Kluwer Competition Law Blog

Just How Far Could We and Should We Stretch the Facebook V Commission Court Order?

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The Court order of 29 October 2020 struck by the President of the General Court in a dispute between Facebook and the European Commission is probably the first time in a while where the essence of a case against one of the Big Tech firms lies not in what those companies are (or are not) doing. Yet that does not make it any less interesting, quite the opposite. The conflict and subsequent analysis of the President laid bare a remarkable issue. Well, the issue is not remarkable, the fact that such an issue arises and is not yet foreseen by law is.

The Commission made a request for information by decision on 4 May 2020. This RFI entailed almost 1 million, yes million, documents. Facebook responded by providing most of those documents in time. However, the faith of some 117.000 documents was contested. These documents could all be categorized as either strictly personal information of employees or strictly personal information of the company itself.

Facebook found the RFI, which entailed all documents that resulted from very general search terms, too broad and alleged that the remaining documents were irrelevant for the investigation. The Commission on the other side wanted to check the relevance (or lack thereof) of those documents itself.

The position of the European Commission makes sense. It cannot be up to an undertaking itself to decide whether a document is relevant for an investigation. The President confirmed that it is for the Commission to decide whether the information it requests is necessary. Though the legitimate concerns of Facebook were also recognized by the Court. The documents requested contained a lot of very sensitive and personal information. For which the court recognized that the unfettered sharing of that information among the people working on the case at the Commission could be enough to seriously and irreparably harm the people involved.

The Court had to find the correct balance between protection of the right to privacy of certain individuals by limiting the enlargement of the circle of persons with knowledge of sensitive personal data on the one hand and the protection of the public interest in preserving the effectiveness of EU competition rules on the other hand.

In trying to find the correct balance between these legitimate interests the President

found it problematic that there was no methodology foreseen to check whether a document containing sensitive personal information requested as part of an RFI is relevant for an investigation. The President drew a parallel between the RFI at issue here and inspections at a companies' premises where adequate procedural guarantees are put in place to preserve that certain documents are not included in the file.

The President's analogy between these two types of investigatory measures is interesting but also makes a lot of sense. As an RFI using general search terms boils down to exactly what the Commission would be doing itself during a dawn raid.

That is why the president set up an ad hoc procedure for the examination of documents likely containing sensitive personal information. It would be up to Facebook to identify these documents. They would then subsequently be put into a separate virtual data room. Access to that data room would be limited to as little people of the Commission as feasible, being the people responsible for the investigation, and they would be accompanied in person or virtually by Facebook's lawyers. It would then be up to those investigators to examine the relevance, with the lawyers having the possibility to comment. In case of continuous disagreement, the documents will not be added to the case file and it will eventually be up to DG Comp's Director for Information, Communication and Media to resolve the matter.

What makes this decision interesting is that it could be the first decision in a while taken against a Big tech firm that could have an impact on how firms with far fewer resources and power go about their business. Most decisions, allegations and judgments against GAFAM have focussed on their remarkable position, making the impact on conduct of other firms rather limited. This court order, however, raises an issue that could have a much broader impact. The question I would therefore like to focus on is just how wide this impact could be.

Scenario 1: It remains an ad hoc procedure

The President's powers were, of course, limited to deciding on whether to allow interim measures in this particular instance. It could thus very well be that this court order won't have any wider impact at all, making me writing this and you reading this rather redundant. Though it would certainly be the least desirable scenario, as the issue at stake will undoubtedly arise again in the future.

Scenario 2(a and b): This procedure becomes the norm for (all?) RFI's

It would be much more beneficial to legal certainty if this procedure were to become the default method for dealing with confidentiality issues originating out of RFI's. But a further question arises from the wording of the President. He emphasized that the RFI at issue was of a wide-ranging nature using general search terms and thus being very similar to an inspection at the premises of a company. Should we, therefore, conclude that only when dealing with such broad RFI's this method would be applicable?

This would mean that when dealing with more specified RFI's there would be no comparable appropriate guarantees. Such an outcome would not be desirable, as the issue would remain. Certain documents, even in case of a very specified RFI, may turn out to be irrelevant, and when they contain sensitive personal information, the same level of protection is required. Apart from the desirability, there would also be a problem of feasibility. As it would be rather difficult to categorize every RFI as either wide-ranging or more specified, leading to a lot of conflicts and discussions. This was a problem already flagged in a previous post (see here). It would thus be better for all parties involved to foresee a procedure (as the one ordered by the court in this instance) as standard when dealing with any kind of request for information.

Scenario 3: The court order has an impact beyond RFI's

The court order shows a willingness of the EU's top courts of coming up with practical solutions to confidentiality issues. The impact could thus prove to be even wider than RFI's in antitrust probes.

Over the years numerous confidentiality issues have arisen, for example in SEP licencing negotiations. Where SEP-holders have a legitimate interest in keeping previously negotiated licensing agreements confidential, as those contracts could entail a lot of sensitive business information. On the other hand, there is a broader public interest in knowing these terms to establish what fair, reasonable and non-discriminatory licensing terms are.

SEP disputes are most often litigated before either the English or the German courts, with the former showing more willingness to come to effective solutions honouring both parties' concerns. German courts have struggled with the issue, although they are improving. Confidentiality rings have become commonplace, though the big issue is whether it should be possible to limit access to external counsel only, the so-called 'external-eyes only' confidentiality ring.

The big debate in SEP-licensing nowadays is about who to license to, and it will be up to the Court of Justice to decide on the matter, following the recent referral from the Regional Court of Düsseldorf in the longstanding conflict between Nokia and Daimler. But when this dust settles the focus will inevitably shift again to on what terms SEP's should be licensed.

It is my understanding that in the Nokia v Daimler dispute the Düsseldorf court has asked Nokia to hand over previously signed licensing agreements with other carmakers, using a confidentiality ring. But in general, the possibility of limiting access to external eyes only has remained controversial in Germany. As it would encroach a party's right to a fair trial. In trying to resolve this issue it could be possible that national courts perceive the court order of the President as a confirmation of the possibility of coming up with practical and fitting solutions to confidentiality issues, appropriately taking into account both parties' interests. German courts could subsequently follow their English counterparts and recognize the possibility of external eyes only confidentiality rings, albeit in exceptional

circumstances. (For completeness external eyes only has also been recognized in France for disclosure of comparable licences in *Core Wireless V LG.)*

So, it will be interesting to see how wide the impact of the court order will be moving forward. There are many conceivable scenarios, ranging from very limited to quite broad and everything in between. In any case, it shows a willingness of the court to get practical and somewhat creative.

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