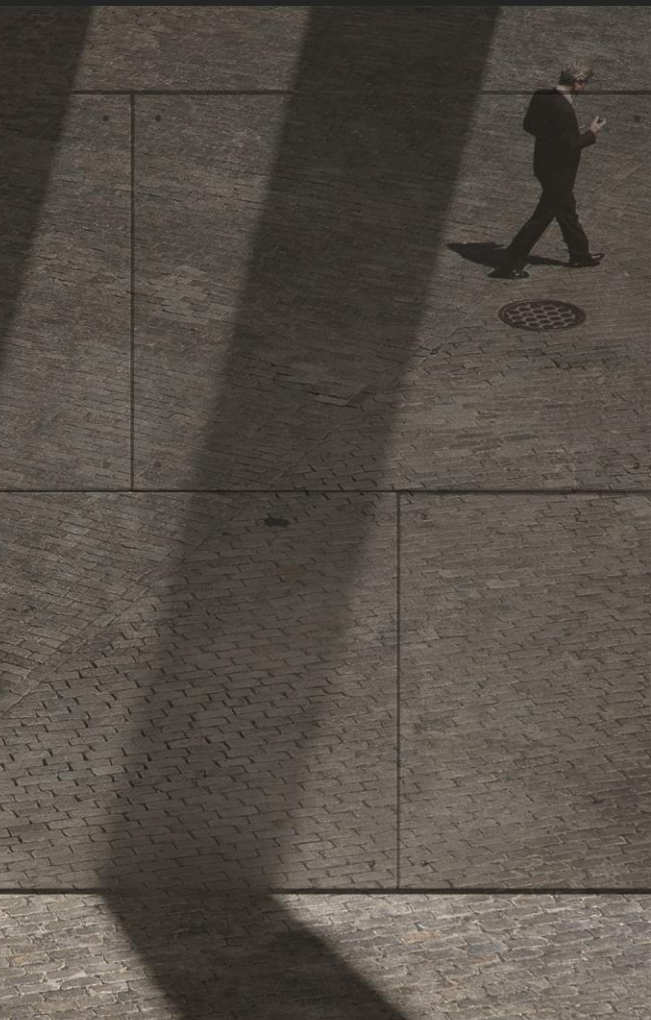




IMPLEMENTING THE OECD ANTI BRIBERY CONVENTION

PHASE 4 REPORT:
Korea



Implementing the OECD Anti-Bribery Convention

Korea Phase 4 Report



This Phase 4 Report on Korea by the OECD Working Group on Bribery evaluates and makes recommendations on Korea's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the OECD Working Group on Bribery on 13 December 2018.

The report is part of the OECD Working Group on Bribery's fourth phase of monitoring, launched in 2016. Phase 4 looks at the evaluated country's particular challenges and positive achievements. It also explores issues such as detection, enforcement, corporate liability, and international cooperation, as well as covering unresolved issues from prior reports.

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EXECUTIVE SUMMARY

This Phase 4 report by the OECD Working Group on Bribery evaluates and makes recommendations on Korea's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report tracks progress made by Korea since the 2011 Phase 3 evaluation. It details Korea's achievements and challenges, including on enforcement of its foreign bribery laws, corporate liability and detection of foreign bribery.

Korea's enforcement record has declined since Phase 3. Since 2011, Korea has secured convictions in four foreign bribery cases; two other prosecutions resulted in acquittals, and decisions not to prosecute were taken in four other cases. Two further investigations and one criminal trial are ongoing as of the time of this review. In view of the level of exports and outward investment by Korean companies in jurisdictions and sectors at high risk for corruption, Korea must increase its level of enforcement of foreign bribery and related offences against individuals and companies. Since Phase 3, little has been done to strengthen the capacities of Korea's law enforcement agencies to proactively detect and investigate foreign bribery. The Working Group calls for clarification of the coordination mechanisms between Korea's police and prosecutors' offices, including with respect to case allocation and information-sharing. Greater cross-agency training and awareness-raising should also be introduced on detection and reporting of suspected bribery to relevant law enforcement agencies, including as concerns AML reporting requirements, clarification of reporting obligations of tax authorities, and enhancing detection capacities by Korean public officials in agencies that interact with Korean companies operating abroad. The report also highlights good practices that have the potential to enhance Korea's detection capacities: in particular, Korea's legal and institutional framework provides comprehensive protection for whistleblowers who report suspected foreign bribery, and the scope of protections has been expanded since Phase 3, to cover notably both internal and external reporting. The Working Group also welcomes the recent passing of legislation, which closes the loophole concerning bribes paid to third party beneficiaries.

A longstanding recommendation remains concerning sanctions available for natural and legal persons, which are insufficient and should be increased in law and in practice. The Working Group further notes that practical application of the foreign bribery offence by investigators, prosecutors and judges raises potential concerns about restrictive interpretations of 'international business,' consideration of local custom and a non-autonomous approach to the definition of foreign public official, and urges Korea to provide written clarification on these points. The current investigation time limit and statute of limitations for legal persons have also impeded effective foreign bribery enforcement and should be reviewed. Foreign bribery investigations could also be enhanced through a more proactive use of MLA.

The report and its recommendations reflect the findings of experts from Finland and Italy and were adopted by the Working Group on 13th December 2018. It is based on legislation, data and other materials provided by Korea, as well as research conducted by the evaluation team. Information was also obtained during an on-site visit to Seoul in July 2018, during which the evaluation team met representatives of Korea's public and private sectors, law enforcement, media, and civil society. Korea will submit an oral report to the Working Group within one year on progress made to increase foreign bribery sanctions, in particular for legal persons, and a written report in two years on the implementation of all recommendations and its enforcement efforts.

INTRODUCTION

1. In December 2018, the Working Group on Bribery in International Business Transactions (Working Group or WGB) discussed its fourth evaluation of Korea's implementation of the [Convention on Combating Bribery of Foreign Public Officials in International Business Transactions](#) (the Convention), the [2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions](#) (2009 Recommendation) and related instruments.

1. Previous evaluations of Korea by the Working Group on Bribery

2. Monitoring of Working Group members' implementation and enforcement of the Convention and related instruments takes place in successive phases through a rigorous peer-review system. The monitoring process is subject to specific, agreed-upon principles. The process is compulsory for all Parties and provides for on-site visits (as of Phase 2) including meetings with non-government actors. The evaluated country has no right to veto the final report or recommendations. All of the OECD Working Group on Bribery evaluation reports and recommendations are systematically published on the OECD website.

3. During its Phase 3 evaluation by the Working Group in October 2011, Korea received 16 recommendations. In 2014, the Working Group concluded that Korea had fully implemented 10 recommendations, partially implemented 4, and not implemented 2.¹

Box 1. Prior WGB Evaluations of Korea	
2014	Phase 3 Follow-up
2011	Phase 3 Report
2007	Phase 2 Follow-up
2004	Phase 2 Report
1999	Phase 1 Report

Figure 1. Korea's Implementation of its Phase 3 Recommendations

(WGB Assessment of Korea's Phase 3 Two-Year Written Follow-Up Report - 2014)

10 Fully Implemented	4 Partially Implemented	2 Not Implemented
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2. Phase 4 process and on-site visit

4. Phase 4 evaluations focus on three key cross-cutting issues – enforcement, detection, and corporate liability.² They also address progress made in implementing outstanding recommendations from previous phases, as well as any issues raised by changes to domestic legislation or the institutional framework. Phase 4 takes a tailor-made approach, considering each country's unique situation and challenges, and reflecting positive achievements and good practices. For this reason, issues which were not deemed

¹ See Annex 1 for a list of Korea's Phase 3 recommendations and the Working Group's assessment of their implementation, based on Korea's Phase 3 Follow-up Report.

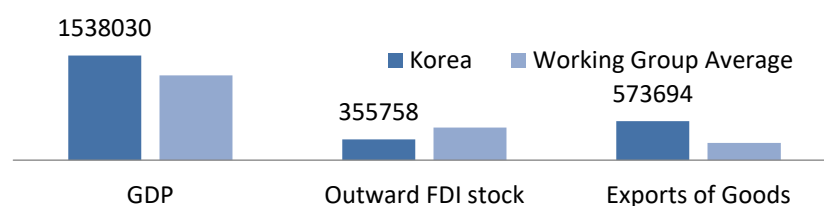
² See Working Group [Phase 4 evaluation procedures](#).

problematic in previous phases or which have not arisen as such in the course of this evaluation may not have been fully re-assessed at the on-site visit and may thus not be reflected in this report.

5. The evaluation team for this Phase 4 evaluation of Korea was composed of lead examiners from Finland and Italy, as well as members of the OECD Anti-Corruption Division.³ After receiving Korea's responses to the Phase 4 questionnaire and supplementary questions, the evaluation team conducted an on-site visit to Seoul on 2-6 July 2018. The team met with representatives of the Korean government, law enforcement, the private sector (business associations, companies, banks, lawyers, and external auditors), as well as civil society (non-governmental organisations, academia and the media).⁴ Regrettably, the team was unable to meet with representatives of the judiciary, who considered it inappropriate for judges to make comments on specific cases outside of the Court. The evaluation team expresses its appreciation to all the participants for their contributions to these discussions.

3. Korea's economic situation and potential foreign bribery risks

Figure 2. Comparison of Korea's Economic Data against Working Group Average



Source: OECD, IMF (2017), UNCTAD (2017) and WTO (2017); Millions of current USD.

6. Since the 1950s, Korea has transformed rapidly from one of the poorest countries globally to a major industrial power.⁵ In 2017, its economy rebounded mainly thanks to business investment and a continuing boom in construction.⁶ In 2017, Korea was the 9th largest economy amongst the 44 Working Group members. The 2018 OECD Economic Survey of Korea states: "The [Korean] economy rebounded in 2017 after several years of

³ **Finland** was represented by **Juuso Oilinki**, Senior Specialist, Department of Criminal Policy of the Ministry of Justice, and **Tuire Tamminiemi**, District Prosecutor from the Helsinki Prosecutor's Office. **Italy** was represented by **Colonel Alessandro Nencini**, Guardia di Finanza, Attaché to the Italian Embassy in Beijing and accredited to Korea, and **Giovanni Tartaglia Polcini**, Magistrate, Legal Advisor to the Ministry of Foreign Affairs and International Cooperation. The **OECD** was represented by **France Chain**, Coordinator of the Phase 4 Evaluation of Korea and Senior Legal Analyst; **Leah Ambler**, Legal Analyst, **Lise Née**, Legal Analyst; and **Maria Xernou**, Consultant, all from the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

⁴ See Annex 2 for a list of participants in the on-site visit discussions.

⁵ OECD (2018), *OECD Economic Surveys: Korea 2018*, OECD Publishing, Paris, p. 18.

⁶ *Ibid*, p. 12.

subpar growth. The upturn was led by business investment and a continuing boom in construction. The economy is projected to grow around 3% a year in 2018 and 2019.”

7. Korea’s rapid economic development has been largely export-led, with exports accounting for nearly half of the Korean GDP.⁷ In 2017, Korea was the 6th largest export economy globally. While Korean trade contracted significantly at the height of the global crisis and again slightly during the euro crisis,⁸ in 2017, Korea was ranking 4th among the WGB members for trade in goods.⁹ The top 5 export partners of Korea are China (24.8%), the United States (12%), Vietnam (8.3%), Hong Kong/China (6.8%), Japan (4.7%), and Australia (3.5%).¹⁰ The sectoral breakdown of Korean exports for 2017 is as follows: semiconductors (17.1%), ships (7.4%), cars (7.3%) and petroleum products (6.1%).¹¹ An important part of Korean exports hence occurs in four of the five sectors more prone to foreign bribery risks: construction, transportation and storage, information and communication, and manufacturing.¹² In practice, the foreign bribery cases referred to in Phase 4 have occurred mainly in the construction and transport services sectors, as well as the technology, mining, services and telecommunications industries (see sub-section 4 below on foreign bribery cases).

8. The levels of outward investment of the Korean economy are also high. In 2016, Korea ranked 16th in terms of outward foreign direct investment (FDI) among Working Group members. In 2016, Korea’s outward FDI was equivalent to 21% of its GDP and significantly larger than its inward investment (12%).¹³ The top 3 recipients of outward FDI stocks from Korea in 2016 were China (USD million 69 284), the United States (USD million 67 395) and the European Union (EU) members (USD million 35 616), accounting for approximately 58% of its outward FDI stocks. Vietnam, Cayman Islands, Hong-Kong/China, Singapore and Australia receive 4% each of outward FDI from Korea.¹⁴

9. The Korean business sector, and traditional model of growth, is led by exports produced by “chaebols”. These are large enterprise groups comprised of diversified family-owned conglomerates. They remain leading players in the Korean economy, with the top 30 groups accounting for about two-thirds of shipments in Korea’s manufacturing and mining sector and a quarter of sales in services. Their share of total national sales amounts

⁷ *Ibid*, p. 20.

⁸ OECD (2017), [Korea Trade and Investment Statistical Note](#), p.2.

⁹ OECD Data, [Trade in goods, Exports, Million US dollars, 2017](#).

¹⁰ OECD(2018), *OECD Economic Surveys: Korea 2018*, *op.cit.*, p. 23; UNCTAD statistics, which provide information until 2016, do not include unified information on exports towards the European Union. Japan is hence the 5th major export partner of Korea according to UNCTAD; UNCTADSTAT, [General Profile: Republic of Korea 2016. This is also the case for the OECD](#); OECD (2018), *OECD Economic Surveys: Korea 2018*, *op.cit.*, p.23.

¹¹ OECD Economic Surveys: Korea 2018, *op.cit.*, p.23.

¹² OECD (2014), OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials, OECD Publishing, p. 22.

¹³ *Ibid*, p.1.

¹⁴ OECD Foreign Direct Investment statistics database, [FDI positions by partner country BMD4: Outward FDI stocks of Korea by partner country.](#); IMF, [Coordinated Direct Investment Survey \(CDIS\)](#).

to 32%.¹⁵ The ties between these groups and political leaders were exposed during the recent scandal resulting in the impeachment of Korea's previous President.¹⁶

10. Small and medium-sized enterprises (SMEs) make a limited contribution to Korean production, but the percentage of exporting Korean SMEs is significant and has been on the increase since 2012, partly due to the mounting challenges they face at home.¹⁷ SMEs now make up 38% of Korea's exports. Their major export destinations are Southeast Asia (26.7%), followed by China (22.6%), the United States (11.3%), and Japan (9.7%).¹⁸ Almost two-thirds of SME employment is in the service sector, with manufacturing accounting for another 27% and construction 8%.¹⁹

11. Korea's state-owned enterprises (SOEs) exercise control over sectors with strong exports. Thirty SOEs play a major and strategic role in the energy, real estate and infrastructure sectors, including railroad and highway construction, the financial and network industries.²⁰

12. As already noted in Korea's Phase 3 report, corruption risks may arise in specific geographical zones of economic activity with distinct legal regimes: the Kaesong Industrial Zone and Korean Free Economic Zones. The Kaesong Industrial Zone (KIZ), a South Korean industrial park located in North Korea, was established in 2002 and closed in 2016. At the time of Phase 3, this private venture involving both governments and endowed with important incentives for Korean companies to establish operations, was considered to present specific bribery risks regarding North Korean officials and persons performing public functions for the KIZ.²¹ As of February 2016, when the KIZ was closed,²² 123 medium-sized South Korean companies were operating in KIZ from industries including clothing and textiles, car parts and semiconductors, employing approximately 54 000 North Korean workers. KIZ produced USD 3 billion in trade for North Korea from 2005 to 2016. Although there has been no official discussion of resuming business in the KIZ by the tenant companies, it is included in the agenda of the current South Korean President.²³

13. Korean Free Economic Zones (KFEZ) may also present potential foreign bribery risks, given the exemptions, tax breaks, financial support and other incentives provided to foreign companies in these zones.²⁴ KFEZs are specially designated areas for foreign investment firms in Korea. The major investment of the Korean government in

¹⁵ *OECD Economic Surveys: Korea 2018, op.cit.*, p.74.

¹⁶ [South Korea's presidential scandal](#), *BBC News*, 6 April 2018.

¹⁷ Source: Financial Tribune, 23 April 2018, [South Korea SMEs looking abroad for sustainable growth](#).

¹⁸ Source: [Korean Ministry of SMEs and Startups](#), and Business Korea article on [Portion of exports by Korean SMEs](#).

¹⁹ *Ibid*, p.119.

²⁰ [Korea- 7-State-Owned Enterprises](#), *Export.gov*, 25 July 2017.

²¹ Phase 3 report, para. 7.

²² J. BERMUDEZ, B. PARALLEL, [Kaesong Industrial Complex Not Operational Despite Minor Activity](#), *Beyond Parallel. Org*, 6 November 2017.

²³ [Five reasons why Kaesong Industrial Zone will survive](#), *The Investor*, 26 April 2018; [What is the Kaesong Industrial Complex](#), *BBC News*, 10 February 2016.

²⁴ Ministry of Finance and Economy of the Republic of Korea, [Free Economic Zones in Korea: The Future of Northeast Asia](#), September 2003.

infrastructure in these zones may also entail corruption risks in the public procurement sector.²⁵

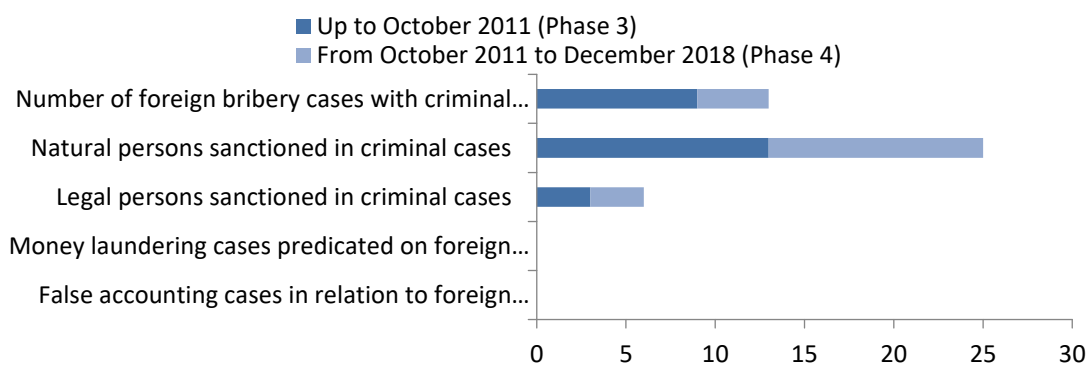
4. Foreign bribery cases

14. Foreign bribery enforcement in Korea has slightly declined since Phase 3. At the time of Phase 3, Korea had secured convictions of 13 individuals and 3 companies in 9 foreign bribery cases. Since Phase 3 in 2011, and as of 5 November 2018, there have been/are:

- 4 foreign bribery cases with sanctions against 12 individuals (with 1 person currently appealing) and 6 companies;
- 2 foreign bribery cases resulting in acquittals;
- 4 cases investigated but resulting in non-prosecution decisions;
- 2 ongoing foreign bribery investigations (1 formal, 1 preliminary); and
- 1 ongoing foreign bribery trial.

Annex 3 describes Korea's foreign bribery enforcement actions since Phase 3.

Figure 3. Comparison between concluded foreign bribery cases in Phases 3 and 4



15. Two of the cases concluded since Phase 3 resulted in criminal convictions by summary order of the Seoul Central District Court (Hanwha) and Busan District Court (Busan Shipping). The third case (CCTV) resulted in criminal sanctions following a trial in the Seoul Central District Court. A fourth conviction in the Busan District Court was confirmed by Korea in December 2018 (FELDA). Two prosecutions resulted in acquittals (China Eastern Airlines; Filipino Casino License), although one of these cases (China Eastern Airlines) resulted in convictions for breach of trust and violation of the Punishment of Tax Evaders Act of two natural persons and one legal person engaged in the giving of bribes. In four cases, the relevant District Prosecutors Office terminated criminal investigations with a decision not to prosecute (Indonesia Mining; Kazakhstan Consulting; Russia Governor; and Mongolia Land Lease cases). The Busan District Prosecutor's Office also decided not to prosecute nine natural persons and two legal persons in the Busan Shipping case. In the US Relocation and Construction case, prosecutions against seven companies were time-barred, while prosecutions are ongoing against the individuals concerned. Investigations were ongoing in two further foreign bribery cases (Ghana Tax and UAE Oil cases) and one case is at trial stage (US Relocation and Construction case).

²⁵ South Korea Corruption Report, [GAN Business Anti-Corruption Portal](#).

The evaluation team is aware of six further alleged foreign bribery schemes involving Korean companies and individuals, which have not been investigated by the Korean authorities.²⁶

16. The flow chart in Figure 4 shows how Korea has addressed all of the known potential foreign bribery cases that have arisen since the Convention came into force in 1999. It shows that Korea opened investigations or preliminary investigations in 87% of all known allegations, with convictions resulting from 38% of these investigations. While this demonstrates that Korean law enforcement authorities generally investigate allegations brought to their attention, as described elsewhere in this report, the detection rate of foreign bribery cases is very low for an economy as significant and internationally-oriented as Korea's.

Figure 4. Korea foreign bribery enforcement since 1999 (by case)



Source: Secretariat research and information provided by Korea during the Phase 4 evaluation.

Note: Some cases against companies have been time-barred, whereas prosecutions of individuals have gone ahead due to different statutes of limitations. These cases are not counted as being time-barred in this figure.

Commentary

The lead examiners commend the Korean authorities for having investigated and prosecuted a significant number of the foreign bribery allegations brought to their attention by the Working Group on Bribery since the entry into force of the Convention. However, the lead examiners note a decrease in enforcement actions since Korea's Phase 3 in 2011. They further note the recent entry into force, in the wake of several investigations of high-profile corruption cases involving senior Korean officials, of the Improper Solicitation and Graft Act ("Kim Young Ran Law"). This has mobilised the attention of both public and private sectors on domestic corruption issues. Nevertheless,

²⁶ Following prior Phase 4 reviews, the allegations used in this evaluation come from the Matrix, a collection of foreign bribery allegations prepared by the OECD Secretariat using public sources, such as the media. The inclusion of allegations in the Matrix does not prejudice the issue of whether the allegations are, in fact, an offence under any applicable law.

the lead examiners consider that the total number of foreign bribery enforcement actions appears particularly low, especially in view of the size of the Korean economy, its export oriented nature and the geographical and industrial sectors in which Korean companies operate, which represent high bribery risks. As further developed in this report, the majority of foreign bribery cases in Korea were brought to the attention of law enforcement authorities by foreign authorities or through reports or complaints from business partners or competitors. This suggests a concerning lack of efforts and capacity to detect this crime, and that much could be done to improve the detection of foreign bribery. Korea should urgently take measures to improve detection of foreign bribery and achieve stronger enforcement of its anti-bribery legislation.

A. DETECTION OF THE FOREIGN BRIBERY OFFENCE

17. The majority of foreign bribery cases in Korea were brought to the attention of law enforcement authorities by foreign authorities or through reports or complaints from business partners or competitors. This suggests that much could be done to improve the detection of foreign bribery through other sources, such as public agencies or the media. Looking more closely at the 13 foreign bribery investigations since 2013 (i.e. including those that resulted in non-prosecutions or acquittals), 5 cases were brought to the attention of Korea by foreign authorities (CCTV, Hanwha, FELDA, US Relocation and Construction, and UAE Oil cases); 5 cases by either reports (2) or complaints (3) from business partners or competitors of the persons or companies allegedly involved (Busan Shipping, Filipino Casino License; Indonesia Mining, Russia Governor, and Mongolia Land Lease cases); and 3 by whistleblowers (China Eastern Airlines, Kazakhstan Consulting, and Ghana Tax cases).

Figure 1. Detection Sources for foreign bribery cases investigated since 2013

(Cases include non-prosecutions and acquittals)



18. Self-reporting (or voluntary disclosure) by companies is not a source of detection in Korea and is not foreseen under the law. Across the countries party to the Convention, self-reporting accounts for approximately a quarter of all foreign bribery cases detected since the entry into force, and has been recognised as an invaluable source of detection of foreign bribery.²⁷ Korean law does not contain provisions to reward self-reporting of irregularities by legal persons generally, although self-reporting may be taken into account generally as a mitigating factor in sentencing for any offence (article 52 of the Criminal Act; article 14 of the Protection of Public Interest Reporters Act). Korea's competition legislation (Monopoly Regulation and Fair Trade Act) offers a leniency programme for natural and legal persons who voluntarily report and cooperate in investigations, and who may, as a result, become eligible for mitigation of the corrective measures, or for full or partial exemption from the penalty surcharges, or may be exempted from a criminal charge. This leniency programme is used as a measure to encourage companies' self-reporting, but has not been extended to other areas of law and does not apply to foreign bribery cases.

²⁷ OECD (2017), [The Detection of Foreign Bribery](#), p. 13.

A.1. Foreign jurisdictions: an important detection source

19. Information provided by foreign law enforcement authorities has been the second most important source of detection, accounting for 5 of the 13 ongoing and concluded foreign bribery cases between Phase 3 and Phase 4. This situation is similar to the one at the time of Phase 3, when a majority of the foreign bribery cases had been brought to the attention of Korean law enforcement by the US authorities.²⁸ In its written submissions, Korea notes that informal networks of law enforcement officials, including the meetings organised under the Council of Europe, ASEAN+3 and UNCAC, constitute important communication channels as well. However, no foreign bribery cases have been detected through these channels.

20. Three of the reports from foreign jurisdictions have resulted in sanctions imposed on natural and legal persons, in the CCTV, Hanwha and FELDA cases, while one is the subject of an ongoing trial (US Relocation and Construction case), and one other report is under investigation (UAE Oil case). The reports originated from US authorities in two cases, as well as from Australia, Switzerland and Turkey. As in Phase 3, the majority of the cases involved activities in Korea, with three of the five cases concerning the bribery of foreign authorities on Korean soil or on a US military base in Korea.

21. In addition, two cases have been brought to the attention of the Seoul Central District Prosecutor's Office (DPO) and the Supreme Prosecutor's Office (SPO) through incoming mutual legal assistance (MLA) requests from two Parties to the Convention. These have not led to the opening of investigations in Korea to date, but Korea has, or is in the process of, providing MLA. (See also part B.6 on international cooperation.)

Commentary

The lead examiners welcome Korea's positive reaction, through the opening of investigations, to foreign bribery reports referred by foreign authorities. They encourage Korea to continue to be proactive in this respect and to ensure that information received from foreign jurisdictions is processed effectively and thoroughly by Korean investigation authorities.

A.2. Whistleblowers and whistleblower protection

22. Since Phase 3, three Korean foreign bribery investigations have been triggered by reports from whistleblowers (China Eastern Airlines, Kazakhstan Consulting, and Ghana Tax cases). Korea's legislation, in particular the Act on the Protection of Public Interest Whistleblowers (PPIWA), includes very advanced measures for the protection of whistleblowers, and endows the Anti-Corruption & Civil Rights Commission (ACRC) with broad powers. Nevertheless, greater awareness-raising efforts could be achieved to enhance specifically the reporting of foreign bribery.

a. A broad protection afforded to whistleblowers under the PPIWA

23. The PPIWA, which entered into force on 30 September 2011, governs reporting and protection of reporters of acts of corruption and violations of the public interest

²⁸ Phase 3 report, para. 9.

committed in the private sector.²⁹ The PPIWA contains important elements that constitute good practices in terms of whistleblower protection. In particular, under the PPIWA:

- The definition of “whistleblower” includes any “person who performed a public interest whistleblowing activity” (art. 2(4)). ACRC representatives at the on-site visit considered that this would cover foreign employees of Korean companies, including those employed abroad. They acknowledged, however, the difficulties inherently involved in providing protection to whistleblowers located outside of Korea, beyond damages orders against the retaliating company.
- “Public interest whistleblowing” covers any reporting that a public interest violation has occurred or is likely to occur, and public interest violations include acts that infringe on public health and safety, the environment, consumer interests and fair competition. These acts should be subject to either criminal or administrative provisions of specific laws listed in the Annex to the PPIWA, including the FBPA.³⁰
- In 2016, amendments to the PPIWA introduced special measures for internal public interest whistleblowers. Internal public interest whistleblowers include employees or seconded workers of organisations who report, employees of a subcontracted organisation of such organisations, and persons who perform contracts for such organisations.
- Confidentiality of the report is ensured (art. 12). The PPIWA makes it a crime to disclose the contents of a whistleblower report, including the identity of the public interest whistleblower, punishable by five years’ imprisonment or a fine of KRW 50 million (USD 44 232) (art. 30(1)).
- “Disadvantageous measures” (retaliation) are broadly defined as any unfavourable personnel action, from dismissal to suspension, disciplinary action, reduction in pay, reduction of duties, reassignment, restriction or discrimination in promotion or training opportunities, blacklisting, unfair audit or inspection etc. (art. 2(6)). Retaliation or discrimination, such as removal or release from office, dismissal or any other unfavourable personnel action equivalent to the loss of status at work against a public interest whistleblower is also criminalised and punishable by maximum three years’ imprisonment or a fine of maximum KRW 30 million (USD 26 546) (art. 30(2)). Other types of retaliation and discrimination against whistleblowers such as mandatory transfers, as well as refusal to carry out protective measures for whistleblowers, are punishable by two years’ imprisonment or a fine of KRW 20 million (USD 18 000) (art. 30(3)). The PPIWA provides for joint liability of the company if its representative or an agent or employee, or any other person employed by a corporation or an individual retaliates against a whistleblower in connection with the business affairs of the company (art. 30-2). Following 2017 amendments to the PPIWA, a person or company who inflicts loss on a public interest whistleblower is liable to pay compensation up to three times the value of the loss (art. 29-2).

²⁹ The ACRC Anti-Corruption Act deals with reporting and protection of reporters of acts of corruption in the public sector.

³⁰ See Phase 3 report, para. 94.

- Other protections include mitigated sanctions or exemption from liability where a whistleblower is found to have committed a criminal act in connection with a public interest report, etc.(art. 14(1)).
- Korea is one of only two WGB members to provide monetary rewards/awards to whistleblowers to assist whistleblowers and their relatives or cohabitants to cover expenses for medical treatment, moving due to transfer or redundancy, litigation, loss of wages or other economic losses (art. 27), monetary rewards³¹ (art. 26) and awards³² (art. 26-2) for whistleblowers.
- Following 2017 amendments, the burden of proof for the legitimacy of the measures imposed against a whistleblower has been reversed, and now falls on the person or company responsible for the retaliation.

b. The ACRC, guardian of the PPIWA

24. The ACRC was established as an independent statutory body in 2008, with the ACRC Anti-Corruption Act. The ACRC has not only broad powers with regard to the monitoring and enforcement of the ACRC Anti-Corruption Act and the PPIWA but also functions as the main reporting or complaints channel for whistleblowers. Any person who becomes aware of an act of corruption may report it directly to the ACRC.³³ There is no need therefore, to exhaust internal channels in advance, nor to report to any other public supervisory body. Moreover, whistleblowers may request the ACRC to take protective measures if they or their relatives risk pressure or retaliation or have already suffered reprisals. The ACRC has the power not only to set in place a protective shield for the whistleblower by instructing the relevant authorities to take the necessary measures³⁴ but also to offer reconciliation between the whistleblower and the reported person upon the request of the whistleblower.³⁵

25. The ACRC is further mandated to enforce the protections afforded under the PPIWA. This includes sanctioning companies for whistleblower reprisals, and ordering reinstatement of whistleblowers who have been transferred, demoted or fired. Following amendments in 2017, the ACRC is required to monitor, for two years, whether the person or company ordered to implement protective measures has done so (art. 20(5)). This has proved efficient in a number of cases, including a recent high-profile whistleblower case, in which Hyundai accepted ACRC recommendations to reinstate a former general manager who was fired after reporting information about vehicle defects to the Korean government, which resulted in product recalls.³⁶

³¹ If the report directly contributes to the recovery or increase of revenue or expenditure reduction of public agencies, the internal whistleblower is rewarded with 4-20% of the amount recovered, at a maximum amount of about USD 1.8 million (KRW 2 billion).

³² If the report contributes to public interest, institutional improvement or a disciplinary action, the internal and external whistleblowers are monetarily awarded, up to about USD 180,000 (KRW 200 million).

³³ ACRC Anti-Corruption Act, art. 55

³⁴ ACRC Anti-Corruption Act, arts. 62-64; PPIWA, arts. 17-22.

³⁵ PPIWA, art. 24. However, the reconciliation concerns only the retaliation measures and not the offence for which the employer is investigated.

³⁶ Hyundai Motor to reinstate whistleblower who leaked info about recall coverup, 30 April 2017, The Hankyoreh (see: english.hani.co.kr/arti/english_edition/e_business/792836.html).

26. Between the original implementation of the PPIWA and the end of 2017, a total of 24°365 reports were submitted to the ACRC. Public health violations were the most common type of report (44.1%), followed by public safety violations (16.0%). Out of the 24°365 cases received as public interest reports, 14°156 have been referred or forwarded to investigative organisations (i.e. approximately 58%). The ACRC indicates having received an additional corruption-related 32°306 reports and referred 1°615 of these to Korean investigative authorities and 3°838 to competent public institutions, representing approximately 17% of total corruption-related reports. 26°024 reports were considered unreasonable or not related to corruption (for example, complaints related to procedure and result of administrative works, unfriendliness of public officials, or acts committed by persons not classified as public officials) and the remaining were referred to other competent authorities. The ACRC has paid rewards totalling KRW 11.8bn (USD 10.6m) in 412 corruption cases, to date, which resulted in revenue increase or recovery of KRW 137bn (USD122.9m) for public organisations in Korea.³⁷ A total of 165 requests have been made for the protection of corruption reporters.

27. With respect to foreign bribery, ACRC representatives indicated at the on-site visit that two reports had been received and forwarded to investigative authorities in 2013 and 2017. When asked about the very low number of reports relating to foreign bribery, against a backdrop of a very high general reporting level, representatives from the ACRC and law enforcement all agreed that this was due to the nature of the foreign bribery offence, not deficiencies in the whistleblower protection framework. In particular, they indicated that the nature of the information disclosed in foreign bribery cases may make it easier to identify the whistleblower and therefore create reluctance to report. Whistleblowers may fear retaliation in the context of any work they undertake abroad, noting the ACRC only has powers to enforce protection measures in Korea. There may also be a broader concern that whistleblowers may not report because they think that nothing will be done to address foreign bribery.

28. The issue of reporting lines for the ACRC was raised in Korea's Phase 3 Report, when the WGB recommended that Korea establish clear criteria for requiring the ACRC to transfer reports of FBPA violations to law enforcement authorities.³⁸ In response, the ACRC implemented a "Guideline for referral of reported cases" in 2012. According to the Guideline, when the case is referred to an investigative agency, it should be referred to the Supreme Prosecutor's Office (SPO) if a public interest violation is subject to "imprisonment of more than 5 years, or a fine of KRW 50 million or more". For offences with lesser penalties, the referral should be made to the National Police Agency (NPA). On this basis, all foreign bribery reports should be referred to the SPO. In practice, of the two whistleblower reports involving the bribery of foreign public officials, the ACRC referred the 2013 report, related to Korean companies bribing Chinese officials in the context of starting business operations in China, to the NPA. The second, received in 2017, was in relation to the Ghana Tax case, and was referred to the SPO, which subsequently designated the Daegu District Prosecutor's Office to conduct the proceedings. While Korea indicated that the ACRC transferred the foreign bribery case to the police because it required additional investigation to determine that a violation of the public interest actually occurred, this practice would suggest that ACRC officials are insufficiently aware of the reporting procedure set out in the Guideline, or that it is unclear to the officials concerned.

³⁷ [ACRC Annual Report 2017](#).

³⁸ Phase 3 recommendation 4(d).

c. Protection under other legislation

29. Korea indicates that in December 2016, whistleblowers who report corruption offences as defined under the Act on Special Cases concerning the Confiscation and Return of Property acquired through Corrupt Practices were included in the categories of “specific crime informants” to be protected against retaliation under the Act on Protection of Specific Crime Informants, etc. (art. 2(1)(g)). The Koreans Act on Preventing Bribery of Foreign Public Officials in International Business Transactions (FBPA) is included in the list of legislation covered by the Act. Art. 16 provides that when a person is found to commit a crime after reporting, his/her punishment may be reduced or exempted. The reporting person may also be entitled to a reward if property is confiscated as a result of the information reported (art. 13 of POCA – see also below sub-section 3.a. below on AML reporting).

30. The Act on External Audit of Stock Companies underwent major revision in September 2017. The revised bill, which entered into force on 1 November 2018, contains fundamental changes covering a wide range of issues concerning false accounting and auditing requirements. In relation to whistleblower protection, the Act now includes provisions that enable the Financial Services Commission to punish or fine those who give any disadvantageous treatment to a whistleblower or make public his/her personal information.³⁹

31. It is unclear how the authorities responsible for enforcing these new whistleblower protection provisions will interact, if at all, with the ACRC. However, to ensure universal coverage and avoid loopholes in protection, there should be close coordination.

d. Encouraging whistleblowers to report suspected foreign bribery

32. The ACRC reports having carried out a variety of initiatives to raise awareness of the public interest whistleblower protection system and to expand social consensus about the need for protecting whistleblowers, through both public media and within Korean public agencies – though these do not address specifically issues relating to foreign bribery. For example, NPA officials at the on-site visit described an internal guideline on dealing with whistleblower reports. ACRC representatives indicated that it has also conducted specific training for the private sector (2°800 representatives in 2016; 2°000 in 2017; 3°000 in 2018), notably with a focus on ISO 37001 (Anti-bribery management systems). In 2017, the ACRC conducted promotional activities customised to personnel in the fields of construction, food service, safety control on dangerous substances, and pharmaceuticals to facilitate internal whistleblowing. As a result of these diverse promotional and educational activities with regard to the public interest whistleblowing system, ACRC reported an increase in awareness from 28.4% in 2016 to 30.6% in 2017.

33. Journalists and civil society representatives at the on-site visit indicated that whistleblowers were among their primary sources of information on economic crime. While they considered that there was a strong legal framework to protect whistleblowers in Korea, they noted the need for cultural change towards protecting whistleblowers, rather than treating them as traitors. Companies and business organisations both indicated

³⁹ Financial Services Commission, Press Release “[Revision to the Act on External Audit of Stock Companies](#)”, 28 September 2017.

positive attitudes towards whistleblowers, in particular noting their right to report either internally within the company or directly to external authorities.

Commentary

The lead examiners congratulate Korea on its comprehensive legal framework to protect whistleblowers who report suspected foreign bribery, as well as the role of the ACRC in enforcing this legal framework. They welcome the various amendments and improvements that have been made to this system since Phase 3, including an increase in scope of protections as well as protection for both internal and external reporting. The lead examiners consider that many of the elements of Korea’s whistleblower protection framework constitute good practices in this field, which is evidenced by the significant number of reports the ACRC has received and acted upon. They nevertheless consider that the Working Group should follow up on the efficiency of whistleblower reporting as concerns specifically foreign bribery suspicions, including the ACRC’s referral of such reports to the SPO, noting that only two such reports have been referred since 2013.

A.3. Anti-money laundering reporting measures

34. An effective system designed to detect and deter money laundering may uncover underlying predicate offences such as foreign bribery and thus trigger investigations. With the support of Korea’s Financial Intelligence Unit (KoFIU), law enforcement authorities may access suspicious transaction reports (STRs) and use, in an appropriately sanitised format, the information contained within to begin an intelligence operation or to corroborate and support the development of existing intelligence. However, in practice, there is no record of any foreign bribery investigation generated by information provided by the KoFIU.

a. Korea’s anti-money laundering reporting framework: improvements from Phase 3

35. With respect to Korea’s anti-money laundering (AML) reporting framework, the Working Group recommended in Phase 3 that Korea “take appropriate steps according to its legal system to ensure that financial institutions responsible for making STRs understand the total ownership structure of their corporate customers”, and “address the potential for conflicts of interest between financial institutions regarding their STR obligations, and their customer corporations that belong to the same enterprise groups as themselves”. Both aspects of this recommendation were considered not implemented at the time of Korea’s Phase 3 written follow-up.⁴⁰

36. Korea’s AML framework is based on two pieces of primary legislation, and remains largely unchanged since Phase 3. The Proceeds of Crime Act (POCA) establishes the offence of money laundering and AML reporting obligations. The Financial Transactions Reports Act (FTRA) establishes suspicious transaction reporting obligation for financial institutions.⁴¹ Casinos are the only Designated Non-Financial Business or Profession to be

⁴⁰ Phase 3, recommendation 5(ii) and (iii); the Phase 3 written follow-up report, para. 7, notes that recommendation 5 has been partially implemented, but only as concerns awareness-raising activities.

⁴¹ FATF, [Mutual Evaluation of Korea, 8th Follow-up report, June 2014](#), p. 8.

included in the AML/CFT system since 2007 and are considered to be a “financial institution” in Korea, as they conduct financial transactions.⁴²

37. At the time of Phase 3, the Working Group expressed concern that, due to the large enterprise structure that predominates in Korea, with its complicated system of interlocking shareholdings, it could be challenging for Korean financial institutions to verify the identity of beneficial owners of accounts. Korea has taken an important step to ensure a better understanding of the total ownership structure of corporate customers by financial institutions. Under amended article 5(2) of the FTRA, which entered into force on 1 January 2016, reporting entities are now required to identify the natural person(s) who ultimately owns or controls the customer when establishing a business relationship or engaging in an occasional transaction,⁴³ thus implementing Phase 3 recommendation 5(ii).

38. Phase 3 recommendation 5(iii) also noted the potential for conflicts of interest between financial institutions regarding their STR obligations, and their loyalty to customer corporations that are part of the same enterprise group. Since it is very common for financial service providers, such as insurance, credit card, and asset and investment management companies to be affiliated with large enterprise groups, it was suggested that, in order to ensure effective STR reporting, this could be an area for further attention in Korea.⁴⁴ In 2016, Korea introduced the Act on Corporate Governance of Financial Companies, which obliges financial institutions to establish internal control standards to avoid conflicts of interest.

39. Since Phase 3 additional improvements to Korea’s AML reporting framework have been introduced or are envisaged, which could enhance Korea’s capacity to detect foreign bribery through its AML reporting framework:

- *Incentivising reporting*: article 13(1) of the POCA, amended in 2013, provides for a reward to reporting persons, where this results in confiscation of criminal proceeds. According to the Korean authorities, rewards amounting to KRW 108 200 000 in total have been disbursed in 107 cases from 2014 to 2017, although none of these concern foreign bribery cases.
- *Removal of the monetary threshold for the reporting of STRs*: Among other amendments, in July 2013, the FTRA was revised. The new article 4 of the FTRA does not set any threshold for STRs based on the amount of the transaction.⁴⁵
- *Potential broadening of reporting entities subject to AML reporting obligations*: a bill introducing reporting requirements for lawyers, accountants and notaries was introduced to the National Assembly in April 2017. This would be a significant step forward in efforts to better detect foreign bribery, as noted by the Working Group, which observed that these professionals are key to identifying and detecting foreign bribery.⁴⁶ Korean authorities indicated that the intended timeline for adoption is the

⁴² The term “financial company etc.” refers to 14 financial entities, including banks, investment entities, agricultural and fisheries cooperatives, credit unions, insurance companies, postal service agencies, casino business operators and ‘persons prescribed by Presidential Decree who conduct financial transactions’; article 2(1) of the FTRA.

⁴³ Article 5(2) of the FTRA.

⁴⁴ Phase 3 report, para. 66.

⁴⁵ FATF, Mutual Evaluation of Korea, 8th Follow-up report, *op.cit.*, p. 15.

⁴⁶ OECD (2017), [The Detection of Foreign Bribery](#), Chapter 10.

beginning of 2019. Real estate agents are not included in the bill. Accountants and private sector lawyers attending the on-site visit were generally unaware of the bill. In addition, following recent reports of security breaches at cryptocurrency exchanges, an amendment bill was submitted to the National Assembly in the second quarter of 2018 to amend the FTRA and include crypto handling businesses in the list of reporting entities.⁴⁷ Both bills were pending at the time of this report.

- *Potential removal of the exception of certain transactions from article 5(2) of the FTRA:* Until recently, the obligation incumbent upon financial institutions to identify the ultimate owner of their customers did not apply to certain institutions considered at low risk because of the nature of their business, as well as to transactions below a monetary threshold.⁴⁸ As a representative of KoFIU noted during the on-site visit, the exemption of certain institutions created confusion, and was thus removed through an amendment to the FTRA which entered into force in August 2018. In addition, a draft amendment to article 8(2) FTRA to lower the monetary threshold to KRW 10 000 000 is expected to enter into force in July 2019.

b. KoFIU could play a greater role in enhancing Korea’s capacity to detect foreign bribery

40. In Phase 3, the Working Group recommended that Korea “increase awareness amongst institutions and individuals responsible for making STRs of the risk of laundering the proceeds of foreign bribery, including by publishing relevant case studies”. This recommendation was considered to be partially implemented at the time of Korea’s written follow-up. Although the Group recognised some efforts to raise awareness, it noted “a lack of relevant case studies focusing on foreign bribery as the predicate offence to money laundering, which would help raise awareness among institutions and individuals responsible for making suspicious transaction reports”.⁴⁹

41. Indeed, despite the important number of STRs received by KoFIU, to date, none have related to foreign bribery and data maintained by the KoFIU does not include active foreign bribery. According to Korea’s Phase 4 responses, in 2017, 22 668 reports out of 519 908 STRs received (approx. 4 %) were forwarded by KoFIU to law enforcement agencies. KoFIU transmitted an additional 18 528 reports upon request of law enforcement authorities.⁵⁰ Figures provided show a small decrease in the number of disseminated STRs from 2014 to 2017. In 2018, the number of disseminated STRs appeared low compared to previous years: as of mid-2018 approximately 31 757 STRs had been disseminated out of 95 613 received. According to the latest information available online, the banking sector accounts for the largest portion of STRs, and the majority of the reports referred to law enforcement authorities concern tax fraud.⁵¹ KoFIU’s resources have remained relatively

⁴⁷ G. BARKER, [South Korean Regulators Move to Tighten Rules After Exchange Hacks](#), *Bitcoinnews.com*, 21 June 2018.

⁴⁸ Article 5(2) para.1 FTRA; see also FATF, Mutual Evaluation Report on Korea, 26 June 2009, para. 12.

⁴⁹ Phase 3 recommendation 5(i); Phase 3 written follow-up, para. 7.

⁵⁰ The relevant law enforcement agencies are the Public Prosecutor General, the Commissioner of the National Tax Service, the Commissioner of the Korea Customs Service, the National Election Commission or the Financial Services Commission (article 7 paras 1-2 of the FTRA).

⁵¹ KoFIU, Annual Report 2012, *op.cit.*, pp. 17-22.

unchanged since Phase 3. Given the relatively high number of incoming STRs and the operational needs for their analysis, KoFIU's resources are constrained.

42. Since Korea's Phase 3 written follow-up in 2014, KoFIU has not taken further measures to raise awareness of reporting entities responsible for making STRs of the risk of laundering the proceeds of foreign bribery. No typologies or case studies have been developed addressing specifically money laundering predicated on foreign bribery. KoFIU confirmed at the on-site visit that existing training manuals do not contain a specific section on foreign bribery.

Commentary

The lead examiners welcome steps taken by Korea since Phase 3 which could facilitate the detection of foreign bribery through AML reporting measures. This includes notably measures to understand the total ownership structure of corporate customers under amended article 5(2) of the FTRA, the removal of the reporting threshold, the reward incentive introduced with amended article 13 of the POCA, and plans to expand AML reporting obligations to crypto-handling businesses. They recommend that Korea proceed promptly with adoption of legislation that would further enhance its AML reporting framework by extending reporting requirements to appropriate non-financial entities including lawyers, accountants and auditors to report suspected money laundering transactions.

The lead examiners, however, note with concern the absence of detection of foreign bribery cases by the KoFIU, in spite of the large volume of information generated by the STR regime. Consequently, they reiterate the Phase 3 recommendation that Korea raise awareness among relevant professions of the risk of laundering the proceeds of foreign bribery and of the red flags which may indicate foreign bribery, including by publishing relevant case studies. They further recommend that KoFIU undertake a review of its methodology for analysing and transmitting STRs to ensure its staff is adequately resourced and trained to detect STRs that may be indicative of money laundering predicated on foreign bribery.

A.4. Increasing the use of other potential sources

a. Mobilising Korean public agencies to detect and report foreign bribery

43. Korean public officials are under a general obligation to report all acts of corruption committed by both natural and legal persons under article 234(2) of the Criminal Procedure Act. This reporting obligation covers any act of corruption or foreign bribery, including acts committed by private individuals or companies.⁵² In practice, this obligation has been of limited effectiveness in foreign bribery cases with no foreign bribery reports made from Korean public agencies to law enforcement. This could be explained in part by the recent entry into force, in the wake of several high-profile corruption scandals involving senior Korean officials, of the Improper Solicitation and Graft Act ("Kim Young Ran Law"), which has mobilised the attention of both public and private sectors on domestic corruption issues.

⁵² Phase 3, para.91.

i. Tax authorities

44. Detection by the tax authorities is one of the main areas for improvement in terms of detection by government agencies, as already noted in the Phase 3 evaluation of Korea. Indeed, the functions of National Taxation Service (NTS) imply exposure to foreign bribery allegations and therefore a potential to regularly detect and report. This issue is explored in greater detail in part D.1 below.

ii. Foreign representations

45. Korean officials in foreign representations are particularly well positioned to report foreign bribery to law enforcement authorities in their home country because of their knowledge of the business opportunities in the host countries, familiarity with the local environment and use of local media.⁵³ Reporting mechanisms are in place for the 188 consuls in 182 embassies and delegations globally to collect information and report to Korean law enforcement authorities. In addition, 65 police liaison officers are dispatched within Korean representations abroad in 55 countries for collection of information purposes.

46. Korean embassies reportedly monitor foreign media for allegations of bribery involving Korean companies and nationals abroad, and transmit such reports to the relevant Korean intelligence and information gathering system coordinated by the Ministry of Justice (MOJ). However, to date, no foreign bribery investigation has ever been initiated on this basis. In addition, 65 police liaison officers are dispatched within Korean representations abroad in 55 countries for collection of information purposes.

47. Information transmitted by foreign representations is referred either to the SPO or NPA for investigation. The foreign bribery intelligence and information gathering system set-up in 2011 between the MOJ, the SPO, the NPA and the Ministry of Foreign Affairs (MOFA) is still operational.⁵⁴ At the time of Phase 3, the system had been used to follow-up nine media allegations, of which six cases were ultimately closed based on information received through the relevant Korean embassies. Since Phase 3, the remaining three cases have been closed without being investigated. During Phase 4 discussions, the MOJ reported that several foreign bribery allegations had been reported through their embassies. Although some preliminary steps were taken by the MOJ to gather further information through embassies and forward the information to the Intelligence Division of the SPO, none of the cases detected so far through this channel have resulted in the opening of an official investigation in Korea. Against this background, Korea has not provided officials posted abroad with specific and regular instructions on their role in reporting foreign bribery since Phase 3.

iii. Export credit and ODA agencies

48. Korea's export credit agencies, Eximbank and K-Sure have implemented the 2006 Recommendation on Bribery and Officially Supported Export Credits, and thereby put in place mechanisms for reporting suspicions of foreign bribery to law enforcement officials,⁵⁵ although this has not led to any reporting of foreign bribery in practice. This issue is explored in greater detail in part D.2 below.

⁵³ OECD, *The Detection of Foreign Bribery*, p.102.

⁵⁴ Phase 3, paras 53-57.

⁵⁵ Phase 3, paras 98-100.

49. Eximbank is also Korea's official development aid agency, alongside the Korea International Cooperation Agency (KOICA). No instance of foreign bribery has ever been reported by either of these agencies to Korean law enforcement authorities. Mechanisms developed by the two agencies to detect and report foreign bribery, and more generally implement the 2016 Recommendation for Development Cooperation Actors on Managing Risks of Corruption, are reviewed under Part D.2. below.

Commentary

The lead examiners recognise the steps taken by Korea to develop mechanisms for the detection and reporting of foreign bribery by its public agencies. Nevertheless, they are concerned about the lack of foreign bribery-related training and guidance provided to officials of these agencies since Phase 3. The lead examiners therefore recommend that Korea mobilise its agencies with particular potential for detecting foreign bribery, and in particular provide relevant officials with clear and regular guidance and training on foreign bribery red flags and on the processes for reporting these to Korean law enforcement authorities (see also commentary regarding the KoFIU and NTS).

b. Detection through the media and investigative journalism: potential for improvement

50. The WGB has recognised media reporting as an essential source of detection in foreign bribery cases, as well as an important tool for public awareness-raising on corruption, noting that “the fourth estate should be respected as a free eye investigating misconduct and a free voice reporting it to citizens”.⁵⁶

i. No foreign bribery case initiated on the basis of media articles

51. Since Phase 3, Korea has not used information reported in the media as a primary source of detection of foreign bribery cases. Yet, several allegations involving Korean companies have surfaced to date by this source. Such allegations have been referred to Korea by the Working Group on Bribery through the Matrix of alleged cases. The Matrix is handled in Korea at a first stage by the MOJ, which periodically informs and directs the Investigative Intelligence Division under the SPO in assessing the need for further investigation. However, to date, no formal foreign bribery investigation has been initiated based on the information contained in the Matrix.

52. The SPO's Investigative Intelligence Division explains that it monitors Korean and foreign media regularly to understand current trends, and periodically monitors foreign media to detect corruption cases, including foreign bribery. Since bribery allegations are often reported in the media of the foreign countries where bribes have allegedly been paid, regular monitoring of foreign media could be useful to enhance Korea's detection of foreign bribery cases. (See also part A.4.a. above on the monitoring of foreign media by foreign representations).

53. During the on-site visit, representatives of the SPO and MOJ confirmed that prosecutors cannot open a preliminary investigation solely based on a domestic or foreign media report. If foreign bribery is uncovered through media reports, the SPO's Investigative Intelligence Division would take some preliminary steps, to first assess the veracity of the information. In particular, the SPO would, as relevant, perform an accounting analysis of the company, request intelligence reports from the FIU and/or check

⁵⁶ OECD (2017), [The Detection of Foreign Bribery](#), Chapter 4.

travel records of alleged offenders. Only credible allegations would then be transmitted to the DPO for investigation.

ii. *Limited interest of the Korean media in foreign bribery*

54. To date, foreign bribery has not been an area of great interest for the Korean media. Structural issues may explain this in part, as well as the greater attention paid to domestic corruption issues, notably in light of recent scandals that have shaken the highest echelons of the Korean government.

55. Freedom of the press is protected under Korean law, including in the Constitution, and access to information and open data is guaranteed in law.⁵⁷ In the 2018 report of Reporters Without Borders, South Korea is ranked 43rd, up 20 spots from the previous year.⁵⁸ The Official Information Disclosure Act and relevant documents provide that MOFA releases declassified documents to the general public after thirty years. However, participants in the on-site visit agreed that the information provided in the context of freedom of information legislation is not always sufficient and that changes to the legal framework may be necessary. During the on-site visit, an investigative journalist noted that access to national security and taxation information is difficult due to lack of transparency. Other structural issues persist which may hamper the reporting of economic crime, including foreign bribery, in particular the criminalisation of defamation and penalties for the dissemination of sensitive information.⁵⁹

56. Under South Korea's press system, members of the press clubs attached to different government agencies obtain certain interviews and background briefings from senior government officials.⁶⁰ The system has been substantially reformed since the 1980s in order to establish a more open relationship between the government and the media.⁶¹ During the last two decades, the number of government agencies with associated press clubs decreased substantially, press club memberships increased more than threefold and the government charges certain press club member reporters fees to cover expenses.⁶² However, some panellists at the on-site visit noted that Korea's press club system still restricts access to information in the context of media reporting on corruption, and that some declassified documents are only shared with members of the relevant press club. Media outlets that are not part of this press club and individual investigative journalists therefore need to rely on press club members to share their documents or to request documents from government or judicial authorities, as relevant. Korean authorities assert that declassified documents are available to the general public. They further stressed the historic importance of the press clubs in promoting transparency and enhancing accountability of governmental agencies. However, these purposes were served in the past when the number of Korean press companies was limited and the press clubs were meant to provide transparency and alleviate concerns of informal ties between journalists and the

⁵⁷ According to the Act on Disclosure of Information by Public Agencies, government agencies must respond to requests within 15 days and are required to provide all requested public information, except when protected for reasons of national security;

⁵⁸ Reporters Without Borders, [2018 World Press Freedom Index](#).

⁵⁹ [Reporters Without Borders for Freedom of Information, South Korea](#).

⁶⁰ Freedom House, [South Korea: Freedom of the Press 2016](#).

⁶¹ N. ONISHI, "[South Korea Dissolves Ties That Once Bound the Press to the Powerful](#)", *New York Times*, 13 June 2004.

⁶² N. ONISHI, *op.cit.*

government. The system appears of more limited use now that Korean media has multiplied and diversified. Based on journalists' remarks at the on-site, the various press club rules governing access to and publication of information may limit public access to official documents.

57. Undoubtedly, another element that contributes to the lack of detection of foreign bribery cases by Korean media is the strong focus on domestic bribery cases. Korean media have been playing an important role in the national fight against domestic corruption.⁶³ When questioned on the public's interest in foreign bribery allegations involving Korean companies, a civil society representative confirmed that the interest is in domestic corruption. According to several interlocutors, the lack of awareness of, and interest in, foreign bribery is also due to the fact that there have not been any major foreign bribery cases involving Korean companies that have caught the attention of the public so far.

Commentary

The lead examiners are concerned that existing sources of foreign bribery allegations arising from the media – including information referred to Korea by the Working Group through the Matrix – are insufficiently examined and analysed by Korean law enforcement authorities. They therefore recommend that Korea ensure that law enforcement authorities routinely and systematically assess credible foreign bribery allegations that are reported in domestic and foreign media, including the information referred to Korea by the Working Group, on a timely basis. The lead examiners further recommend that Korea ensure that adequate resources be allocated to the prosecuting authorities to monitor and act upon media reports in Korea and abroad.

Finally, the lead examiners note the important role of investigative journalism in developing serious, vigorous and high profile reporting of foreign bribery issues. They therefore recommend that Korea ensure that laws relating to freedom of the press and equal access to information are fully applied in practice in respect of foreign bribery reporting.

c. A need to train auditors on their obligations to report foreign bribery

58. In Phase 2 and Phase 3, the Working Group recommended that Korea consider requiring external auditors to report suspicions of foreign bribery to competent authorities, independent of the company, such as law enforcement or regulatory authorities, in particular by amending relevant legislation in this respect. It further asked Korea to provide adequate protection to auditors making such reports. Amendments to legislation that entered into force in November 2018 require external auditors to report to competent authorities violations of any statutes. However, discussions with representatives of the auditing profession in Phase 4 reveal the need for awareness raising and training, if this reporting requirement is to be effective in practice.

59. The Act on External Audit of Stock Companies (AEASC), which regulates external audit requirements, includes an obligation that companies concerned be audited in accordance with the International Standard on Auditing (ISA) issued by the International Auditing and Assurance Standards Board. ISA 240 deals with auditors' responsibilities relating to fraud in an audit of financial statement, but does not specifically refer to foreign

⁶³ S. KIM, "[Korean Reporters Got Fired, Got Active and Got the President](#)", *Foreign Policy*, 21 December 2016.

bribery, focusing more generally on the responsibility of the external auditor to identify and assess the risks of material misstatement due to fraud.

60. The 2017 amendments to the AEASC, which entered into force in November 2018, explicitly require external auditors to report broadly to the FSC “any misconduct or any serious facts that are in violation of any statute” (article 22(7) AEASC). Article 28 further provides for protection of “persons who report wrongful acts”. The reporting obligation under article 22(7) covers all illegal acts, including foreign bribery. However, the auditors interviewed during the on-site visit were not aware of this, and expressed the view that the reporting standards under the AEASC only impose a requirement to report violations of the AEASC, thereby highlighting the need to raise awareness and provide training on these new reporting obligations. Following the on-site visit, Korea explained that the AEASC requires companies to report on the education and training plans of their staff in charge of the preparation and disclosure of accounting information.⁶⁴ This training obligation by companies appears limited to internal staff, concerning the maintenance of books and records, and would not extend to detection of foreign bribery. It does not appear that any training focusing on the detection of foreign bribery specifically has been delivered to auditors – whether internal or external – by public authorities or professional associations.

Commentary

The lead examiners welcome amendments to Korea’s AEASC that require external auditors to report to the FSC suspected violations of any statute, including foreign bribery offences. They note, however, that this reporting obligation is very broad and that the auditors interviewed during the on-site visit were not aware of it. While the lead examiners acknowledge that this lack of awareness may be due to the very recent entry into force of this reporting obligation, they consider that, to be effective for the purpose of detection of foreign bribery, awareness-raising and training will be essential. The lead examiners therefore recommend that Korea develop awareness-raising and training on the FBPA in the accounting and auditing profession to ensure auditors are in a capacity to detect foreign bribery red flags and are aware of their reporting obligations.

⁶⁴ Article 9(2)7.a. of the amended Enforcement Decree of the AEASC.

B. ENFORCEMENT OF THE FOREIGN BRIBERY OFFENCE

B.1. The foreign bribery offence

61. Korea's foreign bribery offence in article 3.1 of the FBPA remains largely unchanged since Phase 3, with, nevertheless, two notable amendments. One significant modification – already noted at the time of Korea's written follow-up to Phase 3 – is that, in October 2014, Korea removed the small facilitation defence in the FBPA.⁶⁵ Another significant and welcome reform was introduced on 29 November 2018 by a new law which clarifies that bribes delivered directly to a third party, or received with knowledge thereof, constitute bribery of a foreign public official, which had been noted as an issue for follow-up in Phase 3 (Phase follow-up issues 11a and b; see sub-section b on third party beneficiaries below). Previous evaluations by the Working Group found that the FBPA largely conforms to requirements of the Convention, noting, however, its narrower definition of what constitutes a *foreign government and the non-coverage of North Korean officials (Phase 3 recommendation 1.a)*. Since Phase 3, further issues have surfaced as jurisprudence has developed regarding the autonomous definition of what constitutes a foreign public official.

Commentary

The lead examiners commend Korea for the removal of the small facilitation defence in the FBPA.

a. Scope of “foreign government”: a loophole in the coverage of North Korean officials

62. In Phase 3, the WGB raised concerns that officials from the North Korean regime are not considered foreign public officials under the FBPA, since South Korea does not recognise North Korea.⁶⁶ Cooperative projects between South and North Korea essentially take place in special economic zones such as the Kaesong Industrial Zone (KIZ). While the KIZ was closed in 2016, bribery of North Korean public officials occurring through activities in this zone may yet come to light. Furthermore, although discussions on resuming business in the KIZ have not taken place officially, the topic is included in the agenda of the current South Korean President.

63. In its responses to the Phase 4 questionnaire, Korea confirmed that North Korean officials are not considered domestic nor foreign public officials. Therefore the provisions on domestic bribery in the Korean Criminal Act do not apply, nor do those in the FBPA. In Phase 4, Korea reiterated the view expressed in Phase 2 and 3 that bribery of North Korean public officials would be covered through provisions in different pieces of legislation.⁶⁷ However, the Working Group already considered these laws at the time of Phase 2 and Phase 3 and did not consider them sufficient to address its concern since the provisions in questions did not relate to active bribery.⁶⁸ Korea has not taken any further step to implement Phase 3 recommendation 1(a). Given the risk of bribery of North Korean

⁶⁵ Phase 3 recommendation 1b and c; Phase 3 written follow-up, para. 4.

⁶⁶ Phase 3, paras 30-33. See also Introduction, para. 12 of this Phase 4 report on the KIZ.

⁶⁷ The Criminal Act, National Security Legislation and the Inter-Korean Exchange and Cooperation Act.

⁶⁸ Phase 2, paras 103-105; Phase 3, paras 30-33.

officials might increase because of the growing economic ties between South and North Korea, it remains important to close this loophole.

Commentary

The lead examiners acknowledge that the relations between South and North Korea represent a sensitive political issue. Nevertheless, they consider that there is a potential risk of bribery of North Korean officials by South Korean natural or legal persons, and that this situation currently constitutes a loophole in Korea's foreign bribery legislation. The lead examiners therefore consider that Phase 3 recommendation 1(a) remains not implemented, and recommend that Korea take appropriate steps within its legal framework to ensure that the bribery of persons performing public functions for the North Korean Regime is covered.

b. Third party beneficiaries

64. In Phase 3, the Working Group agreed to follow-up on the coverage of third party beneficiaries in the absence of express language to this effect in Article 3.1 of the FBPA (follow-up issue 11(a)). This topic had been the focus of Phase 2 recommendation 5(a). While no steps had been taken to clarify the FBPA in this regard at the time of Phase 3, case law on domestic bribery and interpretation by academics provided at the time had convinced the Working Group to convert this topic to a follow-up issue.

65. On 29 November 2018 Korea passed a new law which amends article 3 of the FBPA and explicitly covers bribes offered or paid directly to a third party or received with knowledge thereof (new paragraph 2, article 3 FBPA). The amended article 3 is expected to enter into force before the end of December 2018.

Commentary

The lead examiners commend Korea for the adoption of legislation expressly covering bribes paid directly to any third party beneficiary in article 3.1 of the FBPA.

c. A restrictive interpretation of "international business"

66. In Phase 3, the WGB raised concerns about the interpretation of "international business transaction" in practice (follow-up issue 11b).⁶⁹ No further information was provided at the time of Korea's written follow-up report.

67. Case developments since Phase 3 demonstrate an overly restrictive interpretation of the international business transaction nexus in at least two foreign bribery cases. In the Filipino Casino Licence case, which resulted in acquittal due to lack of evidence, the Seoul Central District Court expressed the view that "it is difficult to determine that the procedure for obtaining an online casino business approval from PAGCOR constitutes an international business transaction."⁷⁰ PAGCOR is a public corporation fully funded by the government of Philippines, overseeing all authorisation and regulatory activities related to entertainment in the country. During the on-site visit, an MOJ representative concurred that the restrictive court interpretation of the business transaction nexus in this case was concerning. Similarly, in the Indonesia Mining case, the Seoul DPO, quoting a written opinion from the NPA, noted a lack of certainty on whether the bribes paid by a Korean national to a Regent in Indonesia to acquire a mining licence constituted a bribe to secure

⁶⁹ Phase 3 Report, paras 26-29.

⁷⁰ Seoul Central District Court (2012) decision 2010GoHap443.

an “international business transaction”. Korean authorities further indicated in the Phase 4 responses that consideration was also given to local custom to determine that the donations did not constitute bribe payments (further discussed immediately below). At the on-site visit, the SPO explained that the prosecutors ultimately declined to prosecute on the grounds that the business transaction nexus was not clearly established and because there was insufficient evidence to establish that the bribe had been paid to a foreign public official (see also sub-section e. below on the autonomy of the foreign bribery offence).

68. During the on-site visit, private sector lawyers and prosecutors expressed the view that, in the absence of a clear definition of the term “international business transaction” under the FBPA, the terms can be interpreted broadly or follow the general interpretation under other criminal laws. They further stated that Korean courts could consider foreign courts’ interpretations in the absence of domestic case law. After the on-site visit, the MOJ and the SPO stated that, in general, acquisition of business licenses from foreign governments is interpreted as a part of “transactions involving profits or losses and property of the parties” and therefore would qualify as an international business transaction. It remains that in practice, two cases were closed at least partly on the basis of a restrictive interpretation of “international business”, contrary to Convention standards. In November 2018, the MOJ further indicated its intention to publish a manual on the FBPA which would include explanations on the concept of “international business transaction”. Korean authorities noted that the manual was published online in December and became accessible to the Prosecution Service and the Institute of Justice. Prosecutors and investigators have access to the manual through the intranet. Given the date this was issued, the lead examiners did not have sufficient time to assess whether the manual addresses the WGB’s concerns.

Commentary

The lead examiners are concerned about the restrictive interpretation of “international business” by Korean prosecutors and courts. They therefore recommend that Korea take the necessary steps to ensure that “international business” is interpreted broadly, consistent with Article 1 of the Convention.

d. Perceptions of local custom taken into consideration by Korean authorities

69. Recent developments in the context of foreign bribery enforcement actions raise concern as to their conformity with Commentary 7 to the Convention, which prohibits, inter alia, “perceptions of local custom” as a defence or exception to the foreign bribery offence. In the Indonesia Mining case, law enforcement authorities, both from the NPA and DPO, appear to have taken into consideration perceptions of local custom as one of the reasons not to prosecute. The written opinion filed by the NPA when transmitting the file to the DPO accepted statements by the defendant that the money paid did not constitute bribes but “*sumbangan*”, and alleged the traditional need to pay this fee to the “regent” in Indonesia for obtaining a mining licence. The NPA further considered that “the criminal allegations cannot be determined without clear guidelines or basis on the practice of political donations in Indonesia and [that], at this stage, there are (sic.) insufficient evidence to admit the charges”. Following the on-site visit, Korea indicated that partial opinions expressed by the NPA should not be cause for concern, since the prosecutors are the ones making prosecution decisions in foreign bribery cases and would be clear on local donation customs may also constitute a foreign bribery offence. However, in its non-prosecution decision, the Seoul DPO indicates that “the reasons for non-prosecution are as stipulated in the Written Opinion filed by a judicial police officer”. This approach was confirmed

during the on-site visit by an NPA representative who stated that offering a donation in exchange for the right to explore is local custom in Indonesia, and would therefore not constitute a bribe. An SPO representative did not agree with the NPA's interpretation. Korean authorities indicated that this issue has been clarified in the Manual issued by the MOJ in December 2018.

Commentary

The lead examiners recommend that Korea clarify by any appropriate means to its law enforcement authorities, and in particular the NPA, that its foreign bribery offence does not take into account factors such as perceptions of local custom, and the tolerance of local authorities in the country of the foreign public official.

e. A need to clarify the autonomy of the foreign bribery offence

70. In previous evaluations, the WGB expressed doubts about whether the definition of “public enterprise” in article 2.2.c of the FBPA establishes a higher threshold than the one under Commentary 14 to the Convention since a) the term “*de facto* or effective control” in article 2.2.c differs from the term “dominant influence” in Commentary 14 and b) article 2.2.c of the FBPA does not clearly specify if indirect control is a sufficient trigger to consider a company as a public enterprise.⁷¹ Korea considers that its foreign bribery offence is in line with the Convention in covering bribery of officials in public enterprises. Discussions on-site and case law examined in Phase 4 appear to point to a different problem: the issue may not be the definition of a public enterprise in the law but rather a requirement of proof of the law of the foreign official's country to ascertain whether that person was, in fact, a foreign public official. Such a high threshold would be contrary to Commentary 3, which explicitly requires the autonomy of the offence (i.e. not requiring proof of the law of the particular official's country).

71. The 2012 court decision in the China Eastern Airlines case resulted in the acquittals of the suspects for foreign bribery on the basis that it was not sufficiently established that the persons bribed were foreign public officials. The courts' interpretation – confirmed at second instance – raises concern as to whether a foreign public official under the FBPA would be interpreted to cover “any person exercising a public function [...] including for a public enterprise”, and whether a public enterprise would be considered to include “any enterprise, regardless of its legal form, over which a government [...] may, directly or indirectly, exercise a dominant influence.”⁷² In this case, the court considered that China Eastern Airlines does not correspond to an “enterprise in which a foreign government has invested in excess of 50 % of its paid-in capital or over which a foreign government has *de facto* control as regards all aspects of its management”.⁷³ Korean prosecutors further explained during the on-site and in written responses that the court did not consider credible the documents submitted by an employee who testified in court concerning the Chinese government's share of investment in China Eastern Airlines, and that evidence obtained through MLA would have been necessary to demonstrate that the company in question was a public enterprise as defined under article 2.2.c of the FBPA.

72. The decision in the China Eastern Airlines case, while focusing attention on the definition of “public enterprise”, raises the broader question of the autonomy of Korea's

⁷¹ Phase 3 report, para.25; Phase 2 report, paras. 101-102; Phase 1 report, p.4.

⁷² Convention, Article 1 and Commentary 14.

⁷³ Article 2.2.c. FBPA.

foreign bribery offence. Although the FBPA does not require proof of law of the foreign official's country, in practice and as confirmed by prosecutors and MOJ representatives at the on-site visit, some Korean courts may require official information obtained from a foreign country via MLA to prove certain elements of the offence, as illustrated in the China Eastern Airlines case. Other courts might consider that information appearing on a website (mentioning, for instance, the person's position in an administration) would be sufficient in this respect. The Working Group underlines that it is crucial not to lose sight of the objective and purpose of the principle of autonomy of the offence enshrined in the Convention, i.e. that a legal system should not "require proof of elements beyond those which would be required to be proved if the offence were defined as in Article 1 of the Convention" (Commentary 3). The purpose of this principle is to avoid relying on obtaining information from a foreign country to be able to prove the elements of the offence, thus allowing for the broadest and most accessible definition possible.⁷⁴ Korean authorities indicated that the issue of the autonomy of the offence has been clarified in the Manual issued by the MOJ in December

Commentary

In light of recent case law and discussions during the on-site visit, the lead examiners consider that the evidentiary threshold applied in practice to prove elements of the foreign bribery offence is unreasonably high and that, unless this is addressed, a number of foreign bribery cases risk resulting in acquittals or decisions of non-prosecution. The lead examiners therefore recommend that Korea take all necessary measures to ensure that the foreign bribery offence under the FBPA applies autonomously, without requiring proof of the law of the foreign public official's country. This information should, at a minimum, clarify that the foreign bribery offence is in all cases autonomous; the definition of foreign public officials does not require recourse to foreign authorities in order to be established; and that no element of proof beyond those contemplated in Article 1 of the Convention is required to define a foreign public official.

More generally, as concerns the interpretation of international business transaction, perceptions of local customs, or the autonomy of the definition of foreign public official, the above-outlined issues appear to emanate primarily from a restrictive interpretation of the offence by the police, prosecutors or the courts, rather than from issues with the text of the legislation itself. To this end, the lead examiners recommend that Korea provide and disseminate detailed written information to investigators, prosecutors, and judges (whether separately or collectively) on the requirements of the foreign bribery offence under Article 1 of the Convention. If such written clarification to law enforcement and the judiciary proves insufficient in practice, Korea may need to consider amending and making more explicit its foreign bribery legislation with respect to the above issues.

The lead examiners encourage Korea to proceed promptly with Korea's stated intention to publish a manual on the FBPA and to provide training within a year on the above-mentioned issues, with a view to ensuring that all relevant law enforcement and judicial authorities have access to this.

⁷⁴ See, e.g. Germany Phase 3, para. 33.

B.2. Related offences of false accounting and money laundering

a. False accounting for the purpose of committing or hiding foreign bribery

73. The WGB expressed concern with regard to the false accounting offence at the time of Phase 2. In particular, the WGB concluded that “fines [for false accounting] are so low that they are merely the cost of doing business”, noted that sentences imposed in practice were at the low end of the range, and recommended that sanctions be increased. This recommendation was not implemented at the time of Korea’s Phase 2 written follow-up.⁷⁵ While sanctions increased since Phase 2, they remain fairly low, although very recent legislative amendments represent improvements. Finally, Korea has never enforced its false accounting offence in relation to foreign bribery.

74. Korea identifies the two following laws that cover the false accounting offence:

- Article 39(1) of the *Act on External Audit of Stock Companies* (AEASC) –as amended in 2017 – provides that: “If any person provided for in Articles 401-2 and 635 (1) of the Commercial Act or any other person in charge of accounting affairs of a company prepares and publishes any false financial statements or consolidated financial statements, in violation of the accounting standards referred to in Article 5, he/she shall be punished by imprisonment with labour for not more than ten years or by a fine not exceeding two to five times the amount of gains acquired or loss evaded by the relevant violation.” Korea explains that the accounting standards referred to in article 5 are the International Financial Reporting Standards (IFRS) issued by the International Accounting Standards Board. Article 45 further allows for confiscation of “the benefits acquired by violating article 39 (1)” or “if all or part of them cannot be confiscated, the value thereof”. Article 46 provides that the same penalties applicable under article 39(1) would apply to legal persons, provided there has been a failure of “due attention and supervision” (on “due attention and supervision”, see part C.1.a. below). Confiscation under article 45 is, however, not applicable to legal persons.
- The *Commercial Act* also covers false accounting, but not the full range of activities prohibited under Article 8 of the Convention. It provides that natural and legal persons that make false reports to the court or a general meeting with respect to the value of the net assets may be punished by imprisonment for not more than five years or by a fine not exceeding KRW 15 million (USD 13°300). An additional administrative fine of KRW 5 million may be imposed – only against natural persons – for “failure to state any particulars to be stated in [...] the list of assets, balance sheets, a business report, operation report, income statements, or other documents indicating financial status and management performance of the company [...], a report on the settlement of accounts, books of account, or supplementary statements or an audit report...”.

75. The AEASC only applies to companies with audit obligations. The scope of companies subject to external audit – originally limited to stock companies – was significantly expanded in November 2018 to include limited liability companies. Nevertheless, some companies remain outside of the scope of application of the AEASC, and would therefore not be liable for the full range of false accounting activities under Article 8 of the Convention.

⁷⁵ Phase 2, para. 74 and recommendation 6a; Phase 2 Written Follow-Up, para. 9.

76. Although Korea states that “false accounting offences have been always considered [in] corporate crime investigations because embezzlement, breach of trust, and bribery are usually closely intertwined with false accounting”, none of the foreign bribery cases to date have included proceedings for false accounting. In terms of enforcement more generally, the false accounting offence in the AEASC has been enforced against legal persons in 56 cases since 2011, and in 391 cases against natural persons, none of them in relation to foreign bribery. As concerns the level of sanctions, the increase to “two to five times the amount of gains acquired or loss evaded” brought on by the 2017 amendments to the AEASC represents an improvement on the previous situation – the maximum fine prior to 2017 was KRW 2 billion” (USD 1°770million) for legal persons.

Commentary

In light of the applicability of the false accounting offence to a limited range of legal persons, the lead examiners recommend that Korea ensure that all legal persons can be held liable for false accounting offences committed for the purpose of bribing foreign public officials or of hiding such bribery.

Furthermore, in light of the absence of enforcement of the false accounting offence in relation to foreign bribery to date, the lead examiners recommend that Korea vigorously investigate and prosecute this offence where appropriate, and, to this end, raise awareness and provide training to law enforcement authorities.

Finally, in light of concerns expressed by the WGB since Phase 2, and given the very recent entry into force of legislation increasing the level of sanctions for false accounting, the lead examiners recommend that the WGB follow up to ensure that sanctions imposed in practice for false accounting in relation to foreign bribery are effective, proportionate and dissuasive.

b. Money laundering predicated on foreign bribery

77. Korea’s money laundering offence under the POCA has been amended twice since Phase 3, in 2012 and 2014 Article 3 of the POCA establishes the offence of “concealing and disguising criminal proceeds regardless of the crime from which the criminal proceeds originate”. Both domestic and foreign bribery qualify as predicate offences. Korea’s legislation also allows for the simultaneous conviction of a person for money laundering and foreign bribery (self-laundering), and Korea referred to several domestic bribery cases in which the offenders were charged and punished for self-laundering.

78. Korea indicates that over 2 000 cases have been prosecuted for money laundering since Phase 3. The vast majority resulted in sanctions against natural persons (3 118 natural persons sanctioned), while only 23 legal persons were sanctioned). None of these cases were predicated on foreign bribery. Yet, at least one recent foreign bribery case appears to present elements of money laundering. In the Kazakhstan Consulting case, the suspects embezzled USD 2.2 million on the pretence of consulting fees through a company from another state party to the Convention, used for the purpose of laundering money, and used the money to bribe Kazakh politicians. In two other cases in which Korea is providing assistance to foreign authorities, money laundering predicated on foreign bribery also appears to have taken place without any investigative action for money laundering on the part of Korean law enforcement authorities. Korea clarified that in an additional case an investigation for money laundering could not be launched because the main offence amounted to preparatory steps of bribery and was thus not punishable under the FBPA. In another case, the reason for not pursuing proceedings was lack of evidence, which could

be remedied in the future. Encouragingly, Korean prosecutors have charged two individuals for the first time with both foreign bribery and money laundering committed through different intermediaries in the US Relocation and Construction case, currently pending trial. However, the charges only relate to the laundering of the instrument (i.e. the bribes) and not of the proceeds of foreign bribery. The prosecutor explained during the on-site visit that prosecution of money laundering predicated on foreign bribery was possible in this particular case because of the involvement of an intermediary, which raises concerns about effective enforcement of money laundering of the proceeds of foreign bribery. Following the on-site visit, Korean authorities stated their intention to provide relevant training and awareness-raising activities.

79. Finally, Korea has made some efforts to address issues relating to “beneficial ownership”. Although Korea has not adopted a system of beneficial owners’ registry, the revised Financial Investment Services and Capital Markets Act provides since March 2016 that listed companies must maintain a roster of beneficial shareholders through a transfer agent and report the information on shareholders and related persons with not less than 5% of the total number of stocks to the Financial Services Commission and the Korea Exchange, which disclose the information to the general public through their websites. Financial institutions are also obliged to verify the beneficial ownership of each customer pursuant to the customer due diligence requirement under the FTRA since January 2016.

Commentary

The lead examiners recommend that Korea take measures to enforce the money laundering offence in foreign bribery cases more effectively. They encourage Korea to proceed with its stated intention to provide training to investigative authorities on the importance of enforcing the money-laundering offence predicated on foreign bribery against the bribe payers.

B.3. Investigative and prosecutorial framework

a. Bodies responsible for investigating and prosecuting foreign bribery

80. Korea’s institutional framework for investigating and prosecuting foreign bribery remains unchanged since Phase 3. Foreign bribery investigations can be led either by the public prosecutor’s office or the police. Since Phase 3, foreign bribery investigations have been shared equally between the police and prosecutors.

81. The Prosecutor General is head of the Supreme Prosecutor’s Office (SPO), which oversees the District Prosecutors’ Offices (DPOs). The SPO has a supervisory function with respect to DPOs but does not have a direct role in foreign bribery investigations and prosecutions. The 18 DPOs are responsible for directing police investigations and for conducting prosecutions.⁷⁶ Since Phase 3, DPOs have led or are leading foreign bribery investigations in 7 of the 13 foreign bribery cases: the Busan DPO in the FELDA case; the Daegu DPO in the Ghana Tax case; the Incheon DPO in the China Eastern Airlines case; the Seoul Central DPO in the US Relocation and Construction and CCTV cases; and the Seoul Southern DPO in the Russia Governor case. The UAE Construction case is undergoing preliminary investigation by the SPO Foreign Illicit Asset Recovery Task Force.

⁷⁶ Art. 4(2), Public Prosecutors’ Office Act.

82. The National Police Agency (NPA) is headquartered in Seoul and has 17 provincial agencies. The Criminal Procedure Act (CPA) provides that NPA investigators shall investigate crimes under the instructions of a public prosecutor (art. 196). However, at the on-site visit, NPA representatives indicated that the police do not alert the relevant DPO until they need to use coercive measures as part of the investigation (e.g. search and seizure). Since Phase 3, the NPA has led investigations into 6 of the 13 foreign bribery cases (Busan Shipping, Filipino Casino License, Mongolia Land Lease, Kazakhstan Consulting, Hanwha and Indonesia Mining cases).

b. Resources, expertise and training

83. In its responses to the Phase 4 Questionnaire, Korea indicated that there are no specialised units within the DPOs for foreign bribery investigations and that these are mainly carried out by the Seoul Central DPO Foreign Affairs or Special Investigation departments. However, the Seoul Central DPO oversaw just 5 of the 13 foreign bribery cases since Phase 3. Korea reports that 3 of the 18 DPOs (Seoul Central, Busan, Incheon) have Foreign Affairs Investigation departments, each staffed by 1 senior prosecutor, 2-4 prosecutors, 5-6 investigators and 2-4 assistants. Seven DPOs have Special Investigation departments (Seoul Central, Busan, Incheon, Suwon, Daejeon, Daegu, Gwangju.). Seoul Central DPO's special investigation department has over 50 prosecutors, 55 investigators and 32 assistants, the other 8 DPO special investigations departments have 4-5 prosecutors, 6-14 investigators and 3-4 assistants, although 3 have digital forensic experts and 1 has an account tracing expert. The financial resources available to these specialised departments are unknown, as are their corresponding caseloads and the scope of cases they investigate and prosecute.

84. There is a central NPA Special Investigation Division in Seoul which is responsible both for oversight of foreign bribery investigations by regional NPA offices, as well as investigating its own foreign bribery cases. Each of the 17 regional NPA agencies has a Sophisticated Crime Investigation Unit which leads investigations of specific offences, including foreign bribery. There are a total of 2°300 police officers specialising in foreign and domestic bribery and misuse of power investigations across Korea. NPA headquarters in Seoul is nominally responsible for serious cases, including foreign bribery.

85. In terms of training, police representatives indicated that while they make efforts to include content on transnational bribery in their courses, the legal framework was still relatively new,⁷⁷ there had only been three investigations and that it was too early for dedicated training material. Korea could not provide examples of training materials to the evaluation team for confidentiality reasons. At the on-site visit, and as described above in Part B.1, NPA officers demonstrated interpretations of the foreign bribery offence that are inconsistent with several standards of the Convention. This knowledge gap, coupled with the very low number of foreign bribery investigations led by the NPA since Korea's Phase 3 evaluation seven years ago, shows that greater capacity and awareness among NPA officers is essential. The lack of dedicated training, alongside a lack of perceived need for such training, is of serious concern given that the foreign bribery offence was introduced in Korea almost twenty years ago.

⁷⁷ The FBPA entered into force in 1999, i.e. nearly twenty years ago as of the time of this Phase 4 evaluation.

c. Interagency cooperation and attribution of cases

i. A fragmented approach to case allocation between and across prosecutors' offices and police agencies

86. It is unclear how cases are allocated between the DPOs and the NPA. At the on-site visit, prosecutors explained that case allocation between the DPOs and NPA depends essentially on which body receives the initial report. Representatives at the on-site visit indicated that there are no specific guidelines on allocation of foreign bribery investigations, either between DPOs or NPA agencies, and a number of public agencies interviewed during the on-site visit were unclear as to which law enforcement authority foreign bribery reports should be referred. Discussions are ongoing about future guidelines on the division of investigative responsibility between the NPA and DPOs. Prosecutors and MOJ officials indicated that as a rule of thumb, DPOs (rather than the NPA) conduct the investigations in large cases. However, the definition of what would constitute a 'large case' is unclear. In practice, the NPA has led half of the foreign bribery investigations to date, which would indicate that allocation of investigative authority is not related to the amount paid in bribes.

87. If the SPO receives a foreign bribery report, it will evaluate the credibility of the information and then decide which DPO to allocate the investigation, based on whether the DPO has either a Foreign Affairs or Special Investigation Department. Prosecutors at the on-site visit indicated that they can conduct entire investigations and prosecutions without requesting the assistance of the police and that if a DPO receives a foreign bribery report directly, it will carry out the entire investigation.

88. The police conduct investigations when they detect or receive direct reports of allegations, however, there is no obligation to inform the DPO of the opening of an investigation and this usually only happens when coercive measures, such as search warrants are necessary. Four of the six foreign bribery cases investigated by the NPA since 2015 were investigated by four different Seoul police stations. Three of these were assigned to the Seoul Central DPO and the other to the Seoul Western DPO. The other two were dealt with by the Korea Coast Guard (Busan Shipping) and Gyeonggi Provincial Police Agency (Kazakhstan Consulting) and went to the Busan and Suwon DPOs, respectively, for prosecution. While the NPA referred to excellent cooperation with the MOJ and MOFA on both domestic and international cases, there was no discussion about the level of cooperation with DPOs in foreign bribery cases. Combined with the sensitivity of the discussion on the proposed reorganisation of criminal investigative powers (see below), there appears to be significant room for improved communication and cooperation between investigative and prosecutorial authorities in Korea.

ii. Proposed reorganisation of criminal investigative powers – an opportunity for improvement?

89. In response to public concern about the lack of checks and balances for prosecutors, notably in the context of direct prosecutorial investigations, in February 2018, the Committee on the Reformation of the MOJ and the Prosecutor's Office was established under the MOJ. The Committee made a recommendation, which, in principle, would ensure the police more autonomy to investigate and reduce the prosecution's authority to conduct direct investigations. By press release dated 21 June 2018, the government announced its proposal to reallocate authority to investigate between prosecutors and police officers. According to representatives at the on-site visit, the government instructed

the administration to prepare a bill to reorganise investigative powers. Following the on-site, Korea indicated that an MOJ Task Force for Reorganisation of Investigative Powers had been convened to prepare the bill which was expected to be submitted to the National Assembly in late 2018. Discussions of this proposed reorganisation during the on-site visit were sensitive: nearly all of the participants from law enforcement and government agencies were very reluctant to address the issue, and explanations were therefore essentially obtained from discussions with private sector lawyers and through media articles. In terms of the timeline, participants at the on-site visit considered that the draft legislation would take over a year to be adopted. The amendments would provide the police with primary authority to investigate prior to the referral of a case for prosecution and limit prosecutors' direct investigative authority for specific corruption offences. MOJ representatives indicated that foreign bribery would continue to be subject to direct investigation by prosecutors regardless of any potential organisation of investigative powers, as it is considered a serious offence. Lawyers concurred, noting the important role of the SPO in seeking MLA in foreign bribery cases through the MOJ, Korea's competent authority for international legal cooperation. Police officers were very reluctant to comment on the proposed reorganisation but considered that if the legislative initiative was adopted, it would have a positive impact on implementation of the Convention. They nevertheless indicated that there had been arguments over case reallocation for the previous 15 years and that the aim of the reforms was to strengthen checks and balances between the NPA and Prosecutors' Offices. Legal professionals at the on-site visit were sceptical of the proposed reallocation and considered that the public opinion had too strong an influence over both NPA and DPO investigations. They considered that any restructuring should promote greater competition between the NPA and DPOs, considering that this would lead to both agencies competing to do better in the public opinion.

Commentary

The lead examiners are concerned at the lack of clarity and the fragmented approach to allocating foreign bribery cases both within and between central and regional police agencies and DPOs. This lack of coordination could lead to inconsistent application of investigative techniques and strategies; result in cases 'falling through the cracks'; prevent the accumulation of knowledge and expertise necessary for foreign bribery investigations and undermine enforcement efforts. The lead examiners recommend that Korea ensure, for instance by establishing clear and specific procedures, appropriate coordination, sharing of information and resolution of conflicts of competence in foreign bribery investigations, within and between DPOs and NPA agencies.

B.4. Foreign bribery investigations and prosecutions

a. Commencement of an investigation

90. Phase 3 recommendation 4(c) requested that Korea increase the use of proactive steps to gather information from diverse sources at the pre-investigative stage, both to increase sources of allegations and enhance investigations. The WGB considered this recommendation partially implemented at the time of Korea's Phase 3 Written Follow-Up Report, noting that a number of cases at pre-investigation stage had been closed and that most had originated from referrals from foreign authorities. Seven years later, referrals from foreign authorities still constitute the primary source of detection (CCTV; Hanwha; FELDA; US Relocation and Construction; and UAE Oil cases). Korean law enforcement

authorities appear to have made very limited efforts to increase foreign bribery detection or to more proactively investigate foreign bribery allegations.

91. The NPA has one reporting channel for all offences: a dedicated phone number (112). In the five years between Korea's Phase 3 Written Follow-Up and Korea's Phase 4 evaluation the NPA received only one foreign bribery report via this channel (Hanwha case). As noted above in part. A., the 13 foreign bribery investigations since Phase 3 arose as a result of reports or complaints from business partners or competitors (2+3 cases), referrals from foreign authorities (5) and whistleblower reports (3). Media reports alone are not sufficient to launch a pre-investigation, but would require DPOs to conduct criminal record and financial intelligence checks on the company and individuals involved before commencing a pre-investigation.

92. There are two investigative stages in Korea: pre-investigation and formal investigation. In general, at pre-investigation stage, basic information is gathered through a search of criminal records and other open sources, and a formal investigation is launched when coercive measures such as search and seizure, call records check, and account tracking are needed. In the case of direct investigations by DPOs, the same prosecutor in charge of the pre-investigation decides whether to press charges. For NPA-led investigations, a judicial police officer provides a written opinion to the DPO on the possible charges and reasons for prosecution or non-prosecution, with the final decision on prosecution left to the DPO. In practice, transition from pre- to formal investigation usually occurs where a court grants authority to undertake coercive measures, such as conducting search warrants.

Commentary

Korean law enforcement authorities demonstrate a concerning lack of initiative when it comes to detecting and proactively investigating foreign bribery. The lead examiners reiterate Phase 3 recommendation 4(c) and recommend that Korea increase the use of proactive steps to gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations.

b. Conducting foreign bribery investigations

i. Investigative techniques

93. Korean law enforcement authorities have at their disposal a range of investigative tools and techniques. Subject to certain exceptions, a court warrant is needed to conduct coercive measures, such as searches of premises, wiretapping, seizure and search of email servers and location tracing. Pursuant to Supreme Court precedent, undercover investigations are permitted to the extent they facilitate the commission of a crime by persons with criminal intent. However, operations designed to induce criminal intent in persons who do not have such intent in the first place, are illegal.⁷⁸ Korea indicated that undercover investigations most often used in the context of narcotics offences and rarely in corruption cases. However, they were used in the context of the joint investigation with US authorities in the CCTV case. Warrants for search or seizure are executed by police officers under the supervision of a public prosecutor (art. 115 CPA). Wiretapping is regulated by the Protection of Communications Secrets Act. It is permitted only for

⁷⁸ Supreme Court Decision 2005DO1247 on October 28, 2005.

criminal investigations of offences listed in art. 5(1) of the Act, which include domestic bribery (arts. 129 and 133, Criminal Act) but not foreign bribery.

94. In Korean foreign bribery cases, the following investigative techniques have been used since Phase 3: search and seizure of telecommunication and email correspondence either from providers or company servers, bank account tracing, search and seizure, suspect interrogation, digital forensics, whistleblower statement, witness interview (see Table 1 below).

95. Prosecutors indicated that joint investigation teams among agencies are common and that there is a practice of developing investigation plans, however, the example of an investigation plan provided to the evaluation team did not describe investigative timelines, measures, or the role played by the various agencies involved. It is unclear how many of the concluded or ongoing foreign bribery cases to date involved such interagency joint investigation teams.

Table 1. Investigative techniques used in foreign bribery cases

Investigative technique	Ongoing trial/investigations (4 cases)	Concluded cases* (9 cases)	Total (13 cases)
Bank account tracing	2	5	7
CCTV investigation		1	1
Digital forensics		2	2
FIU cooperation	1		1
Investigation of the complainant		1	1
Search and seizure	3	4	7
Suspect interrogation	2	9	11
Undercover operations		1	1
Whistleblower statement		1	1
Witness interview	1	1	2
Number of tools used per category	9	25	34

* 'Concluded cases' include both cases that were concluded either in court (by conviction or acquittal), as well as investigations discontinued at an advanced stage.

ii. Instructions and directions from the Prosecutor General and SPO

96. In terms of the role of the prosecutorial hierarchy in investigations, prosecutors reported during on-site discussions that the DPO conducts investigations and regularly reports to the SPO at important stages in specific cases (search warrants, procedural decisions, etc.). The SPO's Anti-Corruption Division communicates with DPO prosecutors and informs the Prosecutor General of progress in specific cases. If there are conflicting views on how to proceed with the case, the SPO or Prosecutor General's instructions prevail. As further discussed below, the Prosecutor General can and regularly does issue oral or written instructions in specific cases, including whether to prosecute. There are no rules or guidelines limiting the scope or application of instructions in specific cases. As noted below, this raises concerns about the consideration of factors prohibited in Article 5 of the Convention (see part B.4.e. on independence of investigations and prosecutions).

iii. Access to bank information: Requirement to notify account holders

97. Financial institutions are required to share information with law enforcement agencies upon receiving a corresponding court warrant (art. 4(1)(1), Act on Real Name Financial Transactions Guarantee of Secrecy). However, pursuant to art. 4-2(1), financial institutions ‘shall notify in writing the holder of a title deed of the relevant contents, purpose of use, person to be provided, and date of provision, etc., within ten days from the date of such provision.’ Law enforcement authorities may request that notification be deferred if it ‘carries a matter of obvious concern about obstructing the progress of fair legal procedures such as destruction of evidence or threat to witness’ (art. 4-2(2)). Notification can be deferred for a maximum period of one year, in such circumstances, and the financial institution in question cannot refuse to defer notification. At the on-site visit, prosecutors reported regularly requesting and obtaining the suspension of notification. Police representatives confirmed that the court grants the delays requested in most cases. Notification is also required when bank information is requested from abroad in the context of an MLA request. In such cases, the relevant DPO usually requests a delay of notification to the account holder while seeking a search and seizure warrant on the account from a court, and the notification can be deferred for up to one year. In particular, these international cases could result in the account holder being alerted to the investigation and potential asset or witness flight in the context of a foreign bribery investigation.

Commentary

The lead examiners welcome the wide range of investigative techniques used by Korean law enforcement authorities in foreign bribery investigations. They nevertheless recommend that Korea extend the availability of wiretapping to foreign bribery investigations, since this is an available tool for domestic bribery investigations, and welcome Korea’s expressed intention to consider this in future revisions of the law.

In relation to access to bank information by law enforcement, the lead examiners question whether the notification of account holders could lead to potential asset, information or witness flight. Although they note reassurance provided by Korea, they recommend that the Working Group follow up on this issue to ensure that time limits to notify account holders can be sufficiently extended to allow for effective foreign bribery investigations and provision of information to foreign authorities.

c. Investigation time limits and statute of limitations

i. A prohibitively short investigation time limit

98. In cases where a prosecutor investigates a crime based on a ‘complaint or accusation’, the prosecutor must decide whether to prosecute within three months (art. 257 CPA). Police and prosecution representatives indicated that this provision was not mandatory and instead a ‘recommendation’ introduced to prevent investigative delays. Private sector lawyers confirmed this interpretation and that it would never be possible to argue that a case should be dismissed based on violation of art. 257. Prosecutors did indicate, however, that although this three-month time limit is not a standard, it is a practice inferred from art. 257, which applies in all cases, not limited to those initiated based on a complaint. They further explained that this three-month period does not generally constitute an obstacle as, once an investigation is started, all resources would be mobilised, but admitted that this is a reason why prosecutors are often not willing to request MLA as it requires going beyond timeframes Korean prosecutors have in mind. Korea asserted that requesting MLA would suspend the investigation time limit. This three-month limitation

period is not only a very short period of time in which to complete a preliminary investigation before deciding whether to issue an indictment but also operates to prevent prosecutors from obtaining potentially vital evidence from abroad.

ii. *Different statutes of limitations for natural and legal persons*

99. In Korea, art. 249 CPA defines the limitation period for prosecution based on the statutory maximum sanction which may be imposed. As the foreign bribery offence is punishable by a maximum of five years' imprisonment or a fine, the applicable limitation period for natural persons being prosecuted is seven years (art. 249(4) CPA). Given that the sanction of imprisonment does not apply to legal persons, corporate prosecutions for foreign bribery must be conducted within five years (art. 249(5) CPA). Investigations against seven companies were abandoned in the US Relocation and Construction case due to expiry of the statute of limitations; proceedings against four individuals are ongoing. The differential limitation periods applicable to natural and legal persons in Korea could lead to impunity for companies in foreign bribery cases and risk undermining Korea's implementation of Article 2 of the Convention.

100. The statute of limitations commences running on the date of completion of the offence. The limitation period cannot be extended or suspended if an MLA request is issued in relation to the case. However, Korea indicated that when there is a risk of the limitation period elapsing due to a lack of prompt response to an MLA request, prosecutors make efforts to acquire evidence aside from that sought through MLA, so that a conclusive decision may be reached even in the absence of a response. Pursuant to a Constitutional Court decision⁷⁹ setting out additional factors to be taken into account in decisions to prosecute, prosecutors may take into account 'the period of time that has elapsed since the commission of the offence'. Korea indicated that this period of time does not correspond to the statutory limitation period and is at the discretion of the prosecutor, taking into account whether the proceedings were initiated immediately after the commission of offence or a considerable period of time afterwards, for example. To date, no foreign bribery proceedings have been closed as a result of prosecutors taking this factor into account in deciding whether to prosecute. However, at the on-site visit, prosecutors indicated that if criminal intelligence acquired prior to the launch of the investigation points to expiry of the corresponding statute of limitations, no further investigative activity is undertaken.

Commentary

The lead examiners are seriously concerned that that the three-month investigation time limit is taken into consideration in foreign bribery investigations, in particular when deciding whether to request MLA. They recommend that Korea take measures to ensure that the investigation time limit is sufficient to conduct a thorough foreign bribery investigation in all cases.

The lead examiners are also seriously concerned that the shorter limitation period for legal persons has led to closure of investigations against seven companies in one significant foreign bribery case. They recommend that Korea extend the limitation period applicable to legal persons such that it is aligned with the limitation period applicable to individuals.

⁷⁹ 1995. 1. 20, 94 Human 246.

d. Commencing and terminating prosecutions

101. At the conclusion of the investigation, the prosecutor in charge decides whether the suspect should be prosecuted. When the prosecutor finds that the alleged facts do not constitute a crime or that there is insufficient evidence to prove the crime in court, he/she can exercise discretionary power not to bring the case to the court (see sub-section (ii) below). Even if incriminating evidence against the suspect is sufficient for prosecution, the prosecutor is authorised to suspend prosecution in consideration of the suspect's age, character, motive, and other circumstances (see sub-section (iii) below).⁸⁰ There is no procedure for pre-trial resolution in Korea.

i. Challenges in prosecuting foreign bribery

102. In its responses, Korea listed the following challenges in bringing foreign bribery prosecutions: obtaining evidence, witness statements and conducting investigations on bribe receivers in foreign countries; and tracking the flow of money to foreign accounts. Korea also indicated that, following indictment, at trial stage, prosecutors encounter difficulties proving admissibility of evidence acquired through foreign counterparts; inadequate evidence to prove the case due to application of the hearsay rule and the impossibility of summoning relevant persons and taking statements; and lack of a means to obtain assistance from persons involved, such as plea bargaining and pre-trial resolution (or settlement) procedures.

ii. A large range of factors taken into account in non-prosecution decisions

103. Korea's criminal justice system operates on the basis of discretionary prosecution (art. 247 CPA). Prosecutors may decide not to commence prosecution based on the criteria set out in art. 51 of the Criminal Act.⁸¹ The abovementioned decision of the Constitution Court⁸² provides additional factors to be taken into account when deciding whether to prosecute.⁸³ Korea indicates that all of these factors apply in deciding whether to suspend or terminate prosecutions, and are normally considered again during the sentencing stage.

104. In its responses to the Phase 4 questionnaire, Korea indicated that in cases involving the offer of bribes, prosecutors can decide not to prosecute for instance when there is voluntary surrender to investigative agencies. In the CCTV case, prosecutions of one natural person and one legal person who paid the bribes in this case were abandoned because they self-reported in the US and cooperated with the investigation. Korea argues that dropping the prosecution in this specific case was justified as the US and Korean bribe receivers were prosecuted and sanctioned as a result. As the Working Group has noted in

⁸⁰ Ministry of Justice website, "The Justice System": http://www.moj.go.kr/HP/ENG/eng_02/eng_2040.jsp

⁸¹ (1) age, character and conduct, intelligence and environment of the offender; (2) offender's relation to the victim; (3) motive for the commission of the crime, the means and the result; (4) circumstances after the commission of the crime (art. 247 CPA).

⁸² 1995. 1. 20, 94 Human 246.

⁸³ 1) previous convictions and the criminal history of the accused; (2) gravity of the penalty prescribed by the relevant law; (3) social impact of the alleged offence; (4) the change in the condition of public life and in the evaluation of the criminality of certain acts; (5) the development of the law; (6) whether or not any accomplices have been pardoned; and (7) the period of time that has lapsed since the commission of the offence.

previous country evaluations,⁸⁴ Article 1 of the Convention does not contemplate exoneration from prosecution under such circumstances; consideration of these factors may be understandable in a domestic bribery context but, in a foreign bribery context, would render the active bribery offence inoperative. Korea indicates that with no plea bargaining or pre-trial resolution (or settlement) procedures available in Korea, the prosecutor's discretion to discontinue criminal proceedings on this basis functions as a means to make progress in the investigation and to obtain cooperation from persons involved. Korea further clarified that prosecutors' decisions to suspend prosecutions are subject to judicial review by the Constitutional Court, upon appeal by persons directly affected by the decision such as the defendant or the complainant. Nevertheless, in a foreign bribery case, there is no guarantee that the bribed foreign official will be prosecuted by the foreign authorities. Therefore the exoneration from prosecution serves no useful purpose: the crime is brought to light through the self-report, but the offenders remain unpunished.

105. Korea also indicated that in cases involving the offer of bribes, prosecutors can decide not to prosecute where the offence ended only with a promise or expression of intent to offer the bribe. This may be contrary to Article 1 of the Convention, which requires Parties to criminalise the offer, promise or gift of a bribe.

106. Since Phase 3, a further 4 out of 13 foreign bribery cases have resulted in non-prosecution decisions, based on a restrictive interpretation of 'international business,' consideration of local custom and insufficient evidence to press charges (see above, part B.1). While non-prosecution decisions are not made public, in cases that have been brought to the attention of authorities by a complainant, the complainant is notified of the non-prosecution decision. The complainant can appeal the decision to the higher prosecutors' office, the SPO or the competent district court, where a judge can order a prosecution. In two foreign bribery cases (Indonesia Mining and Mongolia Land Lease cases) the complainants appealed the non-prosecutions decisions but in both cases the appeals were dismissed.

iii. Suspension of prosecution and the absence of a pre-trial resolution procedure

107. The Busan Shipping case resulted in conviction for four natural persons and one legal person, but is also the only foreign bribery case to date to have been concluded through suspension of prosecution for another nine natural persons and two legal persons. Prosecutions were suspended on the basis of the small amount of the bribes paid in this case (cash and valuables paid between 2008 and 2010 and totalling less than USD 10 000), pressure exerted by the foreign public officials, and repentance of the suspects. For note, the Busan Shipping case pre-dates the 2014 amendments to the Criminal Act abolishing the small facilitation payments exception (see above, Part B.1).

108. Contrary to non-prosecution decisions, suspended prosecutions are subject to changes in the circumstances of the case.⁸⁵ Korea indicates that although there is no

⁸⁴ For example, see Phase 2 Russia (paras. 242-247); Phase 2 Slovak Republic (paras. 150-161); Phase 2 Czech Republic (paras. 153-163); Phase 3 Portugal (paras. 41-42); Phase 3bis Greece (paras. 41-47).

⁸⁵ For note, Korea's system of suspended prosecutions is not similar to the deferred prosecution agreements in place in certain jurisdictions, whereby the authorities may agree to defer prosecutions

specified duration for suspending the prosecution, the prosecutor may reinstitute a public prosecution depending on the circumstances afterwards. In active bribery cases, factors such as solicitation, extortion, coercion, self-reporting or reporting on accomplices, or mere promise or expression of intent to offer the bribe are taken into account to suspend prosecution. Decisions to suspend prosecution are not subject to judicial review, *per se*, but can be appealed to the Constitutional Court by persons directly affected by the decision, such as the defendant or the complainant, on the basis of infringement of equal rights and right to pursue happiness, within 90 days of notification (arts. 68 and 69, Constitutional Court Act). Decisions to suspend prosecutions are not made public.

109. Korea indicates that there is no pre-trial resolution procedure in its criminal justice system. Lawyers at the on-site visit considered that the introduction of a formal pre-trial resolution framework in Korea could address some of the inadequacies in its enforcement of economic crime, but that this would need to be accompanied both by much stronger sanctions and strong incentives to self-report and cooperate (see also part C below on liability of legal persons).

Commentary

The lead examiners are concerned that some foreign bribery investigations have ended in non-prosecution decisions due to restrictive interpretations of certain elements of the offence, contrary to the Convention. They therefore recommend that Korea take the necessary measures to ensure that decisions not to prosecute or decisions to terminate foreign bribery prosecutions are not taken on the basis of factors contrary to Article 1 of the Convention (see also recommendations under part B.1.). The lead examiners also recommend that the Working Group follow up on suspended prosecutions in foreign bribery cases to examine the circumstances under which such prosecutions might be reinstated.

e. Independence of foreign bribery investigations and prosecutions and considerations forbidden under Article 5 of the Convention

110. Pursuant to the Prosecutors' Office Act, the Prosecutor General and individual prosecutors are appointed and assigned to their positions by the President of Korea upon the proposal of the Minister of Justice (art. 34). The Prosecutor General is appointed for a non-renewable two-year term. The Prosecutorial Personnel Committee is appointed by the Minister of Justice and deliberates on appointment and change of position of prosecutors as well as (where one-third of the Committee requests) "evaluation of prosecutors' investigation, involving an acquittal case or any other case that has drawn much of the public's attention" (art. 35). Art. 8 of the Prosecutors' Office Act mandates the Minister of Justice (as the supreme superintendent of prosecutor affairs) to direct and generally supervise prosecutors, and with respect to specific cases, direct and supervise only the Prosecutor General. Korea indicated that the Minister of Justice may receive reports on the development and results of cases from the SPO but may not direct or generally supervise DPO prosecutors on specific cases. In its responses to the Phase 4 questionnaire, Korea referred to the MOJ directing the SPO's Investigative Intelligence Division to investigate foreign bribery allegations contained in the Matrix. Korea indicates that, since 2005, there has been one case in which the Minister of Justice exercised the authority to direct the Prosecutor General. Despite the prosecutor's recommendation for investigation under

provided the defendant agrees to the payment of fines and disgorgement, as well as remedial actions, such as the development or improvement of compliance measures.

detention, the Minister of Justice at the time exercised his authority and directed the Prosecutor General to conduct the investigation without detention. Although the Prosecutor General at the time accepted such direction, he tendered his resignation as a sign of protest. Civil society representatives at the on-site visit reported that the new government had eliminated the practice of requesting reports from the SPO on ongoing investigations. They nevertheless considered that there was scope for influence given the Blue House's (the Korean Presidency) power to appoint high-level officials in Prosecutors' Offices. There is no legislative or regulatory framework governing the reporting by the Minister of Justice or SPO to the Blue House. During the previous administration, there were criticisms that ongoing prosecutorial investigations were reported to the Blue House through the MOJ. In response to this criticism, a high-level official of the current government declared that the prosecutorial investigations would not be directed.

111. The Chief Prosecutor of the various DPOs decides which DPO prosecutors are allocated cases. It appears that the SPO does perform a limited supervisory role in that DPOs inform it of important developments in the investigation, such as requesting search warrants or filing charges. If there is a resulting difference of opinion on the procedure to be followed, the Prosecutor General has the final decision. Korea confirmed that, to date, the Prosecutor General has not exercised authority to make direct decisions in foreign bribery cases. As noted above (part B.4.b.ii.), the Prosecutor General can also issue oral and written instructions in relation to individual cases, including whether to commence or terminate a prosecution. The SPO enacted in December 2017 (and amended in 2018) "Guidelines on the Process of Raising Objections by Prosecutors, etc" which set out a formal process for prosecutors to object to the direction or supervision of a specific case. While there are no rules or guidelines defining or limiting the Prosecutor General's powers of instruction, in December 2017, the SPO issued "Guidelines for Documentation of Directions, Instructions etc. during Decision-Making by the Prosecution." These Guidelines "prescribe a manner and procedure for recording directions, instructions, etc. made by supervisors or the SPO." Korea indicated that as the Prosecutor General's opinions are channelled through the SPO, the Guidelines therefore applies to all lines of communications through the SPO, without exceptions, and therefore would apply to individual instructions by the Prosecutor General him or herself. Pursuant to the Guidelines, opinions, directions or instructions are to be recorded on the Korea Information system of Criminal-justice services (KICS), an information system the police and prosecutors use throughout the law enforcement process. The information is to be stored for the "respective preservation period for the case". Korea clarified that the preservation period corresponds to either the limitation period for the sentence in cases resulting in convictions, or the statutory limitation period for cases resulting in non-prosecution decisions. Art. 6 of the Guidelines prohibits the disclosure of information recorded under the Guidelines. Nobody other than those who prepared the records can access them, other than an inspection or investigation agency if the records in question are subject to an inspection or investigation. The Guidelines entered into force on 1 April 2018 and Korea expects them to operate to prevent unfair control and clarify the roles and responsibilities throughout the case supervision and law-enforcement processes. Nevertheless, the power of both the Minister of Justice and the Prosecutor General to issue individual instructions

is a serious issue that has been raised in Working Group evaluations of other countries with a similar supervisory framework.⁸⁶

112. Korea refers to the establishment, in December 2017 of the Prosecutorial Investigation Deliberative Committee in response to public concerns about prosecutorial practices. The Committee was established within the SPO and consists of 150-250 members to be appointed for a term of two years renewable twice. The scope of the Committee's reviews covers "cases that earned popular suspicion or attracted focused attention from the society" and the Committee has the power to review whether to continue the investigation; whether to prosecute; whether to request an arrest warrant; propriety and legitimacy of investigations in cases where decisions to prosecute or not to prosecute were made; and other matters which the Prosecutor General submits for consideration to the Committee. Prosecutors in charge of the cases in question may appear before the Committee to provide explanations on a voluntary basis. The Committee can decide whether to disclose decisions or notify interested persons. The prosecutor in charge of the case and the Prosecutor General are required to respect the review of the Committee. The Committee has the power to review prosecutorial decisions in foreign bribery cases although it has not reviewed any domestic or foreign bribery cases, to date. While the December 2017 Guidelines and Prosecutorial Investigation Deliberative Committee aim to make prosecutorial instructions more accountable and transparent, without independent scrutiny and publicly available information, they may be insufficient to counterbalance the risk of potential influence.

Commentary

The lead examiners are concerned at the possibility open, to both the Minister of Justice and Prosecutor General, to influence individual foreign bribery cases either through prosecutorial appointment and assignment processes, case reviews or individual instructions (in the case of the Prosecutor General). They welcome the recent enactment by Korea of Guidelines that aim to counterbalance this influence. Nevertheless, they consider that the current power of both the Minister of Justice and the Prosecutor General to issue individual instructions exposes foreign bribery investigations to influence by factors prohibited by Article 5 of the Convention (i.e. considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved). The lead examiners therefore recommend that Korea ensure prosecutors who conduct foreign bribery cases are not subjected to political or other undue interference, including through the Minister of Justice or Prosecutor General's power of instruction in specific cases.

B.5. Sanctioning natural persons for foreign bribery

113. This part of the Report addresses criminal penalties and confiscation imposed upon conviction against natural persons. Sanctions for legal persons are addressed under Part C.

114. The Working Group has repeatedly voiced concern about the inadequacy of criminal sanctions and the absence of confiscation of the proceeds for foreign bribery in Korea's legislation and in practice. At the time of Korea's Phase 3 written follow-up, no

⁸⁶ Other WGB countries have received recommendations to not issue individual instructions in foreign bribery cases (Germany Phase 4 (Rec. 2(c)); France Phase 3 (Rec. 4a), Argentina Phase 3bis (Rec. 6(c)); Czech Republic Phase 3 (Rec. 3), New Zealand Phase 3 (Rec. 5(d)).

progress had been made on these issues and relevant recommendations were considered not implemented.⁸⁷

a. Insufficient criminal penalties

115. Criminal penalties for natural persons committing foreign bribery have not changed since Phase 1 (1999) and are a maximum of 5 years imprisonment or KRW 20 million (USD 18 000), or up to twice the profit obtained if such profit exceeds KRW 10m (USD 9000). The sanctions for foreign bribery have not evolved since the adoption of the FBPA.

116. Sanctions have been imposed against 12 natural persons in the 4 Korean foreign bribery cases since Phase 3 as follows⁸⁸:

Table 2. Sanctions imposed against natural persons for foreign bribery

Case	Court imposed sanction on natural persons
CCTV	4 natural persons: <ul style="list-style-type: none"> • 3 suspended imprisonment sentences between 6 and 14 months • 4 fines between KRW 3m (USD 2700) and KRW 20m (USD 18 000)
Hanwha	1 natural person: KRW 5m (USD 4500)
Busan Shipping	4 natural persons: fines between KRW 500 000 (USD 450) and 1m (USD 900)
FELDA	3 natural persons: <ul style="list-style-type: none"> • 3 suspended imprisonment sentences between 1 and 3 years • 3 fines between KRW 1m (USD 900) and KRW 3m (USD 2700)

117. The adequacy of sanctions applied in practice raises concern. In the four foreign bribery cases finalised between Phase 3 and 4, either no prison sentences were imposed, or they were suspended. Furthermore, the level of fines imposed was generally lower than the amount of the bribes offered, let alone the profit gained (see Annex 3 for further details on foreign bribery enforcement actions). This is in keeping with the findings in the Phase 3 report which notes that prison sentences imposed in practice are far below the maximum term and that monetary sanctions appear unusually low in light of the bribes paid and the estimated profits gained.⁸⁹ During the on-site visit, civil society and private sector lawyers echoed concerns expressed by the Working Group: penalties available under the FBPA and imposed in practice are insufficient to mobilise law enforcement agencies to enforce the foreign bribery offence, and to deter commission of the offence. This is even more relevant where legal persons are concerned.

118. The FBPA provisions also allow for a fine of up to twice the profits where those exceed a certain threshold. While this could appear, at first glance, to provide a more effective, proportionate and dissuasive financial sanction for natural persons who use legal persons to commit bribery for their own personal gain, the application in practice of this

⁸⁷ Phase 2 recommendation 6a; Phase 3 recommendation 3 and follow-up issues 11c. and d.; Phase 3 written follow-up report, para. 5.

⁸⁸ See part C.1.b. for sanctions imposed against legal persons in these cases, and Annex 3 – Table of foreign bribery cases.

⁸⁹ Phase 3, paras 47-48.

provision has never occurred in a foreign bribery context.⁹⁰ In addition, as already noted in Phase 2 and Phase 3, linking the fine with the profit raises questions about the adequacy of such a fine where the proceeds from bribing a foreign public official are substantial, but the person or company is able to show small profit or loss from the transaction.⁹¹ In addition, there seem to be practical difficulties in Korea calculating profits derived from a foreign bribery offence (see section C.1.c.ii below on confiscation of proceeds of foreign bribery).

b. A concerning absence of confiscation measures in foreign bribery cases

119. Where confiscation is concerned, Phase 4 responses as well as case law indicate that Korea focuses very much on confiscation of the bribe rather than the proceeds. For instance, Korea reports that its MOJ is consulting with foreign authorities concerning the origin and confiscation of bribes provided in the US Relocation and Construction case as well as in another domestic bribery case.⁹² This could be explained by the absence of adequate legislation as well as the lack of expertise on identifying and quantifying proceeds of active (foreign) bribery.

120. As noted in Phase 3, article 5 FBPA only provides for confiscation of the bribe if “the offender under this Act [...] is in possession of the bribe given...”⁹³ This seems of limited application, since the bribe would rarely still be in the hands of the bribe payer once the foreign bribery offence has been committed. Nevertheless, in the Hanwha case, USD 5000 were able to be confiscated from the bribe payer since his attempt to bribe was not successful and the bribe money was therefore still in his hands.

121. The FBPA does not cover confiscation of the proceeds of foreign bribery, which is regrettable, given this would be more likely to constitute an effective, proportionate and dissuasive sanction for foreign bribery. However, two other laws allow for confiscation of the proceeds of bribery in the hands of natural persons, neither of which have ever been used in a foreign bribery case to date:

- Article 8 of the POCA allows for confiscation of criminal proceeds and properties derived from criminal proceeds. The definition of “criminal proceeds” in article 2 includes reference to article 3.1 of the FBPA (but not article 4, see below section C.1.c.ii on confiscation of foreign bribery proceeds in the hands of a legal person).
- Under article 3 of the 2008 Act on Special Cases Concerning Confiscation and Recovery of Stolen Assets (ASCC), a court may confiscate “proceeds of corruption” which includes criminal proceeds and properties derived from such proceeds. Like the POCA, this Act only refers to article 3 of the FBPA.

122. At the time of Phase 3, Korean authorities indicated that recent steps had been taken to strengthen confiscation efforts, notably with the creation in September 2010 of a specialised Confiscation of Criminal Proceeds Unit in the SPO. Korean authorities also stated that confiscation efforts were being applied in the China Eastern Airlines case. Unfortunately, this case ended in an acquittal and the creation of the new Unit did not lead to any concrete progress in foreign bribery cases. In Phase 4, Korea explained that the specialised Confiscation of Criminal Proceeds Unit set up in 2010 had grown into the Criminal Asset Recovery Division, established within the SPO on 5 February 2018 to

⁹⁰ Phase 3, para. 47.

⁹¹ Phase 3, para. 47; Phase 2, paras. 127-128.

⁹² Phase 4 Q.26.

⁹³ Phase 3, para. 50.

manage domestic and foreign money-laundering and criminal asset recovery. In addition, a Criminal Asset Recovery Department was established within the Seoul DPO, and a Foreign Illicit Asset Recovery Taskforce was established under the SPO's authority, operated jointly by competent law enforcement authorities. Korea expects this new set-up to allow for a more pre-emptive and effective application of confiscation measures in the future.

Commentary

The lead examiners are seriously concerned that sanctions for foreign bribery for natural persons are not sufficiently effective, proportionate and dissuasive, in law and in practice, and that Korea has not implemented Working Group recommendations on sanctions that date back to Phase 2 and 3. The lead examiners therefore recommend that Korea:

- a. Urgently amend its legislation to increase financial sanctions applicable to natural persons for foreign bribery; and*
- b. Take all necessary steps (including through guidance and training to law enforcement and the judiciary) to ensure (i) that sanctions imposed in practice against natural persons in foreign bribery cases are effective, proportionate and dissuasive; and (ii) that confiscation of the bribe and proceeds of bribery from natural persons is routinely sought and imposed in foreign bribery cases where appropriate. (See also commentary on sanctions against legal persons.) In this respect, they are encouraged by Korea's expressed intention to actively present these views to the Sentencing Commission in the future, so that these issues may be taken into consideration.*

B.6. International cooperation

a. Mutual Legal Assistance (MLA)

123. Korea's legal MLA framework has not changed since Phase 3.⁹⁴ The MOJ is the central authority for both incoming and outgoing MLA requests in Korea. As a positive development, Korea acceded to the Council of Europe Convention on MLA in Criminal Matters on 29 December 2011. Korea entered into bilateral MLA agreements with ten countries,⁹⁵ and also signed MOUs with the competent authorities of seven countries.⁹⁶ A Manual on MLA in Criminal Matters and one on Criminal Extradition were issued by the MOJ in October 2014 for each investigative agency covering both incoming and outgoing requests. Both are periodically updated.

i. An insufficient use of outgoing requests

124. Of particular concern is Korea's lack of proactive use of MLA in its foreign bribery investigations. At the time of the on-site visit, Korea had requested MLA in only 1 case out of 13 foreign bribery investigations. By contrast, Korea had sent 13 requests in passive bribery cases. At the time of Phase 3, most bribery cases involved the bribery of procurement authorities in US Army bases located in Korea.⁹⁷ Since then, a number of

⁹⁴ Phase 3, para. 83.

⁹⁵ Argentina, Belgium, Indonesia, Iran, Kazakhstan, Malaysia, Peru, South Africa, Spain, and the United Arab Emirates.

⁹⁶ Australia, Colombia, Egypt, Mexico, the Netherlands, the Philippines and Turkey.

⁹⁷ Phase 3, para. 9.

foreign bribery allegations from various sources and investigations involving Korean companies abroad should have triggered more MLA requests. During the on-site visit, the lead examiners were informed of the first outgoing MLA request so far which was recently sent to a Party to the Convention in the US Relocation and Construction case, and responded to within three months. After the on-site visit, two additional MLA requests were sent in the Ghana Tax case and the UAE Construction case.

125. During the on-site visit, representatives of the SPO, the MOJ and private sector lawyers stated that the short investigation time limit is one important influencing factor why MLA is not sought in foreign bribery investigations (see part B.4.c. above). Korea further argues that, given the difficulties expected in obtaining MLA, especially from certain jurisdictions, and given the capacity of Korean law enforcement authorities to mobilise resources and deal with cases in an expeditious manner, Korean investigative agencies may be in a better position to secure additional evidence, other than the one provided through MLA. The MOJ confirmed that the sending of an MLA request would suspend the investigation time limit: guidelines issued by the SPO in December 2017 provide for a temporary stay of prosecution in cases “when important evidential materials are located overseas and securing such materials requires considerable time.” Conversely, the sending of an MLA request does not suspend the statute of limitations. The SPO indicated that this is also a reason not to send MLA requests abroad. One private sector lawyer further commented that the limitation period applicable to foreign bribery is indeed too short to secure international cooperation. Private sector lawyers further pointed to the lack of incentives for prosecutors to investigate and send MLA requests in foreign bribery cases, notably due to the focus on and increasing workload in domestic bribery cases; the lack of resources available to seek MLA; and the low level of sanctions available for foreign bribery. However, prosecutors and representatives of the MOJ agreed that seeking MLA is an important step in investigations. Following the on-site visit, Korean authorities noted their intention to proceed with training and awareness-raising activities to prosecutors regarding MLA.

126. While Korea reports that it has not had to drop any case specifically because of lack of assistance, certain investigations have been closed due to the lack of evidence to prove certain elements of the offence. For instance, in the China Eastern Airlines case, the court ruled that there was not sufficient evidence to prove that the company was a foreign public enterprise. Judges reached the conclusion after an unanswered request for assistance to the Chinese embassy in Korea, without sending an MLA request to China (see also part B.1). Similarly, in the Kazakhstan Consulting case, the DPO closed the investigation due to insufficient evidence because it was necessary to investigate the intermediaries and the Kazakh officials involved, but without seeking MLA from Kazakhstan. One concern noted by the prosecutor in the US Relocation and Construction case during the on-site visit regarding the request was the delay in receiving a response to the MLA request and the limited amount of information provided.

ii. *Overall efficient treatment of incoming requests*

Table 3. Incoming MLA requests in foreign bribery cases

		2011-2015	2016-2018
Parties to the Anti-Bribery Convention	Requests made	4	12
	Granted	4	4
	Rejected	0	0
	Average time for response (days)	319 days	177 days
Non-Parties to the Anti-Bribery Convention	Requests made	3	1
	Granted	3	0
	Rejected	0	0
	Average time for response (days)	151 days	-

Note: The average time for response during 2016-2018 is calculated based on the time of responding to the four granted requests.

Source: Data provided by the Korean authorities in its answers to the Phase 4 questionnaire.

127. In Phase 3, the Working Group decided to follow up the provision of MLA by Korea to other Parties to the Anti-Bribery Convention (follow-up issue 11e).⁹⁸

128. Since Phase 3, the number of incoming MLA requests in Korea has increased significantly.⁹⁹ Korea received 20 MLA requests in foreign bribery cases, of which 16 were from Parties to the Convention Korea responded to all but five, which are still pending. Nine requests were received for financial information, two for investigation and court records, four for statements from involved parties, and one each for evidence produced in the context of a trial in Korea, identification information of parties involved, import documents, writ of summons to a witness and whereabouts of involved parties.

129. In the first stage of this Phase 4 evaluation, and in accordance with the Phase 4 monitoring procedures, WGB member countries were consulted on their experience with Korea concerning international cooperation in foreign bribery cases. Overall Korea appears to be performing well in facilitating MLA to WGB member countries regarding domestic and foreign bribery, although only two countries had experience of international cooperation with Korea in foreign bribery cases. Cooperation was described as timely and positive. According to statistics provided by Korea, the estimated average response time for WGB members has improved, decreasing from approximately 10 months in 2011-2015 to 6 months in 2016-2018. One country noted delays in receiving responses from Korea to MLA requests that concern cases with high profile Korean businesses due to their political sensitivity.

130. Korea's responses to requests for financial information take longer than other MLA requests. In its answers to the Phase 4 questionnaire, Korea indicates that requests for financial information took 350 days on average as opposed to 150 days for other requests. Discussions at the on-site visit indicate that this delay may result from a provision of Korea's banking law, which requires notification of the account holder of the provision of bank information (see part B.4.b.iii above). Korean authorities assert that the delays in question are not due to the notification requirements for access to bank information, but rather to the multiplicity of information required and included in these MLA requests and

⁹⁸ Phase 3, paras 80-84; Phase 3 Written Follow-up, pp. 32-33.

⁹⁹ From 2004 to 2011, Korea had only received one MLA request in relation to foreign bribery cases; Phase 3, para. 82.

the complexity of some of these; these requests are also time consuming due to the important number of bank accounts that need to be processed.

iii. International consultations on the most appropriate jurisdiction

131. Article 4(3) of the Convention focuses on consultation and coordination between Parties when more than one Party has jurisdiction over an alleged foreign bribery offence. In relation to transnational cases, there is no special consultation procedure provided by Korean law. The MOJ stated that it first consults internally with the competent investigative team, before discussing the issue with competent authorities from foreign jurisdictions. Factors taken into consideration in order to define the authority that will deal with the case include the quality of collected evidence, administrative challenges to the investigation and the possibility of pressing charges.

132. During the on-site visit, the MOJ referred to the FELDA case in the context of which the Korean authorities received information from the Australian Federal Police. Following a joint investigation with their foreign counterpart, Korean authorities shared information and their investigation plan and launched a formal investigation. A formal investigation on money laundering was launched in Australia. Coordination meetings and conference calls were also organised in the US Relocation and Construction and case, between the MOJ and the US Department of Justice. The final common decision was to launch an investigation in Korea for active and in the US for passive bribery, as well as indict the intermediary in Korea for reasons of available evidence.

iv. Informal cooperation and cooperation with international governmental organisations

133. Law enforcement officials can also receive information about foreign bribery cases through informal cooperation channels. Information shared informally is, however, not directly admissible in Korean courts, unless it is also subsequently provided through formal MLA. Nevertheless, as noted by the Working Group on several occasions, informal cooperation facilitates access to information that can later be used as evidence in court proceedings.¹⁰⁰ Korea has made limited use of informal cooperation channels in foreign bribery cases to date, and could therefore potentially enhance its detection and investigation capacity by more proactively engaging in informal international networks of prosecutors, such as, in particular, the biannual meetings of law enforcement officials from Working Group members. Korean investigative authorities can thus make direct contact with their foreign counterparts and facilitate MLA.

134. During the on-site visit, a private sector lawyer noted that prosecutors often make use of informal channels of cooperation due to the inefficiency of formal channels (not limited to bribery cases). However, during the on-site visit the lead examiners noted a lack of requests for police to police information from the NPA. Since Phase 3, the SPO has participated in the establishment of the Asset Recovery Interagency Network-Asia Pacific (ARIN-AP). At the time of Phase 4, Korea states that it has cooperation systems with 25 institutions in 23 countries, although these systems do not appear to have been relied on in foreign bribery investigations. In their answers to the consultation procedure, WGB countries noted a significant number of engagements with Korea during the last two years,

¹⁰⁰ See OECD (2017), [The Detection of Foreign Bribery](#), p. 140; and OECD (2012), [Typology on MLA in Foreign Bribery Cases](#), p. 22.

including reciprocal visits on the method of case management with regard to serious and complicated fraud or bribery cases.

135. As concerns cooperation with international development banks,¹⁰¹ the treatment of one case of foreign bribery referred to the SPO by the World Bank raises some questions.¹⁰² In its written responses, Korea notes that the case was opened by the World Bank and subsequently referred to the SPO through the Korean prosecutor seconded to the World Bank. The case was then assigned to the Special Investigation Department of the Seoul Central DPO and is currently under investigation. Since the case has been pending since 2016, Korea's answer shows a lack of proactivity. Korea noted no updates at the time of Phase 4 on the proceedings. This could be explained in part by the lower priority assigned to the case, in light of the limited amount of bribes involved.

Commentary

The lead examiners note with concern the very limited use of MLA by Korea in its foreign bribery investigations. The lead examiners therefore recommend that Korea take a more proactive stance in sending MLA requests in foreign bribery cases, including by proceeding with its stated intention to raise awareness and provide training to Korean investigative authorities to identify foreign bribery cases requiring MLA. Greater communication and coordination between police and prosecutors could also contribute to increased proactivity in this area. To this end, they also encourage Korea to use all available means to secure MLA, in particular through contacts with foreign authorities via informal channels and through the Working Group.

With respect to the provision of MLA, the lead examiners commend Korea for the good level of international cooperation provided to its foreign counterparts, including for the significant improvement in the average time taken to respond, and the coordination with other jurisdictions in recent foreign bribery cases. Nevertheless, the lead examiners recommend that the Working Group follow up on whether Korea a) provides prompt and efficient responses to requests for banking information in foreign bribery cases and b) increases its use of informal means of international cooperation, including through participation in the Working Group's informal meetings of law enforcement officials

b. Extradition

136. No changes have been made to Korea's extradition framework since Phase 3.¹⁰³ Since Phase 3, Korea entered into bilateral extradition agreements with seven more countries. Korea also ratified the Council of Europe Convention on Extradition which entered into force on 29 December 2011.¹⁰⁴ Under article 6 of the Extradition Act, foreign bribery is an extraditable offence.¹⁰⁵ Korea provides extradition to a foreign country if the conduct underlying the extradition request, had it occurred in Korea, is punishable in Korea

¹⁰¹ See 2009 Anti-Bribery Recommendation, XIII.2.

¹⁰² The SPO signed in February 2011 an MOU with the World Bank on mutual cooperation to enable future cooperation and referral of foreign bribery cases; Phase 3, para. 84.

¹⁰³ Phase 3, para.81.

¹⁰⁴ CoE, [Chart of signatures and ratifications of Treaty 024 \(status as of 26 August 2018\)](#).

¹⁰⁵ Phase 3, para. 81.

by death or imprisonment of at least one year; foreign bribery offences would thus meet this threshold.¹⁰⁶ Dual criminality is mandatory for extradition.¹⁰⁷

137. Korea has not issued any extradition requests in foreign bribery cases. However, a Party to the Anti-Bribery Convention noted as part of the consultation process having sent to Korea extradition requests on foreign bribery charges. The extradition requests reportedly stalled due to Korea's assertion of dual criminality issues. This is potentially contrary to Article 10(4) of the Convention which provides that "where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of the Convention." During the on-site visit, Korea contended that delays are due to the complexity of the cases. In one case, the main offence was not punishable under the FBPA as it was detected at preparatory stage.

Commentary

The lead examiners recommend that Korea ensure that extradition requests in foreign bribery cases are responded to in a timely manner.

¹⁰⁶ Articles 6, 42, Extradition Act; Phase 3, para.81.

¹⁰⁷ ADB/OECD Anti-Corruption Initiative for Asia Pacific, [Korea Extradition Act](#).

C. RESPONSIBILITY OF LEGAL PERSONS

C.1. Liability of legal persons

138. The legislation on liability of legal persons for foreign bribery is largely unchanged since Phase 3 – with the exception of the removal of the small facilitation payments exception – and continues to be regulated under article 4 FBPA. Several questions remain concerning compliance of the FBPA with the standards on liability of legal persons in the Anti-Bribery Convention and 2009 Anti-Bribery Recommendation, as well as concerning the effectiveness of enforcement in practice.

a. Elements of liability of legal persons requiring follow-up

i. Can a legal person be held liable in the absence of prosecution or conviction of a natural person?

139. It is unclear whether the FBPA allows for prosecution or conviction of a legal person in the absence of proceedings against a natural person. Article 4 of the FBPA provides “not only shall such offender be punished, but also the corporation shall be punished” [emphasis added]. This issue was already raised in Phase 2 and recommended for follow-up.¹⁰⁸ In its Phase 4 responses, Korea cites, in relation to a case not involving foreign bribery, Supreme Court decision 87DO1213 of 10 November 1987 which states that “responsibility of the legal person is not dependant on the punishment of the employee...” A further Supreme Court decision from 2006 states that “punishment of an employer is not entirely dependent upon the punishment of an employee” and considered permissible to only charge the employer as a defendant.¹⁰⁹ Korean authorities are confident that, based on these Supreme Court decisions, the prosecution of a natural person is not a prerequisite to engaging the liability of the legal person. Discussions on-site revealed differing views on this issue, with some practitioners considering that conviction of a natural person might be a prerequisite, and others considering that it may be possible to hold a legal person liable even in the absence of liability of the natural person. In practice, no legal person has been prosecuted in Korea for foreign bribery in the absence of prosecution of a natural person.

ii. Can Korea exercise nationality jurisdiction over legal persons?

140. The WGB expressed its concern in Phase 2 that Korea may not have jurisdiction over a legal person for the bribery of a foreign public official where the bribery is committed abroad but the natural person who perpetrated the offence is not a Korean national.¹¹⁰ Since enterprise groups frequently use local intermediaries to transact business abroad, follow-up of this issue remains important. Private sector lawyers interviewed during the on-site visit expressed the view that Korea did not have jurisdiction over legal persons for acts of foreign bribery. Korean authorities refer to general provisions on

¹⁰⁸ Phase 2, paras 120-121. *Note:* the Working Group only decided to follow-up on this issue and did not make a recommendation for change at the time as Korea’s Phase 2 report pre-dates the adoption of the 2009 Anti-Bribery Recommendation. Annex I of the 2009 Recommendation requires that liability of legal persons can be triggered even in the absence of prosecution or conviction of a natural person.

¹⁰⁹ Supreme Court decision 2005DO7673, 24 February 2006 [Violation of the *Copyright Act*].

¹¹⁰ Phase 2, paras 118-119.

nationality jurisdiction in the Criminal Act: article 3 of the Criminal Act states that the Act “shall apply to all Korean nationals who commit crimes outside the territory of the Republic of Korea.” According to Korea, the concept of nationality jurisdiction includes natural and legal persons and, inasmuch as there does not exist any other interpretation that exclude legal persons, the provision would therefore apply to Korean legal persons committing foreign bribery abroad. In practice, Korea has not exercised its jurisdiction over legal persons based on nationality in a foreign bribery context.

iii. Are Korean legal persons liable for foreign bribery by related legal persons?

141. In Phase 2, the WGB expressed concern that the FBPA may not cover a company that bribes a foreign public official for the benefit of a sister company in the same enterprise group, since article 4 only provides for liability of the bribery “in connection with the business affairs of the corporation”. This was noted as especially concerning in the Korean economic context where enterprise groups (commonly known as *chaebols*) are largely dominant, thus creating intricate business and financial relationships between the parent company and its affiliates.¹¹¹

142. During Phase 4 discussions, practitioners expressed the view that a legal person could be held liable for acts of related legal persons on the basis of “broad conspiracy theories”. In practice, it would need to be demonstrated that several individuals conspired, so that these individuals could be prosecuted and thereby reach the responsible legal persons. There is no case law to date to demonstrate application of this theory.

iv. Absence of jurisprudence concerning the exemption of sanctions for “due attention and supervision”

143. Article 4 of the FBPA provides that a legal person shall not be subject to the sanctions in Article 4 if it “has paid due attention or exercised proper supervision to prevent the offence against this Act” – a concept relied on in all joint penal provisions under Korean criminal law that provide for liability of legal persons. No jurisprudence was available at the time of Phase 3 in relation to foreign bribery cases. The WGB therefore decided to follow-up on this issue to ensure this exception is not applied contrary to the Convention standards on liability of legal persons. No further information was available at the time of Korea’s Phase 3 written follow-up.¹¹²

144. There have not been any foreign bribery cases in which a legal person was exempted from liability for paying due attention or exercising proper supervision. Korea did, however, refer to a 2010 Supreme Court decision (not relating to foreign bribery) which highlighted the following factors to be taken into account in assessing whether a legal person has been “negligent in giving due attention and supervision”:

- “the purpose for enacting that law, the severity of damages coming from infringing rights due to violation of the relevant law, and the purpose for introducing the joint penal provisions in that law;
- the concrete details of the violation and actual damage caused by the violation of this law;

¹¹¹ Phase 2, paras 112-114 and follow-up issue 7(b)(i). The 2009 Anti-Bribery Recommendation now explicitly requires that legal persons should not be able to avoid responsibility for foreign bribery by using intermediaries, including related legal persons.

¹¹² Phase 3, paras 41-43 and follow-up issue 11.c.i.

- the size of the business, along with the degree of command and supervision by the employer; and
- the company’s efforts to prevent violations.”

145. The Supreme Court decision indicates that general and abstract supervision is not sufficient, but that comprehensive factors are considered to determine the level of supervision that would exempt the legal person from liability. For instance, by referring to the size of the business, the Court indicates that the long and complex chain of command and the large number of employees require large corporations to make more concrete efforts to prevent violations. As is the case for any criminal offence, the burden is on the prosecution to establish that there are no legal grounds for exemptions. In a bribery context, it is unclear, for the time being, what the burden on prosecutors would be to prove “the concrete details of the employer’s duties and violations”.

v. *Absence of successor liability*

146. The FBPA does not contain provisions regarding successor liability for corrupt conduct committed prior to the acquisition, merger or other succession of a target company. Private-sector lawyers confirmed on-site that successor liability more generally does not exist under Korean law. Korea clarified that there are limited provisions on successor liability where the execution of sanctions is concerned: article 479 of the Criminal Procedure Act provides that where a legal person has been sanctioned to a fine and is then merged into another, the penalty may still be executed by the legal person resulting from the merger. Korea is a member of the G20, which adopted in 2017 the High-Level Principles on Liability of Legal Persons for Corruption. Principle 6 provides that “companies should not be able to escape liability by altering their corporate identity.”

Commentary

In the absence of case law clarifying how certain FBPA provisions on the liability legal persons will be applied in foreign bribery case, the lead examiners recommend that the Working Group follow-up on:

- Application in practice of the liability of legal persons for the foreign bribery offence, even in the absence of prosecution or conviction of a natural persons;***
- Nationality jurisdiction over legal persons, even where the natural persons involved are not Korean nationals;***
- Liability of legal persons for bribery committed by related legal persons; and***
- Application of the provision that absolves from liability a legal person that “has paid due attention or exercised proper supervision to prevent” foreign bribery.***

b. Level of foreign bribery enforcement against legal persons

147. The WGB expressed concern in Phase 3 over the limited foreign bribery enforcement against legal persons, and pointed out that convictions against legal persons were sought in only three of the nine foreign bribery cases prosecuted at the time, even though the bribes appeared to have been paid for the benefit of the legal person. Furthermore, at the time, the private sector appeared to have very limited awareness that companies in Korea were liable for foreign bribery. This brought the WGB to recommend that Korea raise awareness of its law enforcement and private sector on liability of legal persons.¹¹³ This recommendation was considered only partially implemented at the time of

¹¹³ Phase 3, paras. 38-40.

Korea's written follow-up report. While the WGB recognised some level of awareness-raising, it appeared to be about the foreign bribery offence generally, and not specifically about the liability of legal persons, and did not include adequate training for law enforcement officials.¹¹⁴

148. During the Phase 4 on-site visit, business representatives were well aware of the liability of legal persons for foreign bribery. However, they overwhelmingly expressed greater concern with enforcement from foreign jurisdictions, such as the UK and the US, than from Korean authorities. This state of mind is reflected in compliance programmes and other materials developed by or for Korean companies, which refer predominantly to the requirements under the US Foreign Corrupt Practices Act (FCPA) or the UK Bribery Act (UKBA). In terms of awareness-raising and training for law enforcement, no further measures or training for law enforcement, specifically focusing on liability of legal persons in foreign bribery case appears to have been undertaken since Phase 3.

149. In terms of enforcement in practice, as noted earlier, the limited number of foreign bribery cases since Phase 3 does not allow for drawing any definitive conclusion with respect to enforcement against legal persons. Of the four cases concluded with sanctions since Phase 3, legal persons were prosecuted in all four cases. A legal person was also prosecuted in one of the two foreign bribery cases resulting in acquittals. With respect to ongoing investigations, one legal person is under investigation in the Ghana Tax case. The majority of cases ending in acquittals or non-prosecutions did not involve legal persons. During the on-site visit, civil society and private sector lawyers expressed the view that there was limited incentive for law enforcement to proceed against legal persons for engaging in foreign bribery. In addition to the current environment which places greater focus on domestic bribery, and high-level bribe recipients in particular, such investigations are time and resource-intensive, require expert skills and international cooperation, and yield insufficient results in terms of sanctions. The shorter statute of limitations for foreign bribery applicable to legal persons may also explain in part the limited enforcement of liability of legal persons for foreign bribery in Korea (see part B.4.c.ii. above).

Commentary

The lead examiners note a mixed picture where foreign bribery proceedings against legal persons are concerned: while legal persons were sanctioned in the four foreign bribery cases concluded since Phase 3 and are the subject of one ongoing investigations, the majority of foreign bribery proceedings resulting in acquittals or non-prosecutions did not include legal persons. Given concern expressed by the WGB at the time of Phase 3, as well as by private sector lawyers in Phase 4, they recommend that the WGB follow up on the level of enforcement of foreign bribery against legal persons.

c. Sanctions are not effective, proportionate and dissuasive

150. As noted by several participants during the on-site visit, the inadequacy of sanctions may also act as a deterrent in prosecutorial decisions to initiate proceedings against legal persons for foreign bribery. (See also part B.5 on sanctions against natural persons.) The low level of sanctions in law and in practice was already a Working Group concern in

¹¹⁴ Phase 3 written follow-up report, para. 6.

Phase 3 and earlier reviews. Phase 3 recommendations in this area were considered not implemented at the time of Korea's written follow-up report.¹¹⁵

i. Low criminal sanctions against legal persons

151. Sanctions for foreign bribery for legal persons are relatively low under the law, with a maximum fine of KRW 1bn (USD 900 000) or twice the amount of the pecuniary advantage if such advantage is superior to KRW 500m (USD 450 000). The level of financial sanctions applicable to legal persons is particularly low in light of the size of large Korean corporations. Korea argues that the capacity to impose a fine of up to twice the amount of the pecuniary advantage renders the level of sanctions sufficient. As noted under Part B.5.a., linking the fine with the profit raises questions about the adequacy of such a fine where the proceeds from bribing a foreign public official are substantial, but the person or company is able to show small profit or loss from the transaction. In addition, there seem to be practical difficulties in Korea in calculating the amount of the profits derived from foreign bribery (see below on confiscation of foreign bribery proceeds). Furthermore, this type of fine has never been applied in practice.

152. The fines imposed in practice in the four cases since Phase 3 are very concerning. As noted above, they are generally below the value of the bribe given and, consequently, well below the level of profits derived. Sanctions were imposed against legal persons in the four Korean foreign bribery cases since Phase 3 as follows.¹¹⁶

Table 1 Sanctions imposed against legal persons for foreign bribery

Case	Court imposed sanction on legal persons
CCTV	Legal person 1: KRW 10m (USD 8 900)
	Legal person 2: KRW 5m (USD 4 450)
	Legal person 3: KRW 20m (USD 17 800)
Hanwha	1 legal person: KRW 5m (USD 4500)
Busan Shipping	1 legal person: KRW 1m (USD 900)
FELDA	1 legal person: KRW 2m (USD 1800)

ii. No confiscations of proceeds of bribery from legal person in practice

153. The FBPA does not cover confiscation of the proceeds of foreign bribery. The POCA and ASCCC allow for confiscation of criminal proceeds derived from a limited list of offences, which includes article 3.1 of the FBPA (active foreign bribery by a natural person), but not article 4 FBPA (active foreign bribery by a legal person), which raised questions as to the capacity under Korean law to confiscate the proceeds of foreign bribery

¹¹⁵ Phase 2 report, para. 129 and recommendation 6.a.; Phase 3 report, paras 50-52 and recommendation 3; and Phase 3 written follow-up report, para. 5.

¹¹⁶ See also part B.5. above for sanctions imposed against the natural persons in these four cases, and Annex 3 – Table of foreign bribery cases.

from legal persons. However, Korea was able to provide case law, including a recent decision from 2017, which confirms that “the additional penalty of confiscation may also be imposed upon the legal person, even without express provision within the individual punitive provision”.¹¹⁷

154. None of the case law provided relates to foreign bribery, nor to active domestic bribery. Confiscation of the proceeds of foreign bribery has never been imposed to date against legal persons in a foreign bribery case. During the on-site visit, prosecutors explained the practical difficulties in calculating the amount of the proceeds of a foreign bribery offence. Private-sector lawyers more generally noted that bribe givers have been neglected in Korean law, and confirmed the lack of guidance on the calculation of illegal profits deriving from criminal offences. In the context of money laundering predicated on foreign bribery – noting that this offence has not been enforced to date against legal persons –, representatives of KoFIU also indicated that no specific training material has been provided on the issue. Since, in the context of foreign bribery in international business transactions, the proceeds will almost systematically fall in the hands of legal persons, the absence in practice of the confiscation of foreign bribery proceeds is concerning.

Commentary

The lead examiners are seriously concerned that financial sanctions for foreign bribery for legal persons are not sufficiently effective, proportionate and dissuasive, in law and in practice. They therefore consider that Korea has not implemented Working Group recommendations on sanctions that date back to Phase 2 and 3. The lead examiners recommend that Korea:

- a. Urgently amend its legislation to increase sanctions applicable to legal persons for foreign bribery; and*
- b. Take all necessary steps (including through guidance and training to law enforcement and the judiciary) to ensure that (i) sanctions imposed in practice against legal persons in foreign bribery cases are effective, proportionate and dissuasive; and (ii) confiscation of the bribe and proceeds of foreign bribery – or property of equivalent value – from legal persons is routinely sought where appropriate, and, to this end, provide training on the use of confiscation and the identification and quantification of proceeds of foreign bribery.*¹¹⁸

C.2. Engagement with the private sector

155. Korea reports a number of initiatives to engage companies on corruption issues:

- Initiatives by the **ACRC**, in particular:
 - Seminars and training on ethical management and domestic and foreign bribery issues, as well as whistleblower protection;
 - Publication of *Anti-corruption Guidelines for Companies* broadly distributed to companies, business associations and economic organisations in Korea;¹¹⁹ and a *Guidebook for Anti-corruption Business*

¹¹⁷ Jeonju District Court Decision 2017NO657, decided 17 November 2017.

¹¹⁸ See, for instance: OECD/The World Bank (2012), *Identification and Quantification of the Proceeds of Bribery*: Revised edition, February 2012, OECD Publishing. <http://dx.doi.org/10.1787/9789264174801-en>

¹¹⁹ See

<http://www.acrc.go.kr/en/board.do?command=searchDetail&method=searchDetailViewInc&menuId=020504&confId=64&conConfId=64&conTabId=0&currPageNo=1&boardNum=6380>

Management with advice to business on global anti-corruption trends and ISO 37001: the Anti-bribery Management System;

- The **MOJ** organised an information session in May 2017 on legal assistance to Korean enterprises in Indonesia, where bribery of foreign public officials was addressed as one of the risk factors. The MOJ further reports on activities with the US Department of Justice and the World Bank, including seminars and a guidebook for SMEs on anti-corruption laws and relevant compliance requirements by country and by industry in December 2018.
- The **Small and Medium Business Administration** (SMBA) developed in May 2016 of a Pact on Integrity and Ethics with 23 SME-related organisations to promote an anti-corruption and integrity culture for SMEs, and subsequently published a manual distributed to 2 700 SMEs aimed at responding to the Improper Solicitation and Graft Act.
- A **public-private sector platform, the Fair Player Club** has been established to promote collective action for anti-corruption, bringing together representatives of conglomerates, SMEs, public enterprises, and institutions, the Ministry of Commerce, Industry & Energy, the ACRC, etc.¹²⁰

156. Overall, these initiatives address domestic corruption issues, especially focusing on the recently introduced Improper Solicitation and Graft Act. Where foreign bribery has been included, it has been largely based on the introduction of the ISO 37001 standard. Interestingly, several publications developed by Korean public agencies for Korean companies mention only the UKBA and the US FCPA when addressing the topic of foreign bribery, with no reference to Korea's FBPA. This is in line with the greater awareness – and the greater fear – expressed by private sector representatives during the on-site visit about FCPA and UKBA enforcement.

157. The MOFA does not report specific initiatives through its overseas missions to engage with Korean companies operating abroad on foreign bribery risks. It indicates, however, that “embassies have held business support consultation meetings in which the difficulties that Korean companies face in the course of their business are communicated to the embassies”, and notes that “several channels between the embassies and companies [exist] in which potential awareness-raising activities can take place.”

Commentary

The lead examiners welcome the processes developed by Korea to engage with its private sector, and consider that the many different networks and initiatives represent a great potential to engage Korean companies, including SMEs, on foreign bribery issues. They, however, regret that Korea has made limited use of these mechanisms to date to raise awareness on foreign bribery issues. They recommend that Korea reconsider, in coordination with all relevant government bodies that interact with Korean companies operating abroad, how to engage and incentivise its private sector to respect Korea's foreign bribery legislation, including by developing awareness-raising measures specifically focusing on foreign bribery risks.

¹²⁰ The Fair Player Club in Korea is hosted and organised by the UN Global Compact Network Korea and the Global Competitiveness Empowerment Forum consortium. The events hosted by the Fair Player Club have been sponsored by government agencies including the Ministry of Trade, Industry and Energy and the ACRC. See also www.fairplayerclub.kr.

D. OTHER ISSUES

158. Parts A, B and C of this report, above, review key cross-cutting issues identified by the WGB as important for all Convention Parties, as well as country-specific issues relevant to Korea. This part of the report addresses the following other issues: 1) tax measures for combating foreign bribery; and 2) public advantages, including measures for managing foreign bribery risks in development cooperation, and public procurement. The first issue relates to a Phase 3 WGB recommendation that was not fully implemented at the end of the Phase 3 review cycle, and the second relates to implementation by Korea of the 2016 Recommendation of the Council for Development Cooperation Actors on Managing the Risk of Corruption, as well as a Phase 3 follow-up issue.

D.1. Tax measures for combating foreign bribery

a. Non-tax deductibility of bribes and enforcement

159. The National Taxation Service (NTS) is Korea's tax authority. NTS inspectors are subject to a standard five-year limitation period for re-opening and re-examining tax returns which can be extended to seven years for taxpayers who fail to make regular reports. The limitation period extends to 10 years when the taxpayer evades taxes through illegal activities including double or fake book-keeping, manipulation or concealment of transactions; and 15 years when the illegal activities were committed in international transactions. The limitation period commences on the next day of the due date of filing tax base and tax returns (Framework Act on National Taxes, Art. 26-2). The longer limitation period would therefore only apply to foreign bribery cases also involving tax evasion convictions. There are no rules requiring automatic re-opening of tax returns following a criminal conviction for foreign bribery and the NTS has not introduced systemic re-examinations following convictions for tax or other offences. However, NTS indicates that it conducts a thorough re-examination of tax returns following convictions for tax or other offences, in accordance with the general rules of taxation, including the Instruction on the Processing of Corporate Tax. After the on-site visit, Korea indicated that, following information from the SPO, the NTS reviewed the tax audit concerning the company involved – but not prosecuted due to the expiry of the statute of limitations – in the US Relocation and Construction case.

160. In Phase 3, the WGB recommended that Korea encourage the SPO to systematically share information with the NTS about convictions under the FBPA, so that the NTS can review the information for evidence of related tax crimes. The Working Group considered this recommendation only partially implemented at the time of the Phase 3 Written Follow-Up, as there was no systematic sharing of information by law enforcement authorities with the NTS on FBPA violations.¹²¹ At the on-site visit, NTS representatives indicated that there were informal information-sharing arrangements with the SPO but that, to date, the NTS has not been informed of any finalised foreign bribery cases and NTS representatives at the on-site visit were not aware of any of the foreign bribery cases concluded since Phase 3. This information gap could be explained by NTS's system for obtaining information on criminal convictions which, representatives report, relies on the NTS submitting annual requests both to the courts and the SPO. There is currently no system in place to ensure

¹²¹ Phase 3 recommendation 8(ii); Phase 3 written follow-up, para. 8.

that conviction data is transferred to the NTS on a systematic basis and the NTS has not received any of the court decisions in the foreign bribery cases concluded to date.

161. One related question regarding tax deductibility concerns the possible deduction of financial sanctions and disgorgements. Korea considers that, in accordance with provisions in the Corporate Tax Act, penalties for bribery offences are not recognised as a deductible or necessary expense.¹²² Where the instruments or proceeds of bribery have been confiscated, these cannot be excluded from the tax base.

b. Detection and sharing of information

162. In Phase 3, the WGB recommended that Korea take appropriate steps to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties. In April 2013, the NTS revised its Tax Audit Guideline, which sets out the tax audit procedure, and added a specific form entitled “Verification Report on Foreign Bribery”. According to the form, a tax auditor who identifies a foreign bribery case should report it to the NTS’s International Tax Investigation Division. However, at the time of Korea’s written follow-up, it was not clear to the WGB whether the transfer of this information from the NTS to other law enforcement authorities was undertaken on a systematic basis. For this reason, this recommendation was deemed only partially implemented.¹²³ NTS representatives at the on-site visit indicated that the 2013 edition of the Guideline has not been amended since. To date, no foreign bribery cases have been brought to the attention of law enforcement authorities by the tax administration. After the on-site visit, NTS indicated that, in the context of a tax investigation, it is subject to a legal prohibition on abuse of tax investigations.¹²⁴ The NTS indicated that this prohibition constitutes a “limit to the scope of NTS’s mandate in defining and reporting a case as potential foreign bribery” to law enforcement authorities. While the law in itself is not problematic, the restrictive interpretation of Korea’s tax legislation regarding the prohibition on abuse of tax investigations could constitute an impediment to the detection of foreign bribery through tax audits.

163. The WGB further recommended in Phase 3 that Korea provide tax examiners with specific training on detecting FBPA violations; and include bribery in the risk assessment and audit processes of the NTS with a view to more effectively detecting foreign bribery and enforcing the non-tax deductibility of bribes. At the time of Korea’s Phase 3 written follow-up, there was no indication that awareness-raising or training addressing foreign bribery had been provided to tax auditors.¹²⁵ The NTS reports regularly offering training programmes to its officials in the tax audit field so that they can be familiar with the details of the OECD Anti-Bribery Convention and how to report foreign bribery. However, NTS officials at the on-site visit appeared unfamiliar with the NTS’ role in enforcing the non-tax deductibility of bribes and more generally detecting foreign bribery. The lack of detection and reporting, to date, indicates that training and awareness-raising should be strengthened.

¹²² Article 21, Corporate Tax Act.

¹²³ Phase 3, recommendation 8(i); Phase 3 written follow-up, para. 8.

¹²⁴ Article 81-4 (Prohibition of Abuse of Right of Tax Investigation) of the Framework Act on National Taxes (1) Any tax official shall conduct a tax investigation to the minimum extent necessary to realise appropriate and fair taxation and shall not abuse the right of tax investigation for any other purpose.

¹²⁵ Phase 3 recommendation 8(iii) and (iv); Phase 3 written follow-up, para. 8.

Commentary

Regarding the non-tax deductibility of bribes, the lead examiners are concerned about the effective enforcement of the non-tax deductibility of bribes in Korea, given that, to date, the NTS has not received any information regarding concluded foreign bribery cases and none of the individuals or companies convicted of foreign bribery have had their tax returns re-examined. The NTS should therefore engage, as a matter of priority, in a more proactive approach in enforcing the non-tax deductibility of bribe payments against the defendants in past and future foreign bribery enforcement actions, including by systematically re-examining defendants' tax returns for the relevant years to verify whether bribes have been deducted.

In this regard, the lead examiners note the inadequacy of communication channels between the NTS and prosecution authorities, and that Phase 3 recommendations on tax measures for preventing and detecting foreign bribery have not been sufficiently implemented. They therefore reiterate Phase 3 recommendation 8 and recommend that Korea (a) ensure NTS officials have specific training on detecting FBPA violations, including through tax audit processes; (b) ensure the prosecuting authorities systematically share information with the NTS in relation to foreign bribery convictions, so that the NTS can enforce non-deductibility of bribes.

Finally, the lead examiners are concerned at the NTS' restrictive interpretation of the legal prohibition on abuse of tax investigations in the Framework Act on National Taxes. They recommend that Korea take appropriate measures to clarify the interpretation of this provision, such that it does not operate to prevent the NTS from reporting information regarding suspected foreign bribery uncovered in the course of tax investigations to Korean law enforcement authorities.

D.2. Public advantages

164. This section considers the denial of public advantages as administrative sanctions for foreign bribery. It also addresses the prevention, detection and reporting of foreign bribery by agencies involved in officially supported export credits and guarantees as well as official development assistance (ODA).

a. Public procurement

165. The Phase 3 report noted increased anti-corruption efforts in public procurement processes, in particular a requirement for bidders to provide a pledge of non-conviction for foreign bribery with an express reference to the Anti-Bribery Convention. The Pledge of Integrity further requires bidders to endeavour to establish codes of ethics and whistleblower protection mechanisms, and sets out administrative sanctions for bidders and contractors who have violated its provisions. Compliance checks with the Pledge of Integrity are carried out through a random survey of companies. The Working Group also welcomed in Phase 3 the introduction of KONEPS, a governmental database of information on contractors, including previous sanctions imposed on companies. However, the Public Procurement Service of Korea did not consult the debarment lists maintained by the multilateral development banks (MDBs).¹²⁶ The situation remains unchanged in Phase 4.

¹²⁶ Phase 3 Report, para. 101-102.

166. Mandatory debarment is imposed for bribery, with the time period of debarment based on the amount of the bribe. When a company is convicted for a corruption offence, contracting authorities, including the PPS, enforce debarment measures on the company. The debarment list is then shared among contracting authorities through KONEPS. Although Korean companies operating internationally have been implicated in bribery allegations recently, debarment for a foreign bribery conviction has yet to be applied in practice. In domestic bribery cases, relevant procedures have been applied.

167. In terms of reporting from the PPS to law enforcement, PPS officials are subject to the general reporting obligation applicable to all Korean officials (see part A.4.a. above), and also benefit from the extensive protection under PPIWA for whistleblowers. PPS representatives stated during the on-site visit that, when suspicions of bribery arise, they are reported to the competent prosecutor through the entity's internal whistleblowing system. No suspicion of foreign bribery has been reported through this system. By contrast, a PPS representative stated during the on-site visit that 29 domestic bribery suspicions have been reported since Phase 3.

Commentary

The lead examiners recommend that Korea encourage public contracting authorities to (a) in the context of public procurement contracting, routinely check the debarment lists of multilateral financial institutions, and (b) consider, as appropriate, the existence of anti-corruption internal controls, ethics and compliance programmes of companies seeking procurement contracts.

b. Officially supported export credits

168. Korea has two export credit agencies (ECAs): the Export-Import Bank of Korea (Eximbank)¹²⁷ and the Korea Trade Insurance Corporation (K-Sure). Korea is a member of the OECD Working Party on Export Credit and Credit Guarantees. Their efforts to implement the 2006 Recommendation on Bribery and Officially Supported Export Credits (the 2006 Export Credit Recommendation) are detailed in the Phase 3 Report.¹²⁸ Since Phase 3, these two agencies have applied a more harmonised approach to better align their anti-bribery policies, in particular to share information with each other.¹²⁹

169. Each agency has in place due diligence processes for preventing and detecting bribery, already reviewed in the context of Phase 3. These include requiring detailed information about exporters' management control systems for combating bribery. As concerns prior foreign bribery convictions, Eximbank and K-Sure systematically verify information provided by applicants against the debarment lists of MDBs, and have access to KONEPS for information on prior convictions. Since Phase 3, each agency has undertaken enhanced due diligence processes based on suspicions of domestic bribery twice. Bribery suspicions arose in Eximbank from media reports and other banks that participated as creditors. For K-Sure, the information originated from media reports. During the on-site visit, an Eximbank representative referred to one case where information was detected in the media regarding an ongoing foreign bribery investigation of an

¹²⁷ Eximbank is also one of the agencies which disburse Korea's official development assistance (see Panel 17).

¹²⁸ Phase 3, paras 98-100.

Note: as of the drafting of this Report, the 2006 Export Credit Recommendation was under review.

¹²⁹ Phase 3 Written Follow-Up Report, para. 9, recommendation 9; and Phase 4 Q. 8.a.

applicant company. The enhanced due diligence procedure in this case was limited to a declaration provided by the company, according to which it had not engaged in corrupt practices for this specific contract and an internal controls, ethics and compliance system.

170. As noted in Phase 3, Korean ECAs can impose debarment of contractors found to have committed foreign bribery.¹³⁰ In case of a conviction in a national court or equivalent national administrative measures for violation of laws against bribery of foreign public officials of any country within a 5-year period, the ECAs verify whether appropriate internal corrective measures (e.g. replacement of individuals involved in bribery, adoption of appropriate anti-bribery management control systems) have been taken. If the ECAs determine that additional measures need to be taken, the approval is suspended.

171. As concerns reporting from the ECAs to law enforcement, the general reporting obligation of public officials under article 234 para. 2 of the CPA does not apply either ECA's staff. Both ECAs had, however, adopted by 2011 provisions on reporting obligations of their officials to law enforcement authorities.¹³¹ In spite of this, no foreign bribery suspicion has ever been reported to law enforcement authorities through these processes. The absence of reports does not allow for an assessment on the effectiveness of these procedures.

Commentary

The lead examiners recommend that Korea mobilise its ECAs on the importance of detecting and reporting foreign bribery and in particular provide staff with regular training and guidance on foreign bribery red flags and the processes for reporting these to law enforcement authorities.

c. Official Development Assistance (ODA)

172. This Phase 4 evaluation is the first time Korea's ODA system is reviewed in light of the 2016 Recommendation for Development Cooperation Actors on Managing Risks of Corruption (the 2016 ODA Recommendation), and in particular sections 6-8 and 10 which more directly pertain to foreign bribery.

173. The amount of Korea's ODA has increased significantly in the last two decades. Since Phase 3, the total amount of ODA provided by Korea has progressed steadily, increasing by 10.2% between 2015 and 2016 in bilateral ODA and 18.1% between 2015 and 2016 in overall ODA.¹³² In 2016, Korea was the 16th largest Development and Assistance Committee (DAC) provider by volume.¹³³ Korea's ODA is mainly provided through two implementing agencies: Eximbank and the Korea International Cooperation Agency (KOICA). EximBank – which is also one of the two Korean export credit agencies (see sub-section b. above) – is responsible for the administrative operation of two government-entrusted funds. The ODA system is based on two main pillars: grants and loans. The Economic Development Cooperation Fund (EDCF) provides ODA loans. The second fund is the Inter-Korean Cooperation Fund (IKCF), which promotes exchanges

¹³⁰ Phase 3, para. 98.

¹³¹ Phase 3 report, paras 99-100.

¹³² [OECD-DAC, Korea, Aid at a glance charts 2015-2016](#); OECD (2016), *Development Co-operation Report 2016: The Sustainable Development Goals as Business Opportunities*, OECD Publishing, Paris, p.223, updated by Korea.

¹³³ [OECD-DAC, Korea, Aid at a glance charts 2015-2016](#).

with North Korea.¹³⁴ EDCF's funding resources consist in vast majority of government contributions, as well as long-term borrowings from the government's special budget and profit earned from the fund's operation.¹³⁵ KOICA, oversees grant ODA projects and programmes to support the economic and social development of partner countries, and provides contracting and partnership opportunities to diverse actors in the private sector, including a number of Korean firms. Both EDCF and KOICA have strengthened their anti-corruption efforts in recent years, including to comply with the 2016 ODA Recommendation. The agencies publish their anti-corruption policies on their websites and maintain ethical codes of conduct which include anti-corruption clauses.

174. In terms of measures to prevent and detect corruption enshrined in ODA contracts (section 6, 2016 ODA Recommendation), both agencies require from bidders a declaration on both themselves and the implementing partners that they have not engaged in any corruption offences in foreign countries. They verify these declarations against debarment lists maintained by MDBs and KONEPS. KOICA does not, however, require persons applying for ODA contracts to declare prior convictions of corruption offences.¹³⁶ Due diligence measures after the conclusion of ODA contracts could also be improved. During the on-site visit, both agencies referred mainly to risks of bribery of their own officials, but did not seem fully attuned to possible instances of bribery occurring outside the ODA-funded contract. Once a contract or loan has been granted, Korean ODA agencies take regular auditing measures on potential corrupt practices at each phase of the contract, including reports from overseas offices and declaration of non-engagement in corruption offences during the contract. Corruption risks are monitored through the same procedure for both the bidders and the subcontractors.

175. Section 7 of the 2016 ODA Recommendation addresses reporting mechanisms and whistleblower protection. No cases of foreign bribery have been detected through either ODA agency, nor have instructions been given to staff regarding reporting allegations of foreign bribery as appropriate to law enforcement authorities. KOICA staff are nevertheless subject to the general reporting obligation applicable to all Korean officials (see part A.4.a. above) and EDCF staff are subject to the reporting obligations applicable to Eximbank staff. Both benefit from the extensive protection under PPIWA for whistleblowers. As no allegations of foreign bribery have been reported to prosecuting authorities, it is difficult to analyse what would be done if credible allegations were uncovered. Where external reporting is concerned, both agencies have established accessible and secure reporting mechanisms. The relevant structures are accessible to anyone, including subcontractors and partners. They also apply the general framework of whistleblower protection, including the ability to submit anonymous complaints. KOICA operates a hotline connected to the head of auditors and Eximbank operates an internal reporting channel. The agencies follow fact-finding processes and conduct on-site checks when reports are received. Controls include local partners and take into consideration country specific corruption risks. In spite of these accessible and secure reporting mechanisms, neither Eximbank nor KOICA have received any report of foreign bribery suspicions.

176. Recommendation 8 asks that ODA contracts provide for termination, suspension or reimbursement clauses when the information provided by applicants to ODA was false, or

¹³⁴ [Korea Eximbank, History](#); see also [Korea Eximbank, Annual Report 2017](#).

¹³⁵ In 2017, out of KRW 656 686 total resources, USD 590 000 came from contributions from the government's general budget account; [EDCF, Funding Resources](#).

¹³⁶ 2016 ODA Recommendation, 6.ii.

when the implementing partner subsequently engaged in corruption during the course of the contract. KOICA has mandatory debarment procedures for 3-24 months based on the amount of the bribe paid and may cancel a partial or full contract. EDCF may impose debarment for 6-20 months for foreign bribery under the new Regulations of Malpractice. EDCF's options are more limited than in Phase 3, when the agency could impose debarment for up to 3 years.¹³⁷ Suppliers, consultants, bidders or other persons concerned are declared ineligible to participate in EDCF-financed activities. The information is disclosed on EDCF's site and notification is provided to the government of the entity's country.¹³⁸ ODA partner contracts also include anti-corruption clauses.

177. Recommendation 10 considers the risks of the environment of operation. By its nature, ODA operates in geographical areas and sectors which are at high risk of corruption. Although both agencies organise various anti-corruption training courses for employees and contractors, including NGOs and private companies, no specific reference is made in the context of these activities to foreign bribery. Both agencies identify corruption risks in the ODA recipient country before awarding contracts or loans through different procedures, including on-site inspections conducted by KOICA. However, they appear to lack concrete processes to verify risks of foreign bribery.

Commentary

The lead examiners commend Korea's ODA general due diligence efforts to combat corruption. They nevertheless consider there is room for improvement and recommend that where ODA is concerned, (a) KOICA align with the EDCF to require persons applying for ODA contracts to declare that they have not been convicted of foreign bribery, in any jurisdiction; and (b) take into consideration foreign bribery risks specifically in awareness-raising and training activities courses for employees of both ODA agencies as well as contractors, including in particular to provide staff with regular training and guidance on foreign bribery red flags and the processes for reporting these to law enforcement authorities.

¹³⁷ Phase 3, para. 49; see also EDCF, [Notice regarding malpractice with respect to Economic Development Cooperation Fund \(EDCF\) projects](#); Foreign bribery is specifically mentioned under article 76(1)-10.

¹³⁸ EDCF, Notice regarding malpractice, *op.cit.*

CONCLUSION: RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

178. The Working Group considers that the decrease in foreign bribery enforcement since the Phase 3 evaluation of Korea in 2011 is a cause for concern, especially in view of the size of the Korean economy, its export-oriented nature, and the geographical and industrial sectors in which Korean companies operate, which represent high corruption risks. Korea should therefore promptly take necessary steps to more proactively detect and enforce its anti-bribery legislation. Furthermore, Korea needs to address key elements of its legislative framework, in particular to increase the level of sanctions for foreign bribery, and to ensure that application of its foreign bribery law is not in practice subject to a restrictive interpretation by its law enforcement and judiciary.

179. The Phase 3 recommendations that the Working Group considered not or only partially implemented after the 2014 Written Follow-Up Report continue to be outstanding: recommendations 1(a) (foreign bribery offence) and 3 (sanctions) are still not implemented. Recommendations 2 (liability of legal persons), 4(c) (investigation), 5 (money-laundering) and 8 (tax) continue to be only partially implemented.

180. In conclusion, based on the findings in this report, the Working Group acknowledges the good practices and positive achievements set out in Part 1 below and makes the recommendations set out in Part 2. The Working Group will also follow up the issues identified in Part 3. Korea will submit an oral report to the Working Group within one year (i.e. in December 2019) on progress made to increase foreign bribery sanctions, in particular for legal persons. The Working Group invites Korea to submit a written report on the implementation of Phase 4 recommendations and issues for follow-up in two years (i.e. in December 2020), including detailed information on its foreign-bribery enforcement actions.

1. Good Practices and Positive Achievements

181. This report has identified several good practices and positive achievements by Korea regarding implementation of the Convention and related instruments. However, in the current context of limited foreign bribery enforcement, it is not possible to ascertain whether these areas of progress actually represent good practices and positive achievements that have proved effective in combating foreign bribery and enhancing enforcement.¹³⁹ Nevertheless, the Working Group considers that some areas developed by Korea could constitute potential good practices. In particular, with respect to the foreign bribery offence, Korea has repealed the facilitation payments defence from the FBPA and adopted legislation to close the loophole on bribes paid to third party beneficiaries. In terms of enforcement and international cooperation, the Korean authorities have responded positively to their foreign counterparts, both in investigating reports referred to them by foreign law enforcement authorities, as well as in the provision of international cooperation, including through significant improvement in the average time taken to respond to the majority of incoming MLA.

182. Korea's positive achievements also relate to certain aspects of detection of foreign bribery, in particular with the development of a comprehensive framework to protect

¹³⁹ See [Phase 4 Monitoring Guide](#), which states that Phase 4 evaluations should also reflect good practices and positive achievements which have proved effective in combating foreign bribery and enhancing enforcement.

whistleblowers who report suspected corruption, including foreign bribery. The Working Group considers that several features of this regime constitute good practices in this field, such as the protection extended to foreign employees of Korean companies based abroad, and protection for both internal and external reporting. This together with the possibility to award monetary rewards/awards to whistleblowers and a reversed burden of proof in case of retaliation constitute a potentially strong asset in the detection of foreign bribery cases. In addition, the ACRC plays a central role in enforcing this whistleblower protection framework although the Working Group notes that in practice, the ACRC only referred two whistleblower reports relating to foreign bribery to law enforcement authorities since Phase 3 – out of a very high volume of reports received by the ACRC.

2. Recommendations of the Working Group

Recommendations regarding the detection of foreign bribery

1. Regarding **anti-money laundering (AML) measures** to enhance detection of foreign bribery, the Working Group recommends that Korea:
 - a. Proceed promptly with adoption of legislation that would further enhance its AML reporting framework by extending reporting requirements to appropriate non-financial entities including lawyers, accountants and auditors to report suspected money laundering transactions related to foreign bribery ;
 - b. Raise awareness among relevant professions of the risk of laundering foreign bribery proceeds and of foreign bribery red flags, including by publishing relevant case studies; and
 - c. Ensure KoFIU undertakes a review of its methodology and resources for analysing and transmitting STRs to ensure its staff is adequately resourced and trained to detect STRs that may be indicative of money laundering predicated on foreign bribery [Convention, Article 7; 2009 Recommendation III.i. and IX.i.; Phase 3 recommendation 5].
2. Regarding detection of foreign bribery by **Korean public agencies**, the Working Group recommends that Korea provide clear and regular guidance and training on foreign bribery red flags and on the processes for reporting these to Korean law enforcement authorities to relevant officials in agencies with particular potential for detecting foreign bribery, including diplomatic missions, trade promotion agencies, export credit agencies and official development aid agencies, as well as other public bodies that interact with Korean companies operating abroad [2009 Recommendation IX.ii.].
3. Regarding detection of foreign bribery by **the media**, the Working Group recommends that Korea:
 - a. Ensure that law enforcement authorities routinely and systematically assess credible foreign bribery allegations that are reported in domestic and foreign media, including the information referred to Korea by the Working Group;
 - b. Ensure that adequate resources are allocated to law enforcement authorities to monitor and act upon media reports in Korea and abroad; and

- c. Ensure that laws relating to freedom of the press and equal access to information are fully applied in practice in respect of foreign bribery reporting [Convention, Article 5 and Commentary 27; 2009 Recommendation Annex I.D.].
4. Regarding detection of foreign bribery by **accountants and auditors**, the Working Group recommends that Korea develop awareness-raising and training on the FBPA in the accounting and auditing profession to ensure auditors are in a capacity to detect foreign bribery red flags and are aware of their reporting obligations [Convention, Article 8; 2009 Recommendation X.B.; Phase 2 recommendation 2(a)].

Recommendations regarding the enforcement of the foreign bribery and related offences

5. Regarding the **foreign bribery offence**, the Working Group recommends that Korea take appropriate steps within its legal framework to ensure that the bribery of persons performing public functions for the North Korean Regime are covered [Convention, Article 1; Phase 3 recommendation 1(a)].
6. Regarding the **evidentiary threshold for the foreign bribery offence**, the Working Group recommends that Korea clarify by any appropriate means that its foreign bribery offence should be interpreted consistently with Article 1 of the Convention, including by providing written information to investigators, prosecutors, and judges (whether separately or collectively) on the requirements of the foreign bribery offence under the Convention. This information should at a minimum ensure that:
 - a. The threshold for establishing that a transaction constitutes ‘international business’ is not unduly high;
 - b. Perceptions of local custom, the tolerance of such payments by local authorities or the alleged necessity of the payment do not constitute defences or exceptions to prosecution or sanctioning; and
 - c. The foreign bribery offence under the FBPA applies autonomously, without requiring proof of the law of the foreign public official’s country [Convention, Article 1 and Commentaries 3 and 7].
7. Regarding the **false accounting offence**, the Working Group recommends that Korea:
 - a. Ensure that all legal persons can be held liable for false accounting offences committed for the purpose of bribing foreign public officials or of hiding such bribery; and
 - b. Vigorously investigate and prosecute this offence where appropriate, and, to this end, raise awareness and provide training to law enforcement authorities [Convention, Article 8; 2009 Recommendation X.A.].
8. Regarding enforcement of **money laundering predicated on foreign bribery**, the Working Group recommends that Korea take measures to enforce the money laundering

offence more effectively, including by providing training to investigative authorities [Convention, Article 7].

9. Regarding **investigation and prosecution of foreign bribery**, the Working Group recommends that Korea:
 - a. Ensure, for instance by establishing clear and specific procedures, appropriate coordination, sharing of information and resolution of conflicts of competence in foreign bribery investigations, within and between DPOs and NPA agencies;
 - b. Increase the use of proactive steps to gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations;
 - c. Extend the availability of wiretapping to foreign bribery investigations, in line with investigative tools available for domestic bribery investigations;
 - d. Ensure that the investigation time limit is sufficient to conduct a thorough foreign bribery investigation in all cases;
 - e. Extend the statute of limitation applicable to legal persons such that it is aligned with that applicable to natural persons; and
 - f. Ensure that decisions not to prosecute or decisions to terminate foreign bribery prosecutions are not taken on the basis of factors contrary to Article 1 of the Convention, and
 - g. Ensure prosecutors who conduct foreign bribery cases are not subjected to political or other undue interference, including through the Minister of Justice or Prosecutor General's power of instruction in specific cases [Convention, Articles 1, 2, 5 and 6; 2009 Recommendation III.i. and Annex I.D.; Phase 3 recommendation 4(c)].
10. Regarding **sanctions applicable to natural persons** for foreign bribery, the Working Group recommends that Korea:
 - a. Urgently amend its legislation to increase financial sanctions applicable to natural persons for foreign bribery; and
 - b. Take all necessary steps (including through guidance and training to law enforcement and the judiciary) to ensure (i) that sanctions imposed in practice against natural persons in foreign bribery cases are effective, proportionate and dissuasive; and (ii) that confiscation of the bribe and proceeds of bribery from natural persons is routinely sought and imposed in foreign bribery cases where appropriate [Convention, Articles 3 and 5; 2009 Recommendation IV and V; Phase 3 recommendation 3].
11. Regarding **international cooperation**, the Working Group recommends that Korea
 - a. Take a more proactive stance in sending mutual legal assistance (MLA) requests in foreign bribery cases, including by raising awareness and providing training to Korean investigative authorities to identify foreign bribery cases requiring MLA. Korea is encouraged to use all available means to secure MLA, including through contacts with foreign authorities via informal channels and through the Working Group; and

- b. Ensure that extradition requests in foreign bribery cases are responded to in a timely manner.” [Convention, Articles 5, 9 and 10].

Recommendations regarding the liability of, and engagement with, legal persons

12. Regarding **sanctions applicable to legal persons** for foreign bribery, the Working Group recommends that Korea:

- c. Promptly amend its legislation to increase sanctions applicable to legal persons for foreign bribery; and
- d. Take all necessary steps (including through guidance and training to law enforcement and the judiciary) to ensure that (i) sanctions imposed in practice against legal persons in foreign bribery cases are effective, proportionate and dissuasive; and (ii) confiscation of the bribe and proceeds of foreign bribery from legal persons – or property of equivalent value – is routinely sought in foreign bribery cases where appropriate, and, to this end, provide training on the use of confiscation and the identification and quantification of proceeds of foreign bribery [Convention, Articles 2, 3 and 5; 2009 Recommendation IV and V; Phase 3 recommendation 3].

13. Regarding **engagement with legal persons**, the Working Group recommends that Korea review, in coordination with all relevant government bodies that interact with Korean companies operating abroad, its processes and initiatives for engaging the private sector with a view to developing awareness on foreign bribery risks specifically, and more efficiently incentivising Korean companies, including SMEs, to respect Korea’s foreign bribery legislation [Convention Articles 2 and 5; 2009 Recommendation X.C. and Annex II].

Recommendations regarding other measures affecting implementation of the convention

14. Regarding **tax measures to combat foreign bribery**, the Working Group recommends that Korea:

- a. Engage as a matter of priority, through its National Taxation Service (NTS), in a more proactive approach in enforcing the non-tax deductibility of bribe payments against the defendants in past and future foreign bribery enforcement actions, including by systematically re-examining defendants’ tax returns for the relevant years to verify whether bribes have been deducted;
- b. Take appropriate measures to clarify the interpretation of the Framework Act on National Taxes such that it does not operate to prevent the NTS from reporting information regarding suspected foreign bribery uncovered in the course of tax investigations to Korean law enforcement authorities;
- c. Ensure NTS officials have specific training on detecting FBPA violations, including through tax audit processes; and
- d. Ensure the prosecuting authorities systematically share information with the NTS in relation to foreign bribery convictions, so that the NTS can enforce non-deductibility of bribes [2009 Recommendation VIII.i.; 2009 Tax Recommendation; Phase 3 recommendation 8].

15. Regarding **public advantages**, the Working Group recommends that Korea:

- a. Encourage its Public Procurement Service (PPS) to routinely check the debarment lists of multilateral financial institutions in the context of public procurement contracting;
- b. Encourage public contracting authorities, including the PPS and KOICA, to consider, as appropriate, the existence of anti-corruption internal controls, ethics and compliance programmes of companies seeking public advantages;
- c. With respect to official development assistance (ODA), (i) KOICA align with the EDCF and require persons applying for ODA contracts to declare that they have not been convicted of foreign bribery, in any jurisdiction; and (ii) take into consideration foreign bribery risks specifically in awareness-raising and training activities courses for employees of KOICA and EDCF agencies as well as contractors [2009 Recommendation XI; 2006 Export Credit Recommendation; 2016 ODA Recommendation].

3. Follow-up by the Working Group

16. The Working Group will follow up on the issues below as case-law, practice and legislation develop:

- a. The efficiency of whistleblower reporting as concerns specifically foreign bribery suspicions, including the ACRC's referral of such reports to the SPO;
- b. The sanctions imposed for false accounting committed for the purpose of bribing a foreign public official or hiding such bribery, to ensure they are effective, proportionate and dissuasive;
- c. The use of suspended prosecutions in foreign bribery cases to examine the circumstances under which such prosecutions might be reinstated;
- d. That time limits to notify account holders can be sufficiently extended to allow for effective foreign bribery investigations and provision of information to foreign authorities;
- e. The provision by Korea of prompt and efficient responses to international requests for banking information in foreign bribery cases;
- f. Application in practice of the liability of legal persons for the foreign bribery offence in the absence of prosecution or conviction of a natural persons;
- g. Nationality jurisdiction over legal persons, where the natural persons involved are not Korean nationals;
- h. Liability of legal persons for bribery committed by related legal persons;
- i. The level of enforcement of foreign bribery against legal persons; and
- j. Application of the FBPA provision that absolves from liability a legal person that "has paid due attention or exercised proper supervision to prevent" foreign bribery.

**ANNEX 1: PHASE 3 RECOMMENDATIONS TO KOREA (2011) AND
ASSESSMENT OF IMPLEMENTATION
BY THE WORKING GROUP ON BRIBERY (2014)**

<i>Phase 3 Recommendations – 2011</i> ¹⁴⁰	<i>Written Follow-Up – 2014</i> ¹⁴¹
<i>Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery</i>	
<p>Text of Recommendation 1a:</p> <p>1. Concerning the offence of bribing a foreign public official in the FBPA, the Working Group recommends that Korea:</p> <p>a. Take appropriate steps within its legal framework to ensure that the bribery of persons performing public functions for the North Korean Regime, or the Kaesong Industrial Zone, are covered by the FBPA as the bribery of a foreign public official, or by the Korean Penal Code as the bribery of a domestic public official (Convention, Article 1, Commentary 18);</p>	<i>Not implemented</i>
<p>Text of recommendation 1(b):</p> <p>1. Concerning the offence of bribing a foreign public official in the FBPA, the Working Group recommends that Korea:</p> <p>b. Continue to periodically review its policies and approach on facilitation payments pursuant to the 2009 Anti-Bribery Recommendation, and consider in its review: i) whether guidelines on the defence would be beneficial, and ii) the practical value of maintaining the defence in Korea (2009 Recommendation VI i)); and</p>	<i>Fully implemented</i>
<p>Text of recommendation 1(c):</p> <p>1. Concerning the offence of bribing a foreign public official in the FBPA, the Working Group recommends that Korea:</p> <p>c. Encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures (2009 Recommendations, para. VI ii)).</p>	<i>Fully implemented</i>
<p>Text of recommendation 2:</p> <p>2. Regarding the liability of legal persons for the bribery of foreign public officials, the Working Group recommends that Korea raise awareness among law enforcement authorities and the private sector on the liability of legal persons for violations of the FBPA (Convention, Article 2).</p>	<i>Partially implemented</i>
<p>Text of recommendation 3:</p> <p>3. Regarding sanctions for the offence of bribing a foreign public official, the Working Group recommends that Korea: i) take appropriate steps according to its legal system to ensure that sanctions imposed in practice on natural and legal persons are effective, proportionate and dissuasive; and ii) make full use of the authority to confiscate the bribe and proceeds where appropriate, and consider whether the complicated nature of the legislation on confiscation has been a hindrance to the effective imposition of confiscation as a sanction (Convention, Article 3.1, 3.3).</p>	<i>Not implemented</i>

¹⁴⁰ This column sets out the recommendations of the Working Group on Bribery to Korea in its [Phase 3 Report](#), as adopted in October 2011.

¹⁴¹ This column sets out the findings of the Working Group on Bribery on [Korea's Phase 3 Written Follow-Up Report](#), as adopted by the Working Group in May 2014.

<i>Phase 3 Recommendations – 2011</i> ¹⁴⁰	<i>Written Follow-Up – 2014</i> ¹⁴¹
<p>Text of recommendation 4(a): 4. Regarding the investigation and prosecution of cases of foreign bribery, the Working Group recommends that Korea:</p> <p>a. Ensure that the investigation records on transnational bribery cases are not destroyed before Korea has had an opportunity to provide a full report on those cases to the Working Group, and that case records are kept for a reasonable period to provide prompt and effective mutual legal assistance to other Parties for proceedings under the scope of the Anti-Bribery Convention (Convention, Articles 9.1, 12);</p>	<i>Fully implemented</i>
<p>Text of recommendation 4(b): 4. Regarding the investigation and prosecution of cases of foreign bribery, the Working Group recommends that Korea:</p> <p>b. Strengthen the new information and intelligence gathering capacity coordinated by the Ministry of Justice, which involves the Ministry of Foreign Affairs and Trade and the Supreme Prosecutor’s Office (SPO), by making the Korean Financial Supervisory Commission and the National Tax Service (NTS) part of the new system (Convention, Article 5, Commentary 27, 2009 Recommendation Annex I, para. D);</p>	<i>Fully implemented</i>
<p>Text of recommendation 4(c): 4. Regarding the investigation and prosecution of cases of foreign bribery, the Working Group recommends that Korea:</p> <p>c. Increase the use of proactive steps to gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations (Convention, Article 5, Commentary 27, 2009 Recommendation, IX. i), Annex I, para. D); and</p>	<i>Partially implemented</i>
<p>Text of recommendation 4(d): 4. Regarding the investigation and prosecution of cases of foreign bribery, the Working Group recommends that Korea:</p> <p>d. Establish clear criteria for requiring the Anti-Corruption and Civil Rights Commission (ACRC) to transfer reports of FBPA violations to the law enforcement authorities, and that such criteria are established as a matter of priority given that a statutory amendment extending whistleblower protections to persons who report FBPA violations came into force on 30 September 2011 (Convention, Article 5, Commentary 27, 2009 Recommendation Annex I, para. D).</p>	<i>Fully implemented</i>
<i>Recommendations for ensuring effective prevention and detection of foreign bribery</i>	
<p>Text of recommendation 5: 5. The Working Group recommends that Korea take the following steps to improve the prevention and detection of the foreign bribery offence through its anti-money laundering system: i) increase awareness amongst institutions and individuals responsible for making Suspicious Transaction Reports (STRs) of the risk of laundering the proceeds of foreign bribery, including by publishing relevant case studies; ii) take appropriate steps according to its legal system to ensure that financial institutions responsible for making STRs understand the total ownership structure of their corporate customers; and iii) address the potential for conflicts of interest between financial institutions regarding their STR obligations, and their customer corporations that belong to the same enterprise groups as themselves (Convention, Article 7).</p>	<i>Partially implemented</i>

<i>Phase 3 Recommendations – 2011</i> ¹⁴⁰	<i>Written Follow-Up – 2014</i> ¹⁴¹
<p>Text of recommendation 6: 6. The Working Group recommends that Korea take the following steps to improve the prevention and detection of foreign bribery through its accounting and auditing framework: i) consider amending the Board of Audit and Inspection Act to require external auditors to report suspected acts of foreign bribery to competent and independent authorities, such as law enforcement or regulatory authorities; ii) ensure that auditors making such reports reasonably and in good faith are protected from legal action; and iii) encourage awareness-raising and training on the FBPA in the accounting and auditing profession (2009 Recommendation X.B.).</p>	<i>Fully implemented</i>
<p>Text of recommendation 7: 7. Regarding measures in the private sector for preventing and detecting foreign bribery in the private sector, the Working Group recommends that Korea: i) encourage all companies, including SMEs, to adopt adequate internal controls, ethics and compliance programmes and measures, taking into account the Good Practice Guidance in Annex II of the 2009 Anti-Bribery Recommendations; and iii) pursue additional opportunities to raise awareness of the FBPA among SMEs (2009 Recommendation X.C., and Annex II).</p>	<i>Fully implemented</i>
<p>Text of recommendation 8: 8. Concerning tax measures for preventing and detecting foreign bribery, the Working Group recommends that Korea: i) take appropriate steps to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties; ii) encourage the SPO to systematically share information with the NTS about convictions under the FBPA, so that the NTS can review the information for evidence of related tax crimes; iii) provide tax examiners with specific training on detecting FBPA violations; and iv) include bribery in the risk assessment and audit processes of the NTS (2009 Recommendation VIII (i); and 2009 Tax Recommendation).</p>	<i>Partially implemented</i>
<p>Text of recommendation 9(a): 9. Regarding the prevention, detection and reporting of suspicions of foreign bribery by Korea's two public agencies that provide contracting opportunities, the Working Group recommends that Korea: a. Consider applying a more harmonised approach to the anti-bribery guidelines of Korea's officially supported export credit agencies -- Korea Eximbank and K-Sure -- to more effectively implement the 2006 Recommendation on Bribery and Officially Supported Export Credits (2009 Recommendation XI (i) and XII); and</p>	<i>Fully implemented</i>
<p>Text of recommendation 9(b): 9. Regarding the prevention, detection and reporting of suspicions of foreign bribery by Korea's two public agencies that provide contracting opportunities, the Working Group recommends that Korea: b. Consider adopting a systematic approach to providing access to information on companies convicted of corruption, such as through a national debarment register, to facilitate debarment by public contracting agencies of companies convicted of foreign bribery (Convention, Article 3.4, Commentary 24, 2009 Recommendation XI (i)).</p>	<i>Fully implemented</i>
<p>Text of recommendation 10: 10. Regarding the protection of whistleblowers, the Working Group encourages Korea to consider further clarifying that the Act on Protection of Public Interest Whistleblowers now provides protections for those who report suspicions of foreign bribery in any official guidance on the Act, and continue its awareness-raising activities on the Act (2009 Recommendation IX (iii)).</p>	<i>Fully implemented</i>

Follow-up by the Working Group

11. The Working Group will follow-up the issues below as FBPA case law and practice develop:

- a. Application of the FBPA to cases where the bribe is transmitted directly to a third party, and the application of the law on co-principals and accessories to intermediaries (Convention, Article 1);
- b. How “international business” is interpreted in practice, including whether it covers employment with a foreign government (Convention, Article 1);
- c. Regarding sanctions i) application of the provision in the FBPA that results in no sanctions for a legal person that “has paid due attention or exercised proper supervision to prevent” foreign bribery; ii) application of the revised sentencing guidelines for bribery, including how the profit is determined when calculating fines to be imposed for foreign bribery; and iii) impact on confiscation in foreign bribery cases of the newly established specialised confiscation units in prosecutors’ offices (Convention, Articles 1, 2, 3.1, 3.3);
- d. Whether natural and legal persons are subject to effective, proportionate and dissuasive penalties when cases of foreign bribery are prosecuted under other penal provisions (Convention, Article 3.1);
- e. Provision of MLA by Korea to other Parties to the Anti-Bribery Convention (Convention, Article 9.1); and
- f. Implementation of an amendment to the Commercial Act, due to come into force in April 2012, requiring listed companies to establish “compliance guidelines”, and appoint a “compliance officer” to carry out compliance duties in the guidelines, monitor compliance with the guidelines, and report the results to the board of directors (2009 Recommendation C, and Annex II).

ANNEX 2: LIST OF PARTICIPANTS IN THE ON-SITE VISIT

Public Sector

- Ministry of Foreign Affairs (MOFA), including Consular Service Division, Development Policy Division and Multilateral Economic Organizations Division
- Ministry of Justice (MOJ), including International Criminal Affairs Division, International Legal Affairs Division, Small and Medium Business Administration, Audit and Inspection Division
- Supreme Prosecutor's Office (SPO), including Accounting Analysis Investigation Team, Anti-corruption Department, Criminal Asset Recovery Division, Fund Tracking Team, Intelligence Division, International Cooperation Center
- District Prosecutors' Office (DPO), including Seoul Central DPO, Criminal Asset Recovery Department
- Anti-Corruption & Civil Rights Commission (ACRC), including International Relations Division and Public Interest Whistleblowing Inspection & Policy Division
- Economic Development and Cooperation Fund (EDCF), Planning and Coordination Department
- Export-Import Bank (Eximbank), Credit Policy Department
- Financial Intelligence Unit (FIU)
- Financial Services Commission, Fair Market Division
- Institute of Justice
- International Cooperation Agency, including Audit Office Planning, Coordination Department and Procurement Team
- National Oil Corporation (national oil and gas company)
- National Police Agency (NPA), including Foreign Affairs Bureau, CPO INTERPOL NCB and Investigation Bureau
- National Tax Service, International Investigation Division
- Public Procurement Service, Audit and Inspection Division, International Cooperation Division and Procurement Planning Division
- Trade Insurance Corporation (K-Sure), International Relations Team

Private Sector and Civil Society

Private Enterprises

- Gio-Lite (manufacturing)
- SK Hynix (semiconductors)
- Hyundai Motor Group (car manufacturing)
- POSCO (steel-making)
- Radian QBio (manufacturing)
- Samsung Electronics (electronics)

Individual Lawyers and Legal Academics

Accounting and Auditing Profession

- Korea Accounting Institute
- Korea Accounting Standards Board
- Korean Institute of Certified Public Accountants

Civil Society

- Citizens' Coalition for Economic Justice
- Korea Network on Anti-Corruption and Transparency

Media and Investigative Journalists

- Donga Daily
- Korea Center for Investigative Journalism (KCIJ)/Newstapa
- Korea Times

Business Associations

- Federation of Korean Industries (FKI)
- Global Competitiveness Empowerment Forum (GCEF)
- Korea Federation of SMEs (KBIZ)

- Samjong KPMG Accounting Corp
- Shinhan Bank

- Transparency International Korea
- UN Global Compact Korea (Fair Player Club)

ANNEX 3: KOREA'S FOREIGN BRIBERY ENFORCEMENT SINCE PHASE 3

Note: In this table, “LP” refers to “legal persons”, while “NP” refers to “natural persons;” in the “Date” column, “F” refers to the date of the facts and “D” refers to the date of the decision.

Foreign bribery prosecutions resulting in sanctions

Case	Dates	Detection	Parties	Facts	Sanctions
CCTV	F: 2009-14 D: 09/12/2016	Information from foreign investigative agencies (FBI, CID)	4 NP + 3 LP *1NP sanctioned for passive bribery in connection with this case	Employees of 3 different CCTV manufacturers offered bribes (KRW 115m; 74.1m; 9.9m (199m total))/USD 177 101 to a US Army Contracting Officer based in Korea in relation to retain CCTV installation contracts and overlook defects.	NP1: Prison: 14 mths suspended for 2yrs; Fine: KRW 20m/USD 17 800 NP2: Prison: 8 mths suspended for 2 yrs; Fine: KRW 10m/USD 8 900 NP3: Prison: 6 mths suspended for 2 yrs; Fine: KRW 3m/USD 2 670 NP4: Fine: KRW 5m/USD 4 450 LP1: Fine: KRW 20m/USD 17 800 LP2: Fine: KRW 10m/USD 8 900 LP3: Fine: KRW 5m/USD 4 450 *NP (Passive bribery): Prison : 3yrs suspended 4 yrs; Confiscation: KRW 131.2m/USD 116 762
HANWHA	F: 16/11/2017 D: 19/01/2018	Report to NTS from Turkish officials	1NP + 1LP	The defendant, executive director (planning) of a petro-chemical manufacturer, provided USD 5,000 with cosmetic products worth approximately KRW 250 000/USD 222 to an official at Turkey's Ministry of Economy who had entered Korea to investigate anti-dumping of synthetic fibres and plastic raw materials exported by Hanwha General Chemical	NP: Fine: KRW 5m/USD 4 450; Confiscation of 50 one-hundred-dollar bills and two sets of cosmetics LP: Fine: KRW 5m/USD 4 450

				Co., Ltd. By bribing, the defendant intended to manipulate results of the anti-dumping investigation to be advantageous to Hanwha General Chemical Co., Ltd.	
BUSAN SHIPPING	F: 08/2008-12/2010 D: 04-12/2011	Report made by 'relevant person working in the field.'	4NP + 1LP	<p>Defendant provided USD 2,429 cash and valuables, including alcohols, tobaccos, etc., worth KRW 430 800/USD 383 on 14 occasions to Chinese or Russian officials who inspected the ship for vessel entry/departure.</p> <p>At Port Bataan, the Philippines, the defendant - the captain of the Samho Amber, the Samho Sapphire, the Sampho Crystal, and the Samho Leader, which are vessels run by Samho Shipping Co., Ltd. - gave USD 100 to an unidentified Pilipino official in charge of vessel inspection, in order to cover up defects of his ship indicated in PSC inspection. Including this, the defendant provided bribes worth USD 4,400 in total on 10 occasions to foreign public officials, etc. in relation to international business transaction with intent to obtain an improper advantage for the international business transaction.</p>	<p>Case concluded in part through suspended prosecution order, in part through summary conviction</p> <p>NP1: Fine: KRW 500 000/USD 445</p> <p>NP2: Fine: KRW 1m/USD 890</p> <p>NP3: Fine: KRW 1m/USD 890</p> <p>NP4: Fine: KRW 700 000/USD 623</p> <p>LP: Fine: KRW 1m/USD 890</p>
FELDA	F: 08/2013-07/2014 D: 30/11/2018	Referral by Australian Federal Police	3NP + 1LP (Appeal lodged by NP2 in Dec. 2018)	<p>Bribery (KRW 730m/USD649 667) of several officials of a Malaysian SOE under the direction of the Malaysian Prime Minister's Office, to obtain contracts in connection with a project worth MYR 146.25m/USD 34.5m.</p>	<p>NP1: 3yrs prison with 4yr suspension of execution of sentence; Fine: KRW 3m/USD 2672; Confiscation: KRW 1bn / USD909319</p> <p>NP2: 1yr prison with 2yr suspension of execution of sentence; Fine: KRW2m/USD1780 (appeal lodged by</p>

NP2)

NP3: 2.5yrs prison
with 3yr suspension
of execution of
sentence; Fine:
KRW1m / USD 890;
Confiscation: KRW
1bn / USD909319

LP: Fine: KRW2m /
USD 1780

Ongoing Foreign Bribery Proceedings¹⁴²

US Relocation and Construction case (ongoing trial)	F: 09/2010-02/2012	Report from a U.S. military contracting officer	4NP (Limitation period expired and precluded prosecution of 7 LP)	<p>To win a relocation contract (“LDUI contract,” valued at approximately KRW 464.1bn/USD 4.1m at the time of contract award on 24/12/2008; approximately KRW 769bn/USD6.84m after design change in March 2017) and other contracts solicited by a US authority in 2008, the first NP bribed a US citizen and US contracting officer in charge of LDUI contracting, in exchange for various favours throughout the tender and design change processes.</p> <p>The first NP, paid KRW 3.1bn/USD 27.6m between 2010 and 2011 over 16 different bank transfers to the second company’s account, disguising the money as a construction fee.</p> <p>The construction contract was worth about KRW 7.2bn/USD 6.4m and the first company won the contract in May 2010. The first NP agreed with the US contracting officer and the second NP the following, in return for helping the company win the contract: i) the second company would be a partner company for the construction and would select the companies to build a dining facility as part of the construction; ii) the second company would sign a false agreement with the first company as a contractor to build the office buildings as part of the construction project, and when the first company would pay the second company on the pretext of the construction payment, the second NP would launder the money and give it to the US contracting officer. The criminal trial is ongoing.</p>
Ghana Tax case (ongoing investigation)	10/2013	ACRC referral following whistleblower report	4NP + 1LP	<p>In an attempt to avoid USD 366,600 tax levied by the Ghana Revenue Authority on a Korean company’s construction site in Ghana, in around October 2013, the company provided USD 50,000 bribe to Ghanaian tax investigator.</p>
UAE construction case (ongoing preliminary investigation)	Unknown	Referral by Swiss Office of the Attorney-General	Unknown	<p>Bribery (unknown amount) by an employee of a Korean company, allegedly paid as consulting fees to an intermediary trading company to win construction contracts worth about USD 7bn with subsidiaries of an SOE from the UAE.</p>

¹⁴² Information exact as of December 2018.

Foreign bribery cases resulting in acquittals / Closed foreign bribery investigations

China Eastern Airlines case (Acquittal)	F: 05/2006-01/2011 D: 14/02/2012	Whistleblower report	2NP 1LP	<p>Acquittal on counts of foreign bribery. The court accepted the defence arguments that China Eastern Airlines does not correspond to an “enterprise in which a foreign [Chinese] government has invested in excess of 50 % of its paid-in capital or over which a foreign [Chinese] government has <i>de facto</i> control as regards all aspects of its management,” and enterprise engaging in a business in competition at arm’s length with general private business entities without any privilege conferred thereon, such as discriminative subsidies, prescribed by Article 2-2(c) of the Anti-Bribery Act. The court found that ‘There are a considerable amount of materials which may deem that China Eastern Airlines corresponds to the enterprise prescribed by the abovementioned Article. However, under the abovementioned circumstances, this court finds it difficult to determine that China Eastern Airlines is undoubtedly proven to correspond to the enterprise prescribed by the abovementioned Article, unless documents with more credibility to support the correspondence are provided.’</p> <p>2NP found guilty of giving bribes by breach of trust and received sentences of 8 yrs prison and a KRW 7.9bn/USD 7m fine (NP1) and a prison sentence of 1 yr suspended for 2 yrs (NP2).</p> <p>Airline charged with violation of <i>Punishment of Tax Evaders Act</i>, and fined KRW 4.75bn/USD 4.2m.</p>
Filipino Casino License case (Acquittal)	F: 2007-2008 D: 04/05/2012	Report by business partner	2NP LP not indicted	<p>The defendants had planned to start an online casino business in the Philippines together. After co-founding a company, they were waiting for the relevant authority, PAGCOR, to review their business license application. PAGCOR is a public corporation fully funded by the Government of the Philippines and oversees all authorisation and regulatory activities related to all entertainment, gambling and gaming facilities within the Philippines and establishment and management of the businesses therein. Philip, an ex-aide to the President of the Philippines, was in charge of business licensing and authorization. From 2007 to 2008, the defendants provided a total of USD 350,000 to Philip’s private enterprise for their business license.</p> <p>Acquittal. The court found it difficult to conclude that the defendant had the intent to provide the bribes and that obtaining a business license for an online casino in the Philippines constituted an international business transaction.</p>
Indonesia Mining Case (Non-Prosecution)	F: 12/2008-01/2010 D: 26/06/2014; 17/11/2015	Criminal complaint by CEO of parent company to NPA	1NP	<p>The suspect provided the Regent of an Indonesian province with a total of KRW 1.97bn/USD USD 350 000 in “<i>sumbangan</i>” donations in order to have the company he managed acquire a mining exploration company. The Seoul Central DPO did not prosecute on the basis that in order to acquire a valid license for the mining areas, the <i>sumbangan</i> was necessary. It could not eliminate the possibility of the political donations to the Regent being made based on the</p>

				<p>mutual agreement between the defendant and the victim. The Prosecutor's Office could not establish that the act of acquiring the exploration company for the benefit of the Indonesian corporations and their businesses was an "international business transaction". Moreover, it found that the criminal allegations could not be established without clear guidelines or basis on the practice of political donations in Indonesia.</p>
<p>Kazakhstan Consulting case (Non-Prosecution)</p>	<p>F: 09/2010-06/2012 D: 05/12/2012</p>	<p>Whistleblower report</p>	<p>3NP</p>	<p>The suspects embezzled USD 2,200,000 on the pretence of consulting fees through a money laundering company in another Party to the Convention, and used the money to bribe Kazakh politicians, judges and lawyers in order to win a lawsuit for compulsory acquisition of stakes against their company filed in Kazakhstan to take control of that company's management rights. The suspects created a slush fund through fraudulent accounting under the pretence of advance payment, account receivable and payment commissions, thereby embezzling a total of KRW 11,661,764,000 (about USD 10,339,500) over 16 times from 2010 to 2012.</p> <p>The Seoul Central DPO closed the investigation on the basis that there was insufficient evidence to bring the foreign bribery charges because it was necessary to investigate the intermediaries and the Kazakh officials involved. The charges were only supported by the company's internal documents.</p>
<p>Russia Governor case (Non-Prosecution)</p>	<p>F: 07/2011 D: 30/10/2014</p>	<p>Criminal complaint by CEO of company</p>	<p>2NP</p>	<p>The suspects contracted a Russian company to undertake house repairs amounting to KRW 385,160,000/USD 343 822 and provided KRW 400,000,000/USD 357 069 in cash, to a Russian governor. The Prosecutor's Office found that the complainant failed to provide clear statements about the process of alleged crimes. Although financial transaction analysis indicated that it was probable that the Russian company undertook the house repairs without charge and paid bribes to the governor.</p>
<p>Mongolia Land Lease case (Non-Prosecution)</p>	<p>F: 11/2010 D: 20/04/2015</p>	<p>Criminal complaint by party to contract</p>	<p>2NP</p>	<p>The suspects gave the Director of Land Management in a Mongolian province a bribe of KRW 6,000,000/USD 5 356 in order to cancel the land lease that the complainant had been granted by the Mongolian government on June 25, 2007. Based on the official letter invalidating the land lease, the suspects insisted on the invalidity of the sales and the construction contracts and accused the complainant of fraud at the Mongolian Prosecutors' Office. The complainant submitted the statement of a Mongolian employee of the complainant's company, but it could not be accepted as evidence. Other than this statement, there was nothing that proved the charges of the suspects of bribing Mongolian public officials and the prosecution was closed.</p>

ANNEX 4: LIST OF ABBREVIATIONS, TERMS AND ACRONYMS

ACRC	Anti-Corruption & Civil Rights Commission	KONEPS	Korea's On-Line E-Procurement System
AESC	Act on External Audit of Stock Companies	KRW	Korean Won
AML	Anti-Money Laundering	KSA	Korean Standards on Accounting
ARIN-AP	Asset Recovery Interagency Network-Asia Pacific	K-Sure	Korea Trade Insurance Corporation
ASCCC	Act on Special Cases Concerning Confiscation and Recovery of Stolen Assets	MDB	Multilateral Development Bank
ASEAN	Association of Southeast Asian Nations	MLA	Mutual Legal Assistance
CFT	Countering the Financing of Terrorism	MOFA	Ministry Of Foreign Affairs
CDIS	Coordinated Direct Investment Survey	MOJ	Ministry of Justice
CID	United States Army Criminal Investigation Command	NPA	National Police Agency
CPA	Criminal Procedure Act	NTS	National Taxation Service
DAC	Development and Assistance Committee	ODA	Official Development Assistance
DPO	District Prosecutors' Office	OECD	Organisation for Economic Co-operation and Development
ECA	Export Credit Agency	POCA	Proceeds of Crime Act
EDCF	Economic Development Cooperation Fund	PPIWA	Act on the Protection of Public Interest Whistleblowers
EU	European Union	PPS	Public Procurement Service
Eximbank	Export-Import Bank of Korea	SMBA	Small and Medium Business Administration
FBPA	Korean Act on Preventing Bribery of Foreign Public Officials in International Transactions	SME	Small- and Medium-sized Enterprise
FCPA	U.S. Foreign Corrupt Practices Act 1977	SOE	State-Owned Enterprise
FBI	U.S.	SPO	Supreme Prosecutor's Office
FDI	Foreign Direct Investment	STR	Suspicious Transaction Report
FSC	Financial Services Commission	UK	United Kingdom
FTRA	Financial Transactions Reports Act	UKBA	United Kingdom Bribery Act
GDP	Gross Domestic Product	UN	United Nations
KCF	Inter-Korean Cooperation Fund	UNCAC	United Nations Convention against Corruption
IMF	International Monetary Fund	UNCTAD	United Nations Conference on Trade and Development
ISA	International Standards on Auditing	US	United States
KCIS	Korea's Information System of Criminal-Justice Services	USD	U.S. dollar
KIZ	Kaesong Industrial Zone	WGB	Working Group on Bribery in International Business Transactions
KoFIU	Korea's Financial Intelligence Unit	WTO	World Trade Organization
KOICA	Korea International Cooperation Agency		

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