



JONES DAY  
**COMMENTARY**

## CARTEL LENIENCY IN THE ASIA-PACIFIC REGION

One of the worst possible nightmares for in-house counsel is to discover that the business has been involved in a cross-border cartel. Quick and careful action can ensure that the damage is minimized by seizing the leniency option.

Navigating the optimal course for leniency applications in the Asia-Pacific region can be particularly challenging because there is such a wide variety of approaches to competition law and its enforcement. Nevertheless, there is an indisputable trend: the number of Asia-Pacific countries adopting or effectively enforcing competition laws is increasing, and this trend should continue in the next few years.

The existence of legislation in various stages of development presents challenges for cartel participants seeking leniency for practices having effect in several Asia-Pacific countries. In some countries, cartels are a criminal offense for which executives can serve jail time; in others, only the company is exposed; and in some countries, cartels are not illegal at all. Not all countries with a specific prohibition against cartels have a leniency regime in place. Moreover, in certain countries, the antitrust enforcer

retains a certain discretion over whether to grant immunity or leniency, which may deter would-be applicants.

To complicate matters further, in some countries it is also necessary to carefully manage the interaction between what is disclosed to the competition authority and how that can create an exposure to private damages litigation.

The disclosure of a cartel in a country in which leniency is available may bring the cartel conduct to the attention of enforcers in countries that do not offer leniency. In countries where the availability of leniency is only at the authorities' discretion, a cartel participant may refrain from disclosing its conduct at all. There have been cases in which applicants have applied for leniency in one country and, by being too slow to consider whether the conduct has extended to other countries, have inadvertently encouraged another member of the cartel to take the benefit in those countries. An effective strategy for the use of leniency should be coordinated across all relevant jurisdictions at the same time.

This *Commentary* provides an overview of cartel laws and enforcement in the main Asia-Pacific countries, distinguishing between the countries where leniency is available and where it is not.

Jurisdiction	General Cartel Law	Leniency
Australia	Civil and criminal	Yes
China (Mainland)	Civil	Yes
Hong Kong SAR	Telecommunications and broadcasting industries only	No
India	Civil	Yes
Indonesia	Civil and criminal	No
Japan	Civil and criminal	Yes
Korea	Civil and criminal	Yes
Malaysia	Civil and criminal	Yes (few details)
New Zealand	Civil	Yes
Pakistan	Civil	Yes
Taiwan	Civil and criminal	Yes
Thailand	Civil and criminal	Yes
The Philippines	Civil and criminal	No

## AUSTRALIA AND NEW ZEALAND

In Australia, cartel conduct is prohibited under the Competition and Consumer Act (“CCA”). The CCA is enforced by the Australian Competition and Consumer Commission (“ACCC”). New Zealand’s Commerce Act treats cartels in a manner similar to that of Australia’s CCA, except that criminal sanctions (in addition to the existing civil penalties) still are in the process of being introduced. In addition, the New Zealand Commerce Commission has a very similar approach to leniency to that employed by the ACCC.

**Sanctions for Cartel Conduct.** Participation in a cartel is subject to both civil prohibition and criminal sanctions. Individuals can be punished by imprisonment of up to 10 years and/or fines of up to AU\$220,000 per contravention (US\$230,000). In addition, under the civil prohibition, individuals may be imposed a penalty of up to AU\$500,000 per contravention (US\$520,000). For corporations, the fine for each contravention (whether criminal or civil) may not exceed the greater of (i) AU\$10 million (US\$10.5 million), (ii) three times the total value of the benefits obtained as a result of the cartel, or (iii) where those benefits cannot be fully determined, 10 percent of the corporate group’s annual turnover in the 12-month period when the offense/contravention applied.

**Leniency Provisions.** Full immunity is available for both criminal and civil sanctions. If the cartel is being enforced as a civil penalty contravention, the ACCC itself grants immunity, while if the cartel is being enforced as a criminal penalty contravention, the Director of Public Prosecutions will grant immunity based on the ACCC’s recommendation. Full immunity will be granted to the first applicant that provides full, frank, and truthful disclosure, including full details of all known facts relating to the cartel. Australia has a marker system, so that a company can provisionally claim leniency if it is unsure if there has been a cartel or does not yet have sufficient information, providing a limited window of time in which to complete the internal investigation. A marker can be withdrawn if the internal investigation does not reveal what is feared or sought.

If a cartel participant is not eligible for full immunity (for example, if the company is the second cartel participant to approach the ACCC), it still can benefit from a more lenient treatment under the ACCC’s Cooperation Policy for Enforcement Matters.

**Amnesty Plus.** In addition to cooperating with the ACCC in relation to one particular cartel, if a cartel participant discloses the existence of second cartel and is entitled to full immunity for that second cartel, the ACCC will recommend to the court the application of a reduced fine for the first cartel.

**Damages Actions.** Private parties, such as a company's own customers and even the customers of other cartel members who suffer damage from cartel conduct, can sue to recover those damages. The ACCC is willing to cooperate with the leniency applicant's counsel to reduce the potential exposure of the leniency applicant to damages, particularly from the customers of other cartel members.

## CHINA (MAINLAND)

China's Anti-Monopoly Law ("AML") prohibits cartel conduct. The AML's cartel provisions are enforced by the National Development Reform Commission ("NDRC") and the State Administration for Industry and Commerce ("SAIC"), the former having jurisdiction for "price-related" conduct and the latter for non-price-related conduct. For a more detailed description of the leniency regime in the PRC, see the *Jones Day Commentary* titled "China's New Leniency Procedure in Cartel Investigations," available at [www.jonesday.com/china\\_new\\_leniency\\_procedure/](http://www.jonesday.com/china_new_leniency_procedure/).

**Sanctions for Cartel Conduct.** Sanctions for violations of the AML include fines, between 1 percent and 10 percent of the infringer's total turnover, and the confiscation of illegal gains. However, when the anticompetitive agreement has not yet been implemented, a relatively small fine of no more than RMB500,000 (US\$75,000) may be imposed.

**Leniency Provisions.** Under the AML, if an undertaking involved in an anticompetitive agreement reports its conduct to the enforcement agencies and provides "important" evidence, such agency "may" grant reduced penalty or exemption at its discretion. Both NDRC and SAIC have issued guidelines on leniency.

Under the NDRC leniency rules, the agency "may" grant immunity to the first undertaking to self-report and provide "important evidence" about an anticompetitive agreement. Similarly, NDRC "may" reduce the penalty for subsequent applicants. NDRC retains such discretion even if the applicant brings forward the required "important evidence." Under NDRC rules, the agency may grant full immunity to the first applicant, the second applicant may receive a reduction of at least 50 percent, and the third and subsequent applicants may receive reductions of at most 50 percent.

Under the SAIC Leniency Rules, there is some uncertainty about SAIC's discretion to grant immunity to an applicant that has brought forward the necessary "important evidence." The SAIC rules do not specify whether SAIC "may" or "should" grant immunity, although a literal reading of the text suggests that the agency "should" do so. SAIC's press release on the occasion of the rules' publication also uses the term "should" for first applicants. Like the NDRC rules, the SAIC rules state that, for subsequent applicants, reductions of penalty "may" be granted at the discretion of SAIC. The SAIC rules leave the level of fine reduction for subsequent applicants entirely at the discretion of the agency, depending on the time sequence of the application, the importance of the evidence provided, the relevant information about the concluding or implementing of the agreement, and the cooperation with the investigation.

**Damages Actions.** Damages actions are possible in China. In May 2012, the Supreme People's Court published its Rules for Civil Litigation under the Anti-Monopoly Law, which lay down a comprehensive legal framework for civil actions under the AML (See the *Jones Day Antitrust Alert* titled "Chinese Supreme People's Court Sets Framework for Antitrust Litigation," available at <http://www.jonesday.com/antitrust-alert--chinese-supreme-peoples-court-sets-framework-for-antitrust-litigation-05-08-2012/>).

## INDIA

India's Competition Act ("CA"), enforced by the Competition Commission of India ("CCI"), prohibits cartel conduct.

**Sanctions for Cartel Conduct.** A cartel participant may receive a penalty of up to three times its profit for each year of the continuance of the cartel or 10 percent of its turnover for each such year, whichever is higher.

**Leniency Provisions.** The CA provides for a leniency regime, which is further fleshed out in the CCI's (Lesser Penalty) Regulations of 2001. Essentially, the CCI may impose a lesser penalty on a cartel member that makes a "vital disclosure," i.e., information or evidence sufficient to allow the Commission to find prima facie that a cartel exists or to help establish the violation of the CA. The CCI retains broad

discretion under the Act; it “may” impose a lesser penalty but is not required to do so.

The Regulations establish a cap on the possible penalty reduction, which varies based on the particular applicant’s “priority status.” The first applicant to provide a “vital disclosure” may receive up to a 100 percent reduction. The applicants second and third in priority may receive up to 50 percent and 30 percent of penalty reduction, respectively. Priority is based on order of application.

Applicants other than the first in priority are required to provide significant added value in order to receive a reduction in penalty. That is, they must provide evidence that enhances the Commission’s ability to establish the existence of a cartel. Aside from the priority cap, the amount of reduction is up to the discretion of the Commission, depending on the (i) timing of application, (ii) evidence already possessed by the Commission, (iii) quality of information provided, and (iv) facts and circumstances of the case.

**Damages Actions.** Compensation can be ordered by the competent tribunal in relation to cartel conduct, and leniency filings should be mindful of this exposure.

## JAPAN

The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade prohibits cartels and is enforced by the Japan Fair Trade Commission (“JFTC”).

**Sanctions for Cartel Conduct.** Both criminal and civil sanctions apply. On the criminal side, companies may be required to pay a fine of no more than 500 million yen (US\$6.4 million) and individuals a fine of no more than 5 million yen (US\$64,000) and/or imprisonment of no more than five years. On the civil side, cartel participants are subject to the payment of a “surcharge” equal to a certain percentage of their total sales in Japan during the last three years of the cartel.

**Leniency Provisions.** The first cartel participant to disclose the existence of the cartel and provide related materials to the JFTC will receive full immunity against civil and criminal sanctions. The second applicant, before the initiation of the

procedure, will receive a 50 percent reduction of the surcharge, but possible criminal sanctions still apply. The third through fifth applicants, before the initiation of the procedure, will receive a 30 percent reduction of the surcharge. In addition, any applicant after the investigation has been initiated will receive a 30 percent reduction.

**Damages Actions.** Private parties that suffer damages from cartel conduct can file civil damages actions against corporations violating antitrust laws to recover those damages. A plaintiff is able to file a suit under section 25 of the Act where the JFTC has issued an administrative order. In this section 25 litigation, strict liability applies to defendants, and a court is required to seek the JFTC’s opinion for calculation of damages. A plaintiff can choose to file a tort action for anticompetitive conducts under section 709 of the Civil Code where there is no government action.

## MALAYSIA

Since the beginning of 2012, Malaysia’s competition law has prohibited cartel conduct throughout the economy. The law is enforced by the Malaysia Competition Commission (“MyCC”).

**Sanctions for Cartel Conduct.** Penalties can amount to 10 percent of the company’s worldwide turnover.

**Leniency Provisions.** Although the law provides for complete and partial leniency in cartel cases, the MyCC has yet to publish detailed materials on how the policy works, and no leniency cases have yet been decided.

**Damages.** Private parties can take court action to recover damages from cartel conduct.

## PAKISTAN

The Competition Commission of Pakistan vigorously enforces the Competition Act, including so far in cartel cases against the banking, cement, and port dredging industries.

**Sanctions for Cartel Conduct.** Penalties of up to 75 million rupees or 10 percent of annual turnover can apply.

**Leniency Provisions.** A leniency regulation provides for either complete immunity or a reduction in fines depending on whether a cooperating applicant is first to approach the Commission.

**Damages Actions.** Damages actions are not specifically provided for by the Pakistan competition law. The question of whether damages for cartel conduct can be recovered under the general tort of breach of statutory duty has not yet been tested in court. However, it is unlikely that the courts will permit recovery under general tort law because the competition law is broad in nature, regulating business conduct throughout the economy rather than protective of a specifically identified class of victim. In addition, the law itself provides a detailed remedies regime that often leads common law courts to conclude that Parliament did not intend for the general tort law to have any additional role to play in the regulatory structure.

## SINGAPORE

Singapore's Competition Act, which is enforced by the Competition Commission of Singapore ("CCS"), prohibits cartel conduct.

**Sanctions for Cartel Conduct.** The CCS may impose financial penalties on cartel participants of up to 10 percent of turnover per year for up to three years.

**Leniency Provisions.** The CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases provide that the first applicant to come forward before the CCS initiates an investigation is eligible for total immunity, but only if the CCS did not already have sufficient information to prove the alleged cartel violation. If the first applicant comes forward after the CCS begins its investigation, it is no longer automatically entitled to immunity. Instead, it may gain up to a 100 percent reduction, at the CCS's discretion, based on the (i) stage at which the applicant comes forward, (ii) evidence already in the CCS's possession, and (iii) quality of information provided. All subsequent, similarly situated applicants are entitled to up to a 50 percent reduction based on the same factors.

The CCS has enforced cartels both in which no applicant has sought immunity and in which an applicant has taken the benefit of leniency.

**Leniency Plus.** An applicant that does not receive immunity may provide evidence about "completely separate cartel activity." If the applicant would be eligible for total immunity or up to a 100 percent penalty reduction for the second activity, it will receive an additional reduction in penalty for the first activity.

**Damages Actions.** Private damages actions are possible in Singapore only after a finding of breach by the CCS.

## SOUTH KOREA

South Korea's Monopoly Regulation and Fair Trade Act ("MRFTA") prohibits cartel conduct. The MRFTA is enforced by the Korean Fair Trade Commission ("KFTC").

**Sanctions for Cartel Conduct.** Cartel behavior is punishable by a surcharge not to exceed 10 percent of turnover or, in the absence of turnover, two billion won (US\$1.8 million). Individuals are subject to a fine of up to 200 million won (US\$184,000) or up to three years' imprisonment or both.

**Leniency Provisions.** The MRFTA's leniency regime is fleshed out in the Enforcement Decree of the Monopoly Regulation and Fair Trade Act ("Decree") and its Notification on Implementation of Cartel Leniency Program ("Leniency Notification"). The first applicant to report the existence of a cartel to the KFTC before the KFTC starts an investigation is entitled to full immunity. Subsequent applicants are entitled to a reduction of the fine of up to 30 percent. Companies that cooperate and do not deny their involvement in a cartel may receive up to a 20 percent reduction even if not eligible for immunity or leniency.

**Leniency Plus.** The Decree provides that companies that are subject to penalties for one cartel, but are eligible for first-in-line treatment for "another improper cartel," may receive reduced fines for the first cartel. The Leniency Notification specifies that the size of the reduction depends on the size of the second improper cartel: 20 percent by default, 30



percent if bigger but not double, 50 percent if between two to four times as big, and exemption if more than four times.

**Damages Actions.** Private complainants can obtain compensation under the MRFTA.

## TAIWAN

The Taiwan Fair Trade Act, which is enforced by the Taiwan Fair Trade Commission (“TFTC”), prohibits cartel conduct.

**Sanctions for Cartel Conduct.** Sanctions for cartel behavior include fines of between NT\$100,000 (US\$3,000) and NT\$25 million (US\$850,000). As a recent example of cartel enforcement, in March 2011, the TFTC imposed fines totaling NT\$31 million (US\$1 million) on 31 distributors of tobacco for fixing the price of cigarettes.

**Leniency.** In 2012, Taiwan added a leniency regulation that provides for either complete immunity or, for those who do not qualify for full immunity because they are not first to apply, the potential for reduced fines if they cooperate with the investigation and provide additional evidence that the Commission requires.

**Damages Actions.** In Taiwan, damages can be recovered and, indeed, a court can award greater than the actual damage suffered (up to a maximum of three times the actual damage) if the perpetrator engaged in the conduct deliberately.

## ASIA-PACIFIC JURISDICTIONS PROHIBITING CARTELS BUT WITHOUT A LENIENCY PROGRAM

Several Asia-Pacific countries prohibit cartels but do not (yet) have a leniency regime in place. The main jurisdictions are briefly discussed below.

### Hong Kong

Although competition law provisions have been actively enforced in the telecommunications and broadcasting industries for many years, to date the Hong Kong

competition law has not applied to the rest of the economy. The government is continuing a long and detailed process toward the adoption of a general competition law, but this law has not yet been enacted.

### Indonesia

Cartels are prohibited by the Law No. 5 of 1999, which is actively enforced by antitrust regulator, the KPPU (*Komisi Pengawas Persaingan Usaha* or Commission for the Supervision of Business Competition). Violations of competition law are subject to fines of between approximately US\$117,096 and US\$2,927,400, and there are many cartel violations discovered each year. In addition, the KPPU may seek to have criminal sanctions imposed by the courts. The KPPU has been relatively active in the last few years, especially in the cartel area. Avenues exist for both compensation orders by the KPPU and damages actions in the general court system, although the scope of the latter exposure is uncertain under current legal precedent.

To date, Indonesia has no leniency, although proposals for such a policy have been considered for several years.

### The Philippines

General criminal and civil laws, and certain industry-specific laws, outlaw cartel conduct in the Republic of the Philippines, and each has different potential sanctions, but there is no dedicated, economy-wide competition authority. For several years, the Philippines Congress has debated proposed laws, and in preparation for a possible change, the Philippines Department of Justice has begun to take enforcement actions.

### Thailand

Thailand’s Competition Act BE 2542 (the “Act”) prohibits cartel conduct. Violation of the Act is subject to imprisonment for a period of one to three years and/or a fine of up to THB 6 million (US\$200,000). However, there are few reported enforcement cases, and an overhaul of the Act is currently being discussed. No leniency policy currently exists in Thailand.

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1 Fiji and Sri Lanka also have cartel prohibitions without a leniency regime in place.

## Vietnam

Vietnam's Competition Law No. 27/2004/QH11 (the "Law") prohibits cartel conduct if the cartel concerns at least 30 percent of the relevant market. The Law is enforced by the Vietnam Competition Administration Department, and relevant adjudications are performed by the Vietnam Competition Council. Breach of the Law results in at least a warning or a fine capped at 10 percent of total turnover for the preceding year. In 2010, 19 insurance companies were fined a total of 0.025 percent of their total turnover. To date, there is no leniency policy.

## CONCLUSION

Cartel conduct extending to Asia-Pacific countries will be subject to enforcement actions under a variety of regimes: countries without competition laws, countries without leniency, country with leniency where the regulator keeps a certain margin of discretion, and countries where leniency is more "automatic."

Different rules apply in each country for the award of damages or compensation, and the strategy for filing leniency applications should take account of these differences.

As a result, when assessing whether to file for leniency for practices covering multiple jurisdictions in Asia-Pacific, would-be applicants will need to balance the possible benefits gained, in countries that offer leniency, against the possible risk that disclosure in one country will bring the conduct to the attention of countries without leniency or in countries in which the authorities retain a certain margin of discretion.

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