The views stated in this submission are presented jointly on behalf of the Section of Antitrust Law and the Section of International Law (the “Sections”) of the American Bar Association (ABA) only. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (collectively, the “Sections”) of the American Bar Association welcome the opportunity to respond to the public consultation of the Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (“INDECOPI”) regarding Peru’s draft Leniency Program Guidelines (“Draft Guidelines”). The Sections commend the efforts of INDECOPI to make use of its powers under Section 26.7 of the Peruvian Competition Act to issue guidelines setting terms, rules, and particular conditions or restrictions for the best application of that Section and appreciate the substantial thought and effort reflected in the Draft Guidelines. We offer these comments in the hope that they may further assist in the completion of the final Guidelines. The Sections are available to provide additional comments or to participate in consultations, as appropriate. The Sections’ Comments reflect their expertise and experience with competition law in the U.S. as well as many other countries.

Executive Summary

The Sections applaud INDECOPI’s desire to provide guidance as to what must be submitted to obtain a marker. We believe, however, that for a leniency program to be most effective, the evidentiary threshold for receiving a marker should be low and very transparent. We would therefore urge that the threshold for obtaining a marker be low, and that marker applicants not be required to provide all of the details required under the draft Guidelines (e.g. a list of the cartel's participants, territories affected, and estimated duration).

Requiring written leniency applications creates a disincentive to seek leniency given the risk that the application will be discoverable in U.S. private litigation. The Sections recognize that Peruvian law requires a written application, but we would urge that the application process be designed to minimize written requirements and that INDECOPI explore opportunities to amend the legal provision requiring written leniency applications. With respect to confidentiality, the Sections note that the Guidelines prohibit disclosure of the leniency request to third parties without authorization from Peruvian authorities. We would encourage INDECOPI to amend the Guidelines to allow disclosure as required by securities
laws of other jurisdictions, and recommend that INDECOPI obtain a confidentiality waiver before sharing information with other antitrust agencies.

The Sections applaud INDECOPI’s initiative to enhance the legal certainty of its leniency program, but believe that certain requirements may serve as a disincentive to participate in Peru’s leniency program. The Sections would recommend that the requirement to “provide all available information” be clarified to exclude an obligation to provide privileged materials. In addition, the Sections would urge INDECOPI not to condition immunity on the successful resolution of cartel claims against other cartel participants, and instead to condition leniency only on full cooperation.

The Sections commend the efforts to define the reduction in sanctions that subsequent applicants would receive, as they highlight the benefits for leniency applicants and should incentivize such parties to report and resolve their exposure for cartel activities. We interpret the intent of the Peruvian Competition Act to call for restitution even from the leniency applicant, but the Sections would recommend clarification of the Guidelines regarding what corrective measures may be imposed on a leniency applicant.

**Introduction**

The Sections welcome INDECOPI’s initiative to issue Guidelines for Peru’s antitrust leniency program (“Leniency Program”)\(^1\). The Sections’ comments are not intended to be exhaustive but rather to highlight certain points that the Sections believe are important. These comments focus on (i) the marker system, (ii) paperless procedure, (iii) confidentiality, (iv) incentives for leniency applicants, (v) sanctions, and (vi) corrective measures.

**The Marker System\(^2\)**

The Sections commend INDECOPI for its clear commitment to helping companies successfully participate in Peru’s Leniency Program and applaud INDECOPI’s desire to provide guidance and clarity as to what must be submitted in order to obtain a marker. Nevertheless, the Sections are concerned that INDECOPI’s commitment to bringing companies into its Leniency Program may be undermined by the unnecessarily high threshold for obtaining a marker under the Draft Guidelines. The Sections believe that for a leniency program to be most effective, the evidentiary guidelines for receiving a marker should be low and very transparent. A clear and low threshold is used to grant markers by various other jurisdictions including the U.S. Department of Justice, Antitrust Division (“DOJ”).

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\(^1\) Article 26 of the Peruvian Competition Act.

\(^2\) The Sections note that there are substantial similarities between the marker system in the Draft Guidelines and that contained in the Chilean draft leniency guidelines. The Sections submitted similar comments to Chile in 2015 in response to Chile’s proposed marker system, available at http://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/2015_comments.htm.
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 while the company “gathers additional information through an internal investigation to perfect the client’s leniency application.” The experience of many jurisdictions over a number of years confirms that a program requiring only a minimal amount of information up front is sufficient to permit the authority to determine if the company seeking a marker is indeed “first in” to initiate a claim for leniency. A low threshold takes into account that an applicant for leniency will eventually need to acknowledge the existence of a cartel and identify additional details regarding it, including its alleged participants, the territories affected, and its estimated duration. However, this level of detail takes time to develop and is therefore more appropriately required as part of the formal leniency application process.

INDECOPI’s threshold for obtaining a marker is set out in Section 4.2 of the Draft Guidelines, which list five questions that an applicant must answer in order to obtain a marker. It includes commonly requested information like the products or services that may be involved in the suspected cartel conduct. However, it also requires the applicant to identify the type of cartel and the cartel’s participants, the territories affected, and the cartel’s estimated duration, all at a stage of an internal investigation when these details may be difficult to determine in a reliable manner. Section 4.2 does not specify the level of detail required in answering the five questions, but it does state that a marker will not be granted if the information provided by the applicant is “not enough to determine the existence of anticompetitive behavior….”

In contrast, the threshold for obtaining a marker employed by the DOJ is quite 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 possible 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. Similarly, Chile has recently issued its Leniency Guidelines establishing a relatively low evidentiary threshold for obtaining a marker, i.e.,

4 The Sections also recognize that INDECOPI is willing to give an applicant an additional 5 days to supplement its responses.
6 Id.
applicants need only to provide the name of the company, contact details in Chile and a general description of the conduct and of the market.7

A clear, low threshold for obtaining a marker can increase the effectiveness of a leniency program by reducing uncertainty. This, in turn, is likely to result in companies becoming more comfortable coming forward quickly before they have completed a full internal investigation. As the DOJ states, “because companies are urged to seek leniency at the first indication of wrongdoing, the evidentiary standard for obtaining a marker is relatively low.”8 Often when companies first obtain indications of possible collusive conduct, they will not have sufficient information to describe the conduct in detail, including the cartel’s participants, the territories affected, and the estimated duration as required by Section 4.2, or to say with certainty that a violation took place. Therefore, a requirement to provide this level of detail at such an early stage may discourage or delay individuals or companies from self-reporting to INDECOPI.

A lower threshold that leads to earlier notification would also benefit INDECOPI. The sooner that a cartel member reports a potential violation, the sooner the investigating agency can detect, dismantle, and penalize cartel members and the less damage is done to the public. As the DOJ has explained, “leniency programs ha[ve] completely transformed the way competition authorities around the world detect, investigate, and deter cartels…. Leniency programs have led to the detection and dismantling of the largest global cartels ever prosecuted and resulted in record-breaking fines….9

The Sections also respectfully urge INDECOPI to consider the ramifications of enacting a higher threshold for securing a marker than that employed by other jurisdictions. For members of international cartels contemplating self-reporting possible cartel activity to numerous jurisdictions simultaneously, a similar approach to the marker-granting process greatly facilitates dealing expeditiously with multiple jurisdictions. The United States and various other jurisdictions permit companies seeking a marker to do so on the basis of very limited information. If INDECOPI were to impose a higher threshold, it may deter a leniency applicant from promptly reporting to INDECOPI.

In sum, a low threshold for obtaining a marker provides greater certainty for the applicant and encourages early reporting. The sooner that potential cartel activity is reported, the sooner it can be investigated, dismantled, and penalized by the investigating agency. It is therefore one of the key foundations of an effective leniency program. Thus, the Sections

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7 See paragraph 23 of the Fiscalia Nacional Economica’s (“FNE”) Guidelines on Leniency in Cartel Cases (“Em casos calificados, como carteles internacionales complejos, previa y debidamente autorizados por la FNE, el Postulante podrá efectuar la Solicitud de Beneficios de manera verbal, e incluso em idioma inglés”).
8 S. Hammond & B. Barnett, note 5, supra.
respectfully suggest that INDECOPI revise Section 4.2 of the Draft Guidelines with language making clear that, when self-reporting conduct, an applicant may easily satisfy the evidentiary threshold for securing a marker for full immunity by sharing the identity of the client and sufficient information about the products or services and the conduct involved to allow INDECOPI to determine if first-in leniency is available.

In Section 3.1.1., the Draft Guidelines permit immunity until the Technical Secretariat has started an administrative procedure. The Sections believe that, in the case of an ongoing investigation, it would be appropriate for INDECOPI to adopt an approach similar to that of the DOJ, requiring applicants to provide somewhat more detail in order to obtain a marker and not limit the availability of immunity to prior to INDECOPI starting an administrative procedure.

Finally, Sections 4.3 and 4.4 of the Draft Guidelines set forth the timeline for the application process under Peru’s Leniency Program. The Sections commend INDECOPI for its efforts to provide procedural transparency and improve predictability. However, the Sections encourage INDECOPI to consider adopting a more flexible approach, particularly with respect to the periods of time provided for leniency applicants to comply with INDECOPI’s requests. Investigations can vary greatly in complexity and some flexibility in timelines will allow for complications that may arise in the course of an investigation to be accommodated in the application process.

**Paperless Procedure**

Under Section 4.2 of the Draft Guidelines “the application shall be delivered by the Applicant in writing.” This provision is based on Article 26.2 of the recently amended Peruvian Competition Act.10

The Sections are concerned about the disincentives to participate in the Leniency Program created by the requirement that an applicant submit a written document describing its participation in the reported conduct in order to obtain leniency. In particular, the requirement to submit a written document will create a major disincentive to report international cartel activity to INDECOPI when private damage litigation is anticipated in the United States or other jurisdictions. For example, the written confession that INDECOPI currently requires would likely be subject to mandatory disclosure to opposing parties in follow-on U.S. private damage litigation as admissions against the company’s interests and would therefore expose the leniency applicant to significant and unfair litigation risks that would not be incurred by companies that elect not to self-report or not to cooperate with

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10 Article 26.2 of the Peruvian Competition Act states that “The application for immunity will be presented in writing and shall be processed in a confidential file, in accordance with the following procedure…”.
INDECOPI’s investigation. In fact, some United States courts have ruled that these submissions must be turned over to plaintiffs during pre-trial discovery, allowing plaintiffs to use the documents against the applicant should the case goes to trial. Such admissions would also be available for use in other proceedings, such as by European complainants pursuing competition proceedings in European Union Member States.

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, requiring 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 INDECOPI 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 likely be deterred from reporting in Peru.

As the International Competition Network has recognized, “potential leniency applicants may be reluctant to make a written application due to fear of private damages actions, including class actions, arising out of the application…” and “where oral statements by the leniency applicant receive greater confidentiality protections than a written application, a paperless process may increase an incentive to apply for leniency.” Many jurisdictions, including the United States, the European Union, Canada, Australia, Japan, and many others, have found that the paperless process is fully consistent with the fulfillment of their law enforcement mandate. Chile, for example, which is also a civil law jurisdiction like Peru, has adopted a procedure that makes oral applications available for “complex international cases”, acknowledging that the possibility of private litigation in other countries could create disincentive to report international cartels.

The Sections recognize that the requirement in the Draft Guidelines for a leniency application in writing is based on a legal provision. However, for the reasons set out above the Sections suggest that INDECOPI design an application process in which the written

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11 Public records would be admissible, if relevant, in the United States. See Fed. R. Evid. 401 (governing relevance); id. 803(8) (providing for a public records exception to the rule against admitting hearsay). Indeed, foreign public documents are self-authenticating under Federal Rule of Evidence 902(3) and can be proved under Federal Rule of Civil Procedure 44(a)(2). In addition, admissions of a party opponent would be permissible under the hearsay exceptions for prior witness statements and party opponent admissions in Federal Rule of Evidence 801(d).


14 See paragraph 39 of FNE’s Guidelines on Leniency in Cartel Cases.
requirements are minimized. The Sections also encourage INDECOPI to explore opportunities to amend the legal provision in the future, as written materials are a serious disincentive for potential cooperating parties, particularly in international cases. For instance, the European Commission amended its leniency guidelines in 2006 to allow for an oral application process due to the issues described above.\textsuperscript{15}

To institute a process that is as paperless as possible within the existing legal framework, INDECOPI would also need to establish procedures that limit emails and other written communications sent by INDECOPI to applicants, as such documents may also be subject to mandatory disclosure to opposing parties in future proceedings in other jurisdictions. Thus, INDECOPI would need to reconsider and amend the practice of sending written confirmation to the applicant when it grants a marker as contemplated by Section 4.2.

In summary, the Sections believe the litigation risks associated with written leniency applications will likely dissuade members of international cartels from reporting in Peru, thereby undermining the effectiveness of INDECOPI’s enforcement against cartels. In contrast, a pure paperless leniency application process would allow a corporate leniency applicant to cooperate fully with INDECOPI’s investigation without being disadvantaged in other proceedings. Moreover, it is not clear that a written application process provides significant benefits for an agency over a paperless one.

Therefore, the Sections strongly recommend that INDECOPI seek a legislative amendment to abandon the writing requirement, at least in respect of international cases as Chile has done.

Confidentiality

Section 3.3 of the Draft Guidelines sets forth detailed rules on confidentiality regarding the identity of the leniency applicant and the information provided. The Sections appreciate that INDECOPI has a significant and justifiable interest in ensuring that neither the fact nor the content of an application for leniency be disclosed during a period when doing so can jeopardize INDECOPI’s investigation. However, the Sections respectfully submit that certain adjustments should be made in order to avoid disincentives to participate in the Leniency Program.

Section 3.3 of the Draft Guidelines states that the leniency applicant may not disclose the request for leniency benefits to third parties without an authorization from the Technical Secretariat of the Commission for the Defense of Free Competition (“Technical Secretariat”). In this regard, the Sections suggest that greater flexibility is required to permit an applicant to comply with the disclosure rules contained in securities laws, such as Section

\textsuperscript{15} European Commission, Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006], O.J. C 298/17.
409 of the U.S. Sarbanes-Oxley Act of 2002 and Form 8-K of the U.S. Securities Exchange Act of 1934, and similar laws in other jurisdictions. As drafted, Section 3.3 may place applicants in the untenable position of having to choose between violating the requirements of the Leniency Program—and thereby losing the benefit of immunity—or violating the securities or corporate laws of their home jurisdiction. Moreover, the decision to disclose leniency status under the securities laws is not always unambiguous and often involves the judgment of a company and its counsel about whether disclosure is required. In these circumstances, where a “good faith judgment” may be made that disclosure is required, the Sections suggest that it is important to provide applicants with the flexibility to make such disclosure rather than put a cooperating company at risk of violating other laws.

Recognizing that overly restrictive non-disclosure requirements could create disincentives to participation in its Leniency Program, Chile recently allowed leniency applicants to disclose participation in the leniency program in order to comply with domestic and foreign regulations, as long as the Fiscalia Nacional Economica (“FNE”) (the Chilean antitrust authority) is given advance notice. This would be a useful model for INDECOPI to adopt.

On the other hand, the possibility that 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.

The Sections further recognize that the sharing of information between foreign competition authorities can be an important component in detecting, prosecuting, and deterring domestic or international cartels. However, the Sections recommend that INDECOPI 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

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16 See paragraph 74 of the FNE’s Guidelines on Leniency in Cartel Cases: “Abstención de divulgación de una Solicitud de Beneficios.… La FNE no considera como divulgación, para estos efectos, la comunicación de una Solicitud de Beneficios, cuando ésta es exigida por una normativa, nacional o extranjera, y se haga con conocimiento previo de la FNE.”

adequate confidentiality safeguards. Chile, for example, acknowledges that the FNE may request a waiver to the leniency applicant.18

Consequently, the Sections recommend amending Section 3.3. of the Draft Guidelines, as follows: “The confidentiality and non-disclosure commitment of INDECOPI regarding information provided by the leniency applicant extends to (i) any civil litigation of the leniency applicant, (ii) any action by other enforcement agencies, and (iii) other competition authorities, unless the leniency applicant has explicitly provided a relevant waiver.”

**Requirements for Immunity**

Section 3.1.1 sets forth the requirements that must be fulfilled by leniency applicants to obtain immunity. While the Sections applaud INDECOPI’s initiative to enhance legal certainty of its Leniency Program, the Sections submit that certain requirements may serve as a major disincentive to participating in Peru’s Leniency Program.

The Draft Guidelines establish that an applicant must “provide all available information about the investigated cartel.” Leniency applicants may have legitimate legal privileges, such as attorney work product or attorney-client privileged information or materials in various jurisdictions. Disclosure of such material to any party, including an antitrust agency such as INDECOPI, may be deemed a waiver of such privileges in all other settings under the laws in the United States or other jurisdictions. The Sections therefore believe that INDECOPI should limit “all available information” to “all non-privileged available information.”

Furthermore, Section 3.1.1.c expressly provides that a requirement for obtaining immunity is to help the Technical Secretariat and the Commission for the Defense of Free Competition (“the Commission”) to obtain an effective result, which could mean “(i) a decision of the Commission determining the responsibility of the offenders and establishing sanctions, and (ii) a conclusion of the administrative proceedings by the approval of one or more plea agreements.” The Sections believe that conditioning immunity to the ultimate result of the investigation, which may not necessarily depend entirely on the applicant, and will likely only be known years after the applicant has filed for immunity, will create uncertainty, serving as a major disincentive to participate in Peru’s Leniency Program. Such uncertainty is enhanced by the fact that conditional immunity is granted by the Technical Secretariat, while a different body, i.e., the Commission, will decide whether such objectives were achieved or not. For these reasons, the Sections urge INDECOPI to remove this requirement of its Leniency Program and, instead, condition leniency only on full and continuing cooperation, as

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18 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.”
various jurisdictions, including the Unites States and Brazil, do; or, as in Chile, condition leniency to the provision of information sufficient to submit a complaint before the Tribunal.¹⁹

**Incentives for Leniency Applicants**

The Sections commend INDECOPI for its efforts to clarify the extension of benefits to leniency applicants. Providing greater clarity and transparency into the sanctions, corrective measures, and class action initiated by the Commission or the Tribunal for the Defense of Competition and Intellectual Property of INDECOPI (“the Tribunal”) will help assess the degree of incentives the leniency applicants will be afforded in fulfilling the requirements under the Leniency Program. Promoting certainty of incentives a potential leniency applicant may receive will help the Program succeed in its fight against cartels.

On this point, Section 4.4 of the Draft Guidelines states that if an applicant decides to withdraw its application, the Technical Secretariat would not be able to use the documents provided by the applicant, which is in line with the enforcement practice in the United States and most jurisdictions, and has 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. However, at the same time, Section 4.4 allows the Technical Secretariat to “continue with its investigations in the market affected by the uncovered infringement and to use all the information obtained in exercise of its powers.” To further enhance the incentives for leniency, the Sections encourage INDECOPI to consider revising the last paragraph of Section 4.4 make clear that no information provided to the agency during the application process will be used in case the application is withdrawn and immunity is not granted. Alternatively, INDECOPI could consider stating that, in such a scenario, it 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 INDECOPI gains knowledge through other sources (e.g., press, other government agencies) that the same infringement took place.

**Sanctions²⁰**

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¹⁹ See Article 39 bis of Chile’s Decree Law No. 211: “Provide precise, truthful and verifiable information that represents an effective contribution to constituting the elements of sufficient proof on which to base the complaint before the Tribunal....”

²⁰ The Commission and the Tribunal have the power to impose sanctions against participants in serious infringements or hard core cartel conduct. Imposition of sanctions on cartel conduct could range higher than 1000 Tax Units and up to the 12% of the income of the cartel conspirator relating to economic activities in the year prior to the date of the Commission’s final decision. Law No. 1034, art. 43.1(c), Ley de Represión de Conductas Anticompetitivas, 25 junio 2008 (amended Law No. 1025, Sept. 23, 2015) (Peru); INDECOPI, Explanatory Notes, Leniency Program Guidelines (Draft) (May 2016).
The Draft Guidelines reinforce the provisions of the Peruvian Competition Act that the first immunity applicant to report and fulfill certain requirements under the Leniency Program will be exonerated from sanctions (“fines”).21 The Draft Guidelines also seek to clarify the range in the reduction of sanctions that subsequent leniency applicants would receive, which the statute does not define. The Draft Guidelines designate the applicable range of potential discount in sanctions for subsequent applicants to be from 30 to 50% for the first beneficiary (the economic agent applying after the immunity applicant), from 20 to 30% for the second beneficiary, and up to 20% for the third and subsequent beneficiaries. The Sections commend the efforts to define the reduction in sanctions that subsequent applicants would receive, as they highlight the benefits for leniency applicants and should incentivize such parties to report and resolve their exposure for cartel activities.

**Corrective Measures**

Corrective measures are additional instruments independent of sanctions that the Commission could impose to restore the competitive process or to provide restitution.22 Corrective measures are defined into two main categories, (i) “injunctions of restitution of competitive process aimed at preventing the continuation or repetition of the infringement” or (ii) “injunctions of restitution aimed at reversing the harmful effects arising from the infringement.”23

The Sections interpret the intent of the Peruvian Competition Act to call for restitution to injured parties regardless of the marker position of the leniency applicant. It is clear from the Draft Guidelines that the corrective measures will be imposed upon the immunity applicant in connection with restoring the competitive process.24 However, Section III of the Explanatory Note and Section 3.1.1 of the Draft Guidelines define the benefit conferred on the immunity applicant to include the non-imposition of corrective measures of restitution.25 This “non-imposition of the corrective measures for restitution does not imply an exoneration or limitation regarding the liability for damages caused by the infringer [and] the obligation to repair the damaging effects of the infringement will not be required by the Commission at the moment of its final decision in the administrative process.”26 The Commission still has power to bring class action suits on behalf of final consumers for damages against the immunity applicant, though the information provided by the immunity applicant

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23 Id. art. 46. See also; INDECOPI, Leniency Program Guidelines (Draft), p. 6, (May 2016).
24 INDECOPI, Leniency Program Guidelines (Draft) (May 2016) (providing that immunity applicants are afforded benefit that also “implies that corrective measures of restitution will not be imposed to the beneficiary.”).
25 INDECOPI, Explanatory Notes, Leniency Program Guidelines (Draft) (May 2016).
26 INDECOPI, Leniency Program Guidelines (Draft), Explanatory Note pp. 6-7, (May 2016).
will not be used against them.\textsuperscript{27} Although the Commission may provide a benefit in the non-
imposition of corrective measures of restitution during the administrative proceedings, the
Commission will still have a hand in facilitating restitution by having the authority to start the
lawsuit for consumers.

The Draft Guidelines make clear that subsequent applicants will not be exempt
from either of the two corrective measures discussed above.\textsuperscript{28} Nevertheless, the Sections
respectfully submit that the Guidelines provide additional clarity by outlining determinative
factors or the methodology that the Commission or the Tribunal may use in formulating the
applicable corrective measures against leniency applicants. Providing a framework to
understand the possible outcomes of the corrective measure for the leniency applicants may
provide for better transparency into the Leniency Program.

\textbf{Conclusion}

The Sections appreciate the opportunity provided by INDECOPI’s public
consultation to comment on the Draft Guidelines. The Sections would be pleased to respond
to any questions INDECOPI may have regarding these comments, or to provide any additional
comments or information that may assist INDECOPI in finalizing the Draft Guidelines.

\textsuperscript{27} Law No. 1034, art. 49, Ley de Represión de Conductas Anticompetitivas, 25 junio 2008 (amended Law No. 1025,
Sept. 23, 2015) (Peru). (INDECOPI has the “power to start a lawsuit for compensation for damages caused by
conduct prohibited.”).

\textsuperscript{28} INDECOPI, Leniency Program Guidelines (Draft) (May 2016).