

Transparency International (UK)



Research Note RN-001

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Facilitation Payments in the Legislation of Signatories to the OECD Anti-Bribery Convention

This 'Research Note' is the first in what we trust will develop, over time, into a series of papers addressing a wide variety of corruption-related issues. 'Research Notes' will be distinguished from our 'Policy Papers' and 'Policy Briefs' in that they present information to inform debate without containing any statement of TI(UK) policy on the subject in hand.

This first paper, on the subject of facilitation payments is based on an analysis of country reports from stage 1 of the CIME peer review process which has followed up the OECD Convention. It is not based on examination of the primary documents of national legislations, nor has it been re-checked by legal experts in the various countries to which reference is made. We are very grateful to Ms. Kamala Dawar for volunteering to carry out the research for us in late-2001. It has proved extremely useful in many discussions during the past year, and following repeated requests we are now making it more widely available in this format, although in some countries (including the UK) there have been legislative changes in the interim.

The document is not intended to provide legal advice, and should not be treated as anything other than a preliminary study of the differences in the ways that, according to the CIME reports, facilitation payments are treated in the laws of the different countries. On this level we hope that it will continue to prove useful. In addition to the text we include two more detailed tabulations which further illustrate the differences between countries. As the global TI movement continues to debate the issue we trust that this will prove to be a useful informational input.

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1. Introduction

Bribery and corruption have been rising higher on the international agenda since the late 1980s due to a growing worldwide concern that the bribery of foreign government officials, especially in the course of international business transactions, has become a serious threat to the development and preservation of democratic institutions. It has become widely accepted also that corruption undermines economic development and distorts international competition by seriously misdirecting resources and management time.

Following the adoption of the OECD's first Recommendation on Combating Bribery in International Business Transactions in 1994, and on the elimination of the practice of allowing tax deductions for bribe payments in 1996, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) was finally signed in Paris in 1997. This Convention entered into force on 15 February 1999 and more than 30 signatory countries have deposited instruments of ratification or acceptance of the convention.

The OECD Convention prohibits payments or provision of other advantages to foreign public officials for the purpose of obtaining or retaining business or other improper advantage in the conduct of international business.

The OECD takes a multifaceted approach to fighting bribery, recognising that tackling the supply side and the demand side of the bribery transaction requires different prevention measures. It recognises also that cutting the supply of bribes requires more than criminalizing the act of bribing a foreign public official; businesses themselves must play their part by addressing the practice of bribery internally through changing the corporate culture that enables it to continue.

It is not claimed that the 1997 Convention solves the entire bribery problem. It focuses on one aspect, on "grand corruption", or bribery for the purpose of obtaining or retaining international business. Smaller payments to public officials to "expedite or secure the performance of acts of a routine nature that are part of their usual duties or functions" (often known as 'facilitation payments') are placed outside its scope.

Such payments are commonly associated with accelerating the issuance of licences, the processing of official documents (such as work permits or visas) and the provision of public services - for example mail, telecommunications, power, water and police protection. Facilitation payments, also termed 'speed-', 'tea-' or 'grease money', being made to induce public officials to perform functions that are part of their routine duties, do not constitute payments made to obtain or retain business or other improper advantage and thus are not an offence under the Convention. [Commentaries to the Convention, Article 1.9].

The Convention does not, however, condone facilitation payments, nor does it consider them to be unimportant or trivial, nor even as a matter of lesser urgency. They are recognised as a serious problem. The Commentaries appended to the main text of the Convention note that in many countries facilitation payments are already illegal and recommend that this form of corruption should be fought through good governance programmes at national level in the developing world rather than by criminalisation internationally in the developed world. Many very low-level officials

rely on such gifts and facilitation payments as their remuneration, being very poorly paid, and in writing the Convention it was felt that for wealthier states to criminalize such low level payments would be to interfere in matters best handled via local clean-up initiatives. The question was not whether action was needed to address the widespread curse of 'grease' but rather, what kind of action? Also, a clear focus within the Convention would avoid the risk of distraction from the primary task of preventing larger-scale corruption.

This "grand bribery" approach has, however, resulted in some ambiguity surrounding the status and criminalisation of facilitation payments. While the OECD "urges all countries to fight this form of corruption," it offers few clear guidelines as to how. The following sections look at contrasting examples of how the signatories to the Convention have chosen to address the issue within their anti-corruption laws. Some have followed the line described above; others have not.

2: Five Approaches

The following paragraphs are based on a study of the published papers from the Phase 1 CIME review of the implementation of the OECD convention. The review teams were not the same in each country, and the precise methodology appears to have varied somewhat from country to country. Nevertheless their reports provide valuable sources of data for a preliminary study (recognising that some countries may have changed their laws since being reviewed in 1999/2000).

2a: No Exemption - Explicit inclusion

The 'No Exemption' approach can be seen in the Finnish Penal Code, where foreign bribery offences are not restricted to bribes given in order to obtain business or other improper advantage. This penal code explicitly states that small facilitation payments made to induce acts of a routine nature from public officials are not exempted from the offence of bribery. In such cases, it would seem that prosecution is probable, for there is no ambiguity or prosecutorial discretion regarding the nature of the act or the size of the payment.

The no exemption approach has also been adopted by: Argentina; Belgium; Bulgaria; Denmark; France; Greece; Hungary; Japan; Republic of Korea; Luxembourg; Mexico and Poland. (However, the OECD Working Group considered that Argentina, Bulgaria and Japan generally do not conform to the OECD Convention requirements. In Denmark and Korea, the Working Group considered that facilitation payments were not sufficiently well defined, while in Greece and Hungary the Working Group considered that there were significant loopholes in the law.)

2b: Not specified - Implicit Inclusion

In Austria, there is no explicit exemption of facilitation payments from the offence of bribery. Nevertheless, when queried on this point by the Working Group, the Austrian authorities confirmed that facilitation payments were considered to give an advantage and are therefore not exempt from the offence under the Austrian Penal Code.

The Amendments to the Czech Criminal Code do not specifically mention facilitation payments. Czech law does not know the term "socially acceptable gifts", and it was stated that the Czech legal order does not tolerate bribes of even a negligible value. However, the OECD Working Group were concerned that there were loopholes surrounding criminality in cases where the briber was under duress and reported the offence immediately, and also concerning the issue of 'effective repentance'.

Germany, Italy, Spain, and the UK do not explicitly address the issue of facilitation payments, and implicitly these payments fall within the ambit of the offence of bribery. The Working Group did not express concern over this implicit inclusion. (In the case of the UK, there was a more general lack of clarity in the law dating back to Acts of the late-19th and early-20th centuries and, in the opinion of the review team, an over-dependence upon future judicial interpretation. Since the review, in late-2001, tougher new UK legislation has come into force which does implicitly treat facilitation payments as bribery).

In Iceland, under the General Penal Code of 1998, there is no explicit exception made for small facilitation payments from the offence of bribing a domestic or foreign public servant. However, the OECD Working Group considered that these payments are probably not criminal because the punishable act is of the use of bribery in relation to a public official, or an official of a public international organisation, with the aim of obtaining or retaining business or other improper advantage in the conduct of international business, which does not include facilitation payments.

2c: Prosecutorial discretion

In the Netherlands, facilitation payments are explicitly defined as small payments to low-level public officials for the purpose of inducing them to do something that is not in contravention of their public duties. However, rather than being unequivocally criminalized, prosecutorial discretion can be exercised and in certain circumstances it would be possible not to prosecute a case involving facilitation payments. The Working Group showed some concern about this approach and recommended careful monitoring with a view to issuing guidelines for corruption cases involving facilitation payments.

In Norway, the penal code also gives the prosecution the discretion not to prosecute the giving of facilitation payments. This is because the presence of the word 'illegally' denotes that minimal gifts required in a foreign public official's country are exempt. The Working Group did not express any concerns on this issue.

(Although the UK has been included in the "Implicit Inclusion" section above, since the passing of the new law in December 2001 there has been some debate as to the circumstances under which the Crown Prosecution Service would or would not proceed with a prosecution under the three tests of (i) probability of achieving a successful prosecution, (ii) the public interest, and (iii) the Attorney General's consent. It is arguable, therefore, that the UK should now be in the category of 'Prosecutorial Discretion').

2d: Explicit Exclusion

In Switzerland, advantages of minor value in conformity with socially accepted practices are not considered to fall within the offence of bribery because advantages of this nature are not considered to be 'undue' advantages. The OECD Working Group considered that this was satisfactory where the advantages were thought to be insignificant and represented no risk of inciting public officials to behave in a manner inconsistent with their duties. However, the Working Group was concerned to ensure that all Swiss courts systematically adopt this position rather than refer to social practices accepted in a particular foreign public official's country.

The Swedish Penal Code treats the offence of bribery in accordance with the OECD Convention, and therefore considers that small facilitation payments do not constitute an improper reward. The decision as to whether or not a reward is "improper" is left to the discretion of the courts and the Working Group did not raise any questions on this issue.

2e: Explicit Exclusion - Defence for Facilitations

In some respects this category fits under "Explicit Exclusion" above, but is listed separately because in some countries, although it would be untrue to say that there is no risk of prosecution, there exist relatively sophisticated criteria for distinguishing facilitation payments from bribes to obtain business.

Under the US 1988 Amendment to the Foreign Corrupt Practices Act, facilitation payments are explicitly excluded from its definition of bribery. Facilitation payments are described as small payments to low-level government officials whose duties are essentially administrative or clerical. Examples include small payments to enable or speed up a legitimate process, such as licenses, permits, and clearing goods through customs. Facilitation payments are distinguished from bribes, which involve paying someone to do something improper or illegal. Gratuities given to foreign public officials are allowed as long as they are used to aid the processing of 'routine governmental action' and are not 'inappropriately large.'

While the US Amendments to the FCPA generally conform to the OECD Convention, the Working Group were concerned that although a qualifying list of these actions had been drawn up to aid the defence for facilitation payments, the list of payments was not sufficiently well defined, along with the discretionary nature and legality of the reciprocal act. This left potential for the defence to be misused.

Australian legislation contained within the Amendments to the Criminal Code recognises a defence for facilitation payments, provided the payment or benefit that is given is of a minor nature and for the dominant purpose of achieving a 'routine government action'. Small sums paid to induce officials to perform their lawful functions, such as issuing a licence or permit are therefore excluded from the charge of bribery because it is thought that this form of corruption is better left as a domestic matter in the country concerned.

Nevertheless, while facilitation payments are not prohibited under the legislation they must be disclosed and described; companies will be liable for a fine if facilitation payments are not adequately disclosed and explained in the accounts. The Australian authorities state that the purpose of the record requirement is to ensure that the defence is only available upon full disclosure of the nature of the payment in record. This is needed to prove that the payment was actually a "genuine facilitation payment to secure or expedite non-discretionary routine government action of a minor nature."

While Australian law generally conforms to the OECD Convention, the OECD Working Group nevertheless considered that the Australian decision not to define a specific money value to qualify "small" facilitation payments could lead to ambiguity. It was suggested that although a facilitation payment may be immaterial by virtue of its size, whether or not the potential effect was material would only become apparent with hindsight. The Working Group also suggested that some of the items considered to be routine government actions entailed a degree of discretion, which could serve to create a lack of clarity in the defence.

In Canada, facilitation payments are defined under the Corruption of Foreign Public Officials Act of 1999 as payments to public officials to 'expedite or secure the performance of acts of a routine nature that are part of their usual duties or functions'. These acts include the issuance of permits and licences, the processing of official documents (such as work permits or visas) and the provision of public services, for example mail, telecommunications, power, water and police protection.

In agreement with the Commentaries to the OECD Convention, Canada states that small facilitation payments do not constitute payments made to obtain or retain business or other improper advantage and are not an offence. The wording of this exception of facilitating payments and reasonable business expenses adopts some of the concepts and wording of the "facilitation payment" exception in the U.S. Foreign Corrupt Practices Act (FCPA), in recognition of the fact that many Canadian companies are obliged to comply with the provisions of the FCPA. The Working Group considered the exemption of "reasonable expenses incurred in good faith..." and payments to secure "acts of routine nature" could affect the implementation of the Convention.

3: Conclusion

The above analysis illustrates the difficulty which countries on the supply side of bribery have with facilitation payments.

They are often seen as different from 'real' bribes, and yet in many places they are in fact seen by some researchers as the low-level, visible manifestation of hidden criminal hierarchies of extortion. Even where this is not the case, local populations struggle under the burden of constant demand for unofficial payments - and it is ultimately the poor who suffer the most.

Even from a business point of view, facilitation payments can create more problems than they solve. In theory they buy time but in practice they can actually cause delays by giving officials an incentive to create obstacles so they can be paid off for removing them. 'Speed money' can actually

slow down service, impeding both efficiency and the overall legitimacy of public institutions.

The OECD Convention adopts a pragmatic approach to facilitation payments. Although it does not sanction facilitation payments, and recognises their seriousness, it has excluded such payments from its definition of bribery and supports the battle against this form of corruption through good governance programmes.

The lack of clear guidelines on how the national governments should discourage or criminalise these practices has been accompanied by the continuation and emergence of varied approaches to the status and criminalisation of facilitation payments. These include the explicit and implicit inclusion and non-inclusion of such payments within the crime of bribery, the prosecutorial discretion/non-discretion and the defence for facilitation payments approaches.

Whether or not the best way to reduce facilitation payments is to criminalise them in other ('supply side') countries is a point which will be argued for a long time. This paper does not set out to answer that question.

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Comparative Tables

Country	Relevant Article conforming to Convention	Conforms to Convention?	Areas of Recommendation	Specifically Mentions Facilitation Payments?
Argentina	Article 258	No	1. Elements of the Offence i) Definition of foreign public official ii) Third Parties iii) In order that the official act/ refrain from acting in relation to the performance of official duties 2. Responsibility of Legal Persons 3. Imprisonment sanctions for natural persons 4. Jurisdiction 5. Tax Deductibility	Yes
Australia	Criminal Code Act 1995. The amendments include a codification of the offence of bribing a foreign public official in section 70.2, all the relevant definitions including one of "foreign public official" in section 70.1, and section 70.5, which provides for the territorial and nationality requirements of the offence. The Proceeds of Crime Act 1987, the Mutual Assistance in Criminal Matters Act 1987, the Extradition Act 1988 and the Corporations Law	yes	1. The offence of bribery of foreign public officials 1.1 Interpretation of paragraph 8 of the Commentary to the Convention: an offence is not committed if the advantage is not prohibited under the law of the foreign public official's country. 1.2 Defence for facilitation payments 2. Sanctions	Yes
Austria	Amendments to sections 307 (offence of bribery) and section 308 ("trafficking in influence") of the Austrian Penal Code	No	1. Definition of "foreign public officials" 1.1. Coverage of appointed and elected officials 1.2. Public officials of other EU member states 2. Responsibility of legal persons 3. Sanctions 4. Small facilitation payments	No
Belgium	Amendments to Articles 246 and 247 of the Criminal Code	Yes	1. The offence of bribery of foreign public officials 1.1 The definition of foreign public official 2. Jurisdiction 2.1 Nationality jurisdiction II. Tax deductibility	No
Bulgaria	Article 304 of the Penal Code	No	1. Elements of the offence 1.1 To offer, promise or give 1.2 Any undue pecuniary or other improper advantage 2. The defences 3. Responsibility of legal persons 4. Seizure and confiscation of the bribe and its proceeds	Yes
Canada	The Corruption of Foreign Public Officials Act	Yes	1. Elements of the offence 1.1 The defences for "reasonable expenses incurred in good faith" and "acts of a routine nature" 2. Corporate criminal liability 3. Sanctions 4. Nationality jurisdiction	Yes
Czech Republic	Amendments to the Czech Criminal Code, particularly Sections 161, 162, 163	Yes	I. Specific Issues 1. Non-punishability in case of "effective repentance" 2. Responsibility of legal persons II. Non-deductibility of bribes	No
Denmark	The Danish Act No. 228	Yes	1. The term "unlawfully" 2. Definition of Foreign Public Official 3. Third Parties 4. Legal Persons 5. Sanctions 6. Confiscation 7. Nationality Jurisdiction 8. Statute of Limitations for Legal Persons	Yes
Finland	Finnish Penal Code: Sections 13, 14, 20	Yes	1. Actions in relation to the performance of official duties 2. Forfeiture of bribe 3. Jurisdiction 4. Sanctions against a corporation 5. Accounting	Yes
France	Amendments to Title III of the Criminal Code by inserting Chapter	Yes	1. Definitions of foreign public	Yes

Country	Relevant Article conforming to Convention	Conforms to Convention?	Areas of Recommendation	Specifically Mentions Facilitation Payments?
	V, "Breach of the Public Administration of the European Communities, Member States of the European Union, Other Foreign States and Public International Organisations"		officials 2. Elements of Office 3. Criminal Responsibility of Legal Persons 4. Jurisdiction 5. Rules for Instituting Prosecutions 6. Statute of Limitations	
Germany	Act on Combating Bribery of Foreign Public Officials in International Business Transactions	Yes	1. Performance of official duties 2. Responsibility of legal person 3. Enforcement 4. Statute of limitations	No
Greece	Article 2 of Act 2656/1998	Yes	1. The Convention as a whole 2. The offence of bribery of foreign public officials 2.1 The definition of foreign public official 3. Responsibility of legal persons 4. Confiscation 5. Jurisdiction 6. Enforcement	Yes
Hungary	Amendments to the Criminal Code under the new title "Crimes against the Integrity of International Public Life"	Serious Loopholes	1. Elements of the offence Section 258B/3 of the Hungarian Criminal Code provides a defence in the case of the bribe being given upon the initiative of the public official because the briber feared unlawful disadvantage in case of his refusal. 2. Responsibility of legal persons 3. Sanctions 4. Statute of limitations	Yes
Iceland	Act No. 147/1998 of the General Penal Code	Yes	1. Level of sanctions vis-à-vis legal persons 2. Statute of limitations	
Italy	Amendment of Article 322 to the Criminal Code	Yes	1. Third Party 2. Payments after performance of duty 3. Exception: Abuse of power by the public official (<i>concussione</i>) 4. Responsibility of legal persons 5. Sanctions 6. Overlapping jurisdictions	
Japan	Amendments to the Unfair Competition Prevention Law establish the offence of bribing a foreign public official, define "foreign public official" and provide sanctions. Other existing laws, including the Penal Code, the Code of Criminal Procedure and the Commercial Code contain provisions relevant to the other obligations under the Convention.	No	1. The offence of bribing a foreign public official 1.1 "Main office" exception 1.2 Definition of foreign public official in relation to public enterprises 1.3 Third party beneficiaries 2. Sanctions 2.1 Fines in relation to legal persons 2.2 Seizure and confiscation 3. Nationality jurisdiction 4. Statute of limitations II. Tax deductibility	Yes
Korea	<i>The Act on Preventing Bribery of Foreign Public Officials in International Business Transactions</i> ("FBPA")	Yes	1. Terms used for describing the subject of the bribe 2. Small payments 3. Third parties 4. Seizure and confiscation 5. Jurisdiction	Yes
Luxembourg	Law of 15 January 2001 amending the Criminal Code, the code of Criminal Procedure and the Law of 4 December 1967 on income tax	Yes but there is a serious loophole in the Luxembourg legislation concerning the liability of legal persons.	1. Liability of legal persons. 2. Confiscation 3. Rules for instituting prosecutions	Yes
Mexico	Amendment to the <i>Federal Penal Code</i> (FCC) adding Article 222	Yes	1. Autonomous definition of "foreign public official" 2. Third parties 3. Level of monetary sanctions 4. Criminal liability of legal persons 5. Unavailability of sanctions for	Yes

Country	Relevant Article conforming to Convention	Conforms to Convention?	Areas of Recommendation	Specifically Mentions Facilitation Payments?
			state-owned and state-controlled companies	
Netherlands	The amendments contained in Article I and Article II of the Implementing Bill	Yes	1. Small Facilitation Payments 2. Definition of Foreign Public Official 3. Third Parties 4. Level of Monetary Sanctions for Legal Persons 5. Nationality jurisdiction	Yes
Norway	Amendments to the Norwegian Penal Code: Section 128	No	1. Definition of foreign public official 2. Third persons 3. Corporate liability 4. Sanctions and statute of limitations	Yes
Poland	Act of September 2000 on the Amendment to the Act – Penal Code, the Act – Code of criminal procedure, the Act on Combatting Unfair Procedure, the Act on Combating Unfair Competition, the Act on Banking Orders and the Act Banking Law	Yes	1. Third parties 2. The administrative responsibility of legal persons 3. The forfeiture of bribes and its proceeds 4. Tax deductibility	Yes
Slovak Republic	Amendments to the Criminal Code and the Law on Banks	No	1. "For that official or for a third party" 2. Non-punishability in case of "effective regret" 3. Responsibility of legal persons 4. Sanctions for bribery of domestic versus foreign public officials 5. Statute of limitations 6. Money laundering 7. Accounting/Auditing	Yes
Spain	The <i>Organic Act 3/2000</i> modifies the <i>Penal Code</i> adding Article 445	Yes, with exceptions	1. Definition of the Offence 1.1. Acts or omissions of the foreign public official 1.2 Definition of foreign public official 2. Responsibility of legal persons 3. Sanctions 3.1 Level of sanctions 3.2 Secondary issues	No
Sweden	Swedish Penal Code: Chapter 17, Section 7	Yes	1. Definition of "foreign public officials" 2. Public interest in prosecuting international bribery cases 3. Effectiveness of sanctions 4. Forfeiture of bribe and pecuniary damages 5. Jurisdiction	Yes
Switzerland	Amendment to Criminal Code adding Article 322	Yes, except in respect of liability of legal persons for bribery	1. Any undue pecuniary or other advantage 2. Performance of official duties 3. Liability of legal persons 4. Seizure and confiscation of the bribe and its proceeds 5. Jurisdiction 6. Accounting	Yes
United Kingdom	Prevention of Corruption Act 1906 (1906 Act) and <i>Common Law</i>	No	1. Article 1 of the Convention 1.1 The offence 1.2 Related issues 2. Applicability of U.K. law to foreign Members of Parliament and foreign members of the judiciary. 3. Application of the Convention to U.K. Crown dependencies and overseas territories 4. Nationality jurisdiction 5. Enforcement II. Communications between tax authorities and prosecutorial authorities	No
United States	Amendments to the Foreign Corrupt Practices Act ("FCPA")	Yes	1. The offence of bribery of foreign public officials 1.1 Interstate nexus requirement 1.2 To a foreign official, for that	Yes

Country	Relevant Article conforming to Convention	Conforms to Convention?	Areas of Recommendation	Specifically Mentions Facilitation Payments?
			official, or for a third party 1.3 Affirmative defence and routine governmental action 1.4 Obtaining or retaining business or other improper advantage 2. Sanctions 3. Statute of limitations 4. Accounting	

Country	Conforms to OECD Convention?	Reference to Facilitation Payments?	Definition of Facilitation Payments	Are Facilitation Payments Criminalised?	Ambiguous Criminality?	Is Prosecution likely?	The dividing line between facilitation payments and other bribes
Argentina	No	Yes	Criminal Code Article 258 The offence of bribery contains no exception for facilitation payments	Yes	Yes	- Sanctions for foreign bribery offences are imprisonment of 1-6 years including perpetual disqualification to hold a public office - Domestic bribery sanctions are imprisonment of 1-6 years for the principal offence, 2-6 years or 3-10 years for the aggravated offences (e.g. bribery of a judge, the offender is a public official)	There is no dividing line
Australia	Yes	Yes	Criminal Code Amendments Section 70.4 Defence for Facilitation Payments A person is not guilty of the foreign bribery offence where the person's conduct was to secure or expedite non-discretionary routine government action of a minor nature	No	- No specific money value to better define the "small" nature of such facilitation payments - 'Routine government action' entail a certain discretion	Dependent on size of the payment and nature of the act	Dependent on size of the payment and nature of the act
Austria	No	No	Sections 307 (offence of bribery) and Section 308 (trafficking in influence) of the Austrian Penal Code contain no explicit reference to facilitation payments	Yes	No	Yes	No dividing line
Belgium	Yes	Yes	Article 246 (2) of the Bribery Prevention Act Facilitation payments fall within the scope of Article 246 if they match the other components of the act of bribery	Yes		Yes	No dividing line
Bulgaria	No	Yes	Article 304 of the Penal Code: Small facilitation payments made to induce public officials to perform acts of a routine nature that are part of their functions are not exempted from the offence of foreign bribery	Yes	Legislation limited to a reference to undue pecuniary or other "valuable" advantage. This is narrower than the Convention, excluding some type of advantages from the scope of the offence	No dividing line except in "value" advantage	
Canada	Yes	Yes	The Corruption of Foreign Public Officials Act The offence of bribery exempts "reasonable expenses incurred in good faith" and payments to secure performance of any "act of a routine nature"	No	These are issues that may affect implementation of the Convention	No	"Reasonable expenses incurred in good faith" and payments to secure performance of any "act of a routine nature" are exempted from the offence These terms are seen to be sufficiently well defined in the Canadian legal system as to prevent abuse

Country	Conforms to OECD Convention?	Reference to Facilitation Payments?	Definition of Facilitation Payments	Are Facilitation Payments Criminalised?	Ambiguous Criminality?	Is Prosecution likely?	The dividing line between facilitation payments and other bribes
Czech Republic	Yes	No	Amendments to the Czech Criminal Code (particularly Sections 161, 162, 163) -Czech legal order does not tolerate bribes at all, including bribes of negligible value - Czech law does not know the term "socially acceptable gifts"	Yes	- Bribery of a domestic or foreign public official is not considered an offence if the perpetrator provided or promised the bribe only because he/she was asked to do so and reported the fact voluntarily and without delay to a state attorney or police - The defence of "effective repentance" presents a potential for misuse particularly because confiscation is not permitted because of the non-punishability of the briber	Yes, except in cases of "effective repentance"	"Effective repentance"
Denmark	Yes	Yes	Danish Act No. 228 The offence of bribery includes small facilitation payments although there is an exception clause covering gifts given according to local customs	Unclear	The application of the local customs exception for small facilitation payments are not sufficiently qualified, especially concerning the relevance of the "situation" in the country of the foreign public official, and the absence of limits on the discretionary nature and legality of the reciprocal act of the foreign public official	Unclear	Section 122 of the Criminal Code provides an exclusion from the offence in the following cases: 1. The usual gifts in connection with anniversaries, etc. 2. A grant of a gift as a reward for an act already carried out without any advance promise, except where the gift is an implicit bribe for possible future acts; and 3. Small facilitation payments - The assessment of whether a particular offer, etc. involves a small facilitation payment must take into account the situation in the country in which the public official exercises his office and the purpose of such grant - The case might be covered where the purpose of the gift is to induce the foreign public official to act in breach of his/her duties
Finland	Yes	Yes	Finnish Penal Code: Sections 13, 14, 20 The offence of foreign bribery does not exempt small facilitation payments made to induce public officials to perform acts of a routine nature that are part of their functions	Yes	No	Yes	No dividing line
Greece	Yes	Yes	Article 2 of Act 2656/1998 Small facilitation payments made to induce public officials to perform their functions constitute an offence	Yes	Questions were raised in general in relation to the meaning of the direct applicability of the Convention in domestic law	Yes, but should a conflict arise over the interpretation of the Convention and its Commentaries, the prevailing practice of Greek courts indicates that it would be resolved in favour of the accused	No dividing line

Country	Conforms to OECD Convention?	Reference to Facilitation Payments?	Definition of Facilitation Payments	Are Facilitation Payments Criminalised?	Ambiguous Criminality?	Is Prosecution likely?	The dividing line between facilitation payments and other bribes
Hungary	Serious Loopholes	Yes	Hungarian Criminal Code Subsection 258/B (1) There is no exception to the offence of bribery for small facilitation payments	Yes	- Section 258B/3 provides a defence for facilitation payments in the case of the bribe being given upon the initiative of the public official because the briber feared unlawful disadvantage in case of his refusal - This could present a potential loophole for effective implementation of the Convention	Yes	No dividing line
Iceland	Yes	No	General Penal Code (GPC) Act 147/1998 There is no explicit exception from the offence of bribery for small facilitation payments	Unclear	Section 109 paragraph 2 of the GPC suggests that small facilitation payments are probably not criminal	Unclear	Section 109 makes no explicit exception for whether a person will be punished for the bribery of a foreign public official when the law of the state in question allows it
Italy	Yes	No	Amendment of Article 322 to the Criminal Code The offence of bribery does not exclude facilitation payments	Yes	- Criminality only applies where the bribe is intended to obtain the performance of an act related to the official's office. This requirement does not exist where the bribe is intended to obtain an omission or delay of an act related to the official's office or an act in breach of the official's duty - In the absence of a prior offer or promise of a bribe, Italian law does not criminalise the act of making a payment after the performance of an act by the foreign public official in compliance with his duties (although a passive bribery offence would be committed by the official)	Yes	No dividing line
Japan	No	Yes	Amendments to the Unfair Competition Prevention Law (UCPL) ; The Penal Code, the Code of Criminal Procedure and the Commercial Code There is no exception to the offence of bribery for small facilitation payments	Yes	- Article 10 of the UCPL contains an exception to the foreign bribery offence where the "main office" of the person giving the bribe is located in the same country for which the foreign public official engages in public service - This rule applies regardless of where the act of bribery takes place, and even provides an exception for such bribery occurring within Japanese territory	Unclear	- The definition of "public enterprise" in Article 10 is inconsistent with the Convention - The offence under Article 10 does not specifically apply where there is a third party beneficiary - The sanctions available for legal persons are not sufficiently effective, proportionate and dissuasive in view of the large size of many Japanese corporations, particularly since seizure and confiscation are not available under the Japanese legislation

Country	Conforms to OECD Convention?	Reference to Facilitation Payments?	Definition of Facilitation Payments	Are Facilitation Payments Criminalised?	Ambiguous Criminality?	Is Prosecution likely?	The dividing line between facilitation payments and other bribes
Korea	Yes	Yes	<p>The Act on Preventing Bribery of Foreign Public Officials in International Business Transactions (FBPA)</p> <p>The offence of foreign bribery is not restricted to “payments” and includes the providing of useful information, the introduction of a person, the issuance of licenses for importing goods, the certification of documents and the installation of telephone lines, etc</p>	Yes	<p>- Article 3.2.b. establishes an exception to the offence in relation to a “small pecuniary or other advantage” for routine or ordinary work</p> <p>- There is a lack of judicial and legislative guidance in interpreting the exception which makes it uncertain what constitutes an offence, in particular with reference to the smallness of the payment or other advantage</p>	Unclear	Little existing case law to provide guidance on the scope of small facilitation payments
Luxembourg	Yes but a serious loophole	Yes	<p>Law of 15 January 2001 amending the Criminal Code, the code of Criminal Procedure and the Law of 4 December 1967 on Income Tax</p> <p>The offence of bribery refers to offers, promises, gifts, presents or advantages of any kind whatsoever</p>	Yes	No	Yes	No dividing line
Mexico	Yes	Yes	<p>Federal Penal Code (FCC) Article 222</p> <p>There is no express exception to the offence of bribery for small facilitation payments</p>	Yes	No	Yes	No dividing line
Netherlands	Yes	Yes	<p>Article I and Article II of the Implementing Bill</p> <p>Facilitation payments are defined as small payments to low level public officials for the purpose of inducing them to do something that is not in contravention of their public duties</p>	Yes	<p>- Prosecutorial discretion means that in certain circumstances it would be possible to not prosecute a case involving a small facilitation payment</p> <p>- The application of prosecutorial discretion needs monitoring, including the application of the future guidelines</p>	Yes	Under certain circumstances it would be possible to consider not prosecuting a case involving a facilitation payment
Norway	No	Yes	<p>Penal Code Section 128</p> <p>An offence is committed regardless of whether the advantage is tolerated or necessary in the relevant foreign country</p>	Unclear	The prosecution has the discretion to not prosecute the giving of facilitation payments	Unclear	The presence of the word “illegally” denotes that <i>de minimus</i> gifts and gifts that are required in a foreign public official's country are exempted. This gives the prosecution discretion to not prosecute the giving of facilitation payments

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Poland	Yes	Yes	Penal Code Article 229 There is no exception from the offence of bribery for small facilitation payments	Yes	No	Unclear	- In the case of bribery, the value of the benefit provided, etc. to a public official, the rank of the official, the kind of act that the briber intends to induce, and the effect or the danger caused would be considerations - A "small facilitation payment" in the meaning of the Convention is likely to be considered as a case "of less significance" and article 229.2 may not apply in repeated cases of this significance - Article 229.2 would not apply in cases of aggravated offence
Slovak Republic	No	Yes	Amendments to the Criminal Code and the Law on Banks The offence of bribery excludes gifts of very small value, which includes facilitation payments	No	No	No	- The term "socially acceptable gift" or "a very small gift" are not considered as a bribe - The social context in which the act has been committed is recognised as important
Spain	Yes, with exceptions	No	The <i>Organic Act 3/2000</i> modifying the <i>Penal Code</i> adding Article 445 - Article 445 includes advantages of all kinds, real and personal, tangible and intangible, pecuniary and non-pecuniary (money, a remuneration agreement, a painting and a mink coat have been covered by the domestic corruption offences)	Yes	No	Yes	No dividing line
Sweden	Yes	Yes	Swedish Penal Code: Chapter 17, Section 7 Small facilitation payments do not constitute "improper reward"	No	No	No	The courts consider all relevant circumstances, including the legislation and custom of the foreign public official's country, in deciding whether a particular reward is "improper"
Switzerland	Yes, except in respect of liability of legal persons for bribery	Yes	Criminal Code Amendment Article 322 Advantages of minor value in conformity with socially accepted practices are not considered as undue advantages	No	Advantages which are considered insignificant and deemed to represent no risk of inciting public officials to behave in a manner inconsistent with their duties Swiss courts must systematically adopt this concept and not refer to social practices accepted in the foreign public official's country	Unclear	The implementing legislation does not apply to all cases where the undue advantage is offered, promised or given to foreign public officials in order that they carry out the duties of their functions

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United Kingdom	No	No	Prevention of Corruption Act 1906 (1906 Act) and the Common Law The offence of bribery includes any gift or consideration, including non-pecuniary and intangible gifts and consideration or offers of "any undue reward"	Unclear	No	- There is no explicit provision in the UK law that criminalises bribery of foreign public officials - Application of the 1906 Act to the bribery of a foreign public official depends entirely upon future judicial interpretation - There are serious concerns about the applicability of this statute law to cases of bribery of foreign public officials	Not applicable
United States	Yes	Yes	Foreign Corrupt Practices Act (FCPA) - Gratuities given to foreign public officials are allowed under the FCPA as long as they are used to expedite the processing of non-discretionary permits or licenses or other routine documentation - The FCPA provides an illustrative list of what qualifies as "routine governmental action" - Contrary to the Convention, the "routine governmental action" exception is not limited to small facilitation payments because of the practice of attributing one large expenditure to several smaller ones	No	The list of exceptions is not sufficiently qualified, for example by reference to the size of the payment, and the discretionary nature and the legality of the reciprocal act, and is therefore potentially subject to misuse	No	- A routine governmental action could be rendered corrupt where the size of the payment is inappropriately large - The "routine governmental action" clause only applies where action under consideration is questionable