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**COMMISSION DECISION**

**of 4.2.2015**

**relating to proceedings under Article 101 of the Treaty on the Functioning of the  
European Union and Article 53 of the EEA Agreement**

**(AT.39861 – Yen Interest Rate Derivatives)**

(Only the English text is authentic)

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## COMMISSION DECISION

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**relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement**

**(AT.39861 – Yen Interest Rate Derivatives)**

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

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

Having regard to Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty,<sup>2</sup> and in particular Article 10a thereof,

Having regard to the Commission Decisions of 12 February 2013 and 29 October 2013 to initiate proceedings in this case,

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 11(1) of Regulation (EC) No 773/2004,

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

Having regard to the final report of the hearing officer in this case,<sup>3</sup>

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<sup>1</sup> OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("the Treaty"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the Treaty should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The Treaty also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the Treaty will be used throughout this Decision.

<sup>2</sup> OJ L 123, 27.4.2004, p. 18.

Whereas:

## **1. INTRODUCTION**

- (1) This case concerns six separate instances of bilateral anticompetitive conduct covering the territories of the contracting parties to the EEA Agreement, in which the addressees of this Decision, ICAP plc, ICAP Management Services Ltd and ICAP New Zealand Limited (also referred to collectively as "ICAP"), participated as facilitators, in different periods between 2007 and 2010, in anticompetitive conduct relating to Japanese Yen Interest Rate Derivatives ("Yen Interest Rate Derivatives" or "YIRDS"), referenced to the Japanese Yen LIBOR ("JPY LIBOR").
- (2) The anticompetitive conduct of the banks involved consisted of discussions relating to the level of upcoming JPY LIBOR submissions, revealing their preferences for the direction of future JPY LIBOR movements and exchanges of commercially sensitive information.
- (3) The broker ICAP facilitated the relevant conduct by serving as a conduit for collusive communications (in one of the instances) and by contacting other JPY LIBOR panel banks or disseminating information via manipulated daily Run Thrus<sup>4</sup> with the aim of influencing their JPY LIBOR submissions in directions suitable to the participants in the relevant conduct (in the remaining five instances).

## **2. THE UNDERTAKING SUBJECT TO THE PROCEEDINGS**

### **2.1. ICAP**

- (4) This Decision is addressed to the following legal entities belonging to the ICAP undertaking:
  - (a) ICAP plc with registered offices at 2 Broadgate, London EC2M 7UR, United Kingdom;
  - (b) ICAP Management Services Ltd with registered offices at 2 Broadgate, London EC2M 7UR, United Kingdom;
  - (c) ICAP New Zealand Limited with registered offices at Level 12, 36 Customhouse Quay, Wellington, New Zealand.
- (5) ICAP is the world's premier voice and electronic inter-dealer broker and provider of post-trade services. It is headquartered in the United Kingdom and employs some 4,500 people across 32 countries.
- (6) ICAP plc is a holding company and the ultimate parent company of the ICAP group of companies.

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<sup>3</sup> Final report of the Hearing Officer of 30 January 2015.

<sup>4</sup> See recital (99) for an explanation of the term 'Run Thru'.

- (7) ICAP Management Services Ltd (IMSL) is a wholly owned indirect subsidiary of ICAP plc. [...].
- (8) ICAP New Zealand Limited (INZL) is majority owned and controlled by ICAP plc [...].

### **3. THE PRODUCT CONCERNED**

#### **3.1. General description**

- (9) Each of the six bilateral infringements addressed in this Decision concerns Japanese Yen Interest Rate Derivatives ("Yen Interest Rate Derivatives" or "YIRDs"), referenced to the Japanese Yen LIBOR ("JPY LIBOR"). One of the infringements also concerns YIRDs referenced to the Euroyen TIBOR.
- (10) The JPY LIBOR and Euroyen TIBOR are important reference interest rates (also called benchmarks) for many financial instruments denominated in Japanese Yen. At the time of the infringements, the JPY LIBOR was set by the British Bankers Association (BBA) and the Euroyen TIBOR was set by the Japanese Bankers Association (JBA). The rates were set daily for different tenors (loan maturities)<sup>5</sup> on the basis of submissions from banks that were members of the JPY LIBOR and Euroyen TIBOR panels. These banks were asked to submit, each business day and before a certain time, estimates of interest rates at which they believed they could borrow unsecured funds in a reasonable market size on the London interbank money market (in the case of JPY LIBOR) or estimates of what they believed to be prevailing market rates for transactions between prime banks on the Japan offshore market (in the case of Euroyen TIBOR) for various tenors. The BBA and JBA then calculated, on the basis of an average of these submissions, while excluding the 4 (in the BBA's case) and 2 (in the JBA's case) highest and lowest submissions, the daily JPY LIBOR and Euroyen TIBOR rates for each tenor. The resulting rates were immediately published and available to the public each business day.
- (11) JPY LIBOR and Euroyen TIBOR rates are, among others, reflected in the pricing of YIRDs, which are globally traded financial products used by corporations, financial institutions, hedge funds, and other undertakings to manage their interest rate risk exposure (hedging, for both borrowers and investors) or for speculation purposes. Undertakings within the EEA routinely enter into YIRDs priced in reference to JPY LIBOR and Euroyen TIBOR. In addition, traders at Union/EEA banks, hedge funds and institutional investors, among others, purchase, sell and trade these instruments for speculative and risk management purposes.<sup>6</sup>
- (12) While the treasury departments (also called cash desks) of the panel banks are responsible for determining a bank's submission to the BBA or JBA, the trading of interest rate derivatives is carried out by the respective trading desk(s). Employees involved in a treasury department's rate submissions are referred to as "submitters" in

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<sup>5</sup> For JPY LIBOR, the maturities set by the BBA were: s/n (spot/next ), 1w (week), 2w, 1m (month), 2m, 3m, 4m, 5m, 6m, 7m, 8m, 9m, 10m, 11m, 12m.

<sup>6</sup> For examples of EEA located undertakings involved in such transactions see [...] and [...].



this Decision. Employees involved in a trading desk's trading activity are referred to as "traders" in the present Decision.

- (13) YIRDs are financial instruments the value of which is linked to the level of a reference interest rate such as Yen LIBOR or Euroyen TIBOR payable on a notional amount. Typically, in YIRDs that use Yen LIBOR or Euroyen TIBOR as a reference rate, one party will either pay or receive an amount of money based on the Yen LIBOR/ Euroyen TIBOR interest rate ("floating rate") at some predetermined point(s) in the future - this is known as the "settlement date(s)" - while the other party will either receive or pay the fixed interest rate of the contract. In practice, the interest rates to be paid will be netted so that only one "net" amount changes at settlement date(s).
- (14) JPY LIBOR and Euroyen TIBOR serve as single market benchmarks for all JPY LIBOR-based YIRDs and all Euroyen TIBOR-based YIRDs, applicable to all participants in the YIRD market.
- (15) The most common YIRDs are: (i) forward rate agreements, (ii) interest rate swaps, (iii) interest rate options, and, (iv) interest rate futures. YIRDs may be traded over the counter or, in the case of interest rate futures, exchange traded. All these products usually involve a floating rate (the reference interest rate of the contract) and a fixed rate. The fixed rates reflect the market expectations, at that moment in time, of future reference interest rates (which are equal to the floating rate) and are normally calculated by the financial institutions that take part in YIRD trading on the basis of the so-called yield curves<sup>7</sup>.
- (16) **Forward rate agreements (FRAs):** a FRA is an agreement between two counterparties to fix the interest rate today for a certain time period in the future and payable on a specified notional amount. One party will pay a fixed rate and receive a reference floating rate and vice versa, where the tenor of the reference interest rate corresponds to the time period of the contract. As with most other financial derivatives, the notional amount of the transaction is not exchanged between counterparties but is used only for calculating the amount of the cash flow to be exchanged. Such cash flow will be based on the net difference between the fixed and the floating rates as observed on the fixing date (in other words, the settlement occurs on a net basis). Contrary to swaps and options, FRA contracts comprise only one fixing hence one cash flow.
- (17) **Interest rate swaps (IRS):** these are agreements in which two counterparties agree to exchange (or swap), at specific intervals and for a set term, streams of future interest rate payments. More specifically, one party typically agrees to periodically pay (or receive) a floating rate of interest to another party, and to receive (or pay) periodically a fixed rate in return, with usually both legs in the same currency. As for FRAs, the notional amount of the transaction is typically not exchanged between counterparties, but is used only for calculating the amount of the cash flows to be exchanged between the parties. Such cash flows will be, at each payment date, the difference between the amounts of interest payable or receivable over the fixed rate

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<sup>7</sup> The term yield curve refers to the representation of the relationship between the level of interest rate and the time to maturity.

leg and the floating rate leg of the contract (net settlement at each settlement date). Usually the periodicity of the IRS corresponds to the tenor of the reference interest rate (i.e. for a 10-year interest rate swap referencing the Yen LIBOR 6-months, the swap will comprise 20 periods, meaning 20 fixing dates and 20 payment dates every 6 months). Conceptually, an IRS can be seen as a series of FRAs.

- (18) **Interest rate options:** an agreement which gives the buyer the right (but not the obligation) to either buy from another party or sell to another party a reference interest rate payable on a specified notional amount at a given level ('strike price'). As for interest rate swaps, interest rate options comprise several periods (for example, a 10-year interest rate cap referencing the Yen LIBOR 6-months will comprise 20 periods, meaning 20 fixing dates and 20 payment dates) and the notional amount of the transaction is typically not exchanged between counterparties, but is used only for calculating the amount of the cash flows to be exchanged. Contrary to interest rate swaps, there may not be a cash flow for each period, as there is one only if the reference interest rate is above (or, depending on the option type, below) the strike price.
- (19) **Interest rate futures:** these are exchange traded contracts that entitle participants to make or receive payments based on the movements in the reference interest rate over the life of the contract. The contracts are subject to a final settlement at contract expiration based on prevailing market interest rates at the time of settlement. At the time of the infringements, no interest rate futures tied to the JPY LIBOR were actively traded.

### 3.2. Discussion of ICAP's arguments in reply to the statement of objections regarding the affected products

#### 3.2.1. ICAP's general arguments regarding the products concerned

- (20) ICAP alleged that the Commission mis-characterized the product. ICAP took the view that YIRDs are not products that can be purchased and sold on the market but are transactions that have to be entered into. ICAP also claimed that a YIRD, after it has been entered into, cannot be sold. In respect of the latter argument, ICAP maintained that a trader cannot sell the YIRD at a later stage but that it can lock in the gains by entering into another YIRD which is opposite to the original one<sup>8</sup>.

#### 3.2.2. The Commission's assessment

- (21) The Commission disagrees with the claim that YIRDs (and interest rate derivatives in general) are not products that can be purchased or sold. While different from physical products, financial products are products that can be purchased or sold none the less as explained in the recitals (22) (30) below. Moreover, it is established case-law that competition rules apply also to banking undertakings.<sup>9</sup> In addition, any

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<sup>8</sup> This means that if in the original YIRD the trader was paying the fixed rate and receiving the floating rate, in another opposite YIRD he would then be receiving the fixed rate and paying the floating rate, and vice versa.

<sup>9</sup> See Case C-172/80 - Züchner, ECLI:EU:C:1981:178, paragraphs 6-8.

activity consisting in offering goods and services on a given market is an economic activity, which is subject to competition rules.<sup>10</sup>

- (22) The Commission notes that ICAP did not dispute that the most common types of YIRDs are those mentioned in recitals (15)-(19) above, namely: (i) forward rate agreements, (ii) interest rate swaps, (iii) interest rate options, and (iv) interest rate futures.
- (23) Interest rate futures are, as indicated in recital (19) above, traded on exchanges. The trading of interest rate futures therefore involves buyers buying interest rate future contracts from the exchange and sellers selling interest rate future contracts to the exchange<sup>11</sup>. Such contracts are thus purchased and sold by market participants. Therefore ICAP's allegations that YIRDs cannot be purchased or sold are unfounded.<sup>12</sup>
- (24) Nevertheless, and because during the Oral Hearing ICAP mentioned that its claim concerned primarily over the counter derivatives (rather than the interest rate futures which are exchange traded)<sup>13</sup>, the Commission sets out the characteristics of the other three most common types of YIRDs so as to further demonstrate that ICAP's allegations are unfounded.
- (25) Interest rate options are, as indicated in recital (18) above, agreements which give the buyer certain rights (but no obligations). This implies that the seller of an option grants such rights to the buyer. Since such right has a value, the seller of an option transfers an option in exchange of a sum of money, which is called the option premium or the option price<sup>14</sup>. In other words, because an interest rate option has a value when it is traded, the trading of an interest rate option involves a buyer (that will pay the option price) and a seller (that will receive the option price). It thus follows that interest rate options are purchased and sold. Interest rate options are thus the second type of YIRDs for which ICAP's allegations that YIRDs cannot be purchased or sold are unfounded.
- (26) Concerning interest rate swaps (IRS) and forward rate agreements (FRAs), the Commission agrees that these contracts are entered into. However, the Commission emphasizes three important facts which demonstrate that the fact that these contracts are entered into does not preclude them from being products.

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<sup>10</sup> See e.g. Case C-327/12, *Soa Nazionale Costruttori*, ECLI:EU:C:2013:827, paragraph 27 and case law cited.

<sup>11</sup> See notably Robert W. Kolb (2000), *Futures, Options & Swaps* third edition (hereafter referred to as "Kolb (2000)") p. 13 ( [...]).

<sup>12</sup> On 9 October 2014 ICAP made a submission explaining that no JPY LIBOR futures were traded during the infringement periods. The Commission does not dispute this (see also recital (19) above). However, the fact that no JPY LIBOR tied interest rate futures were actively traded during the infringement periods does not mean that interest rate futures are not traded at all, which is the relevant issue here, i.e. whether interest rate futures are products (that are traded).

<sup>13</sup> [...] recording from the Oral Hearing (Q&A part).

<sup>14</sup> See notably Frank J. Fabozzi (2000), *Bond Markets, Analysis and Strategies* fourth edition (hereafter referred to as "Fabozzi (2000)") p. 529 ([...]).

- (27) First, there is a reason why IRS and FRAs are entered into. The reason is that such contracts are designed to have a value of zero, in principle, at their inception<sup>15</sup>. In other words, IRS and FRAs require, in principle, no upfront payment from either party to the transaction<sup>16</sup>. This is why the parties to such a transaction are called the "payer" (usually referring to the payer of the fixed rate) and the "receiver" (usually referring to the receiver of the fixed rate)<sup>17</sup>. The fact that the parties to an IRS or a FRA are not called buyer and seller but payer and receiver is only a semantic difference<sup>18</sup>. It remains that an IRS or a FRA is an agreement between two counterparties. This is analogous to a sale contract for a 'physical' product.
- (28) Second, the fact that there is in principle no upfront payment in IRS and FRAs does not mean there will be no payments at all. As indicated in recitals (16)-(17) above, in an IRS or a FRA, one party agrees to pay the fixed rate (and receives the floating rate), and vice versa for the other party. The fact that the contracts have in principle a value of zero at their inception is a consequence of the way the contracts are designed (that is to say that, at inception, the future fixed rate payments have the same present value as the future floating rate payments)<sup>19</sup>. Therefore IRS and FRAs are agreements between two counterparties which involve future payments. This is analogous to a sale contract for a physical product which would specify a deferred payment.
- (29) The third point addresses particularly ICAP's claim that a YIRD, after it has been entered into, cannot be sold and that a trader wishing to lock in his gains can only enter into a new YIRD opposite to the original one. The Commission agrees that a trader wishing to lock in his gains may enter into a new YIRD opposite to the original one. However, other possibilities exist as well and are available to this trader: as acknowledged by ICAP during the Oral Hearing<sup>20</sup>, a YIRD contract can be either cancelled between the parties to the contract (in full or in part) or novated by one of the parties to a third party. Novation refers to the process where one of the two parties to the contract (the transferor) assigns its role to a third party (the transferee)<sup>21</sup>. The transferor is described as stepping out of the contract while the transferee is described as stepping into the contract. A novation is analogous to a physical product being sold on by the buyer to a third party.
- (30) In view of the above, the Commission concludes that YIRDs are products and that YIRDs can be purchased, sold and sold on – be it over the counter or on exchanges – either because the specific YIRD contracts' nature makes it so or because the specific

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<sup>15</sup> See notably John C. Hull (2009), *Options, Futures and Other Derivatives* seventh edition (hereafter "Hull (2009)") p. 159 ([...]).

<sup>16</sup> See notably Fabozzi (2000) p. 576 ([...]).

<sup>17</sup> See notably Kolb (2000)" p. 611 ([...]) or Fabozzi (2000) p. 571 ([...]). The parties may alternatively be called the "fixed rate payer" and the "floating rate payer".

<sup>18</sup> For illustration purpose, the brochure 'Interest Rates Swaps Product Descriptions' published by ICAP on its website (see <http://www.icap.com/what-we-do/global-broking/~media/Files/I/ICap-Corp/pdfs/icap-interest-rates.pdf>) indicates on its page 3 that the following trading conventions are applicable to IRS: "*Buyer (Payer) pays fixed interest rate and receives floating interest rate*" and "*Seller (Receiver) receives fixed interest rate and pays floating interest rate*" ([...]).

<sup>19</sup> See notably Fabozzi (2000), p. 576 ([...]).

<sup>20</sup> [...], recording from the Oral Hearing (Q&A part).

<sup>21</sup> See notably <http://www.isda.org/publications/pdf/2004isdanovdefinitionsug.pdf> ([...]).

YIRD contracts are in an analogous situation to that of the sale of a physical product. The fact that the parties to an IRS or a FRA are not called buyer and seller but payer and receiver is only a semantic difference. Hence the Commission concludes that ICAP's allegations relating to the mis-characterization of the products are unfounded.

### 3.2.3. *ICAP's arguments regarding the relevance of the reference interest rate for the pricing of YIRDs*

(31) ICAP claimed that the Commission wrongly considered that the JPY LIBOR represents an element of the price of YIRDs.

(32) In the first limb of its claim, ICAP first agreed that the Commission correctly identified YIRDs as being instruments the *value* of which is linked to the level of a reference interest rate such as Yen LIBOR. However ICAP maintained that the *price* paid for YIRD (which ICAP defined as the fixed rate component) is not the same as the *value* of the YIRD (which ICAP defined as the determination of how much is paid out and to which party at set dates over the lifetime of the contract or, in other words, the size and flow of payments as a result of that YIRD). ICAP took the view that the JPY LIBOR rate that materialises at a certain date in the future will determine the *value* of the YIRD, without however it (the JPY LIBOR rate) being or influencing the *price* of the YIRD. ICAP illustrates its response by taking the example of an interest rate swap referenced to the JPY LIBOR and specifies that its reasoning applies equally to all YIRDs.

(33) In the second limb of its claim ICAP maintained that the Commission made a mistake when it stated that the prices of YIRDs are modelled on the basis of yield curves which are a reflection of current and expected JPY LIBOR levels. ICAP took the view that the JPY LIBOR yield curve represents the relationship between the level of interest rate and the time to maturity and that it provides a snapshot of the published JPY LIBOR rates for different tenors such as overnight, 1-month, 3-month, 6-month etc. According to ICAP however, the JPY LIBOR curves do not indicate what the expected interest rate of a particular tenor will be at any point in the future and as a result do not inform the fixed rate agreed for YIRDs. ICAP illustrates its response by taking the example of a yield curve showing on a given day that the 6-month JPY LIBOR is 0.13% and by indicating that this means that the current rate for 6 months' money is 0.13% and not that the rate will move to 0.13% in six months' time. Finally, ICAP also claimed that, in any event, the Commission did not provide any evidence of the relationship between the current yield curve and future JPY LIBOR rates.

### 3.2.4. *The Commission's assessment of ICAP's arguments*

(34) Concerning the first limb of ICAP's claim, the Commission agrees that the concept of *price* and *value* are different. However, there is necessarily a link between price and value. Indeed, the *price* of any financial instrument is the present *value* of its expected cash flows<sup>22</sup>. In economics, the concept of present value corresponds to the value today of an amount of money – a cash flow - in the future. The Commission

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<sup>22</sup> See notably Fabozzi (2000) p. 16 ([...]).

will illustrate this by using the same example as ICAP, that is to say an interest rate swap referenced to the JPY LIBOR.

- (35) The main principle behind the calculation of the fixed rate of a new interest rate swap (in ICAP's terms, its *price*) is the equivalence in the present *value* of cash flows to be received by each party<sup>23</sup>. This principle is equivalent to saying, as already mentioned in recitals (27) and (28) above, that the fixed rate of a new swap must be so that the contract has a value of zero in principle at its inception<sup>24</sup> or in saying that the fixed rate of a new swap must be such that the present value of the payments on the fixed rate side of the IRS and the present value of the payments on the floating rate side of the IRS must be equal.
- (36) A reference interest rate such as the JPY LIBOR is an element of the value of YIRDS.<sup>25</sup> Given that value and price are linked, it follows that a reference interest rate such as the JPY LIBOR is a component of the price of YIRDS. The fact that JPY LIBOR is an element of the price of YIRDS is supported by evidence on the file<sup>26</sup>. The Commission will also further explain in recitals (37)-(43) below in which way the JPY LIBOR is an element of the price of YIRDS.
- (37) The main principle in the pricing of an IRS has already been mentioned above, which is the equivalence between the present value of the payments on the fixed rate side of the IRS and the present value of the payments on the floating rate side of the IRS. In order to determine the floating rate side of the IRS, one needs to estimate (today) what floating interest rates - in this case JPY LIBOR - will be (in the future). Expected future interest rates are also called forward rates. Forward rates can be derived from the current rates or from the yield curves (representing the relationship between the level of current interest rates and the time to maturity). This point addresses the second limb of ICAP's claim and is elaborated in detail in recital (41) below. Finally, concerning the specific yield curves relevant for the pricing of YIRDS, it must be stressed that ICAP's own reply to the statement of objections refers to the JPY LIBOR yield curve, which confirms the evidence on the file that there do indeed exist JPY LIBOR yield curves<sup>27</sup> or more generally yield curves based on the JPY LIBOR. In addition, the yield curves<sup>28</sup> used for the pricing of (JPY) interest rate derivatives are in general based on the (JPY) LIBOR rate for their short-end; beyond this level, the (JPY) LIBOR yield curves are extended (usually based on the futures, forwards and/or swaps markets)<sup>29</sup>.

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<sup>23</sup> See notably Fabozzi (2000) p. 576 ([...]) or Hull (2009) p. 159-160 ([...]) or ISDA (International Swaps and Derivatives Association) Research Note Issue 3, 2010 p. 1 ([...]).

<sup>24</sup> See as well Christian Ekstrand (2011), *Financial Derivatives Modeling*, p. 225-226 ([...]).

<sup>25</sup> ICAP does not contest this.

<sup>26</sup> [...].

<sup>27</sup> [...].

<sup>28</sup> Before the financial crisis, an unique curve was usually used for the pricing of interest rate derivatives, in a given currency while, post the financial crisis, the market practice has evolved to use different curves for projecting forward rates (forward curves) and for the discounting of future cash flows (discount curves). The recital refers rather to the former.

<sup>29</sup> See notably Hull (2009) p. 158 ([...]) or Christian Ekstrand (2011), *Financial Derivatives Modeling*, p. 226 and 238 ([...]).

- (38) Therefore, from the yield curves which are based, among others, on JPY LIBOR as shown in the preceding recital, one can derive the implied forward rates (that is to say the expected JPY LIBOR rates). These are then used for the valuation of the floating rate side of the YIRDs and therefore for the determination of their fixed rate, that is to say their price<sup>30</sup>. The pricing of YIRDs referenced to JPY Libor is thus a complex mechanism influenced by many elements, one of them being the JPY Libor rate.
- (39) As another argument that JPY LIBOR is an element of the price of YIRDs through the yield curves, it must be noted that for standard interest rate swaps, which are spot starting<sup>31</sup> interest rate swaps (as are the examples used by ICAP in its reply to the statement of objections and at the Oral Hearing)<sup>32</sup>, the first fixing occurs on the same day that the swap is traded<sup>33</sup>. In other words, whereas it is true that, in order to price a swap, in general one needs to estimate the expected future interest rates, for the first fixing of a standard swap, in particular, one does simply need to use the JPY LIBOR fixed on that day. The JPY LIBOR of the day is thus directly relevant in this case.
- (40) To conclude on ICAP's allegations that the JPY Libor rate is not an element of the price of YIRDs, the Commission has demonstrated that the concepts of value and price are linked to each other. The JPY LIBOR is an element of the value of YIRDs – a point on which ICAP agrees – and as such, JPY LIBOR is an element of the price of YIRDs. Therefore, the Commission concludes that ICAP's allegations that the JPY Libor rate is not an element of the price of YIRDs are unfounded.
- (41) Concerning the second limb of ICAP's claim, the Commission agrees that the JPY LIBOR yield curve represents the relationship between the level of interest rate and the time to maturity and that it provides a snapshot of the published JPY LIBOR rates for different tenors. However, the Commission disagrees that the JPY LIBOR curves do not indicate what the expected interest rate of a particular tenor will be at any point in the future and as a result do not inform the fixed rate agreed for YIRDs.

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<sup>30</sup> See Robert L. McDonald (2009), *Fundamentals of derivatives markets* (hereafter "McDonald (2009)") p. 233 ([...]) which indicates "*The set of swap rates at different maturities implied by LIBOR is called the swap curve*".

<sup>31</sup> See notably Richard Flavell (2010), *Swaps and other derivatives* second edition (hereafter "Flavell (2010)") p. 33 ([...]) which indicates that "*A generic swap is a "spot swap"*". For a definition of spot starting, see notably the brochure 'Interest Rates Swaps Product Descriptions' published by ICAP on its website (internet link referred to in footnote 18) which indicates on its page 4: "*Spot Starting: A swap whose Effective Date is 2 business days from the Trade Date (T+2)*" ([...]).

<sup>32</sup> [...], ICAP's presentation to the Oral Hearing. At slide 11, ICAP shows the confirmation of a "*fixed/floating*" interest rate swap contract which has a contract date on 08.09.2008 and a value date 2 days later on 10.09.2008 making it thus a spot starting interest rate swap. The confirmation also indicates that the fixed rate of the contract is 1.21, that the variable rate index is "*6 MONTH TIBOR*" and the variable rate index reference is "*REUTERS ZTIBOR*". The latter refers to the fact that the fixing values of the 6 MONTH TIBOR are to be found on the data vendor Reuters' page ZTIBOR.

<sup>33</sup> See notably Flavell (2010) p. 35 ([...]) which contains "*the first fixing is the current Libor rate.*" See also the brochure 'Interest Rates Swaps Product Descriptions' published by ICAP on its website (internet link referred to in footnote 18) which indicates on its page 4 that "*For Spot Starting swaps, the Interest Rate for the first interest period is fixed on the Trade Date, for both Floating and Fixed Rates*" ([...]) or the brochure 'Interest Rate Swap Example' published by ISDA on its website (see <http://www.isda.org/educat/pdf/irs-diagram1.pdf>, [...]) which indicates "*Typically, the first floating rate payment is determined on the trade date*".

According to the financial theory, from a yield curve and via a mathematical formula, one can compute the so-called forward rates, that is, the expected future interest rates. Forward rates are thus implied by the yield curve<sup>34, 35</sup>. This can be illustrated by the example provided by ICAP in its response to the statement of objections, i.e. the example of a yield curve providing a snapshot of the published JPY LIBOR rates for different tenors such as overnight, 1-month, 3-month, 6-month etc. and showing on a given day that the 6-month JPY LIBOR is 0.13%. The Commission agrees that this means that the current 6-month JPY LIBOR rate is 0.13% and that this does not mean that the rate will move to 0.13% in six months' time. However, on that given day, the yield curve will also show a certain level for the current 3-month JPY LIBOR rate and, based on the current 3-month JPY LIBOR rate and the current 6-month JPY LIBOR rate, one can easily compute the expected 3-month JPY LIBOR rate beginning in three months' time. As another example, on the given day, the yield curve will also show a certain level for the current 1-month JPY LIBOR rate and, based on the current 1-month JPY LIBOR rate and the current 6-month JPY LIBOR rate, one can easily compute the expected 5-month JPY LIBOR rate beginning in one month's time, etc. In fact, the current yield curve can be used to calculate the forward rates for any time in the future<sup>36</sup>.

- (42) In view of the above, the Commission considers that while the yield curves do not directly indicate the future expected interest rates, such information is nevertheless embedded and contained within them. As such, yield curves do indirectly indicate the expected future interest rates. Therefore, the Commission concludes that ICAP's allegations that the JPY LIBOR curves do not indicate what the expected interest rate of a particular tenor will be at any point in the future are unfounded.
- (43) Concerning ICAP's assertion that the JPY LIBOR curves do not inform the fixed rate agreed for YIRDs, the Commission has explained in recitals (37)-(40) that the forward rates (implied by the yield curves) are used for the valuation and the determination of the fixed rate – the price – of the YIRDs. Therefore, the Commission concludes that ICAP's argument that the JPY LIBOR curves do not inform the fixed rate agreed for YIRDs is unfounded.
- (44) Finally, with regards to ICAP's claim that the Commission did not provide any evidence of the relationship between the current yield curve and future JPY LIBOR rates, the Commission stresses that both the initial description of the market characteristics in the statement of objections and the extended description in this

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<sup>34</sup> See notably Fabozzi (2000) p. 108-110 ( [...]) or Hull (2009) p. 82 ([...]) or McDonald (2009) p. 186-188 ([...]) or ISDA Research Note Issue 3, 2010 p.3 ( [...]) or ECB (European Central Bank) Technical Note on Euro area yield curve (see [https://www.ecb.europa.eu/stats/money/yc/html/technical\\_notes.pdf](https://www.ecb.europa.eu/stats/money/yc/html/technical_notes.pdf)) p.1 ([...]) or Moorad Choudhry's March 2008 paper 'The yield curve, and spot and forward interest rates' ([...]).

<sup>35</sup> In case of un-coupons rates (rates which do not foresee intermediate interest payments), one can directly compute the implied forward rates from the yield curve. In case of coupons rates (rates which do foresee intermediate interest payments), an intermediary step is necessary: first one needs to compute, from the current yield curve, the implied current un-coupons rates (also called zero-coupon rates or zero rates or spot rates). This is done usually via a methodology called bootstrapping. Then, one may compute, from the current zero-coupon rates, the implied forward rates. See notably Fabozzi (2000) p. 99 ([...]) or Hull (2009) p. 80-82 ( [...]) or McDonald (2009) p. 189 ( [...]).

<sup>36</sup> See notably Fabozzi (2000) p. 110 ( [...]).



Decision (and in particular the relationship between expected future interest rates and the current yield curve) rely on basic elements of financial theory, all of them being publicly available as demonstrated by the public references used in this Decision<sup>37</sup>. Consequently, the Commission concludes that ICAP's allegations on the lack of evidence of the relationship between the current yield curve and future JPY LIBOR rates are unfounded.

#### 4. PROCEDURE

- (45) On 17 December 2010, UBS AG and UBS Securities Japan Co., Ltd. (hereinafter “UBS”) applied for a marker under points 14 and 15 of the Notice on immunity from fines and reduction of fines in cartel cases (hereinafter “the Leniency Notice”).<sup>38</sup> [...]. By decision of 29 June 2011, the Commission granted UBS conditional immunity pursuant to point 8(a) of the Leniency Notice.
- (46) On 20 April 2011, the Commission sent out requests for information to a number of undertakings active in the YIRD sector.
- (47) On [...], Citigroup Inc. and Citigroup Global Markets Japan Inc. (hereinafter “Citigroup” or “Citi”) submitted an application for immunity and/or leniency. The application [...]. By decision of 12 February 2013, the Commission granted Citigroup conditional immunity pursuant to point 8(b) of the Leniency Notice for the Citi/DB 2010 infringement.
- (48) On [...], Deutsche Bank Aktiengesellschaft (hereinafter “Deutsche Bank” or “DB”) applied for a reduction of fines under the Leniency Notice, [...]. The application [...].
- (49) On 28 September 2012, R.P. Martin Holdings Ltd and Martin Brokers (UK) Ltd (hereinafter “RP Martin”) applied for a reduction of fines under the Leniency Notice, submitting an oral statement together with documentary evidence. The application was followed by an additional submission consisting of oral statements and documentary evidence.
- (50) On [...], The Royal Bank of Scotland Group plc and The Royal Bank of Scotland plc (hereinafter “RBS”) applied for a reduction of fines under the Leniency Notice, [...]. The application [...].
- (51) On 12 February 2013, the Commission initiated proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003, against:
- (a) UBS AG and UBS Securities Japan Co., Ltd.;
  - (b) The Royal Bank of Scotland Group plc and The Royal Bank of Scotland plc;

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<sup>37</sup> These elements can also be found in Wikipedia. See, for example: [http://en.wikipedia.org/wiki/Interest\\_rate\\_swap](http://en.wikipedia.org/wiki/Interest_rate_swap) ([...]) or [http://en.wikipedia.org/wiki/Forward\\_rate](http://en.wikipedia.org/wiki/Forward_rate) ([...]).

<sup>38</sup> OJ C 298, 8.12.2006, p. 17.

- (c) Deutsche Bank Aktiengesellschaft;
  - (d) Citigroup Inc. and Citigroup Global Markets Japan Inc.;
  - (e) JPMorgan Chase & Co. and JPMorgan Chase Bank, National Association and J.P. Morgan Europe Limited; and
  - (f) R.P. Martin Holdings Ltd and Martin Brokers (UK) Ltd.
- (52) On 29 October 2013, the Commission adopted a statement of objections, with reference C(2013)7395, addressed to the undertakings identified in recital (51) above, in which it raised objections based on the description of the infringements in Section 5 and the legal assessment in Section 6 below. In addition, that statement of objections contained objections relating to the '[non-addressee]/[non-addressee] 2007 infringement', in which the addressees of the present Decision were not involved and therefore its description is not part of the present Decision.
- (53) On 29 October 2013, the Commission initiated proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 against ICAP plc, ICAP Management Services Ltd and ICAP New Zealand Limited.
- (54) A settlement meeting with ICAP took place on 31 October 2013. At this meeting, the Commission informed ICAP about the objections it envisaged raising against it and disclosed the main pieces of evidence in the Commission file relied on to establish the potential objections. ICAP was also given access to the relevant parts of the oral statements at the Commission's premises and received a DVD with copies of the relevant pieces of documentary evidence and a list of all the documents in the file.
- (55) On 12 November 2013, ICAP informed the Commission that it wished to discontinue the settlement discussions and subsequently returned to the Commission the DVD with copies of the relevant pieces of documentary evidence and the list of all the documents in the file.
- (56) On 4 December 2013 the Commission adopted a prohibition and fining Decision, with reference C(2013) 8602/7 ('Settlement Decision'), addressed to:
- (a) UBS AG and UBS Securities Japan Co., Ltd.;
  - (b) The Royal Bank of Scotland Group plc and The Royal Bank of Scotland plc;
  - (c) Deutsche Bank Aktiengesellschaft;
  - (d) Citigroup Inc. and Citigroup Global Markets Japan Inc.;
  - (e) JPMorgan Chase & Co. and JPMorgan Chase Bank, National Association and J.P. Morgan Europe Limited; and
  - (f) R.P. Martin Holdings Ltd and Martin Brokers (UK) Ltd.
- (57) The Settlement Decision is based on matters of fact and law accepted by its addressees. Therefore, the Settlement Decision does not establish any liability of

ICAP for any participation in any infringement of Union competition law in this case.

- (58) On 6 June 2014 the Commission adopted a statement of objections addressed to ICAP plc, ICAP Management Services Ltd and ICAP New Zealand Limited, with reference C(2014) 3768 final, in which it raised objections based on the description of the infringements in Section 5 and the legal assessment in Section 6 below. Subsequently, ICAP was provided with a CD ROM which allowed it to access to the accessible parts of the Commission's investigation file. In addition, its legal representatives made use of their rights of access to the parts of the Commission's file that were only available at the Commission's premises.
- (59) ICAP made known to the Commission its views on the objections raised against it in writing on 14 August 2014 and orally during a hearing that took place on 12 September 2014.
- (60) Upon ICAP's request, the Commission granted access to the Settlement Decision to ICAP's representatives on 30 September 2014. ICAP provided its comments on 9 October 2014.
- (61) On 8, 9 and 16 October 2014, ICAP made further submissions relating to the Commission's allegations in the statement of objections.

#### **4.1. Discussion of ICAP's arguments in reply to the statement of objections regarding the procedure**

##### *4.1.1. ICAP's arguments*

- (62) ICAP alleges that the Commission failed to discharge its burden of proof and breached the presumption of innocence by not showing (i) an infringement by the banks and (ii) ICAP's facilitation of the infringement. ICAP alleges that the Commission revealed bias against ICAP by unduly relying on the settlement decision and qualified the statement of objections addressed to it as overly vague on the infringement committed by the banks.
- (63) ICAP claims that the Commission infringed its rights of defence by addressing to it a statement of objections that set out the objections in such a brief manner that ICAP has not been provided with a meaningful opportunity to make its views known to the Commission. Furthermore, ICAP claims that the Commission infringed ICAP's rights of defence by failing to provide it with sufficient time to respond to the statement of objections addressed to it and mentions that Commissioner *Almunia* pre-judged the outcome of the investigation against ICAP by stating at a speech on 30 June 2014 that "*probably before the end of the mandate of this commission there will be some news from this investigation.*"
- (64) ICAP also argues that the Commission infringed the principles of good administration by failing to conduct a rigorous investigation of the infringement and the facilitation practices. ICAP states that the Commission had already taken a position before hearing ICAP's defence by reaching a settlement with the other parties by September/October 2013. ICAP asserts that the Commission is less willing to hear ICAP as this would contradict the settlement decision already adopted against the other parties.

(65) ICAP maintains that the Commission would as a result of these deficiencies, need to adopt another statement of objections before adopting a decision against ICAP.

4.1.2. *The Commission's assessment of ICAP's arguments*

(66) The Commission disagrees that it failed to discharge its burden of proof or that it breached the principle of presumption of innocence. In the statement of objections, the Commission set out the infringements of the banks involved in the bilateral infringements as well as ICAP's facilitation of those infringements. ICAP was in a position to challenge the objections raised against it. Hence, ICAP's assertion that the Commission breached the presumption of innocence that would apply in favour of ICAP by not discharging its burden of proof is unfounded.

(67) The Commission also disagrees that the statement of objections addressed to ICAP is so short that ICAP cannot meaningfully defend itself against the objections. The statement of objections sets out in sufficient detail the infringements committed by the banks, ICAP's involvement in those infringements and their duration. As ICAP has been informed about all important elements of the objections raised against it, ICAP's alleged infringement of its rights of defence is unfounded. As to the Commission's alleged over-reliance on the Settlement Decision, it is noted that while the facts and evidence underlying both the Settlement Decision and statement of objections and the present Decision are necessarily identical, the Commission set out in sufficient detail its objections with respect to both the underlying infringements and ICAP's facilitating practices in the statement of objections. As evidenced by its reply to the statement of objections, ICAP was in a position to defend itself in relation to all of the Commission's objections. The same objections are assessed in the present Decision in light of ICAP's reply. ICAP has also been provided with a sufficient deadline to reply to the statement of objections and a further extension was granted by the Hearing Officer. In addition, during the settlement procedure, ICAP had already been given access to the essential documents in the Commission's file and in the context of that procedure, had already been informed about the content of the objections formally raised against ICAP in the statement of objections addressed to it in the context of the normal procedure. Furthermore, Vice-President Almunia's speech of 30 June 2014 does not show that the Commission pre-judged the outcome of the investigation before hearing ICAP's defence. The speech, among others, merely acknowledges that there might be news from the investigation before the end of October 2014. The Commission also refers to the clarification provided during the oral hearing by a member of Vice-President Almunia's cabinet.<sup>39</sup> Finally, it should also be noted that when applying Article 101 of the Treaty the Commission is an investigative authority of an administrative nature with the power to adopt a statement of objections to which its addressees have the opportunity to respond. The Commission also has the right to inform the public about the content of its objections and the state of the investigation. Such communication does not mean that the Commission shall ignore the response to a statement of objections provided by its addressee in its defense. Ignoring possible substantial arguments that the companies may invoke to defend themselves may indeed lead to a biased investigation.

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<sup>39</sup> [...], recording from the Oral Hearing (Q&A part).

However, the legitimate statement of Vice-President Almunia does not contain anything to that effect.<sup>40</sup>

- (68) The Commission disagrees with the alleged infringement of the principles of good administration. A full, in-depth investigation was carried out between the date of UBS's marker application in December 2010 and the opening of proceedings in February 2013. ICAP, together with the other parties to the proceedings, was invited, prior to the opening of proceedings in February 2013, to express their interest in pursuing settlement talks. However, ICAP declined to do so with reference to other investigations in other jurisdictions. Following a public announcement of ICAP's settlement of some of these investigations (with the US Commodities and Futures Trading Commission and the UK Financial Conduct Authority), the Commission again invited ICAP to join the settlement discussions that were at the time ongoing with the other parties to the procedure. This time, ICAP decided to join the settlement talks and proceedings were opened against it in October 2013. However, after having been informed of the Commission's case and having had access to the relevant parts of the file, ICAP decided to discontinue the settlement discussions. In this regard, ICAP's allegation that it was only involved in the settlement procedure after settlement had been reached with all other parties is misleading and does not accurately describe the way the proceedings were conducted in this case. ICAP had an opportunity to start settlement discussions together with the other parties – which it declined – and was even given a chance to participate in already on-going settlement talks – which it took up. The Commission therefore rejects ICAP's arguments as to the alleged infringement of the principles of good administration.

## 5. DESCRIPTION OF THE EVENTS

- (69) The undertaking comprising the addressees of the present Decision participated as facilitator in six distinct infringements of Article 101(1) of the Treaty and Article 53 EEA, distinct and separate from one another, which were established in the Settlement Decision:
- (a) '[non-addressee]/[non-addressee] 2007 infringement' between [non-addressee] and [non-addressee], facilitated by ICAP;
  - (b) '[non-addressee]/[non-addressee] 2008 infringement' between [non-addressee] and [non-addressee], facilitated by ICAP;
  - (c) '[non-addressee]/[non-addressee] 2008-09 infringement' between [non-addressee] and [non-addressee], facilitated by ICAP and [non-addressee];
  - (d) '[non-addressee]/[non-addressee] 2010 infringement' between [non-addressee] and [non-addressee], facilitated by ICAP;
  - (e) '[non-addressee]/[non-addressee] 2010 infringement' between [non-addressee] and [non-addressee], facilitated by ICAP;

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<sup>40</sup> See also Case C-467/13 P *Chemical Industries Ltd. Fluor (ICF) v Commission*, §34, not yet published.

(f) '[non-addressee]/[non-addressee] 2010 infringement' between [non-addressee] and [non-addressee], facilitated by ICAP.

(70) The description of those infringements, identical to that set out in the Settlement Decision addressed to [non-addressee], [non-addressee], [non-addressee], [non-addressee] and [non-addressee], is reproduced in Sections 5.1 – 5.2.

(71) The participation of the addressees of the present Decision in those six infringements is described in Section 5.3.

### **5.1. Description of the six infringements established in the Settlement Decision against [non-addressee], [non-addressee], [non-addressee], [non-addressee] and [non-addressee]**

(72) In the Settlement Decision, the Commission established the existence of, among others<sup>41</sup>, six distinct infringements of Article 101(1) of the Treaty and Article 53 of the EEA Agreement, as set out in recital (69).

(73) Each of the separate infringements listed out in recital (69) concerned YIRDS referenced to the JPY LIBOR. The [non-addressee]/[non-addressee] 2010 infringement also concerned YIRDS referenced to the Euroyen TIBOR.

(74) Certain traders of the parties to each of the respective infringements engaged in various anticompetitive practices the object of which was the restriction and/or distortion of competition in relation to the products covered by the respective infringements.

(75) As to the means of communication, the participants in each of the separate infringements, including the facilitating cash brokers, generally used online chats such as the Bloomberg platform, emails and telephone.

(76) The geographic scope of each of the six infringements and for all the respective participants therein covered the entire EEA.

#### *5.1.1. The anticompetitive practices of the participating banks*

(77) The parties (banks) to the respective infringements engaged in the following anticompetitive practices:

(a) Traders of the banks participating in the respective infringements on certain occasions discussed directly (and in the case of [non-addressee] and [non-addressee] in the [non-addressee]/[non-addressee] 2010 infringement – indirectly – through the broker ICAP) the JPY LIBOR submissions for certain tenors of at least one of the respective banks, in the understanding that this might be beneficial to the YIRD trading positions of at least of one of the traders involved in the communications. To this end, at least one of the traders approached, or indicated a willingness to approach, the JPY LIBOR submitters

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<sup>41</sup> The Settlement Decision addressed the existence of seven separate bilateral infringements. The present Decision finds that six of these were facilitated by ICAP.

at his respective bank to request a submission to the BBA towards a certain direction or on a few occasions at a specific level.

- (b) Traders of the banks participating in the respective infringements communicated and/or received from each other (in the case of [non-addressee] and [non-addressee] in the [non-addressee]/[non-addressee] 2010 infringement – indirectly – through the broker ICAP), on certain occasions, commercially sensitive information relating either to trading positions or to the future JPY LIBOR submissions of at least one of their respective banks. In the [non-addressee]/[non-addressee] 2010 infringement, this communication and/or receipt of information related also to certain future Euroyen TIBOR submissions of at least one of the respective banks.

- (78) In the [non-addressee]/[non-addressee] 2008-09 infringement [non-addressee] and [non-addressee], in order to facilitate the anticompetitive practices described in recital (77)(a) above, also explored the possibility of executing trades designed to align their YIRD trading interests, and may on a few occasions have entered into such trades.

#### 5.1.2. *Facilitation of the different infringements by cash brokers*

##### 5.1.2.1. ICAP's facilitation of the [non-addressee]/[non-addressee] 2007, [non-addressee]/[non-addressee] 2008 and [non-addressee]/[non-addressee] 2008-09 infringements

- (79) A trader of [non-addressee] used the broker ICAP, without the awareness of [non-addressee] or [non-addressee], with the aim of influencing the JPY LIBOR submissions of certain JPY LIBOR panel banks that did not participate in the three infringements set out above, in furtherance of the anticompetitive practices present within each of the infringements. ICAP did so in the following ways:

- (a) On 24 October 2007<sup>42</sup>, by using its contacts with a certain JPY LIBOR panel bank that did not participate in the [non-addressee]/[non-addressee] 2007 infringement ICAP sought to influence its JPY LIBOR submission in a direction desired by the trader at [non-addressee];
- (b) On certain occasions<sup>43</sup>, by disseminating misleading information to certain JPY LIBOR panel banks via the so-called 'Run Thrus', which were veiled as 'predictions' or 'expectations' of where the JPY LIBOR rates would be set. This misleading information was aimed at influencing certain panel banks that did not participate in these infringements to submit JPY LIBOR rates in line with the adjusted 'predictions' or 'expectations'.

- (80) For this assistance ICAP was compensated by [non-addressee] through brokerage fees.<sup>44</sup>

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<sup>42</sup> [...].

<sup>43</sup> See recitals (99)-(100) and specifically recitals (106)-(114), (116)-(125), (127)-(140) which set out all the dates of the relevant communications in the respective infringements.

<sup>44</sup> See also recitals (177)-(179) below.

5.1.2.2. [non-addressee]'s facilitation of the [non-addressee]/[non-addressee] 2008-09 infringement

- (81) A trader of [non-addressee] used the broker [non-addressee], without the awareness of [non-addressee], with the aim of influencing the JPY LIBOR submissions of certain JPY LIBOR panel banks that did not participate in this infringement, in furtherance of the anticompetitive practices present within it. [non-addressee] did so in the following ways:
- (a) On certain occasions, by using its contacts with a number of JPY LIBOR panel banks that did not participate in the infringement, [non-addressee] sought to influence their JPY LIBOR submissions in directions desired by the trader of [non-addressee];
  - (b) By, on at least one occasion, misleading certain JPY LIBOR panel banks about the situation on the London interbank money market by making so-called 'spooft bids', which are fake offers to lend or demands to borrow at rates desired by the trader of [non-addressee]. By doing so, they misled the panel banks about the rates at which they might be able to borrow in the London interbank money market, thereby potentially influencing the JPY LIBOR submissions of those banks (which are supposed to reflect independent, uninfluenced estimates as to the interest rate at which the bank perceives it could borrow unsecured funds in the London interbank money market).
- (82) For this assistance [non-addressee] was, at times, compensated by [non-addressee] through commission on the so-called flat switch trades.<sup>45</sup>

5.1.2.3. ICAP's facilitation of the [non-addressee]/[non-addressee] 2010 and [non-addressee]/[non-addressee] 2010 infringements

- (83) A trader of [non-addressee] used the broker ICAP, without the awareness of [non-addressee] or [non-addressee], with the aim of influencing the JPY LIBOR submissions of certain JPY LIBOR panel banks that did not participate in the two infringements, in furtherance of the anticompetitive practices present within each of them. ICAP did so in the following ways:
- (a) On 30 April 2010<sup>46</sup>, by using its contacts with certain JPY LIBOR panel banks that did not participate in the infringements, ICAP sought to influence its JPY LIBOR submissions in a direction desired by the trader of [non-addressee];
  - (b) On certain occasions<sup>47</sup>, by disseminating misleading information to certain JPY LIBOR panel banks via the so-called 'Run-Thrus', which were veiled as 'predictions' or 'expectations' of where the JPY LIBOR rates would be set.<sup>48</sup> This misleading information was aimed at influencing certain panel banks that

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<sup>45</sup> Flat switches are trades which are only entered into to generate commission for the broker involved in the transaction.

<sup>46</sup> [...].

<sup>47</sup> See recitals (99)-(100) and specifically recitals (154)-(158), (160)-(163) which set out all the dates of the relevant communications in the respective infringements.

<sup>48</sup> See recitals (99)-(101) for detailed information regarding the 'Run-Thrus'.



did not participate in these infringements, to submit JPY LIBOR rates in line with the adjusted 'predictions' or 'expectations'.

#### 5.1.2.4. ICAP's facilitation of the [non-addressee]/[non-addressee] 2010 infringement

(84) The broker ICAP facilitated the infringement by serving as a communications channel between a trader of [non-addressee] and a trader of [non-addressee] thus enabling the anticompetitive practices between them described above in recital (77).

### 5.2. Participation by [non-addressee], [non-addressee], [non-addressee], [non-addressee] and [non-addressee] in the bilateral infringements, nature and duration of involvement

#### 5.2.1. [non-addressee]/[non-addressee] 2007 infringement

(85) [non-addressee] and [non-addressee] engaged in anticompetitive practices with the object of restriction and/or distortion of competition in the sector for YIRDS referenced to the JPY LIBOR in the period of 8 February 2007<sup>49</sup> until 1 November 2007<sup>50</sup> consisting of discussions on the submission of certain JPY LIBOR rates and the exchange of commercially sensitive information<sup>51</sup>.

(86) [non-addressee] acknowledged that between 14 August 2007<sup>52</sup> and 1 November 2007<sup>53</sup>, it used the cash broker ICAP to facilitate the infringement with the aim of influencing the future JPY LIBOR submissions of certain JPY LIBOR panel banks that did not participate in the infringement<sup>54</sup>. [non-addressee] was not aware of this circumstance.

#### 5.2.2. [non-addressee]/[non-addressee] 2008 infringement

(87) [non-addressee] and [non-addressee] engaged in anticompetitive practices with the object of restriction and/or distortion of competition in the sector for YIRDS referenced to the JPY LIBOR in the period of 7 May 2008<sup>55</sup> until 3 November 2008<sup>56</sup> consisting of discussions on the submission of certain JPY LIBOR rates and the exchange of commercially sensitive information<sup>57</sup>.

(88) [non-addressee] acknowledged that, between 28 August 2008<sup>58</sup> and 3 November 2008<sup>59</sup>, it used the cash broker ICAP to facilitate the infringement with the aim of influencing the future JPY LIBOR submissions of certain JPY LIBOR panel banks

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54 For example: [...].

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57 [...] .

58 [...] .

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that did not participate in the infringement<sup>60</sup>. [non-addressee] was not aware of this circumstance.

#### 5.2.3. *[non-addressee]/[non-addressee] 2008-09 infringement*

- (89) [non-addressee] and [non-addressee] engaged in anticompetitive practices with the object of restriction and/or distortion of competition in the sector for YIRDs referenced to the JPY LIBOR in the period of 18 September 2008<sup>61</sup> until 10 August 2009<sup>62</sup> consisting of discussions on the submission of certain JPY LIBOR rates and the exchange of commercially sensitive information<sup>63</sup>. They explored the possibility of executing trades designed to align their trading interests and may, on a few occasions, have entered into such trades<sup>64</sup>.
- (90) [non-addressee] facilitated the infringement in the period from 29 June 2009<sup>65</sup> until 10 August 2009<sup>66</sup>, whereby at the request of [non-addressee], [non-addressee] promised to, and at least on a few occasions did, contact a number of JPY LIBOR panel banks that did not participate in the infringement, with the aim of influencing their JPY LIBOR submissions<sup>67</sup>. [non-addressee] was not aware of this circumstance.
- (91) [non-addressee] acknowledged that from 22 May 2009<sup>68</sup> until 10 August 2009<sup>69</sup> it used the cash broker ICAP to facilitate the infringement with the aim of influencing the future JPY LIBOR submissions of certain JPY LIBOR panel banks that did not participate in the infringement.<sup>70</sup> [non-addressee] was not aware of this circumstance.

#### 5.2.4. *[non-addressee]/[non-addressee] 2010 infringement*

- (92) [non-addressee] and [non-addressee] engaged in anticompetitive practices with the object of restriction and/or distortion of competition in the sector for YIRDs referenced to the JPY LIBOR in the period of 3 March 2010<sup>71</sup> until 22 June 2010<sup>72</sup> consisting of discussions on the submission of certain JPY LIBOR rates and the exchange of commercially sensitive information<sup>73</sup>. They did so indirectly, through the broker ICAP, which served as a conduit for information and thus facilitated the anticompetitive practices over the duration of the infringement, i.e. from 3 March 2010 until 22 June 2010.

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<sup>60</sup> For example: [...].

<sup>61</sup> [...].

<sup>62</sup> [...].

<sup>63</sup> [...].

<sup>64</sup> [...].

<sup>65</sup> [...].

<sup>66</sup> [...].

<sup>67</sup> [...].

<sup>68</sup> [...].

<sup>69</sup> [...].

<sup>70</sup> For example: [...].

<sup>71</sup> [...].

<sup>72</sup> [...].

<sup>73</sup> [...].

### 5.2.5. *[non-addressee]/[non-addressee] 2010 infringement*

- (93) [non-addressee] and [non-addressee] engaged in anticompetitive practices with the object of restriction and/or distortion of competition in the sector for YIRDs referenced to the JPY LIBOR in the period of 26 March 2010<sup>74</sup> until 18 June 2010<sup>75</sup> consisting of discussions on the submission of certain JPY LIBOR rates and the exchange of commercially sensitive information<sup>76</sup>.
- (94) [non-addressee] acknowledged that in the period from 7 April 2010<sup>77</sup> until 7 June 2010<sup>78</sup> it used the cash broker ICAP to facilitate the infringement with the aim of influencing the future JPY LIBOR submissions of certain JPY LIBOR panel banks that did not participate in the infringement<sup>79</sup>. [non-addressee] was not aware of this circumstance.

### 5.2.6. *[non-addressee]/[non-addressee] 2010 infringement*

- (95) [non-addressee] and [non-addressee] engaged in anticompetitive practices with the object of restriction and/or distortion of competition in the sector for YIRDs referenced to the JPY LIBOR and Euroyen TIBOR in the period of 28 April 2010<sup>80</sup> until 3 June 2010<sup>81</sup> consisting of discussions on the submission of certain JPY LIBOR rates and the exchange of commercially sensitive information of certain JPY LIBOR and Euroyen TIBOR rates<sup>82</sup>.
- (96) [non-addressee] acknowledged that from 28 April 2010<sup>83</sup> until 2 June 2010<sup>84</sup> it used the cash broker ICAP to facilitate the infringement with the aim of influencing the future JPY LIBOR submissions of certain JPY LIBOR panel banks that did not participate in the infringement<sup>85</sup>. [non-addressee] was not aware of this circumstance.

## 5.3. **Participation of the addressees of the present Decision in the six infringements described in Sections 5.1 and 5.2 above**

- (97) The general nature of ICAP's facilitating role in the six infringements set out in Sections 5.1 and 5.2 above has already been described in recitals (79)(80)(83)(84) and this role has been acknowledged by the relevant participants in the respective infringements (see recitals (86)(88)(91)(92)(94)(96)).<sup>86</sup> This Section contains a

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<sup>74</sup> [...].

<sup>75</sup> [...].

<sup>76</sup> [...].

<sup>77</sup> [...].

<sup>78</sup> [...].

<sup>79</sup> For example: [...].

<sup>80</sup> [...].

<sup>81</sup> [...].

<sup>82</sup> [...].

<sup>83</sup> [...].

<sup>84</sup> [...].

<sup>85</sup> For example: [...].

<sup>86</sup> [...], [...], [...]. In line with point 35 of Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ [2008] C 167/1 ('Settlement Notice'), the Commission has granted ICAP access to the settlement submissions made in this case. These submissions, including the

detailed description of ICAP's participation in the six infringements. It begins with a description of ICAP's relevant broking activities and of the roles of the relevant individuals within ICAP and then sets out the facts in relation to each of the infringements separately.

5.3.1. *Description of ICAP's relevant brokerage activities and the roles of its employees that took part in the respective infringements*

(98) As part of its business, ICAP participates in the cash deposit Japanese Yen market ('the JPY cash deposit market') through its Cash/Money Markets desk ('the Desk'), which is based in London, as an interdealer broker ('IDB'). In this role, ICAP talks to major financial institutions participating in the JPY cash deposit market, establishes an overview of the volumes available in the market and the price, and based on these communications it distributes quotes to the market participants showing both price and volume available in the market. The purpose of this is to bring two counterparties ('taker' and 'giver'<sup>87</sup>) together, which then enter into a trade directly once they have agreed upon the specific terms of the trade. For this broking service ICAP is remunerated by a commission at a pre-agreed rate with the relevant counterparties.

(99) As a part of this job ICAP *'help[s] a potential taker or giver understand the prevailing market levels so brokers on the Desk are aware of and would be asked for their views on the benchmark Yen LIBOR rate and where it may be fixed that day and in the future. In response to these inquiries, the Desk decided a number of years ago that instead of merely fielding "ad hoc" queries throughout the morning of each trading day, it would circulate its view of where the rate would be set... This practice started more than a decade ago and was continued unchanged throughout the period 2007 through to 2010. The main purpose was to limit the time that brokers would otherwise have to spend answering queries from their customers as to how the market may develop'*.<sup>88</sup> These views were circulated in the form of a spreadsheet to a number of financial institutions<sup>89</sup>, including members of the BBA JPY LIBOR panel at the time. In the material periods this spreadsheet was compiled and sent out in the morning of each business day by [...], a broker in the Desk or his substitute when [...] was away.<sup>90</sup> It was commonly known as the daily Yen Run Thru ('Run-Thru').<sup>91</sup> It contained information on the prevailing borrowing rates for Japanese and offshore banks for all the JPY LIBOR tenors as well as a table titled 'suggested libors', which consisted of suggested JPY LIBORs submissions for all tenors on the relevant business day.

(100) This daily Run Thru was sent out to a number of JPY LIBOR panel banks and was perceived as widely influential in that the JPY LIBOR submitters of the recipient

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acknowledgements contained in them, are corporate statements made by the relevant parties on the basis of [...]. The acknowledgements in the relevant settlement submissions corroborate the evidence on the file and are as such relied on by the Commission throughout the present Decision.

<sup>87</sup> 'Taker' is the party who accepts the cash deposit; and 'giver' is the party who provides the cash deposit and receives the interest payment at the end of the given period ([...]).

<sup>88</sup> [...]

<sup>89</sup> [...].

<sup>90</sup> [...].

<sup>91</sup> [...].

banks took it into account as a basis for, or one of the elements in, the determination of their daily JPY LIBOR submissions because it was perceived as accurately reflecting the situation in the JPY cash deposit market.

- (101) Some of the recipients of the daily Run Thru were observed to follow its daily JPY LIBOR submission suggestions ('suggested libors') over a large proportion of their submissions in the material periods.<sup>92</sup> Moreover, the influence of the daily Run Thru was reflected in the perception of market participants evidenced by for example the following statement made on 14 August 2007 by [...] (broker of ICAP): *'[...] sending out higher than he thinks so hopefully the sheep will just copy'*.<sup>93</sup> Meaning that the JPY LIBOR submitters will simply use the suggestions for JPY LIBOR tenors in the daily Run Thru and reproduce them in their daily JPY LIBOR submissions. This influence and [...]'s general JPY cash deposit market reputation earned him the nicknames 'Lord Libor' and 'Lord Bailiff' amongst others.
- (102) In addition to participating as a broker in the JPY cash deposit market, another part of ICAP's business is to act as an IDB in the YIRD market. Similarly to its role as an IDB in the JPY cash deposit market, as an IDB in the YIRD market ICAP seeks to connect counterparties that wish to enter into YIRD trades. This activity is carried out by ICAP's 'Yen MIRS Desk' ('the Yen Desk'), which was, in the material periods, headed by [...] and staffed, among others, by [...].<sup>94</sup> A key individual, [...] was not formally part of the Yen Desk as in the material periods he was employed by ICAP New Zealand. However, in his role as a broker for [...] (see below) he carried out activities of the same type as the other brokers on the Yen Desk with whom he was in daily contact. Prior to his transfer to ICAP New Zealand, [...] was an employee of ICAP Management Services in London and a formal member of the Yen Desk. In their broker role, these employees were in communications with YIRD traders from financial institutions participating in the YIRD market, which may use brokers such as ICAP to find counterparties for YIRD trades they wish to enter into.
- (103) [...] was particularly important as he was, over the material periods, ICAP's broker for [non-addressee] (and later [non-addressee]) and specifically, for [...]. He was in nearly daily contact with [...]<sup>95</sup> (first of [non-addressee] and later of [non-addressee]) and provided him with standard YIRD brokerage services. However, in addition to these legitimate services, [...] (ICAP) also provided what came to be known as the 'libor service' to [...]. This additional service consisted of efforts to affect the JPY LIBOR in various tenors in directions desired by [non-addressee], and later [non-addressee], by the means of (i) [...]'s Run Thrus that were adjusted to take into account the direction of JPY LIBOR movements desired by [...] and as such designed to skew the perception of the recipient banks of these Run Thrus as to the market reality as to, unbeknownst to them, affect their JPY LIBOR submissions for the benefit of [non-addressee] and later [non-addressee], (ii) by using ICAP's contacts with certain JPY LIBOR panel banks that did not participate in the

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<sup>92</sup> [...].

<sup>93</sup> [...].

<sup>94</sup> [...].

<sup>95</sup> [...] was employed as a JPY Rates Trader by [non-addressee] between 1 January 2007 and 3 December 2009 ([...]) and as an Interest rate derivatives trader by [non-addressee] between 3 December 2009 and 6 September 2010 ([...]).

respective infringements to influence their JPY LIBOR submissions in directions desired by [...].

- (104) The following table provides an overview of ICAP employees involved in, or aware of, the anticompetitive contacts described in this section:

Table 1:

Name	Employing entity in the material period(s)	Position
[...]	INZL	[...]
[...]	IMSL	[...]
[...]	IMSL	[...]
[...]	IMSL	[...]
[...]	IMSL	[...]
[...]	IMSL	[...]
[...]	IMSL	[...]
[...]	IMSL	[...]

- (105) Over the period covering the three relevant infringements ([non-addressee]/[non-addressee] 2007, [non-addressee]/[non-addressee] 2008, [non-addressee]/[non-addressee] 2008-09 infringements), ICAP had a formal agreement with [non-addressee] for its brokerage services in the YIRD market.<sup>96</sup> The fees under this agreement also unofficially included remuneration for services ('libor service'), which constituted part of ICAP's conduct that facilitated those infringements (see recital (79) above and Sections 5.3.2, 5.3.3 and 5.3.4 below).<sup>97</sup>

### 5.3.2. ICAP's facilitation of the [non-addressee]/[non-addressee] 2007 infringement

#### 5.3.2.1. ICAP's conduct that facilitated the [non-addressee]/[non-addressee] 2007 infringement

- (106) On 14 August 2007, [...] ([non-addressee]) discussed with [...] (ICAP) in a Bloomberg chat the future development of the 6 month JPY LIBOR rate. In this context, [...] ([non-addressee]) mentioned that [non-addressee] and [non-addressee] would submit high rates for the 6 month JPY LIBOR rates ('[non-addressee] and [non-addressee] are going high 6m') and, thereby, informed [...] (ICAP) of his ongoing discussions of future JPY LIBOR submissions with [non-addressee].<sup>98</sup> As of this discussion, [...] (ICAP) was, or at least should have been, aware of the fact that [...] ([non-addressee]) was coordinating future JPY LIBOR submissions with [non-

<sup>96</sup> [...].

<sup>97</sup> [...].

<sup>98</sup> [...].

addressee] and that assistance provided to [...] ([non-addressee]) after this chat was, or could have been, facilitating the anticompetitive practices between [non-addressee] and [non-addressee]. Therefore, the date of this chat is taken as the start date for ICAP's participation, as a facilitator, in the [non-addressee]/[non-addressee] 2007 infringement, which at this point in time had already been ongoing for several months (since 8 February 2007). [...] (ICAP) mentioned in this chat furthermore that [...] (ICAP) would in his Run Thru mention for the 6 month JPY LIBOR tenor a higher rate than the one he considered to be the correct one ('[...] sending out higher than he thinks so hopefully the sheep will just copy').

- (107) On 15 August 2007, [...] ([non-addressee]) requested from [...] (ICAP) to keep 6 month JPY LIBOR rates high until the following Tuesday ('need to keep 6m up till tues then let it collapse')<sup>99</sup>. In an ICAP-internal chat of the same day, [...] (ICAP) requested from his colleagues [...] (ICAP) and [...] (ICAP) high 6 month JPY LIBOR rates ('I want high 6's !!'). [...] (ICAP) explained that [...] ([non-addressee]) needed ICAP's help ('[...] hurting today needs all the help he can 6m').<sup>100</sup> [...] (ICAP) repeated his request for high 6m JPY LIBOR rates on 16 and 17 August 2007.<sup>101</sup> On 20 August 2007, [...] ([non-addressee]) requested from [...] (ICAP) high 3 month JPY LIBOR rates ('need 3's high now').<sup>102</sup>
- (108) On 22 August 2007, [...] ([non-addressee]) requested from [...] (ICAP) low 6 month and 3 month and a high 1 month JPY LIBOR rates.<sup>103</sup> [...] (ICAP) requested in an email to his colleague [...] (ICAP) of the same day low 6 month JPY LIBOR rates<sup>104</sup>.
- (109) [...] (ICAP) asked [...] ([non-addressee]) in a chat of 23 August 2007 which rates he requested for that day ('what do you need today for your fixings?'). [...] ([non-addressee]) asked [...] (ICAP) to push for high 1 month JPY LIBOR rates; the latter announced he would contact [...] (ICAP) on this matter.<sup>105</sup> [...] ([non-addressee]) asked [...] (ICAP) in an online chat of 24 August 2007 to keep 3 month and 6 month JPY LIBOR rates stable.<sup>106</sup>
- (110) On 10 September 2007, [...] ([non-addressee]) thanked [...] (ICAP) in a chat for the work on the JPY LIBOR rates and asked to keep them high for the following week, because he needed high JPY LIBOR rates at the beginning of October and low ones only afterwards. [...] (ICAP) replied that [...] ([non-addressee]) should at the beginning of each day provide him with his wish list and that he would approach [...] (ICAP) accordingly.<sup>107</sup> On 11 September 2007, [...] ([non-addressee]) asked [...] (ICAP) in a chat for lower 6 month JPY LIBOR rates.<sup>108</sup> [...] (ICAP) informed [...]

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101 [...].  
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108 [...].

([non-addressee]) in a chat that his colleague [...] (ICAP) kept the 6 month JPY LIBOR rate down.<sup>109</sup>

- (111) On 18 September 2007, [...] ([non-addressee]) requested from [...] (ICAP) in a chat low 6 month, 3 month and 1 month JPY LIBOR rates. [...] (ICAP) replied that he would check what [...] (ICAP) could do in this respect.<sup>110</sup> On 19 September 2007, [...] ([non-addressee]) requested from [...] (ICAP) in a chat high 3 month, low 6 month and 1 month JPY LIBOR rates.<sup>111</sup> The next day, 20 September 2007, [...] ([non-addressee]) asked in a further chat for the same rates again.<sup>112</sup> On 21 September 2007, [...] ([non-addressee]) requested from [...] (ICAP) in an online chat high 3 month and 6 month JPY LIBOR rates; [...] (ICAP) promised to contact colleagues at ICAP to remind them of [...] ([non-addressee]) requirements.<sup>113</sup> On 30 September 2007, [...] (ICAP) announced in a chat after his return from holidays that he would push [...] (ICAP) for higher JPY LIBOR rates.<sup>114</sup> On 2 October 2007, [...] ([non-addressee]) requested from [...] (ICAP) in a Bloomberg chat high 3 month JPY LIBOR rates for that week, which [...] (ICAP) accepted.<sup>115</sup>
- (112) On 13 October 2007, [...] ([non-addressee]) asked [...] (ICAP) in an online chat for high 6 month JPY LIBOR rates and low other JPY LIBOR rates.<sup>116</sup> On 16 October 2007, [...] ([non-addressee]) requested from [...] (ICAP) in a further chat an unchanged 6 month JPY LIBOR rate until the end of the month.<sup>117</sup> Later the same day [...] ([non-addressee]) requested in an online chat again an unchanged 6 month JPY LIBOR rate which [...] (ICAP) accepted ('that should be easy').<sup>118</sup> In a chat of 2 November 2007, [...] ([non-addressee]) asked [...] (ICAP) to keep the JPY LIBOR rates and to push up the 6 month JPY LIBOR tenor.<sup>119</sup>
- (113) As promised, [...] (ICAP) was in contact with [...] (ICAP) in respect of [...] ([non-addressee]) requests. The contact between [...] (ICAP) and [...] (ICAP) was in parallel to the contact between [...] (ICAP) and [...] ([non-addressee]). These communications evidence that [...] ([non-addressee]) requests were passed onto [...] (ICAP) by [...] (ICAP). [...] (ICAP), who was fully aware that those requests originated from [...] ([non-addressee]), adjusted, where possible, his daily Run Thrus accordingly, or at least passed information as to the trends in the cash market affecting the JPY LIBOR to [...] ([non-addressee]). Communications of this type took place on 22 August 2007<sup>120</sup>, 23 August 2007<sup>121</sup>, 24 August 2007<sup>122</sup>, 28 August 2007<sup>123</sup>, 31 August 2007<sup>124</sup>, 3 September 2007<sup>125</sup>, 4 September 2007<sup>126</sup>, 5 September

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122 [...].  
123 [...].



2007<sup>127</sup>, 10 September 2007<sup>128</sup>, 11 September 2007<sup>129</sup>, 13 September 2007<sup>130</sup>, 18 September 2007<sup>131</sup>, 19 September 2007<sup>132</sup>, 21 September 2007<sup>133</sup>, 2 October 2007<sup>134</sup>, 4 October 2007<sup>135</sup>, 5 October 2007<sup>136</sup>, 9 October 2007<sup>137</sup>, 10 October 2007<sup>138</sup>, 11 October 2007<sup>139</sup>, 12 October 2007<sup>140</sup>, 17 October 2007<sup>141</sup>, 18 October 2007<sup>142</sup>.

- (114) Furthermore, the fact that [...] (ICAP) was speaking to [...] (ICAP) about [...]’s ([non-addressee]) requests is evidenced by communications [...] (ICAP) had with other ICAP brokers on: 15 August 2007<sup>143</sup>, 16 August 2007<sup>144</sup>, 17 August 2007<sup>145</sup>, 7 September 2007<sup>146</sup>, 14 September 2007<sup>147</sup>, 20 September 2007<sup>148</sup>, 21 September 2007<sup>149</sup>, 1 October 2007<sup>150</sup>, 10 October 2007<sup>151</sup>, 11 October 2007<sup>152</sup>, 17 October 2007<sup>153</sup>, 19 October 2007<sup>154</sup>, 29 October 2007<sup>155</sup>, 30 October 2007<sup>156</sup>, 31 October 2007<sup>157</sup> and 1 November 2007<sup>158</sup>.

5.3.2.2. [non-addressee]’s acknowledgement of ICAP’s facilitation of the [non-addressee]/[non-addressee] 2007 infringement

- (115) [non-addressee] acknowledged that between 14 August 2007 and 1 November 2007, it used the cash broker ICAP to facilitate the infringement with the aim of influencing the future JPY LIBOR submissions of certain JPY LIBOR panel banks

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that did not participate in the infringement.<sup>159</sup> [non-addressee] was not aware of this circumstance.

### 5.3.3. ICAP's facilitation of the [non-addressee]/[non-addressee] 2008 infringement

#### 5.3.3.1. ICAP's conduct that facilitated the [non-addressee]/[non-addressee] 2008 infringement

- (116) On 28 August 2008, at around 7:09am, [...] ([non-addressee]) and [...] (ICAP) engaged in a Bloomberg chat in which they discussed the situation with respect to 1m, 3m and 6m JPY LIBOR. In the course of this chat, [...] ([non-addressee]) told [...] (ICAP), among others, what [non-addressee]'s 1m JPY LIBOR submission was going to be on that day, and, importantly, what [non-addressee]'s JPY LIBOR submissions were going to be ('low across the board'). [...] ([non-addressee]) then expressed his desire to get the 'other' (meaning other JPY LIBOR panel banks) to submit a low 1m JPY submission.<sup>160</sup>
- (117) There is abundant evidence on the file of regular communications between [...] ([non-addressee]) and [...] (ICAP) throughout 2008, in which they regularly discuss JPY LIBOR rates of various tenors (usually 1m, 3m and 6m), with [...] (ICAP) repeatedly promising [...] ([non-addressee]) to attempt to influence other banks to submit rates suitable to [non-addressee] (by sending out adjusted 'Run-Thrus' or directly contacting other JPY LIBOR panel banks).
- (118) However, the chat of 28 August 2008 is the first instance in which [...] (ICAP) is informed of [...] ([non-addressee]) contacts with another JPY LIBOR panel bank – [non-addressee] – in the context of the manipulation of JPY LIBOR rates. As of this moment, [...] (ICAP) was, or should have been, aware that [...] ([non-addressee]) was in contact with at least [non-addressee], and that assistance provided after this point to [...] ([non-addressee]) in moving JPY LIBOR rates, is, or could be, also assistance to anticompetitive practices between [non-addressee] and [non-addressee]. Therefore, the date of this communication is taken as the start date for ICAP's participation, as a facilitator, in the [non-addressee]/[non-addressee] 2008 infringement, which at this point in time had already been ongoing for more than three months (since 7 May 2008).<sup>161</sup>
- (119) In a follow-up to their chat of 28 August 2008, [...] ([non-addressee]) and [...] (ICAP) engaged in a chat on 29 August 2008 over the course of several hours between 4:30am and 9am, in which they again discussed the situation with respect to 1m, 3m and 6m JPY LIBOR. In this chat, [...] ([non-addressee]) told [...] (ICAP) to 'try for unch [unchanged] again', which from the context of the chat means to try to achieve a 6m JPY LIBOR rate at the same level as the business day before. [...] (ICAP) responded that he has already had several conversations with Mr [...] (ICAP) on this topic, meaning that he has already requested [...] (ICAP) to send out a Run Thru along the lines requested by [...] ([non-addressee]).<sup>162</sup>

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<sup>159</sup> [...].

<sup>160</sup> [...].

<sup>161</sup> See recital (85) above.

<sup>162</sup> [...].

- (120) In the night of 31 August 2008, [...] ([non-addressee]) and [...] (ICAP) engaged in another chat of similar nature, in which [...] ([non-addressee]) stated his need for the 3m JPY LIBOR to stop rising. [...]’s (ICAP) statement in response: ‘doing our best mate...’, is indicative of ICAP’s actions in support of [...] ([non-addressee]) requests.<sup>163</sup> Conversations of the same or similar nature continued between [...] ([non-addressee]) and [...] (ICAP) throughout the next days, namely on 2 September 2008<sup>164</sup>, 3 September 2008<sup>165</sup>.
- (121) These communications between [...] ([non-addressee]) and [...] (ICAP) and the intentions reflected therein were mirrored by communications between [...] (ICAP) and [...] (ICAP). These individuals exchanged a series of emails in which [...] (ICAP) requested [...]’s (ICAP) view of the state of the cash market with respect to the JPY LIBOR tenors discussed with [...] ([non-addressee]) and informed [...] (ICAP) of [...] ([non-addressee]) trading exposure and preferences as to the movements of the JPY LIBOR. Importantly, in his email of 5 September 2008, [...] (ICAP) informed [...] (ICAP) that [non-addressee] and [non-addressee] had a ‘vested interest’ in low 3m JPY LIBOR.<sup>166</sup> This further indicates awareness on the part of [...] (ICAP) and ICAP as such, that there must have been discussions ongoing between [non-addressee] and [non-addressee] concerning the movement of the 3m JPY LIBOR.
- (122) In the following days and weeks, [...] ([non-addressee]) and [...] (ICAP) repeatedly discussed, sometimes on a daily basis, [...] ([non-addressee]) preferences for the movement of the JPY LIBOR in various tenors. In these communications, [...] (ICAP) stated in various ways that ICAP was, where possible, working to help [...] ([non-addressee]) achieve these movements, mainly via the ‘Run-Thrus’ of [...] (ICAP), whose adjustment in the requisite direction [...] (ICAP) requested from [...] (ICAP). [...] (ICAP) subsequently communicated this fact to [...] ([non-addressee]), hence keeping the latter informed that ICAP was working towards [non-addressee]’s goals as regards the manipulation of the JPY LIBOR. Such communications took place on 9 September 2008<sup>167</sup>, 10 September 2008<sup>168</sup>, 11 September 2008<sup>169</sup>, 12 September 2008<sup>170</sup>, 15 September 2008<sup>171</sup>, 16 September 2008<sup>172</sup>, 18 September 2008<sup>173</sup>, 25 September 2008<sup>174</sup>, 29 September 2008<sup>175</sup>, 1 October 2008<sup>176</sup>, 3 October 2008<sup>177</sup>, 13-14 October<sup>178</sup>, 16 October 2008<sup>179</sup>, 17 October 2008<sup>180</sup>, 19 October

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2008<sup>181</sup>, 20 October 2008<sup>182</sup>, 26 October 2008<sup>183</sup>, 27 October 2008<sup>184</sup>, 28 October 2008<sup>185</sup>, 29 October 2008<sup>186</sup>, 30-31 October 2008<sup>187</sup>.

- (123) As promised, [...] (ICAP) was in contact with [...] (ICAP) in respect of [...] ([non-addressee]) requests. The contact between [...] (ICAP) and [...] (ICAP) was in parallel to the contact between [...] (ICAP) and [...] ([non-addressee]). These communications evidence that [...] ([non-addressee]) requests were passed onto [...] (ICAP) by [...] (ICAP). [...] (ICAP), who was fully aware that those requests originated from [...] ([non-addressee]), adjusted, where possible, his daily 'Run-Thrus' accordingly, or at least passed information as to the trends in the cash market affecting the JPY LIBOR to [...]. Communications of this type took place on 2 September 2008<sup>188</sup>, 4 September 2008<sup>189</sup>, 5 September 2008<sup>190</sup>, 8 September 2008<sup>191</sup>, 9 September 2008<sup>192</sup>, 25 September 2008<sup>193</sup>, 3 October 2008<sup>194</sup>, 14 October 2008<sup>195</sup>, 23 October 2008<sup>196</sup>.
- (124) Furthermore, the fact that [...] (ICAP) was speaking to [...] (ICAP) about [...] ([non-addressee]) requests is evidenced by communications [...] (ICAP) was having with other ICAP brokers. In some of these, like in the chat of 18 September 2008 with [...] (ICAP), [...] expressed his concern over the consequences for the ongoing brokerage relationship between [non-addressee] and ICAP of [...]’s (ICAP) occasional non-compliance with [...] ([non-addressee]) requests.<sup>197</sup> In another telling example, [...] (ICAP) wrote to [...] (ICAP) on 26 September 2008, informing him of [...] ([non-addressee]) needs as regards the movement of the JPY LIBOR and stating that '...we [ICAP] are trying to hold it down where the arbi suggests it should be;-)'.<sup>198</sup> The reference to 'arbi' in this sentence is understood as a veiled reference to the manipulation of the JPY LIBOR, that came to be used following pressure from the compliance department of ICAP one year earlier. Following that pressure, [...] (ICAP) and [...] ([non-addressee]) agreed to use more 'subtle' language in their communications concerning the manipulation of the JPY LIBOR.<sup>199</sup> Further

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In a chat of 1 November 2007 in which [...] writes: 'HI MATE, JUST HAD [...] BACK ON RE-LIBORS, HAD A LOT OF COMPLIANCE PRESSURE RECENTLY DUE TO THE CREDIT PROBLEMS, WE BOTH NEED TO BE A LITTLE MORE SUBTLE IN OUR "VIEWS"...IE' I THINK THE FWDS ARE SUGGESTING THIS 6MOS LIBOR SHOULD BE LOWER....ETC. MY E-MAILS ETC. NEED TO BE WORDED MORE CAREFULLY' ([...]). The interpretation of the word

examples of ICAP internal communications of this type include communications on 28 August 2008<sup>200</sup>, 16 September 2008<sup>201</sup>, 1 October 2008<sup>202</sup>, 3 October 2008<sup>203</sup>, 28 October 2008<sup>204</sup>, 29 October 2008<sup>205</sup>, and 31 October 2008<sup>206</sup>.

(125) The last communication between [...] ([non-addressee]) and [...] (ICAP) within the infringement period occurred on 31 October 2008. In this communication [...] ([non-addressee]) requested [...] (ICAP) to try to obtain high 6m LIBOR submissions from other panel banks on this day, and lower 1m, 3m and 6m on Monday, 3 November 2008. [...] (ICAP) acknowledged the request.<sup>207</sup> This is the last instance of a communication with a collusive aim between [non-addressee] and ICAP within the [non-addressee]/[non-addressee] 2008 infringement period. However, in view of the agreement to obtain lower JPY LIBOR submissions on Monday, 3 November 2008, it is this date that is set as the end of ICAP's facilitation of the [non-addressee]/[non-addressee] 2008 infringement.

5.3.3.2. [non-addressee]'s acknowledgement of ICAP's facilitation of the [non-addressee]/[non-addressee] 2008 infringement

(126) [non-addressee] acknowledged that, between 28 August 2008 and 3 November 2008, it used the cash broker ICAP to facilitate the infringement with the aim of influencing the future JPY LIBOR submissions of certain JPY LIBOR panel banks that did not participate in the infringement.<sup>208</sup> [non-addressee] was not aware of this circumstance.

5.3.4. *ICAP's facilitation of the [non-addressee]/[non-addressee] 2008-09 infringement*

5.3.4.1. ICAP's conduct that facilitated the [non-addressee]/[non-addressee] 2008-09 infringement

(127) While ICAP continued, in the same way as in 2007 and 2008, to provide assistance with the JPY LIBOR to [non-addressee] throughout the first half of 2009, the start of its participation in the [non-addressee]/[non-addressee] 2008-09 infringement is established on the basis of communications, which show that ICAP was, or should have been aware, that [non-addressee] was engaged in anticompetitive contacts with [non-addressee] in relation to their YIRD trading and the JPY LIBOR.

(128) The first relevant communication, although outside the period of ICAP's participation in this infringement, is a chat of 28 April 2009, in which [...] ([non-addressee]) informed [...] (ICAP) of his need to obtain a high 6m JPY LIBOR as of the beginning

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'arbi' that appears in a number of subsequent communications as a veiled reference to requests relating to the manipulation of the JPY LIBOR is further corroborated by evidence on the file under [...].

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of July 2009 to benefit his trading positions. In reply, [...] (ICAP) stated that he would 'get to work on [...]'. As of this date, [...] (ICAP) was fully aware of [...] ([non-addressee]) plans as regards the movement of the 6m JPY LIBOR in the following months. This plan became gradually more elaborate, and involved a coordinated gradual increase of the 6m JPY LIBOR and its sudden drop on 10 August 2009. As the communications described in recitals (129)-(139) below show, [...] (ICAP) was fully informed of this plan and, through him, ICAP actively contributed to its achievement in full knowledge of [non-addressee] and [non-addressee]'s communications in pursuance of this plan.

- (129) The first communication that demonstrates this knowledge on the part of ICAP is an internal email from [...] (ICAP) to [...] (ICAP) from 22 May 2009, in which [...] (ICAP) stated that [non-addressee] moved its 6m JPY LIBOR by 6bps following a conversation between [...] ([non-addressee]) and [...], a YIRD trader and JPY LIBOR submitter<sup>209</sup> at [non-addressee]<sup>210</sup>. Therefore, this date is taken as the starting date of ICAP's knowing facilitation of the [non-addressee]/[non-addressee] 2009. As of this date, ICAP knew, or should have known, that all of its actions taken in support of [non-addressee]'s requests to manipulate the JPY LIBOR, were, or could have been, also in support of [non-addressee] and [non-addressee]'s collusive aims.
- (130) Another communication that shows ICAP's awareness of collusive contacts between [non-addressee] and [non-addressee] is a chat between [...] (ICAP) and [...] (ICAP) on 4 June 2009 in which [...] (ICAP) explained that [...] ([non-addressee]) traded with [...] ([non-addressee]) on terms advantageous to the latter on the understanding that [...] ([non-addressee]) would do [...] ([non-addressee]) a favour 'on the arbi' at the end of the month.<sup>211</sup> The reference to 'arbi' in this context is understood, in light of earlier communications described above, as a reference to the manipulation of the JPY LIBOR.<sup>212</sup>
- (131) A further example is a communication of 15 June 2009 between [...] ([non-addressee]) and [...] (ICAP). In this Bloomberg chat [...] ([non-addressee]) laid out his plan for the raising of the 6m JPY LIBOR in the following terms: 'we will move 6m, will ask [...]of [non-addressee]]', to which [...] (ICAP) replied: '[...] [[non-addressee]], yep, [...] will get a text on the way in and a call'.<sup>213</sup> This communication demonstrates not only awareness on the part of ICAP of the collusive scheme to 'move' the 6m JPY LIBOR between [non-addressee] and [non-addressee] but also the active assistance provided by ICAP in furtherance of it. Indeed, the next day, on 16 June 2009, [...] (ICAP) wrote to [...] ([non-addressee]): 'the "turn campaign" begins today, Will put an e-mail together at lunchtime to [...]'.<sup>214</sup>
- (132) In subsequent days and weeks, [...] ([non-addressee]) and [...] (ICAP) engaged in repeated communications in which they discussed [...] ([non-addressee]) preferences

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<sup>209</sup> [...].

<sup>210</sup> [...].

<sup>211</sup> [...].

<sup>212</sup> See recital (125) and footnote 199 above.

<sup>213</sup> [...].

<sup>214</sup> [...].

for the movement of the JPY LIBOR mainly with respect to the 6m JPY LIBOR but also other JPY LIBOR tenors. In these communications, [...] (ICAP) stated in various ways that ICAP was, where possible, working to help [...] ([non-addressee]) achieve these movements, mainly via the 'Run-Thrus' of [...] (ICAP), whose adjustment in the requisite direction [...] (ICAP) requested from [...] (ICAP) and subsequently communicated this fact to [...] ([non-addressee]), hence keeping the latter informed that ICAP was working towards [non-addressee]'s goals as regards the manipulation of the JPY LIBOR. In some of these communications [...] ([non-addressee]) also repeatedly disclosed to [...] (ICAP) the content of his communications with [...] ([non-addressee]). Communications of this nature took place on 19 June 2008<sup>215</sup>, 21 June 2009<sup>216</sup> and 23 June 2009<sup>217</sup>.

- (133) A particularly good example of the type of communications that were taking place between [...] ([non-addressee]) and [...] (ICAP) in this period is a chat of 23-24 June 2009, in which the two discuss the ways to move the 6m JPY LIBOR higher. These include [...] (ICAP) '*putting arbi pressure on [...] and [...]*', [...] ([non-addressee]) speaking to [...] ([non-addressee]) as well as other individuals in the YIRD market who may have had an influence over JPY LIBOR panel banks' submissions.<sup>218</sup>
- (134) Communications of a similar nature and content between [...] ([non-addressee]) and [...] (ICAP) continued to take place on 24-26 June 2009<sup>219</sup>, 28-30 June 2009<sup>220</sup>, 1-3 July 2009<sup>221</sup>, 6 July 2009<sup>222</sup>, 9 July 2009<sup>223</sup>, 14 July 2009<sup>224</sup>, 21-22 July 2009<sup>225</sup>.
- (135) The chat of 22 July 2009 is worth mentioning in greater detail because it laid out [...] ([non-addressee]) concrete plan for the end of the 'Operation 6m' by explaining to [...] (ICAP) that he needed the 6m JPY LIBOR to remain high until 11 August 2009, because of his ongoing positions, and then drop. [...] (ICAP) expressed his concern that a sudden drop of [non-addressee]'s JPY LIBOR submissions might look suspicious, especially if [non-addressee] and another JPY LIBOR panel bank did the same. To this [...] ([non-addressee]) replied that the drop will be staggered with each of the banks taking turns to drop their 6m JPY LIBOR submissions, eliciting a telling response from [...] (ICAP): '*great the plan is hatched and sounds sensible*'.<sup>226</sup> This chat demonstrates the significant degree of [...] (ICAP) involvement in [...] (ICAP)'s ([non-addressee]) plan and his full awareness of it.
- (136) Following this conversation, the two continued their nearly daily communications on the realization of [...] ([non-addressee]) plan. The nature and content of these

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communications was similar to those mentioned in recitals (132)-(135) above and they took place on 23-24 July 2009<sup>227</sup>, 26-30 July 2009<sup>228</sup>, 2-3 August 2009<sup>229</sup>.

- (137) On 4 August 2009 [...] ([non-addressee]) left for vacation and [...] (ICAP) began to communicate on the carrying out of the plan to move the 6m JPY LIBOR with [...] ([non-addressee]) colleague, [...] ([non-addressee]) who was a YIRD trader at [non-addressee].<sup>230</sup> These communications continued on 5-6 August 2009<sup>231</sup>.
- (138) Consistent with [...]’s (ICAP) declarations concerning him speaking to [...] (ICAP) with regard to [...] ([non-addressee]) requests, [...] and [...] (both ICAP) engaged in communications parallel to those [...] (ICAP) was having with [...] ([non-addressee]). These communications evidence that [...] ([non-addressee]) requests were passed onto [...] (ICAP) by [...] (ICAP). [...] (ICAP), in full awareness of the fact that those requests originated from [...] (ICAP), adjusted, where possible, his daily 'Run-Thrus' accordingly. Communications of this type took place on 18 June 2009<sup>232</sup> and 29 June 2009<sup>233</sup>. Furthermore, the fact that [...] (ICAP) was speaking to [...] (ICAP) about [...] ([non-addressee]) requests is evidenced by communications [...] (ICAP) was having with other ICAP brokers: 15 June 2009<sup>234</sup>, 26 June 2009<sup>235</sup>, 29 June 2009<sup>236</sup>, 3 July 2009<sup>237</sup>, 9 July 2009<sup>238</sup>, 3 August 2009<sup>239</sup>.
- (139) On 10 August 2009, consistent with the plan set out by [...] ([non-addressee]) on 2 July 2009, [...] (ICAP) and [...] ([non-addressee]) discussed the sudden drop of 6m JPY LIBOR to be effected on that day by [non-addressee], [non-addressee] and another JPY LIBOR panel bank.<sup>240</sup> This communication is followed by further chats in the coming days where [...] ([non-addressee]) and [...] (ICAP) discussed their efforts and monitored their success in moving the 6m JPY LIBOR lower. In particular, on 11 August 2009, [...] (ICAP) wrote to [...] ([non-addressee]): *'have done all I can with the cash arbitrage, a lot of this will come down to how much your boys move by...fingers crossed, thanks for today, have another go tomorrow'*.<sup>241</sup> This communication demonstrates ICAP's active efforts, or the perception of it in the eyes of [non-addressee], in assisting in moving the 6m JPY LIBOR lower (the reference to 'cash arbitrage' is to be understood as explained in recital (130) above) in line with the plan set out by [...] ([non-addressee]) gradually over the course of ICAP's participation in the infringement.

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(140) The end of ICAP's participation in the infringement is set at the end of the infringement between [non-addressee] and [non-addressee] itself, which has been established as 10 August 2009.<sup>242</sup>

5.3.4.2. [non-addressee]'s acknowledgement of ICAP's facilitation of the [non-addressee]/[non-addressee] 2008-09 infringement

(141) [non-addressee] acknowledged that in the period of 22 May 2009 until 10 August 2009 it used the cash broker ICAP to facilitate the infringement with the aim of influencing the future JPY LIBOR submissions of certain JPY LIBOR panel banks that did not participate in the infringement.<sup>243</sup> [non-addressee] was not aware of this circumstance.

5.3.5. *ICAP's facilitation of the [non-addressee]/[non-addressee] 2010 infringement*

5.3.5.1. ICAP's conduct that facilitated the [non-addressee]/[non-addressee] 2010 infringement

(142) On 3 March 2010 at around 7:16am, [...], now a YIRD trader at [non-addressee]<sup>244</sup>, contacted [...], a broker at ICAP, through the Bloomberg chat platform, disclosing that [...] ([non-addressee]) would benefit from low 3m JPY LIBOR. [...] ([non-addressee]) then went on to request that [...] (ICAP) contact [non-addressee] to try to obtain a lower 3m JPY LIBOR submission by [non-addressee]. [...] (ICAP) agreed and stated that he would contact [non-addressee] later.<sup>245</sup>

(143) The same day (3 March 2010) at around 9:55am, [...] (ICAP) indeed contacted [...] ([non-addressee]), a JPY LIBOR submitter at [non-addressee], with a view of obtaining a lower 3m JPY LIBOR submission by [non-addressee]. This request is made on behalf of [...], which are the initials of [...]. [non-addressee] acquiesced to ICAP's request in the knowledge that this was in fact a request coming from its competitor in the YIRD market – [non-addressee].<sup>246</sup>

(144) On 4 March 2010 at around 11:32am, [...] ([non-addressee]) contacted [...] (ICAP) through the Bloomberg chat platform and informed [...] (ICAP) that JPY LIBOR is lower, accompanying his statement by a 'wink' (smiley emoticon). [...] (ICAP) comments approvingly: 'good work'. This chat indicates that [...] ([non-addressee]) lowered [non-addressee]'s JPY LIBOR submission just as requested by [...] ([non-addressee]) through [...] (ICAP) the day before.<sup>247</sup>

(145) These communications mark the beginning of a string of communications between [non-addressee], ICAP and [non-addressee], in which [non-addressee], through ICAP, obtained or attempted to obtain information about [non-addressee]'s future

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<sup>242</sup> See recital (89) above.

<sup>243</sup> [...].

<sup>244</sup> As explained in recital (103) and footnote 95 above [...] moved from [non-addressee] to [non-addressee] on 3 December 2009.

<sup>245</sup> [...].

<sup>246</sup> [...].

<sup>247</sup> [...].

JPY LIBOR submissions and on occasions influenced them to the benefit of [non-addressee].

- (146) For example, on 28 April 2010 at around 8:07am, [...] (ICAP) asked [...] ([non-addressee]) whether [non-addressee]'s 3m and 6m JPY LIBOR submission would remain unchanged the following day. In response, [...] ([non-addressee]) confirmed that they would remain unchanged compared to the day before.<sup>248</sup> [...] (ICAP) subsequently passed this information on to [...] ([non-addressee]) in a telephone call that took place subsequent to the Bloomberg chat between [...] (ICAP) and [...] ([non-addressee]).<sup>249</sup> The fact that [...] ([non-addressee]) was informed of [non-addressee]'s intentions is further evidenced by a communication between him and a YIRD trader at [non-addressee], [...] ([non-addressee]), in which [...] ([non-addressee]) disclosed, among others, that he was 'speaking to [non-addressee] cash desk'.<sup>250</sup> This statement illustrates [...] ([non-addressee]) perception of the contacts with [non-addressee], which he saw as a direct line to the JPY LIBOR submitters ('cash desk') of [non-addressee], irrespective of the fact that the communications were carried out through ICAP.
- (147) A further example evidencing the awareness on the part of [...] ([non-addressee]) of the fact that [...] (ICAP) requested to share information on [non-addressee]'s upcoming JPY LIBOR submissions or to adjust them, were being made on behalf of [...] ([non-addressee]), is a series of Bloomberg chats of 29 April 2010. Over these bilateral chats, which took place more or less simultaneously at around 7am, [...] (ICAP) obtained information from [...] ([non-addressee]) about [non-addressee]'s upcoming 3m and 6m JPY LIBOR submissions and expectations as to their future movements and passed this information on to [...] ([non-addressee]). Both [...] ([non-addressee]) and [...] ([non-addressee]) were aware as to the origin and the destination of this information exchange, since [...] copied the relevant parts of his chat with [...] ([non-addressee]) to his chat with [...] ([non-addressee]) and vice versa.<sup>251</sup>
- (148) A similar series of communications between [non-addressee] and ICAP, and ICAP and [non-addressee] took place on 12 May 2010.<sup>252</sup> In these communications, [non-addressee] requested ICAP to inquire about [non-addressee]'s intentions as to its upcoming 3m JPY LIBOR submission and to request [non-addressee] to move it lower. These resulted in [non-addressee]'s declaration to move the 3m JPY LIBOR lower, in line with [non-addressee]'s request.
- (149) Communications of a similar nature, in which information about [non-addressee]'s JPY LIBOR preferences (based on [...] requests) or [non-addressee]'s upcoming JPY LIBOR submission passed between these two competitors through ICAP (...), took place on 4 May 2010<sup>253</sup> and 13 May 2010<sup>254</sup>.

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<sup>250</sup> [...].

<sup>251</sup> [...].

<sup>252</sup> [...] (chat between ICAP and [non-addressee]), [...] (calls between [non-addressee] and ICAP at 3:31pm, 3:36pm and 3:42pm JST).

<sup>253</sup> [...].

(150) On 25 May 2010 at around 12:19 pm, [...] (ICAP) initiated a Bloomberg chat with [...] ([non-addressee]) in which he asked if [non-addressee] would move its 6m JPY LIBOR lower. [...] ([non-addressee]) confirmed that [non-addressee]'s submission would be lower. [...] (ICAP) thanked him for the information and said that he would pass it on to [...] ([non-addressee]).<sup>255</sup>

(151) In another chat, on 15 June 2010 at around 7:03am, [...] (ICAP) asked [...] ([non-addressee]) whether [non-addressee] would move its 3m JPY LIBOR higher and informed him that [...] ([non-addressee]) would like the 3m JPY LIBOR to move higher. This time, [...] ([non-addressee]) declined to accede to this request, explaining that he held a position which benefited from a lower 3m JPY LIBOR.<sup>256</sup> This shows that [...] ([non-addressee]) may have felt the need to explain why he could not accede to [...] ([non-addressee]) request.

(152) The last instance where [...] ([non-addressee]) shared information about [non-addressee]'s upcoming 3m JPY LIBOR submission with [...] (ICAP) and appeared willing to adjust it in line with [...] (ICAP) – and indirectly [...] ([non-addressee]) – request is a Bloomberg chat of 22 June 2010.<sup>257</sup> In this chat, [...] (ICAP) asked [...] ([non-addressee]) whether the latter had less 'emotion' regarding the 3m JPY LIBOR on that day. [...] ([non-addressee]) replied that he was intending to leave his submission unchanged, but went on to ask whether [...] (ICAP) would like him to raise it. [...] (ICAP) confirms that a higher submission would be better, to which [...] ([non-addressee]) replies that he 'will do what he can, maybe up a pip' (i.e. 1bp).

#### 5.3.5.2. [non-addressee]'s and [non-addressee]'s acknowledgement of ICAP's facilitation of the [non-addressee]/[non-addressee] 2010 infringement

(153) [non-addressee] and [non-addressee] acknowledged having engaged in anticompetitive practices with the object of restriction and/or distortion of competition in the sector for YIRDS referenced to the JPY LIBOR in the period of 3 March 2010 until 22 June 2010 consisting of discussions on the submission of certain JPY LIBOR rates and the exchange of commercially sensitive information. They did so indirectly, through the broker ICAP, which served as a conduit for information and thus facilitated the anticompetitive practices.<sup>258</sup>

#### 5.3.6. *ICAP's facilitation of the [non-addressee]/[non-addressee] 2010 infringement*

##### 5.3.6.1. ICAP's conduct that facilitated the [non-addressee]/[non-addressee] 2010 infringement

(154) On 7 April 2010, at around 3:17 pm, [...] ([non-addressee]) informed [...] (ICAP) in a Bloomberg chat that [non-addressee], [non-addressee] and [non-addressee] would after June drop JPY LIBOR rates by 20 bp. [...] ([non-addressee]) predicted that by December the 3 month JPY LIBOR tenors would decrease to 35 before he needed

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<sup>254</sup> [...].

<sup>255</sup> [...].

<sup>256</sup> [...].

<sup>257</sup> [...].

<sup>258</sup> [...] and [...].

that rate to be higher again. [...] ([non-addressee]) mentioned that [non-addressee], [non-addressee] and [non-addressee] would all join this move and that he would try to also influence other panel banks accordingly ('will work on others').<sup>259</sup> As of this discussion, [...] (ICAP) was, or should have been, aware of the fact that [...] ([non-addressee]) was discussing future JPY LIBOR submissions with [non-addressee] and that all assistance provided to [...] ([non-addressee]) after this chat was, or could have been, facilitating the anticompetitive practices between [non-addressee] and [non-addressee]. Therefore, the date of this chat is taken as a start date for ICAP's participation, as a facilitator, in the [non-addressee]/[non-addressee] 2010 infringement, which at this point in time had already been ongoing for several days.

- (155) [...] ([non-addressee]) requested from [...] (ICAP) to influence certain JPY LIBOR rates. He requested for instance on 18 May 2010 to keep 1 year JPY LIBOR rates low ('*keep 1y down*'), which [...] (ICAP) accepted ('*yep of course mate ...*').<sup>260</sup> The same day, [...] ([non-addressee]) requested from [...] (ICAP) to try to keep JPY LIBOR rates low until past June ('*pls try for low across the board till we get past june imm*').<sup>261</sup> Furthermore, [...] ([non-addressee]) asked [...] (ICAP) on 23 May 2010 in a chat to keep the 1 year JPY LIBOR rate down and the 3 year JPY LIBOR rate up.<sup>262</sup>
- (156) The evidence demonstrates that the requests to influence JPY LIBOR rates as requested by [...] ([non-addressee]) were followed up by [...] (ICAP). [...] (ICAP) informed [...] ([non-addressee]) in an online chat of 2 June 2010 that [...] (ICAP), who prepared ICAP's 'Run-Thrus', had in line with [...] ([non-addressee]) requests priced in the turn (of the rates) and offered to further adjust his 'Run-Thru' for 6m JPY LIBOR rates.<sup>263</sup> On 7 June 2010, [...] (ICAP) informed [...] ([non-addressee]) that [...] (ICAP) had tried to push the 6 month JPY LIBOR rate.<sup>264</sup>
- (157) As promised, [...] (ICAP) was in contact with [...] (ICAP) in respect of [...] ([non-addressee]) requests. The contact between [...] (ICAP) and [...] (ICAP) was in parallel to the contact between [...] (ICAP) and [...] ([non-addressee]). These communications evidence that [...] ([non-addressee]) requests were passed on to [...] (ICAP) by [...] (ICAP). [...] (ICAP), who was fully aware that those requests originated from [...] ([non-addressee]), adjusted, where possible, his daily 'Run-Thrus' accordingly. Communications of this type took place on 12 May 2010<sup>265</sup> and 1 June 2010<sup>266</sup>.

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<sup>259</sup> [...]. Although the chat speaks of [non-addressee] and [non-addressee] joining [non-addressee] in the moving of their JPY LIBOR submissions, the evidence on the file does not show that [non-addressee] was aware of [non-addressee]'s contacts with [non-addressee] or that [non-addressee] was aware of [non-addressee]'s contacts with [non-addressee]. Therefore, from the perspective of [non-addressee], the discussions [non-addressee] and [non-addressee] had with each other were bilateral.

<sup>260</sup> [...].

<sup>261</sup> [...].

<sup>262</sup> [...].

<sup>263</sup> [...].

<sup>264</sup> [...].

<sup>265</sup> [...].

<sup>266</sup> [...].

(158) On 7 June 2010, [...] ([non-addressee]) and [...] (ICAP) first discussed strategies to manipulate JPY LIBOR rates, before [...] ([non-addressee]) mentioned that he needed low JPY LIBOR rates for this month. [...] (ICAP) replied that it would be okay for ICAP to keep the rates down this month. He added that moving up JPY LIBOR rates afterwards would require a joint effort of [non-addressee], [non-addressee] and [non-addressee].<sup>267</sup>

#### 5.3.6.2. [non-addressee]'s acknowledgement of ICAP's facilitation of the [non-addressee]/[non-addressee] 2010 infringement

(159) [non-addressee] acknowledged that in the period of 7 April 2010 until 7 June 2010 it used the cash broker ICAP to facilitate the infringement with the aim of influencing the future JPY LIBOR submissions of certain JPY LIBOR panel banks that did not participate in the infringement.<sup>268</sup> [non-addressee] was not aware of this circumstance.

#### 5.3.7. ICAP's facilitation of the [non-addressee]/[non-addressee] 2010 infringement

##### 5.3.7.1. ICAP's conduct that facilitated the [non-addressee]/[non-addressee] 2010 infringement

(160) Before the start of the infringement, [...] ([non-addressee]) had informed [...] (ICAP) on 7 April 2010 in a Bloomberg chat that [non-addressee], [non-addressee] and [non-addressee] would after June drop JPY LIBOR rates by 20 bp. [...] ([non-addressee]) predicted that by December the 3 month JPY LIBOR tenors would decrease to 35 before he needed that rate to be higher again. [...] ([non-addressee]) mentioned that [non-addressee], [non-addressee] and [non-addressee] would all join this move and that he would try to also influence other panel banks accordingly ('will work on others').<sup>269</sup> As of this point in time, [...] (ICAP) was aware that his efforts to manipulate the JPY LIBOR rates were part of a wider scheme in which [non-addressee] was also involved.

(161) [...] ([non-addressee]) requested from [...] (ICAP) to influence certain JPY LIBOR rates. He requested for instance on 18 May 2010 to keep 1 year JPY LIBOR rates low ('*keep 1y down*'), which [...] accepted ('*yep of course mate ...*').<sup>270</sup> The same day, [...] ([non-addressee]) requested from [...] (ICAP) to try to keep JPY LIBOR rates low until past June ('*pls try for low across the board till we get past june imm*').<sup>271</sup> Furthermore, [...] ([non-addressee]) asked [...] (ICAP) on 23 May 2010 in a chat to keep 1 year JPY LIBOR rate down and 3 year JPY LIBOR rate up.<sup>272</sup>

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<sup>267</sup> [...].

<sup>268</sup> [...].

<sup>269</sup> [...]. Although the chat speaks of [non-addressee] and [non-addressee] joining [non-addressee] in the moving of their JPY LIBOR submissions, the evidence on the file does not show that [non-addressee] was aware of [non-addressee]'s contacts with [non-addressee] or that [non-addressee] was aware of [non-addressee]'s contacts with [non-addressee]. Therefore, from the perspective of [non-addressee], the discussions [non-addressee] and [non-addressee] had with each other were of bilateral nature.

<sup>270</sup> [...].

<sup>271</sup> [...].

<sup>272</sup> [...].

(162) The evidence demonstrates that the requests to influence JPY LIBOR rates as requested by [...] ([non-addressee]) were followed up by [...] (ICAP). [...] (ICAP) informed [...] ([non-addressee]) in an online chat of 2 June 2010 that [...] (ICAP), who prepared ICAP's 'Run-Thrus', had in line with [...] ([non-addressee]) requests priced in the turn (of the rates) and offered to further adjust his 'Run-Thru' for 6m JPY LIBOR rates.<sup>273</sup>

(163) As promised, [...] (ICAP) was in contact with [...] (ICAP) in respect of [...] ([non-addressee]) requests. The contact between [...] (ICAP) and [...] (ICAP) was in parallel to the contact between [...] (ICAP) and [...] ([non-addressee]). These communications evidence that [...] ([non-addressee]) requests were by passed by [...] (ICAP) onto [...] (ICAP) who has, in full awareness of those requests originating from [...], adjusted, where possible, his daily 'Run-Thrus' accordingly. Communications of this type took place on 12 May 2010<sup>274</sup> and 1 June 2010<sup>275</sup>.

#### 5.3.7.2. [non-addressee]'s acknowledgement of ICAP's facilitation of the [non-addressee]/[non-addressee] 2010 infringement

(164) [non-addressee] acknowledged that in the period of 28 April 2010 until 2 June 2010 it used the cash broker ICAP to facilitate the infringement with the aim of influencing the future JPY LIBOR submissions of certain JPY LIBOR panel banks that did not participate in the infringement.<sup>276</sup> [non-addressee] was not aware of this circumstance.

#### 5.3.8. Conclusion on ICAP's participation in the respective infringements

(165) On the basis of the facts set out in recitals (72)-(80), (83)-(164) above, the following conclusions on the duration and nature of ICAP's participation in the respective infringements are drawn in recitals (166)-(171).

(166) ICAP facilitated the [non-addressee]/[non-addressee] 2007 infringement in the period from 14 August 2007 until 1 November 2007, whereby at the request of [non-addressee], ICAP aimed to influence certain JPY LIBOR panel banks that did not participate in the infringement to submit JPY LIBOR rates in line with the requests from [non-addressee] by (i) disseminating misleading information to them via the so-called 'Run Thrus' and/or (ii) directly contacting them. [non-addressee] was not aware of this circumstance.

(167) ICAP facilitated the [non-addressee]/[non-addressee] 2008 infringement in the period from 28 August 2008 until 3 November 2008, whereby at the request of [non-addressee], ICAP aimed to influence certain JPY LIBOR panel banks that did not participate in the infringement to submit JPY LIBOR rates in line with the requests from [non-addressee] by (i) disseminating misleading information to them via the so-called 'Run Thrus' and/or (ii) directly contacting them. [non-addressee] was not aware of this circumstance.

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<sup>273</sup> [...].

<sup>274</sup> [...].

<sup>275</sup> [...].

<sup>276</sup> [...].

- (168) ICAP facilitated the [non-addressee]/[non-addressee] 2008-09 infringement in the period from 22 May 2009 until 10 August 2009, whereby at the request of [non-addressee], ICAP aimed to influence certain JPY LIBOR panel banks that did not participate in the infringement to submit JPY LIBOR rates in line with the requests from [non-addressee] by (i) disseminating misleading information to them via the so-called 'Run Thrus' and/or (ii) directly contacting them. [non-addressee] was not aware of this circumstance.
- (169) ICAP facilitated the [non-addressee]/[non-addressee] 2010 infringement in the period from 3 March 2010 until 22 June 2010 by serving as a communications channel between a trader of [non-addressee] and a trader of [non-addressee], thus enabling the anticompetitive practices between them.
- (170) ICAP facilitated the [non-addressee]/[non-addressee] 2010 infringement in the period from 7 April 2010 until 7 June 2010, whereby at the request of [non-addressee], ICAP aimed to influence certain JPY LIBOR panel banks that did not participate in the infringement to submit JPY LIBOR rates in line with the requests from [non-addressee] by (i) disseminating misleading information to them via the so-called 'Run Thrus' and/or (ii) directly contacting them. [non-addressee] was not aware of this circumstance.
- (171) ICAP facilitated the [non-addressee]/[non-addressee] 2010 infringement with respect to YIRDs referenced to the JPY LIBOR<sup>277</sup> in the period from 28 April 2010 until 2 June 2010, whereby at the request of [non-addressee], ICAP aimed to influence certain JPY LIBOR panel banks that did not participate in the infringement to submit JPY LIBOR rates in line with the requests from [non-addressee] by (i) disseminating misleading information to them via the so-called 'Run Thrus' and/or (ii) directly contacting them. [non-addressee] was not aware of this circumstance.

#### **5.4. Discussion of ICAP's arguments in reply to the statement of objections regarding the facts of the case**

##### *5.4.1. ICAP's arguments concerning the nature and purpose of the daily 'Run Thrus'*

- (172) ICAP argued that the Commission misunderstood and mischaracterized the nature and purpose of the 'Run Thrus'. In particular, ICAP claimed that they were merely informative in nature and only meant to assist traders in understanding a particular dealing day's net cash flows. Their genuine purpose was for [...] to start a conversation with his customers in the hope that they would choose him to broker their cash trades.
- (173) As regards the column titled 'Suggested LIBORS', ICAP asserted that its title has been mischaracterised to imply that ICAP was suggesting to the panel banks the rate at which they should set their JPY LIBOR submissions. However, it was rather meant as a prediction of the rate at which the LIBOR would be set. Moreover, the

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<sup>277</sup> Although the anticompetitive practices of [non-addressee] and [non-addressee] in the [non-addressee]/[non-addressee] 2010 infringement concerned YIRDs referenced to the JPY LIBOR and Euroyen TIBOR, ICAP's facilitation of the [non-addressee]/[non-addressee] 2010 infringement concerned only YIRDs referenced to the JPY LIBOR.

'Run-Thrus' were merely one item of information in a large pool of available data on the basis of which the panel banks would normally determine their JPY LIBOR submissions. Also, they were not sent to every JPY LIBOR panel bank and the panel banks' submissions did not track the suggested LIBORS. As such, ICAP could not influence the setting of JPY LIBOR.

#### 5.4.2. *The Commission's assessment of ICAP's arguments*

- (174) It is not disputed that the primary purpose of the 'Run Thrus' may have been as ICAP asserts, i.e. informative and promotional. That, however, does not address the Commission's concern set out in the statement of objections, i.e. that ICAP adjusted, as a result of requests from [non-addressee] and later [non-addressee], the information in the Suggested LIBORS column with the aim of influencing the JPY LIBOR submissions of the recipient panel banks.<sup>278</sup>
- (175) As to ICAP's claims set out in recital (173), ICAP essentially argues that the information in the Suggested LIBORS column of the 'Run Thrus' was not capable of influencing the JPY LIBOR submissions of the recipient banks and, a fortiori, the JPY LIBOR. This argument is difficult to accept for several reasons. First, as is clear from a communication of 14 August 2007 between [...] (ICAP) and [...] ([non-addressee]) where [...] stated that [non-addressee] and [non-addressee] were going to submit higher 6m JPY LIBOR submissions to which [...] replied that '[...] *sending out [sic] higher [6m Suggested JPY LIBOR in the 'Run Thru'] than he thinks so hopefully the sheep [other JPY LIBOR panel banks] will just copy*', ICAP itself perceived and presented the 'Run Thrus' as potentially influential over the JPY LIBOR submissions of the recipient banks.<sup>279</sup> Second, the 'Run Thrus' were indeed not the only information taken into account by the submitters of JPY LIBOR when determining their bank's JPY LIBOR submissions, but as this information was coming from one the world's leading brokers (that is to say an organization at the centre of the market) and, within this firm from someone who was so knowledgeable of the market that he was known by the nickname Lord Libor, it was a relevant piece of information. Third, the fact that not all JPY LIBOR panel banks may have received it is irrelevant because given the way the Libor is computed (trimmed average), it can be manipulated by just one submission.<sup>280</sup> Moreover, there are indications on the file that some banks' JPY LIBOR submissions followed closely – sometimes exactly – the levels suggested in the 'Run Thrus'.<sup>281</sup> Finally, the fact that the Suggested LIBORS may have related to the suggested end-level of the JPY Libor instead of the suggested submissions is irrelevant: if all panel banks submit at the suggested level by ICAP, the level at which the JPY LIBOR would be set would obviously be the suggested one.

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<sup>278</sup> For the description of the 'Run-Thrus' see recitals (99)-(100).

<sup>279</sup> [...].

<sup>280</sup> See recital (10) above.

<sup>281</sup> See recital (101) above.



5.4.3. *Arguments of ICAP regarding financial incentives and remuneration by [non-addressee]*

(176) In its reply to the statement of objections, ICAP claimed that it was not compensated by [non-addressee] through extra brokerage fees. During the Oral Hearing, ICAP claimed that its fixed fee arrangement with [non-addressee] meant that ICAP had no financial incentive to carry out the actions described in the statement of objections and that it did not receive any benefits as a result of allegedly having carried out such actions.

5.4.4. *The Commission's assessment of ICAP's arguments*

(177) According to the evidence in the file<sup>282</sup>, on the one hand, within [non-addressee], [...] and/or his supervisor have, at times, advocated for (GBP 5 000 per month) extra brokerage fees to be paid to ICAP, while, on the other hand, ICAP also requested to [non-addressee], at times, such extra brokerage fees of GBP 5 000 per month.<sup>283</sup> However, in the end, the brokerage fees amounts actually paid by [non-addressee] to ICAP seem not to have included such extra brokerage fees of GBP 5 000 per month. In this light, the Commission accepts ICAP's claim that it was not compensated through extra brokerage fees as such. However, the Commission notes that while [non-addressee] in the end did not pay an extra GBP 5 000 a month to ICAP, this amount was nevertheless paid as a result of ICAP's internal arrangements by ICAP to [...] for his actions with respect to the JPY LIBOR in response to requests from [non-addressee].<sup>284</sup> It is telling that this internal arrangement was put in place to ensure that [non-addressee]'s requests with respect to the 'Run Thrus' were fulfilled and that a good client relationship was maintained with [non-addressee].<sup>285</sup>

(178) It is not disputed that ICAP was remunerated by [non-addressee] via a fixed fee arrangement. According to the evidence on the file<sup>286</sup>, fixed monthly fees were set based on the average monthly fees of the actual trading volume for the months of the prior quarter. To determine the prior quarter's actual fees, [non-addressee] and ICAP agreed on a negotiated per trade fee with a cap on fees for individual trades; these would then be applied to the actual trading volume to calculate the average fees per month. In other words, ICAP and [non-addressee] renegotiated - or could have renegotiated - the monthly fixed fee every quarter. ICAP's financial incentive was thus the ability for ICAP to improve its negotiation position vis-à-vis [non-addressee] (potentially impacting the negotiated per trade fee and per trade cap and thus

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<sup>282</sup> [...].

<sup>283</sup> As is clear from an email dated 15 October 2007 exchanged between [non-addressee] and ICAP in the context of fee negotiations in which ICAP's senior manager [...] suggested an increase by GBP 5000 a month to reflect an amount that '[...] pays for the fixing service'. Similar exchange took place in March 2009 in which [...] mentioned the 'LIBOR service he [...] is getting from London [ICAP London]' ([...]). As regards the interpretation of the terms 'fixing service' or 'LIBOR service', it is useful to refer to a communication between [...] and [...] in November 2007 in preparation of a meeting between [...] and [...] of [non-addressee]. In this communication, [...] asks [...] to stress to [...] the value that ICAP provides with its 'cash libor information' and goes on to explain its value as regards 'what London banks are doing or where they should be fixing their libors' ([...]).

<sup>284</sup> ([...]). This was also confirmed by ICAP during the Oral Hearing ([...]).

<sup>285</sup> As acknowledged by ICAP during the Oral Hearing, ICAP carried out its actions assisting [non-addressee] in order to maintain good client relationship ([...]).

<sup>286</sup> [...]

ultimately the fixed monthly fee) as well as the ability for ICAP to broker more transactions with [non-addressee] (potentially impacting the actual trading volumes and thus ultimately the fixed monthly fee).

- (179) In light of the above, the Commission concludes that ICAP was compensated by [non-addressee] through regular brokerage fees. The Commission also concludes that the terms of the brokerage fee arrangement with [non-addressee], as well as the internal transfers to [...], did provide a financial incentive to ICAP to assist [non-addressee] in the way described in this Decision. ICAP's claim in this respect is thus rejected.

## 6. LEGAL ASSESSMENT

- (180) Having regard to the body of evidence, the facts as described in Section 5 as well as taking account of the clear and unequivocal acknowledgements by [non-addressee], [non-addressee], [non-addressee], [non-addressee] and [non-addressee] in their settlement submissions<sup>287</sup>, the Commission makes the following legal assessment. The Commission's assessment set out in sections 3.2.2 3.2.4 4.1.2 5.4.2 5.4.4 above forms part of the legal assessment in this Decision.

### 6.1. Application of Article 101 of the Treaty and Article 53 of the EEA Agreement

- (181) Article 101(1) of the Treaty prohibits as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.<sup>288</sup>

#### 6.1.1. *Agreements and concerted practices with specific regard to the role of facilitators*

##### ***Principles***

- (182) An *agreement* can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties. Furthermore, it is not necessary, in order for there to

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[...], [...], [...], [...], [...].

<sup>288</sup>

Article 53(1) of the EEA Agreement (which is modelled on Article 101(1) of the Treaty) contains a similar prohibition. However the reference of Article 101(1) to trade "between Member States" is replaced by a reference to trade "between contracting parties" and the reference to competition "within the internal market" is replaced by a reference to competition "within the territory covered by the ... [EEA] Agreement". The case law of the Court of Justice and the General Court in relation to the interpretation of Article 101 of the Treaty applies equally to Article 53 of the EEA Agreement. See Recitals 4 and 15 as well as Article 6 of the EEA Agreement, Article 3(2) of the EEA Surveillance and Court Agreement and Case E-1/94 of 16 December 1994, paragraphs 32-35. References in this Decision to Article 101 of the Treaty therefore apply also to Article 53 EEA.

be an infringement of Article 101(1) of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan.

- (183) In its judgment in the PVC II case, the General Court stated that “*it is well established in the case-law that for there to be an agreement within the meaning of Article 81 of the Treaty [now Article 101 of the Treaty] it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way*”.<sup>289</sup>
- (184) Although Article 101(1) of the Treaty and Article 53 of the EEA Agreement draw a distinction between the concept of “*concerted practices*” and “*agreements between undertakings*”, the object is to bring within the prohibition of these Articles a form of co-ordination between undertakings by which, without having reached the stage where an agreement has been concluded, they knowingly substitute practical co-operation between them for the risks of competition.<sup>290</sup>
- (185) The criteria of co-ordination and co-operation laid down by the case-law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which he intends to adopt in the internal market.
- (186) Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market.<sup>291</sup>
- (187) Thus, conduct may fall under Article 101(1) of the Treaty as a *concerted practice* even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour.<sup>292</sup> Furthermore, exchange of information between competitors can be characterised as a concerted practice if it

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<sup>289</sup> Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v. Commission* (PVC II) [1999] ECR II-931, paragraph 715.

<sup>290</sup> Case C-48/69 *Imperial Chemical Industries Ltd. v. Commission* [1972] ECR 619, paragraph 64.

<sup>291</sup> Joined Cases C-40-48/73 and others (C-50/73, 54-56/73, 111/73, 113/73 and 114/73) *Coöperatieve Vereniging "Suiker Unie" UA and others v. Commission* [1975] ECR 1663, paragraphs 173-174 and Case C-8/08, *T-Mobile Netherlands and Others*, [2009] ECR I-4529, paragraph 33.

<sup>292</sup> Case T-7/89 *Hercules Chemicals v. Commission*, [1991] ECR II-1711, paragraphs 255-261 and Case T-279/02 *Degussa AG v. Commission*, [2006] ECR II-897, paragraph 132.

reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted.<sup>293</sup>

- (188) Although in terms of Article 101(1) of the Treaty the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period. Such a concerted practice is caught by Article 101(1) of the Treaty even in the absence of actual anticompetitive effects on the market.<sup>294</sup>
- (189) In the case of a *complex infringement* it is not necessary for the Commission to characterise the conduct as exclusively one or other of these forms of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. The anticompetitive behaviour may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall objective into several different forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 101 of the Treaty lays down no specific category for a complex infringement of the type involved in the present case.<sup>295</sup>
- (190) In its *PVC II* judgment, the General Court stated that “[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [101] of the Treaty”.<sup>296</sup>
- (191) An agreement for the purposes of Article 101(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel, the term “*agreement*” can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose as well as to the

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<sup>293</sup> Case C-8/08, *T-Mobile Netherlands* [2009] ECR I-4529, paragraphs 35 and 43.

<sup>294</sup> Case C-199/92 P *Hüls v. Commission* [1999] ECR I-4287, paragraphs 158-167. Case C-8/08, *T-Mobile Netherlands* [2009] ECR I-4529, paragraph 51.

<sup>295</sup> Case T-7/89 *Hercules Chemicals v. Commission* [1991] ECR II-1711, paragraph 264.

<sup>296</sup> Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v. Commission* (PVC II) [1999] ECR II-931, paragraph 696.

measures designed to facilitate the implementation of price initiatives.<sup>297</sup> As the Court of Justice has pointed out, it follows from the express terms of Article 101(1) of the Treaty that an agreement may consist not only in an isolated act but also in a series of acts or continuous conduct.<sup>298</sup>

- (192) The organisation of meetings or providing services relating to anticompetitive arrangements<sup>299</sup> may also be prohibited under certain conditions according to the case law of the General Court. The General Court stated that "*it is sufficient for the Commission to show that the undertaking concerned attended meetings at which anticompetitive agreements were concluded*", and that "*the Commission must prove that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by the participants as a whole and that it was aware of the substantive conduct planned or implemented by other undertakings in pursuance of those objectives, or that it could reasonably have foreseen that conduct and that it was ready to accept the attendant risk*".<sup>300</sup>
- (193) It is also well-established case-law that "*the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anticompetitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings*".<sup>301</sup> Such distancing should have taken the form of an announcement by the company, for example, that it would take no further part in the meetings (and therefore did not wish to be invited to them).
- (194) Engaging in activities that further anticompetitive practices between undertakings or serving as a conduit for collusive communications may also be prohibited under certain conditions according to the case law of the Union Courts. According to the case-law, even facilitating the attainment of the cartel is enough to share responsibility for the overall cartel<sup>302</sup> and Article 101 of the Treaty applies also to facilitators that are not active on the cartelised market for the purposes of the infringement but which intentionally and actively contribute to the success of the cartel on that other market<sup>303</sup>. As such, facilitators may assume a role that is different

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<sup>297</sup> Case T-7/89 *Hercules*, paragraph 256.

<sup>298</sup> Case C-49/92 P *Commission v. Anic Partecipazioni SpA* [1999] ECR I-4125, paragraph 81.

<sup>299</sup> Such as checking deviations and monitoring compliance facilitating the implementation of the agreements.

<sup>300</sup> Case T-99/04, *AC- Treuhand AG v. Commission*, [2008] ECR II-1501, paragraphs 122, 127 and 130.

<sup>301</sup> Case T-334/94 *Sarrió SA v. Commission* [1998] ECR II-1439, paragraph 118, Case T-141/89 *Tréfileurope Sales SARL v. Commission* [1995] ECR II-791, paragraph 85; Case T-7/89 *Hercules Chemicals v. Commission*, paragraph 232; Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, *Cimenteries CBR and Others v Commission* ("Cement") [2000] ECR II-491, paragraph 1389; Case T-329/01 *Archer Daniels Midland Co. v. Commission* [2006] ECR II-3255, paragraph 247; and Case T-303/02 *Westfalen Gassen Nederland BV v. Commission* [2006] ECR II-4567, paragraphs 138-139.

<sup>302</sup> See in this sense Case T-36/05 *Coats Holdings Ltd v Commission* [2007] ECR II-110 (summary publication), at paragraphs 119-122.

<sup>303</sup> Case T-99/04 *AC Treuhand v Commission*, [2008] ECR II-1501, paragraphs 112-138; Case T-27/10, *AC-Treuhand v Commission*, not yet published, paragraphs 43-47.

from the other participants in the cartel. It is established case law that the Commission may hold an undertaking liable as a co-perpetrator of the infringement if it can show that the relevant undertaking intended, through its own conduct, to contribute to the common anticompetitive objectives pursued by other undertakings, provided that the undertaking was aware of the substantive conduct planned or implemented by other undertakings in pursuance of those objectives, or that it could reasonably have foreseen that conduct and that it was ready to accept the attendant risk.<sup>304</sup> In addition, there is no need to demonstrate that the parties were aware of all details concerning bilateral communications between the other parties. According to case-law, even facilitating the attainment of the cartel is enough to share responsibility for the overall cartel.<sup>305</sup>

### *Application to this case*

- (195) It emerges from the facts described in Sections 5.1 and 5.2, that the various collusive arrangements between [non-addressee] and [non-addressee] within the [non-addressee]/[non-addressee] 2007 infringement, [non-addressee] and [non-addressee] within the [non-addressee]/[non-addressee] 2008 infringement, [non-addressee] and [non-addressee] within the [non-addressee]/[non-addressee] 2008-09 infringement, [non-addressee] and [non-addressee] within the [non-addressee]/[non-addressee] 2010 infringement, [non-addressee] and [non-addressee] within the [non-addressee]/[non-addressee] 2010 infringement and [non-addressee] and [non-addressee] within the [non-addressee]/[non-addressee] 2010 infringement, can be characterized as six complex and separate infringements of Article 101(1) of the Treaty and Article 53 of the EEA Agreement, each of them consisting of actions described and referred to above<sup>306</sup>, which can either be classified as agreements or concerted practices, within which the competitors knowingly substituted practical cooperation between them for the risks of competition.
- (196) This legal qualification has been accepted by [non-addressee], [non-addressee], [non-addressee], [non-addressee] and [non-addressee] insofar as the relevant infringements are concerned.<sup>307</sup>
- (197) For the purposes of this procedure against the addressees of the present Decision, the Commission sets out below the reasoning concerning the anticompetitive object common to the six relevant infringements.
- (198) The agreements and/or concerted practices present within the relevant infringements restricted or distorted by object competition in the market for all YIRDs referenced to the JPY LIBOR, the prices of which are determined on the basis of, among other factors, the JPY LIBOR.<sup>308</sup>

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<sup>304</sup> Case T-99/04 *AC Treuhand v Commission*, [2008] ECR II-1501, paragraphs 112-138; Case T-27/10, *AC-Treuhand v Commission*, not yet published, paragraphs 43-47.

<sup>305</sup> See in this sense Case T-36/05 *Coats Holdings Ltd v Commission* [2007] ECR II-110 (summary publication), at paragraphs 119-122.

<sup>306</sup> See recitals (72)-(78),(85),(87),(89),(92),(93) and (95) and the evidence referred to in the footnotes to these recitals.

<sup>307</sup> [...], [...], [...], [...], [...].

<sup>308</sup> See also recitals (218)-(219) below.

- (199) The direct relevance of JPY LIBOR for the floating rate leg of a YIRD contract referenced to the JPY LIBOR requires no further explanation as the JPY LIBOR is the reference interest rate of such a YIRD contract and the level of the JPY LIBOR on the relevant date(s) will be used for calculating the cash flow(s) to be exchanged.
- (200) As regards the fixed rate, as explained in recitals (34)-(44) the JPY LIBOR is an element in the setting of the fixed rate of a YIRD, i.e. an element of its price. While there are other elements that influence the setting of the fixed rate of a YIRD, the fact remains that current JPY LIBOR rates are indirectly reflected in the pricing of the fixed rate of a YIRD through yield curves/expected future interest rates. The prices in the YIRD market - and the so-called yield curves which are modeled upon those prices and in turn are used for the pricing and re-evaluation of YIRDs - are a reflection of current and expected future JPY LIBOR levels. The current level of the JPY LIBOR is a starting point of this yield curve. Therefore, conduct aimed at influencing the JPY LIBOR, which is an element of the price of YIRDs, constitutes a violation of Article 101(1)a of the Treaty. On the one hand since it influences the price of YIRDs, the manipulation of JPY LIBOR is indirect price fixing. On the other hand, given that the JPY LIBOR manipulation influences the value of YIRDs currently held by the banks and their strategy related to these contracts, it is also a fixing of trading conditions in the sense of Article 101(1)a of the Treaty, affecting the structure of competition.
- (201) While the principal intention of the participants in the relevant infringements was to affect the cash flows under existing YIRD contracts, the agreements and/or concerted practices set out in Section 5 above also had the potential to distort competition in the markets for YIRDs referenced to the JPY LIBOR, as the participants in the infringement aimed at rates being set at levels other than those that would prevail in the absence of collusion, and as the different JPY LIBOR tenors serve as single market benchmarks for JPY LIBOR-based YIRDs, applicable to all participants in the YIRD market. Due to the method of its calculation (see recital (10) above for the description of how the JPY LIBOR is set), the JPY LIBOR can be manipulated by a single submission. The magnitude of its manipulation increases with the number of adjusted submissions i.e. two aligned adjusted submissions have a greater potential impact on the JPY LIBOR rate than one adjusted submission, and so on. A single submission (like an individual price increase), not preceded by collusion, does not lead to a restriction of competition. By colluding on their JPY LIBOR submissions, exchanging information about their trading positions and their future JPY LIBOR submissions, the parties involved in the respective infringements aimed at affecting the JPY LIBOR rate more successfully and with greater potential impact than if they had simply individually misreported, without colluding.<sup>309</sup>
- (202) This also resulted in the participants having advance information about the moves of the JPY LIBOR as well as an awareness of its artificial levels. Both restricted competition between the colluding banks and led to the distortion of competition in the market for YIRDs overall. Either in fact or potentially, it led to consequences which, while interwoven, can be classified into two main categories: (i) restriction of competition among the colluding banks, (ii) distortion of competition between the

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<sup>309</sup> See also recitals (218)-(219) below.

colluding banks on the one side and their non-colluding competitors on the other side.

- (203) As regards the restriction of competition, by coordinating the level of their upcoming JPY LIBOR submissions, revealing their interest as to the preferred direction of future LIBOR movements, exchanging information about intended trades, the banks participating in the respective infringements restricted competition amongst themselves in the market for YIRDs by aiming at the JPY LIBOR rates being set at levels different than those that would have prevailed in the absence of collusion. Through these practices they revealed to each other information about fundamental aspects of their strategy and conduct on the market, hence significantly reducing the inherent uncertainty in a market where risk (and uncertainty) management is one of the key parameters of competition. As a result, they were competing for YIRD contracts armed with the knowledge of their perceived ability to influence the rate in accordance with their preferences, their respective strategies, trading exposures and aware of their reliance on the same information and assumptions as to where the JPY LIBOR would be set or the level of its artificiality at given times. This led to the restriction of competition between them compared to the state that would have prevailed in the absence of collusion.
- (204) As regards the distortion of competition, the agreements and/or concerted practices engaged in by the banks participating in the relevant infringements resulted in an informational asymmetry between market participants, which was created as a result of the fact that the participating cartel members knew (i) in advance with a certain proximity at what level the JPY LIBOR would be set (as a result of having manipulated it), and (ii) whether the JPY LIBOR on a given day was at artificial levels (and by how much) as a result of the manipulation or whether it corresponded to market realities. Their competitors were in this respect completely unaware. This informational asymmetry gave the colluding parties an advantage when offering terms for YIRDs compared to their competitors. During the time of the collusion, the colluding parties possessed far more information, which led to them being able to offer better terms than their competitors, who were relying on what they perceived as JPY LIBOR determined by legitimate market reality and were prevented from competing on equal terms with the colluding competitors. This applies equally to the conclusion of contracts in the future as well as to on-going, i.e. already concluded, contracts with any counterparty.
- (205) The parties to the respective bilateral infringements discussed their JPY LIBOR submissions and exchanged commercially sensitive information.<sup>310</sup> Such communications run counter to the requirement that each economic operator must determine independently the policy which it intends to adopt on the market, since the requirement of independence strictly precludes any direct or indirect contact between such operators with the object or effect of either influencing the conduct on the market of an actual or potential competitor or of disclosing to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market. The individual assessment by a bank of information which is public and available, should not be confused with the joint evaluation by two

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<sup>310</sup> See recitals (72)-(78),(85),(87),(89),(92),(93) and (95) above.



competitors of that information, in combination, as the case may be, with other information on the state of the market, and of its impact on the development of the sector, very shortly before they take decisions affecting their pricing in the market.<sup>311</sup>

- (206) The addressees of the present Decision contributed, through their actions described in detail in Section 5 and in particular Section 5.3 to the anticompetitive object pursued by the other undertakings within the relevant infringements. As is demonstrated in recitals (106)(118)(121)(129)-(133)(135),(142)-(152),(154),(160), ICAP was aware of the substantive conduct (manipulation of the JPY LIBOR in various tenors) planned by the other undertakings participating in the relevant infringements or it could have reasonably foreseen that conduct and that it was ready to accept the attendant risk. Due to its brokerage activities, ICAP is a sophisticated participant in the YIRD and JPY LIBOR cash markets and as such it must have been aware of the consequences of its actions carried out in support of the actions taken by the participants in the relevant infringements.
- (207) As regards the activities of ICAP within the [non-addressee]/[non-addressee] infringement, described in Section 5.1.2.4 and recitals (142)-(152) above, the evidence shows that ICAP was, as a communications hub, essential to the conclusion of the agreements and/or concerted practices between [non-addressee] and [non-addressee]. It cannot be excluded that without ICAP's actions the anticompetitive contacts between [non-addressee] and [non-addressee] would not have taken place, at least not in the form in which they did. By serving as a conduit for collusive communications, in full awareness of the purpose and object of those communications, ICAP knowingly contributed to the anticompetitive objectives pursued by [non-addressee] and [non-addressee] and played a crucial role in their attainment. Such conduct can only be characterized as active participation and involvement conducive to, and facilitating, the anticompetitive arrangements and their implementation.
- (208) As regards ICAP's actions within the [non-addressee]/[non-addressee] 2007, [non-addressee]/[non-addressee] 2008, [non-addressee]/[non-addressee] 2008-09, [non-addressee]/[non-addressee] 2010 and [non-addressee]/[non-addressee] 2010 infringements described in sections 5.1.2.1, 5.1.2.3, 5.3.1, 5.3.2, 5.3.3, 5.3.4, 5.3.6, 5.3.7 above, the Commission concludes that these actions significantly contributed to the achievement of the anticompetitive objectives pursued by the banks participating in the relevant infringements. By contacting other JPY LIBOR panel banks to submit rates suitable to the participants in the relevant infringements or disseminating information via daily Run Thrus<sup>312</sup> that, while veiled as a reflection of the situation on the JPY cash market, was in fact skewed with the intention of misleading the recipient JPY LIBOR panel banks into making, unwittingly, JPY LIBOR submissions in directions suitable to the banks participating in the relevant infringements, ICAP either in fact or potentially not only facilitated but also amplified the possible impact of the agreements and/or concerted practices reached by the colluding banks. As such its facilitating role in these infringements ([non-addressee]/[non-addressee] 2007, [non-addressee]/[non-addressee] 2008, [non-

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<sup>311</sup> See, to that effect, Case T-587/08 *Fresh Del Monte Produce v Commission*, not yet reported, at paragraphs 344-346.

<sup>312</sup> See also recitals (174)-(175) above.

addressee]/[non-addressee] 2008-09, [non-addressee]/[non-addressee] 2010 and [non-addressee]/[non-addressee] 2010) is of particular seriousness because, due to its actions, the potential impact of the agreements and/or concerted practices is significantly greater than that which could result from their actual scope (agreements and/or concerted practices between two JPY LIBOR panel banks). This is because in the absence of ICAP's actions, only two JPY panel banks would have been misreporting to the JPY LIBOR panel, while as a result of ICAP's actions there were or could likely be a number of other JPY LIBOR banks (that were not involved in the infringements) making their JPY LIBOR submissions in directions desired by the participants in the infringement. Such conduct can only be characterized as active participation and involvement conducive to, and facilitating, the anticompetitive arrangements and their implementation.

- (209) In view of the reasons stated above, the Commission holds ICAP liable as a facilitator of the following infringements for the following durations:
- (a) [non-addressee]/[non-addressee] 2007 infringement: from 14 August 2007 until 1 November 2007;
  - (b) [non-addressee]/[non-addressee] 2008 infringement: from 28 August 2008 until 3 November 2008;
  - (c) [non-addressee]/[non-addressee] 2008-09 infringement: from 22 May 2009 until 10 August 2009;
  - (d) [non-addressee]/[non-addressee] 2010 infringement: from 3 March 2010 until 22 June 2010;
  - (e) [non-addressee]/[non-addressee] 2010 infringement: from 7 April 2010 until 7 June 2010;
  - (f) [non-addressee]/[non-addressee] 2010 infringement: from 28 April 2010 until 2 June 2010.

#### 6.1.1.1. Single and continuous infringement

##### *Principles*

- (210) A complex cartel may properly be viewed as a single and continuous infringement for the timeframe in which it existed. The concept of “single agreement” or “single infringement” presupposes a complex of practices adopted by various parties in pursuit of a single anticompetitive economic aim.<sup>313</sup> The cartel may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. It would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively would manifest itself in both agreements and concerted practices.

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<sup>313</sup> Joined Cases T-25/95 *Cimenteries CBR and others v Commission* [2000] ECR II-491, paragraph 369.

- (211) The mere fact that each participant in an infringement may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same anticompetitive object or effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement, where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could reasonably have foreseen it and was prepared to take the risk.<sup>314</sup>

*Application to this case*

- (212) The six collusive arrangements which are described in Section 5 above constitute six separate complex single and continuous infringements of Article 101 TFEU and Article 53 of the EEA Agreement:
- (a) [non-addressee]/[non-addressee] 2007 infringement;
  - (b) [non-addressee]/[non-addressee] 2008 infringement;
  - (c) [non-addressee]/[non-addressee] 2008-09 infringement;
  - (d) [non-addressee]/[non-addressee] 2010 infringement;
  - (e) [non-addressee]/[non-addressee] 2010 infringement;
  - (f) [non-addressee]/[non-addressee] 2010 infringement.
- (213) Each of these six infringements constitutes a separate single and continuous infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement, as the evidence reveals that the respective participating banks engaged, with the support of ICAP, in various anticompetitive practices, which, within each of the six separate infringements, constituted an interrelated string of occurrences united by a common objective of the restriction and/or distortion of competition in the YIRD sector.
- (214) As is demonstrated in Section 5 above, ICAP was aware or should reasonably have foreseen that its actions within each of the six infringements to influence the upcoming JPY LIBOR submissions of certain JPY LIBOR panel banks that did not participate in the relevant infringements facilitated the anticompetitive activities of the banks participating in the different infringements.
- (215) Within each of the infringements, ICAP was made aware by [non-addressee] and then [non-addressee] of the identity of the other JPY LIBOR panel bank with which [non-addressee] and [non-addressee] were in anticompetitive contact.<sup>315</sup> ICAP also knew that its actions, which formed an integral part of the collusive activities of the different participating banks, aimed at increasing the effects of the manipulation of

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<sup>314</sup> Case 49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 83. Case C-444/11P, *Team Relocations NV a. o. v Commission*, not yet published, paragraphs 49 and ff.

<sup>315</sup> See recitals (106), (118), (128)-(136), (142)(152), (154), (160) above.

future JPY LIBOR submissions by the participating banks in the relevant infringements.

- (216) ICAP was also aware of the bilateral nature of the six infringements<sup>316</sup> and carried out specific tasks that had been requested from it by [non-addressee] and later [non-addressee] without disclosing or giving an impression to the other participants that it would be participating in a wider cartel. This also applies to the [non-addressee]/[non-addressee] 2010 infringement, [non-addressee]/[non-addressee] 2010 infringement and the [non-addressee]/[non-addressee] 2010 infringement, which significantly overlap in time. ICAP acted for the [non-addressee]/[non-addressee] 2010 infringement as a ‘conduit for information’ and was therefore well aware that the collusive contacts in that infringement were of bilateral nature. ICAP was also aware that the [non-addressee]/[non-addressee] 2010 infringement and the [non-addressee]/[non-addressee] 2010 infringement were of a bilateral nature, because based on its extensive contacts with [...] it was aware of the personal nature of the collusive contacts between [non-addressee] and [non-addressee] on the one hand and [non-addressee] and [non-addressee] on the other.
- (217) By virtue of its knowledge of the bilateral nature of the respective infringements, each time between different banks, without acting in a manner or giving the impression to other participants that it would be participating in a wider cartel, ICAP's actions pursued an anticompetitive aim specific to each of the respective infringements. It follows from case law that even if an entity may be involved and aware of several infringements with different parties at the same time, that does not suffice to regroup those infringements into a single infringement, in the absence of the pursuit of a single anticompetitive aim by all participants, and consequently separate fines can be imposed for each infringement<sup>317</sup>.

#### 6.1.2. *Restriction of competition*

##### *Principles*

- (218) Article 101 of the Treaty and Article 53 of the EEA Agreement prohibit agreements and concerted practices which have as their object or effect the restriction of competition by directly or indirectly fixing prices or any other trading conditions. It is settled case-law that, for the purpose of the application of Article 101 of the Treaty and Article 53 of the EEA Agreement, there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market.<sup>318</sup> The same applies to concerted practices.<sup>319</sup> According to the Court of Justice of the European Union, coordination between undertakings is a restriction by object when it reveals a sufficient degree of harm to competition that it may be found that there is no need to

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<sup>316</sup> See recitals (106),(118),(129)-(136),(142)-(152),(154),(160) above.

<sup>317</sup> In the context of the litigation concerning the Commission Decision 2003/2/EC of 21 November 2001 in Case COMP/E-1/37.512 – Vitamins (OJ 2003 L 6, p. 1) see Judgment of 15 March 2006 in Case T-15/02 *BASF v Commission* [2006] ECR p. II-497, paragraphs 98-100 and the operative part, where the Court itself set separate fines for the individual infringements for each vitamin.

<sup>318</sup> Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, paragraph 178 and case-law cited therein.

<sup>319</sup> Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, paragraphs 158-166.

examine its effects. Certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition. In particular collusive behaviour leading to horizontal price-fixing by cartels may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant for the purposes of applying Article 101(1) of the Treaty, to prove that they have actual effects on the market.<sup>320</sup> In order to determine whether an agreement reveals a sufficient degree of harm that it may be considered a restriction of competition by object, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part.<sup>321</sup> In addition, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the Union from taking that factor into account.<sup>322</sup> Finally, restrictions by object may occur also in atypical cases<sup>323</sup>, in any kind of sector.

### *Application to this case*

- (219) As established in the Settlement Decision, and again set out in the present Decision, the parties participating in the respective infringements described in this Decision engaged in behaviour, set out in Section 5 above, which had as its object the restriction and/or distortion of competition in the YIRDs sector within the EEA within the meaning of Article 101 of the Treaty and Article 53 of the EEA Agreement.<sup>324</sup> By coordinating the level of their upcoming JPY LIBOR submissions, revealing their interest as to the preferred direction of future LIBOR movements and exchanging information about intended trades<sup>325</sup>, the banks participating in the respective infringements:
- (a) Restricted competition amongst themselves in the market for YIRDs. Through these practices they revealed to each other information about fundamental aspects of their strategy and conduct on the market, hence significantly reducing the inherent uncertainty in a market where risk (and uncertainty) management is one of the key parameters of competition (here one of the most important elements of the price which determine the profitability of the financial instruments at stake). Competition on the market of derivatives pegged on the JPY LIBOR is based on the fact that the LIBOR is inherently variable, its evolution is inherently uncertain and not determined by the parties to the financial instrument. In taking the necessary steps to secretly influence this rate to their benefit, the parties to the collusion diminished the risk of detrimental evolution of the rate and, for this reason, put their competitors at a competitive disadvantage. As a result, they were competing for YIRD contracts armed with the knowledge of their perceived ability to influence the rate in

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<sup>320</sup> Case C-67/13P *CB v Commission*, not yet published, paragraphs 49ff.

<sup>321</sup> Case C-67/13P *CB v Commission*, not yet published, paragraph 53.

<sup>322</sup> Case C-67/13P *CB v Commission*, not yet published, paragraph 54.

<sup>323</sup> Case T-90/11, *Ordre national des pharmaciens (ONP) a.o. v Commission*, ECLI:EU:T:2014:1049, paragraphs 304-322, in particular 312.

<sup>324</sup> See also recitals (198)-(205) above.

<sup>325</sup> See recitals (72)-(78),(85),(87),(89),(92),(93) and (95) above.

accordance with their preferences, their respective strategies, trading exposures and aware of their reliance on the same information and assumptions as to where the JPY LIBOR would be set or the level of its artificiality at given times. This inevitably led to the restriction of competition between them compared to the state that would have prevailed in the absence of collusion.<sup>326</sup>

- (b) Distorted competition between themselves and other players in the YIRD market that did not participate in the relevant infringements due to an informational asymmetry between market participants, which was created as a result of the fact that the participating cartel members knew (i) in advance with a certain proximity at what level the JPY LIBOR would be set (as a result of having manipulated it), and (ii) whether the JPY LIBOR on a given day was at artificial levels (and by how much) as a result of the manipulation or whether it corresponded to market realities. Their competitors were in this respect completely unaware. This informational asymmetry gave the colluding parties an advantage when offering terms for YIRDs compared to their competitors. During the time of the collusion, the colluding parties possessed far more information, which led to them being able to offer better terms than their competitors, who were relying on what they perceived as JPY LIBOR determined by legitimate market reality and were prevented from competing on equal terms with the colluding competitors. This applies equally to the conclusion of contracts in the future as well as to on-going, i.e. already concluded, contracts with any counterparty. It is well established since the Case C-7/95P *John Deere*, in which the General Court and the Court of Justice first examined an agreement on the exchange of information in the context of the EC Treaty, that such an agreement is incompatible with the rules on competition if it reduces or removes the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted.<sup>327</sup> In the present case, the unambiguous object of the contacts was to transform the variable element (JPY LIBOR) of the price of YIRD into a predictable element.<sup>328</sup>

- (220) Accordingly, the Commission concludes that the conduct of the banks participating in the respective infringements reveals a sufficient degree of harm since it consists of collusive behavior relating to price and other trading conditions of YIRDs.

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<sup>326</sup> For further detail see recitals (195)-(203) above.

<sup>327</sup> See Case C-7/95P *John Deere v Commission*, [1998] ECR I-3111, paragraph 90, and Case C-194/99 P *Thyssen Stahl v Commission*, [2003] ECR I-10821, paragraph 81. See also Case C-238/05 *Asnef-Equifax*, [2006] ECR I-11125, paragraph 51: '*it is inherent in the Treaty provisions on competition that every economic operator must determine autonomously the policy which it intends to pursue on the common market. Thus, according to that case-law, such a requirement of autonomy precludes any direct or indirect contact between economic operators of such a kind as either to influence the conduct on the market of an actual or potential competitor or to reveal to such a competitor the conduct which an operator has decided to follow itself or contemplates adopting on the market, where the object or effect of those contacts is to give rise to conditions of competition which do not correspond to the normal conditions of the market in question, taking into account the nature of the products or the services provided, the size and number of the undertakings and also the volume of the market* (see *Commission v Anic Partecipazioni*, paragraphs 116 and 117, as well as the case-law cited)'

<sup>328</sup> For further detail see recitals (203)-(205) above.

- (221) The actions of the broker ICAP, which are described in detail in Section 5 above, facilitated the relevant infringements. By virtue of its facilitating practices in the relevant infringements, the broker ICAP was aware or should have been aware that its actions<sup>329</sup> contributed to the restriction and/or distortion of competition by object at issue within them:
- (a) By serving as a conduit for collusive communications within the [non-addressee]/[non-addressee] 2010 infringement, in full awareness of the purpose and object of those communications<sup>330</sup>, ICAP knowingly contributed to the anticompetitive objectives pursued by [non-addressee] and [non-addressee] and played a crucial role in their attainment.
  - (b) By contacting other JPY LIBOR panel banks (within the [non-addressee]/[non-addressee] 2007, [non-addressee]/[non-addressee] 2008, [non-addressee]/[non-addressee] 2008-09, [non-addressee]/[non-addressee] 2010 and [non-addressee]/[non-addressee] 2010 infringements)<sup>331</sup> to submit rates suitable to the participants in the relevant infringements or disseminating information via daily Run Thrus that, while veiled as a reflection of the situation on the JPY cash market, were in fact manipulated with the intention to mislead the recipient JPY LIBOR panel banks into making, unwittingly, JPY LIBOR submissions in directions favourable for the banks participating in the relevant infringements, ICAP significantly contributed to the achievement of the anticompetitive objectives pursued by the banks participating in the relevant infringements.

6.1.3. *Effect on trade between Member States and between contracting parties to the EEA Agreement*

***Principles***

- (222) Article 101(1) of the Treaty is applicable to agreements and practices on the part of undertakings which may harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the common market. Similarly, Article 53(1) of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area.
- (223) The Union Courts have consistently held that the notion that an agreement may effect trade implies that it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.<sup>332</sup> In any event, while Article 101 of the Treaty does not

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<sup>329</sup> See recitals (106)(118)(121)(129)-(133)(135),(142)-(152),(154),(160), (206) above

<sup>330</sup> See recitals (142)-(152) above.

<sup>331</sup> See sections 5.1.2.1, 5.1.2.3, 5.3.1, 5.3.2, 5.3.3, 5.3.4, 5.3.6, 5.3.7 above.

<sup>332</sup> Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 282, at paragraph 7; Case 42/84 *Remia and others v Commission* [1985] ECR 2545, at paragraph 22 and Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-

require that agreements referred to in that provision have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect.<sup>333</sup>

- (224) The application of Articles 101(1) of the Treaty and Article 53(1) of the EEA Agreement to a cartel is not, however, limited to that part of the members' trades that actually involve the transfer of goods or services from one State to another. Nor is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States.<sup>334</sup>
- (225) Agreements and practices covering or implemented in several Member States are in almost all cases by their very nature capable of affecting trade between Member States.<sup>335</sup> Practices between banks that cover international transactions are capable of affecting trade between Member States within the meaning of Article 101(1) of the Treaty, the concept of "trade" used in that Article having a wide scope which includes monetary transactions.<sup>336</sup> Cartel agreements such as those involving price fixing and market sharing covering several Member States are by their very nature capable of affecting trade between Member States.<sup>337</sup>

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- (226) The YIRD business is characterised by a substantial volume of trade between Member States and a considerable volume of trade between the European Union and the EFTA countries belonging to the EEA. The undertakings participating in the six relevant infringements are all major international financial institutions that were involved in the YIRD business through their offices in London and elsewhere inside and outside the EEA. The JPY LIBOR and Euroyen TIBOR are important reference interest rates for many financial instruments denominated in Japanese Yen. Many undertakings such as banks, corporations, hedge funds, pension funds, and investment banking firms within the EEA routinely enter into YIRD contracts that use JPY LIBOR or Euroyen TIBOR interest rates as the reference rate. The anticompetitive practices concerning these reference rates, which were described above, must have resulted, or, at the very least, were likely to result in the diversion of trade patterns from the course they would otherwise have followed.
- (227) Each of the six infringements covered the entire EEA and related to trade within the EEA and was therefore capable of having an appreciable effect upon trade between Member States and between contracting parties to the EEA Agreement.

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69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and others v Commission* ECR [2000] II-491, at paragraph 1986; Case C-306/96 *Javico v Yves Saint Laurent Parfums* [1998] ECR I-1983, at paragraph 16.

<sup>333</sup> Case C-219/95 P *Ferriere Nord SpA v Commission* [1997] ECR I-4411, at paragraph 19.

<sup>334</sup> Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, at paragraph 304.

<sup>335</sup> Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101, 27.4.2004, p. 81 (the "Notice on the effect on trade"), at point 61.

<sup>336</sup> Case T-172/80 *Gerhard Züchner v Bayerische Vereinsbank* [1981] ECR 2021, at paragraph 18.

<sup>337</sup> Notice on the effect on trade, at point 64; Case T-142/89 *Usines Gustave Boël* [1995] ECR II-867, at paragraph 102.



#### 6.1.4. *Non-applicability of Article 101(3) of the Treaty*

- (228) The provisions of Article 101 of the Treaty and Article 53 of the EEA Agreement may be declared inapplicable pursuant to Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement where an agreement or concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, provided that it allows consumers a fair share of the resulting benefit, does not impose restrictions that are not indispensable to the attainment of those objectives and does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
- (229) There is no indication that the behaviour by the undertakings that participated in the six infringements entailed any efficiency benefits or otherwise promoted technical or economic progress. Complex infringements like those which are the subject of this Decision, are, by definition, among the most detrimental restrictions of competition. They do not benefit consumers. Nor has ICAP argued that the conditions of Article 101(3) of the Treaty or Article 53(3) of the EEA Agreement could be met in this case.
- (230) Accordingly, the conditions for exemption provided for in Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement are not met in this case with regard to any of the six infringements.

## **6.2. Discussion of ICAP's arguments in reply to the statement of objections regarding the Commission's legal assessment**

### *6.2.1. ICAP's arguments regarding the Commission's legal qualification of the conduct of the banks*

- (231) ICAP argued that the conduct of the banks, while potentially amounting to attempted manipulation of JPY LIBOR, does not constitute an infringement of Article 101 of the Treaty and Article 53 EEA for the following reasons:
- (a) As regards YIRDs, banks act as counterparties as opposed to competitors.
  - (b) There has been no conduct, including information exchange, in relation to prices of YIRDs because the JPY LIBOR is not an element of their price. There is no nexus between the price of YIRDs and the JPY LIBOR.
  - (c) There has been no exchange of information of strategic nature as the exchange of information on the banks' trading positions is normal in the context of YIRD contract negotiations.
  - (d) Attempted manipulation of JPY LIBOR does not amount to collusion as it does not fulfil the three essential prerequisites of economic theory on collusion according to a paper by RBB economics submitted together with ICAP's reply to the statement of objections: (i) participants must reach a common understanding on the terms of collusion, (ii) there must be incentive to deviate from the agreement; (iii) participants must successfully monitor and punish any deviations from their understanding.

- (e) The conduct did not amount to a restriction or distortion of competition because the informational advantage possessed by the allegedly colluding banks led to, if anything, them being able to offer better terms to their customers.
- (f) The incentive to manipulate JPY LIBOR is unilateral. Hence even if two banks had the same trading exposure, they didn't need to collude but simply individually misreport. The counterfactual of collusion is hence the same – i.e. two banks misreporting individually.
- (g) The alleged collusion only affected (and aimed at affecting) ex post payments from already concluded YIRD contracts.
- (h) Due to the way the JPY LIBOR was calculated in the material periods, the impact of any attempted manipulation would have been non-existent or very limited and as such *de minimis*.
- (i) Foreign courts (United States District Court for the Southern District of New York<sup>338</sup>) and regulators (Canadian Competition Bureau) have not found the attempted manipulation by banks to constitute an antitrust violation.

#### 6.2.2. *The Commission's assessment of ICAP's arguments*

(232) The Commission rejects ICAP's arguments as unfounded based on the following considerations:

- (a) The fact that on some occasions banks are counterparties in YIRD transactions does not mean that on other occasions they do not compete on the YIRD market for customers. As regards the interbank YIRD sector, the conclusion of a YIRD that renders two banks counterparties is itself a result of a competitive process in which banks look for the most suitable counterparty based on the banks' YIRD price offers. As regards YIRD contracts between banks and third parties, such as hedge funds, pension funds and various companies, the latter obviously choose the bank, which offers the best conditions. ICAP itself acknowledged during the Oral Hearing, that banks compete between themselves for these types of customers.<sup>339</sup> In addition, as noted in recital (200) above, given that the JPY LIBOR manipulation influences the value of YIRDs currently held by the banks and their strategy related to these contracts, it is also a fixing of trading conditions in the sense of Article 101(1)a of the Treaty, affecting the structure of competition.
- (b) In its argument, ICAP essentially disputes that the JPY LIBOR is an element of the price of YIRDs and that therefore any conduct relating to the collusive manipulation of the JPY LIBOR or the exchange of information on future JPY LIBOR submissions cannot constitute a restriction or distortion of competition. In recitals (34)-(44) above, the Commission explained that the JPY LIBOR is an element in the pricing of YIRDs and hence refers to that reasoning. During

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<sup>338</sup> In re LIBOR-Based Financial Instruments Antitrust Litigation. Judgment of 29 March 2013.  
<sup>339</sup> [...], recording from the Oral Hearing (Q&A part).

the Oral Hearing ICAP acknowledged that one of the factors taken into account in the pricing of YIRDs is the 'cost of money'.<sup>340</sup> Precisely that ('cost of money') is supposed to be reflected, on each given day, by the levels of JPY LIBOR. By seeking to jointly manipulate the JPY LIBOR the relevant banks involved in the respective infringements artificially reduced their uncertainty as regards one of the elements of the price of YIRDs. Similarly, by exchanging information on their future JPY LIBOR submissions, the relevant banks disclosed information of a commercially sensitive nature relating to one of the elements of the price of YIRDs. Knowing another JPY LIBOR panel bank's submission prior to the release of that day's JPY LIBOR by the BBA artificially reduces the uncertainty of the recipient of that information as to where the JPY LIBOR will be set that day. ICAP's assertion that the banks' JPY LIBOR submissions are public information misses the point. They became public only once the relevant day's JPY LIBOR had been calculated and published and not before, which was the time when the information exchanges between the relevant banks were taking place.<sup>341</sup>

- (c) The Commission does not agree with ICAP's argument that a bank's trading position (exposure) is information with no strategic value in the competitive process in the YIRD sector. The fact that banks might share this information (indirectly, through the communication of conditions for YIRDs they wish to enter into) in the course of YIRD contract negotiation with specific counterparties does not mean that this information is not strategic in nature. Moreover, the Commission's concerns relate to the sharing of this information in the context of communications relating to the banks' future JPY LIBOR submission, i.e. a context far removed from any contractual negotiation.
- (d) The Commission notes that it assesses the conduct subject to the present proceedings as an infringement by object of Articles 101 of the Treaty and 53 EEA as interpreted by Union Courts, neither of which contains the requirements set out in ICAP's reply to the statement of objections and the annexed report by RBB economics.<sup>342</sup>
- (e) By its argument that the conduct of the banks led, if anything, to banks offering better terms to their customers, ICAP appears to misunderstand the Commission's concern as set out in the statement of objections by taking the words 'better terms' out of their context. The Commission's concern is not about the banks allegedly offering better terms to their customers but that they were able, as a result of collusive actions relating to an element of the price of YIRDs, to offer better terms than their competitors, hence distorting competition in the YIRD sector as a result.
- (f) This argument is unconvincing. The fact that two undertakings might, as a result of similar incentives, adopt a similar course of action in a market does not mean that it is legal for them to agree to do so.

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<sup>340</sup> [...], recording from the Oral Hearing (Q&A part) at 18:33-18:48.

<sup>341</sup> See recital (10) above.

<sup>342</sup> See e.g. Case C-8/08 *T-Mobile Netherlands and others*, [2009] ECR I-04529 and Case C-67/13P *CB v Commission*, not yet published.

- (g) By this argument, ICAP essentially claims that since the agreements and/or concerted practices aimed at affecting the financial outcome of YIRD contracts that have already been concluded, that there has been no restriction or distortion of competition as competition for those contracts had already taken place.<sup>343</sup> In this respect, the Commission considers that there should be no confusion between (i) the objectives of the traders involved in the illegal contacts, and (ii) the object of those practices. The primary objective of the traders involved was to affect the LIBOR/TIBOR rates applicable to the YIRD contracts that they entered into so as to affect the pay-outs under those contracts. However, with the manipulation of the LIBOR/TIBOR, the participants in the cartel also caused an automatic distortion of competition in the markets for all YIRDs as the rates were set at levels other than those that would prevail in the absence of collusion. This resulted in the colluding banks having advance information about the anticipated moves of the LIBOR as well as an awareness of its artificial levels during the time of collusion. Both restricted competition between the colluding banks and led to the distortion of competition in the market for YIRDs overall. Either in fact or potentially, it led to consequences which, while interwoven, can, for the purposes of clarity, be classified into two main categories: (i) restriction of competition among the colluding banks, (ii) distortion of competition between the colluding banks on the one side and their non-colluding competitors on the other side.
- (h) As to the alleged *de minimis* nature of any impact, the Commission stresses that the concept of *de minimis* does not apply to the actual impact on price but to market coverage and in any event it does not apply to restrictions by object with an effect on trade, such as in the present case<sup>344</sup>. In this case, the JPY LIBOR determines the price for the whole industry, hence the potential impact of any collusion is particularly significant. In addition, precisely because of the way it is calculated (see recital (10) above) when two JPY LIBOR panel banks collude to adjust their submissions in concert, this has a greater potential impact on the rate than a single adjusted submission (as the JPY LIBOR is a trimmed average). Likewise, three submissions adjusted in concert have a greater potential impact than two adjusted submissions, and so on. And while it is theoretically possible that the concerted manipulation has no impact of the JPY LIBOR rate<sup>345</sup> it does not remove the anticompetitive aim of such concertation and relates merely to its implementation or the lack thereof. Also, although the impact of the manipulation may seem small at first sight, this industry is characterized by large volumes and low price variations (usually expressed in basis points where 1 basis point is 0.01%) and as such even a small movement in the JPY LIBOR is of great significance.<sup>346</sup>

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<sup>343</sup> A similar argument was repeated in ICAP's submission of 8 October 2014.

<sup>344</sup> See Case C-226/11 *Expedia*, ECLI:EU:C:2012:795, in particular paragraphs 35, 36 and 37, as recalled in point 2 of the Communication from the Commission — Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) OJ C 291, 30.8.2014, p. 1–4.

<sup>345</sup> In a situation where the colluding banks would be in the bottom or top four submissions (that are discarded from the calculation) and agree on making an adjusted submission that would again remain in the bottom or top four submissions and as such again discarded.

<sup>346</sup> [...].

- (i) With respect to the foreign 'precedents' argument, the Commission points to the obvious difference between the relevant facts as well as the applicable legal tests at stake in this case and those relevant in the LIBOR litigation before the United States District Court for the Southern District of New York or before the Canadian Competition Bureau.<sup>347</sup>

6.2.3. *ICAP's arguments regarding the Commission's qualification of ICAP's conduct as facilitation under Article 101 of the Treaty and Article 53 EEA*

(233) ICAP argued that:

- (a) Its conduct did not amount to facilitation of a cartel under the Union Courts' case law for the following reasons:
  - In five out of the six infringements ([non-addressee]/[non-addressee] 2007, [non-addressee]/[non-addressee] 2008, [non-addressee]/[non-addressee] 2008-09, [non-addressee]/[non-addressee] 2010 and [non-addressee]/[non-addressee] 2010) there are two separate schemes, which did not form part of the same single and continuous infringement as they do not share the same objective: (i) attempted LIBOR manipulation by the banks, and (ii) [non-addressee]/[non-addressee] and ICAP's scheme to influence the JPY LIBOR submissions of other panel banks.
  - ICAP did not contribute to the common objectives of the scheme between the banks. The first scheme's objective was to affect the JPY LIBOR submissions of the two relevant banks whereas the objective of the second scheme was to affect the JPY LIBOR submissions of the panel banks that did not participate in the first scheme. Hence ICAP could not have contributed to the common objective of the allegedly colluding banks.
  - The banks never intended to use ICAP as a facilitator and a unilateral action by [non-addressee]/[non-addressee] to use ICAP as a facilitator does not satisfy the requirements of Article 101 of the Treaty regarding joint intention in the form of coordination. The fact that the other bank involved in the relevant infringements did not know of ICAP's activities means that there was not joint coordination involving ICAP.
- (b) Were the Commission find ICAP liable as a facilitator, it would be a complete novelty based on the Commission's previous decisional practice.

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The present Decision addresses a restriction of competition in the sector of YIRDs and not, as the plaintiffs in that case have alleged, a restriction of competition in relation to the setting of the JPY LIBOR (see pages 30-31 of the SDNY judgment). Moreover, The Commission also points to page 160 of the SDNY judgment where Judge Buchwald explains the seeming contradiction between her dismissal of the plaintiffs' antitrust damages claims and the fact that several of the defendants in that case have entered into settlements with government regulators, by the fact that damage plaintiffs must satisfy many requirements, which government agencies need not. (Order of Judge Naomi Rice Buchwald, District Court for the Southern District of New York, dated 29 March 2013, Case 1:11-md-02262-NRB Document 286 Filed 03/29/13).

- (c) Even assuming that ICAP did facilitate the relevant infringements, their duration is vastly overstated because the Commission did not produce evidence of events sufficiently proximate in time to justify the uninterrupted duration of the individual infringements.
- (d) The Commission did not provide evidence that ICAP would be aware, on an ongoing basis, of coordination between the participating banks. It instead relied on a one off communication to show awareness and then extends ICAP's participation to the end of the relevant infringement. At best, ICAP could only be held liable with respect to the instances of coordination of which it was specifically aware.

#### 6.2.4. *The Commission's assessment of ICAP's arguments*

(234) The Commission considers ICAP's arguments as unfounded based on the following considerations:

- (a) As to whether ICAP's conduct amounts to facilitation under the applicable case law, the Commission is of the following view:
  - Contrary to ICAP's arguments, the two schemes share the same ultimate objective, which is to shift the JPY LIBOR so as to affect the value and price of YIRDS which is linked to the JPY LIBOR. ICAP's argument artificially splits the two schemes as aiming at affecting the JPY LIBOR submissions of banks involved in the collusion on the one hand and those of banks not involved in the collusion on the other hand. However, affecting JPY LIBOR submissions was merely a step necessary in order to achieve the ultimate objective, which was to move the JPY LIBOR in directions desired by the participating banks. Therefore, the actions of the two banks involved in the respective infringements and those of ICAP do share a common ultimate objective. They are also mutually complementary and ICAP's actions reinforce the potential impact of the collusion between the banks involved.
  - As explained above, the objective was not to manipulate a JPY LIBOR submission but rather to affect the JPY LIBOR. Manipulation of JPY LIBOR submissions was just a means to achieve that objective. Thus ICAP's actions, which aimed at affecting the LIBOR submissions of banks not participating in the infringement did contribute to the common objective of the colluding banks.
  - Under the applicable case law, the Commission must show that ICAP knew or should have known of the objectives of the colluding banks and whether it has, through its own actions, contributed to their achievement.<sup>348</sup> The Commission is not required to show that all of the colluding banks must also be aware of the presence of a facilitator. Their lack of awareness of this circumstance has been recognized by the

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<sup>348</sup> Case T-99/04 *AC Treuhand v Commission*, [2008] ECR II-1501, paragraphs 112-138; Case T-27/10, *AC-Treuhand v Commission*, not yet reported, paragraphs 43-47.

Commission as an attenuating circumstance in the Settlement Decision in application of the relevant case law<sup>349</sup>. On the other hand, ICAP was aware of the identity of both of the banks participating in the respective infringements and carried out actions that contributed to the achievement of the anticompetitive objectives of those banks.

- (b) The fact that ICAP's specific actions in this case are different from those of AC Treuhand in Organic Peroxides and Heat Stabilizers does not prevent parallels from being drawn between the cases given the fundamental similarity in the objectives of both ICAP's and AC Treuhand's actions, i.e. to assist colluding competitors in achieving their anticompetitive objectives. Facilitation as defined in case law is not about the nature of specific actions but rather about their purpose, which is essentially the same in this case as regards ICAP and in Organic Peroxides and Heat Stabilizers as regards AC Treuhand, i.e. to contribute to the anticompetitive objectives of the cartel.
- (c) As regards the duration of the infringements, the Commission set out evidence showing regular contacts that occurred at intermittent periods based on the needs of the individual participants. It would be artificial to split up a series of interrelated occurrences into individual instances of a few days duration merely due to the daily frequency of the JPY LIBOR setting process.
- (d) The Commission is not required to show that ICAP was specifically aware of each and every instance of coordination between the individual banks.<sup>350</sup> Once it became aware of contacts between [non-addressee]/[non-addressee] and another bank, it was in a position to assume that all of its routine actions (of attempting to move the JPY LIBOR) to the benefit of [non-addressee] and [non-addressee] could also be in support of a scheme between these banks and the other relevant banks in the individual infringements.

## 7. DURATION OF PARTICIPATION IN THE INFRINGEMENTS

(235) In view of the facts set out in Section 5 and their legal assessment set out in Section 6 above, and with respect to [non-addressee], [non-addressee], [non-addressee], [non-addressee] and [non-addressee] as established in the Settlement Decision, the duration of the relevant undertakings' participation, including that of the addressees of the present Decision, in each of the infringements is as follows:

- (a) [non-addressee]/[non-addressee] 2007 infringement:
  - [non-addressee]: 8 February 2007 – 1 November 2007
  - [non-addressee]: 8 February 2007 – 1 November 2007
  - ICAP: 14 August 2007 – 1 November 2007

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<sup>349</sup> Case C-441/11 P *Commission v Verhuizingen Coppens NV*, paragraphs 44-46 and Case T-587/08 *Fresh Del Monte Produce v Commission*, not yet reported, paragraphs 637-648.

<sup>350</sup> See case law referred to in fn 348 above.

- (b) [non-addressee]/[non-addressee] 2008 infringement:
  - [non-addressee]: 7 May 2008 – 3 November 2008
  - [non-addressee]: 7 May 2008 – 3 November 2008
  - ICAP: 28 August 2008 – 3 November 2008
- (c) [non-addressee]/[non-addressee] 2008-09 infringement:
  - [non-addressee]: 18 September 2008 – 10 August 2009
  - [non-addressee]: 18 September 2008 – 10 August 2009
  - [non-addressee]: 29 June 2009 – 10 August 2009
  - ICAP: 22 May 2009 – 10 August 2009
- (d) [non-addressee]/[non-addressee] 2010 infringement:
  - [non-addressee]: 3 March 2010 – 22 June 2010
  - [non-addressee]: 3 March 2010 – 22 June 2010
  - ICAP: 3 March 2010 – 22 June 2010
- (e) [non-addressee]/[non-addressee] 2010 infringement:
  - [non-addressee]: 26 March 2010 – 18 June 2010
  - [non-addressee]: 26 March 2010 – 18 June 2010
  - ICAP: 7 April 2010 – 7 June 2010
- (f) [non-addressee]/[non-addressee] 2010 infringement:
  - [non-addressee]: 28 April 2010 – 3 June 2010
  - [non-addressee]: 28 April 2010 – 3 June 2010
  - ICAP: 28 April 2010 – 2 June 2010

## 8. LIABILITY

### *Principles*

- (236) The subjects of Union competition rules are undertakings, a concept which is not identical with that of corporate legal personality for the purposes of national commercial or fiscal law. The undertaking that participated in the infringement is therefore not necessarily identical with the precise legal entity within the group of companies whose representatives actually took part in the cartel meetings. The term 'undertaking' is not defined in the Treaty. The case law has confirmed that Article



101 of the Treaty is aimed at economic units which consist of a unitary organisation of personal, tangible and intangible elements which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision.<sup>351</sup>

- (237) Despite the fact that Article 101 of the Treaty is applicable to undertakings and that the concept of undertaking is of an economic nature, only entities with legal personality can be held liable for infringements.<sup>352</sup>
- (238) Concerning the principle of personal liability, Article 101 of the Treaty is addressed to 'undertakings' which may comprise several legal entities. The principle of personal liability is not breached as long as different legal entities are held liable on the basis of their own behaviour and their conduct within the same undertaking.
- (239) It is accordingly necessary to define the undertaking(s) that will be held accountable for the infringement of Article 101 of the Treaty by identifying one or more legal persons to represent the undertaking. Union competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Article 101 of the Treaty if the companies concerned do not determine independently their own conduct on the market'.<sup>353</sup>
- (240) According to settled case-law of the Court of Justice and of the General Court, a parent company that owns 100% (or almost 100%) of a subsidiary has the ability to exercise decisive control over such subsidiary. In such a case, there exists a rebuttable presumption that the parent also in fact exercises that control without the need for the Commission to adduce further evidence on the actual exercise of control (the parental liability presumption).<sup>354</sup> When the Commission, in the statement of

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<sup>351</sup> Case T-11/89, *Shell International Chemical Company Ltd v. Commission* [1992] ECR II-757, paragraph 311 and Case T-352/94 *Mo Och Domsjö v. Commission* [1998] ECR II-1989, paragraphs 87-96.

<sup>352</sup> Although an 'undertaking' within the meaning of Article 81 of the Treaty (now Article 101 TFEU) is not necessarily the same as a company having legal personality, it is necessary for the purposes of applying and enforcing decisions to identify an entity possessing legal personality to be the addressee of the measure. Case T-305/94 *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v. Commissions* (PVC II) [1999] ECR II-931, paragraph 978.

<sup>353</sup> See e.g. Case C-97/08 P *Akzo Nobel and Others v Commission*, ECLI:EU:C:2009:536, paragraphs 58-59.

<sup>354</sup> Case T-405/06, *ArcelorMittal Luxembourg and Others v. Commission*, [2009] ECR II-00789,, paragraphs 89-92; Case T-85/06, *General Química and Others v. Commission*, [2008] ECR II-00338\* Summary publication , paragraph 60; Case T-354/94 *Stora Kopparbergs Bergslags v. Commission*, [1998] ECR II-2111, paragraph 80, upheld by the Court of Justice on appeal in Case C-286/98P, *Stora Kopparbergs Bergslags v. Commission*, [2000] ECR I-9925, paragraphs 27-29; and Case 107/82 *AEG v. Commission*, [1983] ECR 3151, paragraph 50; Case T-112/05 *Akzo Nobel NV and Others v. Commission* [2007] ECR II-05049, paragraphs 60-62; Case C-97/08 P *Akzo Nobel NV and Others v. Commission*, [2009] ECR I-08237, paragraphs 60-61; C-521/09 P *Elf Aquitaine v. Commission*, [2011] ECR I-08947, paragraphs 56-57; C-201/09, *ArcelorMittal Luxembourg v Commission and Commission / ArcelorMittal Luxembourg and Others*, [2011] ECR I-02239, paragraphs 97-100; Case C- 495/11 P, *Total SA and Elf Aquitaine SA v. Commission*, not yet reported, paragraph 28. C-310/93 P - *BPB Industries and British Gypsum v.. Commission* [1995] ECR I-865, paragraph 11; Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T- 329/94 and T-335/94 *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société*

objections relies on the Parental Liability Presumption and declares its intention to hold a parent company liable for an infringement committed by its wholly owned subsidiary, it is for that parent company, when it considers that - despite the shareholding - the subsidiary determines its conduct independently on the market, to rebut the presumption by adducing sufficient evidence in this regard during the administrative procedure.<sup>355</sup>

- (241) In cases where such exercise of decisive influence cannot be presumed, it has to be demonstrated on the basis of factual evidence, including in particular the organisational, economic and structural links between the parent and the subsidiary.<sup>356</sup> Such links can be not only directly concluded from the parent's specific instructions, guidelines or rights of co-determination on the commercial policy given to their subsidiary, but also indirectly inferred from the totality of the economic and legal links between the parent company and its subsidiary<sup>357</sup> influencing it in aspects such as corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters, even if each of those indicia taken in isolation does not have sufficient probative value.<sup>358</sup> Among these indicia, Union Courts have considered, for example, the implementation of the applicable statutory provisions/agreements between the parent companies in relation to the management of their common subsidiary, the presence in leading positions of the subsidiary of many individuals who occupy simultaneously (or even consecutive)<sup>359</sup> managerial posts within the parent company,<sup>360</sup> or the business relationships that they have with each other (for example, where a parent company is also the supplier or customer of its subsidiary).<sup>361</sup>

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*artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v. Commissions (PVC II)*, [1999] ECR II-931, paragraphs 961 and 984; Case T-203/01 *Manufacture française des pneumatiques Michelin v. Commission*, [2003] ECR II-4071, paragraph Recital 290; Joined Cases T-71, 74, 87 and 91/03 *Tokai Carbon Co. Ltd, Intech EDM BV, Intech EDM AG and SGL Carbon AG v. Commission* [2005] ECR II-10, paragraphs 59-60; Case T-325/01, *DaimlerChrysler v. Commission* [2005] ECR-II 3319, paragraph 219; Case T-30/05 *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v. Commission* [2007] ECR II-107\*, Summary publication, paragraph 146; Case T-112/05, *Akzo Nobel a.o. v. Commission* [2007] ECR II- 5049. See also Case C-97/08 *Akzo Nobel NV and Others v. Commission*: opinion of advocate general Kokott of 23.04.2009 and judgment of 10.09.2009, [2009] ECR I-08237 not yet reported; Case T-85/06 *General Química v. Commission*, judgment of 18.12.2008, 2008] ECR II-00338\* Summary publication.

<sup>355</sup> Case T-330/01, *Akzo Nobel NV v. Commission*, [2006] ECR II-3389, paragraph 83. Case T-91/03 *Tokai Carbon Co. Ltd, Intech EDM BV, Intech EDM AG and SGL Carbon AG v. Commission* [2005] ECR II-10, paragraph 61. Case T-30/05 *Prym and Prym Consumer v. Commission* [2007], II-107\*, Summary publication, paragraphs 146-147.

<sup>356</sup> Judgement of the General Court T-77/08, *The Dow Chemical Company v. Commission*, not yet reported, paragraph 76, 2 February 2012

<sup>357</sup> Judgement of the General Court T-77/08, *The Dow Chemical Company v. Commission*, not yet published, paragraph 77, 2 February 2012

<sup>358</sup> Judgement of the General Court T-132/07, *Fuji Electric Co. Ltd v. Commission*, [2011] ECR II-04091 paragraph 183, 12 July 2011

<sup>359</sup> Judgement of the General Court T-76/08, *EI du Pont de Nemours and Company, DuPont Performance Elastomers LLC and DuPont Performance Elastomers SA v. Commission*, paragraph 70 & 74, 2 February 2012

<sup>360</sup> Judgement of the General Court T-132/07, *Fuji Electric Co. Ltd v. Commission*, [2011] ECR II-04091 paragraph 184, 12 July 2011.

<sup>361</sup> Judgement of the General Court T-132/07, *Fuji Electric Co. Ltd v Commission*, [2011] ECR II-04091 paragraph 184, 2 February 2012

- (242) The question of decisive influence relates to the level of autonomy of the subsidiary with regard to its overall commercial policy and not to the awareness of the parent company with respect to the infringing behaviour of the subsidiary. Attribution of liability to a parent company flows from the fact that the two entities constitute a single undertaking for the purposes of the Union rules on competition<sup>362</sup> and not from proof of the parent's participation in or awareness of the infringement, both as regards its organisation or implementation.
- (243) Where a parent company has the ability to exercise control over its subsidiary (or over a joint venture) and is aware of the infringement and does not stop it, it will be held liable for its infringement.<sup>363</sup> In such case, the actual exercise or non-exercise of control by the parent is irrelevant for its liability. According to *Agroexpansión*<sup>364</sup>, when a parent company is aware of the involvement of its wholly-owned subsidiary in an infringement and it does not oppose this involvement, the Commission can deduct that the parent company tacitly approves the participation in the infringement and this circumstance represents additional indicia supporting the presumption.
- (244) The actual exercise of management power by the parent company or parent companies over their subsidiary may be capable of being inferred directly from the implementation of the applicable statutory provisions or from an agreement between the parent companies, entered into under those statutory provisions, in relation to the management of their common subsidiary<sup>365</sup>. The extent of the parent company's involvement in the management of its subsidiary may also be proved by the presence, in leading positions of the subsidiary, of many individuals who occupy managerial posts within the parent company. The involvement of the parent company or companies in the management of the subsidiary may follow from the business relationship which they have with each other.<sup>366</sup>
- (245) The decisive influence of the parent company does not necessarily have to result from specific instructions, guidelines or rights of co-determination in terms of pricing, production and sales activities or similar aspects essential to market conduct. Such instructions are merely a particularly clear indication of the existence of the parent company's decisive influence over its subsidiary's commercial policy. However, autonomy of the subsidiary cannot necessarily be inferred from their absence. A parent company may exercise decisive influence over its subsidiaries even when it does not make use of any actual rights of co-determination and refrains from giving any specific instructions or guidelines on individual elements of commercial policy. Thus, a single commercial policy within a group may also be

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<sup>362</sup> Joined Cases T-71/03, T-74/03, T-87/03, and T-91/03 *Tokai Carbon Ltd, Intech EDM BV, Intech EDM AG and SGL Carbon AG* [2005] ECR II-10, paragraph 54.

<sup>363</sup> Joined Cases T-259 to T-264 and T-271/02, *Raiffeisen Zentralbank Österreich AG v. Commission*, [2006] ECR II-05169, paragraph 330.

<sup>364</sup> Case T-38/05, *Agroexpansión, SA v. Commission*, [2011] ECR II-07005, paragraphs 146 and 157. See also Case T-41/05, *Alliance One International, Inc. v. Commission*, [2011] ECR II-07101, paragraph 136.

<sup>365</sup> Case T-314/01, *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v. Commission*, [2006] ECR II-03085, paragraphs 137 to 139.

<sup>366</sup> Case T-132/07, *Fuji Electric Co. Ltd v. Commission*, [2011] ECR II-04091, paragraph 184. See also opinion of Advocate General Mischo in Case C-286/98 P, *Stora Kopparbergs Bergslags AB v. Commission*, [2000] ECR I-09925, paragraphs 50 and 51.

inferred indirectly from the totality of the economic, legal and organisational links between the parent company and its subsidiaries.<sup>367</sup>

- (246) The same principles hold true, *mutatis mutandis*, for the purposes of the application of Article 53 of the EEA Agreement.

#### *Application in this case*

- (247) In application of the above principles, this Decision should be addressed to those legal entities from the ICAP undertaking whose representatives participated in anticompetitive contacts with other undertakings. In addition, this Decision should be addressed to the parent companies of those legal entities in as far as it is presumed<sup>368</sup> or shown that they exercised decisive influence over the commercial policy of their wholly owned subsidiaries. These legal entities should be held liable together for the infringement of Article 101 of the Treaty and of Article 53 of the EEA Agreement.

#### **8.1. [non-addressee]/[non-addressee] 2007 infringement**

- (248) From 14 August 2007 until 1 November 2007 an employee of ICAP New Zealand Limited, [...], participated in the anticompetitive contacts.

- (249) From 14 August 2007 until 1 November 2007 employees of ICAP Management Services Ltd, [...], [...], [...], [...], [...] and [...], participated in the anticompetitive contacts or were aware of the anticompetitive contacts between [...] and [...] ([non-addressee]).

- (250) Therefore, the Commission addresses this Decision to the following companies who should be held liable for their direct participation in the infringement: ICAP New Zealand Limited and ICAP Management Services Ltd from 14 August 2007 until 1 November 2007.

- (251) In addition, the Commission addresses this Decision to ICAP plc who, in its capacity as parent company, should be held jointly and severally liable for the illicit activities of its wholly owned and controlled indirect subsidiary ICAP Management Services Ltd and its majority owned and controlled indirect subsidiary ICAP New Zealand Limited for the respective periods.

- (252) As regards the imputation of liability for the direct involvement of ICAP Management Services Ltd in the infringement to ICAP plc, the Commission presumes the exercise of decisive influence of the latter over the former on the basis of the 100% ownership link between the two.<sup>369</sup> In its reply to the statement of

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<sup>367</sup> Case C-97/08, *Akzo Nobel and Others v. Commission*, [2009] ECR I-08237, paragraph 73, referring to the opinion of Advocate General Kokott in that case, paragraphs 87 to 94, and case T-76/08, *EI du Pont de Nemours and Company, DuPont Performance Elastomers LLC and DuPont Performance Elastomers SA v. Commission*, not yet reported, paragraph 62.

<sup>368</sup> The Commission stated its intention to rely on the Parental Liability Presumption in the statement of objections addressed to ICAP. In its reply to the statement of objections, ICAP did not put forward any arguments rebutting the presumption.

<sup>369</sup> See the case law referred to in recital (240) above.

objections, ICAP has not presented any arguments rebutting the Parental Liability Presumption.

- (253) As regards the imputation of liability for the direct involvement of ICAP New Zealand Limited in the infringement to ICAP plc, the Commission, while not relying on the Parental Liability Presumption, concludes that the latter exercised decisive influence over the former on the basis of the following factual elements in the material period<sup>370</sup>:
- (a) ICAP New Zealand Limited (INZL) was majority owned and controlled by ICAP plc [...].
  - (b) The rules governing the functioning of INZL are set out in the original constitution agreement of Fixed Interest Securities (INZL)<sup>371</sup> and in the agreement concluded between the shareholders of the company, dated [...] ("Shareholders Agreement")<sup>372</sup>. According to the latter, the required majority of shareholders for the governance of INZL is set at [...]. Additionally, as regards the appointment and the removal of directors, Articles 25.2 and 25.4 of INZL's constitution agreement provide that a director may be appointed or removed from office by Ordinary Resolution<sup>373</sup>. As a result, ICAP plc controlled the composition of the board of directors and had the required majority for the governance of INZL.
  - (c) The organisational links within the ICAP group are described in ICAP's Group Policies, contained in Appendix G to ICAP's response to the Commission's request for information.<sup>374</sup> Thus, arrangements regarding control and decision-making governing the relations between the different undertakings within the ICAP group are implemented by the Board of Directors of ICAP plc. These policies are incorporated in ICAP's Group policy Manuals. As it is stated in the Manuals, these policies shall apply to [...]. Regarding corporate governance policies within the ICAP group, it is stated that [...].<sup>375</sup> As a result of these policies, the appointment of a director in any of ICAP's subsidiaries requires the approval of the Group's Chief Operating Officer[...]. The policy described above reinforces ICAP's powers in relation to the appointment of the directors of INZL as set out in the constitution documents of INZL and the Shareholders Agreement.
  - (d) As mentioned above, ICAP had the required majority to appoint and dismiss INZL's directors. During the relevant period, the managing director of INZL was [...] and [...] reported directly to him.<sup>376</sup>

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<sup>370</sup> This conclusion has not been disputed by ICAP in its reply to the statement of objections.

<sup>371</sup> [...].

<sup>372</sup> [...].

<sup>373</sup> According to the definition of the Constitution, "Ordinary Resolution" means a resolution that is approved by a simple majority of those Shareholders entitled to vote and voting on the question.

<sup>374</sup> [...].

<sup>375</sup> [...].

<sup>376</sup> [...].

- (e) In addition, as a result of the policies set out in ICAP's Group policy Manuals, [...] must abide by these rules. Thus, INZL and its staff were bound by various group policies.<sup>377</sup>
- (f) Furthermore, additional elements lead to the conclusion that ICAP plc exercised a decisive influence over the conduct of INZL in the area of YIRD brokerage as a result of the links between [...] and the Yen Desk within ICAP Management Services Ltd. Despite the fact that [...] was formally employed by INZL, *"he did work closely with the YEN MIRS Desk in London"*.<sup>378</sup> All brokers employed in interest product desks work under the supervision of a desk manager and have to comply with the rules set out in ICAP's Compliance Handbook.<sup>379</sup> The manager of the Yen Desk, [...] was fully aware of [...]’s collusive contacts with [...] and he ultimately reported to the CEO, London and EMEA of ICAP plc ([... and later [...]).

## 8.2. [non-addressee]/[non-addressee] 2008 infringement

- (254) The evidence presented in Section 5 above demonstrates that ICAP Management Services Ltd and ICAP New Zealand Limited participated directly in the [non-addressee]/[non-addressee] 2008 infringement between 28 August 2008 and 3 November 2008.
- (255) From 28 August 2008 until 3 November 2008 an employee of ICAP New Zealand Limited, [...], participated in the anticompetitive contacts.
- (256) From 28 August 2008 until 3 November 2008 employees of ICAP Management Services Ltd, [...], [...], [...], [...], [...] and [...], participated in the anticompetitive contacts or were aware of the anticompetitive contacts between [...] and [...] ([non-addressee]).
- (257) Therefore, the Commission addresses this Decision to the following companies who should be held liable for their direct participation in the infringement: ICAP New Zealand Limited and ICAP Management Services Ltd from 28 August 2008 and 3 November 2008.
- (258) In addition, the Commission addresses this Decision to ICAP plc who, in its capacity as parent company, should be held jointly and severally liable for the illicit activities of its wholly owned and controlled indirect subsidiary ICAP Management Services Ltd<sup>380</sup> and its majority owned and controlled indirect subsidiary ICAP New Zealand Limited<sup>381</sup> for the respective periods.

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<sup>377</sup> Code of Ethics and Business Conduct Policy, Compliance Policies, Business Risk Policies, Environmental Policy, Revaluation Policy and HR Disciplinary Policies, see [...].

<sup>378</sup> [...].

<sup>379</sup> Job Description Manual section.

<sup>380</sup> For reasons identical to those explained in recital (252) above.

<sup>381</sup> For reasons identical to those explained in recital (253) above.

### **8.3. [non-addressee]/[non-addressee] 2008-09 infringement**

- (259) The evidence presented in Section 5 above demonstrates that ICAP Management Services Ltd and ICAP New Zealand Limited participated directly in the [non-addressee]/[non-addressee] 2008-09 infringement between 22 May 2009 and 10 August 2009.
- (260) From 22 May 2009 until 10 August 2009 an employee of ICAP New Zealand Limited, [...], participated in the anticompetitive contacts.
- (261) From 22 May 2009 until 10 August 2009 employees of ICAP Management Services Ltd, [...], [...], [...], [...], [...] and [...], participated in the anticompetitive contacts or were aware of the anticompetitive contacts between [...] and [...] ([non-addressee]).
- (262) Therefore, the Commission addresses this Decision to the following companies who should be held liable for their direct participation in the infringement: ICAP New Zealand Limited and ICAP Management Services Ltd from 22 May 2009 until 10 August 2009.
- (263) In addition, the Commission addresses this Decision to ICAP plc who, in its capacity as parent company, should be held jointly and severally liable for the illicit activities of its wholly owned and controlled indirect subsidiary ICAP Management Services Ltd<sup>382</sup> and its majority owned and controlled indirect subsidiary ICAP New Zealand Limited<sup>383</sup> for the respective periods.

### **8.4. [non-addressee]/[non-addressee] 2010 infringement**

- (264) The evidence presented in Section 5 above demonstrates that ICAP Management Services Ltd participated directly in the [non-addressee]/[non-addressee] 2010 infringement between 3 March 2010 and 22 June 2010.
- (265) From 3 March 2010 until 22 June 2010 an employee of ICAP Management Services Ltd, [...], participated in the anticompetitive contacts.
- (266) Therefore, the Commission addresses this Decision to ICAP Management Services Ltd who should be held liable for its direct participation in the infringement in the period from 3 March 2010 and 22 June 2010.
- (267) In addition, the Commission addresses this Decision to ICAP plc who, in its capacity as parent company, should be held jointly and severally liable for the illicit activities of its wholly owned and controlled indirect subsidiary ICAP Management Services Ltd<sup>384</sup> for the respective period.

### **8.5. [non-addressee]/[non-addressee] 2010 infringement**

- (268) The evidence presented in Section 5 above demonstrates that ICAP Management Services Ltd and ICAP New Zealand Limited participated directly in the [non-

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<sup>382</sup> For reasons identical to those explained in recital (252) above.

<sup>383</sup> For reasons identical to those explained in recital (253) above.

<sup>384</sup> For reasons identical to those explained in recital (252) above.

addressee]/[non-addressee] 2010 infringement between 7 April 2010 and 7 June 2010.

- (269) From 7 April 2010 until 7 June 2010 an employee of ICAP New Zealand Limited, [...], participated in the anticompetitive contacts.
- (270) From 7 April 2010 until 7 June 2010 employees of ICAP Management Services Ltd, [...], [...], [...], [...], [...] and [...], participated in the anticompetitive contacts or were aware of the anticompetitive contacts between [...] and [...] ([non-addressee]).
- (271) Therefore, the Commission addresses this Decision to the following companies who should be held liable for their direct participation in the infringement: ICAP New Zealand Limited and ICAP Management Services Ltd from 7 April 2010 until 7 June 2010.
- (272) In addition, the Commission addresses this Decision to ICAP plc who, in its capacity as parent company, should be held jointly and severally liable for the illicit activities of its wholly owned and controlled indirect subsidiary ICAP Management Services Ltd<sup>385</sup> and its majority owned and controlled indirect subsidiary ICAP New Zealand Limited<sup>386</sup> for the respective periods.

#### **8.6. [non-addressee]/[non-addressee] 2010 infringement**

- (273) The evidence presented in Section 5 above demonstrates that ICAP Management Services Ltd and ICAP New Zealand Limited participated directly in the [non-addressee]/[non-addressee] 2010 infringement between 28 April 2010 and 2 June 2010.
- (274) From 28 April 2010 until 2 June 2010 an employee of ICAP New Zealand Limited, [...], participated in the anticompetitive contacts.
- (275) From 28 April 2010 until 2 June 2010 employees of ICAP Management Services Ltd, [...], [...], [...], [...], [...] and [...], participated in the anticompetitive contacts or were aware of the anticompetitive contacts between [...] and [...] ([non-addressee]).
- (276) Therefore, the Commission addresses this Decision to the following companies who should be held liable for their direct participation in the infringement: ICAP New Zealand Limited and ICAP Management Services Ltd from 7 April 2010 until 7 June 2010.
- (277) In addition, the Commission addresses this Decision to ICAP plc who, in its capacity as parent company, should be held jointly and severally liable for the illicit activities of its wholly owned and controlled indirect subsidiary ICAP Management Services Ltd<sup>387</sup> and its majority owned and controlled indirect subsidiary ICAP New Zealand Limited<sup>388</sup> for the respective periods.

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<sup>385</sup> For reasons identical to those explained in recital (252) above.

<sup>386</sup> For reasons identical to those explained in recital (253) above.

<sup>387</sup> For reasons identical to those explained in recital (252) above.

<sup>388</sup> For reasons identical to those explained in recital (253) above.



## 9. REMEDIES

### 9.1. Article 7 of Regulation (EC) No 1/2003

- (278) Where the Commission finds that there is an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement, it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003.
- (279) Given the secrecy in which each of the six infringements was carried out, it is not possible to declare with absolute certainty that each of them has ceased.
- (280) It is therefore necessary for the Commission to require the addressees of this decision to bring the infringement/infringements to an end (if they have not already done so) and to refrain from any agreement, concerted practice or decision of an association which may have the same or a similar object or effect.

### 9.2. Article 23(2) of Regulation (EC) No 1/2003

- (281) Under Article 23(2) of Regulation (EC) No 1/2003,<sup>389</sup> the Commission may by decision impose on undertakings fines where, either intentionally or negligently, they infringe Article 101 of the Treaty and Article 53 of the EEA Agreement. For each undertaking participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.
- (282) The Commission considers that, in this case, based on the facts described in this Decision, each of the six infringements has been committed intentionally.
- (283) Therefore fines should be imposed on the undertakings to which this Decision is addressed.
- (284) Pursuant to Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of fine, have regard to all relevant circumstances and in particular the gravity and duration of the infringement, which are the two criteria explicitly referred to in that Regulation. In doing so, the Commission sets the fines at a level sufficient to ensure deterrence. Moreover, the role played by each undertaking party to an infringement is assessed on an individual basis. The fine imposed must reflect any aggravating and attenuating circumstances pertaining to each undertaking.
- (285) In setting the fines to be imposed, the Commission refers to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003<sup>390</sup> (“the Guidelines on fines”). Finally, the Commission applies, as appropriate, the provisions of the Leniency Notice and the Commission Notice on the conduct of settlement procedures in view of the adoption

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<sup>389</sup> Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area “the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 101 and 102] of the EC Treaty [...] shall apply *mutatis mutandis*”. (OJ L 305/6 of 30 November 1994)

<sup>390</sup> OJ C 210, 1.9.2006, p. 2

of Decisions pursuant to Article 7 and Article 23 of Regulation (EC) No 1/2003 in cartel cases (“the Settlement Notice”).<sup>391</sup>

### 9.3. Calculation of the fines

- (286) In applying the Guidelines on fines, the basic amount for each party results from the addition of a variable amount and an additional amount. The variable amount results from a percentage of up to 30% of the value of sales of goods or services to which the infringement relates in a given year (normally, the last full business year of the infringement) multiplied by the number of years of the undertaking’s participation in that infringement. The additional amount (“entry fee”) is calculated as a percentage between 15% and 25% of the value of sales. The resulting basic amount can then be increased or reduced for each undertaking if aggravating or mitigating circumstances are retained.
- (287) The Guidelines on fines provide only limited guidance on the calculation of the fines which can be imposed on facilitators like ICAP, which was not directly active on the sector covered by the cartel, i.e. interest rate derivatives, for the purposes of the infringements. The Commission cannot rely on ICAP's brokerage fees as a value of sales because the infringements in which it participated affected the sale and purchase of YIRDS traded by banks and not the sale of brokerage services. As such, taking fees generated from brokerage services as a value of sales would have little relation to the gravity and nature of the infringement.<sup>392</sup> As a result, the ICAP's basic amount for each of the infringements is determined in accordance with the requirements of Regulation (EC) No 1/2003, the case-law and point 37 of the 2006 Guidelines on fines<sup>393</sup>, reflecting the gravity (set out in recitals (290)-(292)), duration (set out in recital (294)) and nature of its involvement (set out in recital (295)), as well as the need to ensure that fines have a sufficiently deterrent effect.
- (288) To ensure full respect of the principle of equal treatment, the Commission, in assessing ICAP's basic amounts, applied the same general methodology as that used in the Settlement Decision for the other facilitator in this case, [non-addressee] for its facilitation of the [non-addressee]/[non-addressee] 2008-09 infringement. The Commission also took account of the elements specific to ICAP mentioned in recital (289).
- (289) In determining the basic amount for the [non-addressee]/[non-addressee] 2010 and [non-addressee]/[non-addressee] 2010 infringements, the Commission takes into account that the exact same conduct of ICAP is relied upon to establish its participation in these infringements in order to ensure that this does not lead to a disproportionate level of sanctions. As such, the Commission applies an appropriate reduction in determining ICAP's basic amount for each of these infringements.

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<sup>391</sup> OJ C 167, 2.7.2008, p. 1–6

<sup>392</sup> See, by analogy, Case T-27/10 *AC Treuhand AG v Commission*, not yet published, paragraphs 302-305.

<sup>393</sup> Case T-27/10 *AC Treuhand AG v Commission*, not yet published, paragraph 306.

### 9.3.1. Basic Amount

#### 9.3.1.1. Gravity

- (290) In assessing the gravity of the infringements, the Commission has regard to a number of factors, such as the nature of the infringements, the combined market share of all the undertakings concerned, the geographic scope of the infringements and whether or not the infringements have been implemented.<sup>394</sup>
- (291) In its assessment, the Commission takes into account the fact that each of the infringements is, by its very nature, among the most harmful restrictions of competition.
- (292) The Commission also takes into account the fact that each of the infringements covered the entire EEA and the fact that the collusive activities related to financial benchmarks, which are reflected in the pricing of YIRDs by all relevant participants in the YIRD market.
- (293) This assessment of the gravity of the relevant infringements is identical to that in the Settlement Decision.<sup>395</sup>

#### 9.3.1.2. Duration

- (294) In calculating the fines to be imposed on the addressees of this Decision, the Commission also takes into consideration the duration of ICAP's participation in each of the six infringements, as described in recital (235) above.

#### 9.3.1.3. Nature of ICAP's involvement

- (295) With respect to each of the infringements, the Commission takes into account that ICAP participated in the infringements as a facilitator, which is a role that is not of the same nature as that of the banks participating in the relevant infringements. As such, in determining ICAP's basic amount for each infringement, the Commission applies an appropriate reduction factor.

#### 9.3.1.4. Conclusion on the basic amount

- (296) Based on the criteria explained in Section 9.3 and 9.3.1 above, ICAP's basic amount for each of the six infringements is presented in the following table:

Table 2:

<b>Infringement</b>	<b>Basic amounts (in EUR)</b>
[non-addressee]/[non-addressee] 2007 infringement	1 040 000
[non-addressee]/[non-addressee] 2008	1 950 000

<sup>394</sup> Points 21-22 of the Guidelines on fines.

<sup>395</sup> And is set out in identical language in the present Decision in recitals (290)-(292).

infringement		
[non-addressee]/[non-addressee] 2008-09 infringement		8 170 000
[non-addressee]/[non-addressee] 2010 infringement		1 930 000
[non-addressee]/[non-addressee] 2010 infringement		1 150 000
[non-addressee]/[non-addressee] 2010 infringement		720 000

(297) The basic amounts set out in Table 2 above properly reflect the gravity, the duration and the nature of ICAP's involvement in each of the infringements, as well as the need to ensure that fines have a sufficiently deterrent effect.

9.3.2. *Adjustment to the basic amount: aggravating or mitigating circumstances*

(298) With respect to the addressees of the present Decision, there are no aggravating or attenuating circumstances in relation to any of the infringements.

**9.4. Application of the 10% turnover limit**

(299) Article 23(2) of Regulation (EC) No 1/2003 provides that the fine imposed for each infringement shall not exceed 10% of ICAP's total turnover relating to the business year preceding the date of the Commission decision. The fine for each of the infringements does not exceed 10% of ICAP's total turnover relating to the business year preceding the date of this Decision. In addition, the total fine for the six infringements also does not exceed 10% of ICAP's total turnover relating to the business year preceding the date of this Decision.

**9.5. Conclusion: final amount of individual fines to be imposed in this Decision**

(300) The fines imposed on ICAP pursuant to Article 23(2) of Regulation (EC) No 1/2003 should be as follows:

Table 3:

Infringement	Fines (in EUR)
[non-addressee]/[non-addressee] 2007 infringement	1 040 000

[non-addressee]/[non-addressee] infringement	2008	1 950 000
[non-addressee]/[non-addressee] infringement	2008-09	8 170 000
[non-addressee]/[non-addressee] infringement	2010	1 930 000
[non-addressee]/[non-addressee] infringement	2010	1 150 000
[non-addressee]/[non-addressee] infringement	2010	720 000

## 9.6. Discussion of ICAP's arguments in reply to the statement of objections regarding the remedies in this case

### 9.6.1. ICAP's arguments

- (301) ICAP argued that its possible fine should reflect that its role in the alleged infringements is extremely limited as it only acted as a facilitator. Its presence was not necessary for the successful operation of the alleged infringements as is evidenced by the fact that in a similar case (EIRD), which involved a similar conduct by the banks, there was no facilitator.
- (302) ICAP also claimed that the Commission failed to justify its decision to depart from its general methodology under point 37 of the 2006 Fines Guidelines. Moreover, the Commission did not sufficiently motivate its intention to apply point 37 of the guidelines and failed to set out the criteria on which it intends to rely on in determining ICAP's fine.<sup>396</sup>
- (303) ICAP further argued that any fine the Commission might impose should be only nominal, given the novelty of its classification of ICAP's actions as facilitation under Union competition law.
- (304) As regards the Commission's intention, stated in the statement of objections, to take into account the particular seriousness of ICAP's facilitating role, which resulted in the amplification of the potential impact of the [non-addressee]/[non-addressee] 2007, [non-addressee]/[non-addressee] 2008, [non-addressee]/[non-addressee] 2008-09, [non-addressee]/[non-addressee] 2010 and [non-addressee]/[non-addressee] 2010 infringements or, in the case of the [non-addressee]/[non-addressee] 2010 infringement enabled its very existence, ICAP argued that the Commission fails to provide any evidence suggesting that ICAP's alleged role had any meaningful effect on the JPY LIBOR submissions.

<sup>396</sup>

A similar argument was repeated in ICAP's submission of 16 October 2014.

- (305) ICAP further argued, that the Commission should take into account ICAP's '*very limited role in the various bilateral infringements*'.
- (306) Finally, ICAP argued that the Commission should reflect, possibly as a mitigating circumstance, the size of penalties imposed on ICAP by the relevant financial authorities (the US CFTC and the UK FCA) for the same conduct.

#### 9.6.2. *The Commission's assessment of ICAP's arguments*

- (307) The Commission does take into account that ICAP participated in the infringements as a facilitator (see recital (295) above), and indicated its intention to do so already in the statement of objections (in paragraph 247).
- (308) The Commission does not agree with ICAP's assertion that it failed to provide grounds for its intention to deviate from the application of the Fines Guidelines under point 37. In paragraphs 242-248 of the statement of objections the Commission set out its reasons for the application of point 37 as well as the factors (gravity, duration and nature of participation) on which it intended to rely on in calculating ICAP's fine. The Commission therefore rejects ICAP's arguments.
- (309) As to the alleged novelty of the Commission's classification of ICAP's conduct as facilitation under Union law, the Commission refers to its response to a similar argument of ICAP in recital (234)(b) above. For the same reasons it rejects ICAP's argument that its fine should be only symbolic.
- (310) As regards the Commission's intention to reflect the particular seriousness of ICAP's facilitating role, expressed in paragraph 248 of the statement of objections, the Commission notes that it does not take this element into account with respect to any of the six infringements.
- (311) With respect to ICAP's allegedly limited role in the infringements, the Commission rejects ICAP's assertion to this effect. ICAP was fully involved in each of the infringements and was aware of their overall extent and of the identity of the participating banks. While ICAP may have, on occasions, played up - towards [non-addressee] and later [non-addressee] - its implementation of their requests (within the [non-addressee]/[non-addressee] 2007, [non-addressee]/[non-addressee] 2008, [non-addressee]/[non-addressee] 2008-09, [non-addressee]/[non-addressee] 2010 and [non-addressee]/[non-addressee] 2010 infringements), this can hardly be characterized as a substantially limited role. The Commission therefore rejects ICAP's argument.
- (312) Finally, the Commission rejects ICAP's argument that the fines imposed on ICAP by the US CFTC and UK FCA should be taken into account, possibly as a mitigating circumstance. ICAP's concerns as regards possible double jeopardy are misplaced because the procedures conducted and penalties imposed by the Commission on the one hand and the US CFTC and UK FCA on the other clearly pursue different ends. The aim of the Commission's procedure is to preserve undistorted competition within the European Union and the EEA, whereas the aim of the latter authorities was to

ensure the observance of financial regulations in the United States and the United Kingdom.<sup>397</sup>

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<sup>397</sup> See Case T-223/00 *Kyowa Hakko Kogyo Co. Ltd v Commission*, ECR 2003 II-02553, paragraphs 99-105.

HAS ADOPTED THIS DECISION:

*Article 1*

The following undertakings have infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating as facilitators, during the periods indicated below, in agreements and/or concerted practices covering the territories of the contracting parties to the EEA Agreement, which had as its object the prevention, restriction and/or distortion of competition in the YIRDS sector within the EEA:

- (a) ICAP plc, ICAP Management Services Ltd and ICAP New Zealand Limited from 14 August 2007 until 1 November 2007 ([non-addressee]/[non-addressee] 2007 infringement);
- (b) ICAP plc, ICAP Management Services Ltd and ICAP New Zealand Limited from 28 August 2008 until 3 November 2008 ([non-addressee]/[non-addressee] 2008 infringement);
- (c) ICAP plc, ICAP Management Services Ltd and ICAP New Zealand Limited from 22 May 2009 until 10 August 2009 ([non-addressee]/[non-addressee] 2008-09 infringement);
- (d) ICAP plc and ICAP Management Services Ltd from 3 March 2010 until 22 June 2010 ([non-addressee]/[non-addressee] 2010 infringement);
- (e) ICAP plc, ICAP Management Services Ltd and ICAP New Zealand Limited from 7 April 2010 until 7 June 2010 ([non-addressee]/[non-addressee] 2010 infringement);
- (f) ICAP plc, ICAP Management Services Ltd and ICAP New Zealand Limited from 28 April 2010 until 2 June 2010 ([non-addressee]/[non-addressee] 2010 infringement).

*Article 2*

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

- (a) ICAP plc, ICAP Management Services Ltd and ICAP New Zealand Limited, in respect of the [non-addressee]/[non-addressee] 2007 infringement, jointly and severally liable: EUR 1 040 000;
- (b) ICAP plc, ICAP Management Services Ltd and ICAP New Zealand Limited, in respect of the [non-addressee]/[non-addressee] 2008 infringement, jointly and severally liable: EUR 1 950 000;
- (c) ICAP plc, ICAP Management Services Ltd and ICAP New Zealand Limited, in respect of the [non-addressee]/[non-addressee] 2008-09 infringement, jointly and severally liable: EUR 8 170 000;



- (d) ICAP plc and ICAP Management Services Ltd, in respect of the [non-addressee]/[non-addressee] 2010 infringement, jointly and severally liable: EUR 1 930 000;
- (e) ICAP plc, ICAP Management Services Ltd and ICAP New Zealand Limited, in respect of the [non-addressee]/[non-addressee] 2010 infringement, jointly and severally liable: EUR 1 150 000;
- (f) ICAP plc, ICAP Management Services Ltd and ICAP New Zealand Limited, in respect of the [non-addressee]/[non-addressee] 2010 infringement, jointly and severally liable: EUR 720 000.

The fines shall be paid in euro within three months of the date of notification of this Decision to the following account held in the name of the European Commission:

Banque et Caisse d'Epargne de l'Etat

1-2, Place de Metz

L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000

BIC: BCEELULL

Ref.: European Commission – BUFI / AT.39861

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

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date by either providing an acceptable bank guarantee or making a provisional payment of the fine in accordance with Article 90 of Commission Delegated Regulation (EU) No 1268/2012.<sup>398</sup>

### *Article 3*

The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in that Article insofar as they have not already done so.

They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

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<sup>398</sup> OJ L 362, 31.12.2012, p. 1.

*Article 4*

This Decision is addressed to

- (a) ICAP plc, 2 Broadgate, London EC2M 7UR, United Kingdom.
- (b) ICAP Management Services Ltd, 2 Broadgate, London EC2M 7UR, United Kingdom
- (c) ICAP New Zealand Limited, Level 12, 36 Customhouse Quay, Wellington, New Zealand

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

Done at Brussels, 4.2.2015

*For the Commission*  
*Margrethe VESTAGER*  
*Member of the Commission*