Globethics Repository



The permissibility of facilitation payments

This page was generated automatically upon download from the Globethics Repository. More information on Globethics see https://www.globethics.net. Data and content policy of Globethics Repository see https://repository.globethics.net/pages/policy.

Item Type	Preprint
Authors	Umeda, Toru
Rights	With permission of the license/copyright holder
Download date	2026-11-14 13:35:27
Link to Item	http://hdl.handle.net/20.500.12424/173954

The Permissibility of Facilitation Payments

Professor Toru Umeda
Reitaku University, JAPAN
umeda@reitaku-u.ac.jp

Abstract
Despite increasing efforts to address the issue of foreign bribery by Parties to the OECD Anti-Bribery Convention, companies headquartered in those countries complain that the practice of public officials soliciting or extorting small amounts of money still is pervasive in some developing countries. Such small payments for facilitating services are called 'facilitation payments'. This paper intends to examine discussions on FPs in reference to how Parties to the Convention and business and civil organizations try to address the issue, and to introduce a new formula for companies to adopt in addressing the issue; namely, R-BEC006, proposed by a group of scholars and practitioners in Japan, and to deliberate on the merits and demerits of the proposed. The basic stance of the paper is to keep facilitation payments defenses in place, emphasizing that focus should be more on the demand side of such payments if it needs to be eradicated.

1. Introduction

The 1997 OECD Convention on Combating Bribery of Foreign Public Officials is a framework for the supply-side regulation of bribery, requiring Parties to criminalize bribe payments made to foreign public officials by businesspersons and/or companies under their jurisdictions. The implementation of the Convention in February of 1999 drove many companies headquartered in the State Parties and engaged in international business to take necessary measures, such as reviewing their codes of conduct or newly introducing compliance programs. Despite this, companies complain that the practice of public officials soliciting or extorting small amounts of money from business people or companies for their services still continues.

Such small payments, made usually for facilitating services provided by public officials mostly in developing nations, are called 'facilitation payments', hereinafter referred to as 'FPs'. The Convention itself does not have provisions specifically dealing with FPs, but, pursuant to Commentary 9 on the Convention, 'small' facilitation payments do not constitute what the Convention requires a Party to prohibit under its law. The tolerant stance of the Convention left the issue of FPs unresolved, critics say, resulting in a failure to fully control the supply-side regulation.

This paper intends to examine discussions on FPs in reference to how Parties to

the Convention and business and civil organizations try to address the issue, and to deliberate on the merits and demerits of a newly proposed formula for companies to adopt in addressing the issue; namely, R-BEC006, proposed by a group of scholars and practitioners in Japan.

1. Legislations of state Parties

According to an OECD report on the Convention, at least four state Parties,[1] namely, Australia, Canada, Korea, and the United States, have expressly established a defense for foreign bribery offences in their implementation legislations. The exception made in the US Foreign Corrupt Practices Act's for 'routine governmental action' is typical. Section 78dd-1(d) of the FCPA stipulates that provisions prohibiting foreign bribery "shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official. Under Section 78dd-1(f), the term "routine governmental action" is defined as follows:

> (A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in--
> (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
> (ii) processing governmental papers, such as visas and work orders;
> (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
> (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
> (v) actions of a similar nature.
> (B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

The FCPA, enacted in 1977, had been the only legislation in the world regulating foreign bribery until other Parties to the OECD Convention enacted similar legislations. The above-mentioned exception of 'routine government action' in the FCPA may have served as a model for other Parties in incorporating a defense to or an exception for their foreign bribery offences. Nevertheless, Australia's defense for facilitation payments under the Australian Penal Code is unique, as the defense only applies if a record of the payment has been properly kept.[2] Section 70.4 dealing with facilitation payments as a

[1] OECD, Mid-Term Study of Phase 2 Reports, approved and adopted by the Working Group on Bribery in International Business Transactions on 22 May 2006, p. 20.

[2] [D]efence only applies if a record of the payment has been kept in accordance with subsection 70.4(3).

defense cause stipulates: "(1) A person is not guilty of the offence of foreign bribery if (a) the person's conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature; and (b) as soon as practicable after the conduct occurred, the person made a record of the conduct", and (c), for instance, the person has retained that record at all relevant times.

Other state Parties not having established the defense, however, does not necessarily mean that they do not tolerate any kind of small payment made to foreign public officials. For instance, Japan's domestic legislation to implement the Convention, the Unfair Competition Prevention Law, does not have any explicit provisions concerning FPs, while the government's Guidelines for Preventing Bribery of Foreign Public Officials seem to at least imply that a small amount of payment does not constitute an offence.[3] The OECD's interpretation is that Japan's implementation legislation approves FPs as an exception.[4]

Japan's case leads one to assume that any country, even if it does not establish an explicit exception for foreign bribery offences, may place certain payments to foreign public officials out of the scope of law enforcement by regarding them as benign or not malicious enough to penalize. My assumption is that every Party to the Convention has established a kind of threshold: facilitation payments over the threshold will be penalized; those below can be made with impunity. This assumption has yet to be documented in separate future research, but what this writer would like to stress is that every State has to recognize the existence of this kind of threshold for the application of the anti-bribery law, and furthermore, that the threshold for foreign bribery offences should be higher than for domestic bribery offences. This is because it is more difficult for law enforcement authorities to establish evidence against the former, since the bribery is usually committed outside of the country.

2. Business and other organizations

Next, let us have a look at how other non-state organizations have tried to address the issue. First, the Partnership against Corruption Principles for Countering Bribery set for the by the World Economic Council states:

> "Recognizing that facilitation payments are prohibited under the anti-bribery laws of most countries, enterprises which have not yet eliminated them entirely should support their identification and elimination by (a) explaining in their Programme

---

Ibid.

[3] http://www.meti.go.jp/policy/competition/zowai/190130shishin.pdf#search='外国公務員贈賄防止指針'

[4] OECD, Mid-Term Study of Phase 2 Reports

> that facilitation payments are generally illegal in the foreign country concerned, (b) emphasizing in their Programme that they are of limited nature and scope and must be appropriately accounted for, and (c) including in their Programme appropriate controls and procedures for monitoring and oversight of facilitation payments by the enterprise and its employees."[5]

Second, the International Chamber of Commerce has a set of rules covering the issue. Article 6 of 'ICC Rules of Conduct and Recommendations' stipulates as follows:

> a) Enterprises should not make facilitation payments. In the event that an enterprise determines, after appropriate managerial review, that facilitation payments cannot be eliminated entirely, it should establish controls and procedures to ensure that their use is limited to small payments to low-level officials for routine actions to which the enterprise is entitled.
> b) The need for the continued use of facilitation payments should be reviewed periodically with the objective of eliminating them as soon as possible.[6]

Third, Transparency International, a global NGO leading the fight against corruption, published its Business Principles for Countering Bribery in 2003. The relevant part of the documents states: "Recognizing that facilitation payments are a form of bribery, the enterprise should work to identify and eliminate them." [7]

All three sets of rules deny in principle the permissibility of FPs, but the WEF rule and the ICC rules noticeably contain provisions that could be interpreted as a conditional sanction of a certain form of small payment. This accommodating stance should not be criticized as it is a pragmatic step forward toward the total eradication of the practice.

3. Reasoning for and against FPs

Why should FPs be allowed or prohibited? The main reasons put forward against FPs can be encapsulated in the following three. First, any FP, however small, violates fairness. It is unethical since it is not something that a public office asks a citizen or a national to pay on a fair basis as the due cost of a service. A second reason is that most countries have established legal rules prohibiting FPs. The pervasiveness of FPs may make it appear as if they are tolerated, but this is basically due to the lack of effective law enforcement or weak governance of the country, not because they are legally permitted. Third, a failure to resist a demand of a small payment could lead to further demands, which would make it more and more difficult to eradicate such a practice. This is why any such demand should be categorically rejected.

---

[5] http://www.weforum.org/pdf/paci/PACI_PrinciplesWithoutSupportStatement.pdf
[6] http://www.iccwbo.org/uploadedFiles/ICC/policy/anticorruption/Statements/ICC_ Rules_of_Conduct_ and_Recommendations%20_2005%20Revision.pdf
[7] http://www.transparency.org/global_priorities/private_sector/business_principles

On the other hand, there are four reasons for allowing FPs. First, a clear line can be drawn between an FP and a bribe, the former being clearly limited in scope and amount, with the purpose of facilitating public services provided by usually low-ranked public officials. Second , a refusal to pay such money could cause suspension of administrative services that otherwise could be provided, which would in turn hinder business transactions and subsequently affect entire business operations. Payments will secure or promote smooth business operations. The third reason is concerned with so-called cultural relativism. FPs, it is argued, are part of the cultural tradition of the community and foreigners should not judge their legitimacy on this basis. The final reason is related to the claim that FPs cannot be eradicated unless the infrastructural conditions of a community, such as the low salaries of public officials, are greatly improved. While such circumstances prevail, it is permissible to turn a blind eye to FPs.

From an ethical viewpoint, the reasoning against FPs seems and sounds well-founded. However, a more practical stance, claiming that this kind of expense should be allowed under certain conditions, could still gain support especially from the business community. Such a stance would argue that, in practice, public officials' demands of a payment of a small amount of money in exchange for delivering services are difficult for a company or businessperson to reject, without negative consequences to smooth business operations.

Does this claim have legitimacy? If it does, to what extent? To answer this question, one needs to see how pervasive the practice of solicitation or extortion of small payments is in developing countries or the rest of the world. Unfortunately, little academic study focusing on the pervasiveness of FPs has been published to date. A reason for the scarcity may be attributed to the difficulty of collecting information due to the sensitiveness of the topic, with businesses usually unwilling to talk openly about their experiences. The present writer is currently proceeding with an academic study to obtain factual data on FPs by conducting surveys in Southeast Asian countries, and will be glad to share some insights gained in the near future.

4. Permissibility tests for FPs

In July 2006, R-BEC, a Japan-based research institute to which this writer belongs, published a formula developed to assist a company's decision-making concerning FPs.[8] Code-named R-BEC006, it offers a pragmatic way of reaching decisions on payments demanded by foreign public officials to companies doing

[8] http://r-bec.reitaku-u.ac.jp/files/R-BEC006.pdf

business in a country in which such practices prevail.

The document consists of 5 sections: 1. Background of the Development of R-BEC006; 2. Basic Premises of R-BEC006; 3. Overview of Basic Concepts: 4. How to Apply the Decision-Making Criteria; 5. Nine Cases.

What deserves examination in relation to the main theme of this paper is the seven criteria for decision-making which appear in the section 'How to Apply the Decision-Making Criteria'. Those criteria are as follows:

> **Criterion 1**: Is the provider attempting to facilitate the performance of routine governmental action?
> **Criterion 2**: Is the recipient a lower-level official who performs routine government action, or someone of similar rank?
> **Criterion 3**: Is the objective of the provider to expedite action that can be categorized as routine governmental action as specified in Criteria 1?
> **Criterion 4**: Is the payment or advantage being provided nominal in value by local standards?
> **Criterion 5**: Is the intent of the provider to gain an improper business advantage? Does any "improper intent," such as to gain or retain business, exist? Is the intent of the provider reasonable and bona fide (in good faith)?
> **Criterion 6**: Is the provider's action permitted under local law and norms?
> **Criterion 7**: Even if an advantage is found to violate one or more of Criteria 1 through 6 (especially in cases where it is not permitted under local laws or norms), if there is no choice but to give the advantage and if, from the perspective of universal norms, such as human rights or environmental concerns, giving of the advantage is determined to be unavoidable, then, the giving of the advantage is allowed with a condition attached. The condition is that concrete evidence and records supporting the payment be kept so as to enable the advantage giver to provide explanations on the payment whenever authorities make inquiries.[9]

These seven criteria are intended to be applied in three stages. In the first stage, Criteria 1 through 6 are applied to determine the permissibility of the payment in question. The second stage involves the application of just Criteria 5 and 6, and finally, in the third stage, Criterion 7 is applied. This step-by-step application can be seen as a characteristic of R-BEC006.

A payment that satisfies all the criteria from 1 to 6 is presumed to be 'within the scope of facilitation payment'. If it fails to pass one criterion or more, one should move on to the next stage to confirm the permissibility of the payment in question by applying only Criteria 5 and 6. Passing these two criteria means that the payment is permissible. A failure to pass these criteria requires one to go up to the final stage of examination where one has to apply criteria 7 to determine the permissibility. The passage of Criteria 7 vindicates the permissibility of the payment in question, with the proviso that, in order to 'avoid taking a selfish logic', 'companies must retain information and records

[9] http://r-bec.reitaku-u.ac.jp/files/R-BEC006E.pdf

supporting the payment that was given to be able to bear the burden of proof for the payment.'

5. Discussions on the proposed formula

I took part in developing a Japanese version of R-BEC007 in 2006, but at the time of translating it into English, I started to question the validity of part of the proposed formula. As a result, I felt compelled to request that my name be eliminated from the list of collaborators in the English version, published in 2007.

I must emphasize that I do not reject the entire formula. Which part, then, did I challenge? I do not see any problem in the application of Criteria 1 through 5, which constitute a large part of the first stage examination. The problem lies in the validity of Criterion 6, which purports to test whether the payment of small money is permitted under local laws and norms. Supposing that local laws permit such payments, there should be no ground for questioning their permissibility, at least under that jurisdiction. A challenge, if any, would be under a circumstance brought about by the lack of law enforcement of small money payments, which might require a difficult socio-political judgment. It is, therefore, not a matter of legality within a local system, which is a relatively easy task. For this reason, the formulation of Criterion 6 should be questioned.

Criterion 7 needs to be questioned as well. The test presupposes that an advantage to be given should 'violate one or more of Criteria 1 through 6'. A failure to pass the Criterion 4 test, which determines whether the payment in question is nominal in value by local standards, means that the amount of money intended to be paid is not nominal in value but one beyond a certain acceptable level, even if not significant. It may be difficult for any one to judge the payment of an unacceptable amount of money permissible or to call it facilitation money, because it exceeds the scope of generally permitted FPs.

There is another shortcoming which should not be overlooked. Violating one or more criteria logically means violating all the given criteria. The formula presupposes that despite failures of all the tests from Criterion 1 to Criterion 6, the clearance of the Criterion 7 test overrides the failures of the tests in the previous stages. It seems that such a payment which passes the Criteria 7 test without passing all the other criteria from 1 through 6 cannot be called anything other than a bribe, no matter what the intention or motive of the payer, since the amount is not nominal in value, paid to a high-ranking official, and so on. Such payments ought to be *prima facie* illegal without any reference to universal values such as human rights or environmental concerns. Thus,

the seventh criterion virtually sanctions bribe payments or at least leads to the use of advantage payments going beyond the scope of generally permitted FPs.

Nevertheless, this does not deprive R-BEC006 of all validity or practical value, if it is properly modified. The document contains nine hypothetical cases, which, owing to limited space, this paper cannot comment on in any detail, but it is clear that this case material would be useful, if corrected, for in-house training of employees. The real value of R-BEC006 lies in its attempt to make the issue of FPs a topic of more open debate and to provide some practical criteria, beyond abstract legal rules, through which a decision on the permissibility of a payment in question could be reached.

6. Conclusion

In October 2007, the Transparency International Annual Membership Meeting adopted a resolution on facilitation payments. The resolution says: “It has been the long standing policy of TI to oppose the use of facilitation payments,” and “Transparency International, . . ., reiterates its opposition to the use of “facilitation payments. . . . It will call on companies to cease making such payments immediately.”

The writer of this paper, despite being an executive of a national chapter of TI, is opposed to part of the resolution. He believes that the resolution’s failure to make any mention of the responsibility of the demand side not to effectively regulate such payments is a flaw, because the issue of facilitation payment will not be addressed only by the supply side’s efforts. Half, or more, of the responsibility for not eradicating the practice or phenomenon of facilitation payment lies on the demand side. If it is recognized that the issue of facilitation payment needs to be addressed by both sides - the supply side as well as the demand side - why not mention the responsibility of the demand side?

Efforts should be made by the demand side of facilitation payments. This is the basic stance this writer takes in dealing with the issue of facilitation payments. Let there be no misunderstanding, he does not criticize in any sense the efforts of multinational enterprises like BP or Shell to adopt a ‘no facilitation payment’ policy. However, as such a high ethical stance does not always produce a desired outcome, one must be careful to see the whole picture of what happens in the real world.

References

1. Argandona, Antonio, “Corruption and Companies: The Use of Facilitation Payments,

An Internal Decision-Making Tool for the Prevention of Bribery of Foreign Public Officials

Developed in an Effort to Increase the Effectiveness of Article 18 of the Unfair Competition Prevention Act

R-BEC006 Project

Reitaku University: Business Ethics and Compliance Research Center （R-bec）
http://r-bec.reitaku-u.ac.jp/

January 20, 2007