

An order of the European Court refusing to grant interim relief to Nuctech, a Chinese maker of security scanners, has highlighted the European Commission's (the Commission) extensive powers to access company information following unannounced inspections, or "dawn raids".

The order confirmed that:

- The Commission can inspect the EU premises of a company that is incorporated in another jurisdiction, such as China
- The Commission must be allowed to access information from such companies even if it is held on servers outside the EU
- Although, in principle, a company can argue that complying with a data request would infringe foreign laws and expose it to criminal sanctions, the burden of proving this has been set very high and it is unlikely to be argued successfully
- Companies are also unlikely to get interim relief by arguing that an ongoing investigation exposes them to either reputational harm or financial damage

The Nuctech Dawn Raids

On 23-26 April 2024, the Commission conducted unannounced inspections at the Dutch and Polish premises of Nuctech, a leading supplier of security equipment such as baggage scanners and body scanners for ports and airports. The Dutch and Polish entities are subsidiaries of Nuctech Hong Kong Co. Ltd, which is ultimately controlled by a Chinese state-owned company.

The inspections were the first time that the Commission has used dawn raids in an investigation under the EU Foreign Subsidies Regulation (FSR), which came into force in 2023. Under the FSR, the Commission can open *ex officio* investigations if it suspects that a business active in the EU has received foreign financial assistance that distorts competition in the EU, for instance, by allowing that business to offer artificially low prices. The Commission can also impose either fines of up to 1% of a business' annual worldwide turnover, or daily penalties of up to 5% of its average daily turnover, for failing to cooperate with its investigation. You can read more on the Nuctech dawn raids [here](#), and find further information on the FSR in our previous update [here](#).

During the inspections, the Commission requested access to the mailboxes of several employees based at Nuctech's Dutch and Polish premises. Nuctech informed the Commission that the emails of those employees, all of whom were Chinese citizens, were stored not on local servers, but on the parent company's servers in China, and it refused to grant the Commission access. The Commission requested Nuctech to place a legal hold on the mailboxes in question and, following the inspections, reiterated its request for Nuctech to make the data available as soon as possible.

Nuctech subsequently brought an action before the lower-tier General Court of the EU seeking the annulment of the Commission decision mandating the inspections and of any subsequent requests for data, as well as the legal hold requests. At the same time, Nuctech applied for interim relief in the form of the immediate suspension of the Commission decision and related requests, pending the outcome of its main application. On 12 August 2024, the General Court issued an order denying Nuctech interim relief.

Interim Relief Under EU Law

Case law has established that the European Court will only grant interim relief from a Commission decision in exceptional circumstances. An applicant must show that an interim order is justified, *prima facie*, in both fact and law, and that granting the order is urgent, meaning that the applicant cannot await the outcome of the main proceedings without suffering serious and irreparable damage. The court must also undertake a balancing exercise, weighing the need to protect the applicant's interests against the public interest in upholding the Commission's measure.

Nuctech's Case

Nuctech relied on five pleas in its application for interim relief; however, the court only considered two of them, and ruled the other three inadmissible. The court addressed Nuctech's arguments, firstly, that the Commission had infringed EU law and public international law by compelling it to produce documents stored on servers in China, and secondly, that the Commission's decision was unlawful as complying with it would force Nuctech to infringe Chinese law, including criminal law.

The court did not consider Nuctech's pleas that the Commission infringed its right to the inviolability of business premises and its right to privacy, that the Commission's decision was arbitrary and not supported by adequate evidence, and that the decision infringed Nuctech's rights of defence. The court ruled that these three pleas had not been sufficiently argued.

The Commission's Power to Inspect Documents Held Outside the EU

Regarding Nuctech's first plea, the court cited to the established line of competition law cases which confirm that the Commission can address an inspection decision to a business that is incorporated outside the EU, if it operates within the EU, and can inspect the EU premises of such businesses. The court held that the Commission has equally extensive powers when enforcing the FSR: *"the Commission must ... be entitled to request information from undertakings located outside the EU in order to assess whether their conduct infringes EU law"*.

The court then confirmed that the Commission must be able to inspect information that is accessible from a business' EU premises even if it is stored elsewhere – for example, the mailboxes of Nuctech employees based in the Netherlands and Poland, which were stored on servers in China. If not, the Commission could not carry out investigations effectively and companies might be encouraged to store data outside the EU to evade inspections.

Conflicts Between EU Inspections and Foreign Laws

Nuctech's second plea was based on its claim that, if it granted the Commission access to the mailboxes in question, it risked breaching Chinese state security and data protection laws which would expose the company, and individuals, to criminal sanctions. It cited laws restricting data handling outside China that could harm national security or reveal state secrets, and restrictions on the processing of personal information relating to Chinese citizens carried out outside the country.

The court found that Nuctech had failed, as a starting point, to show that the provisions of Chinese law that they cited actually applied to the information that the Commission had requested. Specifically, Nuctech had not shown that the mailboxes in question contained any state secrets or relevant personal information.

Moreover, the laws that Nuctech cited did not forbid Chinese companies from granting access to information but obliged them to obtain state authorisation before doing so. Nuctech had failed to show that it had either requested or been denied such authorisation – hence, it had failed to establish that complying with the Commission's request would necessarily break any Chinese laws.

Finally, the court noted that, in general, infringements of the laws in question only resulted in financial penalties (as opposed to, for example, jail sentences). Even if Nuctech were penalised under Chinese law for complying with the Commission's order, it could seek compensation from the Commission; hence, the mere threat of financial penalties did not exempt it from producing the information requested.

Interim Relief to Prevent Reputational Harm or Financial Damage

To support its argument that the need for interim relief was urgent, Nuctech claimed that the ongoing Commission investigation was causing it both reputational harm and financial damage. The court rejected both claims in short order, and in doing so underlined that such arguments are in general unlikely to succeed.

Regarding the alleged harm to Nuctech's reputation, the court held that – to the extent that there had been any such harm – it had been caused when the fact that Nuctech had been raided was made public. Suspending the Commission's investigation after the event would not repair the harm that might have been caused, any more than the possible future annulment of that decision in the main proceedings. As such, there was no urgent need to suspend the order. The court also observed that it was not the Commission that had publicised that Nuctech had been the target of the dawn raids, but the Chinese Chamber of Commerce to the EU and Nuctech itself.

Turning to the risk of financial damage, the court cited to established case law that such harm can only be considered serious and irreparable in exceptional circumstances, such as if a business is at imminent risk of leaving the market. In other circumstances, any financial harm that a business might have suffered can be made good through an award of compensation after the decision in the main case. The court went on to find that Nuctech had provided no proof of its financial situation that in any way substantiated the risk of serious and irreparable damage.

Conclusions and Key Takeaways

In a relatively succinct order, the General Court's dismissal of Nuctech's application for interim relief has highlighted important aspects of the Commission's extensive powers of investigation, especially as they apply to overseas businesses.

As the court observed, foreign companies that choose to do business in the EU must be subject to EU law and cannot, in principle, rely on the rules of a third country to object to the application of that law. Foreign companies (or even EU companies) will also not be able to evade the Commission's powers of investigation by storing information outside the EU. In addition, although a company can in theory argue that an investigation should be suspended because it is causing it serious and irreparable reputational or financial damage, in practice it will be extremely challenging to show that this is the case.

Case T-284/24 *Nuctech Warsaw Company Limited and Nuctech Netherlands v Commission*, ECLI:EU:T:2024:564. The Order of the General Court is available online [here](#).

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