

Facilitation Payments

A Call for Collective Action

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The opinions expressed within this paper are solely those of the author and do not necessarily reflect those of the Basel Institute on Governance or the University of Basel.

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1 The Asian air cargo terminal¹

It had rained the night before so the streets had become muddy. And even though it is hot, the air is so humid that nothing really gets dry, including my shirt. From the corner I watch a small truck approaching the entrance to the cargo airport. Well, entrance... it is not much more than an opening in a fence. The driver steps down from his truck and presents a bunch of papers to the guard who is watching the gate. The guard reshuffles the papers without much interest. The driver grasps his wallet and hands over a banknote to the guard. The guard looks at him, scribbles something on the papers and gives them back to the driver. The guard opens the gate in the fence a bit further, gesturing to the driver that he should hurry up. The driver gets back in his truck and drives through the gate.

I ask one of my guides: “What have I just seen?” He says: “Well, the guard is supposed to check whether the content of the truck matches the papers that the driver presented. But the driver just gave him some money in order to pass the gate.” “But what happens if the driver does not pay?” I ask. “In that case he will have to open the truck, unload a large part of the carton boxes that he carries, so the guard can perform his check. The driver will have to put these boxes in the mud on the street, the cartons will get wet, and a large part of the cargo will become useless. The shops in Europe and the US are not going to pay for that anymore. Also, the whole inspection of the truck will take 20-30 minutes. So the driver just pays”. “Ok, I see. And how many drivers just pay?” “Everybody, of course. I don’t think that any driver would seriously consider not paying. It won’t even come up in their mind not to pay.” I watch the gate for another 30 minutes from a distance and have to confirm that my guide is right. All the drivers just routinely pay. Moreover, as more and more trucks and vans are approaching the fence, a sort of chaotic traffic jam arises in front of the gate. There is only one guard and the drivers are becoming more and more impatient; they honk their horns and make wild gestures urging the drivers and the guard to speed up the process. The guard sometimes answers by returning the gestures. I don’t think that any driver is going to refuse the payment at this moment.

I am visiting the air cargo terminal in an Asian country. The employees of the company that I am working for and their subcontractors have been complaining that they face demands for facilitation payments that they find very hard to refuse. Inspired by the plans of the Maritime Anti-Corruption Network (MACN) in Nigeria², I have tried to analyze the situation and found out that there are some 36 moments in the logistical process from the warehouse of the local producer to the departure of the plane from the country where demands for facilitation payments are made. We have been successful in reducing the payments, but so far it has been impossible to get rid of them all.

As the compliance advisor of a logistics company I am at the same time confronted with clients who demand that the company signs zero facilitation payments clauses, sometimes including a flow-down to our subcontractors, prohibiting every party in the supply chain to make a facilitation payment. If we don’t sign these clauses, the business will go to a competitor. That is, some clients are open to a discussion on this topic. But other clients just demand that we sign and shut up. I am wondering how our competitors deal with this. Surely I will be able to find subcontractors who are prepared to sign a zero facilitation payments clause. But I want to know, see and feel what is really happening on the

¹ This story is based on true facts, but has been made anonymous. Also, some of the details have been changed.

² See “Corruption Assessment in the Nigerian Port Sector”, MACN Executive Summary, March 2014

ground and whether these subcontractors can truthfully sign these clauses. So I decided to travel to this country in Asia. It took me a while to get my surprise visit organized. But now I am here, where it all happens.

One of my local colleagues and an employee of one of our local subcontractors guide me through the gate. I carry my passport with me, just in case, but nobody seems to bother about that. Even though I am not wearing a suit today but just jeans and a shirt, everybody immediately recognizes me as a foreigner.

Though I know from the newspapers that horrible crimes are committed sometimes in this country, everybody is extremely friendly and welcoming. Everywhere I go people gather around me and offer me a drink. It's not really the anonymous visit that I had envisioned, but luckily my two guides point out to me what to look for. So I watch the trucks, vans and minivans getting unloaded. The cargo gets stored. As I walk through the cargo terminal I notice the trademarks of many of the premium brands that I usually see in the supermarkets back home in The Netherlands, but also some of the not so premium brands and the names of a couple well-known cheap outlets.

A bit further on in the logistical process the cargo is palletized and sealed. An electrical pallet truck arrives to pick up the cargo. In the end a number of pallets are attached to each other in sort of a row so they can get tugged into the plane. I notice that for every movement, handling or whatever a cash payment is made. And it doesn't look like it is an official tariff; nobody gets a receipt. When you look at it from a distance, as I do now, it almost looks like giving a tip. The only difference is that you normally give a tip after you have received a service that you appreciated. In this case nothing will happen if you don't give the 'tip'. Your cargo will just stay there and nobody will care. As a matter of fact, I think that I notice some cargo in the terminal that looks like it has not been touched for years.

Not only that, as I approach the area where the planes get loaded, I notice that there are also quite a lot of broken planes and skeletons of planes in the area. It almost looks like somebody created a graveyard for planes over here. What a mess.

My guides point out a guy to me who is driving a pallet truck wearing boxer shorts, a tank top and flip flops. They whisper that he is one of the richest persons in the country. I find that difficult to believe from his appearance. Most men in the terminal wear long trousers and a shirt. He really doesn't look like he has any money to spend. But my guides explain to me that he has forced all the terminal employees to give him a cut of all the payments that they gather.

Then I am in for the highlight of my visit: the customs department. I enter one of the rooms and immediately sense that my entrance is causing some commotion, but I can't really figure out what is going on. Within one or two minutes most of customs officials present their broadest smile and I am guided around the room, shaking hands with the officials. Most of them come across as rather friendly, not at all like the stubborn personalities that refuse to do anything without a payment, though there are also a few people who give me the impression that they would rather see me leave as soon as possible. My entrance has definitely stopped all business activity for the time being and everybody is looking at me. There is clearly nothing for me to quietly observe so once I shook everybody's hands and had some chit-chat, I walk out of the door again. The moment that we leave the room my guides start to grin and slap my back. I haven't got a clue what all the fun is about.

"Didn't you see these guys closing these big books and shoving them in the drawer underneath their desk as soon as you entered the room?" No, I had not noticed that, though I had sensed a slight panic and noticed some wild movements. "Well, these books that they were trying to hide contain the shadow

administration. In this office nobody trusts each other. All the customs officials are obliged to ask for facilitation payments. They register them in these big books. At the end of the day they have to pay a percentage of their earnings to their superiors. And once in a while their managers compare the official customs administration to the shadow administration to ensure that the clerks behind the desk are not cheating and that they get their cut.” Wow, that is by far the most interesting discovery today and I had totally missed it. What a shame.

Back in the cargo terminal it is clear that my visit had not passed unnoticed over there as well. A whole crowd of cargo terminal employees, employees of our competitors, customs brokers, cargo handlers, and etcetera gather around me and insist that they want to have a picture with me. Everybody seems quite enthusiastic about the idea so it becomes hard to refuse. So far I had not dared to take a picture myself; moreover, I had noticed the sign that indicated that it was prohibited to take pictures. Nevertheless, I consent and have the picture taken. It still serves as a nice memory to my visit.

Unfortunately, this also means that my last hope to quietly watch people making facilitation payments from a distance has gone and we decide to leave.

As the guides drive me back to my hotel, they take a little detour. We stop in front of a huge estate. I can just look over the wall and see an enormous garden that stretches as far as I can see, with a huge house at the back which seems to contain at least 20 rooms. There are also a couple smaller buildings. My guides inform me that this is the estate of the guy with the boxer shorts, tank top and flip-flops. They tell me that all of his extended family lives here, as well as his servants. I realize that I will never ever make as much money as he does. But I also consider myself lucky because I don't have to provide an income for my uncles, aunts, nephews and nieces, as well as the gardener. And while it gets dark, we approach my hotel.

While my visit had not totally met my expectations, I have thought about it a lot, even now, a couple years later. It has served as a reality check. It also made me humble. I realized that, as things are organized the way that they are, not a single company will be able to withstand the demands for facilitation payments. I will elaborate on these thoughts in the next paragraphs. But first let's have look at the definition of a facilitation payment, the prosecution risk and what compliance policies nowadays say about facilitation payments.

2 Definition of a facilitation payment

There are various definitions of a facilitation payment or facilitating payment. I prefer this one:

“A facilitation payment is a small payment or gift, made to a lower level government official in order to secure something that you are entitled to get anyway.”

Facilitation payments are not about obtaining an unfair advantage. However, sometimes that distinction is difficult to make. When conducting compliance training I usually explain that, when you are standing in front of the customs official and your papers are on top of the pile, the customs official looks at you and makes a gesture like he is going to stack your papers at the bottom of the pile again, some people make a small payment or offer a cigarette to secure that their papers are handled. This is not an unfair advantage, as it is your turn anyway. I call that a facilitation payment.

In a number of countries in Africa and Asia truck drivers are pulled over by the local police, who request a small payment. This may occur a couple times per day. Not paying is usually not an option. A police officer may smash one of the lights of your truck and then give you a fine for a broken light. There are even stories where truck drivers, who kept on refusing to pay, were killed. So most of them just pay in order to obtain what they are entitled to get, namely free passage. I call that a facilitation payment.

Still, there are also situations where it is less clear whether you are obtaining an unfair advantage or not, when making the payment.

In the logistics industry they sometimes refer to facilitation payments as speed payments. I find that a confusing term. Sometimes it is also possible to make an official payment to speed up a process. In that case the rates for the 'fast lane' are usually published and you will get a receipt. There is a risk that people classify all speed payments as facilitation payments, while some of them are legal payments and others should be qualified as bribes. For example, when one would make a payment to a customs official so he doesn't check the content of a container, this will speed up the process, but it also generates an unfair advantage. But how should one then qualify the payments at the gate of the Asian air cargo terminal, which I described at the beginning of this article? Everybody pays them, so do you obtain an unfair advantage when you make this payment to prevent the inspection? This is just one example out of many where you can have a debate about whether a payment is a facilitation payment or not.

3 Prosecution of facilitation payments

While only a few countries make an exception in their law in respect of facilitation payments - the most prominent one is probably the USA³ - so far hardly any company or individual has been prosecuted for making facilitation payments abroad. Most prosecutors have to determine priorities and weigh what would be in the public interest of their country. So far no public prosecutor has shown an interest in going after all these tiny facilitation payments all over the world. Considering how widespread this practice actually is, it would be impossible to do this. There are a couple cases where payments to customs officials or to licensing authorities have been prosecuted⁴, however, this concerned relatively large payments, that should not be labelled as facilitation payments. So while it is usually prohibited to make a facilitation payment abroad, the risk of being prosecuted for making a facilitation payment abroad is quite small.

The risk for a multination company of being prosecuted locally for making a facilitation payment is also quite small. In countries where corruption is rife, this is sometimes considered a normal business practice. Some countries are more active in prosecuting local facilitation payments than others. Remarkable is that most countries tend to prosecute the demand side of the local facilitation payment, namely the person who is requesting the payment, i.e. the government official. International companies are hardly ever prosecuted for making a facilitation payment locally. Many times the demand for a facilitation payment is considered by the local authorities as a form of extortion and as the supply side,

³ The other countries are Australia, New Zealand, Canada and South Korea

⁴ See the settlement of the Swiss freight forwarder Panalpina with the US authorities, regarding payments to the Nigerian customs authorities, for example.

the payer, is usually hardly in a position to refuse, only the government official who demanded the payment gets prosecuted.

4 Company policies on facilitation payments

Despite of the lack of law enforcement in this area, an increasing number of companies prohibit their employees, agents and sub-contractors to make facilitation payments. In some parts of the Western world it has become sort of a no-brainer that your anti-corruption policy should not allow an employee to pay any facilitation payments.

After all, almost all countries prohibit companies and people to make facilitation payments abroad. And virtually everywhere it is prohibited to make a local facilitation payment according to local law. And as it is not always easy to make the distinction between a facilitation payment and a bribe, it is much easier to just prohibit them both, in order to prevent any mistakes.

There are also still companies with a less explicit policy in respect of facilitation payments. However, this group of companies is getting smaller.

Some companies claim that they haven't made facilitation payments, directly or indirectly, for years. So that includes the company, their agents and their supply chain. In some industries this may be possible. In the financial or IT services industry for example, it should be possible to avoid facilitation payments, even as a global player.

For companies that deal with logistical processes and customs procedures in Latin America, Africa and/or Asia it is almost impossible to avoid facilitation payments in the supply chain and sales channel. Even though there is a growing number of guidelines and best practices,⁵ I have become quite skeptical about the possibility to avoid these payments.

I am aware, though, of situations where it appeared to be possible to negotiate an exception for a certain company, as it is commonly known that the policy of this company prohibits them and their subcontractors to make facilitation payments. One of the arguments to be used towards the local government officials in such a case would be that otherwise this company would withdraw from the country, which would not be in the public interest of the country where the demand was made. This only works in situations where the company provides products or services that are essential to the local economy. These kinds of situations are rare. Still, these companies will usually not be able to escape from having facilitation payments made somewhere in their supply chain, in situations similar to the one that I described at the beginning of this article. And let me add two more examples.

Suppose that the products of this company are on a large container ship. The container ship is stopped somewhere by the local (port) authorities and a demand is made for a facilitation payment. Will the captain of the ship refuse the payment because there is one company, representing a tiny percentage of the volume of the cargo that is really serious about the prohibition to make facilitation payments?

⁵ See for example: Transparency International UK, Countering Small Bribes, Principles and good practice guidance for dealing with small bribes including facilitation payments (2014)

Also, many companies rely on the certifications that are signed by their subcontractors. But in the end there may always be a truck driver somewhere in Africa or Asia who takes care of the first or last part of the logistical process. Suppose that you are a truck driver in Afghanistan or Tanzania and you are presented a contract with a zero facilitation payments clause. Will you sign, if signing means that you will have something to eat today? Are you able to understand what the contract implies?

I once had the bizarre experience that most attendees of my anti-corruption training in an Asian country confessed during the training that they had made a facilitation payment in order to get to my training. In order to reach the training location, they had to pass a bridge, where facilitation payments were demanded. To avoid the facilitation payment, they would have had to walk an additional 4 kilometers. So what do you do?

I once tried to make an informal analysis of the companies which are the toughest on prohibiting facilitation payments. I noticed that many times these companies have been prosecuted by or are under investigation of the US authorities. At first I thought that was quite remarkable, as US anti-corruption law makes an exception for facilitation payments made abroad. On second thought I realized that companies that are investigated by the US authorities are usually asked about their policy in respect of facilitation payments. Saying “we allow them” is usually not the best answer when you are in these conversations, when you want to demonstrate how serious you are about prohibiting bribery, while trying to avoid a major fine. Also, any suppliers to the US government will be aware that the US government does not want to spend tax payers’ money by making facilitation payments abroad. So we end up in the strange situation that, whereas the US anti-corruption law has an exception for facilitation payments made abroad, US companies, issuers on a US stock exchange and agents of US companies are actually the keenest on putting a zero facilitation payments clause in place. And since the introduction of the UK Bribery Act, a number of companies with a big UK presence have followed.

In a recent survey of AmCham Singapore and the US Chamber of Commerce, 50.3 % of the respondents indicated that pressure to bribe officials for routine government services was “some hindrance” or a “serious hindrance” to their business.⁶ The respondents were AmCham members in the ASEAN countries. I think that this clearly demonstrates the challenges that companies are facing.

5 The detrimental effects of facilitation payments

A lot has been said and written about the devastating effects of facilitation payments and I am not going to repeat that here.⁷

Some people claim that facilitation payments are rather harmless. They may argue for example that in some countries the wages of the lower government officials are so low that they are almost forced to ask for a facilitation payment; otherwise they can’t make a living. While there may be an element of truth in that in some countries, it is not a valid argument in a whole lot of other countries. In many

⁶ See more at: <http://www.fcpablog.com/blog/2016/9/7/john-bray-threats-and-pressure-still-drive-facilitation-paym.html#sthash.VT2JiLcJ.dpuf> and

⁷ See for example: Transparency International, Anti-Corruption Helpdesk, Evidence of the Impact of Facilitation Payments (2013)

countries the lower level government officials are paid a wage with which they can pay for the basic needs of themselves and their family. They also enjoy other benefits, like health insurance and a government pension.

As we saw from the example of the air cargo terminal in Asia, facilitation payments may be small. But if you add them all up, the total amount may be a large number. Many times the lower government officials have to pay a percentage to their manager. And they also have to pay a percentage to their manager. Or sometimes the lower government official needs to pay his manager in order to get hired. Some of these officials have taken out a loan in order to pay for this bribe.

I believe that the widespread use of facilitation payments leads to a sub-optimal allocation of resources, hinders equal opportunities and facilitates other unfair practices like forced labor and human trafficking. It disrupts sustainable economic growth and undermines trust in government institutions and society in general.

6 A call for collective action

So facilitation payments are detrimental to the society, nobody likes to pay them, but they are also extremely hard to avoid in certain countries. They are the elephant in the room: everybody knows that they are there, but hardly anybody wants to see them, let alone to openly discuss them.

This is a challenge for Ethics & Compliance Officers, who encourage employees and business partners to come forward with any issues and discuss them openly, in order to raise the integrity of the organization. While there are Ethics & Compliance Officers who are brave enough to talk about this topic, I think that all Ethics & Compliance Officers should be prepared to open their eyes, face this challenge and participate in the discussion.

What can we do to improve this situation? From the cases which I described above it is clear that it is impossible for a single company to change the situation. How can one company fight a pyramid scheme at a local customs office? How can you find out where the pyramid stops? Suppose that you are discussing the abolishment of demands for facilitation payments with a higher level government official, how do you know that he or she himself is not benefiting from these payments? The only solution which I see is to join forces and engage in collective action.

A collective action initiative of express carriers has been initiated in Vietnam in the past through the Partnership Against Corruption Initiative of the World Economic Forum. Regretfully, that initiative did not deliver all the intended results. But we can draw some good lessons from that case. The Maritime Anti-Corruption Network on the other hand has made considerable progress. And they are able and prepared to share lessons learned. I am sure that we will hear more about best practices during the ICCA conference in October 2016. My goal with this article has been to open everybody's eyes and invite companies to engage in collective action.

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On January 1 2016 Geert started his own company, Ethics & Compliance Management & Consulting (ECMC). His goals are to help organizations conduct business in an ethical way and make the world a slightly better place.

Through ECMC Geert provides interim compliance management, ethics and compliance consulting and compliance education and training. Geert also speaks and writes on compliance and ethics.

Before starting ECMC Geert worked as a Director of the Netherlands Compliance Institute (NCI). As compliance officers now became Geert's clients, he stepped down as the president of the Dutch Compliance Officer Association.

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