

Preventing Bribery of Foreign Public Officials in Korea: China Eastern Airlines Case

In February 2013, the Seoul High Court affirmed the lower court's decision, finding two individuals who had bribed the CEO of the Korean subsidiary of China Eastern Airlines (the "Company") not guilty in Korea's first-ever trial under the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions (FBPA). This case is noteworthy for addressing the scope of "foreign public official" for purposes of the FBPA.

Article 2 of the FBPA defines "foreign public official" similarly with the OECD Convention on Bribery, encompassing not only government officials but also individuals performing a public function such as employees of government-controlled companies or state-owned enterprises.

Specifically, the FBPA defines "foreign public official" to include:

[A]n executive or employee of a company in which a foreign government contributed more than 50% of the paid-in-capital or with respect to which a foreign government exercises de facto control over its overall management including major business decisions and the appointment or dismissal of its executives (however, this sub-paragraph shall not be applicable if a company conducts business on a competitive basis with other private-sector companies without receiving preferential subsidies or other benefits from the government).

The lower court found that even though there is some evidence to show that the CEO would fall within the definition of a "foreign public official" under the FBPA, the evidence presented did not meet the burden of proof.

On appeal, the prosecution sought to prove that the CEO is a foreign public official for purposes of the FBPA by arguing that the



Chinese government exercises *de facto* control over the Company on the grounds that (i) a company wholly owned by the Chinese government owns more than 50 percent of the Company's capital and (ii) the Chinese government appoints and dismisses the CEO of the Company. The prosecution also presented facts to show that the Company does not conduct business on a competitive basis with private-sector companies.

Notwithstanding the above, the appellate court affirmed the lower court's holding without providing any additional reasoning on the issue.

This case reveals an interesting parallel between the FBPA and the United States' Foreign Corrupt Practices Act (FCPA), which defines "foreign official" to include, *inter alia*, "any officer or employee of a foreign government or any department, agency, or instrumentality thereof ..."

The FCPA does not define "instrumentality [ies]" of a foreign government. Specifically, uncertainty remains as to the exact percentage of government ownership or voting rights required for state-owned/controlled enterprises to constitute an instrumentality within the meaning of the FCPA.

With regard to this issue, *United States v. Esquenazi*, a recent FCPA case currently on appeal, sheds some light. In determining

whether Haiti's national telecommunications company (H-Telco), which received illegal payments from a U.S. company, was a "government instrumentality" under the FCPA, the trial court instructed jurors to consider the following factors, among others:

1. Whether H-Telco's key officers and directors are government officials or are appointed by government officials; and

2. The extent of Haiti's ownership of H-Telco, including whether the government owns a majority of the company's shares or provides financial support, including subsidies and tax breaks.

As seen from above, the exact definition and scope of foreign public official is yet to be delineated in both countries. Needless to say, the standards should be clarified so that companies that engage in business transactions with foreign counterparties can do so without fear of prosecution.

In the case of Korea, it should be noted that the courts in the China Eastern Airlines case ruled against the prosecution not because the CEO does not constitute a "foreign public official" but because the prosecution had not met its evidentiary burden of proof. Furthermore, as the courts acknowledged that "there is some evidence that the Company might be an enterprise within the meaning of the FBPA," it remains to be seen how the Supreme Court of Korea will decide on this issue.

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