# Legal Issues and Trends in Enforcement of Anti-Corruption Legislation in Korea

The recent arrest and detention of 4 employees of **Korea Hydro & Nuclear Power Co. Ltd.** ("**KHNP**") on charges of corruption and bribery received a great deal of media attention and public scrutiny in Korea, and it is expected that issues relating to compliance with anti-corruption legislation will become increasingly more important in doing business in Korea. The following is a summary of the KHNP investigations and a discussion of legal issues and enforcement trends relating to anti-corruption legislation in Korea that may be of interest to foreign companies doing business in Korea.

## 1. Investigations of KHNP Officials

Prosecutors announced on May 4, 2012 that a lobbyist and 4 officers and employees of KHNP had been arrested and detained on charges of corruption and bribery. The arrests were made after ongoing investigations of relevant procurement officers and employees, brokers and suppliers of KHNP uncovered evidence that (i) purported lobby funds amounting to KRW 700 million (approximately USD 600,000) were actually payments made to the lobbyist by various parts suppliers of KHNP in exchange for his promises to use his personal connections to high-ranking officials of KHNP to ensure that such suppliers would win supply contracts with KHNP and (ii) certain technology managers of KHNP had received kickbacks from various suppliers amounting to KRW 180 million (approximately USD 150,000) for their roles in ensuring that supply contracts would be awarded to such suppliers through recommendations of their products for KHNP's new product/technology and green product/technology programs. The prosecutors also laid charges against the representative director of an un-named company, "M", for alleged bribes of KHNP officials in exchange for awards of construction and supply contracts to his company.

KHNP is a wholly-owned subsidiary of **Korea Electric Power Corporation** ('KEPCO'), whose major shareholders are the Korean government and other government-related corporations. According to media reports, the Korean prosecutors have been investigating corruption and bribery allegations involving employees of KHNP and the lobbyist since late 2011, and had conducted office raids on more than 10 different corporations doing business with KHNP. The total amount of bribes uncovered through the prosecutors' investigations is approximately KRW 2 billion (approximately USD 1.8 million), KRW 1 billion of which was found in a bank account held by a KHNP official under another individual's name. The lobbyist accused of making the bribes is alleged to have strong ties to both politicians and high-ranking officials of KHNP.

The prosecutors have reportedly been expanding the scope of their investigations and are now targeting certain high-ranking officials of KHNP. The prosecutors are tracking bank accounts and financial documents to uncover any additional instances of corruption or bribes and many believe that the investigation will continue to broaden and will uncover bribes that were paid by a good many companies that do business with KHNP.

This is not the first time KHNP has been under fire due to corruption allegations. In 2009, a KHNP official was prosecuted for receiving bribes from a Korean subsidiary of Control Components, Incorporated ("**CCI**"), a US manufacturer of control valves for use in the nuclear, oil and gas and power generation industries world-wide that sold its products to both state-owned and private companies in over thirty countries around the world. The case arose out of investigations conducted by US authorities on CCI for violations of the anti-bribery provisions of the US' **Foreign Corrupt Practices Act** (the "**FCPA**"). One of the charges laid against CCI involved a corrupt payment to the KHNP official by an executive of CCI's Korean subsidiary. Upon receiving information on the US investigations, Korean prosecutors investigated and prosecuted the KHNP official in Korea.

## 2. Legal Issues / Enforcement Trends

Under the Korean Criminal Code (the "**Criminal Code**"), public official bribery and private commercial bribery are separate and distinct crimes, each prosecuted under different provisions of the Criminal Code. The determination of which bribery provisions of the Criminal Code will apply depends on whether the individual(s) alleged to have accepted bribes would constitute a "public official".

Any employee of the state and local governments defined by the State Public Officials Act and the Local Public Officials Act, whether employed by an executive, legislative or judicial branch, constitutes a "public official" in the official bribery context. In addition, many Korean statutes contain provisions that have the effect of deeming otherwise private sector employees as "public officials" under the Criminal Code. For example, under the Enforcement Decree of the Act on Additional Punishment of Specific Crimes, officers or employees of certain specified state-owned or state-controlled entities, such as the Bank of Korea or the Financial Supervisory Service, are deemed as public officials. Also, the Act on Administration of Public Entities (the "**AAPE**"), which was enacted in January of 2007, requires the Minister of Strategy and Finance to annually issue a list of state-owned/controlled or subsidized entities that are deemed as "public corporations" and "quasi-government entities", and directors and officers of these specified "public corporations" and "quasi-government entities" are deemed "public officials" under the Criminal Code.

KHNP has consistently been listed as a public corporation since the inception of the AAPE; accordingly, there is hardly a doubt that the directors and officers of the KHNP would fall within the definition of a "foreign official" for purposes of the FCPA. In this regard, in the 2009 prosecution of the KHNP official, since the impugned acts occurred in 2003-2004, which was prior to the enactment of the AAPE, the KHNP official was charged and prosecuted under the Criminal Code bribery provisions applicable to private commercial bribery. However, despite the then lack of Korean statutory grounds for viewing the KHNP official as a "public official", it is noted that in the US prosecution of CCI's alleged corrupt payment to the KHNP official, it was taken as an accepted fact under the plea arrangement that the KHNP official fell within the scope of the FCPA definition of a "foreign official". Now that clear statutory grounds exist for finding that KHNP officials are "public officials" for purposes of the Criminal Code in Korea, the issue of whether they would be deemed "foreign officials" under the FCPA is all the more moot.

There is as yet no information that any foreign companies are implicated in the current KHNP scandal and ongoing investigations. However, since KHNP purchases goods and services from many foreign suppliers, and the Korean prosecutors are investigating bank accounts of all relevant KHNP procurement officials, it remains to be seen whether further investigations will result in foreign companies being implicated.

Punishment for bribery in Korea includes the following. For bribing a public official: imprisonment for not more than 5 years or a fine not exceeding KRW 20,000,000. For a public official who has accepted a bribe: up to life imprisonment, depending on the amount of the bribe accepted. For bribing a private sector officer or employee: imprisonment for not more than 2 years or a fine not exceeding KRW 5,000,000. For a private sector officer or employee who has accepted a bribe: imprisonment for not more than 5 years or a fine not exceeding KRW 10,000,000.

Korean culture, like other Asian cultures, is a gift-giving culture. Giving gifts is common in business transactions, and an accepted business practice. In addition, commercial transactions depend in many cases on personal connections and the entertainment and drinking culture that subsists to maintain and further such connections. In stark contrast to such cultural and commercial norms, however, Korean prosecutors and regulatory authorities are very strict in their investigations and prosecutions of bribery allegations. A recent example of this aggressive enforcement is the investigation and prosecution during 2011 of several major Korean pharmaceutical corporations and doctors in large hospitals, in relation to allegations of illegal rebates being offered by pharmaceutical companies to doctors for purchases of pharmaceutical products for their hospitals. The authorities basically undertook an industry sweep in their investigations of pharmaceutical rebate schemes, and have stated their commitment to actively pursuing prosecution of these corrupt practices until they are totally eradicated from the pharmaceutical industry.

This sharp divide between law and culture may pose higher anti-corruption related risks for foreign corporations doing business in Korea; a fine balance must be struck between compliance with foreign corrupt practices legislation in their home jurisdictions and the observance of accepted (and often expected) commercial practices and societal norms in Korea that often obligate companies to give gifts or entertain clients, which in certain circumstances could run the risk of being misconstrued as bribery under anti-corruption or related legislation in Korea and in their home jurisdictions.

To date, although Korea has enacted its own version of the FCPA – the Act on Prevention of Bribery of Foreign Public Officials in International Business Transactions (the "**Foreign Bribery Prevention Act**") – Korean authorities have not been too eager to chase companies for bribery of foreign officials. However, a shift from this reluctant stance may be appearing on the horizon. In May 2011, Korean prosecutors charged two individuals for bribing the CEO of the Korean subsidiary of **China Eastern Airlines.** This is the first formal prosecution (i.e., by court trial) of a violation of the Foreign Bribery Prevention Act; previous violations resulted only in administrative orders for payment of fines. The trial court held in the China Eastern Airlines case that there was insufficient evidence to prove that the CEO of the Korean subsidiary of China Eastern Airlines falls within the definition of a "foreign official" under the Foreign Bribery Prevention Act, but held that the individuals and CEO were guilty of the alleged acts of bribery in a private, commercial context.

As the issues considered in the China Eastern Airlines case are closely associated to the issues and discussions surrounding the scope of the definition of "foreign official" under the FCPA, it will be interesting to see how the case is finally decided in the appellate courts.

Given the stark contrast in Korea between strict enforcement of anti-corruption laws, on the one hand, and deeply entrenched commercial practices dominated by personal connections, entertainment and gift-giving, on the other hand, foreign corporations doing business in Korea are advised to seek legal advice in relation to compliance programs and other practical measures necessary or advisable for safeguarding against issues arising under both Korean anti-corruption laws and the foreign anti-corruption legislation (e.g., such as the FCPA) in their respective home jurisdictions.

Shin & Kim's **Anti-Corruption • FCPA / Internal Investigations Practice Group** has accumulated a wide range of experience relating to anti-corruption, bribery and FCPA issues in Korea and can help clients navigate the challenges they may face when conducting business in Korea.

If there is any question regarding the above, please contact us as set out below.


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