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Anti-Corruption Enforcement In Korea: Is an Old Law Coming of Age?

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Since 1999, South Korea has had on its books a law prohibiting bribery of foreign officials: The Act on Preventing Bribery of Foreign Public Officials in International Business Transactions. The law, known colloquially as the Foreign Bribery Prevention Act or FBPA for short, was passed to implement the Organization for Economic Cooperation and Development's (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention), to which Korea became a signatory in January 1999.

Yet despite the FBPA being in effect for nearly 15 years, its history to date has been one of relative obscurity, with little enforce-



ment activity and a total of just 10 convictions.¹ Most of the cases brought under the statute have involved bribery of foreign military officials stationed in Korea, not bribery in the commercial context.² In addition, just last month, the global anti-corruption group Transparency International released a report that listed Korea

as one of 20 OECD Convention signatories with little or no foreign bribery enforcement.³

Despite this criticism, there are recent signs that Korean prosecutors are focusing more on bribery of foreign officials, broadly defined to include individuals working for state-owned and controlled companies. A recent prosecution of two

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individuals for bribing the president of the Korean subsidiary of China Eastern Airlines, in which the Chinese government holds a controlling interest, demonstrates this new approach. The case garnered significant media attention in Korea and resulted in the first ever trial under the FBPA in the commercial context. Although the defendants were found not guilty, Korean prosecutors have appealed that verdict all the way to the Korean Supreme Court, which has yet to issue a ruling.⁴

It is too early to tell whether Korean prosecutors will continue an aggressive approach to enforcement. Nevertheless, especially given the increasing foreign bribery enforcement climate globally and the prospect that the recent criticism from Transparency International could spur Korea into more action, a closer look at the FBPA is timely and warranted.

This article examines the key provisions of the FBPA and how the law differs from its U.S. counterpart, the Foreign Corrupt Practices Act (FCPA). It then proceeds to a discussion of the China Eastern Airlines case and how the case signals an increased focus on rooting out foreign bribery in the commercial context. Finally, it offers guidance to companies doing business in Korea on how to mitigate risks.

What Is and Is Not in FBPA

The FBPA is refreshing in its brevity, a scant two pages long. It criminalizes the “promising, giving or offering [of a] bribe to a foreign official in relation to his/her official business in order to obtain [an]

improper advantage in the conduct of international business transactions.”⁵ Like the FCPA, there is no monetary threshold; even small payments or gifts could potentially violate the FBPA. Violators are subject to up to 5 years in prison or a fine of up to 20 million Korean won (slightly under US\$19,000), or, in the event the profit from the bribery exceeds 10 million won, a fine up to twice the amount of the profit.

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Particularly when compared to the FCPA, the text of the FBPA is interesting both in terms of what is included and what is not. Of particular note are (i) the FBPA’s definition of a public official, (ii) the narrowly drawn exceptions to criminal liability, and (iii) the vicarious liability of corporations. Missing in the FBPA are an explicit intent requirement, any discussion of bribery committed through intermediaries, and any reference to whether a non-Korean company can be subject to liability for acts done in Korea. We discuss these points below.

Definition of Foreign Public Official: The FBPA defines “foreign pub-

lic official” as encompassing three separate categories of people:

(1) any individual appointed or elected to a legislative, administrative, or judicial office in any level of a foreign government;

(2) any individual working for a public international organization; and

(3) any individual who exercises a “public function” for a foreign government and who also does one of the following: conducts a business in the public interest delegated by the foreign government, works for a public organization or agency that carries out business in the public interest, or works in an enterprise over which the foreign government holds over 50 percent of its capital or exercises “substantial controlling power” over its management. There is an exception to this part of the definition if the individual works for an enterprise that operates “on a competitive basis equivalent to entities of ordinary private economy, without preferential subsidies or other privileges.”⁶

The test in this last category for when an employee of a state-owned or controlled entity is a “foreign public official” provides some refreshing clarity not seen in the FCPA’s foreign official definition. The FCPA defines foreign official to include employees of “instrumentalities” of foreign governments⁷ without providing any guidance on the meaning of “instrumentality,” although courts have held that personnel from state-owned enterprises can be liable.⁸

The FBPA, by contrast, provides a bright-line rule for employees of companies more than 50 percent owned by the foreign government

or in which the foreign government has substantial control over management, including decision-making and the appointment and dismissal of executives.⁹ What remains unclear, however, is the scope of the exception for “enterprises operating on a competitive basis equivalent to entities of ordinary private economy.” Many countries, particularly in emerging markets, have state-run entities that are important parts of the economy. If they are deemed to be like other competitive enterprises that are not state-run, the FBPA’s exception, without further clarification, could effectively swallow the rule.

Exceptions to Criminal Liability: The FBPA has two exceptions: Individuals are not liable if the payment is permitted or if a “small pecuniary or other advantage is promised, given or offered to a foreign public official engaged in ordinary and routine work, in order to facilitate the legitimate performance of the official’s business.”¹⁰ The first exception is similar to the FCPA’s affirmative defense for payments that are lawful under the relevant foreign country’s written laws;¹¹ the second is similar to the FCPA’s facilitating payments exception which exempts facilitating or expediting payments for “routine governmental action.”¹²

Vicarious Liability: Article 4 of the FBPA addresses criminal responsibility of a corporation for the acts of its representative, agent, employee, or other individual working for it. In such cases, the corporation will be subject to a fine up to 1,000,000,000 Korean won (approx-

imately US\$934,000). If the profit obtained from the offense exceeds 500,000,000 won (approximately US\$467,000), then the fine will be up to twice the amount gained by the corporation. Of particular note is that a corporation will not be subject to any sanctions if it “has paid due attention or exercised proper supervision” to prevent an offense.

What the FBPA Does Not Include: Interestingly, the FBPA does not have an explicit intent requirement. Unlike the FCPA, which requires that the act in furtherance of bribery be done corruptly,¹³ the text of the FBPA only requires the bribe to be done for the purpose of obtaining an improper advantage in international business transactions.¹⁴ An aggressive reading of the FBPA is that it only requires an act, not a criminal state of mind, though it is unclear whether this would hold up in court.

Also unlike the FCPA, the FBPA does not by its terms contemplate a finding of liability for bribe payments made through intermediaries. In other words, there is no provision criminalizing the giving of a thing of value while knowing that it will be passed along to a foreign official, as in the FCPA.¹⁵ That said, the relatively few FBPA cases that have been brought include cases where the bribes were paid through an intermediary.¹⁶ Additionally, Korean criminal law allows for the conviction of accomplices and “co-principals” who assist in furthering a crime, so there appears to be no legal bar to proceeding against third-party intermediaries under the Korean law.¹⁷

Finally, the FBPA is silent on whether a non-Korean company can be liable for acts in furtherance of bribery of a foreign official done in Korean territory. A separate provision of the Korean Criminal Act, however, provides that the Act applies to foreign persons who commit acts in Korea, and so it appears that non-Korean companies can be subject to liability in these instances.¹⁸

China Eastern Airlines Case

The recent case against two individuals for bribing the president of the Korean subsidiary of China Eastern Airlines illustrates a new approach to enforcement in the strictly commercial context in Korea. In May 2011, the Incheon District Prosecutor charged the CEO of a logistics company and the CEO of a travel agency with making bribe payments totaling more than \$6 million in order to receive favorable freight fees and additional tickets at a sale price from China Eastern Airlines.¹⁹

At trial, the district court found the individuals not guilty because the prosecution had not met its burden of proof under Article (2)(c) of the FBPA—namely, that China Eastern Airlines was a state-owned enterprise.²⁰ The court did not indicate under which prong of the “foreign public official” definition it was basing its opinion. In addition, on its face, the ruling does not square with the fact that China East Airlines is well known as a state-owned entity.²¹ Perhaps this is why the prosecution appealed the ruling in February 2013.

The appellate court affirmed the district court’s ruling in February

2013, finding that the two individuals were not guilty of violations under the FBPA. The prosecution argued on appeal that the company was controlled by the Chinese government because it owned more than 50 percent of China Eastern Airline's capital and because the Chinese government appoints and dismisses the CEO of the company.²² The prosecution also presented reasons why China Eastern Airlines does not conduct operations on a competitive basis to entities of ordinary private economy, citing as one of its reasons that the company received large amounts of government subsidies.²³ The appellate court affirmed without providing any reasoning, and so did not provide any guidance on the definition of "foreign public official."²⁴ The prosecutors have appealed again to the Korean Supreme Court, which hopefully will provide some clarification on the definition.

Key Takeaway

While the full implications of the China Eastern Airlines case remain to be seen, one thing is clear: Korean prosecutors are pressing their view of the FBPA and its critical definition of a foreign public official all the way to their country's highest court. Time will tell whether this is a harbinger of an increased focus on foreign bribery enforcement in Korea.

Amidst the uncertainty, there is one key thing companies operating in Korea can and should do to mitigate risks of a violation of the FBPA: Enact robust anti-corruption compliance policies and train their employees on the importance of following compliance procedures. As noted above, the FBPA exempts corporations from liability if they "pa[y] due attention or exercise[] proper supervision" to prevent an offense. Although there has been no court opinion defining "due attention" or "proper supervision,"²⁵ a corporation with an effective anti-corruption compliance and training program should meet that standard.²⁶

It is to be expected that implementation of such policies and the training of employees will involve additional resources. Nevertheless, given the risks of a violation and the costs and reputational damage of defending an investigation, it will be money well spent.

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1. Min-woo Lee, "The Titular Foreign Bribery Prevention Act," *Kyeonggi Ilbo* (June 18, 2013), available at <http://www.kyeonggi.com/news/articleView.html?idxno=685187> ("Since the passing of the Act, 1 case in 2002, 5 cases in 2004, 1 case in 2007, and 2 cases in 2008, 1 case in 2010 for a total of 10 cases have been held to be in violation of the Act.") (translation from Korean).

2. *Id.*; see also OECD Working Group on Bribery, "Phase 3 Report on Implementation of the OECD Anti-Bribery Convention in Korea" at 9 (October 2011) (OECD Phase 3 Report), available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Koreaphase3reportEN.pdf>.

3. Transparency International, "Exporting Corruption; Progress Report 2013: Assessing Enforcement of the OECD Convention on Combatting Foreign Bribery," Oct. 7, 2013, at 56-57, available at http://issuu.com/transparencyinternational/docs/2013_exportingcorruption_oecdprogre.

4. Korea's Criminal Procedure Law Articles 357 and 358 provide for appeals within 7 days of a ruling.

5. English translation of the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions (FBPA) at Article 3(1), available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2378002.pdf>.

6. *Id.* at Article 2.

7. 15 U.S.C. §§78dd-1(f)(1), 78dd-2(h)(2), 78dd-3(f)(2).

8. See *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011); *United States v. Carson*, SACR 09-00077-JVS, 2011 WL 5101701, at *3 (C.D. Cal. May 18, 2011). Although the tests these courts have used varies, one factor commonly taken into account is the foreign state's degree of control over the entity.

9. FBPA Article 2(2)(c).

10. FBPA Article 3(2).

11. 15 U.S.C. §§78dd-1(b), 78dd-2(b), 78dd-3(b).

12. 15 U.S.C. §§78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).

13. 15 U.S.C. §§78dd-1(a), (g)(1), 78dd-2(a), (i), 78dd-3(a).

14. FBPA Article 3(1).

15. 15 U.S.C. §§78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3).

16. See OECD Phase 3 Report at 13.

17. *Id.*

18. Criminal Act of Korea, Art. 2 ("This Act shall apply to both Korean nationals and aliens who commit crimes in the territory of the Republic of Korea"). An English Translation of the Act available at the OECD Anti-Corruption Initiative, <http://www.oecd.org/site/adbocdanti-corruptioninitiative/46816472.pdf>; Minwoo Lee, "Incorruptibility Defines National Prestige—A Need for Stricter Regulations on Foreign Bribery," *Kyeonggi Ilbo* (June 19, 2013), available at <http://www.kyeonggi.com/news/articleView.html?idxno=685529>.

19. Young Hwan Kim, "Chinese State-owned Airline's Bribery Pandemonium," *The Hankyoreh* (May 18, 2011), available at <http://www.hani.co.kr/arti/society/area/478659.html>.

20. Decision of the Court, Incheon District Court, 2011 Gohap 277, 294, 757 (12th Crim. Dept. Feb. 14, 2012) ("The proof proffered by the prosecution that China Eastern Airlines was a state-owned entity relied upon information provided by China Eastern Airlines' employees. However, the employee testified at trial that it was difficult to explain the credibility of the data and could not guarantee the authenticity of its content; therefore, the burden of proof was not met.") (translated from Korean).

21. Joanne Chiu, "China Opens Skies to Privately Owned Airlines," *The Wall Street Journal* (May 29, 2013), available at <http://online.wsj.com/news/articles/SB10001424127887324412604578512943973853754> ("China's civil-aviation market is dominated by the three state-owned carriers: Air China, China Southern Airlines Co. and China Eastern Airlines Corp.").

22. Decision of the Court, Seoul High Court, 2012 no 865, 2012 no 2685 at 1 Ga (4) (1st Crim. Dep't. Feb. 1, 2013).

23. *Id.*

24. *Id.* at 2 Na (4).

25. OECD Phase 3 Report at 18.

26. This makes the FBPA distinct from the FCPA, which has no "compliance defense," and more in keeping with the recently enacted U.K. Bribery Act, which allows companies a defense to a charge of failing to prevent bribery by showing they had adequate procedures to prevent it.

