COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW TO THE NATIONAL COMMISSION FOR THE DEFENSE OF COMPETITION ON THE DRAFT LEGISLATIVE PROPOSAL TO UPDATE THE RULES AND INSTITUTIONS FOR THE DEFENSE OF COMPETITION IN THE ARGENTINE REPUBLIC

October 14, 2016

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 may not be construed as representing the policy of the American Bar Association.

The Sections of Antitrust Law and International Law (the “Sections”) of the American Bar Association (“ABA”) appreciate the opportunity to present their views regarding the National Commission for the Defense of Competition’s (the “Commission”) Draft Legislative Proposal to Update the Rules and Institutions for the Defense of Competition in the Argentine Republic (“Proposal”).¹ The Sections appreciate the substantial thought and effort reflected in the Proposal, whose stated goal is to optimize the current competition law regime by incorporating new tools and adopting the best international practices in the field of competition law. The Sections offer these comments in the hope that they may assist the Commission as it completes the final version of the Proposal. The Sections’ comments reflect their expertise and experience with competition law in the United States as well as in many other jurisdictions worldwide.

I. Executive Summary

The Sections commend the Commission for developing a comprehensive set of reforms that more closely align Argentina’s competition law with international best practices and will promote transparency, efficiency, and effectiveness of Argentina’s legal framework for the protection of competition. These comments focus on five aspects of the Proposal:

1. the creation of an independent agency, the National Competition Authority (the “ANC”);
2. the creation of a national judicial tribunal to hear appeals of ANC decisions;
3. the institution of a new competition law sanctions regime, including a cartel leniency program;

¹ The Sections’ comments are based on a translation into English of the Proposal, provided to the Sections by the National Commission for the Defense of Competition of Argentina.
4. the institution of private damages suits for harm caused by competition law violations; and
5. the institution of a new pre-merger control regime.

The Sections applaud the Commission for proposing the creation of a new independent, decentralized, and autonomous National Competition Agency (ANC) with a transparent process, whose decisions will be reviewed by an independent judicial tribunal. The Sections recommend that the Commission clarify the conditions for the removal of ANC members, and provide for independent judicial review of presidential removal of ANC members.

The Sections also support the Commission’s introduction of a sanctions regime. They respectfully recommend that provisions dealing with fines be refined: (1) to align the size and application of fines more closely to international norms; (2) to base fines on an appropriate measure of domestic commerce; (3) to clarify that the relative magnitude of fines will be aligned with the seriousness of the conduct at issue; (4) to enumerate the factors that will be used to assess the relative percentage of turnover to be used as a fine; and (5) to exclude sales between non-Argentinean entities outside of Argentina in calculating fines. The Sections also recommend that the Commission amplify certain aspects of its process for leniency applications, including credit given for cooperation with the ANC and confidentiality protections, and provide sufficient time for defendants to respond to enforcement proceedings.

The Sections also commend the Commission for facilitating private damages suits. The Sections recommend clarifying the categories of individuals authorized to bring such suits, and the interrelationship of those provisions with civil fraud provisions.

Finally, the Sections support the adoption of a mandatory pre-merger notification regime and suggest certain measures to enhance the effectiveness of the pre-merger notification system. The Sections also recommend that legal representatives of a party not be held jointly and severally liable for breaches of the law by the party.

II. Specific Suggestions

A. New National Competition Authority (“ANC”)

Chapter IV of the Proposal delineates the organization of the ANC, including the designation of ANC members, their duties and powers, and bases for removal from office. The Section commends the Commission’s proposal to establish an independent, decentralized, and autonomous entity, which is consistent with prior Section commentary and the recent Report from the Section’s International Task Force, which stresses that impartiality, along with efficiency and accuracy, are the pillars for ensuring an effective enforcement authority.\(^2\) The

Proposal specifies that the ANC will have five members, designated by the Executive Branch and composed of a President and four commissioners who are required to have experience with competition issues. In addition, two of the members must either be economists or have postgraduate degrees in economics. The requirement that enforcement officials possess sufficient expertise has been previously identified by the Antitrust Section’s International Task Force as a best practice applicable to all phases of antitrust proceedings. Further, providing for five members, an odd number, serves to lessen the chance of deadlock between equal numbers of members and should promote timely decision making. Similarly, the five-year, staggered term for members will help to ensure continuity but also moderate the potential wholesale turnover of members based on election cycles of the Executive Branch.

The Sections also commend the Commission for ensuring a transparent process, one in which, under Section 23 of Chapter IV, the ANC will publicly record its operations with respect to its opposition to concentrations and mergers as well as its final resolutions, presumably those related to its investigations under Chapters I, II and III. The Sections consider transparency essential to the ability of an enforcement agency to receive all pertinent information, issue accurate decisions, ensure effective compliance with the laws and bolster the legitimacy of the agency and its determinations. Indeed, transparency has widely been viewed as a best practice by the Sections, the International Competition Network, and others.

Lastly, Chapter IV identifies six enumerated bases for the removal of an ANC authority member from office. The Sections applaud the Commission for limiting the ability of the Executive Branch to remove members, which will help ensure an independent agency that is protected from political intervention. The Sections note, however, that the first enumerated basis for removal, “inappropriate performance of duties,” appears to be vague, and therefore may permit removal based on disagreements between the Executive Branch and the ANC as to policy more generally, or as to the potential harm a decision may have on an Argentine or foreign interest. The Sections therefore recommend that the ANC consider adopting a more precise standard for removal (for example, providing that members may be removed only “for inefficiency, neglect of duty, or malfeasance in office,” the standard that applies to the U.S. Federal Trade Commission) and that such decisions be subject to review by an independent tribunal or court.

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3 Id. at 10.
5 Under United States law, Federal Trade Commissioners are appointed for seven year periods and (as previously noted in the main text) may be removed by the President only “for inefficiency, neglect of duty, or malfeasance in
B. Judicial Review

As mentioned above, the Proposal provides for the creation of a National Court of Appeals in Competition Matters, a specialized division within the existing Federal Court of Appeals in Civil and Commercial Matters, to review decisions and administrative sanctions issued by the ANC. The Sections fully support the proposal to have an independent tribunal review decisions of the enforcement authority, which the Sections consider a best practice.\(^6\)

The Proposal envisions a three-judge panel, with a Chair Judge and two member judges, although the selection procedure is still to be determined. The Sections recommend, as a matter of best practice (and consistent with its views above with respect to ANC members), that the judges forming such a special court “possess sufficient expertise in competition law, economics and/or other relevant disciplines to enable them to conduct their duties in a disinterested, efficient, and accurate fashion.”\(^7\)

C. Competition Law Sanctions

Reference to Undefined Terminology

Chapter 1, Sections 1 and 2 of the Proposal provide detailed descriptions of the prohibited agreements and practices covered by the Proposal;\(^8\) however, Chapter VIII (Leniency) contains no reference back to Chapter 1 to assist the reader in concluding what constitutes an “agreed anticompetitive practice” from which leniency may be sought.\(^9\) The Sections identified the first use of the phrase “anticompetitive practice” as appearing in Chapter VIII. The use of the word “agreed” to describe the anticompetitive practice only introduces further ambiguity. The Sections suggest clarifying the introductory paragraph of Chapter VIII to make clear the definition of an “agreed anticompetitive practice” either directly within that chapter or by explicit reference back to Chapter 1, Sections 1 and 2. In particular, the Sections recommend that the term “agreed anticompetitive practice” be limited to hard core cartel conduct, which is the type of unambiguously harmful and secretive behavior that leniency programs are designed to cover in the United States and other jurisdictions. In a similar vein, the Sections suggest that Chapter VIII begin with a clear statement that the leniency provisions enumerated therein apply only to hard core cartel behavior.

Guidance is Needed for Determining the Amount of Fines

Section 46(b) of the Proposal states that a party engaged in a prohibited act “shall be subject to the payment of a fine of up to 30% of the business volume associated with the

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\(^{7}\) Id. at 10.

\(^{8}\) See Proposal Chapter 1 Sections 1 and 2, at 1-2.

\(^{9}\) See Proposal Chapter VIII Section 50, at 11.
products or services involved in the unlawful act, multiplied by the number of years during which such act was in place,” and these fines are doubled in the event of recurrence. The Proposal then caps fines at “10% of the consolidated business volume … recorded during the last fiscal year” by the economic group of which the breaching party is part.”

The Sections support the introduction of sanctions and suggest that the Proposal could benefit from additional guidance regarding the level and conditions for application of fines. Specifically, as explained below, the Sections recommend that the Proposal be modified: (1) to align the size and application of fines more closely to international norms; (2) to base fines on an appropriate measure of domestic commerce; (3) to clarify that the relative magnitude of fines will be aligned with the seriousness of the conduct at issue; (4) to enumerate the factors that will be used to assess the relative percentage of turnover to be used as a fine; and (5) to exclude sales between non-Argentinian entities outside of Argentina in calculating fines.

First, the Sections respectfully suggest that the proposal to set fines as high as 60% of the affected sales (in cases of recurrence of prohibited behavior) is disproportionate when compared with the fines assessed elsewhere across the globe. In the United States, for example, the fining process is administered by federal courts with reference to the United States Sentencing Guidelines. Under the U.S. Sentencing Guidelines, a formula is used to calculate corporate fines. The Guidelines establish a “base fine,” which is presumed to be 20% of the volume of U.S. commerce affected by the violation. In practice, many fines imposed in the U.S. are lower than the Sentencing Guidelines range.

Furthermore, fines as high as 30% are, in other jurisdictions, reserved for coordinated rather than unilateral action. For example, even in cartel actions, the European Commission (which has similarly adopted a 30% maximum base amount) has employed typical base percentages ranging from 15% to 20%. Exceeding 20% has been a rare exception even for hard-core cartels. Similarly, the base percentage fine for a hard-core criminal cartel violation under United States Sentencing Guidelines is 20 percent of the volume of commerce affected by the violation. In contrast, while the European Commission can impose a fine for single firm conduct, the European Commission’s Guideline on Fines indicates that penalties at the higher end of the scale will be assessed only for cartel conduct, because it causes the greatest harm.

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10 See Proposal Chapter VII Section 46 b).
12 See, e.g., Case 38.589, Heat Stabilisers, Prohibition decision, Nov. 11, 2009, 2010 O.J. (C 307) 9, paras. 08-09 (utilizing 20% base percentage); Case 39.165, Flat Glass, Prohibition decision, Nov. 28, 2007, para. 482 (18% base percentage); Case 39401, Gas, Prohibition decision of 8 July 2009, para. 365 (15% base percentage).
13 The Marine Hoses cartel penalty used a 25% base percentage, in part due to the length of the cartel, which continued for more than two decades as what was described as a “single, complex and continuous infringement.” Case 39406, Marine Hoses, Prohibition decision of January 28, 2009, paras. 439, 445.
14 U.S.S.G. § 2R1.1(d)(1). The volume of affected U.S. commerce is measured as the amount of goods or services sold by the defendant corporation affected by the violation over the entire length of the violation. In practice, many fines imposed in the U.S. are lower than the Sentencing Guidelines range.
15 European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of
Indeed, the United States has not imposed, nor sought to impose, criminal fines for non-hard-core conduct. Rather, United States federal competition law enforcers remedy anticompetitive conduct by monopolists or dominant firms through behavioral, or, very rarely, structural remedies. Furthermore, while civil fines may still be available for such conduct under state law, such state law fines, when imposed, tend to be at the low end of any scale for non-cartel conduct for the same reasons as those articulated by the European Commission.

Second, the Sections recommend that the Proposal specify the basis for the fine and limit it to an appropriate measure of domestic commerce. In that regard, the Sections also recommend that the Proposal detail those factors that the Authority will assess in determining whether commerce is considered to be domestic or otherwise included in the fining calculation.

Third, section 46 BIS sets forth at least ten different factors that the Authority can consider in “classify[ing] the fines”, but does not differentiate among the different types of potential violations of the competition laws and calibrate the sanctions accordingly. As drafted, the law would in theory allow the Authority to impose greater sanctions for conduct having substantial potential efficiencies than for the most serious hard-core cartel offense. The Sections recommend that the provision be amended to take into account the seriousness of and the harm caused by different offenses. The most serious penalties should be reserved only for the most harmful cartel cases and less serious violations should be subject to less severe sanctions.

Fourth, and related to the third point, the Sections respectfully suggest that in assessing penalties for unilateral conduct, the ANC impose penalties at the lower end of the scale, and enumerate the factors that will be used to assess the relative percentage of turnover to be used as

Regulation No. 1/2003, 2006 O.J.(C210)2, para. 23.

See Joint Comments of the American Bar Association Sections of Antitrust Law and International Law to the Superintendency of Industry and Commerce on the Draft Legislative Proposal of the Congress of Colombia Regarding the Enactment and Modification of Rules and Regulations Regarding the Protection of Competition (“Sections’ Comments for Colombia”), October 21, 2015, p. 7 (explaining the necessity of defining explicitly the measure of commerce on which a fine would be based). This and the other Comments referenced herein are compiled at http://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs.html.

Certain forms of conduct, such as price discrimination, exclusive dealing and vertical restraints, can also have procompetitive features. These procompetitive features need to be weighed against any possible anticompetitive features to determine whether such conduct, on net, harms competition. Without a more measured approach to assess the behavior in question, practices that may prove procompetitive overall may be inappropriately deterred for fear of punishment under the proposed law. See, e.g., Comments of the American Bar Association’s Sections of Antitrust Law and International Law on Draft Guidelines on Administrative Penalties Issued by the South African Competition Commission (“Sections’ Comments for South Africa”), February 13, 2015, pp. 2-3; and Comments of the American Bar Association Section of Antitrust Law to the Fiscalia Nacional Economica (FNE) of Chile on the Draft Guidelines on Vertical Restraints, January 30, 2014.

See Sections’ Comments for South Africa, pp. 2-3 (explaining that the Sections request the higher end of fine scale be “reserved for unambiguously harmful hard-core cartel activities,” while weighing less serious practices against any potential procompetitive justifications for those practices); and Sections’ Comments for Colombia, p. 7 (recommending that the seriousness of and the harm caused by the different offenses be taken into consideration in calculating the fine).
a fine. This reflects the fact that (1) harsh penalties for unilateral conduct risk chilling efficient procompetitive behavior; and (2) unilateral conduct is typically observable rather than hidden from view (unlike cartel conduct, which is secret and has a lower probability of detection). The Sections recommend that the following factors be considered: (i) the nature of the product, (ii) the structure of the market, (iii) the market share(s) of the undertaking(s) involved in the infringement, (iv) entry conditions, (v) the effect on competitors and third parties, (vi) potential pro-competitive justifications for or efficiencies arising from the conduct, and (vii) the availability of non-monetary relief.

Fifth, and finally, the Sections recommend that fining calculations under the Proposal should not include sales between non-Argentinian entities outside of Argentina, so long as the jurisdiction for which those sales are domestic is actively enforcing competition laws. Such a rule would avoid defendants paying multiple fines based on the same underlying sales. This is also a matter of international comity, as nations should not apply competition law fines to commerce occurring outside of their borders, to companies that are not present in their jurisdiction, and against individuals who do not conduct business within their jurisdiction.

Need to Provide an Application Process for Leniency

Section 50 of the Proposal states that “[a]ny individual or legal entity … may disclose and acknowledge” an “agreed anticompetitive practice … before the National Competition Authority by invoking the benefit of full or partial exemption of fines … .” The Sections note that the Proposal does not provide an explanation of the process by which an applicant can seek leniency or invoke any benefit related thereto. The Sections’ concern is that absent a clear path to apply for and obtain leniency, potential applicants may be deterred from self-reporting. Furthermore, ambiguity surrounding the application process may further complicate the Authority’s ability to identify the applicant that is “first among those involved in the practice.”

In addition to providing more detailed instructions on applying for leniency, the Sections recommend that the law make clear that oral applications for leniency are acceptable. “Applicants whose conduct may potentially expose them to private damage litigation in the United States or other jurisdictions” may be concerned that written applications for leniency –

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20 These factors draw from factors used in the United Kingdom. See United Kingdom Office of Fair Trading, OFT’s guidance as to the appropriate amount of a penalty, OFT423, para. 2.6 (September 2012, since adopted by the UK Competition and Markets Authority), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf.
21 See Proposal Chapter VIII Section 50, at 11.
22 See id.
and the information contained therein – may be “subject to mandatory disclosure to opposing parties in [U.S. private damage litigation] and admissible as against interest in court proceedings.”  As such, depending on the scope of the written submissions required by an authority, members of an international cartel may be dissuaded from self-reporting.

“It is understandable that an authority would require an applicant to provide a full oral exposition of all known facts regarding the reported conduct and to make all relevant witnesses and pre-existing documents available to the authority. However, written corporate admissions of wrongdoing will lead to the perverse outcome that a fully cooperating leniency applicant would be in a worse position in civil private damage cases than other cartel participants—even those who refuse to cooperate in any fashion with the enforcement authorities or the representatives of the purported injured parties. If the [the Authority] places companies that self-report in a worse position in civil damages actions than cartel members that refuse to cooperate, then many companies reporting cartel activity to enforcers elsewhere will be deterred from reporting in [Argentina].”

As a result, written leniency applications may deter self-reporting, as the leniency applicant may be exposed to “significant and unfair litigation risks that would not be present for companies who elect not to self-report or not to cooperate” with the Authority as a result of the content of those applications.  The Sections recommend that the Proposal “follow the example of the United States, Canada, the European Union, Japan, Australia, and many other jurisdictions by adopting a paperless leniency application process.”

Clarification of Credit for Cooperation to Avoid Misunderstandings as to Assertions of Privilege, Defenses, and Confidentiality Issues

Section 50 of the Proposal sets out a proposed approach for dealing with leniency for any party involved with an agreed anticompetitive practice, including the granting of the benefit of full or partial exemption of fines.  Section 50 (a)(3) also states that “[f]or the benefit to be applicable,” a number of requirements must be met, including that “[f]rom the moment the request is submitted and until the proceeding concludes, the requesting party shall fully, continuously, and diligently cooperate with the Authority.”  This section of the Proposal could be read to suggest that any delays in the investigation or litigation process that could be

24 See Comments of the ABA Sections of Antitrust Law and International Law on the Public Consultation Version of the Guidelines on Leniency in Cartel Cases in Chile Published by the Fiscalia Nacional Economica (“Chile Leniency Submission”), February 27, 2015, at 2.
25 See Chile Leniency Submission, at 7.
26 See id., at 6.
28 See Proposal Chapter VII Section 50.
29 Id.
attributed to the respondent firm’s conduct may be regarded as being aggravating factors in determining a potential administrative penalty.

The Sections respectfully recommend that this paragraph be clarified so that the assertion of privilege or confidentiality claims not be regarded as constituting dilatory conduct for the purposes of assessing penalties. Clarifying Section 50(a)(3) in this manner would be consistent with international principles of due process and fairness. These principles include providing an opportunity for companies to be heard as to any efficiencies or defenses that they may wish to offer and to assert any applicable privileges or confidentiality issues.  

Need to Provide a System for Establishing and Securing a Marker for Leniency

The Sections commend the Authority for its clear commitment to helping companies successfully participate in Argentina’s Leniency Program. For example, the granting of “full or partial exemption” along with supplementary benefits to companies also reporting additional anticompetitive practices about which the Authority has yet to be informed, demonstrates the Authority’s willingness to incentivize companies to self-report.

The Sections believe that the Proposal would benefit from the articulation of a clear marker system. For example, Chapter VIII’s citation to Section 32 merely states that leniency is granted only up to the point with the Authority has sufficient information to proceed with prosecution, and Chapter VIII’s guidelines regarding partial exemption or fine reduction simply state that “the Authority shall take into consideration the chronological order in which the request [for partial exemption] was submitted.”

Effective marker systems reserve an applicant’s place in line for amnesty for some finite period of time. “As the DOJ has publicly explained, the purpose of granting a marker is to hold a company’s place at the front of the line for a finite period of time while the company ‘gathers additional information through an internal investigation to perfect the client’s leniency application.’” While not a guarantee of leniency, the marker system provides clarity and some amount of certainty to the leniency application, in that no other amnesty applicant would be permitted to “leapfrog” the applicant with the marker during that finite period of time.  

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31 Proposal Chapter VIII Section 50, at 11 and Proposal Chapter VI Section 30, at 8.


33 See id. at 3.
Uncertainty regarding the marker system creates uncertainty regarding the ability of an individual or company to obtain amnesty after an investigation has commenced and they have acknowledged possible knowledge of anticompetitive behavior. The Proposal does not articulate the specifics of a marker system and does not explain how the Authority will determine which companies or individuals will be treated as the first leniency applicant. The Sections note that a misunderstood marker system could impact the incentive to self-report in the first instance.

The Proposal assigns leniency for the “first among those involved in the practice to provide information and proof which, at the discretion of the Authority, enable to verify the practice.” The Sections note that the proposed approach resembles the United States Department of Justice’s Corporate Leniency Criteria in that it lists conditions that must be met for leniency to be granted and that full leniency (exemption under the Proposal) is granted to only a single entity. However, the Proposal provides no further instructions as to how that single entity receiving leniency is determined. Furthermore, the Sections note the absence of reference to a minimum threshold that applicants can use to identify the amount of information that must be supplied to qualify as the first applicant. The threshold for obtaining a marker employed by the DOJ is relatively low, particularly when the DOJ is not already investigating the wrongdoing. Applicants seeking markers for conduct that is not already being investigated need only report that they have uncovered some information that indicates there may have been a criminal antitrust violation; disclose the general nature of what was detected; identify the industry, product, or service involved; and identify the client. Further, the level of detail required in identifying the product or service involved must only be specific enough to allow the DOJ to determine whether leniency is still available.

Furthermore, the lack of a clear threshold for proof (and which entity applying for leniency would reach that threshold first) and the statement that leniency is “at the discretion of the Authority” create uncertainty for a potential leniency applicant as to whether and how they can obtain leniency for reported conduct. The Sections note that establishment of a minimum threshold for qualification of leniency need not contradict requirements in the law for full, continuous, and diligent cooperation once qualification has been obtained. Uncertainty about the requirements for proof, coupled with the absence of a clear marker system, could create disincentives for individuals and companies to self-report anticompetitive practices in Argentina.

**Need for Clarity Surrounding the Amount and Application of the Supplementary Benefit**

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34 See e.g., ICN Chapter 2, at 7.
35 See Proposal Chapter VIII Section 50, at 10.
36 See DOJ Leniency FAQs, at 4-5.
37 See DOJ Leniency FAQs.
38 See id.
39 See Chile Leniency Submission, at 5.
Chapter VIII provides for a reduction in the fine for an applicant who does not qualify for full exemption or leniency, but who “contributes conviction elements additional to those under the possession of the Authority.”\textsuperscript{40} The proposed reduction in fine is provided as a range between 20% and 80% of the maximum. The Authority’s determination of the amount of the reduction would “take into consideration the chronological order in which the request was submitted.”

The Sections commend the Authority for establishing a leniency program that provides the incentive for all participants to self-report anticompetitive behavior by allowing for additional benefits to applicants who are not first to notify and qualify for leniency. However, in the absence of a marker system, an application process, and additional clarity on how chronological order impacts the amount of reduction, even an applicant aware that its application would be the second filed with the Authority would face uncertainty as to whether either extreme in the range of reductions (20% or 80%) could be applied. This uncertainty can impact incentives to apply. Likewise, the Proposal does not indicate whether the Authority would consider factors other than chronological order—such as the relative quality and quantity of “conviction elements” that the applicant provides—nor the importance that other factors may play in determining the amount of the reduction. The Sections urge that the Proposal provide greater detail on the standard to be used or require the Authority to state publicly details on the process it will follow in determining the amount of the reduction.\textsuperscript{41}

**Confidentiality and Protection of Leniency Applicants**

The Proposal states that the Authority will “confidentially maintain the identity of the persons intending to invoke the benefits of this section.”\textsuperscript{42} The Proposal goes on to discuss the guaranteed confidential treatment of information and other evidence submitted by such persons, as well as legal entities. In order to limit the potential for ambiguity, the Sections encourage the Authority to state expressly in the first sentence that the Authority will “confidentially maintain the identity of the persons and legal entities intending to invoke the benefits of this section.”\textsuperscript{43}

The Sections note that the Proposal discusses confidentiality of evidence submitted in the leniency process vis-à-vis the “courts hearing the legal proceedings that may be filed pursuant to this law” but remains silent with respect to the confidentiality granted to the evidence submitted to the Authority that is then transmitted to foreign competition authorities. The possibility that

\textsuperscript{40} See Proposal Chapter VIII Section 50, at 12.
\textsuperscript{41} Even when leniency is not available, the U.S. Department of Justice is often willing to offer substantial discounts in penalties for companies that are “early cooperators,” such as discounts in fines of up to twenty-five to thirty percent, and limitations in executive jail time under plea agreements. See, e.g., Brent Snyder, U.S. Dep’t of Justice, Individual Accountability for Antitrust Crimes (Feb. 19, 2016) (discussing considerations that inform the possible reduction in penalties for early cooperator firms), available at https://www.justice.gov/opa/file/826721/download.
\textsuperscript{42} See Proposal Chapter VIII Section 50, at 12.
\textsuperscript{43} See Proposal Chapter VIII Section 50, at 11-12. See also e.g., Joint Comments of the American Bar Association’s Section of Antitrust Law and Section of International Law on Comisión Nacional De Competencia’s Draft Revision of the Notice on Leniency, June 3, 2013, at 7.
confidential information could be disclosed to civil litigants or other enforcement officials that may use the information against the leniency applicant is a serious potential disincentive for participation in a leniency program. As a result, many regimes do not permit such disclosures. For instance, the European Commission’s rules prohibit national courts from ordering disclosure regarding leniency applications. The Sections recommend extending confidentiality rules in the Draft Guidelines to provide such protection for leniency applicants. While the Sections recognize that the sharing of information between foreign competition authorities can be an important component in detecting, prosecuting, and deterring domestic or international cartels, the Sections recommend that the Authority obtain a confidentiality waiver from a leniency applicant before sharing that applicant’s identity or information with another agency. Confidentiality waivers provide a reasonable compromise between the legitimate enforcement efforts of competition agencies and the applicant’s right to confidentiality, particularly in cases in which the applicant is still considering immunity applications in other jurisdictions, or is concerned that the requesting agency has not adopted adequate confidentiality safeguards. Chile, for example, acknowledges that its competition agency, the FNE, may request a waiver to the leniency applicant.

Need for a Mechanism for an Applicant to Withdraw its Application

The Sections also note that the current Proposal does not outline the procedure for an applicant to withdraw its application. In line with the enforcement practice in the United States and most jurisdictions, the Sections encourage the Commission to specify that if an applicant decides to withdraw its application, the Authority would not be able to use the documents provided by the applicant, which have the purpose of encouraging potential applicants to come forward without the fear that information provided during the application process would be used against the applicant in case the marker is not perfected. Alternatively, the Commission could consider stating that, in such a scenario, the Authority would still be free to conduct an investigation in the same market if it receives information about the same alleged cartel from a different applicant and the first applicant gets no credit for the withdrawn/unperfected marker, or if the Authority gains knowledge through other sources (e.g., press, other government agencies) that the same infringement took place.

Time to Respond to the Authority’s Statement of Objections and Access to the File

45 See Joint Comments of the American Bar Association’s Section of Antitrust Law and Section of International Law on INDECOPI’s Draft Leniency Program Guidelines, June 20, 2016, at p. 8.
46 See paragraph 83 of the FNE’s Guidelines on Leniency in Cartel Cases: “Deber de reserva de la FNE… Lo anterior no obsta a la posibilidad que la FNE obtenga de parte del postulante una dispensa o ‘waiver’ a fin de poder compartir dicha información con algún otro organismo del Estado o alguna autoridad extranjera o internacional, o los casos en que la comunicación sea exigida por ley.”
The Proposal states in Section 32 that “[a]fter conclusion of the preliminary investigation stage or after expiration of a term of one hundred and eighty (180) days to that end, the Authority shall notify the alleged responsible parties so that they may file a reply and offer any evidence deemed relevant within a period of fifteen (15) days.”\textsuperscript{47} The Sections point out that in practice such a statement of objections of the authority is usually a very comprehensive and voluminous document. As the indicted parties are usually confronted with the details of the alleged violation for the first time, a period of fifteen (15) days is too short to allow preparation of a substantial defense supported by the respective evidence. For instance, the European Commission does not provide any deadline for such a reply.\textsuperscript{48} In practice, eight or ten weeks are provided.\textsuperscript{49}

In addition, Section 32 should clarify whether the number of days for a reply refers to business days or calendar days. The Sections recommend that such period be defined as referring to business days.

Also, the Sections believe the parties should be granted access to the file before submitting their reply\textsuperscript{50} and therefore recommend that the Proposal be amended to provide the Parties such a right. At the same time, however, the Proposal should provide that only the accused parties and no other third parties should be granted access to the file.

**Participation in Cartel Conduct**

Section 50.a.2 of the Proposal states that an applicant for leniency shall “immediately cease to engage in the practice … unless the Authority, for the sake of the investigation, determines otherwise.”\textsuperscript{51} This passage potentially permits the Authority to require that an applicant knowingly proceed with illegal anticompetitive activity without regard for the legal consequence of such actions in other jurisdictions. The Sections recommend that any request to continue with cartel behavior be made on a voluntary basis. Continuation of cartel activity could expose an applicant to liability, including possible criminal liability, in other jurisdictions. The applicant may also lose the opportunity for leniency in other jurisdictions if it continues with cartel conduct.

**Liability for Legal Representatives**

Chapter VII, Section 48 of the Proposal provides that any fine imposed for a breach of the competition law “shall also be jointly and severally imposed on … the attorneys-in-fact or legal representatives of such legal entity who, by virtue of their actions or negligent failure to perform their control, supervision or oversight duties, have contributed to, encouraged, or

\textsuperscript{47} Proposal Chapter VI, Section 32 at p. 8.
\textsuperscript{48} See Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, para 10 (2).
\textsuperscript{50} See \texttt{http://ec.europa.eu/competition/antitrust/procedures_101_en.html}.
\textsuperscript{51} Proposal Chapter VIII, Section 50.a.1 at p. 11.
allowed for such breaches.” Furthermore, Section 48 provides that “[t]he fines applied to the referred individuals may neither be paid by the legal entity for which they exercise or exercised their duties or the legal entity’s affiliates or parent companies, nor by the shareholders or partners of any of those entities.”

First, the Sections respectfully suggest that creating potentially devastating personal liability for attorneys based on the anticompetitive actions of their clients could be considered fundamentally unfair given the attorney’s lack of control over the company’s actions and the likelihood that the attorney would not have benefited personally from his or her client’s anticompetitive activities. The Sections are unaware of any such liability being imposed on outside or inside counsel under merger control regimes in other jurisdictions. Although we are informed that Section 48 is not intended to apply to outside counsel, we suggest that the Proposal be clarified to make that understanding explicit.

Second, the Sections suggest that the creation of liability for attorneys and legal representatives based on “negligent failure to perform their control supervision or oversight duties” would inherently implicate communications between the company and its attorneys which should be protected by the attorney-client privilege. The Sections believe that attorney-client privilege is particularly relevant to corporate compliance matters insofar as it protects communications between counsel and employees made during the course of an internal investigation. The prospect that these communications will be put at issue in the course of a Commission action seeking fines personally from in-house or outside counsel would discourage frank client communications and ultimately discourage corporations from implementing strong compliance programs and thoroughly investigating reports of wrongdoing.

### D. Private Damages Suits

Section 51 of the Proposal states that “Any individuals or legal entities that have sustained damages as a result of actions prohibited by this law may exercise the action for damages pursuant to ordinary laws before the competent judge on the matter.” This passage does not appear to provide courts with initial criteria to filter, nor does it offer guidance on, matters for which the individuals or legal entities are too far removed from the impact of prohibited actions to reliably identify damages.

While private enforcement plays an important role in antitrust enforcement, the Sections note that there are situations where damage actions result in overly costly litigation and that such

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52 The Section believes that maintaining attorney-client privilege is a crucial component of an effective anti-cartel enforcement program. This attorney-client privilege is preserved in major jurisdictions, such as Canada and the United States. See, e.g., Comments of the ABA Section of Antitrust Law and Section of International Law in Response to the United Kingdom Office of Fair Trading’s Request for Public Comment on the Draft Detailed Guidance on Principles and Process for Applications for Leniency and No-Action in Cartel Cases, January 25, 2012, pp. 1-2.5-11.

53 Proposal Chapter IX, Section 51, at p. 12.
cases must be carefully controlled and monitored by courts. In other jurisdictions, typical civil antitrust litigation suits are brought by suppliers, direct purchasers, consumers who purchased indirectly, and direct competitors. The Sections respectfully suggest that the Proposal expressly indicate in the first sentence that only individuals and legal entities directly impacted by or that indirectly purchased the goods and services or derivatives thereof from the person engaged in the illegal action be able to exercise action for damages.

Section 51 TER of the Proposal states that “Any person who fails to comply with this law shall, at the request of the party that sustained the damage, be subject to a civil fine for the benefit of the latter party. Such fine shall be determined by the competent court and shall depend on the seriousness of the case and other circumstances, regardless of any other compensation owed.” 54 “Quantifying harm caused by an overcharge is the most common estimation exercise in antitrust litigation, both in the United States and Europe, especially when a cartel causes such harm.” 55 However, the way in which overcharges are applied in estimation of damages fundamentally requires instruction from the law on the appropriate framework for defining damage. Specifically, the Proposal does not indicate whether courts must define damages to include or exclude in damages to direct purchasers the amount of overcharge that they pass on to their indirect purchasers. The Sections respectfully suggest that the Commission consider whether damages to direct purchasers should include or exclude overcharges passed on to indirect purchasers.

Section 51 QUATER of the Proposal states that “As the case may be, upon prior resolution of the National Competition Authority to the effect that the requirements established in Chapter VIII have been met, the liable individuals or legal entities invoking the leniency program embodied in the abovementioned chapter may be discharged, in whole or in part, from the obligation to redress the damage or harm referred to in this Chapter.” 56 The Sections agree that leniency programs are more likely to be successful if the benefits to applicants are extended to civil litigation damages. However, the specific language of this section introduces ambiguity as to how leniency will be applied to the civil damages. For example, it is not clear whether an applicant who is first to file and receives full leniency from sanctions could be liable for “part” of the damages, even assuming other parties who are joint and severally liable have the ability to pay. If the intent of the passage was to mirror the standards for leniency described in Section 50, then it is not clear that the current language is sufficient. In this instance, the Sections respectfully suggest specifying that the same level of leniency be applied in civil litigation as provided for sanctions. Furthermore, the Sections suggest that the law indicate specific rules for applying leniency in civil damages should the government investigation not result in sanctions.

54 Proposal Chapter IX, Section 51 TER, at p. 13.
56 Proposal Chapter IX, Section 51 QUATER, at p. 13.
Section 51 QUATER of the Proposal also states that “The only exception to this rule is that the beneficiary under the leniency program established in Chapter VIII shall be jointly and severally liable to (i) its direct and indirect buyers or suppliers; and (ii) other parties sustaining damage, only to the extent it is impossible to seek full redress of the damage caused from the rest of the companies involved in the breach.” The Section acknowledges that leniency is not intended to deprive parties who are damaged by illegal actions of applicants from obtaining restitution. Thus, in the absence of alternative parties from which individuals and legal entities can obtain restitution it is appropriate to ask whether an applicant for leniency must be obliged to fulfill the burden of redress. However, the wording of this passage allows for a variety of interpretations that could influence whether parties seek to apply for leniency in the first place. First, it states that the threshold for joint and several liability is when “it is impossible to seek full redress” from the remaining companies involved in the breach. One interpretation of this threshold is that if non-applicant companies can only provide for 99% of redress, then the applicant becomes jointly and severally liable for the entirety of redress. A potential applicant that anticipates trouble from others in fulfilling full redress may be deterred from applying in the first place. The Sections respectfully suggest that the language be updated to allow for leniency applicants to be liable only for the remainder of redress that non-applicants cannot pay. Second, as the applicant may be a small part of the group involved in the illegal action, the Sections note that this passage could result in an disproportionate liability for a cooperating applicant. The Sections further suggest that civil liability for applicants be capped, such as to the full amount of profits obtained by the applicant from the illegal activity. Finally, the standard for when it is “impossible to seek full redress” introduces uncertainty about the standard that may deter application. For example, non-applicant participants in the illegal action may have options for insolvency or withdrawal from domestic business activities that, without further clarification in the law, could be interpreted as making redress “impossible.” The Sections respectfully suggest that the language be clarified to indicate a standard for redress.

C. Pre-Merger Control

By replacing the current system of post-closing merger control with a pre-merger control system, the Proposal will bring Argentine law and practice into line with the majority of international merger control regimes. The Sections note, however, that to avoid imposing undue burdens on companies or impeding pro-competitive transactions, it is essential that the new merger review provisions include clear and appropriate thresholds and review timelines (see in particular the discussion below of Sections 8 (thresholds) and 13 (review timelines) of the Proposal).

Section 2.a of the Proposal is intended to prevent parties from exchanging information with the purpose of “[d]irectly or indirectly set[ting] or manipulat[ing] the sale or purchase

57 Id.
price of goods or services supplied or demanded on the market.”

The Sections believe that the Proposal could also make it clear that certain information exchanged between competitors in the context of a merger (with proper safeguards) can have legitimate purposes (e.g., due diligence in a merger when restricting information to a “clean team”).

A literal interpretation of Section 2.1 of the Proposal would suggest that it would be illegal to hold shares in competing companies, regardless of the size of the investment. The Sections believe that this prohibition would be unnecessarily restrictive, particularly for minority and otherwise passive shareholders. The Sections, therefore, respectfully suggest clarifying that the law does not prohibit minority and passive shareholdings.

Section 6.b of the Proposal provides that a “transfer of goodwill” between companies would be subject to merger review. Section 6.d of the Proposal states that transfer of assets would also be subject to merger review. The Sections respectfully suggest combining these two provisions and clarifying that only the sale of assets constituting a going concern or “undertaking” will be subject to merger review. In particular, the sale of assets that do not constitute an operating business and are sold in the ordinary course should clearly not be treated as a transaction subject to merger review.

Section 6.c of the Proposal provides that an economic concentration would apply to convertible securities. The Sections recommend clarifying that the acquisition of convertible securities would not be notifiable until the conversion into a security with voting rights. On the other hand, Section 10.b of the Proposal could be interpreted as exempting acquisition of convertible securities from mandatory notification. The Sections recommend clarifying Section 10.b in light of Section 6.c.

While Section 8 of the Proposal creates a combined turnover threshold (similar to the current threshold but much higher) of US$165.8M, the Sections respectfully suggest an approach more in line with the general global trend of buyer and target thresholds, as in the European Union and China. In particular, to avoid mandatory notification of transactions having no connection to Argentina, it is important, as set forth in the International Competition Network’s Recommended Practices for Merger Notification and Review („ICN Recommended

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58 Proposal Chapter I, Section 2, at p. 1.
59 The scholarly consensus recognizes that, although they may pose competitive risks, information exchanges among competitors also may have substantial procompetitive features. See generally, e.g., OECD, Information Exchanges Between Competitors Under Competition Law (July 11, 2011), available at http://www.oecd.org/competition/cartels/48379006.pdf.
60 Proposal Chapter III, Section 6.b, at p. 3.
Practices”), to require that turnover thresholds be met by at least two parties to the transaction, normally the buyer and the target (see below). Ensuring that thresholds are set to ensure an appropriate nexus with Argentina will minimize unnecessary burdens to parties and save agency resources from being spent on reviewing competitively insignificant merger filings.

Section 8 of the Proposal also states that the threshold applies to the seller’s entire economic group. The Sections recommend that, where a transaction involves the sale of a business, the thresholds apply only to the turnover of the target, not to the seller’s group. Indeed, applying turnover thresholds to target companies only and not to the seller as a whole is consistent with international merger control practice, including as set forth in the ICN Recommended Practices, because the activities of the seller’s group are irrelevant to the competitive effects of the transaction.

Section 10.c of the Proposal exempts “[a]cquisition of a single company by a single foreign company with no any prior assets …” from mandatory notification. The Sections recommend clarifying the meaning of “acquisition of a single company”, and whether this exemption would apply to share acquisitions or asset acquisitions. With respect to exports to Argentina not being “significant, habitual and frequent,” the Sections recommend these terms (“significant, habitual and frequent”) be defined with greater specificity, to enable exporters to Argentina to determine whether or not they are covered.

Section 10.e of the Proposal exempts the notification of transactions “when the amount of the operation and the value of the assets” do not exceed 15,000,000 UVIs. The Sections note that there is a similar exemption in the current merger control regime, although the Proposal’s thresholds are higher. The Sections suggest clarifying how one should determine the “amount of the operation” and the “value of the assets.” (For example, in the context of a transaction involving non-Argentine businesses, do the tests apply only to the Argentine portion of the transaction (if any)?)

The Sections also recommend clarifying the meaning of the term “operations” in the context of the 45,000,000 UVI prong of the exemption. Finally, the Sections respectfully suggest amending the language of Section 10.e of the Proposal to explain the “provided both cases involve the same market” criteria, since it is not clear whether the 45,000,000 UVI prong is relevant only when there is overlap.

64 See ICN Recommended Practices, Recommendation I.B, Comment 3.
65 Proposal Chapter II, Section 10.c, at p. 4.
66 Id.
67 Id., Section 10.e, at p. 4.
Sections 10.e and 8 of the Proposal state the National Competition Authority may inform on an annual basis the legal tender that shall be applied each year. The Sections suggest clarifying whether the NCA would be able to adjust the thresholds each year.

Section 13 of the Proposal sets forth deadlines for the analysis of notified mergers. The Sections suggest when the deadlines start to run and whether the deadlines shall be counted in calendar or business days. The Sections note that for pre-merger control regimes to work efficiently and to avoid undue burdens on business, clear and reasonable timetables are essential. Many if not most pre-merger regimes as well as the ICN Recommended Practices provide for review of most transactions (not requiring an in-depth investigation) in about a month.

Additionally, Section 13 of the Proposal states that in cases where a merger would have a “potential to restrict or distort competition” the authorities will issue a public report. Section 13 of the Proposal, however, does not provide for the protection of the confidentiality of information provided by the parties. Therefore, the Sections respectfully suggest specifying that confidential business information will be redacted from the public version of such reports.

Similarly, the Sections respectfully suggest inclusion of a provision protecting confidentiality of the rest of information provided by the parties during the merger review.

Section 46 of the Proposal sets forth penalties for “legal entities that fail to comply with the provisions” of the law. The Sections respectfully recommend that the Proposal clarify the differences in application of Sections 8 and 13, as they are both related to merger notification and review but have different penalties for violations.

Section 46.b of the Proposal sets forth penalties for violations of the review period under the premerger notification law (Section 13 of the Proposal). The Sections suggest clarifying whether the penalty (“fine of up to 30% of the business volume associated with the products or services involved in the unlawful act committed”) applies only where there is an overlap, or whether it applies to all of the target’s business volume regardless of overlap.

Section 45.d of the Proposal sets forth a penalty for violating Section 8 of the Proposal, which provides the thresholds for mandatory notification. The Sections note that the penalty of 750,000 UVI (approximately U.S. $829,000 per day) is far higher than in other jurisdictions with

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69 ICN Recommended Practices, supra n. 62, at Recommendation IV.C., Comment 2.

70 Proposal Chapter II, Section 13, at p. 5.

71 Proposal Chapter VII, Section 46, at p. 10.

72 Id.
such penalties. As an example, the Sections note that the U.S. just increased its penalties to up to U.S. $40,000 per day.\textsuperscript{73}

Section 48 of the Proposal specifies the categories of individuals who would be jointly and severally liable when “breaches envisaged in this law [are] committed by a legal entity.”\textsuperscript{74} The Sections recommend that the Proposal clarify: (i) that inside and outside counsel of a party in breach would not be held liable; (ii) whether companies may be able to pay fines on behalf of individuals; and (iii) whether joint and several liability would apply to foreign individuals. The Sections also respectfully suggest clarifying what steps legal representatives are expected to take to prevent the actions of clients that violate Argentine competition law.

\textbf{III. Conclusion}

The Sections very much appreciate the opportunity to comment on the Proposal and hope that the Commission finds these comments useful in preparing a final version of the Proposal. The Sections would be pleased to respond to any questions that the Commission may have and to provide any further assistance that may be appropriate.

\textit{Respectfully submitted,}

\textit{Section of Antitrust Law}
\textit{Section of International Law American Bar Association}


\textsuperscript{74} Proposal Chapter VII, Section 48 at p. 11.