

## NO APPROVED RECORDS OF INTERVIEWS, NO DAWN RAIDS: ECJ QUASHES COMMISSION DECISIONS TO CARRY OUT UNANNOUNCED INSPECTIONS DUE TO ITS FAILURE TO COMPLY WITH RECORDING OBLIGATIONS

On 9 March 2023, the European Court of Justice (**ECJ**) issued three substantially similar judgments (**Judgments**), in relation to Intermarché, Casino and Intermarché Casino Achats respectively (**Parties**). In its Judgments, the ECJ annulled the European Commission (**EC**) decisions (**Decisions**) allowing dawn raids to be conducted on the Parties.

In the Judgments, [C-682/20 P](#), [C-690/20 P](#) and [C-693/20 P](#), the ECJ found that the General Court (**GC**) had erred in law in concluding that the obligation to record interviews conducted by the EC does not apply before the opening of a formal investigation. The ECJ ruled that any interviews conducted for the purposes of gathering information in relation with the subject matter of an investigation must be recorded in compliance with these regulations. The documents relied upon by the EC to issue its Decisions, that is internal notes from interviews with third parties, did not comply with the EC's recording obligation and were found inadmissible. As a result, the Decisions were not sufficiently grounded, and thus annulled by the ECJ.

### SUMMARY

#### Factual background

Intermarché and Casino are two of the largest supermarket chains in France. Intermarché Casino Achats was their joint purchasing alliance.

On 9 February 2017, the EC issued the Decisions allowing inspections to be carried out at the premises of the Parties.

The EC suspected the Parties to have engaged in two concerted practices consisting of (i) information exchanges on rebates obtained from various suppliers of food and non-food products and prices for services offered to such

#### Key takeaways

- The ECJ has annulled in its entirety the EC's decisions to conduct dawn raids on Intermarché and Casino and their joint purchasing alliance as it failed to comply with its recording obligations in respect of interviews conducted to collect evidence.
- The ECJ rules that recording obligations apply to any interviews conducted in relation to the subject matter of an investigation, whether before or after a formal investigation has been open, and in the context of sectoral enquiries.
- The EC must take full records of interviews, and such records must be approved by the interviewees.
- The Judgments highlight the ECJ's increasing willingness to review the manner in which the EC conducts investigations and provide further safeguards for companies subject to intrusive dawn raids.
- The Court does not rule against the GC's findings that effective ways exist to challenge the manner in which dawn raids are conducted

suppliers in several Member States, particularly in France, and (ii) information exchanges between the Intermarché and Casino groups on their future commercial strategies.

Unannounced inspections were initiated pursuant to the Decisions on 20 February 2017 by the EC, alongside the French Competition Authority.

Each of the Parties sought annulment of the Decisions in court. All three appeals before the GC essentially argued that the EC did not have sufficient evidence to suspect the alleged infringements, such that the Decisions were not sufficiently grounded. The Parties also submitted that Article 20(1) and (4) of Regulation 1/2003, which relate to the power of the EC to carry out inspections and to the obligation on undertakings to submit to those inspections when ordered to do so by a decision, was in breach of the right to an effective legal remedy, guaranteed by the Charter of Fundamental Rights of the EU and the European Convention of Human Rights, and thus illegal, insofar as it does not allow to effectively challenge the way dawn raids are conducted.

## **THE OBLIGATION TO RECORD INTERVIEWS APPLIES REGARDLESS OF WHETHER A FORMAL INVESTIGATION IS OPEN**

### **Regulatory framework**

Regulation No 1/2003 sets out the procedural framework for the application of EU competition laws, and its Article 19 allows the EC to interview witnesses for the purposes of information collection relating to the subject matter of an investigation.

Regulation No 773/2004 relates to the conduct of proceedings by the EC. Article 3 of this regulation sets out certain formalities in relation to the EC's power to take statements, including the obligation to record interviews. Article 3(3) provides that the statements may be recorded in any form the EC decides to, and that a copy of the record must be made available to the interviewee for approval.

### **The GC's judgments**

As part of the proceedings, the GC had ordered the EC to produce the evidence it had relied upon to issue the Decisions.

In three judgments from 5 October 2020, the GC had partially annulled the Decisions, finding that the EC did not have sufficient grounds to suspect the second alleged infringement.

However, with regard to the first infringement, the GC had found that the EC was not subject to the recording obligations set out in Regulations 1/2003 and 773/2004 before the opening of a formal investigation. The GC thus found that the minutes of interviews conducted by the EC with several suppliers, drafted by the EC, constituted sufficient evidence regardless of whether they complied with the recording obligation set out in Regulations 1/2003 and 773/2004.

Finally, the GC also rejected the plea relating to the illegality of Regulation 1/2003, on the basis that there were sufficient judicial remedies available to those subject to dawn raids. It held that it did not matter that there is no single procedural route allowing a party subject to a dawn raid to challenge all aspects thereof, as long as the various procedural routes, taken altogether, offer full judicial review to a party subject to dawn raids.

## ECJ ruling

The ECJ ruled that the GC erred in law regarding the applicability of the regulatory framework by stating the regulations only apply once formal proceedings have been initiated.

The ECJ first recalled that the wording of the regulations makes it clear the obligation applies to interviews conducted for the purpose of collecting evidence in relation to the subject matter of an investigation. By contrast, nothing in the wording states that this only applies once a formal investigation has been open.

The ECJ also noted that both the context of the relevant provisions and the purpose of the regulations, which include the detection of anticompetitive conduct, confirm that investigatory measures by the EC, such as interviews, fall within the scope of these provisions at every step of the proceedings, from the earliest stage. This applies to investigations into alleged anti-competitive conduct and sectoral enquiries.

The ECJ explicitly rejected the EC's argument that the obligation to record would prevent the use of oral testimony and hinder the investigations or act as a deterrent as it would not be able to protect the identities of third parties.

Because the GC had erred in law in holding that the obligation to take records did not apply prior to the formal investigation being open, the ECJ quashed the judgments, and ruled on the facts, that is on the Parties' allegations that the minutes taken by the EC did not comply with its recording obligation.

In this regard, the ECJ holds the EC to a strict standard, ruling that the EC's own internal minutes will not suffice as the record must be approved by the interviewee to confirm it is (i) an accurate reflection of their statements and (ii) is not a record of the EC's own interpretation of the statements made.

**Because the EC failed to keep proper records of the interviews, the ECJ upheld the Parties' claim that such evidence was invalid and annulled the part of the Decisions which had been confirmed by the GC.**

## EU LAW GRANTS EFFECTIVE JUDICIAL REMEDY AGAINST ACTIONS TAKEN BY THE EC DURING AN INSPECTION

It is worth noting that whilst the Decisions were quashed, the ECJ did not uphold all the Parties' claims and expressly rejected the plea of illegality of Article 20 of Regulation 1/2003 whereby the Parties claimed that those subject to dawn raids did not have the right to an effective remedy enshrined in Article 47 of the Charter and Articles 6 and 13 of the ECHR as they are not able to challenge the conduct of the dawn raids in court.

The ECJ recalled that the right to legal remedy is appreciated through four conditions: (i) the right to effective judicial review of the decision authorising the inspection, (ii) the right to prevent the inspection or recovery after an irregular inspection, (iii) certain access to the proceedings, and (iv) judicial review within a reasonable time.

The ECJ, upholding the GC, found that this was satisfied with the six judicial remedies available to those subject to an inspection decision (in addition to any request that can be addressed to the Hearing Officer of the EC), *i.e.*:

- the appeal against the EC's inspection decision;

- the appeal against an EC's decision finding an obstruction of the investigation by the company subject to it;
- the appeal against any challengeable act adopted by the EC following an inspection decision, such as a decision rejecting legal-privilege claims on seized documents;
- the appeal against a final decision issued under Articles 101 or 102 TFEU;
- the application for interim measures against the EC's inspection decision under Article 279 TFEU;
- the action to engage the non-contractual liability of the EC under Article 340 TFEU.

The GC had found that these remedies met the four conditions of an effective remedy when assessed as a whole.

The ECJ upheld this finding and rejected the Parties' arguments that (i) the GC should have assessed whether the four conditions were met in each of the six remedies and (ii) the right to contest the conduct of the inspections did not have an effective remedy. The ECJ confirmed that remedies available should be assessed as a whole, so that the absence of remedies before a contested inspection (*ex-ante*) are counterbalanced by the available remedies after a contested inspection has taken place (*ex-post*). The Judgments further read that the right to an effective judicial remedy does not require that all the pleas against the measures taken on the basis of the decision authorising the inspection may be raised in the context of a single procedure.

## WIDER IMPLICATIONS

This is not the first time the EC is criticised for failings of its recording obligations. The EU courts have increasingly emphasised that the recording obligation is a strict one, not optional, and that even interviews that are deemed "informal" do not fall out of the scope of the obligation (*Intel Corporation Inc. v EC* ([C-413/14 P](#))).

While the regulations allow for the EC to record interviews as they please, Qualcomm made clear that such records must indicate the content of the discussions, especially in relation to the nature of the information provided by the third-party, and brief internal notes are not acceptable. The Courts have noted the importance of making available such records to the interviewees (*Qualcomm Inc. v EC* ([T-235/18](#))).

With these Judgments, the ECJ confirms the test for the recording obligation, making it clear that this is dependent on the content of the interview and not on the procedural stage at which the investigation has reached. These Judgments thus offer some further comfort and protection for parties subject to dawn raids, as they make clear the recording obligation is a strict one, and the EC must offer proper justification of its decision to conduct such raids.

However, the Judgments also highlight that little can be done against the way a dawn raid is conducted despite increasing scrutiny of the EC. The Parties rightly questioned the remedies available to those contesting this intrusive practice. Companies may find it difficult to use remedies available out of fear that such conduct is construed as "obstruction". The Parties therefore raise genuine concerns that remedies may be regarded as effective by the courts but that their implementation can be difficult and they are, for now, untested.

NO APPROVED RECORDS OF INTERVIEWS, NO DAWN RAIDS: ECJ QUASHES  
COMMISSION DECISIONS TO CARRY OUT UNANNOUNCED INSPECTIONS DUE TO ITS  
FAILURE TO COMPLY WITH RECORDING OBLIGATIONS

**C L I F F O R D**  
**C H A N C E**

While the strict nature of the recording obligation offers some protection to companies, there are still concerns concerning the ability to challenge the actual conduct of the EC during a dawn raid.

## AUTHORS



**David Tayar**  
Partner, Paris

**T** +33 1 44 05 54 22  
**E** david.tayar  
@cliffordchance.com



**Amélie Lavenir**  
Counsel, Paris

**T** +33 1 44 05 59 17  
**E** amelie.lavenir  
@cliffordchance.com



**Sara Ortoli**  
Avocat, Paris

**T** +33 1 44 05 51 30  
**E** sara.ortoli  
@cliffordchance.com

\* Natasha Rai, trainee solicitor (London) and Nicolas Chavonnand-Valades, *Elève-Avocat* (Paris) also contributed to this article.

## CONTACTS



**Marc Besen**  
Partner, Co-Chair, Global  
Antitrust Group

**T** +49 211 4355 5312  
**E** marc.besen  
@cliffordchance.com



**Richard Blewett**  
Partner, Brussels

**T** +86 10 6535 2261  
**E** richard.blewett  
@cliffordchance.com



**Luciano Di Via**  
Partner, Rome

**T** +39 064229 1265  
**E** luciano.divia  
@cliffordchance.com



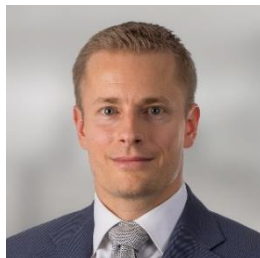
**Michael Dietrich**  
Partner, Düsseldorf

**T** +49 211 4355 5542  
**E** michael.dietrich  
@cliffordchance.com



**Sue Hinchliffe**  
Partner, London

**T** +44 20 7006 1378  
**E** sue.hinchliffe  
@cliffordchance.com



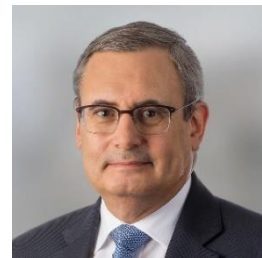
**Nelson Jung**  
Partner, London

**T** +44 20 7006 6675  
**E** nelson.jung  
@cliffordchance.com



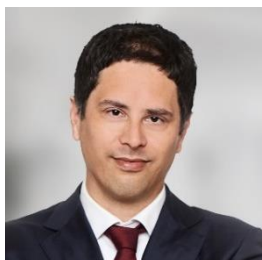
**Elizabeth Morony**  
Partner, London

**T** +44 20 7006 8128  
**E** elizabeth.morony  
@cliffordchance.com



**Alex Nourry**  
Partner, London

**T** +44 20 7006 8001  
**E** alex.nourry  
@cliffordchance.com



**Ashwin van Rooijen**  
Partner, Brussels

**T** +32 2 533 5091  
**E** ashwin.vanrooijen  
@cliffordchance.com



**Miguel Odriozola**  
Partner, Madrid

**T** +34 91 590 9460  
**E** miguel.odriozola  
@cliffordchance.com



**Greg Olsen**  
Partner and Head of  
London Antitrust Practice,

**T** +44 20 7006 2327  
**E** greg.olsen  
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, 1 rue d'Astorg, CS 60058,  
75377 Paris Cedex 08, France

© Clifford Chance 2023

Clifford Chance Europe LLP est un cabinet de sollicitors inscrit au barreau de Paris en application de la directive 98/5/CE, et un limited liability partnership enregistré en Angleterre et au pays de Galles sous le numéro OC312404, dont l'adresse du siège social est 10 Upper Bank Street, London, E14 5JJ.

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.



**Dieter Paemen**  
Partner, Brussels

**T** +32 2 533 5012  
**E** dieter.paemen  
@cliffordchance.com



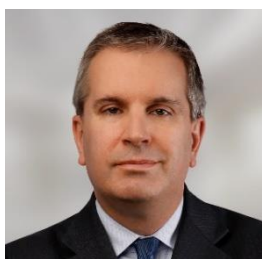
**Michel Petite**  
Avocat of Counsel, Paris

**T** +33 1 4405 5244  
**E** michel.petite  
@cliffordchance.com



**Katrin Schallenberg**  
Partner, Paris

**T** +33 1 4405 2457  
**E** katrin.schallenberg  
@cliffordchance.com



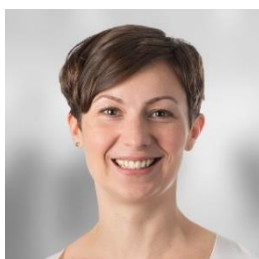
**Matthew Scully**  
Partner, London

**T** +44 20 7006 1468  
**E** matthew.scully  
@cliffordchance.com



**Dimitri Slobodenjuk**  
Partner, Düsseldorf

**T** +49 211 4355 5315  
**E** dimitri.slobodenjuk  
@cliffordchance.com



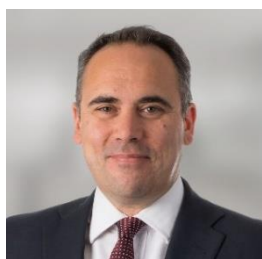
**Jennifer Storey**  
Partner, London

**T** +44 20 7006 8482  
**E** jennifer.storey  
@cliffordchance.com



**Anastasios Tomtsis**  
Partner, Brussels

**T** +32 2 533 5933  
**E** anastasios.tomtsis  
@cliffordchance.com



**Luke Tolaini**  
Partner, London

**T** +44 20 7006 4666  
**E** luke.tolaini  
@cliffordchance.com