

The FBPA: South Korea's Act to prevent bribery of foreign officials



By Kurt Gerstner and Hyunah Kim

Recently, several former executives of a large multinational corporation were hit with the largest civil penalty ever for individuals in a corporate foreign bribery case - each was ordered to pay US\$524,000. Their employer was ordered to pay a staggering corporate fine of US\$1.6 billion to settle the bribery probe. While stunning because of the magnitude of the penalties, the fact that a corporation and some of its former executives were prosecuted for bribing foreign officials is not unique or surprising. Many countries are actively investigating and prosecuting bribery of foreign officials under their respective anti-corruption laws, including the U.S. Foreign Corrupt Practices Act (the FCPA) and the U.K. Bribery Act, and there has been increasing international cooperation to aid such investigations and prosecutions.

In 1998, Korea enacted the Foreign Bribery Prevention Act (the FBPA or the 'Act on Preventing Bribery of Foreign Public Officials in International Business Transactions') to implement the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Although there have not been many FBPA enforcement activities by the Korean government until the recent China Eastern Airlines case, given the increasing international focus on investigations and prosecutions of bribery of foreign officials, it is expected that the Korean government will take an aggressive approach to the FBPA enforcement.

The Foreign Bribery Prevention Act (the FBPA)

Under the FBPA, anyone who promises, gives or offers a bribe to a foreign public official in relation to his/her official business to obtain an improper advantage in international business transactions is subject to up to 5 years of imprisonment or a fine up to KRW 20 million. If the benefit exceeds KRW 10 million, a court may impose a fine equal to double the amount of profit from the act of bribery. Moreover, a corporate entity will be vicariously liable for its employees' bribery and will be subject to a fine up to KRW 1 billion, or double the amount of benefit if the benefit exceeds KRW 500 million, except when the corporate entity "has paid due attention or exercised proper supervision to prevent" the bribery.

No intent requirements and monetary thresholds

While the FCPA requires the person making or authorising the pay-

ment to have a corrupt intent, the FBPA does not have an explicit intent requirement. Furthermore, there is no minimum monetary threshold for a bribery prosecution. However, the FBPA carves out an exception permitting "small pecuniary or other advantage" made to a foreign public official to obtain routine governmental actions.

Definition of 'foreign public official'

Under the FBPA, 'foreign public official' is defined as (i) any person appointed or elected to a legislative, administrative or judicial office of a foreign government; (ii) any person working for a public international organisation; (iii) any person who exercises a public function for a foreign government and who also does one of the following: (a) conducts a business in the public interest delegated by the foreign government; (b) works for a public organisation or agency carrying out business in the public interest; or (c) works at an enterprise over which the foreign government holds over 50 percent of the paid-in capital or exercises substantial control over its overall management, including major business decisions and the appointment or dismissal of its executives; except for a person who works at an enterprise that operates on a competitive basis equivalent to entities of ordinary private economy, without preferential subsidies or other privileges.

There had not been much discussion on the exact definition and scope of 'foreign public official' for the purpose of the FBPA, until the recent China Eastern Airlines case. In 2011, Korean prosecutors brought FBPA charges against two executives for allegedly bribing the CEO of the Korean subsidiary of China Eastern Airlines (the Company). The prosecution sought to prove that the CEO of the Company was a foreign public official because the Chinese government (i) through a wholly owned subsidiary owned more than 50 percent of the Company and (ii) had appointment and dismissal power over the CEO of the Company. Both trial court and the appellate court ruled that the prosecution failed to meet its burden of proof. Prosecutors have appealed to the Korean Supreme Court, which has yet to issue a ruling. Hopefully, the Supreme Court's ruling will provide some clarification on the scope of 'foreign public official' as well as signaling how aggressively prosecutors can enforce the FBPA.

Lee International IP & Law Group

Poongsan Bldg. 23, Chungjeongro
Seodaemun-gu, Seoul 120-013, Korea

Tel: 82 2 2279 3631

Fax: 82 2 2273 4605

Email: kgerstner@leeinternational.com

hkim@leeinternational.com

www.leeinternational.com