

# The UK Bribery Act 2010 and Measures Needed for Korean Multinational Corporations in the Era of Korea-EU FTA

영국 뇌물수수법(UK Bribery Act 2010) 시행에 따른 한-EU FTA 시대에 한국  
다국적기업의 대처방안 관한 연구

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## Abstract

The Korea-EU FTA has substantially escalated the volumes of South Korea's export and investment in the United Kingdom since its ratification. Coupling with the FTA effect, the ease of doing business in the United Kingdom will increase even more trade and investment by South Korean multinational corporations. In the meantime, the UK Bribery Act 2010 was enforced to end bribery by individuals and business entities which have close connection with the United Kingdom. The punishment of violating the Act is severe than ever because of "unlimited" fine. Without fully understanding the Act and have compliance measures as described in the Guidance issued by the UK Ministry of Justice, South Korean corporations may risk its whole business. Therefore, this paper will analyze the UK Bribery Act in details to provide critical implications for South Korean corporations under the Korea-EU FTA.

**Key Words** : UK Bribery Act, Bribery, Corruption, FCPA, China's Anti-corruption law, Korea-EU FTA

## I. Introduction

A 2013 Global Market Report on the evaluation of the Korea-EU FTA by Korea Trade-Investment Promotion Agency (KOTRA) explained that the FTA has played a significant role in Korea's escalation in export and investment to the EU despite its long term economic recession.<sup>1)</sup> The KOTRA Report, in fact, showed a substantial increase in Korea's export to EU member countries upon the ratification of the Korea-EU FTA.

Among the sixteen EU member countries listed in the KOTRA Report, South Korea's export amount to the United Kingdom in monetary figure has increase by 25.25 percent in two years since the ratification of the FTA.<sup>2)</sup> There are about 80 Korean major companies<sup>3)</sup> and approximately 120 Korean small and medium enterprises<sup>4)</sup> currently doing business in the United Kingdom. The significance of the United Kingdom as a business hub among the EU member countries is especially due to its ease of starting and carrying out business. Coupled with the fact that the United Kingdom was ranked 7th in the "Rankings on the ease of doing business" in 2013 published by the World Bank<sup>5)</sup>, the United Kingdom is expected to invite more business activities in the coming years from South Korea as a partner of the FTA. In addition, UK Trade & Investment, Korea Exchange Bank, and Korea Federation of SMEs signed a tripartite Memorandum of Understanding in November 2013 agreeing to reinforce work relationship to increase Korean companies's investment in the United Kingdom by providing them with detailed business consulting services.<sup>6)</sup> The set of circumstances offers a convincing evidence that close connection in business transactions, investment, and trade between South Korean business entities and the United Kingdom will be stronger than ever before. Consequently, the enhanced business

1) KOTRA, Report on Successful Cases under the Korea-EU FTA in the Initial Two Years and Research on Major Buyers's Response, July 1, 2013 pp. 1 [hereinafter KOTRA Report]. The report is available at [http://www.globalwindow.org/GW/global/trade/info/all-detail.html?&SCH\\_TYPE=SCH\\_SJ&MENU\\_CD=M10502&SCH\\_ARTICLE\\_SE=&SCH\\_TRADE\\_CD=&MODE=&ARTICLE\\_ID=5004356&UPPER\\_MENU\\_CD=M10501&BBS\\_ID=0&SCH\\_VALUE=eu&SCH\\_AREA\\_CD=&MENU\\_STEP=2&REL\\_AREA\\_CD=&Page=1&SCH\\_NATION\\_CD=&SCH\\_START\\_DT=&RowCountPerPage=10&RowCountPerPage=10&SCH\\_RELATED\\_AREA\\_CD=&SCH\\_END\\_DT=](http://www.globalwindow.org/GW/global/trade/info/all-detail.html?&SCH_TYPE=SCH_SJ&MENU_CD=M10502&SCH_ARTICLE_SE=&SCH_TRADE_CD=&MODE=&ARTICLE_ID=5004356&UPPER_MENU_CD=M10501&BBS_ID=0&SCH_VALUE=eu&SCH_AREA_CD=&MENU_STEP=2&REL_AREA_CD=&Page=1&SCH_NATION_CD=&SCH_START_DT=&RowCountPerPage=10&RowCountPerPage=10&SCH_RELATED_AREA_CD=&SCH_END_DT=)

2) KOTRA Report, supra note 1, at pp. 40.

3) The list of the companies is available at [http://www.kotra.or.kr/KBC/london/KTMIUI130M.html?SITE\\_CD=01005&SITE\\_SE\\_CD=1039512&TOP\\_MENU\\_CD=33454&LEFT\\_MENU\\_CD=35801&MENU\\_CD=35801](http://www.kotra.or.kr/KBC/london/KTMIUI130M.html?SITE_CD=01005&SITE_SE_CD=1039512&TOP_MENU_CD=33454&LEFT_MENU_CD=35801&MENU_CD=35801)

4) [http://www.exportcenter.go.kr/supporter/support\\_info/guide\\_england.jsp](http://www.exportcenter.go.kr/supporter/support_info/guide_england.jsp)

5) The World Bank and the International Finance Corporation, Doing Business 2013 Smarter Regulation for Small and Medium-Sized Enterprises, 10th Edition, 2013 pp. 3. South Korea was ranked 8th.

6) <http://www.hanafin.com/eng/pr/news/newsDetail.do?page=1&seq=2305>

relationships will result in positive outcome for both countries.

In the meantime, the UK Ministry of Justice enacted the UK Bribery Act 2010 which makes it illegal for a business person or a company to accept, offer, or give bribes in any form for the purpose of exchanging business benefits in an improper manner. The UK Bribery Act resembles the United States' Foreign Corrupt Practices Act (FCPA) in its purpose and overall structure, but the UK Bribery Act is much stricter than any other similar type of anti-corruption laws, such as the FCPA and China's Anti-Corruption Law.

The UK Bribery Act's jurisdiction is almost universal because it applies to any foreigners and corporate persons who conduct business with at least some "close connection" with the United Kingdom. Such an exceptionally powerful jurisdictional basis clearly shows the UK Ministry of Justice's intention to go after the multinational corporations or partnerships which have any business relationships with the United Kingdom. As more explanation will follow, the standard of review will be based on the United Kingdom reasonable person standard, rather than the foreign company's national standard. It essentially means that other jurisdiction's standard (including South Korea) will be ignored, and the business entities must conduct their business applying the United Kingdom's standard. In addition, the penalties in the UK Bribery Act is far more damaging than the FCPA as it could punish individuals or corporations with "unlimited" fine.

Considering the number of South Korean corporations currently doing business and the prospective companies expected to launch business in the United Kingdom due to the Korea-EU FTA, strong correlation exists between the FTA and the UK Bribery Act. In other words, South Korean corporations will be fully exposed to bribery investigations under the Act.

The UK Bribery Act does not state any affirmative defense for the FTA member countries or mistake of law ("I did not know of the law") defense. The only way to avoid the UK Bribery Act's "unlimited" penalties for South Korean companies is studying the law and comply with it.

Therefore, the purpose of this paper is to analyze the UK Bribery Act in details including general bribery offences, bribery of foreign public officials, and commercial organization's failure to prevent bribery. Also, the article will provide explanations on appropriate measures to take to prevent violation of the Act from occurring.

## II. General Bribery Offences

### 1. Elements

Active bribery and passive bribery are the two types of general bribery offenses defined in Section 1 and Section 2, respectively in the Bribery Act. Elements of active bribery<sup>7)</sup> are:

- (1) A person (giver) and another person (recipient)
- (2) Conduct of bribe
- (3) Intent to falsely influence another person (recipient) to exercise improper performance in relevant function or activity

The first element is a person who passes bribe and a person who accepts the bribe. The word “person” not only embraces a natural person, but it also includes a corporate person within the meaning of the Bribery Act.<sup>8)</sup> In addition, the Bribery Act applies if there is a close connection between a person and the United Kingdom at the time of the conduct or failure to prevent such a conduct.<sup>9)</sup> The persons who fall under the close connection category include the United Kingdom citizens living in and outside the United Kingdom, person ordinarily living in the United

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7) Bribery Act, 2010, c.23, § 1 (U.K.). Section 1 is as follows:

1. Offences of bribing another person

(1) A person (“P”) is guilty of an offence if either of the following cases applies.

(2) Case 1 is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P intends the advantage—

(i) to induce a person to perform improperly a relevant function or activity, or

(ii) to reward a person for the improper performance of such a function or activity.

(3) Case 2 is where—

(a) P offers, promises or gives a financial or other advantage to another person, and .

(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

(4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.

(5) In cases 1 and 2 it does not matter whether the advantage is offered, promised or given by P directly or through a third party.

8) Oh, T. K. (2013), “A Proposal for Corporate Criminal Liability in Domestic Bribery Law by Reference to FCPA and UK Bribery Act”, Bupjo, Vol.685, pp.161.

9) Id. § 12(4).

Kingdom, and business entities incorporated under the United Kingdom.<sup>10)</sup> The second element of active bribery is a person's conduct of giving, promising to give, or offering a monetary benefit or other advantages to another person.<sup>11)</sup> The bribe does not have to be passed to the recipient directly. The bribe transferred to from the giver to the recipient through a third party will be equally considered as a direct transfer of the bribe.<sup>12)</sup> The third element of active bribery has to do with the giver's intent. Bribery intent exists where the giver's conduct reciprocally induces improper performance by the recipient in relevant function or activity,<sup>13)</sup> the giver's conduct appears to be a reward to the recipient for his/her improper performance in relevant function or activity,<sup>14)</sup> or the giver has knowledge or belief that the advantage accepted by the recipient itself would result in the improper performance of relevant function or activity.<sup>15)</sup> A crucial point to note is that the relevant function or activity does not require any connection with the United Kingdom and does not have to be done in the United Kingdom.<sup>16)</sup>

Section 4 explains the meaning of "improper performance."<sup>17)</sup> Performance becomes improper when it is executed in a way to go against an expectation that a conduct of a person would be carried out in good faith, impartially, or in position of trust.<sup>18)</sup>

The standard used in deciding whether the performance is improper or not is an "expectation test." In expectation test, propriety of the performance is measured through what a reasonable United Kingdom person would expect about the performance of a relevant function or activity. It essentially means that the United Kingdom's reasonable person standard will supercede the reasonable person standard of any other countries or territories outside the United Kingdom where actual conduct occurs. The Guidance makes it clear in its explanation that "any local custom or practice must be disregarded" for the bribery took place in jurisdiction outside the United Kingdom.<sup>19)</sup> Bean and MacGuidwin argued that such an application of the United Kingdom's

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10) Id.

11) Id. § 1(2)(a).

12) Id. § 1(5).

13) Id. § 1(2)(b)(i).

14) Id. § 1(2)(b)(ii).

15) Id. § 1(3)(b).

16) Id. § 3(6).

17) Id. § 4(1) and (2).

18) Ministry of Justice, The Bribery Act 2010, Guidance about Procedures which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribing (Section 9 of the Bribery Act 2010), March 30, 2011, ¶ 18 [hereinafter Guidance]. The Guidance is available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>

19) Guidance, supra note 12, at ¶ 19.

reasonable person standard even to the bribery done outside the United Kingdom is extensive and will invite a lot of controversies once other sovereign governments start to realize the consequence of the application.<sup>20)</sup>

In contrast to the active bribery, distinguishing feature of passive bribery is found in the conduct. In other words, passive bribery focuses on the recipient rather than the giver of a bribe. Thus, the general conduct of bribe governed in passive bribery is receiving, and it is defined in Section 2.<sup>21)</sup>

Elements for passive bribery<sup>22)</sup> show similarities to the active bribery except for the conduct of bribe and intent. In passive bribery, the recipient will be exposed to the UK Bribery Act investigation if he/she “requests, agrees to receive or accepts” any benefits whether monetary or other forms. In fact, actual conduct of accepting is not necessary. Merely asking for the bribe would activate the investigation.<sup>23)</sup> It is true that specific intent to trigger improper performance of a relevant function or activity is generally required in passive bribery just as in the active bribery. However, if the purpose of the recipient’s request or agreement to receive or accept the bribe is to be rewarded, or if the bribe is passed to the recipient via a third party, then knowledge or belief of the recipient on the improper performance of a relevant function or

20) Bean, W. B. and MacGuidwin, E. H. (2012), “Expansive Reach - Useless Guidance: An Introduction to the U.K. Bribery Act 2010”, *ILSA Journal of International & Comparative Law*, Vol.18:2, pp.324.

21) *Id.* § 2.

22) *Id.* § 2. Section 2 is as follows:

2. Offences relating to being bribed

- (1) A person (“R”) is guilty of an offence if any of the following cases applies.
- (2) Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).
- (3) Case 4 is where—
  - (a) R requests, agrees to receive or accepts a financial or other advantage, and
  - (b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.
- (4) Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.
- (5) Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly—
  - (a) by R, or
  - (b) by another person at R’s request or with R’s assent or acquiescence.
- (6) In cases 3 to 6 it does not matter—
  - (a) whether R requests, agrees to receive or accepts (or is to request, agree to receive or accept) the advantage directly or through a third party,
  - (b) whether the advantage is (or is to be) for the benefit of R or another person.
- (7) In cases 4 to 6 it does not matter whether R knows or believes that the performance of the function or activity is improper.

23) See Bean and MacGuidwin, *supra* note 22, at 331.

activity would not matter at all.<sup>24)</sup>

The UK Bribery Act covers broader range of conduct than the FCPA as it punishes both giving and accepting the bribe whereas the FCPA only focuses on the “active” bribery.

### III. Bribery of Foreign Public Officials

#### 1. Elements

Bribery of foreign public officials is defined in Section 6 of the UK Bribery Act.<sup>25)</sup> Element s<sup>26)</sup> regarding bribery of foreign public officials are:

- (1) A person who bribes (the giver)
- (2) A foreign public official (the recipient)
- (3) Offers, promises, or gives financial or other advantages
- (4) Intent to influence the foreign public official to use his/her authority or function as the public official in order to retain business or an advantage in the course of the business
- (5) Sufficient connection between the advantage and the intent to influence and secure the business or business advantage

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24) Id. § 2(7) and (8).

25) Id. § 6. Section 6 is as follows:

6. Bribery of foreign public officials

- (1) A person (“P”) who bribes a foreign public official (“F”) is guilty of an offence if P’s intention is to influence F in F’s capacity as a foreign public official.
- (2) P must also intend to obtain or retain—
  - (a) business, or
  - (b) an advantage in the conduct of business.
- (3) P bribes F if, and only if—
  - (a) directly or through a third party, P offers, promises or gives any financial or other advantage—
    - (i) to F, or
    - (ii) to another person at F’s request or with F’s assent or acquiescence, and
  - (b) F is neither permitted nor required by the written law applicable to F to be influenced in F’s capacity as a foreign public official by the offer, promise or gift.
- (4) References in this section to influencing F in F’s capacity as a foreign public official mean influencing F in the performance of F’s functions as such an official, which includes—
  - (a) any omission to exercise those functions, and
  - (b) any use of F’s position as such an official, even if not within F’s authority

26) Guidance, supra note 12, at ¶ 21 and 28.

Definition of “foreign public official” within the meaning of the UK Bribery Act is explained divided by three categories in Section 6(5). The first category includes any elected or appointed person in or by a foreign government who holds legislative, administrative, or judicial position.<sup>27)</sup> The second covers a person who is acting on behalf of a government, a public agency, or a public company of a foreign country.<sup>28)</sup> The third category represents a person who is an official or agent of a public international organization.<sup>29)</sup> Bean and MacGuidwin pointed out that the definition laid out in Section 6(5) is almost identical to the definition of foreign public official appears in Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of OECD.<sup>30)</sup>

The interpretation of the giver’s conduct of offering, promising, or giving would be the same as the method of interpretation in Sections 1 and 2. On the other hand, Section 6 does not govern a foreign public official’s “passive bribery” as neither the UK Bribery Act nor the Guidance is silent as to whether merely asking for the bribe would constitute an offence within the meaning of the UK Bribery Act. Thus, like in the case of the FCPA, the giver would be punished, but the recipient, the foreign public official, would not be punished under the UK Bribery Act.

The intent required to constitute a standalone offence must meet two kinds of intent. First, as offering, promising, or giving, the giver must intend to trigger the use of function, position, or power by the foreign public official. The giver also must intend to obtain or retain business related advantages.<sup>31)</sup> In addition, the giver’s intent to cause the foreign public official’s omission to carry out his/her function or leading the foreign public official to abuse his position outside his/her designated function would be considered the same as the intent listed in element (4).<sup>32)</sup>

The Guidance provides an explanation that a prosecution must prove a sufficient connection

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27) Id. § 6(5)(a).

28) Id. § 6(5)(b).

29) Id. § 6(5)(c).

30) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997, art. 1, § 4(a). The official text is available at [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf). Foreign public official is defined as follows:

(a) “foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation.

31) Guidance, supra note 12, at ¶ 21.

32) Id. § 6(4).



between the intent of the giver, as explained above, and the business related advantage that the giver received from the foreign public official.<sup>33)</sup> The standard applied to determine the existence of sufficient connection is the totality of circumstances test. The Guidance points out three factors to be considered for the totality of circumstances test as follows:<sup>34)</sup>

- (1) Type and level of advantage offered
- (2) The manner and form in which the advantage is provided
- (3) The level of influence the particular foreign public official has over awarding the business

Consequently, the higher the financial benefit transferred to the foreign public official and the business related advantage in return are demonstrated, the more likelihood that the connection between the giver's intent and the advantage from the foreign public official exists.

## 2. Facilitation Payments

Simply criminalizing facilitation payments, David Green, the SFO Director, defined in the official open letter that facilitation payments is “money or goods given to a public official to perform, or speed up the performance of, an existing duty.”<sup>35)</sup> In its effort to clarify prosecutorial standards, the SFO published a SFO Guidance.<sup>36)</sup> The SFO Guidance offers lists of factors which the SFO and the Prosecutor's Office would examine whether to prosecute or not.

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33) Guidance, supra note 12, at ¶ 28.

34) Guidance, supra note 12, at ¶ 28.

35) Green, D. (2012), “Enforcement of the United Kingdom's Bribery Act - Facilitation Payments”, Official Open Letter, Serious Fraud Office (SFO), The United Kingdom (December 6).

The official text is available at [https://www.google.co.kr/url?q=http://www.sfo.gov.uk/media/225554/enforcement\\_of\\_the\\_uk\\_bribery\\_act\\_facilitation\\_payments\\_061212.pdf&sa=U&ei=ILBHU-anOYruiAfenYGACw&ved=0CCAQFjAB&usg=AFQjCNGngwwzIzhDS1tVrAf5mauA4iUa](https://www.google.co.kr/url?q=http://www.sfo.gov.uk/media/225554/enforcement_of_the_uk_bribery_act_facilitation_payments_061212.pdf&sa=U&ei=ILBHU-anOYruiAfenYGACw&ved=0CCAQFjAB&usg=AFQjCNGngwwzIzhDS1tVrAf5mauA4iUa)

36) Serious Fraud Office, The Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions, March 30, 2011, [hereinafter SFO Guidance]. The SFO Guidance is available at [http://www.sfo.gov.uk/media/167348/bribery\\_act\\_2010\\_joint\\_prosecution\\_guidance\\_of\\_the\\_director\\_of\\_the\\_serious\\_fraud\\_office\\_and\\_the\\_director\\_of\\_public\\_prosecutions.pdf](http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf)

<Table 1> Prosecutorial Discretion Factors<sup>37)</sup>

Factors Tending in FAVOR of Prosecution	Factors Tending AGAINST Prosecution
<ol style="list-style-type: none"> <li>1. Large or repeated payments</li> <li>2. Facilitation payments that are planned for or accepted as part of a standard way of conducting business</li> <li>3. Payments may indicate an element of active corruption of the official in the way the offence was committed</li> <li>4. Where a commercial organization has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have not been correctly followed</li> </ol>	<ol style="list-style-type: none"> <li>1. A single small payment likely to result in only nominal penalty</li> <li>2. The payment(s) came to light as a result of a genuinely proactive approach involving self-reporting and remedial action</li> <li>3. Where a commercial organization has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have been correctly followed</li> <li>4. The payer was in a vulnerable position arising from the circumstances in which the payment was demanded</li> </ol>

Source: Section 6, SFO Guidance, pp.9.

### 3. Hospitality, Promotional, and Other Business Expenditure

Both the Guidance<sup>38)</sup> and the SFO Guidance<sup>39)</sup> acknowledge that reasonable and proportional amount of hospitality, promotional, and other business expenditures are essential and made in good faith in the ordinary course of business. Products or services performed to enhance the company's image or to strengthen sincere business relationship is common examples. However, the more lavish the expenditure is spent, the clearer inference will be presented to the investigation and will result in higher probability of prosecution.<sup>40)</sup> Totality of the circumstances test will be adopted to determine the appropriateness of the expenditure.<sup>41)</sup>

### 4. Defense

Section 6(7) provides a "local law" defense. The implication of the defense is that bribery to the foreign public official is legitimate and not punishable by the UK Bribery Act as long as the

37) SFO Guidance, supra note 31, at Section 6.

The writer intentionally employed most of the exact languages appears in the SFO Guidance.

38) Guidance, supra note 12, at ¶ 26.

39) SFO Guidance, supra note 31, at Section 6.

40) Guidance, supra note 12, at ¶ 28.

41) SFO Guidance, supra note 31, at Section 6.

local “written” law of the foreign public official’s country permits the its public officials to be influenced by such a bribe. Although the defense exists in the UK Bribery Act, it is a useless defense because there would practically be no country in the world that has written laws which legally authorizes its public official’s acceptance of bribe and allows to abuse his/her function, power, or position in return. The same useless type of local law defense also appears in the FCPA<sup>42)</sup> which requires a written legal authorization of acceptance of bribe by foreign officials.<sup>43)</sup>

## IV. Failure of Commercial Organizations to Prevent Bribery

### 1. Elements

Bribery done by commercial organizations is punishable under the UK Bribery Act, and it is defined in Section 7 of the Act.<sup>44)</sup> Elements for the offence by commercial organizations are as follows:

- (1) Relevant commercial organization
- (2) Associated person to (1)
- (3) Act of bribery
- (4) Intent to obtain or retain business or the business related advantages

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42) 15 U.S.C. §§78dd-1(c)(1), 78dd-2(c)(1), and 78dd-3(c)(1).

43) See Bae, *supra* note 3, at 296.

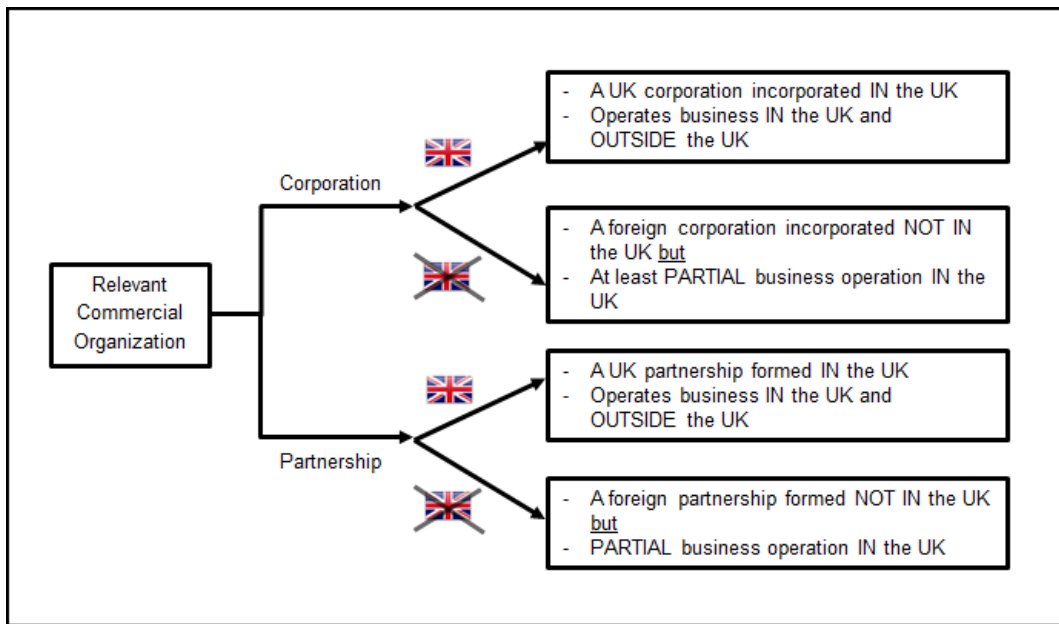
44) *Id.* § 7. Section 7 is as follows:

6. Failure of commercial organisations to prevent bribery

- (1) A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending—
  - (a) to obtain or retain business for C, or
  - (b) to obtain or retain an advantage in the conduct of business for C.
- (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.
- (3) For the purposes of this section, A bribes another person if, and only if, A—
  - (a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or
  - (b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.

Section 7 divides the meaning of a “relevant commercial organization” into 4 categories as shown in figure 1.<sup>45)</sup>

<Figure 1> Four Types of “Relevant Commercial Organization” under the UK Bribery Act



Source: Section 7(5) of the UK Bribery Act (figure organized by the writer)

Whether an organization goes after business purposes will be determined by a ‘common sense approach.’ Applying the common sense approach, the Guidance explains that any corporations and partnerships which fall under one of the four categories of the Section 7(5)’s relevant commercial organization is considered to pursue “business objectives” even if the organization’s major operation for educational, charitable, or public purposes.<sup>46)</sup> On the other hand, applying the common sense approach, if an organization belongs to one of the four categories of relevant commercial organization but is not shown to provide any proof of business presence in the United Kingdom, the court will probably determine that such an organization as non-relevant commercial organization.<sup>47)</sup> As illustrated in the Guidance, a company would not be considered as a relevant

45) Id. § 7.

46) Guidance, supra note 12, at ¶ 35.

47) Guidance, supra note 12, at ¶ 36.

commercial organization within the meaning of the UK Bribery Act based on the mere fact that a company is admitted and listed in London Stock Exchange.<sup>48)</sup> This is a significant distinction from the FCPA. Under the Anti-Bribery Provision of the FCPA, a company is categorized as “issuer” as long as the company is registered with the United States Securities and Exchange Commission, and the issuers are subject to the FCPA regardless of their demonstrable business presence in the United States.

“Associated person” is defined in Section 8 as “a person who performs services for or on behalf of” the relevant commercial organization.<sup>49)</sup> The Guidance elucidate that the language, “performs services” in Section 8 is intended to include wide range of persons who carry out some type of business related tasks for the relevant commercial organization.<sup>50)</sup> Such an intention in the language can be clearly found as Section 8 expressly points out that the capacity of the person within the relevant commercial organization does not matter in determining the “associated person” within the meaning of the UK Bribery Act.<sup>51)</sup> This shows great similarities with the scope of targeted group in China’s Anti-Corruption Laws as Xi Jinping, the General Secretary of the Communist Party, expressed his willingness to crackdown bribery committed by members of the Communist Party from “tigers to flies.”<sup>52)</sup> In other words, both the UK Bribery Act and China’s Anti-Corruption Law are intended to stop corruption by every person related to the organization regardless of their position, rank, influence to decision making or level of proximity to the organization. Thus, any person who carries out some level of business related tasks for the relevant commercial organization, such as employee, agent, or subsidiary will fall under the “associated person” category.<sup>53)</sup> However, the court will be careful in determining whether a person actually carries out services for or on behalf of the relevant commercial organization applying the “totality of the circumstances” test.<sup>54)</sup> In addition, there is a rebuttable presumption as to the application of the totality of the circumstances test.<sup>55)</sup> Of course, not every bribing committed by the associated person will be punished. To constitute a punishable bribery under the

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48) Guidance, *supra* note 12, at ¶ 36.

49) *Id.* § 8(1).

50) Guidance, *supra* note 12, at ¶ 37.

51) *Id.* § 8(2).

52) See Bae, *supra* note 4, at 107.

53) *Id.* § 8(3).

54) *Id.* § 8(4).

55) *Id.* § 8(5).

UK Bribery Act, the associated person's act of bribery must be done with the intent to obtain or retain business or business related advantages not for him/herself, but for the relevant commercial organization.<sup>56)</sup>

## 2. Adequate Bribery Prevention Procedures (Defense)

The UK Bribery Act recognizes offers an affirmative defense for relevant commercial organizations which are equipped with adequate bribery prevention procedures.<sup>57)</sup> The adequate bribery prevention procedures in the UK Bribery Act and the compliance program in the FCPA show great similarities in their purposes to lead companies to reinforce their conformity with the laws. However, they are different because the FCPA does not state the compliance program as an "affirmative" defense whereas the UK Bribery Act makes it clear that the adequate procedures shall be an affirmative defense. Except for Italy, most anti-bribery laws in the world, including the FCPA, do not recognize compliance program or similar appropriate procedures as an affirmative defense.<sup>58)</sup> The Guidance establishes six principles which must be included as frame in the adequate procedures.

The first principle is "proportionate procedures." The adequate procedure must be "proportionate" to the risks the commercial organization faces in their business operations.<sup>59)</sup> Accordingly, the commercial organization not only must understand the kind of risks it is bearing, but also must design policies and procedures reflecting the nature, scale, and complexity of its business operations.

The second principle is "top-level commitment."<sup>60)</sup> As the name of the principle suggests, the people at the top, including directors, owners, and CEOs must express their intolerance against bribery, as well as their determination and commitment that they would run the commercial organization completely preventing corruption. The key to the principle is to spread culture of integrity and transparency within the commercial organization from top to bottom.

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56) Guidance, supra note 12, at ¶42.

57) Id. § 7(2).

58) Jordan, J. (2011), "The Adequate Procedures Defense Under the UK Bribery Act: A British Idea for the Foreign Corruption Practices Act", *Stanford Journal of Law, Business & Finance*, Vol.17, Fall, pp.33.

59) Guidance, supra note 12, at 21.

60) Guidance, supra note 12, at 23.

The third principle is “risk assessment.” The commercial organization must assess its foreseeable internal and external risks of bribery from various angles.<sup>61)</sup> In other words, the commercial organization must fully analyze every possibility of exposure to risks of bribery in their business activities. Thus, multinational corporations must check business community risk, sectoral risk, transactional risk, business opportunity risk, and business partnership risk of the countries where they perform business activities.<sup>62)</sup>

The fourth principle is “due diligence.”<sup>63)</sup> Due diligence must be administered over every person who performs either for or on behalf of the organization. The objective is to mitigate proportional risks assessed regarding business partners or foreign countries based on the third principle.

The fifth principle is “communication (including training).”<sup>64)</sup> The commercial organization must make sure that adequate procedures for bribery prevention is communicated to the associated persons through effective training. The communication is to reinforce the organization’s bribery prevention policies and make them embedded into the organization’s business culture.

The sixth principle is “monitoring and review.”<sup>65)</sup> The commercial organization not only must maintain the adequate procedures and policies, but also need to revise them as changes are made within the organization’s managing persons, business strategies, expansion of business in new areas or regions. Thus, the adequate procedures should be practiced with continuity through monitoring and review of the procedures.

## V. Penalties

The UK Ministry of Justice issued a circular<sup>66)</sup> memorandum explaining severe penalties that the individuals and commercial organizations will be imposed in violation of the UK Bribery Act. The maximum penalties for individuals who are convicted for violation of Sections 1, 2, or 6 is

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61) Guidance, supra note 12, at 25.

62) Guidance, supra note 12, at 26.

63) Guidance, supra note 12, at 27.

64) Guidance, supra note 12, at 29.

65) Guidance, supra note 12, at 31.

66) Ministry of Justice, Legislation - Bribery and corruption, Circular 2011/05, July 1, 2011, [hereinafter Circular]. The Circular is available at <http://www.justice.gov.uk/downloads/legislation/bills-acts/circulars/bribery-act-2010-circular-2011-5.pdf>

an unlimited fine and up to 10 years of imprisonment. For commercial organizations, an unlimited fine will be imposed as a maximum penalty. The Circular is silent on the statute of limitations, and it is referred that the UK Bribery Act does not have statute of limitations in its bribery investigation. The penalties of the UK Bribery Act is substantially heavier than that of the FCPA's Anti-bribery Provision because the imprisonment period is twice longer, and there is no ceiling in the amount of fine as shown in Table 2.

<Table 2> Penalties under the UK Bribery Act vs. FCPA

	UK Bribery Act <sup>67)</sup>	FCPA <sup>68)</sup>
Individuals	Up to 10 year imprisonment and Unlimited fine	Up to 5 year imprisonment and Up to \$250,000 fine
Corporations	Unlimited fine	Up to \$2,000,000 fine
Statute of Limitations	None <sup>69)</sup>	5 years

Source: Organized by the writer based on the Circular and the FCPA.

## VI. Conclusion

Since the commencement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions by the Organization for Economic Cooperation and Development (OECD) in 1999, countries have put their efforts to legally implement anti-corruption laws focusing on bribery. For a decade and a half, major economies including the United States, China, and the United Kingdom have enforced domestic anti-corruption laws with extensive jurisdictional power to stretch their arms to multinational corporations and individuals beyond their borderlines.

Although the United States' Foreign Corrupt Practices Act (FCPA), China's Anti-Corruption Law, and the United Kingdom's UK Bribery Act 2010 have been notorious for powerful

67) Circular, *supra* note 61, ¶ 3 and 16.

68) 15 U.S.C. §§78dd-2(g)(1)(A), 78dd-2(g)(2)(A), 78dd-3(e)(1)(A), 78dd-3(e)(2)(A), 78ff(c)(1)(A), 78ff(c)(2)(A), 78ff(a) .

69) Ortiz, F. C. (2014), "Understanding The UK Bribery Act 2010 And How Liability Arising Thereunder May Be Limited", LeClairRyan, April 8, pp.7.

Article available at <http://www.leclairryan.com/files/Uploads/Documents/Understanding%20The%20UK%20Bribery%20Act%202010%20and%20How%20Liability%20Arising%20Thereunder%20May%20Be%20Limited.PDF>



jurisdiction and appalling penalties, the laws were not as successful in substantial eradication of corruption as expected.<sup>70)</sup>

Especially, the UK Bribery Act aims at a complete crackdown on general bribery committed in the UK, as well as bribery to foreign public officials by requiring commercial organizations to have adequate procedures reflecting upon six principles in the Guidance published by the UK Ministry of Justice. The adequate procedure must not be a “one-time” or “one-size-fits-all” measure. Rather, the adequate procedure is regarded as “adequate” only if it is reviewed, revised, and actually practiced on an ongoing basis.<sup>71)</sup> Penalties imposed on violation of the Act is an “unlimited” fine. It is draconian compared to that of the similar laws including the FCPA and China’s Anti-corruption Law.

In August 2013, the SFO has brought its first UK Bribery Act charges against three individuals working for Sustainable ArgoEnergy plc.<sup>72)</sup> Two of the defendants were the former Chief Commercial Officer and former Financial Controller of the company, and the third defendant was an financial advisor independently contracted with the company. The focus of the investigation was on £23 million fraud involving promotion and sales of Sustainable ArgoEnergy’s biofuel investment products. It took almost two years for the SFO to bring charges against Sustainable ArgoEnergy, which gives some ideas on the length of the investigation for the bribery case.<sup>73)</sup> The case is pending for trial on 22 September 2014.<sup>74)</sup> The SFO is currently undertaking a major investigation on GlaxoSmithKline for its bribery to 16 Iraqi government employed medical doctors and pharmacists in exchange of raising its sales.<sup>75)</sup> The SFO will continue to search for bribery committed by foreign nationals and corporations as long as it finds some business connection to the United Kingdom.

Since the ratification of the Free Trade Agreement between South Korea and the European

70) See Bean and MacGuidwin, *supra* note 22, at 324.

71) Gerrard N., Wiggetts D., Pickworth J., Black C. and Anderson J. (2013), “SFO brings first Bribery Act charges in the UK - what does this mean for your company?”, Dechert LLP, August.

Article available at <http://sites.edechert.com/10/1644/august-2013/sfo-brings-first-bribery-act-charges---what-does-this-mean-for-your-company-.asp?intEmailHistoryId=3564740&intExternalSystemId=1>

72) <http://www.sfo.gov.uk/our-work/our-cases/case-progress/sustainable-agroenergy-plc-and-sustainable-wealth-investments-uk-ltd.aspx>

73) Bonner P. (2013), “SFO finally brings first charges under UK Bribery Act”, Squire Sanders, August 16.

Article available at <http://www.anticorruptionblog.com/uk-bribery-act/sfo-finally-brings-first-charges-under-uk-bribery-act/>

74) Information is available at <http://www.sfo.gov.uk/our-work/our-cases/case-progress/sustainable-agroenergy-plc-and-sustainable-wealth-investments-uk-ltd.aspx>

75) Neate R. (2014), “GlaxoSmithKline holds Iraq inquiry after fresh bribery allegations”, the Guardian, April 7.

Article is available at <http://www.theguardian.com/business/2014/apr/07/glaxosmithkline-inquiry-over-bribery-allegations/print>

Union in 2011, conglomerates and small and medium sized business entities are expected to spur their export and investment in the United Kingdom taking advantage of tariff free market accessibility.

In order to be free from the UK Bribery Act investigation, South Korean companies which wish to continue its business with some relations with the United Kingdom must take measures to prevent corruptive business practice as soon as possible. It is unfortunate that South Korean companies have not demonstrated a corruption free business practices because either sanctions are low-level or confiscation does not exist under Korean Anti-Bribery Law.<sup>76)</sup> Thus, both knowing the Act in details and complying with it are an urgent matter. To ensure the compliance measures, Korean government must make it a legal obligation for companies to set up an internal department which handles the adequate procedures for bribery prevention in and outside the United Kingdom. Along with such a continuous monitoring system, practical whistleblower protection program must be enforced.

It is encouraging that the Federation of Korean Industries hosted “Academy for Better Company” explaining the importance of the UK Bribery Act compliance to 180 managing level officers of various companies.<sup>77)</sup> The government of South Korea should continuously inform the business individuals and organizations about anti-corruption laws of various jurisdictions as it actively expands the Free Trade Agreement relationships with world’s most attractive markets.

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## 국문초록

# 영국 뇌물수수법(UK Bribery Act 2010) 시행에 따른 한-EU FTA 시대에 한국 다국적기업의 대처방안 관한 연구

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한-EU FTA 발효 후 한국의 대영국 수출물량 및 투자는 발효 전에 비해 지속적인 증가 추세를 보여 왔다. 영국은 한-EU FTA 효과와 더불어 2013년 세계은행이 선정한 ‘비즈니스하기 쉬운 국가’에서 최상위로 선정됨에 따라 앞으로도 한국의 다국적 기업들에게 지속적인 수출 및 투자를 하고 싶은 매력적인 무역대상국으로 자리매김 하고 있다. 이러한 가운데 영국법무부는 비즈니스 과정에서 발생하는 부패행위를 척결하기 위해 ‘영국 뇌물수수법(UK Bribery Act 2010)’을 제정 및 전면 시행함으로써 영국과 비즈니스 관계에 있는 개인이나 기업의 뇌물공여 및 수수에 대한 처벌을 선포했다. 영국 뇌물수수법은 적발 시 ‘무한’ 벌금형까지 처벌을 가능하게 함으로써 다른 어떤 부패방지법보다 강화된 법이다. 대영국 비즈니스를 하고 있는 한국의 다국적 기업들도 영국 뇌물수수법의 관할권에 속하기 때문에 영국 뇌물수수법에 대한 정확한 이해와 영국법무부가 발행한 지침서(Guideline)에 명시된 뇌물행위 방지를 위한 준수방안을 구비하지 않으면 가혹한 처벌 대상이 될 수 있다. 따라서 이 논문은 영국 뇌물수수법에 대한 자세한 분석과 해당 법이 한-EU FTA 시대에 대영국 수출 및 투자에 관여하는 한국 다국적 기업에 미칠 영향과 그에 대한 대처방안에 관하여 논하고자 한다.

주제어 : UK Bribery Act, Bribery, Corruption, FCPA, China's Anti-corruption law, Korea-EU FTA

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