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CORRUPTION AND COMPANIES:  
THE CASE OF FACILITATING PAYMENTS

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## **CORRUPTION AND COMPANIES: THE CASE OF FACILITATING PAYMENTS**

### **Abstract**

Facilitating payments are a very widespread form of corruption. They consist of small payments or gifts made to a person –a public official or an employee of a private company– to obtain a favor, such as expediting an administrative process, obtaining a permit, license or service, or avoiding an abuse of power.

Unlike the worst forms of corruption, facilitating payments do not usually involve an outright injustice on the part of the payer, as she is entitled to what she requests. That may be why public opinion tends to condone them; often they are assumed to be unavoidable and are excused on the grounds of low wages and lack of professionalism among public officials and disorganization in government offices. Many companies that take the fight against “grand” corruption very seriously are inclined to overlook these “petty” transgressions, which are seen as the “grease” that makes the wheels of the bureaucratic machine turn more smoothly. And yet, facilitating payments have a pernicious effect on the working of public and private administrations; all too often they are the slippery slope to more serious forms of corruption; they impose additional costs on companies and citizens; and in the long run they sap the ethical foundations of organizations.

This article focuses on facilitating payments from the point of view of the company that makes the payment, either as the active partner (when it is the company that takes the initiative) or as the passive partner (when the official or employee is the instigator).

**Keywords:** Bribery, corruption, extortion, facilitating payments, gifts, “grease”.

## **CORRUPTION AND COMPANIES: THE CASE OF FACILITATING PAYMENTS**

### **Introduction<sup>1</sup>**

Facilitating payments are a very widespread form of corruption in a large number of developing countries –and not only in developing countries<sup>2</sup>. They consist of small payments or gifts made to a person –a public official or an employee of a private company– to obtain a favor such as expediting an administrative process, obtaining a permit, license or service, or avoiding an abuse of power.

Unlike the worst forms of corruption, facilitating payments do not usually involve an outright injustice on the part of the payer, as she is entitled to what she requests, but they may lead to a certain moral callousness. That may be why public opinion tends to condone them; often they are assumed to be unavoidable and in many countries they are excused on the grounds of low wages and lack of professionalism among public officials and disorganization in government offices. Many companies that take the fight against “grand” corruption very seriously are inclined to overlook these “petty” transgressions, which are seen as the “grease” that makes the wheels of the bureaucratic machine turn more smoothly. And yet, facilitating payments have a pernicious effect on the working of public and private administrations; all too often they are the slippery slope to more serious forms of corruption; they impose additional costs on companies and citizens; and in the long run they sap the ethical foundations of organizations. Hence the need for a clear understanding of the nature and forms of this type of “petty” corruption, and the means to combat it.

This article focuses on facilitating payments from the point of view of the company that makes the payment, either as the active partner (when it is the company that takes the initiative) or as the passive partner (when the official or employee is the instigator). The following section describes the phenomenon of corruption and its principal manifestations, as a framework for the discussion of facilitating payments. This is followed by a definition of facilitating payments and a description of their main features. The paper then discusses the ethical appraisal and the legal treatment of facilitating payments (chiefly in international transactions), the attitude companies should adopt, and the question of gifts, ending with the conclusions.

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<sup>1</sup> This paper contributes to a line of research on corruption and business that is part of the activities of the Chair of Economics and Ethics at IESE; cfr. also Argandoña (1997, 1999, 2000, 2001a,b, 2003). I would like to thank the Fundación José y Ana Royo for financial assistance in carrying out this project.

<sup>2</sup> “Facilitating payments” are not to be confused with “trade facilitation”, that is, the simplification and standardization of rules, procedures and information flows to foster and streamline trade between countries. On this alternative use of the term, cfr. Vincke and Heimann (2003), p. 170.

## Corruption

Corruption can be defined as “the act or effect of giving or receiving a thing of value, in order that a person do or omit to do something, in violation of a formal or implicit rule about what that person ought to do or omit to do, to the benefit of the person who gives the thing of value or a third party”. This definition captures the following features of corruption<sup>3</sup>:

1. It is an action, which may also be an omission (for example, not reporting an infraction or not imposing a fine), including even the attempt to perform the action, and also the effect of that action (the payment) and the habit of acting corruptly.
2. It consists of giving or receiving: corruption encompasses both sides of the transaction (supply and demand).
3. A thing of value: money, goods, services, a job, a favor, or simply the promise or hope of obtaining them in the future, however ill-specified.
4. In order that a person, who may hold a position in the public sector (a politician, government official, judge, police officer, etc.) or in the private sector (a manager or employee of a company or organization).
5. Do or omit to do: corruption may occur by action or by omission. This also includes inducing or directing a third party to do or omit to do something (as, for example, in the case of the superior who orders or induces a subordinate to do something, or the leader of a political party who invites a politician or public official to do something).
6. In violation of a formal or implicit rule: the action or omission may go against the law or some other formal regulation, or simply against a brief, custom, moral standard or implied agreement<sup>4</sup>.
7. The rule or agreement requires that the person who does or omits to do always act in accordance with certain interests inherent in her post or position. This rule may be stated in a contract (for example, the employment contract of a public

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<sup>3</sup> The definition given here draws on others already published. For example, the definition given by Marshall (2001): “circumventing formally agreed or implicit rules for decision making (in the public or private sector) by use of personal inducements in order to achieve institutional and/or personal objectives”. Or that of the Asian Development Bank (1999): “involves behavior on the part of officials in the public sector [we have added the private sector to the definition], whether politicians or civil servants, in which they improperly and unlawfully enrich themselves, or those close to them, by the misuse of the power entrusted to them”. Or that of Pope (2000): “the misuse of entrusted power for private benefit. In this [definition] there are three elements: (i) a misuse of power; (ii) a power that is entrusted (i.e. it can be in the private sector just as much as in the public); and (iii) a private benefit (i.e. not necessarily personal to the person misusing the power, but including as well members of his or her immediate family and friends)”. Or that of Lyman (1996): “the unlawful giving or receiving of something of value to have someone do, not do, do slowly, or do quickly, something which is in the recipient’s power or influence to do, not do, do slowly, or do quickly, or cause or influence others to do so” (the author makes it clear that “unlawful” means not only against the law but also against a religious or moral custom or rule: “a malicious act or omission by at least one of the participants”). Or that of Tanzi (1995, 1998): “the intentional noncompliance with arm’s length relationship aimed at deriving some advantage from this behavior for oneself or for related individuals”.

<sup>4</sup> In legal definitions of corruption the action must always go against the provisions of a law or regulation.

official, manager or employee), in a law or regulation, or in a professional code of conduct, etc., and it may be explicit or implicit.

8. To the benefit of the person who pays or a third party (for example, a relative, friend, acquaintance, member of the same tribe or ethnic group, etc., or a political party, group, company, non-governmental organization, etc.).
9. And it tends to be done in secret.

The above definition covers a wide variety of actions and behaviors in which an office holder sacrifices the interest of the person who bestows the office to her own. These include bribery and corruption; abuse of power; misappropriation of public funds or property, etc. for private benefit; illegal political party and electoral campaign funding; numerous forms of absenteeism or diversion of funds for private gain; nepotism and all forms of patronage in the award of contracts; inappropriate use of influence or friendship; improper use of insider information; and, by extension, money laundering, certain forms of organized crime, etc<sup>5</sup>.

We can classify corruption in many different ways. For example<sup>6</sup>:

1. Public (if one of the parties is a public official or politician; implying misuse of power in public office) or private<sup>7</sup>.
2. National (if the corrupt act and its effects are confined to the territory of a single country) or international (if one of the parties belongs to another country, or the payment is made in another country or through intermediaries in another country)<sup>8</sup>.
3. Grand (involving large payments and large effects) or petty (facilitating payments).
4. Political (if it affects politicians; the amounts involved and the effects tend to be significant) or bureaucratic or administrative (if it concerns the minor decisions of an official, it tends to be petty)<sup>9</sup>.
5. Demand-driven (the initiative comes from the person who receives the payment: extortion) or supply-driven (the initiative comes from the person who pays: bribery).
6. Individualized (isolated cases) or systemic (when a system is created that fosters permanent corruption).

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<sup>5</sup> Cfr. Kaufmann (1998).

<sup>6</sup> Cfr. Andvig et al. (2000), Kaufmann (1998), Tanzi (1998).

<sup>7</sup> In the political sphere public corruption is considered much more important than private corruption, even though both are important and serious. On private corruption, cfr. Argandoña (2003).

<sup>8</sup> This distinction is particularly relevant in the legal sphere, in connection with the OECD Convention and the consequent extension of the criminalization of corruption to actions affecting public officials and politicians of other countries.

<sup>9</sup> On political corruption, see Johnston (1982). Jain (1998) develops models of legislative and bureaucratic corruption.

7. Based on coercion (if it involves a more or less violent attempt by one party to dominate the other) or collusion (if it is done by mutual agreement between the parties for their mutual benefit).
8. Centralized or organized (when it involves a hierarchy of actions at various levels of a public or private administration) or decentralized or unorganized<sup>10</sup>.
9. Derived from own greed or stimulated by external events (induced voracity)<sup>11</sup>.
10. Predictable (if the payer can be reasonably certain that the payment will achieve the desired result) or arbitrary<sup>12</sup>.
11. To avoid a disadvantage (or reduce a cost) or to gain an advantage.
12. By actual payment (gift of money, goods, free or cut-price services, etc.) or the promise or hope of payment.
13. For financial gain or for a gain of some other kind (political power, for example).
14. To obtain a legitimate benefit to which one is entitled, or to obtain something to which one is not entitled.
15. For the benefit of the person who receives the payment or of some other person or group (relatives, friends, ethnic or religious community, political party, etc.).

In the rest of this paper we shall be concerned exclusively with facilitating payments, which are always petty (no. 3), bureaucratic or administrative (no. 4), based on coercion (no. 7) and intended to obtain something to which one is entitled (no. 14).

### **Facilitating payments**

Facilitating payments, also known as grease payments, speed money, expediting payments, tea money, or democratic corruption, are a form of petty corruption. We can define them as “the act and effect of giving or receiving a thing of small value, in order that a public official or employee do or omit to do something, or do it faster and more effectively or more slowly and less effectively, circumventing a formal or implicit rule about what that official or employee ought to do or omit to do, to the benefit of the person who gives the thing of value or a third party, to help resolve a matter, expedite an administrative process, secure the issuance of a license, permit or service, etc., but not to obtain or retain business, a contract or a business transaction or to obtain a major competitive advantage”.

The defining characteristics of facilitating payments are as follows:

1. The person who pays does not do so in order to close a business deal, contract or commercial transaction, but merely to help to resolve a matter, expedite an

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<sup>10</sup> Cfr. Shleifer and Vishny (1994).

<sup>11</sup> Cfr. Tornell and Lane (1999).

<sup>12</sup> Cfr. Kaufmann and Zoido-Lobaton (1998).

administrative process or secure the issuance of a permit or license (a passport, a driver's license, etc.) and forestall, avoid or reduce the inconvenience associated with the procedure<sup>13</sup>.

2. The person who pays is entitled to what she is asking for. This means that facilitating payments do not include cases where there is no entitlement (for example, when a person pays a police officer not to impose a legitimate fine for an actual traffic offense)<sup>14</sup>.
3. The person who receives the payment is usually a public official or low-level employee in an organization, with little power of discretion in decision making, yet capable of controlling the procedure, who may hold up, obstruct or draw out the procedure because of negligence, incompetence, work overload, or the spoken or unspoken expectation of payment.
4. The public official or employee is not entitled to the payment<sup>15</sup>.
5. The amount of the payment is small, in absolute terms, though the proportion between the cost (economic or otherwise) of failure to resolve the matter and the amount of the payment may be high.
6. They are very widespread, at least in certain environments or countries.
7. They are prohibited and criminalized almost everywhere in the world, although the extent to which the law is actually enforced varies considerably.
8. And they tend to be made secretly.

The main difference between facilitating payments and ordinary bribery and extortion is that facilitating payments tend to be made to obtain something to which the payer is entitled: what the payer wants the corrupt official or employee to do is not something illegitimate, improper or immoral –something that exceeds her authority– such that the normal course of business would be perverted through dishonest or unlawful behavior, but rather that she do what it is her duty to do in the procedure of resolving a particular matter. The other characteristics mentioned above are not crucial to the definition but extend and support it. Specifically, it is not the amount of the payment but its purpose that turns a facilitating payment into a bribe or an act of extortion.

### **Should facilitating payments be tolerated?**

Facilitating payments are very common, above all in countries where the culture of the government bureaucracy leaves much to be desired. Obviously, however, the fact that they are common does not mean that they are justified. There are many good reasons,

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<sup>13</sup> The distinction between facilitating payments and gifts is necessarily ambiguous. Cfr. Rose-Ackerman (1998).

<sup>14</sup> It would be a different matter if no offense had in fact been committed, yet the assertion that one had been committed were used as a means of extortion, or if the fine were disproportionate, or the procedure were particularly burdensome or humiliating for the person who makes the payment.

<sup>15</sup> In some circumstances the official does not determine the procedure but administers it. One example is in situations where there are queues (cfr. Andvig 1991).

particularly ethical reasons but also social, economic, political, etc., to refuse to tolerate facilitating payments. The arguments set out below refer to the case of a public official who demands a payment (or who receives an offer of payment) from a private company, but they are readily applicable to employees of private organizations and to solicitations or offers of bribes from other sources.

From the ethical point of view, facilitating payments involve a set of questionable behaviors because:

1. The public official does not carry out her duty of resolving the issues entrusted to her as swiftly or as efficiently as is to be expected of a conscientious public servant.

This may not be her fault (for example, an unforeseen increase in workload, or a lack of resources), in which case she bears no direct moral responsibility (though her superiors may do). Or it may be her fault, either because she lacks the necessary qualifications, or because she is lazy or disorganized, etc., which would constitute an injustice –all the more serious an injustice if her behavior is intended to cause harm (to her superiors or to the public), or to create conditions that will make it easier for her to solicit facilitating payments.

2. The company is entitled to the service, and to have it delivered with the proper speed and quality. For example, it is entitled to be granted, without unnecessary delay, a permit or license that is recognized by law and is applied for in good time and by the correct procedure (it is even “entitled” to an act of generosity that the official may grant, such as, for example, a small gift)<sup>16</sup>.

If the company is not entitled to the service, the facilitating payment is a bribe (and an injustice).

3. The company suffers a loss (of money, time, etc.) as a result of the delay in delivery of the service, or the low quality of the service, etc.

If the company does not suffer any loss, there would appear to be no objective reason to make the facilitating payment.

4. It is assumed that the official is able to carry out an action that will guarantee the delivery of the service or improve its quality, speed, etc., thus ensuring that the company obtains what it is entitled to and avoids any loss.

If it is known that the official is unable to carry out the required action, the facilitating payment serves no purpose and becomes a gift (which we shall discuss later).

5. The official may demand or solicit from the company a facilitating payment –a sum of money, a gift, a favor, or the promise of any of these– in exchange

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<sup>16</sup> That a service should be delivered with the proper speed and quality will have to be interpreted according to the circumstances. For example, we could say that the company is “entitled” to the assurance that the administrative procedure relating to a penalty that the company is going to have to pay will not be dealt with any faster than is provided for by the law or than is usual in that particular department.

for performing the action mentioned in no. 4 above, or the promise or hope of performing it. The solicitation may be explicit or implicit (for example, when it is common practice in certain offices). Sometimes, the official who solicits the payment does so (wholly or in part) as an intermediary acting on behalf of a higher instance, which is the seat of the corruption.

Openly demanding or soliciting any such payment will always be extortion, which is immoral, because it forces the company to make a payment that is not included in the terms and conditions attaching to the service, for the exclusive benefit of the official. Obviously, demanding or soliciting a facilitating payment in the knowledge that the company's request will not be granted adds a further injustice to the action.

The official's action is a disloyalty towards the administration, as she does not carry out her duty to do her job diligently, without favoritism and without feathering her nest.

Demanding or soliciting a facilitating payment may be an injustice to citizens if they suffer as a result of the slowness or poor quality of the service to which they are entitled, due to the official's action. It may also be an injustice to the public administration, other public officials and society in general, insofar as it discredits them and contributes to the spread of corruption, etc.

Also, in almost all countries, both extortion and the soliciting of facilitating payments are prohibited by law or public service regulations.

Often, facilitating payments top up the (supposedly inadequate) salary of public servants. Although this is a common practice, it is unjustified from an ethical point of view because the company is treated unfairly, as we said<sup>17</sup>.

6. The company may take the initiative of offering the official a facilitating payment that she has not solicited, either explicitly or implicitly, in order to obtain the service to which it is entitled with the desired speed and quality. In doing so it is using its resources to serve its own interests, but, at the same time, it is contributing to unfair conduct by a public official, the damage that may be caused to other citizens, the discredit of the public administration and other public servants, and the spread of corruption –and that makes the company's action bribery and, as such, ethically unacceptable.
7. If the official demands the payment, the company may ethically agree to pay, subject to certain conditions. Before making any facilitating payment to obtain a service to which it is entitled, the company must consider the scale of the loss it is trying to avoid or the benefit it is trying to obtain and to which it is entitled, compared with the undesirable consequences of its action as described in the previous paragraph.

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<sup>17</sup> Obviously, it is not technically, economically or ethically right for the public service in question to use facilitating payments to justify low salaries. And the fact that the company has the means to pay does not make the facilitating payment any less unjust.

Also, in almost all countries facilitating payments are prohibited by law –and there is no reason to think that this particular law is unjust. Therefore, the company will be breaking the law, which is yet another moral argument against facilitating payments<sup>18</sup>.

There are other, not directly ethical, reasons why companies should not make facilitating payments. Below are some of them, from the point of view of society as a whole:

1. Facilitating payments may represent a step towards a culture of corruption in society, above all if examples of easy wealth, legal impunity and willingness to break the law proliferate<sup>19</sup>.
2. They create an incentive for politicians and public officials to create more regulations, restrictions, prohibitions, permit requirements, etc., in order to have more chances of contact with companies that provide the opportunity for corrupt payments.
3. They encourage the spread of networks of extortion. It is quite common for junior officials to have to hand over part of their facilitating payments to their superiors<sup>20</sup>.
4. They impede the fight against corruption, because the superiors of corrupt officials are themselves corrupt, if not the actual instigators of corruption.
5. In the long run, large sections of the public service may become inefficient, as the practice of not advancing matters until facilitating payments have been received becomes widespread<sup>21</sup>.
6. They may lead to an unequal and, above all, unjust distribution of wealth, insofar as they favor the illicit enrichment of the few.
7. Facilitating payments are particularly burdensome for the poorest in society.
8. The distinction between extortion or bribery and facilitating payments tends to become blurred as time goes by and such practices become more pervasive.
9. Governments may end up including facilitating payments in the (unofficial) remuneration of public officials, which will tend to perpetuate the problem<sup>22</sup>.

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<sup>18</sup> In international transactions, if facilitating payments are allowed by the law of the country of origin but not that of the country of destination, double standards will be applied, which does not seem right. And the false impression would be created that that is how business is conducted in other countries, especially in the developed ones.

<sup>19</sup> Kaufmann (1998) points out that there is likely to be a high correlation between “grand” corruption and the proliferation of facilitating payments.

<sup>20</sup> There are numerous accounts of such networks; for example, Wade (1985) on the irrigation department in India, and Chand and Moene (1977) on tax collection in Ghana.

<sup>21</sup> This argument contradicts those who maintain that facilitating payments contribute to the smooth functioning of government bureaucracies. On the quality of bureaucracies and their relationship with corruption, see Rauch and Evans (1997).

<sup>22</sup> The prevalence of corruption seems to be inversely related to officials’ salaries. Cfr. van Rijckeghem and Weder (1997), Ul Haque and Sahay (1996).

10. If the use of facilitating payments becomes common practice, they have a corrosive effect on people's trust in legal, administrative and judicial procedures (transaction costs increase, and they do so unpredictably and arbitrarily).
11. A culture of unaccountability is created among the population at large.

And from the point of view of companies:

1. Facilitating payments may help to create a culture of corruption inside the company, because they foster a lax attitude towards the demands and solicitations of public officials.
2. They may encourage petty theft by employees, who see the payments made to public officials as an example to be followed. This effect is reinforced by the lack of accounting control over such payments.
3. They may lead the company to neglect essential issues by creating the impression that it is possible to obtain lasting competitive advantage by means of illegal payments<sup>23</sup>.
4. Although the amount of each individual payment may be small, the total cost for the company –in economic terms, but also in terms of time, effort, etc.– may be significant.
5. Giving in to demands for payment may encourage greater demands in the future, especially if it conveys the message that this company –or all companies in general– are ready to pay whatever is asked of them.
6. Facilitating payments may damage the company's reputation, raising doubts about its honesty in other transactions.
7. In the end, the company's accounts will no longer give a true and fair view of the company's business.
8. The ease of making such payments may lead the company to exaggerate the harm caused by any kind of delay in the company's dealings with the administration, which will encourage the culture of paying.

### **Facilitating payments and the law**

In most countries the laws or regulations governing public service prohibit the making or receiving of payments that may encourage politicians or public servants to engage in behavior contrary to the principles that should govern the conduct of public affairs. In the field of international transactions, however, we have had to wait for the Foreign Corrupt Practices Act (FCPA) in the United States (1977)<sup>24</sup> and the application of the 1997 Convention

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<sup>23</sup> This impression is misleading, as the advantages obtained by dubious payments are never differential and may easily backfire on the company.

<sup>24</sup> Corrected by the Omnibus Trade and Competitiveness Act of 1988, and amended again in 1998 to adapt it to the OECD Convention. On the FCPA, cfr. Kaikati et al. (2000).

of the Organization for Economic Cooperation and Development (OECD Convention) for extortion and bribery of foreign public officials and politicians to be considered a criminal offense<sup>25</sup>. Other initiatives are in preparation<sup>26</sup>.

Article 1 of the OECD Convention prohibits any act of bribery of a foreign public official in the conduct of international business. However, paragraph 9 of the official Commentaries explicitly excludes “small facilitation payments” made to “induce public officials to perform their functions, such as issuing licenses or permits”. In a word, the Convention seeks to distinguish small payments (made to induce public officials to quickly and efficiently carry out routine procedures to which the payer is entitled) from payments made to “obtain or retain business or other improper advantage” over a competitor.

In this, the Convention follows the example of the US Foreign Corrupt Practices Act (FCPA) of 1977, which created an exception for “facilitating or expediting payments to expedite or to secure the performance of a routine government action”) (FCPA § 78dd-1 (b)), confining itself to penalizing payments made to “obtain or retain” business. However, the 1998 amendment to the OECD Convention refers to payments aimed at “securing any improper advantage”, so that at least some facilitating payments could fall within the scope of the Convention<sup>27</sup>.

Application of the OECD Convention to the different countries has given rise to a variety of legal treatments. Schemmel (2002a,b) points to three ways in which facilitating payments can be dealt with in national legislation:

1. By incorporating Article 1 of the Convention directly into national law (as in France and Portugal). Given that paragraph 9 of the Commentaries to the Convention excludes facilitating payments from the general prohibition of payments to foreign officials, the most likely interpretation, in this case, is that the national law likewise allows facilitating payments.
2. By implementing the Convention as a special statute, as has been done in some common law countries such as the United States and New Zealand. Such statutes tend to be highly detailed and so tend to either explicitly include or explicitly exclude facilitating payments from the general prohibition contained in Article 1 of the Convention.

<sup>25</sup> The Convention on combating bribery of foreign public officials in international business transactions was signed in December 1997 and came into force in February 1999. By June 19, 2003 it had been ratified by 34 countries. On the significance and content of the Convention, cfr. Dattu et al. (2000), George et al. (2000), Hamra (2000), Moran (1999), Pacini et al. (2002), Zeldin and di Florio (1999).

<sup>26</sup> For example, the United Nations Convention against corruption, signed in Mérida (Mexico) in December 2003. The UN Convention appears not to exclude facilitating payments when it proposes that the signatories establish as a criminal offense “the promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties” (art. 15, a). Other initiatives include the Organization of American States Anti-Corruption Convention (adopted in 1996), the Council of Europe’s Criminal Law Convention on Corruption (1999), etc. Looking beyond the legal sphere, the Rules of Conduct of the International Chamber of Commerce (ICC) on Extortion and bribery in international business transactions prohibit extortion and bribery for any purpose and clearly state that “small payments to low-level officials to expedite routine approvals are not condoned”, although the ICC recognizes that priority should be given to ending large-scale extortion and bribery involving politicians and senior officials. Cfr. International Chamber of Commerce (1999), Argandoña (1996).

<sup>27</sup> Cfr. Zeldin and di Florio (1999), Schemmel (2002a).

3. By adding the prohibition to the country's existing penal code (as in Belgium, Switzerland, Germany and Austria). In these cases, what most countries have done is extend the prohibition of bribery of domestic officials to bribery of foreign officials. And as the making of facilitating payments to domestic officials tends to be prohibited, the making of similar payments to foreign officials is likewise prohibited (with the occasional exception of Slovakia).

In summary, Schemmel (2002b) concludes that, of the 27 countries considered, 15 exclude facilitating payments from the prohibition envisaged in the OECD Convention; 10 do not exclude them; and two have found special solutions.

Should an explicit prohibition of facilitating payments be included in national legislation? The cases for and against have been made many times. Let's look at the main arguments:

1. In the interests of effectiveness and economy of effort, it is only natural that large-scale corruption should head the agenda of governments and international institutions. Focusing attention on facilitating payments would lead to a dispersal of effort, to little practical purpose and at a high cost<sup>28</sup>.

This is not to say that governments, society and public opinion should be tolerant of or indifferent towards facilitating payments. While it may be accepted that the greatest effort should be directed to the fight against "grand" corruption, this does not mean we should abandon the fight against facilitating payments –if only to demonstrate a consistent approach to all forms of corruption<sup>29</sup>.

2. If the law prohibits facilitating payments but is not strictly enforced, it may lead to discouragement.

Perhaps more discouraging still, though, would be not to have any kind of law that castigates corruption and lays down clear guidelines for the conduct to be expected of public servants, companies and citizens.

3. Extortion and bribery are very difficult to prove in cases of facilitating payments, particularly in court. And trying to deal with facilitating payments through the courts is likely to be an ineffective solution.

Nevertheless, there are other options that may work better, such as disciplinary procedures, ad-hoc "honor" tribunals, etc. The best way to combat facilitating payments is by removing the incentives (cutting out red tape, abolishing regulations and permit requirements, preventing continuous personal dealings between individual officials and companies, etc.); by raising standards in the public administration (creating an efficient corps of well trained, well paid public servants, codes of conduct, etc.)<sup>30</sup>; and by raising the costs of corruption (supervision, penalties, etc.).

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<sup>28</sup> But not if we consider that petty corruption may be the first step towards more complex forms of organized corruption.

<sup>29</sup> It is difficult to carry out an effective program to combat corruption if exceptions are made for certain practices.

<sup>30</sup> Certain social cultures tend to foster corruption: the predominance of family, tribal or ethnic interests, nepotism, feudal or paternalistic power structures, the knowledge that certain classes are not accountable to society for their actions, etc.

## Companies and facilitating payments

The attitude of companies towards “petty” corruption tends to be ambiguous: they condemn it, but end up giving in without much of a fight, perhaps because they assume it is inevitable, that it is part of the culture or the way the public administration works in certain countries; or because they see it as something that is very difficult to combat effectively (particularly if they feel they are fighting on their own); or simply because it is easier for them to give in. This is all the more apparent in the case of facilitating payments, because:

- They are very pervasive, which means that they are something the company encounters in almost all its relations with government authorities in certain countries.
- The economic cost of such payments is relatively low (although, as we pointed out earlier, there are other costs, which may be significant).
- Companies feel that they are avoiding other significant costs, such as time wasted completing certain administrative procedures. On a cost-efficiency basis, the best option seems to be to pay.
- Refusing to make such payments may have unpleasant consequences: reprisals (in the same office or in others); “advantages” for other competitors (who are willing to pay); additional delays in administrative processes; perhaps even finding that the company’s file gets “misplaced”, etc.
- Often, companies feel that they are fighting the battle against corruption on their own, precisely because everybody –including their rivals– pays<sup>31</sup>. And the fact that the government, politicians and public opinion condone this form of corruption further encourages companies to suppress any misgivings.
- Making small facilitating payments is unlikely to jeopardize the company’s reputation, particularly not in countries where “grand” corruption is rampant.
- A drastic decision to combat all forms of corruption may be seen as a mere PR stunt, with no practical value.
- A company that is already making facilitating payments may find it very difficult to stop doing so, as the change of policy may lack credibility.
- A company that is new to a country is unlikely to be able to formulate a realistic policy to combat facilitating payments –for example, because it does not know whether the problem is limited to individual public officials or whether it is dealing with a broad-based, hierarchical extortion network in which the superiors of the corrupt officials are the ones who organize the payments, often with the collusion of the police, judges, supervisory bodies, etc.

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<sup>31</sup> This gives rise to a kind of “prisoner’s dilemma”: all companies would prefer not to pay, which would benefit all of them; but given the possibility that some company or other might pay (which increases the disadvantages for those who do not pay), they all end up paying.

What can a company do to put a stop to facilitating payments in an organized and effective manner? Here are a few suggestions<sup>32</sup>:

1. It must make a firm and considered decision with respect to facilitating payments, whether the decision be to allow them as a matter of course, to reject them always and in all circumstances (zero tolerance), or to allow them in certain specific cases<sup>33</sup>.

Our opinion is that a blanket permission of facilitating payments is ethically unacceptable because, as we said earlier, they will only be justified in certain circumstances (when there is genuine extortion, when the cost to the company of not making the payment is very high, or when the foreseeable indirect consequences –in terms of creating a culture of corruption in the company, fostering corruption among public officials, setting a bad example for employees, etc.– are negligible).

The most clear-cut ethical response is to totally outlaw facilitating payments, even though we appreciate that some companies may prefer to retain the option of making such payments in exceptional cases –and that may be an ethically correct decision. In any case, if the company is incapable of offering viable alternatives to employees who have been victims of extortion attempts, it is best not to lay down absolute prohibitions that employees will be unable to obey or that will have a high cost for the organization<sup>34</sup>.

This decision should be taken at the very highest level of the company, be reflected in the company's ethics code, code of conduct, or other such document, and be given the necessary publicity<sup>35</sup>.

2. Once the policy has been adopted, it needs to be put into practice. Here are some suggestions:
  - Demand that all employees and managers scrupulously adhere to the policy. Sometimes, although employees are aware of the prohibition, they prefer to ignore it, as they feel that getting things done efficiently is more important than putting a few principles into practice.
  - Train employees to recognize any cases of solicitation they may encounter and know how to respond to them (manuals, courses, frequently asked questions, examples, etc.). This kind of training is particularly important for employees and managers working in high-risk areas, and for new hires, particularly in countries where corruption is rife.

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<sup>32</sup> Here we are not referring to measures that companies may take to tackle the phenomenon of “grand” corruption, but only to facilitating payments. For measures that companies may take against corruption, cfr. Argandoña (1999, 2003), Transparency International (2002), Hess and Dunfee (2000), Vincke and Heimann (2003).

<sup>33</sup> Any such decision should be independent of the attitude of the authorities, the media, etc. towards facilitating payments.

<sup>34</sup> As a general rule, it does not seem right that subsidiaries should use less rigorous criteria than their parent company; this would be another argument to use when explaining to the authorities and officials why the company does not make facilitating payments.

<sup>35</sup> The amount of publicity will depend on the nature of the decision, the reasoning behind it and the conditions of the environment.

- Set up hotlines or practical problem-solving procedures, so that employees are able to seek and obtain advice on anything they may be uncertain about. Given the nature of facilitating payments, this kind of advice should be available at short notice.
  - Ensure that there is a person (compliance officer) to whom solicitations of facilitating payments, along with infringements of internal regulations, can be reported, with a guarantee of confidentiality for the whistleblower.
  - Establish procedures and sanctions proportionate to the offense, and provide the means to ensure that such cases do not re-occur.
3. If the company decides to authorize facilitating payments in certain cases, it must specify the criteria to be used (the moral criteria mentioned above, the maximum amount of the payment allowed in each case, the maximum number of payments allowed in a particular project, etc.); the decision-making procedure (for example, the decision must always be made by the immediate superior of the employee who has been asked for a payment, or by a senior manager in the country)<sup>36</sup>; and the rules on disclosure (how the solicitation, the decision and the payment are to be recorded, who will receive this information, how it is to be communicated to the company’s senior executives, and how it will be presented in public). Considerations of this nature may be included in the company’s ethics code or code of conduct.
  4. It is also important that the company know the intermediaries, agents, brokers, etc. that it works with, and that they be required to adhere to the same anti-corruption policy as the company itself<sup>37</sup>.
  5. The company should put in place simple control systems (proportionate to the amount of the payments) to detect instances of non-compliance. Such systems will very often be used more to educate employees than to discipline them.
  6. The company must gather information from reliable sources (NGOs, embassies, chambers of commerce, trustworthy companies operating in the country, consultants, etc.) on the legislation applicable to facilitating payments, and also on the kinds of petty corruption (and grand corruption, too, of course) it is likely to come up against (high-risk areas); and pass this information on to its employees. This is particularly important when a company is just starting operations in an unfamiliar country or environment<sup>38</sup>.
  7. All payments must be recorded in the company’s accounts as what they are, even if there is no objective proof of payment. The company should not authorize the creation of a “slush fund” for this type of payments; much less allow a fund of that nature to escape the control of management and the auditors.

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<sup>36</sup> This is because, even though it does not usually carry any penalty for the company or its employees, the decision is still illegal.

<sup>37</sup> It is as well that these agents be subject to periodic supervision – and that they know it.

<sup>38</sup> Public officials know very well the effort it costs a company to start doing business in a country (permits, investments, organization costs); and they know that even a small pressure for payment, when the process is at an advanced stage, will meet with little resistance, given the disproportion between the payment the company is being asked to make and the potential cost of refusing to make it.

8. When a company is determined to fight corruption, however grand or petty, it must make the necessary resources available to root it out. To this end, it should expect to collaborate actively with the authorities, NGOs, etc. involved in this fight<sup>39</sup>.
9. Likewise, if the company finds itself forced to make facilitating payments in a particular environment, it must make a serious attempt, in consultation with its legal and ethical advisers, to find a way to stop all such payments at the earliest opportunity. The fact that a payment is ethically justifiable in a given situation does not mean that it should continue to be so indefinitely.

## Gifts

Facilitating payments may sometimes be confused with gifts, which are an expression of esteem, appreciation, gratitude and good will. The purpose of a gift is to create an atmosphere of friendship and, as far as possible, make the person who receives it more inclined to see the giver in a favorable light.

In theory, a gift differs from a bribe or a facilitating payment in that it is not intended to obtain a direct benefit for the giver, which the other two are. However, this distinction is not so clear in practice, because the giver may indeed hope to obtain some direct benefit, and sometimes the gift may put as much or more pressure on the person who receives it than a straight-out payment<sup>40</sup>.

There are many different kinds of gifts, and therefore the similarities and differences between gifts and facilitating payments are very varied:

1. Like facilitating payments, gifts may consist of money, goods, services, discounts, etc.
2. They may be large or, like facilitating payments, small.
3. In principle, the initiative in gift-making comes from the giver, although there may have been a prior spoken or unspoken demand –for example, in the form of a long-standing custom.
4. Like facilitating payments, gifts may be given once, or occasionally, or on a regular basis.
5. Gifts may be made to the office or company, or, like facilitating payments, to the individual official, manager or employee –either at her place of work or in her home, depending on how secret they have to be.
6. Gifts may be made independently of any particular service or favor, as part of a long-term relationship; or before soliciting or expecting a favor or service (which makes them more like bribes or facilitating payments); or during or after the service or favor.

<sup>39</sup> It may be advisable to put the message across to politicians and public officials that the company will not make facilitating payments.

<sup>40</sup> Cfr. Kapstein (1998), chp. 7.

7. Unlike bribes or facilitating payments, gifts tend to be public, or at least, they could be without drawing attention, whereas bribes and facilitating payments tend to be secret.
8. Insofar as gifts are public, they tend to be made directly, whereas bribes may be made through intermediaries.
9. Unlike bribes and facilitating payments, gifts do not require the receiver to reciprocate –although, as already mentioned, this is not always the case.

The main factors that decide whether a gift is immoral or not are different from those for a bribe:

1. Whether or not the gift influences the person who receives it to do or omit to do something against her duty as an official, manager, employee, etc. (which implies that the giver cooperates in the immoral action).

The key to the moral conduct of the person who makes the gift is, first, her intent to influence, and to what extent, the decision of the official or employee who receives it; and second, the nature of what she hopes to receive, that is, whether it is something to which she is entitled, as in the case of facilitating payments, or whether she is hoping to obtain an improper advantage, which is what defines a bribe<sup>41</sup>.

The key to the moral conduct of the person who receives the gift is the degree to which she forgoes her freedom when making decisions that affect the giver. In any case, there is always the danger that she will rationalize her own conduct, persuading herself that the gift does not affect her independence of judgment and volition, when in fact it does.

2. The possible injustice towards the public office or company, or towards other customers or citizens, if the action carried out by the official or employee causes them any disadvantage.
3. The possible injury to the public good resulting from bad example, the spread of dubious behaviors, the deterioration of standards of honesty in the public administration, etc.

This is not the place for a discussion of how to treat gifts, as we are only concerned about facilitating payments. Nevertheless, it seems clear that, insofar as the two are close and even liable to be confused with one another, they should be subject to similar criteria<sup>42</sup>.

## Conclusions

Facilitating payments are a very widespread form of corruption, at least in certain environments. They are widely accepted, or at least considered to be harmless or unavoidable. And they are very damaging to the atmosphere in which business is conducted.

<sup>41</sup> Other factors may be relevant for judging the morality of a gift, such as the attitude of respect or contempt with which it is given, the way the gift is likely to be interpreted in the culture in question, etc.

<sup>42</sup> Cfr. Argandoña (1999, 2003), Vincke and Heimann (2003).

From the ethical point of view, it is always immoral for an official or employee to solicit a facilitating payment. Under certain conditions, it may be ethically correct to make a facilitating payment, but always subject to a thorough analysis of the circumstances and application of the appropriate moral criteria. Insofar as making a facilitating payment entails cooperating with immoral conduct on the part of an official or employee, such payments should be proscribed as a general rule, although they may be acceptable in specific cases. This is undoubtedly a more restrictive criterion than is generally adopted in very many countries in which facilitating payments are part of the general corruption.

Companies tend to have a permissive attitude towards facilitating payments. Yet they should take the opposite attitude, at least as a general rule, given the internal and external consequences of facilitating payments for the company, its stakeholders, and society at large. In this article we have put forward some arguments to support such an attitude, and some suggestions on how to design policies capable of dealing effectively with these minor, yet pernicious forms of corruption.

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