FSR Investigative Powers and Procedural Rights: Lessons from Nuctech

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Introduction

The EU Foreign Subsidies Regulation (FSR) is a landmark piece of EU legislation, first proposed by the European Commission on 5 May 2021. Regulation (EU) 2022/2560 was formally adopted by the European Parliament and the Council on 14 December 2022 and entered into force on 12 January 2023. The European Parliament had adopted its position on 10 November 2022, followed by the Council's decision on 28 November 2022 (Regulation (EU) 2022/2560). The Regulation aims to establish a harmonised framework for addressing distortions in the internal market caused by foreign subsidies and, ultimately, to ensure a level playing field for undertakings engaged in economic activity in the internal market (Art 1, Regulation

(EU) 2022/2560). To this end, it empowers the European Commission to investigate foreign subsidies and, where appropriate, impose redressive measures or accept commitments to remedy distortions of competition. The Regulation distinguishes between “foreign financial contributions” and “foreign subsidies”: while the former encompasses a broad range of financial or economic support provided directly or indirectly by a third country, a foreign subsidy arises where such a financial contribution confers a benefit on an undertaking and is limited, in law or in fact, to one or more undertakings or industries (Art 3, Regulation (EU) 2022/2560). The rationale for introducing this framework is reflected in the Regulation’s recitals, which identify the potential for foreign subsidies to distort competition in the internal market and the limitations of previously existing EU instruments in addressing such distortions. In particular, Recital 6 explains the need for the existing framework to be complemented by an additional instrument capable of addressing distortions caused by foreign subsidies.

However, the extensive investigative powers conferred on the European Commission by the Regulation raise significant questions concerning the procedural safeguards available to foreign undertakings subject to FSR investigations. The central question of this analysis is therefore whether the order of the President of the General Court in Case T-284/24 R, Nuctech, affords sufficient judicial protection to foreign undertakings against the exercise of the Commission’s investigative powers, or whether the procedural framework risks permitting extensive investigative discretion at the expense of undertakings’ rights of defence. The analysis is limited to the procedural dimension of the FSR. Public procurement is excluded because, although the FSR establishes a separate notification regime for certain public procurement procedures, this analysis is concerned with the Commission’s investigative powers and the procedural rights of undertakings during investigations. Substantive merger control is likewise excluded, as the FSR constitutes a distinct regulatory framework from the EU merger control regime and the present analysis does not concern the substantive assessment of concentrations. The research question is relevant to foreign undertakings engaged in economic activity in the EU internal market, as FSR investigations may involve the examination of commercially sensitive information and trade secrets. The Regulation expressly recognises the importance of protecting such information and establishes confidentiality safeguards under Article 43 (Art 43, Regulation (EU) 2022/2560).

This article argues that the Nuctech interim-relief proceedings place greater weight on the Commission’s investigative effectiveness than on the procedural protection available to foreign undertakings. The analysis proceeds through a doctrinal review of the Regulation’s investigative provisions, the orders of the President of the General Court and the Vice-President of the Court of Justice in the Nuctech interim relief proceedings, and relevant European Union precedents concerning procedural rights in competition proceedings. Three main parts will be presented. The first part explains the legal framework governing Foreign Subsidies Regulation investigations. The second part examines the Nuctech interim relief proceedings in detail. The third part analyses whether this reasoning adequately protects undertakings' procedural rights, before concluding with an assessment of the Regulation's broader implications for administrative fairness.

It should be noted that the main action seeking annulment of the Commission's inspection decision (T-284/24) remains pending before the General Court, following the oral hearing held on 14 April 2026. This article confines its analysis to the interim-relief proceedings (T-284/24 R and the subsequent appeal, C-720/24 P(R)), which constitute the principal judicial proceedings concerning the procedural issues arising from the Commission's inspection in the Nuctech dispute.

The Legal Framework Governing Foreign Subsidies Regulation Investigations

The Foreign Subsidies Regulation establishes a structured, two-stage review procedure through which the Commission may examine potentially distortive foreign subsidies. In the context of an ex officio review, the first stage is the preliminary review under Article 10. Where the Commission considers that the information available indicates the possibility of a foreign subsidy distorting the internal market, it may seek the information necessary to assess, on a preliminary basis, whether the financial contribution constitutes a foreign subsidy and whether it distorts the internal market. If the Commission finds sufficient indications that an undertaking has been granted a foreign subsidy that distorts the internal market, it may initiate an in-depth investigation under Article 10(3). During the second stage, governed principally by Article 11, the Commission further assesses the foreign subsidy identified in its decision to initiate the investigation and may seek the information it considers necessary in accordance with Articles 13 to 15. These provisions give the Commission significant investigative powers, including the power to request information from undertakings and to conduct inspections within and, subject to the conditions laid down in the Regulation, outside the Union (Arts 10–15, Regulation (EU) 2022/2560). The two-stage structure bears a procedural resemblance to the Phase I and Phase II framework used in EU merger control, in that an initial assessment may be followed by a more detailed investigation where concerns remain. However, the two regimes pursue distinct regulatory objectives and operate under different substantive and procedural frameworks; the FSR's two-stage structure should therefore not be understood as simply reproducing the EU merger control procedure.

The Regulation also provides procedural rights to undertakings under investigation. Article 42(1) requires the Commission, before adopting specified decisions, to give the undertaking the opportunity to submit observations on the grounds on which the Commission intends to base its decision. Article 42(4) further grants access to the Commission's file for the exercise of the rights of defence, subject to limitations protecting confidential information and business secrets. Article 43 complements these safeguards by establishing rules on the protection of confidential information. The Regulation also limits the Commission's inspection powers: Article 14(6) provides for Member State assistance where an undertaking opposes an inspection, including, where necessary, assistance from the police or an equivalent enforcement authority. Any requirement for judicial authorisation arises from applicable national law rather than from Article 14(6) itself. Thus, judicial authorisation is relevant to enforcement against opposition rather than being a general prerequisite for every inspection (Arts 14 and 42–43, Regulation (EU) 2022/2560).

However, these safeguards nevertheless contain notable limitations that create uncertainty as to the extent of procedural protection available during the preliminary review. During the preliminary review, the undertaking under investigation is not granted the specific opportunity to submit observations provided for under Article 42(1), which applies to the later stages of the Regulation. The undertaking's first statutory opportunity to respond to the Commission's objections therefore arises only after the Commission opens the in-depth investigation, and once objections are raised, the undertaking must be given at least ten working days to submit its observations, in accordance with Article 17(1) of Commission Implementing Regulation (EU) 2023/1441. Furthermore, Weiß (2024) observes that the Regulation, unlike Regulation 1/2003 and the EU Merger Regulation, does not contain an equivalent explicit confirmation that the rights of defence shall be fully respected. Both comparator instruments expressly provide for such a guarantee, whereas the Foreign Subsidies Regulation does not reproduce the same formulation. This difference in drafting is significant in assessing how the Regulation's specific procedural safeguards interact with the broader rights of defence guaranteed by EU law. These gaps establish the doctrinal backdrop against which the Nuctech proceedings, examined in the following section, must be assessed.

The Nuctech Interim Relief Proceedings

The Nuctech proceedings arose from a Commission inspection conducted under the Regulation's ex officio investigative powers. On 16 April 2024, the Commission adopted a decision ordering an inspection of Nuctech Warsaw Company Limited and Nuctech Netherlands BV, both wholly-owned subsidiaries of a Chinese parent company, pursuant to Article 14(3) of the Regulation. During the inspection, which was conducted between 23 and 26 April 2024, the Commission requested the content of several employees' mailboxes; the undertakings responded that this correspondence was stored not on local servers but on servers belonging to their Chinese parent company instead. The Commission subsequently required the undertakings to place a legal hold on the relevant mailboxes and, by email of 8 May 2024, confirmed that its request remained valid, urging the undertakings to make the data available by 27 May 2024 (Case T-284/24 R, paras 4–9).

The undertakings brought an action seeking annulment of the inspection decision and separately applied for interim measures suspending it. To establish a prima facie case, the applicants relied on five pleas, but the President of the General Court found that three were stated in such a bare and unsubstantiated manner that they were inadmissible outright, since an application for interim measures must set out its legal and factual basis clearly enough for the defendant to respond and for the judge to rule upon it (Case T-284/24 R, paras 29–33). Of the remaining two pleas, the first concerned whether the Commission could lawfully request data stored outside the European Union. In assessing whether this plea could establish a prima facie case, the President referred to the "qualified effects" test drawn from established competition law jurisprudence, according to which EU jurisdiction may extend to conduct occurring outside the Union where that conduct has foreseeable, immediate, and substantial effects within it. On that basis, the President considered that the applicants had not established a prima facie case that the Commission lacked the power to request information stored outside the Union (Case T-284/24 R, paras 36–41). Camesasca and Sideri (2024) emphasise the significance of this reliance on established competition law principles, which illustrates the broad investigative reach afforded to the Commission under the FSR. In this respect, it may be argued that the application of an established competition law jurisdictional approach to the FSR raises questions as to whether the procedural safeguards provided by the Regulation are sufficient to address the specific context of such investigations.

The President further found that the undertakings had neither explained why they lacked access to the requested data nor clarified how Chinese law could prevent EU-established entities from responding to the Commission's requests, and that this evidentiary gap, together with a similarly unsubstantiated second plea, meant no prima facie case had been established (Case T-284/24 R, paras 43–49).

On the question of urgency, the undertakings raised three grounds of alleged serious and irreparable harm. The President applied the general requirement that such harm must be sufficiently serious and irreparable to justify interim relief, rejecting each ground on the facts. First, regarding reputational damage from press coverage, the President held that the alleged harm had already materialised and could not be remedied more effectively by suspension than by a possible future annulment, and therefore did not justify interim relief (Case T-284/24 R, paras 57–62).

Second, the undertakings failed to demonstrate, with supporting financial evidence, that their financial viability was genuinely at risk (paras 63–68). Third, regarding administrative and criminal sanctions under Chinese law, the President found that the administrative penalties were generally pecuniary and therefore not irreparable, and that the undertakings had not demonstrated that the requested data contained state secrets or that Chinese authorisation for disclosure had been sought and refused (paras 71–74). Having found that urgency was not established, the President weighed the interests at stake and held that the Commission's interest in conducting effective investigations prevailed over the undertakings' interest in avoiding disclosure (paras 85–87). The application for interim measures was accordingly dismissed in its entirety (paras 88–89).

On appeal, the Vice-President of the Court of Justice dismissed Nuctech's appeal on 21 March 2025, confirming the relevant findings of the President of the General Court concerning urgency and ordering the undertakings to bear the Commission's costs (Case C-720/24 P(R), paras 46, 59, 62). As Camesasca and Sideri (2024) note, this outcome addresses only the interim measures; the main action concerning annulment of the inspection decision itself remains ongoing. The interim relief proceedings nonetheless constitute the principal judicial proceedings to date concerning how the Regulation's investigative powers operate in relation to an undertaking's procedural position in this dispute, and they form the basis for the analysis that follows in the next section.

Assessing the Adequacy of Procedural Safeguards

The Nuctech proceedings expose a potential asymmetry between the Commission's investigative powers and the procedural protections available to undertakings at the interim-relief stage. As established previously, the President of the General Court required the undertakings to meet a demanding evidentiary standard to establish urgency, applying this standard across all three grounds of alleged harm. Reputational damage was dismissed because it had already materialised and therefore fell outside the preventive purpose of interim relief (Case T-284/24 R, paras 57–62). Financial damage was dismissed for lack of supporting documentation (paras 63–68), while the alleged criminal and administrative risks under Chinese law were rejected because the undertakings had not demonstrated that the correspondence contained state secrets or that authorisation had been sought and refused (paras 71–74). Each ground therefore failed because the undertakings did not satisfy the requirements for establishing serious and irreparable harm. The consistency with which this standard was applied across the three grounds suggests that the evidentiary threshold is a structural feature of the interim-relief mechanism, while raising the question of whether it adequately accounts for the particular procedural circumstances of FSR investigations.

This structural imbalance is compounded by the Regulation's own procedural architecture, discussed previously. Weiß (2024) observes that the Regulation does not provide the specific Article 42 opportunity to submit observations during the preliminary review phase, since Article 42(1) applies to specified Commission decisions adopted at later stages. The inspection at issue in Nuctech occurred precisely at this earlier stage, before the specific Article 42 opportunity to submit observations applied. The undertakings therefore faced the Commission's investigative powers, including the legal hold on their mailboxes and the consequences of non-compliance, without the benefit of the specific Article 42 procedure available at later stages of the investigation. Their only recourse was the general interim relief mechanism available under Articles 278 and 279 TFEU, a mechanism not specific to the Regulation and, as demonstrated above, subject to a demanding evidentiary threshold of its own.

The application of the qualified-effects approach compounds this concern. As discussed above, the President of the General Court relied on established competition law jurisprudence, including Intel, when assessing whether the Commission could request data held outside the Union. The significance of this approach lies not in the reasonableness of the test itself, but in its application within the FSR's distinct procedural framework. Unlike the mature competition law framework under Regulation 1/2003, the FSR contains its own, comparatively recent set of procedural safeguards, including the specific rights provided under Article 42. The Nuctech order therefore illustrates how an established competition law jurisdictional approach may operate within the FSR context, while raising the question of whether the Regulation's existing procedural safeguards are sufficient to address the particular circumstances of such investigations.

A further, more institutional point bears on how much weight this single order can bear. The decision was issued not by the General Court sitting as a panel, but by the President of the General Court acting alone, in the fast, necessarily preliminary procedure reserved for applications for interim measures. Such orders are explicitly provisional and cannot prejudge the outcome of the main action. This is not a criticism of the reasoning itself, which follows established interim relief doctrine consistently, but it does mean that the Nuctech order should be read as evidence of how the Regulation's investigative powers operate within the procedural framework applicable to interim measures rather than as a considered, final statement on the balance the Regulation strikes between Commission discretion and companies' rights of defence. Whether the pending main action reaches a different balance remains to be seen.

Taken together, these findings support the argument advanced in this article's introduction: the Nuctech interim-relief proceedings suggest that, in this case, the Commission's investigative effectiveness was given greater weight than the procedural protection of the foreign undertakings.

This is not to suggest that the outcome was doctrinally incorrect. The President applied the established principles governing interim relief, and the undertakings' evidentiary submissions were, on the President's findings, deficient across each ground raised. Rather, the concern is structural: the Regulation does not provide the same statutory opportunity to exercise the rights of defence during the preliminary review; the application of the qualified-effects approach raises questions as to whether the procedural safeguards provided by the FSR adequately address the specific context of its investigations; and the FSR does not contain the same express rights-of-defence guarantee found in comparable instruments. The Nuctech proceedings therefore illustrate the potential limitations of the procedural protection available to foreign undertakings seeking interim relief against FSR investigative measures.

Conclusion

This work has analysed whether the order of the President of the General Court in the Nuctech interim relief proceedings (T-284/24 R) provides adequate procedural safeguards for foreign undertakings subject to Foreign Subsidies Regulation investigations. It has argued that it does not. The Regulation's own architecture does not provide undertakings with the Article 42 opportunity to submit observations during the preliminary review phase that applies to specified Commission decisions at later stages of the investigation. The qualified-effects approach, drawing on established competition law jurisprudence, extended the Commission's investigative reach to data held outside the European Union, although this assessment was made in the context of interim proceedings and did not constitute a final ruling on the merits. Additionally, the President's assessment of urgency applied a demanding evidentiary standard across three separate grounds of alleged harm, none of which the undertakings could satisfy. Having found that urgency was not established, the President ultimately gave greater weight in the balancing exercise to the Commission's interest in conducting effective investigations (Case T-284/24 R, paras 85–87).

These findings carry implications beyond the immediate parties to the dispute. A foreign undertaking subject to an ex officio inspection under the Regulation may face a procedural position similar to that encountered by Nuctech: the absence of the specific Article 42 opportunity to submit observations at the preliminary review stage and, where interim relief is sought, a demanding evidentiary burden under the general rules governing interim measures. This burden may be particularly difficult where the undertaking is subject to conflicting third-country legal obligations concerning the disclosure of information. The President's order was not wrongly decided on its own doctrinal terms; rather, the deeper issue lies in whether the existing procedural framework provides adequate protection for undertakings in such circumstances. The concern this article raises is therefore one of institutional design. Given the breadth of the

Commission's investigative powers under the FSR, the Regulation could be strengthened by providing undertakings with a defined opportunity to raise procedural objections and explain legal obstacles to disclosure at an earlier stage, particularly before or during inspections involving information held outside the Union. Such a safeguard would not prevent effective enforcement, but would provide a more structured mechanism for balancing the Commission's investigative interests against the rights of undertakings subject to those powers.

Two limitations of this analysis should be acknowledged. First, the Nuctech order was issued by a single judge in a fast and necessarily provisional interim-relief procedure, and should accordingly be read as illustrative of how the Regulation operates within the procedural framework applicable to interim measures, rather than as the Regulation's final word on the matter. Second, the main action seeking annulment of the Commission's inspection decision (T-284/24) remains pending before the General Court following the oral hearing held on 14 April 2026. Whether the eventual judgment on the merits reaches the same balance between Commission discretion and undertakings' rights of defence, or instead addresses the procedural concerns identified in this article, remains to be seen. Future research should revisit these questions once that judgment has been delivered, particularly by examining whether the Court clarifies the scope of undertakings' rights of defence during FSR investigations and how those rights should interact with the Commission's investigative powers. Further research could also consider whether similar procedural issues arise in the Regulation's merger control and public procurement procedures, which fall outside the scope of the present article.

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