DAWN RAIDS AND THE SEIZURE OF EVIDENCE UNDER THE FOREIGN SUBSIDIES REGULATION: BETWEEN INVESTIGATIVE EFFECTIVENESS AND JURISDICTIONAL LIMITS*

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Abstract *In response to the gap identified in the supervision of financial support granted by third countries to companies operating in the European market, which falls outside the scope of traditional State aid rules, the Foreign Subsidies Regulation (FSR) was adopted. The FSR has thus established itself as an instrument of the Union's economic governance, combining the protection of the internal market with strategic autonomy in an increasingly geopolitical and interdependent global context. Particularly significant are Articles 14 and 15, which confer upon the Commission investigative powers both within and beyond the Union's territory, projecting extraterritoriality. The recent Nuctech case illustrates the tensions between investigative effectiveness and jurisdictional limits, highlighting the need for deeper reflection on the legal contours of this new European enforcement model.*

Key-Words Foreign Subsidies – Extraterritoriality – Fundamental Rights – Data Protection – European Enforcement

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1. INTRODUCTION

The current geoeconomic context is characterized by increasing volatility and interdependence, factors that have driven the strengthening of Union legal instruments with the aim of protecting its internal market from potentially unfair economic practices originating in third countries. The growing intensification of economic flows, combined with the (re)emergence of economic models strongly supported by industrial policy–oriented strategies, has highlighted significant regulatory gaps in the legal order of the European Union ("the Union"), particularly in the field of control of State aid granted by non-EU jurisdictions. Against this backdrop, the adoption of Regulation (EU) 2022/2560[1] ("the Foreign Subsidies Regulation", or "FSR"), concerning distortions of the internal market caused by subsidies granted by third countries, constitutes a normative response to the need to address the asymmetries and distortions arising from such practices.

Among the various mechanisms enshrined in the Regulation, particular relevance attaches to the inspection powers laid down in Articles 14 (inspections within the territory of the Union) and 15 (inspections outside the territory of the Union), which allow the European Commission to gather evidence both within and outside the Union's territory, with Article 15 inspections being carried out subject to the consent of the undertakings concerned. This clear extension of the Union's investigative powers raises complex legal questions, notably as regards the compatibility of these mechanisms with the General Data Protection Regulation ("GDPR")[2], the Charter of Fundamental Rights of the European Union ("Charter of Fundamental Rights"), and the foundational principles of Public International Law. The possibility of accessing data located in third-country jurisdictions – often subject to legal restrictions on their transfer – poses additional challenges in terms of legality, proportionality, and mutual respect between distinct legal orders.[3]

Accordingly, the present study proceeds from the recognition that the inspection model enshrined in the Regulation goes beyond the physical borders of the Union, projecting itself, in effect, as an instrument for the assertion of the European Union's regulatory sovereignty, with extraterritorial

1 Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

2 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance).

3 Michalek, 2014: 129-157.

reach. The possibility of requesting data located in third countries is a clear example of this projection, with the case law of the Court of Justice of the European Union ("CJEU") and the principles of Public International Law (such as those of sincere cooperation and international comity) constituting indispensable normative parameters for delimiting the Commission's action. The tension between investigative effectiveness and respect for the sovereignty of third States is not a merely theoretical issue, but one with clear operational consequences: the Nuctech case, the first instance of the practical application of Article 14 of the Foreign Subsidies Regulation, paradigmatically illustrates the legal challenges posed by this new regime.

Accordingly, the present study is structured into five main chapters, in addition to this introduction. The second chapter provides a brief overview of the Foreign Subsidies Regulation and situates its objectives within a broader framework of strategic autonomy. The third chapter is devoted to an analysis of the investigation and inspection mechanisms provided for in Articles 14 and 15, examining their legal basis, scope, and practical application. The fourth chapter discusses the legal challenges associated with the collection of evidence and data in light of the GDPR and the Charter of Fundamental Rights. Chapter five is dedicated to Article 16 of the Regulation, as an expression of the Union's regulatory power in situations of non-cooperation. The final chapter undertakes a more in-depth analysis of the Nuctech case, as a paradigmatic test of the concrete application of the Regulation, offering elements for a critical reflection on the challenges and limits of the new legal framework. Finally, the concluding remarks aim to summarize the main findings of the research, seeking to offer a critical contribution to the study and refinement of the new European legal framework in this field.

2. THE FOREIGN SUBSIDIES REGULATION: BRIEF NOTES

In recent years, the European Union has been marked by an intensification of efforts to assert its strategic autonomy in the economic domain, materialized through the adoption of various legal instruments aimed at correcting asymmetries arising, in particular, from practices originating in third countries whose effects are felt within the territory and the market of the European Union.[4] The geopolitical tensions that have been felt confirm the need to

4 European Commission, 2020a.

ensure economic autonomy vis-à-vis trading partners and the need to reduce economic dependencies that undermine the Union's autonomy.[5]

The single market constitutes the European Union's greatest economic advantage[6], which is why the preservation of fair and neutral conditions of competition is understood as a strategic priority.[7] The Joint Communication of the Commission and of the High Representative of the Union for Foreign Affairs and Security Policy (2023, p. 6) identified four types of risks faced by economies, namely: (i) risks to the resilience of supply chains (including energy security); (ii) risks to the physical security and cybersecurity of critical infrastructure; (iii) risks related to technological security and technology leakage; and (iv) risks arising from the use of economic dependencies as a weapon or as a form of economic coercion.

In this context, subsidies granted by third States thus emerge as a real threat to the integrity of the internal market, insofar as they create undue competitive advantages for certain undertakings[8]. They therefore form part of the European Union's Economic Security Strategy (presented by the European Commission and the High Representative), given that economic dependence on trading partners may jeopardize economic security and, consequently, the Union's autonomy.[9] Notwithstanding the existence of the State aid regime laid down in Articles 107 to 109 of the Treaty on the Functioning of the European Union (TFUE), that regime does not apply to support granted by third countries, thereby creating a significant regulatory gap, which is further exacerbated by the conduct of public or private undertakings benefiting from such support, particularly in strategic sectors such as infrastructure or green technologies.[10]

The adoption of the Foreign Subsidies Regulation represents, in this sense, a turning point in the Union's external economic policy, filling the identified legal vacuum. The Regulation established an autonomous mechanism for the investigation and correction of market distortions caused by foreign subsidies,

5 In this regard, European Commission, 2023a:1.

6 European Commission, 2020a:5-8.

7 European Commission, 2023b:17.

8 As Bauman notes (2023: 200), "*investment controls may [...] be advocated for reasons of competitive neutrality […] so that no enterprise operating in such an (economic) market is subject to undue competitive advantages or disadvantages*".

9 Van Damme, 2024:4.

10 European Commission, 2020a:6.

enabling the Commission to review, prohibit, or condition concentrations or public procurement procedures where they involve external State support with harmful effects on competition within the Union. It is a hybrid instrument, combining elements of competition law, merger control, and State aid control, and it applies on the basis of the territorial effects principle. That is to say, even where a subsidy is granted outside the Union, its distortion is addressed because it materializes within it, which justifies the Regulation's tripartite structure: (i) a system of mandatory notifications of concentrations (Articles 19 to 26); (ii) notifications in public procurement procedures (Articles 27 to 33); and (iii) *ex officio* investigations (Articles 9 to 18).

It is important to note that the Foreign Subsidies Regulation forms part of a broader trend towards the assertion of the Union as a global normative power, within a world economic context that is highly interdependent and competitive. This reconceptualization of the Commission's role, with an extraterritorial vocation constrained by the functional logic of effects on the internal market, represents a new generation of the Union's regulatory and legal instruments. These instruments are now shaped by—and directed towards—a logic of economic resilience, strategic autonomy, and active enforcement, thereby repositioning the Union as a central normative actor in the current international geopolitical and economic landscape.

In this evolving regulatory context, the European Commission has sought to further structure the application of the FSR through the adoption of its 2026 Guidelines 2026[11]. While not altering the normative content of the Regulation, these Guidelines clarify key analytical concepts, most notably the notion of *distortion*, the operation of the balancing test, and the conditions for the exercise of the Commission's investigative powers, thereby contributing to the consolidation of a more predictable and operational enforcement framework. The adoption of the Guidelines confirms the progressive densification of the FSR as a living instrument of the Union's economic governance.

Against this background, central importance is assumed by the instruments set out in Articles 14 and 15, which establish the inspection mechanisms in the context of investigations initiated ex officio by the Commission, as well as to the possibility of adopting decisions on the basis of the best information available where there is a lack of cooperation on the part of the

11 Communication from the Commission C(2026) 42 final, Guidelines on the application of certain provisions of Regulation (EU) 2022/2560 of the European Parliament and the Council on foreign subsidies distorting the internal market.

entities concerned, in accordance with Article 16. When examined together, these provisions make it possible to observe that they equip the Commission with the necessary tools to gather evidence from undertakings under investigation, notably where there are suspicions that they have benefited from foreign subsidies. They thus enable the Commission to act pursuant to a logic of active enforcement, distinct from reactive models or those dependent on notification. The significance of this regime is further justified by the fact that it reflects a structural transposition of competition law enforcement mechanisms into the field of foreign subsidies, with substantial legal and practical implications that merit in-depth examination – an exercise that will be undertaken in the following chapters.

3. *EX OFFICIO* INVESTIGATIONS: INSPECTIONS WITHIN AND OUTSIDE THE TERRITORY OF THE UNION

3.1. Inspections within the territory of the European Union: Article 14 of the FSR

Within the framework of *ex officio* investigations provided for in Chapter 2 of the Foreign Subsidies Regulation (Articles 9 to 18), the Commission is empowered to carry out inspections within the territory of the Member States of the Union, of a nature similar to the powers already conferred under Article 20 of Regulation (EC) n.º 1/2003[12] in the field of competition law. This mechanism, enshrined in Article 14 of the Regulation, must be read in the light of a broader framework aimed at strengthening the Union's strategic autonomy and consolidating its supervisory capacity in economic matters. It enables the Commission to conduct direct inspections – including unannounced inspections (dawn raids) – at the premises of undertakings established in the internal market, whenever there are sufficient indications of the granting of a subsidy by a third State with potentially distortive effects on competition (Article 9(1)).

The provision in question confers on the Commission a broad range of investigative powers, enabling it to access the premises, land, and means of transport of the undertakings concerned (Article 14(2)(a)); to seal premises or documents in order to ensure the preservation of evidence (Article 14(2)

12 Council Regulation (EC) n.º 1/2003 of December 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treatr (text with EEA relevance).

(d)); and to conduct on-site interviews (Article 14(2)(c)). Recitals 27 and 28 of the Regulation expressly acknowledge that these powers are intended to ensure the effectiveness of investigations, allowing the Commission to gather relevant information whenever there are substantiated suspicions of the existence of a foreign subsidy. Unlike what occurs in most national legal systems – where the exercise of such powers frequently depends on prior judicial authorization, as is the case with the Portuguese Competition Authority (AdC)[13] – the Foreign Subsidies Regulation, and Article 14 in particular, establishes a direct and autonomous power of the Commission, with immediate and binding application in all Member States.

The exercise of the powers conferred by the Regulation does not depend on any prior authorization from the national authorities of the Member State concerned, nor on any form of legislative intermediation. Ultimately, this reflects the affirmation of the principle of the primacy of EU law,[14] which ensures the precedence of Union rules over any conflicting national provisions, including those of constitutional rank. This does not, however, preclude the obligation of the authorities of the Member State concerned to aid whenever this proves necessary, as provided for in Article 14(6) of the Regulation. This normative and institutional configuration thus rules out any possibility of internal constitutional blocking by Member States of the execution of an inspection validly decided by the Commission under Article 14, insofar as the Commission acts on the basis of its own institutional mandate conferred by the Treaties, exercising that power within an autonomous legal order.

It is particularly relevant to observe the transposition, into the field of foreign subsidies control, of a supervisory model already well established in competition law, which demonstrates the Union's capacity to extend its classic regulatory instruments to new domains while preserving the internal coherence of its legal system. In this context, Article 14 does not operate merely as a procedural provision, but rather as a genuine instrument of geopolitical projection, reflecting the Union's ambition to safeguard its regulatory autonomy vis-à-vis State interventions originating in third countries. It embodies a logic of internal sovereignty – inasmuch as it is confined to the territory of the Union – while simultaneously assuming a defensive posture externally, in

13 Article 18 of Law n.º 19/2012 of 8 May ("Novo Regime Jurídico da Concorrência").

14 As established by the classic case law of the CJEU, since Case C-6/64, *Costa v. ENEL*, EU:C:1964:66.

that it seeks to protect the internal market and European economic operators against unfair practices supported by foreign public entities.

The application of Article 14 of the Regulation reveals an extraterritorial dimension, insofar as the object of the investigation – a subsidy granted by a foreign entity – does not originate within the internal market, but nonetheless produces distortive effects on its functioning, with the Commission acting as a guardian of the integrity of the internal market. Article 14 thus constitutes an expression of one of the most sophisticated dimensions of the Union's regulatory model: the exercise of jurisdiction not on the basis of the place of origin of the act, but rather on the place where its effects materialize, namely within the European economic area. Strictly speaking, although the inspection takes place within the territory of the Union (pursuant to Article 14, which is the focus here), the impetus for the investigation lies in exogenous conduct, thereby assuming the nature of a regulatory response to normative externalities.[15]

The element of extraterritoriality inherent in Article 14 reflects the overarching logic that runs throughout the Regulation: the recognition that the European Union's regulatory sovereignty must actively accompany the globalization of markets, while simultaneously shielding itself from external State interventions which, although legitimate within their respective legal systems, may infringe the foundational principles of fair and neutral competition within the European economic space. In this framework, Article 14 emerges as a genuine instrument of geoeconomic rebalancing, enabling the Commission to intervene in the internal market with a view to neutralizing the effects generated by external practices. It thus constitutes a form of defensive regulatory projection, legally grounded in the competence conferred on the Union to ensure the effective functioning of the internal market (Article 3(1)(b) TFEU). Article 14 accordingly assumes the role of a point of contact between internal enforcement and the European normative response to exogenous phenomena of global economic governance.

The exercise of the power conferred on the Commission by Article 14, although coercive in nature, may require the cooperation of national authorities, particularly in order to secure, where necessary, physical access to the premises of undertakings – especially in situations in which employees or representatives of the entity concerned obstruct the conduct of the inspection (Article 14(6)). Such cooperation constitutes a concrete expression of

15 Hornkohl, 2022:3-29. Cunha Rodrigues, 2021:197-227.

the principle of sincere cooperation enshrined in Article 4(3) TEU, which obliges Member States to facilitate the achievement of the Union's tasks and to refrain from adopting measures liable to jeopardize their effectiveness. Even within this framework of cooperation, however, the Commission acts directly and autonomously, retaining responsibility for the coordination and direction of the operation. This underscores the depth of the Union's regulatory power, the exercise of which is subject exclusively to the common guarantees of the EU legal order, in particular those laid down in the Charter of Fundamental Rights, as interpreted by the Court of Justice of the European Union.

Article 14 of the Regulation, as a central element of the supervisory mechanism, must be understood within the broader context of the Union's economic policy and interpreted in conjunction with Articles 13, 16, and 17 of the same instrument. Those provisions govern, respectively, the formal requests for information that may precede an inspection, the Commission's ability to adopt decisions on the basis of the best information available in cases of non-cooperation, and the imposition of sanctions for the provision of incorrect information or for obstruction of the investigation.

Taken together, these provisions form a coherent enforcement framework, equipping the Commission with the legal and operational means necessary to act effectively, proportionately, and expeditiously, while ensuring the protection of the internal market against unfair practices of external origin. This broad enforcement architecture is consistent with the approach subsequently reflected in the 2026 Guidelines, which confirm the flexible, effects-based and case-specific nature of the assessment of foreign subsidies, as well as the corresponding breadth of the Commission's investigative action.

Notwithstanding the fact that Article 14 confers robust intervention mechanisms on the Commission, its practical application must be subject to critical reflection, particularly in light of the principles of the rule of law. This includes considerations relating to the limits of investigative powers, the democratic legitimacy of the Commission's decisions, and the extraterritorial reach of its actions. These aspects, which are fundamental to understanding the balance between regulatory effectiveness and respect for fundamental rights, will be examined in the following chapters.

3.1.1. Dawn raids in the context of the FSR

Dawn raids, or surprise inspections – a mechanism provided for in the field of European competition law – are intended to ensure the collection of evidence

in investigations into anticompetitive practices, such as cartels, abuses of a dominant position, or non-notified concentrations.[16] Traditionally associated with the powers laid down in Article 20 of Regulation (EC) n.º 1/2003, these operations have acquired new contours with the entry into force of the Foreign Subsidies Regulation, under which a dawn raid has already been carried out in the Nuctech case, which will be examined in greater detail later in this study. Such inspections represent one of the most effective mechanisms for obtaining evidence and ensuring the enforcement of competition law rules.[17] However, they may also constitute an area in which investigations can, at times, exceed the limits of undertakings' procedural rights.[18]

Within the field of competition law, dawn raids enable the Commission to access premises, IT equipment, correspondence, and any relevant documents, regardless of their format. Such operations are legitimized by a judicial warrant where required and may, in certain cases, involve the cooperation of the national authorities of the Member States. The purpose of dawn raids, as the term itself suggests, is to ensure immediate and unfiltered access to information that might otherwise be destroyed, concealed, or manipulated. At the same time, the CJEU has progressively reinforced the principles of proportionality and legality governing such actions by establishing limits on their execution, while nonetheless acknowledging their utility as an effective investigative tool.[19]

The entry into force of the Foreign Subsidies Regulation and the inclusion of Article 14 (which mirrors Article 20 of Regulation (EC) n.º 1/2003) confirm this investigative mechanism as one of the tools available to the Commission, now in the context of controlling support granted by third countries to undertakings operating in the Union's internal market, even though the legal bases of competition law and foreign subsidies control are distinct. Nevertheless, the parallel is undeniable, insofar as both reflect the Commission's increasing assertiveness in the exercise of its supervisory functions, as well as a broader trend towards the strengthening of the Union's strategic autonomy. In this regard, the extension of the dawn raid logic to the field of foreign subsidies control reveals the Union's concern with safeguarding the neutrality of

16 Pursuant to Article 1 thereof, Regulation (EC) n.º 1/2003 applies to Articles 101 and 102 TFEU, formerly Articles 81 and 82 respectively.

17 Jalabert-Doury, 2023.

18 Idem.

19 Jalabert-Doury, 2023; Andersson, 2024.

its internal market, signaling the Commission's intention to apply competition rules with equal rigor to both internal and external actors, in accordance with a principle of regulatory neutrality.[20]

As such, the possibility for the Commission to carry out dawn raids under Article 14 of the Foreign Subsidies Regulation should be understood as a natural evolution of its competences and of the need to adapt traditional enforcement instruments to new economic and geopolitical realities. In this context, that mechanism acquires a renewed scope of application in an environment marked by the globalization of markets and the increasing interference of third States in the Union's economy.

3.2. Inspections outside the territory of the European Union: Article 15 of the FSR

Following the analysis of Article 14, it is necessary to address Article 15, which constitutes a natural – albeit distinct – extension of the investigative powers conferred on the European Commission. While Article 14 governs the conduct of inspections within the territory of the Union, Article 15 extends the Commission's investigative action beyond its borders, directly engaging with the sensitive issue of extraterritorial jurisdiction.

Article 15 provides that the Commission may request undertakings located outside the Union to supply information deemed relevant in the context of an ex officio investigation into foreign subsidies distorting the internal market. In order to ensure the effectiveness of the investigations it conducts, the Commission may need to access data and evidentiary material located outside the Union's jurisdiction– whether under the control of undertakings established in third countries or even directly held by public entities. Article 15 confers that possibility, on the basis of cooperation mechanisms. In this sense, like Article 14, Article 15 also reflects an assertion of regulatory ambition with an external dimension, the scope of which inevitably raises legal, institutional, and diplomatic questions.

Unlike Article 14, the provision in question does not confer on the Commission any coercive powers outside the territory of the Union. Instead, it is based on a fundamentally voluntary model, consisting of requests for cooperation addressed both to undertakings and, where necessary, to the public authorities of third States. Article 15 of the Regulation thus merely creates the possibility of requesting information, without imposing unilateral

20 Andersson, 2024:256-258; Bauman, 2023: 199-218; Cunha Rodrigues, 2021:216-225.

legal obligations on entities located outside the Union's territory, leaving the Commission dependent on the voluntary cooperation of the parties concerned. This cooperative and non-coercive design is likewise aligned with the approach reflected in the 2026 Guidelines, which emphasize a flexible and context-sensitive assessment, thereby reinforcing the functional (rather than strictly territorial) logic underlying the Regulation.

Where the cooperation mechanism functions properly, the Commission is thus able to obtain the elements necessary for its investigation without exceeding any jurisdictional limits. If an undertaking located in the territory of a sovereign State outside the Union decides not to cooperate, whether in whole or in part, such refusal does not, per se, constitute a direct infringement of the Regulation, even though Articles 16 and 17 of that legal instrument provide for consequences flowing from such refusal, both in the context of Article 15 and of Article 14.

The mechanism established by Article 15 is, in essence, a compromise solution and an expression of the Union's regulatory extraterritoriality, insofar as the Commission cannot carry out coercive inspections outside its territory, out of deference to the rules of public international law concerning respect for the sovereignty of third States. Accordingly, the principle of State sovereignty constitutes a structural legal limit on the direct extraterritorial exercise of the Union's authority.

Accordingly, any action by the Commission aimed at collecting evidence, accessing premises, or directly addressing entities located in foreign territory without having obtained the prior consent of the State concerned constitutes a direct violation of that State's sovereignty. Such conduct undermines not only the principle of the sovereign equality of States, but also calls into question the European Union's external legitimacy as an actor under international law. This principle is confirmed by multiple international instruments and decisions, with the case law of the International Court of Justice ("ICJ") having consistently emphasized that any interference with the exclusive competences of another State amounts to a breach of international law.[21]

Nevertheless, Article 15 should not be read as a practical limitation, but rather as an explicit manifestation of the Union's characteristic legal

21 In this regard, by way of example, reference may be made to Article 2 of the Charter of the United Nations and to the case law of the International Court of Justice in the *Oil Platforms* case (*Islamic Republic of Iran v. United States of America*), 2003. Likewise, the United Nations International Law Commission (2021), in its *Articles on Responsibility of States for Internationally Wrongful Acts*, recognizes that a breach of sovereignty constitutes, in itself, a fact giving rise to international responsibility.

self-restraint. By recognizing that any material action on foreign territory requires consent, the Union avoids falling into the trap of regulatory unilateralism and preserves its integrity as a legal system that seeks to be exemplary. Consequently, the incorporation of a mechanism based on cooperation and respect for the sovereignty of third States represents a strengthening of the legal and political standing of the Commission's action, clearly demonstrating that the force of the Union's regulatory activity lies in legitimacy rather than in coercion.

Recourse to a non-coercive approach outside the territory of the Union does not stem from institutional weakness but rather reflects a regulatory authority that is conscious of its own limits and that embodies a deliberate compromise between the defence of the internal market and respect for the fundamental principles of public international law. In this specific context, the principle of international comity functions as an ethical and legal point of reference, guiding the manner in which the Union engages with external jurisdictions. Accordingly, when the Commission addresses a request for information to an undertaking or an authority in a third country, it does so with a view to avoiding any undue interference or normative friction.[22]

4. SEIZURE OF EVIDENCE AND DATA UNDER THE FSR

The issue of data seizure in the context of investigations carried out by the Commission has undergone a profound evolution, largely driven by the technological transformations of recent decades. Whereas paper long served as the exclusive medium for institutional and commercial information held by undertakings, that model has increasingly been replaced – particularly in recent decades – by integrated digital systems, collaborative platforms, cloud-based servers, and mobile devices.[23] Moreover, the majority of these elements are no longer physically located on the premises of the undertakings subject to inspection, revealing a transformation in the geography of information, which has become decentralized, distributed, and, above all, legally fragmented.[24]

In this context, the Commission is confronted with new obstacles in the exercise of its investigative and inspection powers, which inevitably affects

22 Cunha Rodrigues, 2024:188-195.

23 Autio, 2020: 482.

24 Idem.

its action under the FSR. With regard to Article 14, there is a geographical limitation on the exercise of the powers conferred by that provision, insofar as the undertakings concerned must be physically located within the territory of the Union. However, the real difficulty arises in relation to digital evidence: in that context, the geographical limitation gives rise to substantial practical implications in terms of data protection, administrative proportionality, and fundamental rights.[25]

Given that contemporary corporate information is profoundly characterized by both geographical and technological dispersion, it appears reasonable to interpret Article 14 of the FSR, which allows the Commission to access IT systems, as also encompassing – albeit without an explicit reference to access to data stored outside the territory of the Union – the access to digital content, provided that such content is accessible through the undertaking's devices at the time of the inspection and, according to the President of the General Court of the European Union in the Nuctech case, is data used by employees in the performance of their day-to-day functions within the territory of the Union. In such circumstances, where data stored on remote servers can be easily viewed, transferred, or copied locally, they should likewise be regarded as accessible to the Commission and may therefore be lawfully seized in the context of *ex officio* investigations under the FSR, subject to compliance with certain limits.[26]

The concept of the place of seizure thus undergoes a transformation that is both profound and legally significant, in that it ceases to be purely physical and instead assumes a functional and virtual character, inevitably shifting the legal focus from location to accessibility. In this regard, European case law has progressively consolidated a functional concept of accessibility, according to which the physical location of data becomes irrelevant where the undertaking subject to inspection has practical, direct or indirect access to the information relevant to the investigation.[27] Accordingly, criteria such as the operational use of data, their integration into compliance systems, access by employees of the European subsidiary, or their use in business decision-making

25 Michalek, 2014: 129-157.

26 Jalabert-Doury, 2023. Issues relating to the seizure and processing of data and their limits, in particular those concerning fundamental rights, will be addressed in greater depth in Chapter 4.1 below.

27 European Commission, 2024. As an example, see cases T-284/24, *Nuctech*, EU:T:2024:564 and T-188/24, *Michelin*, EU:T:2025:686.

within the internal market are regarded as sufficient connecting factors to impute to the undertaking under inspection a duty of cooperation.[28]

However, it is important to emphasize that, in this particular area, the Commission does not enjoy an absolute power but rather operates on the basis of a rebuttable presumption. The undertaking concerned may – and, where appropriate, must – demonstrate that the evidence at issue is not accessible, whether for technical or documentary reasons. One of the arguments that may be put forward by the undertaking under investigation – as occurred in the Nuctech case – is that certain information is subject to local legal restrictions, which is, beyond dispute, one of the main points of contention in this field.

If one looks to jurisdictions such as China or the United States of America – by way of a brief exercise in comparative law – it is possible to identify the imposition of significant limitations on access by foreign authorities to strategic data. In the United States, the *CLOUD Act* authorizes the U.S. Government to access data stored abroad by companies subject to its jurisdiction, while not conferring reciprocal powers on foreign authorities.[29] Chinese legislation, for its part, imposes restrictions requiring prior approval for the transfer of certain categories of data, non-compliance with which may entail criminal penalties.[30] At the level of the European Union and the United Kingdom in the post-Brexit context, courts have approached with a degree of skepticism the generic invocation of foreign laws as a justification for non-cooperation in investigative and inspection proceedings. An illustration of this approach is the decision of the UK High Court in *Thomas John Hoshua and Others v Renault S.A. and Others* (case n.º QB-2021-004141), in which arguments that French legislation prohibited the transfer of certain data – and that this, in itself, constituted a valid ground for refusing to disclose the requested information – were rejected.[31] Similarly, in the Nuctech case, the General Court of the European Union ("GC"), in the context of an interlocutory decision, held – inter alia – that a generic invocation of Chinese criminal law provisions was insufficient, and required concrete evidence demonstrating that compliance with the obligation imposed by the

28 This was subsequently confirmed by the President of the General Court of the European Union in the context of the Nuctech case, discussed in Chapter 5 below.

29 Cochrane, 2021:153-210; European Parliament, 2012.

30 Köstner & Nonn, 2023:81-95.

31 In this regard, Stannard & Congdon, 2024.

Commission would entail an imminent, serious, and unavoidable risk of legal sanctions.

This legal environment – largely shaped by the dematerialization and delocalization of information – has placed both EU institutions and multinational undertakings in a particularly delicate dilemma. While undertakings are subject to duties of cooperation vis-à-vis the Commission, compliance may simultaneously expose them to significant legal risks in their States of origin or in the jurisdictions of their parent companies, by virtue of domestic rules on digital sovereignty, national security, or data protection. In light of this current context, the need for effective mechanisms to resolve conflicts of laws has become pressing, such as, for example, specific safeguard clauses within the FSR. Although not expressly provided for in the Regulation, such mechanisms may prove essential in addressing situations of dual liability to which undertakings may be exposed, while at the same time ensuring and reinforcing the principles of legal certainty and regulatory predictability that underpin the Union's internal and external action in a number of field.[32]

One of the most relevant collateral effects of the foregoing is the creation of a perverse incentive: if having a legal presence within the Union exposes undertakings to potential sanctions to which they would not be subject in another jurisdiction, the rational response may be to avoid establishing subsidiaries within the Union altogether. This argument was expressly raised in the judgment of the UK Court of Appeal in the *BMW/Volkswagen* case, in which the court warned of the risk that the existence of a local legal presence may create a jurisdictional bridge enabling the imposition of sanctions in a disproportionate manner. [33] This logic may readily be transposed to the Union's model of extraterritorial regulation: if applied in an excessively assertive manner, it risks undermining its own strategic objectives of attracting foreign direct investment. By imposing extensive and potentially conflicting obligations on undertakings with links outside the Union, the EU may – even if inadvertently – discourage the establishment of a legal presence within its territory, thereby transforming a space intended to offer regulatory predictability into one characterized by exposure to asymmetric risks.

The collection of digital data in the context of inspections carried out under Article 14 of the FSR is not a neutral act, as it frequently involves access to personal data of employees and customers, protected correspondence,

32 European Commission, 2020a; European Commission, 2023a; Cunha Rodrigues, 2024.

33 Cunha Rodrigues, 2024:147-148;

trade secrets, or documents subject to confidentiality regimes. This places heightened obligations on the Commission, inter alia, with regard to the application of the principle of proportionality enshrined in Article 52 of the Charter of Fundamental Rights. The case law of the CJEU expressly condemns so-called "fishing expeditions", requiring that any digital intrusion be clearly delimited, duly reasoned, and accompanied by appropriate legal safeguards.[34] In summary, access to and use of digital evidence obtained in the context of inspections under Article 14 – and, accordingly, the legality of such evidence – depend on the Commission's scrupulous compliance with both formal and substantive requirements. The Commission must therefore conduct its actions by applying appropriate technical filtering, safeguarding the fundamental rights of the parties concerned, ensuring the integrity of the chain of custody of the evidence, and allowing for the full exercise of rights of defense.[35] If the protection of personal data – and, consequently, of fundamental rights – has traditionally been treated as a technical subtopic, in recent years it has come to assume the role of a condition of legitimacy for the European Commission's inspection activities.[36]

In this sense, the Commission cannot conduct the enforcement of Article 14 as though it were an unlimited exercise[37], but must instead be legally guided by principles of international comity, proportionality, and restraint, particularly where a clear extraterritorial dimension is present. This requirement of proportionality also resonates with the broader analytical framework clarified in the 2026 Guidelines, in which the assessment of foreign subsidies entails a structured balancing of their negative and positive effects, thereby reinforcing the need for a comprehensive evidentiary basis. Article 15 of the

34 By way of example, reference may be made to cases C-583/13 P, *Deutsche Bahn*, EU:C:2015:404; C-682/20, *Les Mousquetaires* and *IMT Enterprises SAS*, EU:C:2023:170; and C-693/22 P, *Intermarché Casino Achats*, EU:C:2023:172, all of which concern the procedural safeguards that must frame a dawn raid. The European Court of Human Rights ("ECtHR") addressed these issues in *UAB Kesko Senukai Lithuania v. Lithuania*, Application n.º 19162/19, offering a perspective which, in certain respects, appears to set a higher threshold than that adopted by the CJEU with regard to the design and execution of such measures. In its judgment in Case C-511/18, *La Quadrature du Net and Others*, EU:C:2020:791, the CJEU upheld the retention of metadata, including IP addresses, but imposed strict limits: (i) access only subject to prior judicial review or review by an independent authority; (ii) separation of civil identity data; (iii) use solely for authorized purposes; and (iv) safeguards to protect individual privacy. This approach demonstrates that the Court requires a clear and legally grounded delimitation for any intrusion into digital data. On the practice of so-called "fishing expeditions", see Michaleck, 2014, pp. 135–144.

35 Andersson, 2024; Sousa Mendes, 2024: 9-51; Jalabert-Doury, 2023.

36 Veronese, 2021: 371-385; Di Nuzzo, 2022: 119-149.

37 Jalabert-Doury, 2023.

FSR may be regarded as an interesting and complementary alternative to this regime, insofar as it promotes voluntary cooperation by entities located outside the Union within a model of soft enforcement, thereby helping to mitigate potential diplomatic frictions and to respect the sovereignty of third States' legal systems.

The exercise of the powers conferred on the Commission under Article 14 is therefore subjected to a test of legitimacy, both legal and political, when it involves the seizure of documents and digital data which, although accessible from within the territory of the Union, are formally and materially stored outside it. It should be noted that the complexity of this issue is neither purely formalistic nor merely technical in nature but rather reflects a tension between the Union's regulatory effectiveness and the limits imposed by respect for the sovereignty of other legal orders. By accessing extraterritorial data through terminals located within the Union, there is, in effect, a projection of authority beyond the Union's physical borders, based on a criterion of functional accessibility which, although legally defensible, nevertheless requires solid justification and careful implementation. The legitimacy of the Union's enforcement action in this context will be all the greater the more it is exercised in accordance with the guiding principles of proportionality, transparency, and respect for international normative balances. In this sense, Article 14 does not operate as a mandate for automatic extraterritoriality, but rather as a point of contact between the Union's regulatory ambitions and the legal limits of its global action.

It is relevant at this stage to provide a broader framework for the inspection powers and the seizure of evidence and data in this context, insofar as their legality also depends on their consistency with the broader EU legal order. This includes, in particular, Regulation (EU) n.º 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data[38]; the Charter of Fundamental Rights, which has had binding legal force for all Union institutions since the entry into force of the Treaty of Lisbon; and the case law of the CJEU and of the ECtHR, which impose substantive and procedural limits on the collection and processing of

38 Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) n.º 45/2001 and Decision n.º 1247/2002/EC (Text with EEA relevance).

data, ensuring that the exercise of those powers is carried out in accordance with the principles of legality, necessity, and proportionality.[39]

Against this background, it is necessary to delineate which data and documents may be lawfully seized and which must be excluded by virtue of enjoying enhanced protection. This delineation amounts, in substance, to a normative affirmation of the limits to the Commission's administrative investigative powers in the context of the control of foreign subsidies. Both European legal doctrine and case law allow for a categorization of data susceptible to seizure: (i) freely seizable documents, such as accounting records, contracts with direct relevance to the investigation, public procurement bids, and non-sensitive institutional communications; (ii) conditionally seizable documents, such as emails, internal communications, and other documents or data of a similar nature, the collection of which is subject to prior technical and legal screening; and (iii) protected documents, including lawyer-client communications covered by legal professional privilege, which enjoy absolute protection – as established in *Akzo Nobel*[40] – and must be excluded from seizure, being reviewable only by independent entities.

Since the seizure of evidence – and, more specifically, the collection of data – is also subject to the GDPR and to the provisions of the Charter of Fundamental Rights, particularly as regards the protection of fundamental rights, this entails that the Commission must make every effort to ensure data minimization, purpose limitation, confidentiality, and limited retention of the data seized. Failure to do so may result in the invalidation of the investigative acts deriving therefrom. The seizure of sensitive business data, such as trade secrets or strategic information, inter alia, requires the implementation of appropriate technical protection mechanisms, the purpose of which is to ensure that only information strictly relevant to the proceedings at issue is used.

With regard to the Charter of Fundamental Rights and its applicability to the exercise of the Commission's inspection and data-gathering powers, it should be recalled that the Charter has had binding legal force since the Treaty of Lisbon and, as such, imposes on the Commission an obligation to respect rights such as data protection (Article 8), private life (Article 7),

39 Case Law of the CJEU, cases C-184/20, *Vyriausioji tarnybinės etikos komisija*, ECLI:EU:C:2022:601 and C-394/23, *Mousse*, ECLI: EU:C:2025:2; Case Law of the ECHR, *Petition Zakharov v. Russia* and *Petition Barbulescu v. Romania*.

40 Case law C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd*, ECLI:EU:C:2010:512.

and the rights of defense and effective judicial protection (Article 47). The case law is clear in holding that investigative powers, even where expressly provided for by law, may not be exercised without limits. In particular, the judgment in *Digital Rights Ireland*[41] emphasized that any interference with fundamental rights must be accompanied by robust safeguards against abuse.

Within this framework, the legal architecture governing inspections carried out by the Commission – particularly under the FSR – must be grounded in a system of safeguards based on the principle of proportionality. The Commission must justify acts of seizure on the basis of objective criteria, avoid indiscriminate access, and ensure the security and proper storage of sensitive data. Such a structure of safeguards must be in place from the very outset of the inspection, failing which the validity of the procedure itself may be compromised, as illustrated, for example, by the judgment in *Deutsche Bahn*[42]. Safeguarding these balances – which is not always an easy task – must rest on a procedural framework for inspections that ensures planning based on objective criteria, provides for ex ante screening of sensitive data, and makes use of appropriate forensic technologies, while guaranteeing the availability of *ex post* adversarial review.

This reasoning has likewise been reaffirmed in the case law of the European Court of Human Rights, as illustrated by *Delta Pekárny A.S. v. República Checa*[43], in which it was held that administrative inspections carried out without prior judicial authorization may infringe the right to respect for private and professional life, as protected by Article 8 of the Charter of Fundamental Rights, where they are not accompanied by robust legal safeguards against potential arbitrariness.[44]

It is within this framework of legal rigor that the tension between enforcement effectiveness and the legitimacy of the means employed must be understood. While the Commission's action must be swift and effective – particularly in the context of a dawn raid, where undertakings may seek to conceal evidence or destroy data – such effectiveness cannot justify indiscriminate access to IT systems, nor the seizure of irrelevant or excessive data.

41 C-293/12, *Digital Rights Ireland Ltd. Seitlinger and others*, ECLI:EU:C:2014:238, pursuant to which the CJEU held that an EU directive requiring Internet service providers (ISPs) to retain telecommunications data, with a view to facilitating crime prevention and prosecution, was invalid in light of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.

42 Case law C-583/13 P, *Deutsche Bahn*, ECLI:EU:C:2015:404.

43 *Petition Delta Pekárny A.S. c. República Checa*.

44 Martinho, 2014: 279-304.

4.1. The particular case of the seizure of emails as evidence

In the context of the seizure of documentation and evidence in investigations carried out by the Commission, in particular under the Foreign Subsidies Regulation, it is necessary to address in greater detail the central role that electronic communications play in commercial and personal relations. As such, they have posed significant challenges to legal systems, particularly with regard to criminal and administrative investigations, in terms of ensuring compliance with fundamental rights.[45]

The seizure of electronic mail (emails) as a means of evidence has been one of the most controversial issues in the field of evidence and data seizure, particularly in investigations conducted by administrative, regulatory, or judicial authorities. Within the Union, the seizure of emails is a common practice in competition law proceedings, anti-money laundering enforcement, and, more recently, in foreign subsidies investigations.[46] The legitimacy and legal basis for such action may be found in various EU regulations, such as Regulation (EC) n.º 1/2003 and the Foreign Subsidies Regulation, which confer on the Commission the power to examine documents and correspondence regardless of the medium in which they are stored. In this regard, and from a jurisprudential perspective, the CJEU has generally accepted the admissibility of the collection of emails as a means of evidence, provided that the principles of legality, proportionality, necessity, and respect for fundamental rights (Articles 7 and 8 of the Charter of Fundamental Rights) are observed. The decisive criterion is the relevance of the material to the investigation being carried out, rather than the form or medium of the communication concerned.[47] In the specific case of dawn raids – whether conducted with or without prior judicial authorization – which allow the Commission to seize emails directly from the servers or computers of the undertakings under investigation without prior notice, such practice has been regarded as lawful, provided that it is duly accompanied by procedural safeguards, such as the

45 Di Nuzzo, 2022: 139-143.

46 Andersson, 2024; Di Nuzzo, 2022:119-149.

47 De Bellis, 2021: 416-440. Although it does not concern dawn raids, the CJEU's judgment in case C-470/21, *La Quadrature du Net*, EU:C:2024:370, addresses precisely the issue of balancing privacy and security in the context of data retention. In that judgment, the Court reiterated that such measures must be appropriate, strictly proportionate, and accompanied by effective safeguards—principles that are applicable to any interference with electronic communications.

right to be assisted by legal counsel and the availability of effective ex post judicial review.[48]

By again resorting to a brief exercise in comparative law, the United States legal system imposes far more stringent constitutional constraints on the seizure of emails, relying on the Fourth Amendment to the Constitution, which protects individuals against unreasonable searches and seizures. U.S. case law has evolved so as to include emails and other electronic communications within the concept of "persons, houses, papers, and effects", thereby placing them under constitutional protection. This approach is particularly evident in the landmark decision of the United States Court of Appeals for the Sixth Circuit in *United States v. Warshak*[49], which held that individuals enjoy a reasonable expectation of privacy in respect of their emails stored on third-party servers. Consequently, the Government lacks the authority to access such emails without a duly justified judicial warrant. The Court considered that constitutional protection extends to digital correspondence by analogy with physical letters.[50] Mere public interest or administrative convenience in obtaining emails or electronic communications does not justify the infringement of a constitutional guarantee. This stands in contrast to the European regime, which is more flexible and permits limitations on fundamental rights, provided that such limitations are laid down by law and are proportionate to the objectives pursued or the results sought.[51]

In practice, the divergence between the European and the US legal frameworks entails significant implications for cross-border investigations and for cooperation between authorities. Requests addressed by European authorities to technology companies established in the United States consistently encounter resistance based on the alleged unconstitutionality of their execution in the absence of a warrant issued by a competent judicial authority. This situation raises concerns both as regards the effectiveness of investigations and the normative sovereignty of the legal systems involved. It should be emphasized that undertakings with a presence in both jurisdictions, and

48 Articles 20 and 21 of Regulation (EC) n.º 1/2003. European Commission, 2024. De Bellis, 2021: 417-418.

49 Case n.º 10-3776, judgment of December 14, 2010 – *United States c. Warshak*, United States Court of Appeal for the Sixth Circuit.

50 Weinberg & Goldstein, 2014: 38.

51 In this regard, reference should be made to the cases before the CJEU C-293/12, *Digital Rights Ireland*, EU:C:2014:238, and C-594/12, *Seitlinger and Others*, joined to the former case; as well as to the cases before the ECtHR, *Vinci Construction and Others v. France* and *Delta Pekárny A.S. v. the Czech Republic*. Also, De Bellis, 2021: 424-428.

therefore subject to both EU law and US law, may be exposed to sanctions to the extent that compliance with a request under one legal order entails non-compliance with the rules of the other. This very scenario recently led to the conclusion of the EU-US agreement on electronic evidence (e-evidence) in criminal proceedings, an instrument whose scope of application may in the future be extended to other areas in which access to electronic communications is likewise required for the purposes of administrative proceedings.[52]

The seizure of emails as a means of evidence is illustrative of the growing complexity at the intersection of public investigation, fundamental rights, and digital technology. The divergent approaches to this issue across jurisdictions reflect profound differences in the protection of privacy and in the definition of the legitimate limits of public investigative powers. In the context of the globalization of digital communications, it has therefore become imperative to identify coordinated legal solutions that do not compromise the effectiveness of law enforcement.

4.2. Dawn raids and safeguards in the context of digital evidence collection

Even if it is not possible, at this stage, to undertake an exhaustive analysis, given the nature and scope of this study, it is nevertheless important to mention – due to its relevance – the contribution of the Opinion of Advocate General Laila Medina ("AG Medina") regarding the legality of the seizure of corporate email during an inspection carried out by a national competition authority on the basis of EU law, in Joined Cases C-258/23, C-259/23 and C-260/23[53], delivered on 20 June 2024. Although the case at issue did not arise under the Foreign Subsidies Regulation, AG Medina's Opinion is of cross-cutting legal significance, insofar as it addresses structural issues of compatibility between administrative investigative powers and the

52 Regulation (EU) n.º 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings. According to the information provided by the Commission, the new rules entered into force on 17 August 2023. However, Directive (EU) n.º 2023/1544 of the European Parliament and of the Council of 12 July 2023, which lays down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purposes of electronic evidence in criminal proceedings, entered into force earlier than Regulation (EU) n.º 2023/1543. The latter, although formally in force, will only produce legal effects from August 2026.

53 According to §19 of the Opinion of Advocate General Laila Medina delivered on 20 June 2024, "*by decision of the President of the Court of Justice, Cases C-258/23, C-259/23 and C-260/23 were joined for the purposes of the written and oral procedures, as well as for the judgment.*"

fundamental rights of the parties concerned, particularly as regards the collection of digital evidence.

The European Commission's investigative mechanisms, in particular dawn raids, require a rigorous assessment of their compatibility with the fundamental rights recognized by the Union in the Charter of Fundamental Rights, especially the right to respect for private and family life (Article 7), the protection of personal data (Article 8), and the right to an effective remedy (Article 47). Ensuring such compatibility constitutes one of the most delicate issues in the specific context of the application of Article 14 of the FSR. Any inspection, even where carried out within the territory of the Member States and based on powers conferred by a regulation – which, by its nature, is directly applicable – inevitably entails a certain degree of interference with protected spheres of corporate autonomy, private life, and the integrity of communications. As such, inspections represent moments of friction between the fundamental values of effective European administrative action and the safeguarding of fundamental rights.

Advocate General Medina's position (2024), which does not call into question the legitimacy of inspections per se – acknowledging the Commission's essential role in the control of anticompetitive conduct and, by analogy, of practices distorting the internal market through foreign subsidies – proceeds from recognition of the Charter of Fundamental Rights as a binding normative instrument that frames and constrains inspections. No matter how justified such inspections may be from the perspective of pursuing public policy objectives, they must always comply with the foundational principles of EU law.[54] Indeed, Advocate General Medina (2024) takes the view that investigative powers must always be exercised within a framework of robust procedural safeguards, failing which they risk being disproportionate and in breach of the fundamental rights enshrined in the Charter. Her Opinion, which addresses the three preliminary questions referred, is of particular relevance to the present study, notably insofar as it acknowledges that professional electronic communications – specifically emails exchanged by employees of an undertaking under investigation – are also protected by the Charter of Fundamental Rights. This interpretation departs from the view, still present in certain legal systems, that the professional nature of a communication automatically excludes it from protection, as was the case, for example, under

54 Sousa Mendes, 2024: 9-51.

the practice of the Portuguese Competition Authority (AdC).[55] In Advocate General Medina's view (2024), the existence of protected privacy is not determined by the nature of the device or the email account, but rather by the content of the communication itself and the (reasonable) expectation of confidentiality on the part of the sender. For that reason, she considers that the seizure of business emails by the Commission, where it is unfiltered and not based on prior screening mechanisms, constitutes a significant interference with fundamental rights, which requires specific and concrete justification.

It should be noted, however, that this position does not conflict with the view that national legal systems, in the context of the application of European regulations, may impose enhanced procedural requirements – such as prior judicial authorization for the seizure of certain categories of digital information – provided that such requirements do not undermine the substantive effectiveness of EU action. That is to say, when applying EU law, which includes the Charter of Fundamental Rights, Member States may afford a higher level of protection, so long as they respect the primacy of EU law.[56]

Another essential aspect of Advocate General Medina's conclusions (2024) is the defense of effective *ex post* judicial review.[57] Even where no prior authorization exists, it must always be ensured that a national or European court is able to assess, in a substantive manner, the legality of the seizure, the relevance of the data, and the proportionality of the intervention. This principle is particularly significant where the documents concerned involve third parties, contain high-risk personal data, or are protected by professional secrecy.

The position adopted by Advocate General Medina (2024) forms part of a line of case law which, while not disregarding the requirements of the Union's institutional effectiveness, nevertheless emphasizes that no institutional objective may be pursued at the expense of fundamental rights. Inspections carried out either by national authorities or by the Commission are not an exception to this principle. On the contrary, inspections constitute one of the areas in which the resilience of the Union's legal model is tested against contemporary challenges relating to data protection, the digitalization of

55 Sousa Mendes, 2024: 9-51.

56 In this regard, reference should be made to Article 53 of the Charter of Fundamental Rights, which provides that "*nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized [...] by the constitutions of the Member States (...)*". Also, Lenaerts, 2012: 375-403.

57 In this regard, §42 of the Opinion of Advocate General Laila Medina delivered on June 20, 2024.

evidence, cross-border cooperation, and the procedural safeguards of the entities concerned. The strength of her contribution in the field of inspections and the collection of evidence – particularly electronic correspondence (emails) – is capable of being transposed to the logic governing inspections carried out under Article 14 of the FSR. Such inspections must therefore be conceived, organized, and executed in accordance with principles of restraint, transparency, and adequate justification. The Commission must carry out its functions in strict compliance with formal and substantive legality, as defined by case law and legal doctrine, since the protection of fundamental rights in these contexts constitutes a genuine condition of legitimacy of the Commission's action, as well as of that of national authorities. The true regulatory power of the European Union derives from the fact that it is bound by a grammar of legality, which requires it to justify itself in light of the rights it seeks to respect, even when acting to protect them. It is this commitment – between regulatory effectiveness and legal rigor – that renders the European model not only functional, but normatively exemplary.

4.3. Article 16 of the FSR: an expression of the European Union's regulatory power

In the context of the seizure of data and evidence in foreign subsidies investigation proceedings, in particular under Articles 14 and 15 of the FSR, it is necessary to devote some consideration to Article 16, which constitutes one of the most recent – and illustrative – examples of the strengthening of the European Union's regulatory power.

That provision, which addresses the consequences of non-cooperation by the undertakings concerned and thus reflects the Union's approach to strategic autonomy in the legal and economic sphere, broadly sets out the consequences of refusal, obstruction, or the provision of incomplete information requested by the Commission in the course of an investigation. Accordingly, Article 16 provides that the Commission may adopt a decision on the basis of the facts available, applying the methodology commonly referred to as the best information available. This methodology ensures that a failure by the undertaking to provide information or data does not impede the continuation of the procedure, expressly authorizing the Commission to take decisions on the basis of partial evidence, indirect indicia, or even (reasoned) estimates. This approach closely parallels that already applied in EU competition law – namely under Articles 18 (requests for information), 20 (the Commission's powers of inspection), and 21 (inspections of other premises)

of Regulation (EC) n.º 1/2003 – as well as the practices of the World Trade Organization (WTO) in the context of anti-dumping proceedings.[58]

In broad terms, Article 16 of the FSR represents a safeguard mechanism for the administrative effectiveness of procedures, preventing the strategic or omissive conduct of the undertaking or undertakings concerned from undermining the objectives of the Regulation. It therefore embodies a balance between cooperation and authority by establishing clear consequences in the event of non-cooperation and by conveying an unequivocal message: participation in the internal market entails regulatory obligations, even for external actors or for undertakings with external links to the Union.[59] This explains the reinforcement brought about by Article 16 of the FSR in terms of what has come to be described as the EU's "regulatory power" (or the Brussels effect), pursuant to which the Union exports its normative standards and, consequently, extends its authority beyond its borders through the attractiveness of its market and the sophistication of its rules. That power is operationalized by conditioning the behaviour of undertakings operating in – or seeking to operate in – the internal market through the possibility of adverse decisions in cases of non-cooperation.[60] Strictly speaking, the possibility for the Commission to decide solely on the basis of incomplete information operates as an incentive to voluntary cooperation, by transforming what would otherwise be a reputational and economic risk associated with non-compliance into a regulatory factor in its own right. Nevertheless, the application of Article 16 is not exempt from oversight, since the Commission must rely on reasonable and objectively verifiable information, notwithstanding the absence of cooperation or the provision of information. Decisions adopted on the basis of the facts available remain subject to judicial review by the CJEU, thereby ensuring a balance between administrative effectiveness and the rights of defense and effective judicial protection.[61]

It should further be added, in light of the foregoing, that decisions based on the facts available cannot be arbitrary or punitive in nature, since the mechanism laid down in Article 16 is, by its very nature, a subsidiary safeguard designed to preserve the integrity of the investigative process, rather

58 Paragraph 8 of Article 6and Annex II "*Best Information Available in Terms of Paragraph 8 of Article 6*" of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

59 Cunha Rodrigues, 2024; Cunha Rodrigues, 2021: 197-227; European Commission, 2020a.

60 Bradford, 2019: 25-66; Cunha Rodrigues, 2024: 109-116; European Commission, 2020b.

61 De Bellis, 2021: 416-440. Andersson, 2024.

than a mere instrument of retaliation. As such, it must comply with the principles of proportionality, transparency, and adequate reasoning governing the Commission's decision. In this context, the mechanism provided for in Article 16 of the Foreign Subsidies Regulation is characterized both as a technical instrument and as a symbol of the Union's legal authority and global regulatory power, influencing conduct while simultaneously protecting its strategic interests.

At this juncture, and precisely because it is closely related to issues of non-cooperation, it is necessary to address – albeit briefly – the right against (self-)incrimination of third States or of undertakings subject to investigation by the Commission. The principle of the privilege against self-incrimination precludes an undertaking from being compelled to provide information that would directly or indirectly reveal the commission of an infringement by itself. Accordingly, in the full exercise of its investigative powers, the Commission must strike a balance between the public interest in establishing the truth and its obligation to respect the fundamental rights of the entities concerned, in particular their freedom not to actively contribute to their own liability.[62] Similarly, respect for the privilege against self-incrimination – enshrined in Article 48 of the Charter of Fundamental Rights – constitutes an unavoidable requirement in this context, insofar as the Commission lacks the legitimacy to require an undertaking or a State to produce evidence against itself, especially where the disclosure of data may entail a tacit confession or be used to sanction the cooperating entity.[63] The admissibility of evidence is, moreover, always contingent upon the manner in which such cooperation was obtained. This issue assumes particular significance in the context of cross-border relations, where access to data frequently depends on technical or organizational decisions taken by third parties.

The Commission investigates, sanctions, and acts exclusively vis-à-vis the economic operator that benefits from the subsidy and which, by introducing it into the European economic area, contributes to distorting competition. The third State remains, from a legal standpoint, a neutral entity, even where it is the source of the subsidy. This normative choice is not merely a matter of diplomatic caution, but a requirement inherent in EU law itself, which does

62 Directive (EU) n.º 2016/343 of the European Parliament and the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. Van Cleynenbreugel, 2024: 979-997; Veenbrink, 2015: 119-142.

63 Van Cleynenbreugel, 2024: 979-997; Veenbrink, 2015: 119-142. In the specific context of dawn raid, Anderson, 2024.

not confer on its institutions any competence to adjudicate upon, sanction, or characterize as unlawful a sovereign act of a foreign State. Moreover, that choice is also dictated by public international law, which expressly prohibits international legal subjects – such as the Union – from engaging in any form of unilateral interference in the sovereign decisions of other States. The sovereign equality of States and the principle of non-intervention require the Union to calibrate its regulatory powers so as not to exceed the functional limits of its external jurisdiction.

An examination of the very architecture of the Regulation makes it clear that European enforcement is not directed through or against the third State, but rather against the undertaking benefiting from the subsidy. Illustrative of this is the fact that Article 14, in authorizing inspections within the territory of the Union, confers upon the Commission only the power to collect information from undertakings established therein; the Commission cannot, in the context of its investigations, conclude that any unlawful conduct has been committed by the State granting the subsidy. Accordingly, the investigation may relate solely to the conduct of the undertaking and its effects, and never to the motives or intentions of the State granting the subsidy. The same reading applies to Article 15, under which the Commission may request voluntary cooperation from an undertaking located outside the Union, without being endowed, for that purpose, with any coercive mechanism.

The issue becomes particularly acute where non-cooperation does not stem from the undertaking's own will or express refusal, but rather from the third State's refusal to provide relevant information, or from a legal prohibition imposed on the economic operator. In such cases, a significant legal dilemma arises for the undertaking concerned, namely whether to cooperate with the Commission and thereby infringe the law of its State of origin, or to shield itself from domestic criminal liability and risk European administrative sanctions. It should be noted that the FSR does not directly resolve this conflict. However, Article 16 allows the Commission to take decisions even in the absence of complete information, in an effort to ensure the functionality of the system, albeit at the cost of effectively transferring the risk to the undertaking, even where it does not control the means necessary to ensure the required transparency.

Notwithstanding this apparent severity, the FSR does not provide for strict or automatic liability, and undertakings retain procedural guarantees at all times, including rights of defense, the submission of evidence, and the opportunity to demonstrate that the subsidy does not produce distortive effects on

the internal market. This is because the Commission is bound by the principles of proportionality and reasonableness and must consider the specific context of each case, including legal obstacles to full cooperation. Non-cooperation does not automatically give rise to an irrebuttable presumption but rather operates as a procedural basis for the exercise of the Commission's discretionary powers, which remain subject to judicial review.

5. THE NUCTECH CASE

The Commission carried out its first inspection at the premises of two subsidiaries, located in Poland and the Netherlands, of a company established in a third State, pursuant to the powers conferred by Article 14 of the Foreign Subsidies Regulation. In July 2023, the European subsidiaries of Nuctech Company Limited – a Chinese undertaking supplying security and detection equipment (such as scanners for airports and ports) and regarded as a global leader in the sector—were subjected to dawn raids on the basis of alleged State subsidies granted by the People's Republic of China, capable of giving rise to distortive effects on competition within the Union's internal market.[64] The fact that the investigation concerned a Chinese State-owned enterprise operating in "sensitive" sectors – and that it was conducted under Article 14 of the FSR – heightens the political and strategic dimension not only of the investigation itself but, above all, of the scope of the Regulation, bringing into sharp focus its growing role as an instrument of economic defense.

The investigation conducted by the Commission in this case may be understood from two perspectives: first, as an inaugural test of the Regulation's practical effectiveness; and second, as a clear political signal of the Union's willingness to fully exercise its regulatory competences. Both perspectives share a common underlying rationale, namely the protection of the European internal market against forms of economic interference liable to affect not only competition, but also areas of strategic interest.

Following the inspection decision adopted by the Commission, Nuctech and its subsidiaries brought an action and applied for interim measures pursuant to Articles 278 and 279 TFEU and Articles 156 and 157 of the Rules of Procedure of the GC, giving rise to case T-284/24 R, opposing *Nuctech Warsaw Company Limited sp. z o.o.* and *Nuctech Netherlands B.V. to*

64 Camesasca & Sideri, 2025: 33-34.

the Commission.[65] In the context of those proceedings, the applicants sought the immediate suspension of the enforcement of the Commission's decision, with a view to preventing irreparable harm and safeguarding their procedural rights.[66] he main arguments relied upon may be grouped into three categories: (i) an alleged infringement of public international law, inasmuch as the Commission was said to be exercising, indirectly, coercive powers outside its territorial jurisdiction without any formal request for cooperation addressed to the State concerned (China), contrary to the principle of State sovereignty; (ii) the absence of effective access by the European subsidiaries to the requested data, given that such data were under the control of the Chinese parent company and stored on servers located in China; and (iii) the existence of Chinese criminal legislation prohibiting the unauthorized transfer of data to foreign entities, thereby exposing the applicants to the risk of criminal and administrative sanctions in their State of origin.[67]

Notwithstanding the arguments put forward, they were not upheld by the General Court, the President having found that, in the circumstances of the case, the Commission's interest prevailed over that of the applicants, since the effectiveness of investigations could be jeopardized if undertakings were permitted to store data outside the Union—particularly data passing through the email accounts used by company employees of undertakings controlled by Member States and used to conduct their day-to-day activities within the territory of the European Union. Accordingly, the applicants' request for the grant of interim measures was dismissed.[68]

The order of the President of the General Court, in the legal reasoning section following a brief summary of the facts, is structured into four parts: (i) general considerations (paras 13-17); (ii) the condition relating to the establishment of a prima facie case (paras 18-49); (iii) the condition relating to urgency (paras 50-75); and, finally, (iv) the balancing of interests (paras 76-89).[69] In particular, the Court held that there was no manifest breach of public international law, since the Commission, in acting vis-à-vis entities legally established within the territory of the Union, was acting within

65 Case T-284/24 R, *Nuctech Warsaw Company Limited sp. z o.o and Nuctech Netherlands BV*, EU:T:2024:564.

66 Decision in case T-284/24 R, *Nuctech Warsaw Company Limited and InsTech Netherlands*, EU:C:2025:205.

67 Idem.

68 Decision in case T-284/24 R, *Nuctech Warsaw Company Limited and InsTech Netherlands*, EU:C:2025:205, §86-87.

69 Case T-284/24 R, *Nuctech Warsaw Company Limited sp. z o.o and Nuctech Netherlands BV*, EU:T:2024:564.

its jurisdiction. The fact that the documents at issue were stored on servers located in China was not sufficient to exclude the Commission's competence, given that the relevant criterion is the accessibility of the information by the inspected entity, rather than its physical location. The principle of territoriality is therefore not regarded as absolute and may be relativized where the effects of the conduct occur within the territory of the Union. In this regard, the Court relied on the effects doctrine, already established in EU case law in the fields of competition and data protection, according to which the Union may apply its rules to extraterritorial situations whenever the effects are substantial, immediate, and foreseeable on the internal market.[70]

Considering that the appellants failed to provide sufficient proof of the inaccessibility of the data, the Court observed that the undertakings neither explained nor substantiated that they lacked access to the information stored on servers located in China. This amounts to a reversal of the burden of proof, requiring the undertakings to demonstrate, in a detailed and technical manner, the impossibility of accessing the requested documents.

Although it is a decision of a provisional nature, with merely interlocutory effect, the order of the President of the General Court contains elements with potential structural normative impact, insofar as it: (i) validates, albeit indirectly, the application of the effects doctrine in the context of the FSR, reinforcing the notion that the physical location of data is not, in itself, decisive, provided that a functional link exists with activity on the internal market; (ii) strengthens the Commission's inspection powers by consolidating the interpretation that extraterritorial data may be required where they are under the control of a European subsidiary, thereby substantially expanding the practical scope of Article 14 of the Regulation; (iii) weakens the effectiveness of blocking statutes and foreign legal regimes by requiring an almost insurmountable demonstration of an actual risk of sanctions—an approach that may be subject to criticism insofar as it arguably downplays conflicts of laws and the chilling effects of foreign criminal legislation; and (iv) creates a significant legal paradox, in that, had the Commission sought to obtain the same data directly in China, it would have been required to resort to formal channels of international cooperation, respecting the sovereignty of the third State, whereas by accessing the data through a European subsidiary it circumvents those mechanisms and, in practice, exercises an indirect form of extraterritorial jurisdiction.

70 Behrens, 2021:9-10; 18-25.

Dissatisfied with the order of the President of the General Court, Nuctech Warsaw Company Limited sp. z o.o. and InsTech Netherlands B.V., formerly Nuctech Netherlands B.V., brought an appeal against that order, thereby giving rise to Case C-720/24 P(R).[71] By judgment delivered on 21 March 2025, the Vice-President of the CJEU dismissed the appeal brought against the decision of the President of the General Court, thereby confirming the decision rejecting the application for interim measures lodged by the undertakings concerned. In their appeal, the applicants relied on three main pleas: (i) the alleged infringement of public international law, arguing that the Commission exercised coercive powers outside its territorial jurisdiction without the prior consent of the Chinese State, in clear violation of the principle of State sovereignty; (ii) the absence of effective control over the requested data, which were stored on servers belonging to the parent company based in China; and (iii) the risk of administrative and criminal sanctions under Chinese law in the event that the data were transmitted to the Union authorities without the requisite State authorization.

The CJEU rejected the arguments put forward, in line with those raised in the first appeal, finding that the applicants had failed to demonstrate, to the required standard of proof – having regard to settled case law, such as *Commission v Atlantic Container Line and Others*[72] and *Antonissen v Council and Commission*[73] – the existence of serious and irreparable harm capable of justifying the adoption of interim measures. The Vice-President of the CJEU held that the alleged pecuniary sanctions did not constitute irreparable harm, although they could do so in duly substantiated exceptional circumstances. Accordingly, the Court found that no conclusive evidence had been provided of a concrete risk of criminal sanctions, nor of an actual refusal by the Chinese authorities to authorize the disclosure of the electronic correspondence at issue. In sum, the Court confirmed the absence of urgency, concluded that the appeal was unfounded, and upheld the validity of the Commission's decision and its subsequent requirements.

The significance of this case – which assumes particular relevance in the context of the application of Article 14 of the FSR, as it illustrates both the legal and practical challenges associated with the collection of evidence located in third countries – has been further reinforced by developments

71 Decision in case T-284/24 R, *Nuctech Warsaw Company Limited e InsTech Netherlands*, EU:C:2025:205.

72 C-149/95 P(R), *Atlantic Container Line AB and others*, EU:C:1995:257.

73 C-393/96 P(R), *Antonissen*, EU:C:1997:42.

occurring after the conclusion of the interim-measures litigation. The European Commission decided to move its *ex officio* investigation to the in-depth phase under the FSR, having publicly announced, on December 11, 2025, the opening of the second phase of the procedure, thereby making the first *ex officio* FSR investigation conducted by DG COMP to reach that stage, and the third overall FSR case to proceed beyond the preliminary review. This procedural escalation must be read in continuity with the judicial decisions rendered in 2024 and 2025, under which Nuctech and its European subsidiaries were left with no realistic alternative but to comply with the Commission's investigative measures, under the possibility of fines or periodic penalty payments. The judicial validation of the Commission's inspection powers under Article 14 of the FSR removed the principal procedural obstacle to the continuation of the administrative investigation, enabling the Commission to gather the information it deemed necessary to assess the existence and potential distortive effects of alleged foreign subsidies.

From the limited information available at the time of writing, it appears that the Commission's preliminary review yielded sufficient indications of a distortive foreign subsidy to justify the opening of the in-depth investigation. As in previous Phase II decisions under the FSR – such as those adopted in *e&/PPF Telecom Group* and *ADNOC/Covestro* – the formal decision to open the second phase is expected to be published in the Official Journal and to shed light on the Commission's initial assessment of both the nature of the subsidy and its effects on competition within the internal market. While the substantive outcome of the investigation remains uncertain, the procedural milestone itself confirms that Article 14 inspections may serve as an effective gateway to full-scale enforcement action.

The opening of the in-depth investigation also appears to have coincided with a shift in Nuctech's strategic posture. Following the unsuccessful judicial challenge, the undertaking adopted a more conciliatory tone, publicly expressing its willingness to cooperate with the Commission. This change of approach stands in contrast to the initial litigation strategy, which had centered on arguments drawn from public international law, conflicts of jurisdiction, and exposure to criminal liability under Chinese law. By contrast, recent FSR practice suggests that cooperation and the possible offering of commitments may represent a more expedient path towards a favorable resolution of proceedings, as illustrated by earlier cases in which the undertakings concerned were ultimately able to complete their transactions.

From a systemic perspective, these developments confirm that the Nuctech case is not merely a procedural skirmish over interim measures, but a test case illustrating the full enforcement trajectory of the FSR: from intrusive inspections under Article 14, through judicial validation of the Commission's investigative powers, to the opening of an in-depth substantive investigation. They also lend empirical support to the view that the Regulation equips the Commission with a means of examining foreign subsidy practices even in the absence of cooperation by the subsidizing State, thereby functioning, at least in part, as an alternative mechanism to the limited transparency offered by WTO subsidy disciplines

While it remains to be seen whether the Commission will ultimately adopt redressive measures, accept commitments, or close the proceedings without action, the procedural consolidation already achieved has important implications. The Nuctech case demonstrates that foreign undertakings active on the internal market may find it increasingly difficult to resist FSR enforcement through jurisdictional or sovereignty-based arguments alone. More broadly, it confirms the emergence of a model of functional extraterritoriality in EU economic law, in which judicially endorsed investigative powers enable the Commission to project its regulatory authority beyond the Union's physical borders, subject – at least in principle – to the constraints imposed by public international law

The final decision in the Nuctech investigation, and any subsequent proceedings, will therefore be decisive in determining whether this model can be sustained without exacerbating conflicts of laws and geopolitical tensions. For the time being, however, the case stands as a landmark in the early application of the FSR, illustrating both its enforcement potential and the legal and political challenges inherent in its use.

6. FINAL REMARKS

The analysis carried out throughout the present study leads to the conclusion that the Foreign Subsidies Regulation constitutes a response to the imbalances introduced by foreign subsidies granted by third countries with an impact on the Union's internal market. By establishing a normative framework for the control of such practices – which were not previously covered by any other legal regime – the Union strengthens its ability to protect competition, an element essential to the proper functioning of its internal market and to the integrity of its economic area.

As noted, although Article 14 confers broad inspection powers within the territory of the Union, its application encounters resistance whenever relevant data are physically located outside the Union's jurisdiction, as occurs when such data are stored on servers located in third countries.

Within this framework, the Nuctech case assumes particular relevance. Although Article 14 of the Regulation confers broad inspection powers within the territory of the Union, its application encounters practical and legal resistance when relevant data are physically located outside the Union, notably on servers situated in third countries. As the first inspection carried out under Article 14, the case is paradigmatic of the tensions generated by an enforcement model based on the logic of effects rather than strict territoriality. In this respect, it clarifies – at least at an interim stage – the position of the CJEU as to the scope of the Commission's investigative powers.

The case law of the CJEU has consistently held that the exercise of such powers must remain subject to the rules and principles of international law, including State sovereignty, non-interference, and sincere cooperation between legal orders. At the same time, the Court has not excluded – and indeed appears to have validated – the possibility for the Commission to access information that, although physically located outside the Union, is considered accessible from within its territory, provided that the limits imposed by international law are respected. The Nuctech case thus illustrates the complexity of transnational economic governance, where the legitimacy and sustainability of Union enforcement action depend on a careful balancing of proportionality, reasonableness in evidentiary requirements, international comity, and mutual respect between legal systems.

Although it may be premature to draw definitive conclusions, several implications may nonetheless be inferred from the Court's reasoning. First, it suggests an evolving understanding of the territorial scope of EU law, one that is capable of extending beyond the Union's physical borders and thereby consolidating the effectiveness of the Commission's regulatory powers in the fields of competition and economic control. At the same time, this approach inevitably raises concerns relating to sovereignty and conflicts of laws. While digital accessibility may serve as a jurisdictional connecting factor, the limits of its exercise must be clearly defined, particularly in light of the constraints imposed by international law. In this sense, the case signals the emergence of a legal paradigm in which functional extraterritoriality becomes a legitimate – albeit carefully circumscribed – instrument of EU law enforcement.

This paradigm is further reflected in the investigative powers conferred by the Regulation, notably under Articles 14 and 15, which embody a deliberate choice to project the Union's regulatory authority beyond its borders. These provisions mark a turning point in the Union's positioning as a global regulatory actor alongside other major powers, such as the United States and China. However, the possibility of accessing data and evidence located outside the Union, even where subject to the cooperation of the undertakings concerned, raises complex legal issues requiring a delicate balance between effective enforcement and respect for international law, personal data protection, and the fundamental rights enshrined in the Charter of Fundamental Rights.

Article 16 of the Regulation, in turn, also emerges as an expression of the Union's regulatory power, particularly in scenarios of non-cooperation, granting the Union the legitimacy to take decisions on the basis of the best information available. The practical relevance of this provision becomes apparent in situations in which the collection of evidence is constrained by legal or geopolitical obstacles, as was evident in the Nuctech case. That case revealed not only the technical and legal complexity of the new investigative model, but in particular the true extent of the powers conferred on the Commission by Article 14 and the operational limits of their application in situations of conflict of laws – namely, Chinese legislation on data transfers and the protection of State secrets.

While the Foreign Subsidies Regulation fills a legal gap, it also introduces a new stage in the Union's enforcement approach, grounded in a more assertive and integrated logic within the global legal architecture. However, its practical application requires a careful balance between authority and legitimacy, investigative effectiveness and respect for foreign norms and jurisdictions. The consolidation of this model will depend on the Union's ability to assert its regulatory power without relinquishing the principles that underpin its legal order. The recent adoption of the 2026 Guidelines further confirms that the FSR remains a developing and adaptive instrument, the contours of which continue to be progressively shaped through practice and interpretation.

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