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Kobre & Kim's Antitrust Contacts

Steven W. Perlstein
New York
steven.perlstein@kobrekim.com

Benjamin Sirota
New York
benjamin.sirota@kobrekim.com

5 Questions Raised By the DOJ's Partnership With Global Antitrust Enforcers

The U.S. government's top federal antitrust enforcer, Makan Delrahim, recently announced that the Department of Justice and other competition enforcement agencies around the globe were finalizing a new Multilateral Framework on Procedures in Competition Law Investigation and Enforcement (MFP). Even though the MFP will not be binding, this announcement raises five key questions surrounding the future of global antitrust enforcement.

The U.S. government's top federal antitrust enforcer, Makan Delrahim, recently announced that the Department of Justice and other competition enforcement agencies around the globe were finalizing a new Multilateral Framework on Procedures in Competition Law Investigation and Enforcement (MFP), designed to coordinate competition enforcement across more than 140 government agencies worldwide and identify universal procedural norms.

The MFP is still being finalized, but it will address nondiscrimination, transparency, timely resolution, confidentiality, conflicts of interest, proper notice, opportunity to defend, access to counsel and judicial review. Although the MFP will not be binding on all enforcement regimes, the MFP's compliance mechanisms should incentivize agencies to comply with the common commitments.

This announcement raises five key questions about the future of global antitrust enforcement:

Will the MFP lead to more cross-border enforcement?

Enforcement trends have been on the rise in the past decade in the United States and other regions around the globe, including particularly the EU, Brazil and South Korea. The typical pattern is for other countries to follow suit when one country begins enforcement proceedings. Procedural standardization will likely lead to different sovereign enforcers now acting in concert. If this proves to be the case, countries currently on the sidelines may be encouraged to draft off of countries with robust antitrust regimes and join in antitrust enforcement proceedings, especially considering the amount of money usually at stake.

Whose procedures will be adopted?

A range of procedural norms exists worldwide, determined largely by whether a country follows a common law or civil code regime. While some procedural rules are merely technical, others can have a dramatic, substantive impact. For example, U.S. law generally prohibits the sharing in parallel civil proceedings of information collected by the government through the grand jury process in a criminal antitrust investigation. By contrast, until recently, the Canadian Competition Bureau (CCB) would share such information with putative civil plaintiffs. Although the CCB issued a new stance in June, Canadian courts have come to different conclusions as to whether such production should occur. This results in a higher likelihood of follow-on class litigation in Canada and the potential that Canadian litigants will share otherwise confidential information with their American counterparts. Consequently, which country's rules are adopted will matter.

Will the MFP's call for procedural standardization eventually lead to the standardization of substantive rules?

Global standardization of procedural rules may broaden to include the standards by which these cases are actually decided. There currently are a host of substantive differences between countries' antitrust regimes. For example, European courts will consider the harm suffered by all purchasers of an impacted product — direct and indirect — when determining an antitrust violation's impact (called the "pass-through" analysis). By contrast, U.S. federal law considers only damages that direct purchasers sustain (although the U.S. Supreme Court is set to revisit this issue next fall).

Will antitrust prosecutions become more difficult for companies to defend?

Applying varying privilege laws across multiple jurisdictions can significantly impact companies' ability to defend antitrust actions, including how they conduct internal investigations and cooperate with the government. Yet, there is little global consistency in this area. For example, the EU generally does not recognize attorney-client privilege for in-house lawyers, while South Korea does not recognize the attorney-client privilege in any scenario. The U.S.'s privilege laws, on the other hand, are expansive.

Will the MFP lead to new U.S. policy toward compliance programs?

Many regulators will provide credits to organizations (in the form of reduced fines) that show they have implemented an "effective" compliance program to protect against antitrust infringements occurring in the first place. While the U.S. government gives such credit pursuant to other statutory frameworks, including the Foreign Corrupt Practices Act, it does not generally do so within the antitrust context. But there are already hints that the MFP may cause the U.S. to reconsider this approach, so companies should consider reviewing their compliance programs and policies to ensure that (i) their policies and procedures are updated and based on current law; (ii) their employees are being trained on them; and (iii) there are systems in place to confirm the policies are being followed.

The increasing cooperation among enforcement bodies internationally requires a sophisticated strategy that accounts for how one jurisdiction's enforcement mechanisms and individual rights may significantly impact liability elsewhere in the world. A multijurisdictional strategy can help maximize the chances of successful outcomes across borders.

About Kobre & Kim's Antitrust Team

Kobre & Kim focuses exclusively on disputes and investigations, with extensive experience representing clients in antitrust investigations alleging price-fixing, anti-competitive behavior and cartel activity by regulators such as the U.S. Department of Justice and the U.S. Federal Trade Commission, often in conjunction with non-U.S. authorities. With former U.S. government lawyers based in non-U.S. jurisdictions prone to antitrust enforcement actions, such as South Korea, PRC, Hong Kong, Brazil and the UK, our team brings deep experience in representing corporate clients in high-stakes antitrust enforcement matters involving overlapping stakeholders. Our firm maintains a conflict-free, special counsel model that is particularly suited to antitrust disputes that implicate multiple industry participants, allowing us to file amnesty applications when competing interests prevent other firms from acting.