Facilitation Payments: A Crime?

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I. Introduction

Are there differences between facilitation payments and "real" bribes?[1] From a sociological and legal point of view, the answer is: Yes, there is. People in many countries tolerate facilitation payments when being made at home, and criminal codes such as the Foreign Corrupt Practise Act (FCPA) as well as codes following the OECD Convention on the Bribery of Foreign Public Officials exempt facilitation payments from criminalization when being made abroad. In other jurisdictions, laws against facilitation payments do exist, but states enforce them poorly.[2]

Determining what could be a facilitation payment is highly depended upon the concrete situation and hence a difficult task.[3] According to a widespread definition, facilitation payments shall encourage routine governmental actions, such as processing papers or issuing permits.[4] Such payments are made with the intention of expediting the progress of a service to which the payer is legally entitled. According to that approach, facilitation payments relate to lawful acts; therefore, one cannot speak of a facilitation payment strictu sensu whenever an advantage is granted for a public official for a breach of his/her duties, including the duty of impartiality.[5] Correspondingly, section 335a of the German Criminal Law Code – which currently has been proposed by the German federal government – criminalizes (active and passive) bribery of a foreign public official solely in cases, in which an undue advantage shall get a public official to perform an act and thereby violate his/her official duties. Therefore, granting money to a foreign public official to facilitate an act, which the public official is allowed to perform, is no crime under the (new) German legislation.[6]

II. Why we need to know possible reasons for the criminalization of facilitation payments

Simply focusing on criminal codes however does not answer the question, whether the grant or acceptance of facilitation payments constitute a crime in a substantive sense and hence can be legitimately criminalized. According to a substantive perception, a criminalization would be legitimate if such payments cause harm to individual persons, to states, their institutions or proceedings. Lawmakers in states, which are discussing a reform of their anti-bribery statutes, need to answer the question, whether plausible reasons for the criminalization of facilitation payments do exist or not. The mere fact, that other jurisdictions prohibit such payments,[7] is an insufficient argument for criminalizing an act and penalizing an individual.

But also lawyers in countries, in which criminal law statutes already apply to facilitation payments, must get clear about the foundations of these statutes. Since criminal law statutes cannot be interpreted without knowledge of these foundations, any lawyer specifying a bribery statute must have a clear idea of the reasons for the criminalization of facilitation payments. A compliance officer, for example, who has to "translate" rather abstract anti-bribery statues into more concrete guidelines handed out to the employees of his company, needs to know the ratio legis in order to clarify and explain what sort of conduct is prohibited and which not. The same applies to a judge laying down the opinion of his court or to a defense counsel analysing the chances of a legal challenge or a constitutional complaint: They all need to know arguments, which may justify the prohibition of grease payments.

III. Reasons for criminalizing facilitation payments

Are there good and plausible reasons for the criminalization of facilitation payments? In my view, one could doubt that the acceptance or the grant of facilitation payments must be criminalized under any circumstances. Neither the competi-

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[1] *Bailes*, Business Ethics: A European Review 15 (2006), 293 (295).

[2] *Nichols*, Virginia Journal of International Law 54 (2013), 127 (140).

[3] *Deming*, Anti-Bribery Laws in Common Law Jurisdictions, 2014, p. 228.

[4] For the relevant rules in US law, see §§ 78dd-1 (b), (f) (3) FCPA; Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission (ed.), A Resource Guide to the U.S. Foreign Corrupt Practices Act, 2012, p. 25. Also see *Argandoña*, Journal of Business Ethics 60 (2005), 251 (253 f.); *Bailes*, Business Ethics: A European Review 15 (2006), 293 (295); *Deming*, The Foreign Corrupt Practices Act And the New International Norms, 2005, p. 15; *Nichols*, Virginia Journal of International Law 54 (2013), 127 (132).

[5] Cf. *Zerbes*, in: Pieth/Low/Bonucci (ed.), The OECD Convention on Bribery, A Commentary, 2nd ed. 2014, p. 169 ff.

[6] This is not in line with the recommendation in the OECD Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Germany, 2011, para 56.

[7] Cf. *Bonstead*, Houston Journal of International Law 36 (2014), 503 (520): "Meanwhile the FCPA has been overtaken in legislative leadership, but has turned in an unsurpassed history of anti-corruption enforcement that even the OECD applauds. It is this very comparison that leads the Author to advocate not only for a legislative amendment to the FCPA to prohibit facilitation payments, but also for an enhanced enforcement strategy to go along with it."

tion approach, underlying the OECD Convention, nor the institutional approach, which is the foundation of both the UN Convention Against Corruption (UNCAC) and the Council of Europe's (CoE) Criminal Law Convention on Corruption, support the demand for a strict and global prohibition of facilitation payments.

1. Protection of free trade and fair competition

If we primarily conceive of bribery as an obstacle for free trade and fair competition, facilitation payments must not be criminalized. As long as "grease payments" neither influence the decision-making process nor its outcome, but solely its velocity, such payments do not necessarily hamper fair competition and free trade; they rather function as an instrument to accelerate slow bureaucracies.[8] Consequently, the commentaries to the OECD Convention suggest that facilitation payments do not constitute an undue advantage given to obtain or retain business or other improper advantages and are not a criminal offence under the OECD Convention.[9] States, which follow the OECD's conceptualization of corruption as a distortion of fair competition, may hence abstain from a strict criminalization of facilitation payments. Certainly, if, for example, a sales representative of a company offers a payment to a foreign customs officer in return for preferring the company over its competitors during customs clearings, it is not only a distortion of competition, but also a violation of the official duty of impartiality; the privilege for facilitation payments hence does not apply (supra I.).[10] In contrast to that, facilitation payments that are being made outside of a concrete competitive situation do not hamper fair competition: If police officers ask an employee of a logistics company for a facilitation payment at a roadside check, neither a grant nor a rejection would have an effect on competition. A fortiori, the prohibition of facilitation payments made in a mere private context (e.g. in connection with issuing a visa or a residence permit) cannot be justified with the protection of fair competition.

Although neither the ratio nor the wording of the OECD Convention run up a prohibition of facilitation payments, both the official commentaries published with the OECD Convention and the semi-official commentary edited by *Mark Pieth* adopt a rather narrow concept of permitted facilitation payments. According to them, states must at any rate prohibit grease payments, when they are granted in connection with the performance of a discretionary act. The commentary argues that a public official who accepts money while having to decide within a margin of discretion always breaks his duty of impartiality.[11] One commentator admits that this approach is based on a "suspicion" or a "speculation"[12], according to which the advantage has improperly influenced the public official in his/her exercise of discretion. In my view, this is impermissible: As long as we do not know, whether an advantage has actually distorted a decision making process or not, we cannot base a criminal conviction on a mere presumption of guilt.

2. Facilitation payments as harm to institutions and proceedings

So, if facilitation payments neither lead to unlawful decisions nor distort decision-making processes or hamper fair competition – what could justify the assessment that facilitation payments can be called a crime and deserve punishment?

A possible reason can be derived from the UNCAC.[13] According to the wording of art. 16 UNCAC, the mere facilitation of proceedings can be conceived as an "other advantage in relation to the conduct of international business". More importantly, the aim of the UNCAC suggests such a comprehensive penalization of bribery, including facilitation payments: Unlike the OECD Convention, the UNCAC does not focus on corruption as an obstacle to fair and free trade, but rather stresses (in its preamble) the "threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law". Correspondingly, the Explanatory Report to the CoE Criminal Law Convention points out that "the Convention aims at safeguarding the confidence of citizens in the fairness of Public Administration which would be severely undermined, even if the official would have acted in the same way without the bribe. In a democratic State public servants are, as a general rule, remunerated from public budgets and not directly by the citizens or by private companies."[14]

From that perspective, facilitation payments affect the citizens' trust in the functioning of state institutions and in va-

[8] *Huntington*, in: Heidenheimer/Johnson (ed.), Political Corruption, 3rd ed. 2002, p. 253; *Leff*, in: Heidenheimer/ Johnson (ibid.), p. 307. Also see *Swaleheen/Stansel*, Cato Journal 27 (2007), 343; *Haggard/Tiede*, World Development 39 (2010) 673 (679). In contrast to that *Aidt*, Oxford Review of Economic Policy 25 (2009), 271, stresses the economic dangers of corruption.

[9] OECD (ed.), Commentaries on the OECD Convention on Combating Bribery, art. 1 para. 8: "Small 'facilitation' payments do not constitute payments made 'to obtain or retain business or other improper advantage' within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licences or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programs of good governance. However, criminalization by other countries does not seem a practical or effective complementary action."

[10] *Nichols*, Virginia Journal of International Law 54 (2013), 127 (133).

[11] *Zerbes* (note 5), p. 170. Also cf. *Nichols*, Virginia Journal of International Law 54 (2013), 127 (133).

[12] *Zerbes* (note 5), p. 170.

[13] See *Kubiciel*, International Criminal Law Review 9 (2009), 139 (153 f.).

[14] Council of Europe, Explanatory Report to the Council of Europe's Criminal Law Convention on Corruption, 2000, para. 39.

lidity of legal values.[15] Citizens may regard facilitation payments as a first move in a game that leads to more serious forms of corruption. According to that, facilitation payments – just like all forms of corruption – have an anti-institutional effect: They have the potential to undermine the stability of institutions. Therefore, as a general rule, facilitation payments can be criminalized and called a crime. Correspondingly, the 2009 OECD Recommendations for Further Combating Bribery of Foreign Public Officials in International Business Transactions stress the „corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law" and hence recommend that „Member countries should undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon."[16]

IV. Consequences

Let me briefly point out three consequences of the approach:

1. On the macro-level, this approach does not correspond to states with weak institutions and low public confidence in the functioning of the state, its institutions and procedures. In such states, corruption does not undermine functioning institutions and the relevant public trust; rather, corruption is a main hindrance to solidly founding such institutions.[17] Consequently, criminal law statutes cannot stabilize existing norms and well-established, corruption-free institutions – they simply do not exist or only exist on paper. Institutions, which are commonly perceived as corrupt, cannot be weakened by a further act of corruption, or metaphorically spoken: cannot be infected with the virus of corruption and fall ill with it. If the institution is infected by corruption, it has to be cured. This raises the question, whether criminal law in general and the prohibition of facilitation payments are promising cures.

According to a both optimistic and technocratic approach, in such states criminal law must function as an instrument that helps establishing state institutions and good government practises. However, the potential of criminal law statutes to achieve that goal is rather limited.[18] A lasting legal change in the fight against corruption and a solid implementation of institutions cannot be enforced by means of control and coercion. Therefore, criminal law can only flank positives developments which have to be ignited and fuelled by a fundamental learning process: Public officials as well as citizens must learn to orientate their actions not only towards individual interests or those of a family, clan or religious group, but towards a common good. Where the respect for law and the common good are overruled by other loyalties,[19] institutions cannot flourish and state institutions must wither. In the words of the poet *T.S. Eliot*, legal culture must be compared with trees: One cannot "build" a tree; instead, you must plant it, soak it and hope that it is going to grow.[20] Likewise, one cannot build a state and its institutions, but must wait for it to emerge from society and to develop alongside society. Law, including criminal law, goes along with this process, but cannot and should not head it.

As the potential of anti-corruption statutes is limited, the prohibition of facilitation payments could only be justified with the mere hope that sanctioning grease money would contribute to the implementation of institutions and good governance. This foundation is too weak to justify a criminal sentence over an individual, who has paid grease money. A different stance can be justified on the passive side of corruption. As public officials can be held responsible for the protection of the common good to a greater extent than ordinary citizens, a state may impose additional duties on its servants, including the obligation to refrain from accepting facilitation payments. Therefore, accepting facilitation payments may be criminalized even by weak states, in order to support the emergence of properly functioning institutions.

2. This line of argumentation however does not apply to the criminalization of transnational bribery. A state cannot impose duties on the public officials of another state. Therefore, states can either abstain from criminalizing passive bribery of foreign public officials or condition the criminalization of accepting facilitation payments by the foreign public officials on the stance of the foreign state: If the latter does not hold his public official accountable for accepting facilitation payments, there is no compelling reason why another state should do so. To refrain from criminalizing the acceptance of facilitation payments by foreign public officials neither violates Art. 16 (1) UNCAC nor does this reluctance inflict with Art. 5 CoE Criminal Law Convention as these statutes do not include mandatory obligations, cf. Art. 16 (2) UNCAC, Art. 37 (1) CoE Criminal Law Convention.

3. The approach pointed out above has consequences for states with well-established institutions, too. If the criminalization of facilitation payments shall safeguard the public confidence in state institutions, law enforcement bodies may abstain from adjudicating cases of granting advantages of a very small scale. Such payments do not have the potential to affect the public trust negatively. Therefore, the relevant criminal law statutes are open for an interpretation that approximates written law and the unwritten law of social morality. Moreover, law enforcement bodies may abstain from a formal conviction, if the enterprise assures that it will refrain from paying grease money in the future, e.g. by means of

[15] *Argandoña*, Journal of Business Ethics 60 (2005), 251 (252, 257 f.); *Bailes*, Business Ethics: A European Review 15 (2006), 293 (297); *Nichols*, Virginia Journal of International Law 54 (2013), 127 (152).

[16] *OECD*, Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, 2009, Recommendation VI (i).

[17] *Acemoglu/Robinson*, Why Nations Fail, 2012, p. 334 ff. ("The Vicious Circle"), also see p. 372; *Drury/Krieckhaus/Lusztig*, International Political Science Review 27 (2006), 121.

[18] More detailed *Kubiciel*, in: Linnan (ed.), Legitimacy, Legal Development and Change, 2011, p. 419 (424 ff.).

[19] Cf. *Brooks/Walsh/Lewis/Kim*, Preventing Corruption, 2013, p. 47.

[20] *Eliot*, Die Einheit der europäischen Kultur, 1947, p. 39 (Radio address to a German public). Cf. *Kubiciel*, JZ 2015, 64 (69 f.).

implementing a functioning compliance system. In such cases, the public confidence in the future lawfulness of the enterprise has been re-established; therefore, a conviction is not necessary anymore. This is the ratio of deferred prosecution arrangements.[21]

V. Conclusion

Contrary to a widespread assumption, neither international law nor compelling reasons stipulate a strict criminalization of facilitation payments at home and abroad. States with well-established institutions may criminalize all forms of bribery, including granting and accepting of small facilitation payments. Also, states with weak institutions may consider the criminalization of petty corruption as a necessary step to ostracise corruptive behaviour and thereby promote good governance at home. Contrary to that, a transnational criminalization of facilitation payments "does not seem a practical or effective complementary action."[22]

[21] For relevant case studies and empirical findings see *Garret*, Too big to jail, 2014, p. 45 ff.
[22] See OECD (ed.), Commentaries on the OECD Convention on Combating Bribery, art. 1 para. 8.