The views stated in this submission are presented on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The Sections of Antitrust and International Law of the American Bar Association (the “Sections”) respectfully submit these Comments to the Korea Fair Trade Commission (“KFTC”) on the Amended Rules on the KFTC’s Committee Operation and Case Handling Procedure (“Amended Rules”). The Sections offer these Comments in the hope that they will assist the KFTC in further refining the Amended Rules. The Sections are available to provide additional comments or to participate in consultations with the KFTC as it may deem appropriate.

Introduction

The Sections appreciate the opportunity to comment and applaud the KFTC’s efforts to clarify its case handling procedures. Regular initiatives to review and update agency procedures are an important and laudable means of improving and promoting agency effectiveness. While the KFTC’s Amended Rules are welcome in this regard, the Sections are concerned that certain proposed revisions, particularly with respect to the scope of cross examination, the ability to call rebuttal witnesses, and the use of written opinions from complainants, may not be sufficient to allow respondents to adequately defend themselves. For example, as explained further below, requiring parties to obtain approval prior to cross-examining witnesses on contents upon which the witness has opened the door on direct examination, would deprive parties of the ability to test the witness’s credibility. For that reason, in the United States and elsewhere, the scope of cross-examination is permitted to be as broad as the subject matter of the direct examination, as well as...
on matters affecting credibility of the witness. As the U.S. Supreme Court has explained, fundamental due process requires that “all parties must be fully apprised of the evidence submitted or to be considered, and must be given an opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding.”

Permitting full cross-examination rights, as well as other fundamental due process, is also likely to benefit the KFTC by allowing it to efficiently reach well-informed decisions, maintain credibility with stakeholders and the public, and sustain its decisions on review. Indeed, concerns about process can create the impression that substantive results are flawed, undermining the perceived legitimacy of cases. As the American Bar Association Antitrust Section’s Best Practices for Antitrust Procedures (“Antitrust Section Best Practices”) recognize, “[p]rocedures that allow agencies to obtain and test relevant evidence . . . can enhance significantly the overall quality of enforcement decisions.”

Competition law must also carefully balance the need for enforcement with the potential for discouraging procompetitive or competitively neutral conduct. In the Sections’ view, the use of injunctive relief rather than fines to address non-hard core conduct can reduce the risk of chilling procompetitive conduct.

Finally, while the addition of two non-governmental members to the Examination Committee can help to ensure neutrality and fairness, there should also be a process to evaluate the independence of these members.

The Sections’ comments on the relevant Articles of the proposed Amended Rules are set forth below.

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4 Fed. R. Evid. 611.
7 ANTITRUST SECTION BEST PRACTICES, supra note 6, at 3.
Article 4

Fines and Deterrence in Unilateral Conduct Cases

Over the past 18 years, KFTC has diligently revised its guidelines in relation to the imposition of administrative fines for violations of the Monopoly Regulation and Fair Trade Act (the “MRFTA”) to improve administrative transparency and enforcement predictability. These Guidelines provide the framework for calculating the amount of administrative fines to be imposed on MRFTA offenders by balancing the “Relevant Turnover,” “Culpability Score,” and aggravating or mitigating factors to determine the final monetary penalties for each violation.9

The Sections commend the KFTC for its efforts to carefully design the monetary sanction framework to create ensure transparency and predictability in the monetary penalty process. However, the Sections believe that administrative fines and their calculation method under the current Guidelines are appropriate solely for hard-core cartels (e.g., horizontal price-fixing, horizontal market allocation, and bid-rigging). As these practices do not have any redeeming benefits, applying monetary fines does not, in contrast to mergers and unilateral conduct, risk chilling procompetitive conduct.

Monetary sanctions aim to punish unlawful conduct and deter future violations by the sanctioned and other firms. Thus, the framework for calculating optimal monetary sanctions should be designed to ensure that the ill-gotten gains from the unlawful conduct are less than the expected penalties, and to avoid deterring procompetitive and competitively neutral conduct.

In practice, it is a challenge to calculate optimal sanctions. Although this is true with respect to all kinds of anticompetitive conduct, in the case of hardcore cartels, there is not the same concern regarding the risk of over-deterrence that could chill procompetitive behavior. By contrast, great care should be taken when imposing penalties for conduct that may be procompetitive or competitively neutral.10 Considering the difficulty of calculating optimal sanctions, the Sections believe that monetary sanctions are usually not appropriate with respect to practices, such as mergers, vertical restraints, and unilateral conduct, that are anticompetitive

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9 The latest version of the Guidelines for Administrative Fines for the MRFTA violations is available at [Korean only] [hereinafter Guidelines].

in only limited circumstances; rather, injunctive or cease-and-desist relief can effectively stop the harm while minimizing the risk of chilling procompetitive or competitively neutral conduct.\textsuperscript{11}

In the United States, criminal fines are imposed only in cases involving hard-core cartels, following the principle that monetary fines are not appropriate for other types of conduct to achieve optimal deterrence.\textsuperscript{12} In contrast, the MRFTA allows imposition of administrative fines for unilateral conduct (e.g., refusal to deal and discriminatory practices) and vertical restraints (or unfair trade practices) (e.g., resale price maintenance and tying) and the Guidelines provide the framework for calculating fines accordingly.\textsuperscript{13}

The Sections respectfully suggest that the KFTC refrain from imposing monetary sanctions for potentially procompetitive or competitively neutral conduct. Since private damages actions may be pursued by injured parties, allowing fines as well as private damages actions poses a higher risk of over-deterrence for potentially procompetitive conduct.\textsuperscript{14} Instead, the Sections respectfully propose that the KFTC consider using injunctive relief to reduce the risk of chilling procompetitive conduct in such cases while encouraging the KFTC to continue to use administrative fines to deter cartels, the “supreme evil of antitrust.”\textsuperscript{15}

\textbf{Article 13}

\textit{Independence of “Two Non-Governmental Members” of Examination Committee}

Proposed Article 13(3) alters the composition of the Examination Committee when there is a re-report of a case to include two non-governmental members as well as either one Standing Commissioner or one Director General. The Sections understand that the purpose of the

\textsuperscript{11} The Sections have respectfully submitted the same proposal to the Japan Fair Trade Commission. \textit{See} Sections’ Comments regarding the Antimonopoly Act Study Group Report on the Surcharge System (Jun. 29, 2017) at 5, \textit{available at} www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_salsil_20170629.authcheckdam.pdf (“surcharges are inappropriate for other types of infringements of the AMA. Other remedies, such as injunctive relief, may be more appropriate in those situations.”); Sections’ Comments on the Summary of Issues Concerning the Modality of the Administrative Surcharge System of the Study Group on the Antimonopoly Act (Aug. 31, 2016), at 9, \textit{available at} www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_coverletter_comments_20160831_japan_fair_trade_jp_en.authcheckdam.pdf (“For AMA violations other than hard-core cartel offenses, the Sections believe that surcharges should be imposed with extreme caution, if at all.”); and Sections’ Comments on the Prospective Amendments to Japan’s Antimonopoly Act (Mar. 2008) at 2-3, \textit{available at} www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_japan.authcheckdam.pdf.

\textsuperscript{12} \textit{U.S. SENTENCING GUIDELINES MANUAL} §2R1.1 cmt. background, \textit{available at} www.ussc.gov/guidelines/2015-guidelines-manual/2015-chapter-2-1-x#NaN.

\textsuperscript{13} Under the MRFTA, administrative fines may be imposed for abuse of dominance (Article 6), unfair trade practices (Article 24-2), and resale price maintenance (Article 31-2). \textit{See} Guidelines, \textit{supra} note 9, §IV.1 & Annexed Table (“Criteria for Calculating Culpability Score”) (articulating the criteria for calculation of fines for unilateral conduct violations and vertical restraints).

\textsuperscript{14} Article 56 of the MRFTA and Article 750 of the Korean Civil Code.

The proposed addition of Article 13(3) of including two non-governmental members on the examination committee when a case was initially rejected for examination and there is then a request to reconsider the decision by re-submitting the case for examination, is to ensure an independent examination of the merits of the case. However, the Sections have some concerns regarding ensuring that the non-governmental members of the Examination Committee are impartial and have the expertise to participate in the examination committee’s evaluation of the re-submitted case.

The Sections respectfully recommend that the KFTC include language that ensures the independence and expertise of the non-governmental members appointed to the Examination Committee. The Sections further suggest that the KFTC ensure that there is a process to evaluate the independence of the non-governmental members appointed to the Examination Committee on a case-by-case basis. The Antitrust Section Best Practices address the importance of review of assessments of contentions of infringement by an independent tribunal. Independent decision makers should: “(1) hav[e] no prior role in the investigation, accusation, or in formulating the contention of infringement . . . ; (2) hav[e] no specific personal interest in the matter or material relationship to any party; and (3) hav[e] sufficient expertise in the law and economics of competition and/or other relevant disciplines to conduct the proceeding and to make the assessment in a disinterested, efficient, and accurate manner.”

Article 37

Sequestration of Witnesses

For comments relating to Article 37, see Article 74 section B below.

Article 41

Denial of a Request for Witness Examination

Article 41(3) would provide the Chair of a KFTC deliberation hearing with the authority to deny the KFTC examiner’s or respondent’s request for an evidence examination (or what we understand to be a live witness examination at the hearing). We understand that, in an effort to provide practical guidance and predictability, the KFTC proposes to amend this provision by specifically listing valid reasons for denying a witness examination request. However, we believe that the proposed revisions to Article 41(3) create ambiguity and risk failing to provide adequate due process. We set forth below our views on each of the proposed additions.

Proposed Article 41(3)(1) provides that the Chair may reject a proposed witness if his or her testimony would be redundant. Under a strict reading of this proposed revision, only when a witness is likely to introduce a fact or opinion that has not been previously raised in the KFTC Examiner’s Report (or Statement of Objections or Draft Staff Complaint) or in the respondent’s Rebuttal Brief will the Chairman be required to permit examination of a proposed witness.

16 Antitrust Section Best Practices, supra note 6, § III.D.
17 Id., § III.B.1.
However, parties may call witnesses to add important clarity or elaboration to issues raised previously or to bolster the credibility of prior evidentiary sources. The question of redundancy or repetition might best be addressed by evaluation of the totality of evidence that a party seeks to present and whether an excessive amount of time is sought to present such evidence. An alternative approach to ensure that examination of witnesses does not unduly impede the hearing could be to limit the number of “fact” witnesses and “opinion” witnesses each side may call during the hearing. Similarly, a time limit for the examination of each witness could accomplish the KFTC’s objective.

Proposed Article 41(3)(2) provides that the Chair of the hearing may reject a proposed witness if the objectivity of the proposed witness’s testimony cannot be ensured. While it may be appropriate for a fact finder to consider in his or her own mind the weight to be given to particular testimony because of the witness’s bias or lack of support for the testimony, the Sections believe it generally is not proper to subvert evidence or to reject or disqualify a potential witness from testifying based on perceived lack of objectivity, especially when that finding is made before the testimony is even received. Moreover, as drafted, this provision does not provide practical guidance on how to assess and measure the required “objectivity.” Thus, if a witness for the respondent takes a certain unique, novel, innovative, or even unpopular position, the questions as to that testimony should focus on whether the position is supported by economic, scientific, and factual evidence. To pre-judge a position based on the Chair’s perception of the witness’s potential bias could lead improperly to the exclusion of meaningful evidence, resulting in the Chair of the hearing accepting one party’s request over another’s. Moreover, the Sections believe this procedure could result in an evidentiary bias as it seems more likely to exclude a respondent’s evidence than the complainant’s, since the objectivity of KFTC officials seems unlikely to be questioned.

Proposed Article 41(3)(3) provides that the hearing Chair may reject a proposed witness if his or her whereabouts are unknown. Proposed Article 41(3)(4) provides that the Chair may reject a proposed witness if he or she is not available to attend the hearing for valid reasons. The Sections recommend that the Commission consider a system where a witness’s “unavailability” to testify is simply noted on the record (i.e., “the witness was not available to attend”) rather than rejecting the witness altogether, unless the unavailable witness had already testified on direct examination and was to be called for cross-examination. In that case, it may be appropriate to exclude the witness’s direct examination testimony.

Proposed Article 41(3)(5) provides that the Chair of the hearing may reject a proposed witness if accepting the witness would interfere with the efficient administration of the hearing. While the efficient administration of KFTC hearings is certainly important and a legitimate goal, the Sections believe this provision is too vague and restrictive to provide sufficient guidance and protections with respect to witness disqualification. By definition, each time a new witness is accepted, it will make the hearing longer and potentially less efficient. There is a need to carefully balance the Commission’s interest in efficiently handling matters against the parties’ due process rights.18 As stated above, in lieu of criteria that the Sections believe may be

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18 Matthews v. Eldridge, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”)
ambiguous and difficult to implement, such as “more efficient administration,” we recommend that the KFTC consider adopting more practical and objective limitations on the use of evidence examination, such as limiting the number of “fact” witnesses and “opinion” witnesses each side may call or the amount of time for each of the examination, as the Sections proposed above.

**On-The-Spot Examination**

The Sections understand that the proposed Article 41(6) allows on-the-spot examination of a reference witness during the deliberation committee hearing. The Sections encourage the KFTC to interpret and apply this provision in a manner that provides full due process rights to the respondent, as agreed to by the Korean Government under Article 16.1(3) of KORUS, which provides that “each Party shall ensure that the respondent has a reasonable opportunity to cross-examine any witnesses or other persons who testify in the hearing and to review and rebut the evidence and any other collected information on which the determination may be based.” The concept of “reference witness” is broad and vague, and a reference witness at a KFTC hearing is not under oath. To avoid or prevent the Commission from forming views or accepting the witness’s statement that has not been subject to proper cross-examination, any testimony, statement, or answer made by a reference witness should be verified through cross-examination, with sufficient time for its preparation. Therefore, the Sections respectfully recommend the KFTC guarantee respondent the opportunity to cross-examine on-the-spot reference witnesses.

**Article 41-2**

**Approval of Chairman to Examine Witnesses**

Draft Article 41-2(7) allows for the interrogation of a reference witness on subjects that were not previously disclosed under Article 41(2) with the permission of the Chairman of the hearing. The Sections support this provision, provided that the Chairman’s discretion to approve such interrogation is exercised in a fair and impartial manner. The Antitrust Section Best Practices recommend that counsel for respondents be permitted to introduce “all relevant evidence, argument and expert analysis on all material issues.” Should it become necessary during the course of a hearing to address questions or topics that were not previously submitted through Article 41(2), the Sections recommend that counsel for respondents be permitted the opportunity to introduce all relevant evidence (subject only to reasonable administration of proceedings—e.g., limits on cumulative evidence, reasonable requirements as to timeliness, and/or sequence of submission).

**Article 74**

**Cross-Examination of Complainant on Statements During the Hearing**

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20 ANTITRUST SECTION BEST PRACTICES, supra note 6, § III.D.
The proposed new Article 74 provides that the complainant may be provided an opportunity to state his or her opinion during the examination hearing. Article 74(1) provides the opportunity for the complainant to provide his or her opinion “orally or in writing” during the process of the investigation if the complainant so chooses. Article 74(2) permits the Committee to allow complainant to state his or her opinion during deliberation.

As discussed above, the Antitrust Section Best Practices recommend that all “evidence, arguments, and expert analysis” recorded during the course of an investigation be subject to challenge on the basis of “authenticity, relevance, materiality, and/or other potentially significant aspects.” The Business and Industry Advisory Committee to the OECD Competition Committee further states that effective review “requires a full review on the merits . . . to independently review and test the evidence to the fullest extent provided for by national rules of procedure, for example by calling witnesses to be subject to examination and cross-examination before the court comes to its own conclusions.”

The Sections recommend that the respondent be guaranteed the opportunity to challenge any inculpatory or opposing testimony provided by the complainant during the course of the investigation and deliberation. The Sections propose that live cross-examination of the complainant should be permitted where the complainant provides an opinion orally at the hearing. Where the complainant provides an opinion in writing, the Sections submit that the respondent should be provided the opportunity to challenge or rebut the complainant’s statements in writing.

**Written Statement of Opinion by Complainant**

Article 74(1) provides that the complainant shall be allowed to state its opinion to the investigating officials either orally or in writing. If the complainant elects to state its opinion to the investigating officials in writing and elects not to give an oral statement to the examination committee that would be subject to cross-examination by the parties, then if the examination committee intends to consider that written statement, the inability of the respondent to cross-examine the complainant about that statement raises concerns about the reliability of the statement and potential lack of procedural fairness for the respondent. The examination committee would not be able to evaluate the accuracy or circumstances surrounding the facts and allegations contained in the written statement, which could unduly prejudice the respondent’s ability to obtain a fair hearing.

Therefore, the Sections recommend that the Rules be clarified to provide that, in such circumstances, the examination committee may consider excluding the complainant’s written statement from its deliberations, or at least provide the respondent with the opportunity to review the written statement in advance and provide its response during the examination committee proceeding.

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21 *Id.*, § III.E.

Sequestration of Witnesses

Revised Article 37 provides for the participation of reference witnesses in the examination committee hearing, and new Article 74 allows complainants to provide their oral opinions to the examination committee. The Sections support these revisions, provided that respondents have an opportunity to cross-examine a reference witness or testifying complainant. However, there is a risk that the testimony of reference witnesses and complainants could be inappropriately influenced or coordinated if, before they give their testimony or statement, they are permitted to hear the statement of other reference witnesses or other complainants. This could result, intentionally or unintentionally, in a witness tailoring his or her testimony to be consistent with earlier witnesses, or otherwise altering the testimony, in a manner that would raise questions about his or her credibility and reliability.

The U.S. Federal Rules of Evidence recognize this concern and provide the court, at the request of a party or on its own motion, with the power to order a witness to be excluded (“sequestered”) from the hearing so that they cannot hear other witnesses’ testimony. The United States Supreme Court has stated that “[t]he aim of imposing ‘the [sequestration] rule on witnesses’ . . . is twofold. It exercises a restraint on witnesses ‘tailoring’ their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid.”

The Sections therefore recommend that the Rules be clarified to provide the examination committee with the authority to order the sequestration of reference witnesses and testifying complainants—particularly in situations where there are multiple complainants—from the examination committee hearing upon a party’s request.

Conclusion

The Sections appreciate the opportunity to comment and would welcome the opportunity to discuss this comment or any questions the KFTC may have.

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23 Fed. R. Evid. 615.