Master Thesis International and European Public Law: EU Law

Between a Rock and a Hard Place: Do EU Companies' Problems Resulting from Differences in EU Member States' Law on Facilitation Payments Justify EU Action?

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Abstract

Facilitation payments are small payments to speed up the execution of routine, non-discretionary governmental activities. While illegal in the majority of countries where facilitation payments are paid, this general prohibition is not reflected in other countries' foreign bribery laws. Differences between EU Member States' foreign bribery laws on facilitation payments create problems for EU companies. These problems arise through both legislative differences and divergent levels of enforcement of foreign bribery laws on facilitation payments. Until recently facilitation payments were either not regulated, or were tolerated by legislators of foreign bribery laws. This changed as a result of the influence of two legislative Acts with international significance: the US's Foreign Corrupt Practices Act, and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Following in the stead of these two legislative Acts many EU Member States have chosen to regulate facilitation payments as part of their foreign bribery laws through either criminalisation or creating a legislative exception. This ad hoc approach to the law on facilitation payments has created problems for EU companies which potentially include: legal certainty, compliance costs, and regulatory competition. This article explores whether all or a few of these problems are significant enough to justify EU action to harmonise EU Member States' laws on facilitation payments. The article concludes that the problems faced by EU companies as a result of different laws on facilitation payments should not result in the harmonisation at EU level of EU Member States' laws on facilitation payments as a stand-alone harmonisation measure. However, the article also concludes that in the event of general EU harmonisation of EU Member States' bribery and corruption laws, including foreign bribery laws, the EU should criminalise facilitation payments. In reaching these conclusions, the article examines: the phenomenon of facilitation payments, where EU companies are likely to encounter requests for facilitation payments, the law of two EU Member States on facilitation payments, and the competence available to the EU in harmonising EU Member States' laws on facilitation payments.

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Chapter I: Introduction

Facilitation Payments (FPs), otherwise known as 'grease' payments, are generally described as small payments to speed up the execution of routine, non-discretionary governmental activities.[1] For EU companies operating as multinational companies (MNCs), facilitation payments are a thorny issue. While exceptions from liability for FPs exist in certain countries' foreign bribery laws, FPs are illegal in almost every country where they are paid. Indeed, a global prohibition on FPs would be beneficial for all parties involved. From the perspective of MNCs, such a prohibition would decrease compliance costs for MNCs, assist legal certainty, and eradicate any opportunity for regulatory competition. However, currently such a global prohibition is simply not feasible. Thus, in the absence of a global prohibition differences between countries' FP laws creates problems for MNCs. From the perspective of companies the current ad hoc situation forces them to 'run the risk' of either losing a competitive advantage in foreign business ventures, or of facing prosecution in a country where FPs are prohibited and to whose jurisdiction the MNC is subjected.

In the recent past FPs tended to be either permitted or not regulated by national legal systems. This has changed as the result of two important legal Acts of an international relevance: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), and the US's Foreign Corrupt Practices Act (FCPA). These Acts have influenced the regulation of FPs in most countries. While a number of countries have chosen to criminalise FPs as part of their foreign bribery laws, others countries have chosen to create an exception from criminal liability for FPs. Decisions to either except or criminalise FPs have been based on a wide range of factors including ethical justifications such as cultural considerations, and economic justifications such as competitive necessity. However, although FPs may be limited or prohibited as a matter of law, enforcement levels of FP laws often diverge from the wording of the legislation. There are several reasons for this divergence including legislative 'loopholes' allowing prosecutors to create exceptions in practice, and vague legislative definitions as to what qualifies as a FP.

Differences in terms of countries' laws on FPs, including a lack of consistent enforcement of those laws, create problems for MNCs. The majority of EU MNCs feel both the effects of the FCPA and the OECD Convention, in addition to the law of the Member State(s) (MS(s)) to

[1] Jon Jordon, 'The OECD's Call for an End to 'Corrosive' Facilitation Payments and the International Focus on the Facilitation Payment Exception under the Foreign Corrupt Practices Act' (2010) 13:4 U of Pennsylvania Journal of Business Law 881, 881.

whose jurisdiction they are subjected. The current ad hoc approach towards FP laws within the EU hinders rather than helps EU companies. However, the issue is whether action can and should be taken at EU level to remedy problems for EU companies caused by each EU MS deciding independently its laws on FPs. Thus, the question for this article is whether EU companies' problems resulting from differences in EU MS' law on FPs justify EU action.

The article is structured as follows. Chapter I contains the introduction to the article. Chapter II provides an overview of FPs and places FPs in the more general context of bribery and corruption. The Chapter then addresses the issue of where and why FPs occur. It is identified that the BRIC countries (Brazil, India, and China) are prime suspects where EU companies are likely to be asked to pay FPs as a result of a lack of effective formal institutions. Chapter III then identifies the UK and the Netherlands as two EU MS which are likely to have EU companies under their jurisdiction that are asked to pay FPs abroad. The Chapter then compares the law on FPs in these two MS. Chapter IV discusses the influence and limitations placed on EU companies by the OECD Convention and the FCPA. Chapter V identifies how different FP laws between EU MS are problematic for EU companies. Chapter VI considers whether EU action can be taken in order to remedy the problems identified in Chapter V. Chapter VII concludes that despite the EU's competence (identified in Chapter VI) to harmonise EU MSs' law on FPs, the EU should refrain from engaging in harmonising the laws on FPs as a stand-alone measure. However, the Chapter then goes on to conclude that criminal liability should be extended to FPs if more general harmonisation was to be undertaken at EU level in the area of foreign bribery. Lastly, Chapter VIII provides the overall conclusion for the article.

Chapter II: Facilitation Payments, Prime Suspects, and why they Occur

1. Introduction

Defining FPs is essential to understanding the phenomenon, particularly the features used to distinguish such payments from other forms of corruption. Further terms are defined in this section, including MNCs, and corruption. FPs are then placed in context as a form of corruption, and attention is drawn to the controversy surrounding the definition of corruption. It is further considered whether FPs are in fact tantamount to extortion. This section also explores the common justification that FPs are a cultural practice. Lastly, the issue of where and why FPs occur is addressed.

2. What are Facilitation Payments?

a) Facilitation Payments and Multinational Companies

FPs, otherwise known as 'grease' payments are generally described as small payments intended to speed up the process of routine, non-discretionary governmental activities.[2] From an ethical perspective, the crucial distinction between FPs and 'real bribery' or more serious forms of corruption is the non-discretional nature of FPs, which means the payment operates to 'induce someone to perform an act that in itself is lawful, without gaining an unfair competitive advantage.'[3] Thus, the justification for paying FPs often follows that while the payment of the FP is unlawful on the grounds that it is a bribe; such payment is acceptable because the service paid for is both legal, and one that the paying party was entitled to access; with the payment merely speeding up the delivery of the service.[4]

For EU companies, issues of corruption often arise through expansion to become MNCs. Although there is no universally accepted definition, a MNC (also known as a multinational enterprise) can be simply defined as a company that 'controls and manages production establishments – plants- located in at least two countries.'[5] This definition is not uncontroversial, with issues arising over what constitutes a 'plant' and 'control'.[6] Indeed in

[2] Ibid 881.
[3] Bernard Wientjes, et al 'Honest Business, without Corruption: Practical Tips for doing Business Abroad' (2012), 7 <http://english.rvo.nl/sites/default/files/2013/12/Honest%20Business%20without%20corruption.pdf> accessed 3 January 2014.
[4] Ibid 5.
[5] Richard Caves, *Multinational Enterprise and Economic Analysis* (3rd edn, Cambridge University Press 2007), 1.
[6] Ibid 1.

relation to 'control' countries carry different standards in terms of the minimum percentage of equity ownership required for an investment by a company abroad to constitute a direct investment.[7] In choosing the form of overseas investment, companies registered in countries that penalise overseas corruption committed by the company in question may have an incentive to choose a form of foreign direct investment (FDI), over a joint venture.[8]

There are two obvious ways in which a company can use FDI to conduct business in a developing country where there is a risk they will be requested to engage in corrupt practices: greenfield direct investment, and brownfield direct investment.[9] A company engages in greenfield direct investment through creating a new project in a foreign country, which differs from brownfield direct investment where the company purchases an existing asset in a foreign country.[10] Such forms of FDI may be sufficient to prevent a company being defined as a MNC for the purposes of being held liable in the country it is based in for corrupt acts abroad.[11] However, whether choosing a form of FDI is sufficient to escape liability for overseas activity will depend on the law of the country in question, as some countries contain legislation, notably the US's FCPA that defines its jurisdiction widely, so as to encompass numerous forms of firms' business structure.[12]

b) Placing Facilitation Payments in the context of corruption and bribery

In order to understand what is meant by the term 'FP', it is necessary to place it in context as a form of corruption. Significant controversy surrounds the definition of corruption;[13] but a frequently referred to definition is that of the non-governmental organisation Transparency International (TI), which is a high profile organisation in the fight against international corruption.[14] TI has adopted a wide definition of corruption, describing it as 'the abuse of

[7] Ibid 1.
[8] Sharon Eicher, *Corruption in International Business: the Challenge of Cultural and Legal Diversity* (Farnham 2009), 48.
[9] Ibid 48.
[10] Ibid 48.
[11] Ibid 48.
[12] Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, 'A Resource Guide to the U.S. Foreign Corrupt Practices Act' (2012), 11 <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf> accessed 20 November 2013.
[13] Peter Henning, 'Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law' (2001) 18:3 Arizona Journal of International and Comparative Law 793, 801.
[14] For instance see: Eicher (n 8) 4, Robert Bailes, 'Facilitation payments: culturally acceptable or unacceptably corrupt?' (2006) 15:3 Business Ethics: A European Review 294, 294.

entrusted power for private gain'.[15] While corruption is regularly used interchangeably with illegality, not all corruption is necessarily illegal.[16] Adding complexity to the issue is the fact that what is considered illegal corruption in one country may be legal corruption in another. For instance, several countries around the world have enacted legislative exceptions for FPs paid abroad. An example of such an exception can be found in the FCPA, which allows small FPs, defined as payments intended to expedite the occurrence of 'clerical or ministerial tasks',[17] such as 'provision of telephone, water, and power services; police protection; mail delivery; business permits; and inspections for contract performance and shipment of goods.'[18]

Bribery is closely associated with corruption,[19] and is defined by TI's Business Principles for Countering Bribery as '[a]n offer or receipt of any gift, loan, fee, reward or other advantage to or from any person as an inducement to do something which is dishonest, illegal or a breach of trust, in the conduct of the enterprise's business.'[20] A more formalistic way to understand bribery is through the principal-agent model. This model defines bribery as a breach of trust of the agent against the principal when the agent receives a payment from a third party in return, implicitly or explicitly, for agreeing to undertake his/her duty as the agent.[21] The principal in this model is someone who cannot be bribed, as bribery only occurs when payment is made to the agent.[22] This means that any payment to the principal in return for benefit to the payer is simply a market trade.[23] In the context of MNCs conducting business in a foreign country, a bribe usually consists of a payment being made by the firm or its agent to a foreign public official in order to ensure that the official acts in the firm's, not the public's interest.[24] The bribery definition proffered by TI has a wide scope but it is not clear prima facie whether it includes FPs. This is because the act performed as a result of the FP is in fact an action required of the agent in the course of his/her work. However, it is

[15] Transparency International, 'Frequently asked questions about corruption' <http://archive.transparency.org/news_room/faq/corruption_faq> accessed 20 October 2013.
[16] Eicher (n 8) 2.
[17] Emily Strauss, ''Easing Out' The FCPA Facilitation Payment Exception' (2013) 93 Boston University Law Review 235, 241.
[18] Foreign Corrupt Practices Act Reporter, *supra note* 25, s 1:15, in Strauss ibid 241.
[19] James Weber and Kathleen Getz, 'Buy Bribes or Bye-Bye Bribes: The Future Status of Bribery in International Commerce' (2004) 14:1 Business Ethics Quarterly 695, 696.
[20] UN Global Compact, 'Global Compact Principle 10' <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/principle10.html> accessed 25 November 2013.
[21] Harvey James, 'When is a Bribe a Bribe? Teaching a Workable Definition of Bribery' (2002) 6 Teaching Business Ethics 199, 210.
[22] Ibid 210.
[23] Ibid 214.
[24] Weber and Getz (n 19) 698.

dishonest and/or a breach of trust by the agent to temper the rate of performance of services to which the customer is entitled in return for private gain. While it is even less prima facie clear that FPs fall within the scope of the principal-agent model, this difficulty is only caused where the agent's duty is defined purely in terms of the outcome. Once the agent's duty is seen as encompassing the entire performance of the act, then increasing or decreasing the rate of performance depending on the existence of a FP likely breaches the agent's duty to the principal.

While FPs are a form of bribery and corruption, they are not always treated as equal to other forms of bribery and corruption. TI differentiates between FPs and other forms of bribery, describing FPs as a bribe that is 'according to rule' corruption as opposed to 'against the rule' corruption.[25] In other words, a FP is a bribe paid to receive preferential treatment by an official who is performing an act he/she is required to do by law, whereas 'against the rule' corruption involves paying a bribe for services the bribe recipient is not allowed to provide.[26] Velasquez sought to differentiate FPs as ethically different from other forms of bribery and corruption. Indeed, Velasquez argued that the FPs are not morally devious where the payment 'is made to an official who has a duty to perform the service, the payer is entitled to the service (and so the service is not an illicit one) and would suffer significant harm if it was not rendered, and the payment has only negligible harmful side effects.'[27] Such differentiation implies that not all forms of corruption are of equal gravity, and introduces the notion that corruption in the form of payments such as FPs can be justified even if it cannot be exonerated. This view has been further noted in academic literature,[28] in addition to finding favour among politicians[29] and legislators alike.[30]

Ethical issues surrounding FPs are complex and academic opinion is divided. However, on balance of the relevant factors and arguments, FPs should be considered unethical[31] and

[25] Transparency International (n 15).
[26] Ibid.
[27] Manuel Velasquez, 'Corruption and Bribery' in George Brenkert and Tom Beauchamp (eds), *The Oxford Handbook of Business Ethics* (Oxford Handbooks 2010), 490.
[28] Bailes (n 14) 295.
[29] For example see Adam Afriyie, '"Facilitation Payments" should be allowed under anti-bribery rules' (Real Business 2013) <http://www.adamafriyie.org/articles-&-speeches/facilitation-payments-should-be-allowed-under/255> accessed 18 October 2013.
[30] As evidenced by the facilitation payment exceptions enacted in legislative Acts.
[31] Further elaborated in Chapter II section 2 paragraph b, where it is discussed whether FPs can be justified by a country's culture.

foreign FP laws ethical. FPs are illegal in most countries where they are paid,[32] and if a payment meets the definitional requirements of a bribe, then payment is unethical and should not occur.[33] Furthermore, while justifications for FPs will be explored later in this article, it is worth noting at present that justifications based on the small monetary sum involved in FPs fail to ignore the potential for increasing demands for larger bribes in the long run.[34] Thus, while FPs can be argued as ethical in the short run or immediate situation, this discounts the impact of a long run situation where such payments continue to be ethically tolerated. Closely linked to the question of whether the FPs themselves are ethical, is the issue of whether foreign anti-bribery laws are ethical. In response to this issue Nichols stated that anti-bribery laws are 'ethically unremarkable' because international business relationships should be seen as forming a transnational community.[35] This transnational community is not governed by political or cultural borders, and is capable of generating and authenticating its own transnational norms.[36] Consequently, the unethical nature of FPs and the ethical nature of FP laws with multi-jurisdictional impact, means that in terms of ethics it is open for legislators to enact facilitation payment laws that regulate foreign activity by a country's MNC.

The phenomenon of FPs, at least from the perspective of the Western countries where MNCs are based, has grown out of the numerous anti-bribery and corruption initiatives that have been undertaken by international organisations, legislators, and MNCs.[37] Anti-bribery and corruption initiatives have followed the realisation as to the negative and far-reaching effects of corruption for all involved, with corruption coming to be increasingly accepted by economists as a bad thing for both the country where it exists, and the foreign company involved.[38] The negative effects of bribery and corruption can be classified: political, social, and economic.[39] Bribery harms democracy, with the public official in question failing to serve his/her duty to act in the public interest.[40] In terms of economics, bribery creates

[32] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997, in force 15 February 1999.
[33] James (n 21) 200.
[34] Jordon (n 1) 910.
[35] Philip Nichols, 'The Myth of Anti-Bribery Laws as Transnational Intrusion' (2000) 33 CNLILJ 627, 652.
[36] Ibid 653.
[37] Bailes (n 14) 294.
[38] Ibid 294.
[39] Weber and Getz (n 19) 698.
[40] Ibid 698.

economic distortions including harming competitiveness, and the multiplier effect; and harms investment incentives.[41]

However, despite the increase in initiatives to address the problem of corruption, it is not decreasing.[42] This may at least in part be because MNCs are continuing to bribe 'albeit in the guise'[43] of FPs. Indeed part of the reason for the categorical distinction between FPs and other forms of bribery and corruption relates to the fact that FPs fall in a category of corruption that may 'allow us to accomplish goals in highly bureaucratic and inefficient environments better than we can if we are strictly honest and ethical.'[44]

c) Are requests for Facilitation Payments tantamount to extortion?

Another suggestion as to why MNC's continue to pay FPs is that FPs are in fact a form of extortion. This view has found favour with academics Weber and Getz, who described FPs as petty bribery resulting from extortive demands.[45] In explaining this view they stated:

> 'Simplistically it appears that petty bribery is often the result of extortion driven by economic factors. That is, low-to mid-level servants demand side-payments to complete their jobs as expected in order to supplement their wages to a living-wage level. The firm that pays the bribe does so in response to the extortion, so that the transaction is facilitated. This is the so-called grease payment.'[46]

Whether or not a FP is held to be extortion will depend on the relevant legal definition of extortion in the country in question. Weber and Getz are certainly not alone in their view that FPs are in actual fact extortion.[47]

The view that FPs are in actual fact extortion is not shared by the OECD. Extortion is defined in terms of bribery by the OECD Guidelines for Multinational Enterprises as:

> 'The solicitation of bribes is the act of asking or enticing another to commit bribery. It becomes extortion when this demand is accompanied by threats that endanger the

[41] Ibid 698.
[42] Transparency International, 'Global Corruption Barometer 2013' (2013) <http://www.transparency.org/gcb2013/report/> accessed 03 January 2014.
[43] Bailes (n 14) 294.
[44] Eicher (n 8) 4.
[45] Weber and Getz (n 19) 697.
[46] Ibid 697.
[47] Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press 1999) 53.

> personal integrity or the life of the private actors involved. The threat to refuse an investment license or to tear down a plant's buildings for instance cannot be considered as creating a situation of extortion.'[48]

Relying on such a limited definition creates a very high threshold for claiming that a particular FP constitutes extortion. But the reality is that FPs and extortion are in fact two different acts,[49] and should be treated accordingly. Describing FPs as the result of extortion blurs the lines between FPs and extortion. The main difference between FPs and extortion is the threat of harm to a person.[50] This is reinforced in the definition of the OECD's Guidelines for Multinational Enterprises. However, the difficulty for those extorted is proving that such extortion has in fact incurred, and was not simply a FP. As Rose-Ackerman noted, 'in practice the distinction between extortion and bribery means little because both parties must agree before the corruption can occur.' [51] This highlights the basic difficulty in claiming that a FP was in fact extortion. Where the threat of harm cannot easily be proved, it is difficult for the briber to show that they did not simply willingly agree to bribe the official in question.

As an example of a situation where it may be difficult to prove a FP was in fact extortion, an employee wishing to depart from a West African nation was told that his shot card was not valid.[52] The employee was given two options, if he wanted to leave he would have to pay $100, or be given a shot of yellow fever.[53] After being taken into a room where a needle is filled with an unknown liquid and being told to roll up his sleeve, the employee decided to pay the $100.[54] This is clearly extortion, because of the threat of personal harm involved, but because the employee 'agreed' to pay the $100, in reality it is difficult to prove that he was in fact extorted. In the absence of evidence to the contrary, the employee would have to rely on being believed that there was a threat to his safety, and that he did not simply pay the official to get the official to accept his shot card. Such evidential problems in relation to proving extortion are not limited to FPs. However, because FPs by definition involve a lack of discretion on the part of the official bribed, a claim of extortion is likely to be more credibly

[48] UN Global Compact (n 20).
[49] Velasquez (n 27) 490.
[50] Ibid 490.
[51] Rose-Ackerman (n 47) 53.
[52] Thomas Fox, 'Time to call a spade a spade. Facilitation payments and why neither bans nor exemptions work'(2011) <http://thebriberyact.com/2011/02/03/time-to-call-a-spade-a-spade-facilitation-payments-why-neither-bans-nor-exemptions-work/> accessed 22 October 2013.
[53] Ibid.
[54] Ibid.

raised in relation to FPs than other forms of bribery and corruption. Therefore, the problem in proving that extortion has occurred is not insignificant.

Thus, FPs and extortion are, and should be considered, two different acts. It can be difficult to prove that an act was not a FP, but instead extortion. However, evidential difficulties in proving extortion cannot be used to justify the claim that FPs are in fact extortion. This is because there is no evidence to suggest that most FPs result from the requisite threat of harm to a person necessary for the act to constitute extortion. Were most FPs to result from a threat to a person, it is undoubted that companies would have raised this claim as justification for their payment. Consequently where an act described as a FP is actually extortion it should be treated as such, but FPs cannot be said to be tantamount to extortion.

d) Conclusion

To conclude, FPs are small payments paid in order to 'speed-up' routine, non-discretionary action conducted by a public official. EU companies are likely to encounter demands for FPs, when operating in a foreign jurisdiction as an MNC. Companies may choose a certain foreign business structure in response to bribery laws, but the success of this strategy will differ depending on the laws of the relevant 'home' country. While attempts to distinguish FPs from other forms of bribery and corruption on ethical grounds have found favour with both academics and politicians, the reality is that FPs are small bribes. Accordingly, FPs should be treated as unethical, and laws to regulate FPs should be seen as ethical. Other claims in relation to FPs have included that they are in fact tantamount to extortion. However, an analysis shows that extortion and FPs are in fact two very different acts and should be treated accordingly.

3. Where and why do Facilitation Payments occur?

FPs have been predominantly identified as occurring in countries with high levels of corruption. However, in order for foreign MNCs to want to conduct business in the country in question, it is necessary that other factors exist capable of attracting foreign business. While there is no internationally available data as to countries where EU MNCs are most likely to be requested to pay FPs, countries that are prime suspects can be identified. Following the identification of these 'prime suspects'; whether FPs are necessitated as a cultural practice in the country in question is examined and discounted. The better explanation for the occurrence of FPs is that formal institutions fail to effectively address the creation and expansion of the

informal institution of corruption. Thus, effective formal institutions can be used to limit and erode the informal institution of corruption.

a) *The BRIC countries: prime suspects in the case of where EU Multinational Companies are asked to pay Facilitation Payments*

As a result of the close link between FPs and the existence of other forms of corruption, it is possible to review corruption indexes to gain insight as to the countries where officials are likely to request FPs from MNCs. TI's Corruption Perception Index measures countries' perceived levels of public sector corruption. Reviewing the 2012 index the most corrupt nations are unsurprisingly: Somalia, North Korea, and Afghanistan; with China ranked at number 80.[55] However, MNCs will only invest in countries where they are compensated for risk accordingly, in accordance with the risk-return trade-off.[56] Consequently, MNCs will invest in countries with a high amount of risk as long as they are compensated for this risk with a high amount of return. One of these risk factors is corruption. Therefore, in order to understand where EU companies will invest, it is necessary to find countries with high levels of corruption, and also high levels of return due to a high probability of economic growth.

The BRIC countries: Brazil, Russia, India, and China, are a good example of where the existence of risk is countered by the potential for high levels of return, promoting investment in these countries by MNCs. The four BRIC countries are considered to be the key emerging markets, having all undergone substantial economic development in the time period following the 1990s.[57] BRIC economies share common characteristics in terms of both their attraction for MNCs wishing to invest in developing economies, and the high level of corruption present. While, the phenomenon of FPs is by no means limited to the BRIC countries, the developmental progress and potential of these nations makes them a likely case example of countries where FPs are demanded en masse. By way of explanation of the attractive option BRIC countries represent to MNCs, it is noteworthy that although growth in these four 'boom' countries is slowing, employment is expected to increase in at least two out

[55] Transparency International 'Corruption Perceptions Index 2012' (2012) <http://www.transparency.org/cpi2012/in_detail> accessed on 22 October 2013.
[56] William Sharpe, 'Capital Asset Prices: A Theory of Market Equilibrium under Conditions of Risk' (1964) 14:3 The Journal of Finance 425.
[57] Mohsin Habib and Leon Zurawicki, *Emerging Economies and the Transformation of International Business: Brazil, Russia, India and China (BRICs)* (Edward Elgar 2006) 452.

of the four BRIC countries between the years 2011 and 2015.[58] Indeed in a 2003 Goldman Sachs paper it was stated that:

> '[I]f things go right, in less than 40 years, the BRICs economies together could be larger than the G6 in US dollar terms. By 2025 they could account for over half the size of the G6. Of the current G6, only the US and Japan may be among the six largest economies in US dollar terms in 2050.'[59]

Given this projected shift in economic power it is considered an increasingly important strategic choice for companies to be invested in the right developing markets.[60] With the positive economic report the BRIC countries have received from some quarters,[61] BRIC countries have in recent times been declared as offering an attractive investment opportunity for companies.

The combination of factors of high corruption and high potential investment yield means that BRIC countries represent a prime suspect in terms of countries where EU MNC's are likely to encounter demands for FPs. A prime example of such an economy and one already shown to experience problems of officials requesting FPs is China. China has seen a large number of MNCs enter the market as it became fashionable to do business in China.[62] There are two further conditions present in China which create the ideal environment for bribery and corruption to flourish.[63] Firstly, the existence of contradictory laws, divergences between national policy goals and local level implementation, a multitude of new laws regulating foreign trade and investment, all existing in association with a cumbersome and ungainly bureaucratic system.[64] Secondly, there is the continuing importance in China of creating connections with public officials in order to conduct business.[65] In fact it has been noted that 'as in many other countries, businessmen in BRICs would often find it very difficult to get

[58] Heidrick & Struggles, 'Global Talent Index, 2011-2015: The Outlook to 2015' (2011) < http://www.economistinsights.com> accessed 17 November 2013, 8.
[59] Dominic Wilson, Roopa Purushothaman, 'Dreaming with BRICs: The path to 2050' (2003) < http://www.goldmansachs.com> accessed 17 November 2013.
[60] Ibid.
[61] Ibid; Heidrick & Struggles (n 58) accessed 17 November 2013, 8; Eicher (n 8) 146.
[62] Margot Cleveland et al, 'Trends in the International Fight against Bribery and Corruption' (2009) 90 Journal of Business Ethics 199, 206.
[63] Ibid 206.
[64] Rose et al, 'The Challenges of Global Compliance in Emerging Markets' [2007] ACC Docket 52, as seen in Cleveland (n 62) 206.
[65] Ibid.

official licences if they did not bribe government officials.'[66] While it is difficult to find a single study reviewing whether FPs are demanded in all four countries, the BRIC countries have been individually studied in the subject area of FPs. Over the last five years only Brazil and Russia appear to have made limited progress in their ranking on TI's Corruption Perceptions Index.[67] Yet, as has already been discussed in relation to China, FP demands show no signs of abating in either country. In fact FPs are one of the most common forms of corruption in Brazil.[68]

The example of MNC's being asked to pay FPs in China and Brazil have already been reviewed, but there is also ample anecdotal and statistical evidence of FPs being requested in India and Russia. In India it has been suggested that the reasons for the large number of FPs relates to the large amount of licences required by businesses wishing to operate in the country.[69] This is especially the case in retail, where opening a standard supermarket requires more than 40 licences.[70] Such high licensing demands result in many foreign businesses hiring middle-men, colloquially known as 'speed-merchants', and force down profit margins and thus the attractiveness of conducting business in India.[71] While excessive licensing requirements create problems in India, in Russia demands for bribery have become so extensive that it is considered almost obligatory.[72] FPs in Russia are considered as a way to overcome bureaucratic delays, and seen as supplementing the low incomes of public officials.[73]

b) Are Facilitation Payments necessitated by a country's culture?

Having discussed where FPs are demanded the issue then becomes why this demand is made. A common response is that the culture of the foreign country in question requires FPs to be made as part of conducting business. Indeed Bailes claimed that FPs are in a number of developing countries 'expressions of local customs, traditions, and societal norms and as such

[66] Eicher (n 8) 146.
[67] Transparency International, 'Corruption Perceptions Index' (2008-2012) <http://www.transparency.org/research/cpi/overview> accessed 20 November 2013. See Appendix 1 for table of results.
[68] Eicher (n 8) 50.
[69] Reuters, ''Speed money' puts brakes on India's retail growth' *NDTV* (05 May 2013) <http://www.ndtv.com/article/india/speed-money-puts-brakes-on-india-s-retail-growth-362857> accessed 07 May 2013.
[70] Ibid.
[71] Ibid.
[72] Steven Myers, 'In Russia, Bribery is the cost of Business' *The New York Times* (10 August 2005) < http://www.nytimes.com> accessed 19 November 2013.
[73] Ibid.

are an essential part of simply 'doing business'.'[74] This idea of FPs as representative of cultural differences, finds support from the cultural practice of gifting in numerous countries.[75] Consequently, criminalising FPs becomes a form of cultural absolutism through the imposition of Western values on developing countries.[76] However, claiming that FPs are necessitated as part of a countries culture could also be using the label of culture as an excuse for what is in essence a distinguishable 'culture of corruption'. Alternatively it could be a combination of both.

China, a country that frequently ranks poorly on TI's Corruption Index,[77] provides a prime example of a gifting culture which has been suggested as necessitating FPs.[78] Chinese business relationships involve a certain amount of gift giving, or guanxi, which could be considered in excess of what Western society considers appropriate.[79] Such gift-giving is considered necessary to successfully conduct business in China, and has long existed in Chinese tradition.[80] However, seeing such gift-giving as corruption, China is increasingly taken action against public officials who accept such gifts.[81] Furthermore, Guthric argued that guanxi could and should be distinguished from guanxi practice, with the former relating to good business relations, and the latter involving taking 'care of procedures.'[82] Guthric stated that guanxi practice qualified as corruption that is increasingly avoided by China's large industrial organisations.[83] Consequently, while a country may have a gift giving culture, this could and should be distinguished from a 'culture of corruption'.

Even if a country's culture accepts FPs, there is the issue of whether the actual payment of FPs is necessitated by a foreign country's culture. In answering in the negative, Nichols points to the fact that multiculturalism works in two directions.[84] Thus, Nichols concludes that a country's culture cannot be seen as necessitating bribery and corruption.[85] Consequently, even if it can be successfully argued that a country's culture accepts and

[74] Bailes (n 14) 295.
[75] Ibid 296.
[76] Ibid 296.
[77] Transparency International (n 67).
[78] F. Warin, Michael Diamant, Jill Pfenning, 'FCPA Compliance in China and the Gifts and Hospitality Challenge' (2010) 5 Virginia Law & Business Review 33, 37.
[79] Ibid 37.
[80] Ibid 59.
[81] Ibid.
[82] Douglas Guthric, 'The Declining Significance of Guanxi in China's Economic Transition' (1998) The China Quarterly 254, 255.
[83] Ibid 255.
[84] Nichols (n 35).
[85] Ibid.

involves the use of FPs, this does not equate to a necessity for MNCs to pay FPs in foreign countries.

c) Institutional failure as a reason for why Facilitation Payments occur

The failure of formal institutions to remedy the growth of the informal institution of corruption provides the most accurate explanation as to why FPs occur. This is because the formal institutions define the transaction costs of committing acts of corruption in the form of FPs.[86] North defined institutions as providing the 'rules of the game in a society',[87] that shape the opportunities in a society.[88] Viewed from an institutional perspective, it is apparent that there are two kinds of constraints on people's behaviour: formal and informal.[89] Formal constraints are formal rules such as written laws that are capable of influencing informal constraints.[90] In contrast, informal constraints are those imposed by people themselves that 'reduce the costs of human interaction as compared to a world of no institutions.'[91] Institutions, in the form of both formal and informal constraints are capable of acting as either barriers, or enablers and promulgators of corruption. Teorell argued that corruption itself should be viewed as an institution.[92] Indeed this seems a logical conclusion, as corruption can easily be understood as coming within North's definition of an institution, through providing the codes of interaction between members of society engaging in corruption. Thus, corruption would be understood as acting as an informal institution.[93]

Rose-Ackerman discussed two-models predicting the development of corruption as an institution: top-down, and bottom-up.[94] In the case of top-down corruption, higher-up public officials pay a bribe to their subordinates.[95] This can be contrasted with bottom-up corruption where a low-level public official takes bribes and then either directly or indirectly shares them with his/her higher-up superiors.[96] While a top-down approach with corruption is

[86] Qiang Yan, 'An Institutional Approach to Understanding Corruption in BRIC Countries' in Sharon Eicher (ed), *Corruption in International Business: the Challenge of Cultural and Legal Diversity* (Farnham 2009) 150.
[87] Douglas North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990) 3.
[88] Ibid 7.
[89] Ibid.
[90] Ibid 46.
[91] Ibid 36.
[92] Jan Teorell, 'Corruption as an Institution' (2007) 5 QoG Working Paper Series <http://www.pol.gu.se/digitalAssets/1350/1350653_2007_5_teorell.pdf> accessed 23 November 2013.
[93] Ibid 8.
[94] Rose-Ackerman (n 47) 82.
[95] Ibid 82.
[96] Ibid 82.

possible, the bottom-up approach provides a more accurate assessment of the evolution of corruption, with the informal institution of corruption serving to eventually poison formal institutions.[97] For instance, in Russia it has even been claimed that bribery has grown from the bottom to the top of formal institutions to the extent that it is now so systemic that Russian public officials deliberately draft legislation so as to facilitate bribery opportunities.[98]

While the informal institution of corruption grows to eventually poison the formal institutions, the informal institution of corruption is able to flourish because of a lack of effective formal institutions to remedy the situation. This is evidenced by the growth of corruption in Brazil and China. In Brazil, the dissemination of power from the central to the local governments prohibits effective oversight by formal central institutions of the use of that power.[99] This is because local leaders have autonomous power, making it difficult for them to be disciplined by those further up with centralised positions of power.[100] The lack of effective formal institutions in Brazil can be compared to the corruption problems caused by the lack of institutions in China.[101] In reasoning that could equally be applied to all of the BRIC countries, it is suggested that the corruption problems in China have arisen as a result of economic development outstripping formal institutional development.[102] For instance, although China's economic development has surged exponentially in recent years, its legal system remains in a state of infancy.[103]

Institutional development has been identified as a strong determinant of the future growth of the BRIC countries.[104] Understanding corruption as an informal institution allows practices such as guanxi practice to be distinguished from the informal institution of culture, and to be correctly categorised as belonging to the informal institution of corruption. Indeed more importantly it can be seen that FPs are in fact a part of the institution of corruption.[105] The issue then arises as to the best method to address this informal institution. It has previously

[97] Teorell (n 92) 9.
[98] Steven Myers, 'In Russia, Bribery is the cost of Business' *The New York Times* (10 August 2005) < http://www.nytimes.com>, accessed 19 November 2013.
[99] Yan (n 86) 152.
[100] Ibid 153.
[101] Shuangge Wen, 'The Achilles Heel that Hobbles the Asian Giant: The Legal and Cultural Impediments to Antibribery Initiatives in China' (2013) 50:3 American Business Law Journal 483, 486.
[102] Ibid 486.
[103] Ibid 486.
[104] Stefan Groot et al, 'The Rise of the BRIC countries and its impact on the Dutch Economy' (21 November 2011) CPB Background Document: On request by the Ministry of Economic Affairs, Agriculture and Innovation, 15.
[105] Yan (n 86) 150.

been suggested that existence of FPs is a consequence of a lack of formal institutions.[106] This conclusion is supported by North's claim that informal institutions can be shaped and influenced by effective formal rules.[107] If the existence of an effective formal institution is the antithesis, or at the least the architect of a country's informal institutions, then it can be seen that corruption in the form of FPs arises where there are problems with the country's formal institutions. Conversely, due to the power held by formal institutions, ineffective formal institutions harm and can render ineffective, initiatives against combating corruption.[108]

d) Conclusion

EU companies are likely to encounter requests for FPs in foreign countries where there are high levels of corruption. However, in order to identify those countries where EU companies are likely to pay FPs, it is necessary to determine in which emerging markets with high levels of corruption EU companies are likely to invest. Based on these factors, the BRIC countries are prime suspects, as countries experiencing high current and forecasted growth, with each country additionally providing anecdotal evidence regarding FPs. Reviewing evidence of FPs in the BRIC countries, it can be seen that culture cannot be used to justify FPs. A better explanation for the existence of FPs is that corruption, and FPs, exist as an informal institution. Consequently effective formal institutions can be used to shape or eradicate the phenomenon of FPs, through their impact on the informal institution of corruption.

[106] Wen (n 101) 486.
[107] North (n 87).
[108] Yan (n 86) 151.

Chapter III: The Netherlands and the UK: Two EU Member States with Different Laws on Facilitation Payments

1. Introduction

Comparing the foreign bribery laws on FPs of EU MSs enables the identification of problems caused by different FP laws, and divergent enforcement of that legislation. Due to the brevity of this article it is not possible to review the foreign bribery laws on FPs of every one of the 28 EU MS. Consequently it is necessary to significantly limit the number of EU MS in reviewing their law on FPs. Given the ever increasing size of the EU, and the lack of quantitative data on FPs, this is not an easy or precise task. First this chapter identifies and explains the criteria used to select The Netherlands and the UK as EU MS likely to have companies asked to pay FPs. Second this chapter reviews the laws on FPs in the Netherlands and the UK, including their level of enforcement. Differences between the FP laws in the two countries are then compared.

2. Why Review the Facilitation Payment Laws of the UK and the Netherlands?

The criteria for selecting the UK and the Netherlands can broadly be divided into two categories: BRIC analysis of trade flows, and additional factors. BRIC analysis of trade flows involves reviewing which EU MSs have the largest exports to and imports from the BRIC countries between 2008 and 2012. This allows selection of EU MSs where the issue of FPs is likely to be pertinent for companies falling under these EU MS's jurisdiction.

a) Analysis of which EU Member States have significant trade flows with the BRIC countries[109]

There has been no widespread data collected as to which EU MSs have companies, or indeed have the most companies, that have been asked to pay FPs while conducting business in foreign countries. Therefore, it is necessary to instead rely on other evidence capable of pointing to the EU MSs that are likely to have companies requested to pay FPs. The BRIC countries can be considered 'prime suspects' where EU companies will be asked to pay FPs due to their high rates of economic development, attracting MNCs, and their high levels of corruption.[110] Consequently, by investigating whether there is an economic relationship

[109] See Appendix 2 graphs showing the trade flows between the BRIC countries and selected EU member states between 2009 and 2012.
[110] See Chapter II section 2 paragraph a.

between EU MS and BRIC countries it is possible to ascertain which EU MS are likely to have MNCs that are requested to pay FPs. This economic relationship can be assessed by reviewing trade flows between EU MS and the BRIC countries.[111] Once this information is known it is possible to select two EU MS to review their law on FPs.

The data to analyse trade flows between EU MS and the BRIC countries was accessed via Eurostat. The trade flows (imports and exports) of 25 out of the 28 EU MS were then compared with the BRIC countries.[112] To decrease the chance of outliers, the trade flows were compared over a four year period between 2009 and 2012. The results of this analysis were largely unsurprising. In terms of both imports and exports over a four year period the Netherlands was on average ranked as the fifth exporter to the BRIC countries, and the second importer.[113] The UK was also on average ranked the fifth exporter to the BRIC countries, and the fourth importer, between 2009 and 2012. The number one exporter and importer to the BRIC countries over the four year period was Germany; with France, Italy, and Belgium also consistently ranked among the top five importers and exporters to the BRIC countries. Consequently both the Netherlands and the UK rank highly amongst EU MS that are likely to have MNCs which are requested to pay FPs when operating in foreign countries.

b) Additional Factors in deciding which EU Member States are most likely to have companies asked to pay Facilitation Payments?

Three additional factors were used to decide which EU MS are most likely to have companies asked to payments. First, it is pertinent to select two countries with different legal traditions: common law and civil law. This is because a selection based on this criterion makes it possible to consider whether different legal traditions between EU MS create or exacerbate problems caused by different FP laws. Second, it is necessary to select two EU MS with differences in their laws on FP. This allows comparison between the two laws to assess what problems differences in laws on FPs between EU MS create for EU companies operating abroad. Last, but not least, the author's own experience with the law of different EU MS is taken into account.

[111] See Appendix 2 graphs showing the trade flows between the BRIC countries and selected EU member states between 2009 and 2012.
[112] The EU Member States Luxembourg, Malta, and Cyprus were excluded from the data set due to size restrictions of the data size placed by Eurostat. This decision was based on the small size of the 3 EU MS.
[113] European Commission, 'Eurostat' <http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home> accessed 20 October 2013.

c) Conclusion

Reviewing trade flows with the BRIC countries, considered 'prime suspects' in identifying where EU companies will be asked for FPs, the UK and the Netherlands rank highly on average over a four year period. This means that the laws on FPs in these two EU MS are likely to be of particular concern for EU companies subject to the jurisdiction of these EU MS. The Netherlands and the UK also have different legal traditions and different FP laws. Lastly, the author also has experience with the law of both the UK and the Netherlands.

3. Laws on Facilitation Payments in the UK and The Netherlands

In analysing the law of both the UK and the Netherlands it is necessary to look further than the black letter of the law. This is because when companies in EU MS look to form their policies on bribery and corruption, it is realistic to expect that in addition to reviewing the relevant legislation, the companies will look to prosecutorial statements and other evidence as to the level of enforcement of that legislation. Consequently this section will review three aspects of the law on FPs in both the UK and the Netherlands: legislation, case law, and any prosecutorial or other statements indicating the degree to which the legislation will be enforced. The law between the two countries will then be compared.

a) The UK

Section 6 of the UK Bribery Act 2010 (BA) criminalises the bribery of foreign public officials, with no legislative exception made for FPs.[114] Under Section 6(3), an offence is committed when a person offers, promises or gives any financial or other advantage to the foreign public official in question. Section 6(2) states that this advantage must be given with the intention of obtaining or retaining business or an advantage in the conduct of business. The extra-territorial jurisdiction of the BA also allows prosecution for bribing foreign officials under Section 1.[115] It may be advantageous to seek to prosecute the bribery of a foreign official under Section 1 where it is difficult to prove that person bribed was in fact a

[114] See Appendix 3 for relevant legislation from the UK Bribery Act 2010 including the complete Section 6.
[115] Serious Fraud Office, 'Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions', 8 <http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf> accessed 31 October 2013.

foreign official.[116] However, where prosecution for bribing a foreign official is conducted under Section 1, it is necessary to prove that there was improper performance.[117]

The scope of the BA is wide, potentially providing extensive jurisdiction over an EU company's foreign activities. Section 7(1) states that:[118]

> '7 Failure of commercial organisations to prevent bribery
>
> (1)A relevant commercial organisation ('C') is guilty of an offence under this section if a person ('A') associated with C bribes another person intending—
>
> (a)to obtain or retain business for C, or
>
> (b)to obtain or retain an advantage in the conduct of business for C.'

Article 7(5) defines a 'relevant commercial organisation' as:[119]

> '(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),
>
> (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,
>
> (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or
>
> (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.'

An 'associated person' is defined under Section 8 as:[120]

> '8 Meaning of associated person
>
> (1)For the purposes of section 7, a person ('A') is associated with C if (disregarding any bribe under consideration) A is a person who performs services for or on behalf of C.
>
> (2)The capacity in which A performs services for or on behalf of C does not matter.
>
> (3)Accordingly A may (for example) be C's employee, agent or subsidiary.
>
> (4)Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C.
>
> (5)But if A is an employee of C, it is to be presumed unless the contrary is shown that A is a person who performs services for or on behalf of C.'

Consequently, the UK Bribery Act 2010 covers a wide range of people who may act on behalf of the MNC in a foreign country. However, Section 7(2) provides the MNC with a

[116] Ibid 8.
[117] Ibid 8.
[118] See Appendix 3 for the complete section 7 of the UK Bribery Act 2010.
[119] See Appendix 3 for the complete section 7 of the UK Bribery Act 2010.
[120] See Appendix 3 for the complete section 8 of the UK Bribery Act 2010.

defence against being found liable for the act of bribery committed by an associated person where the MNC can prove that it had in place 'adequate procedures designed to prevent persons associated with C from undertaking such conduct'. Thus it is incumbent on the MNC in question to not only have adequate anti-bribery procedures in place, but to also be able prove that these procedures were in fact adequate. This means that the Crown and the MNC have a shared burden of proof; where it is for the Crown to show that the person who paid the bribe falls within the Section 8 definition of an associated person, before the burden shifts to the MNC to prove that they had adequate systems in place to prevent such bribery happening.

In addition to the wording of the legislation itself, UK companies operating in foreign countries will consider other factors when forming their company policy on FPs. Chief among these considerations is the level of enforcement of the BA, and the associated risk for EU companies of prosecution. Thus it is important to also review prosecutorial guidelines in relation to UK law on FPs. In the UK the relevant prosecutorial agency is the Serious Fraud Office (SFO), which issues prosecutorial guidelines and other information on the BA on its website.[121] On its webpage on FPs, the SFO sets the tone of its opinion on FPs. The SFO sets a firm tone, describing FPs simply as a form of bribery that should be treated accordingly, no matter how small or infrequent the payments by companies coming under the UK's jurisdiction.[122] However, it is interesting that this stern approach towards prosecuting UK companies for paying FPs is somewhat abated by the SFOs general statement as to prosecution. The SFO states that whether or not a UK company is prosecuted for paying FPs to foreign officials when operating abroad depends on the prosecutorial guidelines.[123] The SFO then states that prosecution will occur if two cumulative criteria are met, echoing the Code for Crown Prosecutors: that there is evidence capable of providing a 'realistic prospect of conviction'[124] and such prosecution is in the public interest.[125]

Requiring public interest in the prosecution may prima facie appear to soften the apparently 'hard-line' taken by the SFO towards prosecuting FPs. However, in the *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions* it is clearly stated that an 'inherent public interest'[126] exists in

[121] Serious Fraud Office, 'Facilitation Payments' (2012) <http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/facilitation-payments.aspx> accessed 22 November 2013.
[122] Ibid.
[123] Ibid.
[124] Ibid.
[125] Ibid.
[126] Serious Fraud Office (n 115) 4.

prosecuting bribery. The guidelines further clarify that no exemption is made under Section 6 of the Act for FPs, defining such payments as 'unofficial payments made to public officials in order to secure or expedite the performance of a routine or necessary action…The payer of the FP usually already has a legal or other entitlement to the relevant action'.[127] In laying out the public interest considerations to be taken into account as factors in deciding whether or not to prosecute someone accused of paying FPs, the guidelines state that a prosecution will normally occur unless the prosecutor is certain that the public interest factors against outweigh those for prosecution.[128] While this may appear to simply state the obvious what it actually does is to almost create a rebuttable presumption in favour of prosecuting those who pay FPs, through stating that the starting point or usual situation is that such actions result in the decision to prosecute. These factors to be considered are:

> *'Factors tending in favour of prosecution:*
>
> Large or repeated payments are more likely to attract a significant sentence (Code 4.16a);
>
> FPs that are planned for or accepted as part of a standard way of conducting business may indicate the offence was premeditated (Code 4.16e);
>
> Payments may indicate an element of active corruption of the official in the way the offence was committed (Code 4.16k);
>
> Where a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if FPs are requested and these have not been correctly followed.
>
> *Factors tending against prosecution:*
>
> A single small payment likely to result in only a nominal penalty (Code 4.17a);
>
> The payment(s) came to light as a result of a genuinely proactive approach involving self-reporting and remedial action (additional factor (a) in the Guidance on Corporate Prosecutions);
>
> Where a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if FPs are requested and these have been correctly followed;
>
> The payer was in a vulnerable position arising from the circumstances in which the payment was demanded.'[129]

Prosecutorial guidelines do not reveal the actual level of enforcement of the BA. In order to understand the actual level of enforcement it is necessary to review the relevant case law on the BA. However, there is scant case law available. Furthermore, of the case law available, all

[127] Ibid 8.
[128] Ibid 9.
[129] Ibid 9.

concerns defendants charged under the BA in relation to acts conducted in the UK. This means that there is no case law available at this time where defendants have been charged under Section 6 or Section 1 of the BA with bribing a foreign public official. Additionally, there are no known planned or ongoing proceedings for prosecution of FPs. The lack of prosecutions should not be attributed to a lack of political will. Indeed on 6 December 2012 David Green, the Director of the SFO, published an open letter 'to whom it may concern' seeking to remind those concerned that the Bribery Act 2010 made no exception for FPs.[130] The letter continued by highlighting that individuals and companies that pay FPs as part of conducting business in foreign countries risk criminal prosecution in the UK.[131] Consequently, it is necessary to examine other reasons as to why there has been a lack of prosecutions for foreign bribery to date.

While there does not appear to be a lack of political will in terms of commitment to prosecuting foreign bribery, there are both practical and regulatory reasons as to why there have not been any prosecutions for foreign bribery. Concerning practical justifications, the Bribery Act 2010 has only newly entered into force (1 July 2011), and prosecuting foreign bribery is likely to be resource intensive due to its multi-jurisdictional nature. In terms of regulatory reasons, it is also noteworthy that the UK respects the principle of double jeopardy in relation to foreign bribery. This means that those prosecuted for bribery in another jurisdiction cannot be prosecuted again in the UK for the same offence, and is likely to limit the number of foreign bribery prosecutions.[132] A further regulatory reason as to the lack of prosecutions is that the UK has also decided in favour of introducing Deferred Prosecution Agreements (DPAs) in relation to the BA.[133] The introduction of DPAs is intended to provide prosecutors with a new method for addressing bribery and other corporate crime. However, a consequence of DPAs is to create an alternative to prosecution, with the logical expected result that the number of prosecutions would decrease. Thus, while there have not been prosecutions for paying FPs to date, this is very much an ongoing situation, and companies

[130]David Green, 'Enforcement of the United Kingdom's Bribery Act – Facilitation Payments' (2012) <http://www.sfo.gov.uk/media/225554/enforcement_of_the_uks_bribery_act_facilitation_payments_061212.pdf > accessed 22 November 2013.

[131] Ibid.

[132] Transparency International UK, 'Deterring and Punishing Corporate Bribery' (TI-UK Policy Paper 2012), 67.

[133] Oliver Head, 'The Mechanics of Deferred Prosecution Agreements in the UK' (Speech to the C5 7th Advanced Forum on Anti Corruption on the role of prosecutors and the court, 28 June 2013) <https://www.gov.uk/government/speeches/the-mechanics-of-deferred-prosecution-agreements-in-the-uk> accessed 27 December 2013.

should by no means become complacent that they will not be prosecuted for FPs under the BA.

b) The Netherlands

The Netherlands, like the UK has criminalised foreign bribery and corruption. Articles 177, 177a, 178(1), and 178(2) of the Dutch Criminal Code, Wetboek van Strafrecht, criminalise bribing foreign officials, with no exception made for FPs.[134] While all of the Articles criminalise the bribery of foreign officials, they differ in relation to the recipient of the bribery of the bribe, the action of the foreign official as a consequence of the bribe, and the intended outcome of the bribe. The difference between Article 177 and 177a relates to duty. In Article 177, the public official is bribed so as not to do his/her duty. In comparison in Article 177a the public official is bribed in such a way as he/she still does her duty. Articles 178(1) and 178(2) both involve the exercise of discretion on the part of the official, and so cannot be said to criminalise FPs. Thus, the relevant Articles are 177 and 177a.

The lack of an exception for FPs under Articles 177 and 177a has lead to the conclusion that FPs are criminalised under the identified Articles.[135] Studies on the criminalisation of FPs under Dutch law fail to identify whether FPs are criminalised under both or only some of these Articles.[136] However, the Dutch Public Prosecution Service has implied that such prosecution would occur under either Articles 177a or 177 of the Criminal Code.[137] Consequently, an EU company could be charged with paying FPs under either Article 177 or 177a.

Article 178a of the Wetboek van Strafrecht defines the scope of Articles: 177 and 177a criminalising the bribery of foreign officials. Under Article 178a the jurisdiction of the Wetboek van Strafrecht is extended to situations where a Dutch citizen bribes a foreign public official,[138] provided that it is also a crime in the country where the bribe is paid.[139]

[134] See Appendix 4 for the complete Articles 177, 177a, 178(1) and 178(2) from the Wetboek van Strafrecht.
[135] College van procureurs-generaal, 'Aanwijzing opsporing en vervolging ambtelijke corruptive in het buitenland' (2013) <www.om.nl> accessed 14 October 2013.
[136] See for instance: OECD Directorate for Financial and Enterprise Affairs, 'Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the Netherlands' (2012), 13 <http://www.oecd.org/daf/anti-bribery/Netherlandsphase3reportEN.pdf> accessed 14 November 2013; College van procureurs-generaal (n 135).
[137] College van procureurs-generaal (n 135).
[138] OECD Directorate for Financial and Enterprise Affairs, 'The Netherlands: Phase 2, Follow-Up Report on the Implementation of Phase 2 Recommendations' (2008), 25 < http://www.oecd.org/investment/anti-bribery/41919004.pdf> accessed 15 November 2013.

Article 177a was introduced to the criminal code as part of several legislative changes that came into force from 1st February 2001.[140] However, despite the fact that the legislative amendments came into force 12 years ago, there remain suspiciously few prosecutions for foreign bribery in the Netherlands.[141] Indeed, since the 2001 amendments, the Netherlands has failed to prosecute any cases involving foreign bribery.[142] This is despite the fact that it has conducted several foreign bribery investigations that were subsequently terminated.[143] While it is difficult to assess how many of these cases involved FPs, from the information provided in the OECD Report on the Netherland's implementation of the OECD Convention, there is at least a possibility that some of the terminated cases related to bribery that could be classified as FPs.

The general lack of prosecution for foreign bribery under Dutch Law is difficult to explain, but the lack of prosecutions under Dutch law for paying FPs to foreign officials can be explained. This is because the Public Prosecution Service issued guidelines stating that it will not prosecute small FPs.[144] Other Dutch authorities concerned with the issue of foreign bribery have acted upon and promulgated this stance. For instance, in the guidelines entitled *Honest Business, without Corruption: Practical Tips for doing Business Abroad*, produced in joint publication by various organisations including the Dutch Ministries of Economic Affairs, Agriculture and Innovation, Foreign Affairs, and Security and Justice, the authors state that while FPs are illegal under Dutch criminal law, the Public Prosecution Service 'generally does not proceed against this form of corruption.'[145] According to the Public Prosecution Service guidelines, the reason for this policy is that the FPs fall outside the scope of the OECD Convention.[146] The importance of a policy by the Dutch Public Prosecution Service to not prosecute small FPs should not be understated. This is because under Dutch law the Public Prosecution Service has complete and exclusive authority to determine which cases will be prosecuted.[147] Accordingly the 'exemption' of FPs from prosecution by the

[139] OECD Directorate for Financial and Enterprise Affairs (n 138); PJP Tak, *The Dutch Criminal Justice System* (Wolf Legal Publications 2008), 68.
[140] OECD Directorate for Financial and Enterprise Affairs (n 138), 25.
[141] OECD Directorate for Financial and Enterprise Affairs (n 136).
[142] Ibid.
[143] Ibid.
[144] College van procureurs-generaal (n 135).; Dan Hyde, 'Bribery Act: 'facilitation payments'' *The Law Society Gazette* (17 June 2003) <http://www.lawgazette.co.uk/law/practice-points/bribery-act-facilitation-payments/71372.article> accessed 11 October 2013.
[145] Wientjes (n 3).
[146] College van procureurs-generaal (n 135).
[147] Tak (n 139) 47.

Public Prosecution Service can be logically viewed as providing a 'de facto exception' for FPs from criminal liability.

In addition to the more general statement that the Dutch Public Prosecution Service will generally not prosecute small FPs, the Public Prosecution Service has provided further guidance as to when the decision will be made not to prosecute the payment of FPs in a foreign country. The factors that the Public Prosecution Service will consider when deciding not to prosecute FPs are:

- The payment relates to acts or omissions for which the official was legally obliged to perform. The payment shall in no way have an anti-competitive effect;
- It is, in absolute or relative terms, a small amount;
- It was to lower-level officials;
- The gift should be transparently recorded in the records of the company, and must not be concealed;
- The foreign official must have initiated the gift. [148]

The identified factors do succeed in providing extra guidance as to when decisions will be made to not prosecute a FP. Specifically, the factors provide the clear impression that the 'de-facto exception' will only apply to foreign bribery at the lowest end on the scale of offending, and that companies must retain accurate records of any FPs. However, there remains a general lack of clarity as to when a company will benefit from this 'de-facto exception'. For instance, there is no definition of how the Public Prosecution Service defines a FP. There is also no monetary value ascribed as to what will constitute a 'small' FP. Neither is there any attempt to define which public officials qualify as low-level officials. Furthermore, given that FPs are generally illegal in the country where they are paid, and under other countries' foreign bribery laws, transparently recording the FP may risk prosecution in other countries. Consequently, despite providing a 'de-facto' exception from prosecution for small FPs, and identifying the factors used by the Public Prosecution Service in deciding not to prosecute, the guidelines issued by the Public Prosecution Service ensure that it retains considerable discretion in choosing whether to prosecute FPs.

[148] College van procureurs-generaal (n 135).

4. Conclusion: Comparing and Contrasting the Laws on Facilitation Payments: The UK, and the Netherlands

The most obvious and noticeable similarity between the law on FPs in the Netherlands and the UK is that FPs are illegal and criminalised in both countries. However, the UK and the Netherlands have taken very different approaches to the implementation of the legal prohibition on FPs. The SFO, the UK agency responsible for prosecuting FPs, has stated that FPs will be prosecuted under the BA. In contrast, the Dutch Public Prosecution Service has created a 'de-facto exception' for FPs, by declaring that they will generally not prosecute small FPs. While there have not been prosecutions in either MS for FPs to date, the crucial difference between the two Legislative Acts is that the BA only came into force two years ago, whereas the most recent addition to the Wetboek van Strafrecht relating to FPs was 12 years ago. As will be seen in the next Chapter, the lack of prosecutions under the Wetboek van Strafrecht has been criticised by the OECD Working Group on Bribery (OECD Working Group) for the OECD Convention; and it is to the question of its influence, and the influence of the US FCPA on EU Companies, that this article will now turn.

Chapter IV: Influence of International and US Law on EU companies

1. The Long Reach of International and US law

Neither EU Companies, nor the EU MS in which they operate, are impervious to the laws of other nations outside the EU, or to International Law. While, both EU companies and EU MS are undoubtedly affected to at least some extent by the relevant FP laws in all countries, and relevant international instruments, there is one country, and one international instrument that pervade FP law. This is the US FCPA, and the OECD Convention. These two instruments affect EU Companies and EU MS through different degrees of directness and for different reasons. However, both instruments serve to limit both the policy choices of EU Companies, and the legislation of EU MS.

2. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business transactions

In terms of international law, the most important and influential instrument remains the OECD Convention.[149] Article 1 of the OECD Convention requires States Parties to criminalise the bribery of foreign public officials. While Article 1 contains no exception for FPs, Official Commentary 9 of the OECD Convention states:

> '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 licenses 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 programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.'[150]

Pieth et al have drawn two main conclusions from Official Commentary 9.[151] Firstly, Official Commentary 9 clearly provides a limited exception for FPs from constituting a bribe under

[149] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (n 32), Philip Nichols, 'Who Allows Facilitating Payments' (2009) 14:4 Agora without Frontiers 303, 310.
[150] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (n 32).
[151] Mark Pieth et al, *The OECD Convention on Bribery* (Cambridge University Press 1997) 139.

Article 1(1) of the OECD Convention.[152] However, secondly, this exclusion is limited to small FPs, interpreted by Pieth et al as constituting an amount that is of a 'minor nature not exceeding the social norm'[153] of the society in question.[154] Furthermore, the Official Commentary 9 exception of FPs from criminalisation under Article 1(1) should not be interpreted as tacit ethical approval of such payments. While small FPs are exempted from criminal liability in the country in question, companies are encouraged to resolve the issue through good governance practices when operating abroad.[155] Thus, the exemption should be interpreted as grounded in practical issues surrounding the effectiveness of criminalising FPs in countries other than where they occur.

The OECD Convention has a more indirect effect on EU companies' policies with regard to FPs. However, it directly affects the laws of EU MSs on FPs, through influencing their laws on FPs. As of November 2012, 22 EU MSs were States Parties to the OECD Convention.[156] The influence of the OECD Convention on EU MSs' law on FPs occurs through the reports mechanism under Article 12 of the OECD Convention, whereby the OECD Working Group investigates and then reports on States Parties compliance with the OECD Convention.[157] Furthermore, as regards the issue of enforcement of the OECD Convention through criminal prosecutions, the OECD Working Group can require States through the relevant law agencies, to explain to other States Parties why the agency decided not to prosecute (and vice versa) a particular case.[158] The influence of these reports is significant. For instance, both the UK and the Netherlands have taken legislative action in response to criticisms by the OECD Working Group. In response to criticism by the OECD Working Group in its Phase 2 Report on the Netherlands, the Netherlands instituted a number of significant legislative changes in relation to its laws on foreign bribery.[159] This included the addition of Articles 177a, and 178a to the Dutch Criminal Code.[160] The UK also responded with significant legislative

[152] Ibid, 139.
[153] Ibid, 139.
[154] Ibid, 139.
[155] Ibid, 139.
[156] 'Ratification Status as of 20 November 2012' (*OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* 2012) <http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf> accessed 20 November 2013.
[157] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (n 32), Article XII.
[158] Mark Pieth, 'Collective Action and Corruption' in Mark Pieth (ed), *Collective Action and Corruption: Innovative strategies to prevent corruption* (Dike AG 2012) 8.
[159] OECD Directorate for Financial and Enterprise Affairs (n 138).
[160] Ibid.

change following the recommendations of the Working Group on Bribery, enacting the BA.[161]

Despite being the most influential, the OECD Convention is not the only international instrument to address the issue of FPs. The other international instrument of note is the Inter-American Convention against Corruption (OAS Convention),[162] which pre-dated the OECD Convention and called on States Parties to enact laws criminalising paying bribes in foreign countries.[163] However, the OAS Convention did not refer to the phenomenon of FPs, and did not engender significant legislative action by its States Parties.[164] In contrast, the OECD Convention is lauded as having acted to catalyse significant domestic legal reform amongst its States Parties.[165] As of 20 November 2012, the OECD Convention had 40 signatories,[166] of which 22 are members of the EU. Furthermore, this membership spans the 'majorities of international trade and investment.'[167] Like the OAS Convention, all OECD States Parties must enact legislation criminalising bribing foreign officials. But the OECD Convention differs from the OAS Convention by way of Article 1(9), which excludes 'small' FPs from being included as an offence.

The exclusion of 'small' FPs, from acts which the OECD Convention declares that States Parties must criminalise, is not without controversy. The wording in Official Commentary 9 motivated Nichols to state that the OECD Convention does not in fact create an exception for FPs.[168] Rather it simply does not include facilitating payments in its coverage.[169] This distinction matters because it affects the way States Parties interpret their obligations under the OECD Convention, and whether they see it as justifying or directing the creation of a legal exception for FPs in their domestic law. It also hints at the likely development of international law on the subject of FPs, which will undoubtedly influence both the law of EU MS, and that of other States Parties to the OECD Convention. The controversy has been furthered by the OECD Working Group's statement in the 2009 Recommendation and 2010

[161] OECD Working Group on Bribery, 'Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom' (2012) <http://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf> accessed 4 January 2014.
[162] Inter-American Convention Against Corruption, 29 March 1996, in force 6 June 1997 (OAS Convention).
[163] Ibid.
[164] Nichols (n 149) 310.
[165] Ibid 310.
[166] 'Ratification Status as of 20 November 2012' (n 156).
[167] Nichols (n 149) 310.
[168] Ibid.
[169] Ibid.

Good Practice Guidance, which advised Parties to the OECD Convention to 'encourage companies to prohibit or discourage the use of small FPs.'[170] Jordon interpreted this as a call by the OECD Working Group for States Parties to prohibit FPs.[171] However, whether the wording of the OECD Working Group can be interpreted that strongly is debateable. Furthermore, the 2009 Recommendation and 2010 Good Practice Guidance did not serve to alter the actual Articles or Official Commentary of the OECD Convention.

3. US Law and the Foreign Corrupt Practices Act

The US FCPA directly affects EU companies through its wide jurisdictional scope and the lack of protection against double jeopardy.[172] The lack of protection means that an EU company can be prosecuted for the same crime under the FCPA in two countries, and that prosecution for bribery in a country other than the US does not limit US prosecution.[173] The FCPA explicitly excepts FPs from its scope of criminalisation. The FCPA excepts 'facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.' The exception has been singled out for criticism that it renders the FCPA ineffective.[174] Specifically it has been criticised as failing to provide adequate limits to the exception.[175] The FCPA does define 'routine government action'; but problematically, the provision fails to contain any indication of the permissible limit on monetary value of FPs. Pieth et al, and the OECD Working Group have singled out 'routine governmental action' as problematic due to its potential for abuse.[176] While some case law has touched on the issue of FPs, there has been little guidance as to the limits on the monetary value of a FP, such as will prevent a payment from falling within the exception and being determined to be a bribe.[177] The general, and somewhat obvious, guidance available

[170] OECD Working Group on Bribery, 'Annual Report 2013' (2013), 7 <http://www.oecd.org/tax/crime/oecdworkinggrouponbribery-annualreport.htm> accessed 22 November 2013.
[171] Jordon (n 1) 882.
[172] Michael van Alstine, 'Treaty Double Jeopardy: The OECD Anti-Bribery Convention and the FCPA' (2012) 73:5 Ohio State Law Journal 1321, 1322.
[173] Ibid 1322.
[174] Rebecca Koch, 'The Foreign Corrupt Practices Act: It's Time to Cut Back the Grease and Add Some Guidance' (2005) 28:2 Boston College International and Comparative Law Review 379, 380.
[175] Priya Huskins, 'FCPA Prosecutions: Liability Trend to Watch' (2008) 60:5 Stanford Law Review 1447; Koch (n 174) 380.
[176] Pieth (n 151) 148.
[177] Strauss (n 17) 241.

simply suggests that the higher the monetary value of the payment, the less likely it is to fall within the FP exception.[178]

Perhaps allying the fears of critics, is the fact that despite the potentially wide-ranging FP exception, the US FCPA exemption is not widely relied upon, given the fear of penalties if the payment is held to be outside the scope of the exemption.[179] Such concerns are furthered by the trend of increasing numbers of prosecutions under the FCPA in recent years.[180] Additionally, increasing numbers of DPAs are being concluded under the FCPA.[181] DPAs and non-prosecution agreements (NPAs) are seen as an effective way to enable the US Department of Justice (DOJ) to address corporate misconduct, while avoiding the collateral consequences of formal corporate criminal prosecutions.[182] Indeed, they are now the DOJ's primary method in addressing corporate crime.[183] Increasing trends in terms of both prosecutions, and DPAs and NPAs, could signal a change in US policy on FPs, as the government looks to take further action to stamp out bribery and corruption. Recent enforcement action by the US Securities Exchange Commission (SEC) and the DOJ suggests that US enforcement agencies are increasingly seeking to limit and ease-out the FPs exception.[184] The 2012 SEC *A Resource Guide to the U.S. Foreign Corrupt Practices Act* stated that while there is a narrow exception for FPs under the FCPA the US, in line with the OECD Working Group has regularly acted to 'encourage companies to prohibit or discourage facilitating payments.'[185] In fact the enforcement agencies have begun prosecuting conduct which arguably falls under the exception, through relying on accounting and other provisions requiring such payments to be recorded correctly.[186]

The trend towards limiting and 'easing-out' the FP exception under the FCPA concerns EU MNCs because of the wide jurisdiction of the US FCPA. The FCPA's anti-bribery provisions apply to: issuers, domestic concerns, and certain persons and entities that are not issuers or

[178] Ibid 251.
[179] Hyde (n 144).
[180] Huskins (n 175).
[181] Mark Gideon, 'Private FCPA Enforcement' (2012) 49:3 American Business Law Journal 419, 435.
[182] Joseph Warin et al, 'White Collar crime Report' (2011) 6:3 BNA Inc, 2.
[183] Ibid.
[184] Strauss (n 17) 241.
[185] Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission (n 12) 25.
[186] Strauss (n 17) 241.

domestic concerns.[187] Issuers are companies with a class of securities listed on the US securities exchange, or any companies that have an 'over-the-counter market in the United States and required to file periodic reports with SEC'.[188] Domestic concerns are individuals that are a citizen, national or resident of the US; or any corporation, partnership, association, joint-stock company, business trust, unincorporated organisation, or sole proprietorship that is organized under the laws of the United States or its states, territories, possessions, or commonwealths or that has its principal place of business in the United States.[189] Additionally, the FCPA also applies to:

> '[F]oreign persons and foreign non-issuer entities that, either directly or through an agent, engage in *any* act in furtherance of a corrupt payment (or an offer, promise, or authorisation to pay) while in the territory of the United States. Also officers, directors, employees, agents, or stockholders acting on behalf of such persons or entities may be subject to the FCPA's anti-bribery prohibitions.'

However, it is important to note that this list is non-exhaustive with the FCPA's extraterritorial jurisdiction even further extended to foreign companies that have a connection to the US and breach the FCPA.[190] Consequently it is likely that a large number of EU companies also fall under the jurisdiction of the FCPA. This means that EU companies will likely also have to comply, and pay the associated additional compliance costs, with the FCPA in addition to the relevant EU MS law on FPs. The probability of increased compliance costs for EU companies in complying with the FCPA is particularly assured by the lack of recognition by the US of the principle of double jeopardy. Therefore, prosecution and legislative trends in the US are of particular concern for EU MNCs.

4. Consequent Limitations on EU Companies

To conclude, the policies of EU companies on FPs are limited in two ways by the OECD Convention and the FCPA. Firstly, they are limited through coming, either directly or indirectly, under the jurisdiction of either the FCPA or a country that is a States Party to the OECD Convention. The direct influence is felt through the FCPA's wide ranging jurisdiction, to which EU companies will likely be subjected. The indirect influence comes from the

[187] Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission (n 12) 10.
[188] Ibid 11.
[189] Ibid 11.
[190] Ibid 34.

OECD Convention's role in influencing the law of States Parties on FPs. Secondly, EU companies' policies on FPs are limited by the trends displayed in each of these instruments. While both the FCPA and OECD Convention have exempted or excluded FPs from their scope of criminalisation, there is evidence that both instruments are seeking to narrow this exemption/exclusion. Consequently, EU companies are likely to lack confidence in their ability to rely on the exemptions/exclusions for FPs in the course of their business conduct.

Chapter V: Are Different Facilitation Payment Laws within EU Member States Problematic for EU companies?

1. Introduction

The EU Commission has advocated for a unified approach towards shaping EU anti-corruption policies, reinforcing the notion that differences between EU MS's FP laws are problematic.[191] The potential problems caused by different laws on FP between EU MS can be placed into three categories: cost of compliance, legal certainty, and regulatory competition. This chapter will explain each of these potential problems, including a comparative discussion of the expected magnitude of each identified problem for EU companies.

2. Legal Certainty

EU law is not harmonised in the area of corruption, and more importantly for the purposes of this article, FPs. This creates issues of legal certainty for EU companies which operate in countries outside the EU, and simultaneously may fall under the jurisdiction of more than one EU MS.[192] TI continues to be critical of EU efforts to counteract corruption, and recommended the adoption of an EU comprehensive anti-corruption policy.[193] Trends in the EU point to increasing awareness and impetus to tackle the issue of corruption, both within the EU and abroad. For instance, in 2013 the EU reached a deal in relation to a proposed oil and gas anti-corruption law that would require oil, gas, mining, and logging companies to declare payments to foreign officials.[194] However, to date the vast majority of the EU's focus on corruption has been in regard to corruption occurring within the EU. For example, in its 2003 Communication from the Commission on the subject of a comprehensive EU policy

[191] European Commission, 'Corruption' (2012) <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/index_en.htm> accessed 29 December 2013.
[192] See Chapter V: Parts 2 and 3.
[193] Transparency International EU Office, 'EU Anti-Corruption Policy' (2012) <http://www.transparencyinternational.eu/focus_areas/eu-anti-corruption/> accessed 24 November 2013.
[194] Barbara Lewis, 'European Union reaches deal on tough oil, gas anti-corruption law' *Reuters* (9 April 2013) <http://www.reuters.com/article/2013/04/09/us-eu-transparency-idUSBRE9380XZ20130409> accessed 24 November 2013.

against corruption, the Commission primarily focussed on addressing corruption within the EU, and in EU candidate countries.[195]

While trends show that corruption is increasingly on the 'radar' of the EU, there is no evidence as to the EU's stance on FPs. Issues of legal certainty with regard to EU MSs' FP laws tend to relate to enforcement by EU MSs of their foreign bribery law on FPs. For instance, the Dutch Public Prosecution Service has created a de facto exception for FPs from its laws criminalising the act of bribing a foreign public official, by stating that it will generally not prosecute small FPs.[196] The problem with such an exception is that EU companies that come within the jurisdiction of Dutch law lack certainty as to whether they will be prosecuted for FPs.[197] This is because there is little guidance as to what constitutes a 'small FP',[198] and instead of enacting a legally enforceable exception, the Dutch Public Prosecution Service has ensured that it retains discretion as to whether to prosecute.

Countering the view that there are issues as to legal certainty is the perspective that the Dutch approach of a de facto exception for FPs from foreign bribery laws, offers sufficient legal certainty for the EU companies concerned. Unfortunately there is a lack of evidence to back up this claim. However, proponents can point to the fact that there has been a lack of criminal prosecutions for FPs under Dutch law,[199] as evidence that the de facto exception can be relied on by EU companies.

A third possible perspective as to legal certainty is that from an ethical perspective a lack of legal certainty may in fact be desirable in laws regulating FPs. A lack of legal certainty as to whether an EU company will be prosecuted for paying FPs may be sufficient to prevent a cautious EU company from paying FPs. From an ethical perspective of stopping the payment of FPs by EU companies abroad, this is a desirable outcome.[200] However, the reality is that such legal uncertainty would be unlikely to deter all EU companies from paying FPs abroad, and a much better approach to stopping the payment of FPs abroad, is to criminalise their payment by EU companies.

[195] European Commission, 'Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – On a comprehensive EU policy against corruption' COM (2003) 0317 final.
[196] College van procureurs-generaal (n 135); Hyde (n 144).
[197] See Chapter III section 3 paragraph b.
[198] College van procureurs-generaal (n 135); and see Chatper III section 2 paragraph b.
[199] OECD Directorate for Financial and Enterprise Affairs (n 136) 9.
[200] See Chapter II section 2 paragraph b.

3. Cost of Compliance

The cost of compliance for EU companies complying with different FP laws in EU MS has two elements. Firstly, the issue of cost of compliance relates to the actual costs in complying with the law on FPs in different jurisdictions. This will likely incur significant costs in the form of paying for lawyers and accountants in each EU MS. Secondly, and more generally, the issue of the cost of compliance concerns the time required in order to assess which jurisdictions of EU MS an EU company falls under. Jurisdictional scope concerns the issue of whether an EU company is subject to more than one EU MS's law on FPs. With the law of EU MSs on FPs having a wide jurisdictional scope, this is a very likely scenario. For example, the Dutch law on FPs paid abroad applies where a Dutch citizen bribes a foreign public official.[201] Thus, an EU company based in another EU MS would be subject to Dutch law on FPs where its employee paying the FP is a Dutch citizen. Likewise, the UK law on FPs includes a wide definition of commercial organisations liable for the payment of FPs abroad, including a body or partnership, carrying out business, or part of a business in the UK, whether or not it was formed or incorporated in the UK under UK law.[202] Consequently, EU companies will likely have to comply with the FP laws of more than one MS, which could entail significant compliance costs for the EU company in question.

A direct consequence of the wide-ranging jurisdictions of EU MSs' FP laws is that compliance with one MS's FP laws may engender risks of criminal liability in another. For instance, the BA and its associated guidelines take a firm stance against the permissibility of FPs.[203] Those responsible for the administration and enforcement of the BA have repeatedly confirmed that FPs are illegal and prosecutorial action will be taken against companies that pay FPs.[204] In contrast, the Dutch Prosecutorial Service has enacted a de facto exception from criminal liability for FPs where certain factors are met.[205] These factors include that the FP or 'gift' is transparently recorded.[206] However, because of the wide jurisdiction of the UK FP laws, it is likely that a company subject to the bribery laws of the Netherlands will also fall under the jurisdiction of the UK's bribery laws. Consequently, the cost of compliance in transparently recording the FP may be the endangerment of criminal prosecution in the UK.

[201] Wetoboek van Strafrecht; OECD Directorate for Financial and Enterprise Affairs (n 138); and see Chapter III section 2 paragraph b.
[202] Bribery Act 2010, s 7(5).
[203] See Chapter III section 3 paragraph a.
[204] See Chapter III section 3 paragraph a.
[205] See Chapter III section 3 paragraph b.
[206] See Chapter III section 3 paragraph b.

The antithesis of this problem is the issue of why it matters that EU companies could face considerable compliance costs in ensuring conformity with EU MS's different FP laws. FPs are generally illegal in the country where they are paid,[207] and companies could easily avoid compliance costs through simply prohibiting the payment of FPs abroad. Such a policy of prohibition would ensure that EU MNCs would not risk falling foul of EU MSs' FP laws. However, the reality is that EU companies may consider the loss of competitive advantage through not paying FPs to be greater than the cost of ensuring compliance with a multitude of different laws on FPs. Furthermore, where an EU MS has created an exception from criminal liability for FPs, then EU companies falling under that MS's jurisdiction are legally entitled to rely on that exception. Thus, the cost of compliance as a result of EU MSs' differing laws on FPs, should not be dismissed as a problem brought about by EU companies' own fallacy.

4. Regulatory Competition

Proponents of legal FPs argue that allowing firms to pay FPs in foreign countries is justified on the grounds that it grants firms a competitive advantage.[208] This is a regulatory competition argument to the extent that it is based on the assumption that criminalising FPs in one MS provides companies in another MS with a competitive advantage. Regulatory competition assumes a world where regulation subjects can choose to which regulatory regime they are subjected.[209] The model of regulatory competition assumes that in the absence of externalities regulatory competition is 'good', but acknowledges that externalities and political economy can create negative welfare effects.[210] Regulatory competition has been applied extensively to company law,[211] but not criminal law, which is the area that FPs fall under. Consequently, the issue is whether the theory and arguments against regulatory competition in company law can be equally applied to FP laws; as a problem caused by different FP laws in EU MSs.

Within the context of the EU, the legal framework in the area of EU company law favours proponents of regulatory competition, with its diversity surviving multiple attempts at

[207] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (n 32), Article VII.
[208] Nichols (n 149).
[209] Paul Stephan, 'Regulatory Competition and Anticorruption law' (2012) Law and Economics Research Paper Series 2012, 2 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138248> accessed 25 November 2013.
[210] Ibid 3.
[211] Klaus Heine, 'Regulatory Competition between Company Laws in the European Union: the Uberseering Case' [2003] Intereconomics 103, 104.

harmonisation.[212] Proponents of regulatory competition claim that it leads to efficiency in company law.[213] Opponents of regulatory competition in company law point to several problems in response to the claim of efficiency. Firstly, there are negative externalities where company laws are modelled so as to attract companies to a MS's jurisdiction, which include the risk that laws will be written in a way which does not allow sufficient monitoring of the company's activity (principal-agent problem).[214] Secondly, there is the risk that regulatory competition will create a 'race to the bottom', with each MS copying the other's 'looser' laws in order to compete on regulation.[215] Thirdly, and in line with the 'race to the bottom argument', as a result of the high levels of regulatory competition, MS's could begin to compete on 'marginal price reduction'[216], to attract companies, resulting in the costs of creating the law failing to be covered by the returns of attracting companies to the MS's jurisdiction.[217]

The first issue with the claim that different laws on FPs between MS leads to regulatory competition is that the claimed advantage that it leads to efficient company laws,[218] cannot be easily applied to FPs. This is because efficiency is unlikely to be the primary aim of a MS in creating criminal law in the area of FPs. The second problem, with the claim that different FP laws between MS leads to regulatory competition is the fact that the proposed 'race to the bottom' has not occurred in the area of FP law. Given the assumption under regulatory competition of MSs focused on only looking out for their own interests, the question arises why any EU MS (or other country for that matter), would criminalise corruption by one of its firms in a foreign state.[219] In contrast the reality is that the mere fact that some countries such as the UK have chosen to criminalise FPs, suggests if anything the opposite of a 'race to the bottom'.[220] Regulatory competition can also create a 'race to the top', which is identified as the 'California effect'.[221] However, because there is no evidence that the prohibition of FPs

[212] Simon Deakin, 'Regulatory Competition versus Harmonisation in European Company Law' in Daniel Esty, and Damien Geradin (eds), *Regulatory Competition and Economic Integration* (Oxford University Press 2004) 190.
[213] Heine (n 211) 104.
[214] Ibid 104.
[215] Ibid 104.
[216] Ibid 104.
[217] Ibid 104.
[218] Ibid 104.
[219] Stephan (n 209) 3.
[220] Ibid 14.
[221] David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Harvard University Press 1995).

in the UK has induced other EU MSs to enact laws prohibiting FPs, it is also unlikely that instead of a 'race to the bottom' there is in fact a 'race to the top'.

The logical reason that regulatory competition does not occur in the area of FP laws may be because regulatory competition requires that EU MSs can exclude the law of other MSs applying to companies in relation to FPs. However, because the jurisdictions of MSs' FP laws are so wide[222] it is almost impossible for MSs to compete on the grounds that an EU company present in their MS will be subject to more favourable FP laws. Consequently, the competitive disadvantage that EU companies claim to suffer as a result of being prohibited from paying FPs relates to the actions by EU MSs of criminalising FPs with wide-ranging multi-jurisdictional effect. The wide jurisdictional scope of this criminalisation means that EU companies, although potentially based in other EU MS, are forced to comply with the strictest criminal standard in relation FPs. This naturally relies on three assumptions about the EU MS criminalising FPs: that the MS enacts the criminalisation of FPs with a wide jurisdiction, that the EU MS's economic status is such that a significant number of EU companies will be subjected to its jurisdiction, and that the EU MS is able to create a credible threat that those subject to its jurisdiction will be prosecuted. Where an EU MS criminalises FPs with wide-ranging multi-jurisdictional effect, a cynical viewpoint is to suggest that one of the reasons for such a wide jurisdiction is precisely to exclude regulatory competition in this area so as to 'level the playing field' for that EU MS's own companies.

5. Conclusion

The two primary problems caused by differing FP laws between EU MSs are legal certainty and the cost of compliance. A third problem suggested by supporters of allowing FPs to remain legal under national law, is the argument that differing laws on FPs between MSs allows EU companies from MSs where FPs are legal to gain a competitive advantage over EU Companies from MSs where FPs are illegal. Such an argument in essence amounts to a regulatory competition argument. However, the regulatory competition model cannot be applied to FP laws. Neither the advantages, nor the disadvantages of regulatory competition, can be applied to FP laws. This is likely because regulatory competition requires a MS to be able to exclude the law of other MSs, and laws criminalising FPs tend to be enacted with a wide jurisdictional scope. Thus, providing three key assumptions are met, the real problem

[222] For instance see the jurisdiction of the UK's 2010 Bribery Act as discussed in Chapter III section 2 paragraph a.

EU companies face in terms of competition are caused by an MS criminalising FPs in such a way so that the EU company is caught within the MS's jurisdiction with regard to this law.

Chapter VI: What Action can be taken in Relation to Facilitation Payment Laws at EU Level?

1. Introduction

The EU has three options when considering whether to take action at EU level: harmonise using secondary legislation, harmonise through experimentalist governance, or refrain from taking action. To address the issue of whether action needs to be taken at the EU level in order to harmonise the laws on FPs, two issues need to be addressed. Firstly, in order to harmonise the law on FPs within the EU, the EU must have been granted competence in this area, or be able to rely on experimentalist governance. Secondly, it needs to be addressed whether the problems caused by different FP laws between MSs are sufficient to justify harmonisation.

2. Does the EU have the Requisite Competence to Harmonise the Law on Facilitation Payments?

There are two possible bases for harmonisation of the law on FPs under the EU Treaties: Article 83 of the Treaty on the Functioning of the European Union (TFEU), and Article 114 TFEU. A third possible basis is Article 325 TFEU concerning action with regard to fraud and any other illegal activities affecting the EU's financial interests. However, this basis has not been relied on in similar legislative measures concerning market abuse,[223] and it is even less likely to be available in the case of EU action on FPs, which are neither fraud nor universally accepted illegal activities. Harmonising the law on FPs would involve either criminalising, or enacting an exception from criminal liability, for FPs. In terms of choosing a legal basis for harmonisation, where a measure has more than one purpose or component, the legal basis must be linked to the primary purpose.[224] Exceptionally, a dual basis can be used where it is proven that the measure has simultaneous multiple and inseparable purposes.[225] Thus, the purpose for this harmonisation would be crucial in identifying the appropriate legal basis.

Harmonisation within the area of criminal law has proved controversial. The predecessor of Articles 82 and 83 TFEU, Article 31 of the Treaty on European Union (TEU), failed to

[223] Ester Herlin-Karnell, 'White-collar crime and European financial crises: getting tough on EU market abuse' (2012) 37:4 E.L. Rev. 2012 481, 486.
[224] *Commission of the European Communities v Council of the European Union* C-281/01 [34]
[225] *Commission of the European Communities v Council of the European Union* C-281/01 [35]

provide an express treaty foundation for harmonisation in the area of criminal law, causing controversy as to whether the EU had competence in this area.[226] In *Casati* the Court of Justice of the European Union held that community law is capable of placing limits on national criminal law where it impedes on one of the fundamental freedoms of the EU.[227] In *Commission v Greece*, the ECJ accepted the use of national criminal law as a response to breaches of community law.[228] However, it was in *Commission v Council (Environment Crimes)* that the ECJ confirmed that the Commission has express competence in the area of criminal law.[229] Article 83(2) TFEU, confirms the line of case law leading to acceptance that the Commission has express competence in the area of criminal law.[230] It further adopts a wide interpretation of the previous case law.[231]

a) Competence under Article 83 of the TFEU?

Article 83(1) and Article 83(2) of the TFEU should be considered *lex specialis,* so that the two paragraphs are considered mutually exclusive in scope.[232] Article 83(1) provides competence in the area of crime including corruption with the following limitations:

> 'The European Parliament and the Council may…establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis… On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.'

Article 83(2) states that where an area of law has already been harmonised, then the criminal laws of MSs may be approximated where they are necessary to ensure the effective implementation of EU policy. However, since the EU has not enacted harmonisation measures in the area of foreign bribery, it appears unlikely that the EU has been granted competence under Article 83(2) for the harmonisation of FP laws through approximation of

[226] Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2011) 939.
[227] Case 203/80 *Casati* [1980] ECR 2595.
[228] Case 68/88 *Commission v Greece* [1989] ECR 2965.
[229] Case C-176/03 *Commission v Council* [2005] ECR 1-7879 *(Environment Crimes)*.
[230] Craig and de Burca (n 226) 942.
[231] Ibid 942.
[232] Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 763.

the relevant laws from EU MS. Consequently, it appears that the EU's competence to harmonise in the area of FPs under Article 83 TFEU is limited to Article 83(1).

The first criterion in harmonising under Article 83(1) is that the crime falls within one of the categories listed. As Article 83(1) specifically identifies corruption as a category, then this is no bar to the harmonisation of FP laws. The second requirement of Article 83(1) is that the crime has a cross-border dimension resulting from: a) the nature or impact of the offence, or b) a 'special need to combat' the offence on a common basis. The crime of paying FPs to foreign officials could conceivably meet either or both of these elements. Due to the wide jurisdiction that criminalisation of FPs normally entails, the nature and impact of the offence is such that it is likely to apply to EU companies based in other EU MS from where the offence is prosecuted. Furthermore, it could be argued that there is a special need to combat the crime of FPs on a community level, to more effectively address the problems associated with different laws on FPs between EU MSs. The third requirement for criminalising FPs under Article 83(1) is that the Council must act unanimously after gaining the consent of the European Parliament. This will likely be difficult to satisfy given the wide range of MS positions as to whether FPs should be criminalised.

Apart from issues in satisfying the three criteria that need to be met in order to complete harmonisation under Article 83(1), there is a further issue in that Article 83(1) expressly limits harmonisation to minimum harmonisation. This means that substantive criminal law cannot be harmonised under the Articles.[233] This raises two problems for harmonising FP laws under Article 83(1). First, Article 83(1) allows for the creation of definitions of criminal offences, and it is unclear whether this includes acts that may not be considered as criminal offences by all EU MS. Second, in limiting harmonisation to minimum harmonisation, it is difficult to create a criminal offence or legislative exception for FPs through definition. While it may appear possible to harmonise the law on FPs through defining foreign bribery as including or excepting FPs; this would involve substantive harmonisation, which falls outside the scope of Article 83(1).

b) Competence under Article 114 TFEU?

Article 114 of the TFEU (ex Article 95 TEC) provides the EU with the competence to harmonise in order to achieve the objective under Article 26 TFEU of 'establishing or

[233] Ibid 762.

ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties'. In contrast to Article 83 TFEU, Article 114 allows for substantial harmonisation of criminal law;[234] as established in the *Environment Crimes* case heard under Article 95 TEC.[235] However, this competence is limited by its requirement that the necessary links with the internal market are present. This is a logical limitation, as the only real interest at EU level in criminal law is where it is required as a means to assist the internal market.[236] Consequently, harmonisation in the area of financial crimes such as money laundering and terrorist financing has traditionally relied on the framework afforded by Article 114 TFEU, with the objective of improving investor confidence.[237]

While proposed harmonisation in the area of financial crime has traditionally succeeded in relying on Article 114 as its legal basis, it is questionable whether this competence remains following the Treaty of Lisbon. The Lisbon Treaty extended the EU's competences in the area of criminal law, with Article 83(1) representing a particularly important expansion of the EU's competences.[238] This expansion of competences led Peers to dismiss the suggestion that previous case law from the Treaty Establishing the European Community should be treated as continuing to provide harmonisation competence under Article 114.[239] This is because the TFEU radically altered the structure of the legal framework of this area in order to introduce a specific criminal law competence for harmonisation.[240] Peers also stated that Article 83 TFEU should be treated as *lex specialis*, meaning that since Article 83 TFEU is the more specific of the two provisions, it should be treated as overriding any competence under Article 114 TFEU.[241]

For Article 114 TFEU to constitute a valid ground for harmonisation the proposed measure must genuinely have as its object the improvement of the functioning of the internal market, and actually have that effect.[242] Regarding FPs, the compliance costs faced by firms in relation to EU MSs' diversified bribery and corruption laws could serve as a barrier to the exercise of the fundamental freedoms, such as the free movement of goods or persons. Such

[234] Ibid 765.
[235] *Environment Crimes* (n 229), Ester Herlin-Karnell, 'Is There More to it Than the Fight Against 'Dirty Money'? Article 95 EC and the Criminal Law' [2008] EBLR 557.
[236] Herlin-Karnell (n 223) 482.
[237] Ibid 482.
[238] Ibid 483.
[239] Peers (n 232) 765.
[240] Ibid 766.
[241] Ibid 765.
[242] Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-08419 *(Tobacco Advertising I).*

purpose was held to satisfy the requirements for using Article 114 as a legal basis in *Tobacco Advertising I.*[243] Thus, whether Article 83 TFEU operates as *lex specialis* is a crucial consideration in determining the availability of Article 114 as a legal basis providing competence for the harmonisation of FP laws. Reviewing post Lisbon legislative EU action in the area of criminal law, the *Proposal for a Directive on criminal sanctions for insider dealing and market manipulation*[244] relies on Article 83(2) as a legal basis. The rationale for deciding against relying on Article 114 for the legal basis is not transparent, given that the aim of the measure is to enhance investor confidence and market integrity.[245] However, the decision against relying on Article 114 has been criticised as incorrect,[246] and should not be interpreted as a confirmation of Peers' argument that Article 83 TFEU is *lex specialis.* This conclusion is further supported by another proposed Directive on the *prevention and the use of the financial system for the purpose of money laundering and terrorist financing*, which is based on Article 114 of the TFEU; with the intention that harmonisation will be complemented by relevant criminal law definitions under Article 83(1).[247] Consequently, the EU has competence to harmonise FP laws under Article 114 TFEU.

c) Conclusion

The EU has competence to harmonise the law on FPs under Article 114 TFEU. Competence could also exist under Article 83(1). However, Article 83(1) only provides competence for minimum harmonisation through definition, which is likely to be insufficient to harmonise FP laws with the view of criminalising or creating an exception from criminal liability for FPs.

3. Could Harmonisation Occur through Experimentalist Governance?

The impetus for experimental governance in the EU arose out of a perceived dilemma that EU citizens wanted solutions to major societal problems without recourse to distrusted institutions and politics.[248] Experimental governance is generally understood to involve action where 'instead of issuing detailed regulations, or specifying how services are to be provided, the state would set general goals, monitoring the efforts of appropriate actors to

[243] Ibid.
[244] European Commission, 'Proposal for a Directive on criminal sanctions for insider dealing and market manipulation' COM (2011) 654 final.
[245] Herlin-Karnell (n 223) 485.
[246] Ibid.
[247] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing' COM (2013) 045 final.
[248] European Commission, 'European Governance: A White Paper' COM (2001) 428 final.

achieve those goals by means of their own devising'.[249] This can be contrasted with traditional governance, which usually leads to 'binding, uniform laws.'[250] New governance has been used in a variety of differing situations, including where EU-level competence is limited or non-existent.[251] While there are different types of new governance,[252] the common factor is that in contrast to traditional governance new governance initiatives are not binding.[253] Thus, new governance initiatives are advocated as appropriate measures where there is uncertainty as to the best method of pursuing complicated policy aims, and accordingly places emphasis on flexibility, continual revision, and alteration.[254]

The non-binding nature and emphasis on flexibility and alteration of experimental governance means that it is an unsuitable method for addressing problems caused by different FP laws between MSs. The lack of legal certainty surrounding FP laws between MSs arises largely from MSs' decisions not to apply FP laws.[255] This also adds to compliance costs of EU companies, who are uncertain whether the law as stated on FPs will be applied to their company's actions.[256] Consequently, non-binding measures as occur under experimentalist governance are ill-equipped to address the problems caused by different FP laws between MSs. Furthermore, the emphasis on flexibility and alteration is inappropriate in an area where the two options that are available in terms of EU action are to enact an exception or extend criminal liability to FPs. These are not measures associated with either continued change or flexibility.

4. Conclusion

In conclusion the EU has competence to harmonise the law on FPs under Article 114 TFEU in so far as such harmonisation relates to the establishment and functioning of the internal market. While Article 83(1) TFEU also appears to provide competence, this is prevented by

[249] Charles Sabel, 'Beyond principal-agent governance: Experimentalist organizations, learning and accountability' in Engelen, E.R. and Sie Dhian Ho, M. (Eds.), *De staat van de democratie:Democratie voorbij de staat* (Amsterdam University Press 2004) 173, 175.
[250] Joanne Scott and David Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8 European Law Journal, 2.
[251] Ibid 7.
[252] Ibid 2.
[253] Grainne de Burca, 'EU Race Discrimination Law: A Hybrid Model?' in Grainne de Burca et al (eds), *Law and New Governance in the EU and the US* (Hart 2006).
[254] Grainne de Burca, 'Stumbling into experimentalism: the EU anti-discrimination regime' in Charles Sabel et al (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford University Press 2010) 216.
[255] See Chapter V section 1.
[256] See Chapter V section 2.

its limitation to minimum harmonisation. It is also not possible to rely on Article 325 TFEU as a basis for competence because FPs are neither fraud nor able to be categorised with certainty as other illegal activities. A second harmonisation option would be to rely on experimentalist governance. However, the non-binding nature of experimental governance and the underlying philosophy of flexibility and continued alteration of measures created through this form of governance, means that it is an ill-suited and inappropriate choice for harmonising FP laws. This is because part of the problem with different FP laws between MS relates to a lack of legal certainty, which is an area that experimentalist governance is ill-equipped to remedy.

Chapter VII: The EU Should Refrain from Taking Action to Harmonise Facilitation Payment Laws

1. Introduction

An EU harmonisation initiative in the area of FP laws could occur through two avenues. Firstly, FP laws could be harmonised as part of a stand-alone initiative. This would mean that the EU decided to harmonise FP laws without more generally harmonising the laws on bribery and corruption. Secondly, FP laws could be harmonised as part of a general EU initiative in relation to bribery and corruption laws, particularly foreign bribery laws. Where more general EU-wide harmonisation in the area of bribery and corruption was to occur, the issue is whether an exception from criminal liability should be established for FPs, or whether FPs should be criminalised.

2. Facilitation Payment Laws Should not be Harmonised as a Stand-Alone Initiative

It has been determined that the EU has competence to harmonise the law on FPs under Article 114 TFEU, and that relying on experimental governance is an unsatisfactory option. The competence provided by Article 114 allows for substantive harmonisation, but is limited by the requirement that the measure must be genuinely intended to ensure the functioning of the internal market and actually have that effect.[257] Thus, the issue is whether the EU should harmonise FP laws under Article 114 TFEU, or refrain from taking stand-alone EU action in the area of FPs.

The justification for harmonisation of FP laws would be to reduce the compliance costs for EU companies caused by differences in the law on FPs. Decreasing compliance costs could assist in the functioning of the internal market through decreasing barriers limiting the exercise of the fundamental freedoms, such as the free movement of goods or persons. Two other potential problems caused by different FP laws between EU MSs have also been highlighted: legal certainty, and regulatory competition. However, neither of these problems is capable of providing adequate justification for relying on Article 114 TFEU. The issue of legal certainty in the context of FP laws primarily relates to different levels of enforcement by EU MSs of their laws on FPs.[258] The fact that issues associated with legal certainty relate

[257] *Tobacco Advertising I* (n 242).
[258] See Chapter V section 2.

to EU MSs' own enforcement of their FP laws means that it is difficult to ensure that any harmonisation justified on legal certainty actually has the effect of improving the functioning of the internal market as per Article 114 TFEU. Regulatory competition also does not provide satisfactory justification for harmonisation, because the wide-ranging jurisdiction of EU MSs' FP laws minimises the possibility of regulatory competition. Thus, the primary purpose for harmonisation under Article 114 TFEU would be to decrease EU companies' compliance costs resulting from different laws on FPs between EU MSs.

For harmonisation under Article 114 to be a recommended option, it should be established that such harmonisation would significantly decrease compliance costs for EU companies in complying with FP laws. This would ensure that any harmonisation would be guaranteed to actually have the effect of ensuring the functioning of the internal market as per Article 114 TFEU. An EU-wide exception or criminalisation of FPs would decrease compliance costs within the EU for EU companies. However, any decrease in compliance costs would be countered by the compliance costs associated with the FCPA. The FCPA has enacted a narrow exception for FPs,[259] but the exception has not experienced heavy reliance.[260] While there have not been a significant number of prosecutions under the FCPA, the trend towards prosecution is increasing, [261] and the role of DPAs as an FCPA enforcement tool should not be understated.[262] The US's position on the principle of double jeopardy can be contrasted with the UK's, which accepts the principle of double jeopardy in relation to the BA.[263] This position is expected to be responsible for limiting prosecutions for foreign bribery under the BA.[264] Consequently, the wide jurisdictional scope of the FCPA and the US's rejection of the double jeopardy principle,[265] mean that the law on FPs under the FCPA create a substantial burden in terms of compliance costs for EU companies. [266] Thus, harmonisation of EU MSs' FP laws could not be ensured to significantly decrease compliance costs for EU companies. Thus, harmonisation of EU MSs' FP laws should not occur under Article 114 TFEU as a stand-alone measure.

[259] Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission (n 12) 25.
[260] Hyde (n 144).
[261] Huskins (n 175).
[262] Warin (n 182) 2.
[263] Transparency International UK (n 132) 67.
[264] Ibid 67.
[265] van Alstine (n 172) 1322.
[266] See Chapter IV section 3.

3. More General Harmonisation in the Area of Bribery/Corruption, Including Foreign Bribery, should Include the Criminalisation of Facilitation Payments

While corruption is a high priority issue for the EU, the majority of EU efforts in this area focus on corruption within the borders of the EU.[267] Furthermore, there has to date been no significant initiative in favour of general EU-wide harmonisation of bribery and corruption laws, or more specifically foreign bribery laws. Instead, the EU has continually generally recommended that MSs become signatories to the relevant international instruments, and take action to enforce their corruption laws.[268] This includes encouraging MSs to become parties to international instruments including the OECD Convention.[269] How and whether such general wide-ranging harmonisation in the area of bribery and corruption should occur is outside the scope of this article. However, it is pertinent to consider whether in the occurrence of such harmonisation the EU should enact an exception for FPs, or extend to criminal liability to FPs.

Weighing all factors relevant in deciding whether to except or criminalise FPs, and in light of the findings of this article; in the event of EU-wide harmonisation of bribery and corruption laws, including foreign bribery laws, criminal liability should be extended to FPs. There are convincing regulatory reasons as to why the EU should choose to criminalise instead of except FPs. Firstly, there is a trend towards the criminalisation of FPs. This trend is visible in both the recommendations of the OECD working group, and in relation to the narrowing of the FP exception under the FCPA.[270] Secondly, the claim that FPs are a short term 'competitive necessity',[271] can be countered by the wide-ranging jurisdiction of current (and probably future) EU MS laws on FPs. This wide-ranging jurisdiction minimises the possibility of regulatory competition between States in terms of their anti-bribery and anti-corruption laws.[272] Consequently, EU companies will likely be subject to the anti-bribery laws of multiple States, limiting any potential competitive advantage resulting from a legal exception for FPs in a particular State. Lastly, although perhaps a little optimistic is the

[267] European Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee' COM (2011) 308 final.
[268] European Commission (n 267); European Commission (n 195).
[269] European Commission (n 267); European Commission (n 195).
[270] See Chapter IV sections 2 and 3.
[271] David Hess, 'Catalyzing Commitment to Combating Corruption' (2009) 88 Journal of Business Ethics 781, 782.
[272] See Chapter V section 3.

opportunity that criminalisation of FPs in the home MS provides EU companies to take a firm stance against paying FPs in foreign countries. Such criminalisation has the potential to allow EU companies to refuse payment on the grounds of illegality, creating a potential long run advantage that demands for FPs will decrease in terms of both value and frequency.[273]

Part of the concern associated with criminalising FPs relates to the strong connection between perceptions of ethical behaviour and corruption. As Henning noted, part of the concern with the adoption of criminal law on corruption relates to the issue that the scope could be so wide as to encapsulate, and result in the punishment of, morally permissive behaviour.[274] However, apart from regulatory justifications, there are ethical reasons for criminalising FPs.[275] While a country's culture has been used to justify FPs, the increased action of foreign officials to address FPs, and the two directional nature of multiculturalism, leads to the conclusion that culture is not an adequate justification against criminalisation.[276] Furthermore, it is worth noting that FPs are generally illegal in the countries where they are paid,[277] and are the result of failure by formal institutions to prevent and eradicate an informal institution of corruption.[278] While institutional reform in the country where the FPs are paid is likely to be a more effective means of addressing bribery and corruption than legislative action in a foreign country,[279] this should not undermine the arguments in favour of criminalising foreign bribery in the form of FPs. As Ackerman-Rose stated '(b)ecause it takes two to enter into a corrupt deal, the crime will not occur if the law can deter at least one of the parties.'[280] Indeed, foreign anti-bribery laws such as the criminalisation of FPs should not be considered as intrusions on national sovereignty in the countries where they take effect.[281] Measures such as the criminalisation of foreign FPs instead take a long term approach, to problems which have both a significant economic, as well as human cost.[282] Consequently, ethical reasons

[273] See Jon Jordon's discussion of the increasing cost burdens on companies as a result of costlier facilitation payment. Jordon (n 1).
[274] Henning (n 13) 805.
[275] See Chapter II section 2 paragraph b.
[276] See Chapter II section 2 paragraph b.
[277] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (n 32).
[278] See Chapter II section 2 paragraph c.
[279] Steven Salbu, 'A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery' (2000) 33 CNLILJ 657.
[280] Rose-Ackerman (n 47) 53.
[281] Nichols (n 35).
[282] Bill Shaw, 'The Foreign Corrupt Practices Act and Progeny: Morally Unassailable' (2000) 33 CNLILJ 689; See Chapter II section 2 paragraph b.

strongly favour the criminalisation of FPs as part of any general EU legislative measure on bribery and corruption (including foreign bribery).

4. Conclusion

While competence exists for the harmonisation of FP laws under Article 114 TFEU, the EU should not take action to harmonise FP laws as part of a stand-alone measure. This is because the rationale for the harmonisation of FP laws under Article 114 needs to be based on assisting the functioning or establishment of the internal market through reducing compliance costs for EU companies. The influence of external factors means that it cannot be guaranteed that harmonisation will significantly decrease compliance costs so as to actually have the effect of assisting the establishment or functioning of the internal market. However, if the EU undertakes general wide-ranging harmonisation in the area of bribery and corruption, including foreign bribery, criminal liability should be extended to FPs. This conclusion is based on both regulatory and ethical factors, which on balance weigh in favour of criminalisation.

Chapter VIII: Conclusion

The problems caused by differences in FP laws between EU MSs do not warrant the harmonisation at EU level of EU MSs' laws on FPs as a stand-alone measure. However, if more general harmonisation at EU level was to be undertaken in the area of bribery and corruption (including foreign bribery) then criminal liability should be extended to FPs. In reaching this conclusion this article has explored the complex legal, ethical, and regulatory issues surrounding FPs. While the ultimate finding of the article was against the harmonisation of FPs as a stand-alone measure, this should not detract from the seriousness of the problems for EU companies caused by differences in FP laws between EU MSs. Particularly, the conclusion against harmonisation of FP laws as a stand-alone measure should not be understood as seeking to detract from the seriousness of the issue of FPs in the countries where they are paid, and the more general issue of bribery and corruption.

Chapter I of this thesis introduced the topic of this article and the problem that the article seeks to address. In Chapter II FPs were described and placed in the more general context of bribery and corruption. Claims that FPs are in fact extortion were then addressed and dismissed. Prime suspects where EU companies are likely to be asked to pay FPs were then identified as including the BRIC countries. The merits of the claim that paying FPs abroad are necessitated by a country's culture were then examined and discounted. Instead, the finding of this article is that a better explanation for why companies are asked to pay FPs relates to the lack of effective formal institutions in the country of payment.

The finding in Chapter II that the BRIC countries were prime suspects, in determining where EU companies will be asked to pay FPs, enabled the identification in Chapter III of the UK and The Netherlands as two EU MSs where the FP laws are likely to be particularly relevant for EU companies. After consideration of additional factors, the laws on FPs in these two EU MS were examined before being compared and contrasted. Chapter IV then discussed the influence of the OECD Convention and FCPA on EU companies; and explored the extent that these two legal Acts place limitations on EU companies' options in relation to FPs.

In light of the findings in the previous Chapters, Chapter V identified the problems for EU companies caused by differences in the law on FPs between EU MSs. Three potential problems were identified: a lack of legal certainty, high compliance costs, and the potential for regulatory competition. Chapter VI then identified that the EU has competence to

harmonise EU law on FPs under Article 114 TFEU, but that this competence is limited to assisting the functioning or establishment of the internal market. The option of relying instead on experimentalist governance as a method of harmonisation was explored and dismissed. Chapter VII identified that harmonisation under Article 114 TFEU of EU MSs' laws on FPs could be justified on the rationale that harmonisation would reduce barriers to the internal market through reducing compliance costs. However, it was concluded that the reduction of compliance costs would be unlikely to be significant, because of the large compliance costs imposed by the FCPA. Consequently, the article concluded that FPs should not be harmonised as a stand-alone measure. This is because it was not clear that harmonisation would significantly decrease compliance costs and so it was unclear whether harmonisation would actually assist the establishment and functioning of the internal market.

Although it was ultimately concluded that EU MSs' laws on FPs should not be harmonised at EU level as stand-alone measure, Chapter VII further examined whether in the case of more general harmonisation in the area of bribery and corruption (including foreign bribery), the EU should take action to except or criminalise FPs. The conclusion that in the case of more general harmonisation FPs should be criminalised at EU level was based on both regulatory and ethical concerns. Regulatory concerns included the general trend towards criminalising FPs, and the weakness of the justification that FPs are a 'competitive necessity'. Ethical concerns included the finding that a country's culture does not provide adequate justification that FPs are necessary, that criminalisation can act as a means of deterring one of the parties from partaking in bribery, and that foreign anti-bribery laws do not represent an intrusion on the country's culture where they are applied.

To conclude, differences between EU MSs' laws on FPs create significant problems for EU companies, who essentially find themselves 'between a rock and a hard place'. However, while there may in the future be an EU-wide policy on bribery and corruption, including foreign bribery, the initiative is not quite yet there. Thus, for now those EU companies that decide to pay FPs abroad will have to continue 'run the risk' of prosecution.

Abbreviations

BA	Bribery Act 2010 (UK)
BRIC Countries	The Countries: Brazil, Russia, India, and China
DOJ	Department of Justice (US)
DPAs	Deferred Prosecution Agreements
EU	European Union
FP	Facilitation Payment
FCPA	Foreign Corrupt Practices Act (US)
FDI	Foreign Direct Investment
MNC	Multinational Company
MS	Member State
NPAs	**N**on-prosecution Agreements
OAS Convention	Inter-American Convention against Corruption
OECD Convention	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
OECD Working Group	OECD Working Group on Bribery
SEC	Securities and Exchange Commission (US)
SFO	Serious Fraud Office (UK)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TI	Transparency International

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Appendix 1: TI's Corruption Perceptions Index Rank of the BRIC Countries between 2008 and 2012[283]

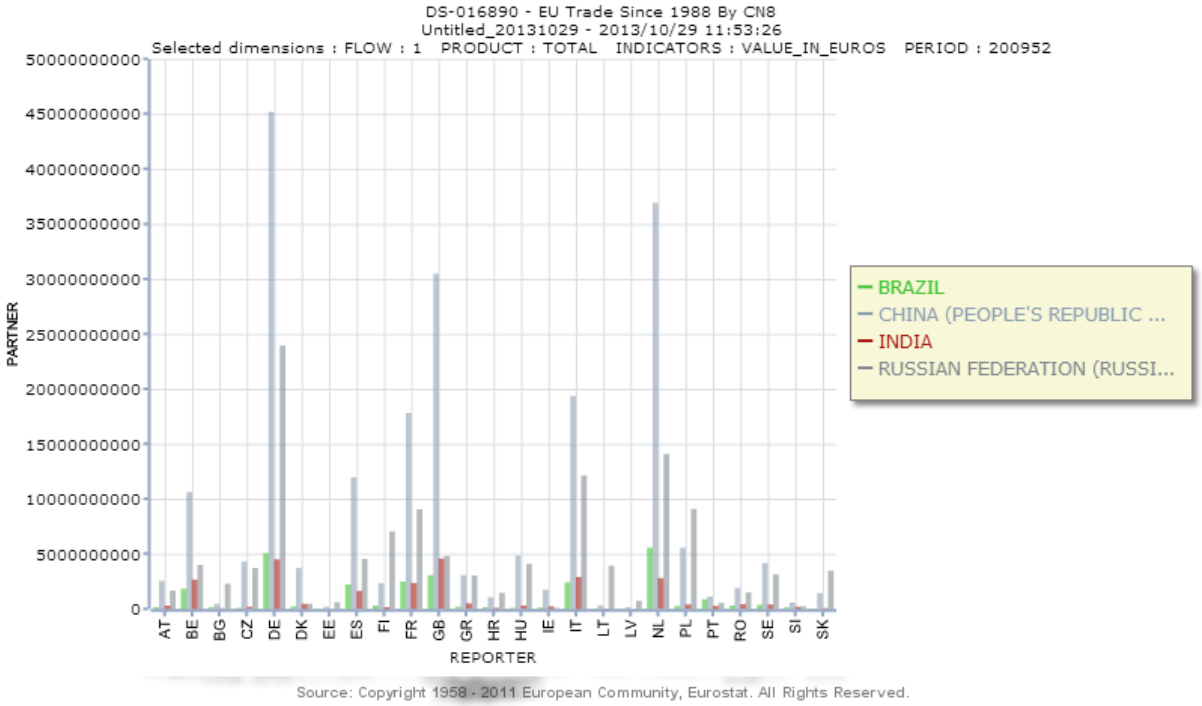
CPI Rank (year)	2008	2009	2010	2011	2012
Brazil	80	75	69	73	69
Russia	147	146	154	143	133
India	85	84	87	95	94
China	72	79	78	75	80

[283] Transparency International (n 67).

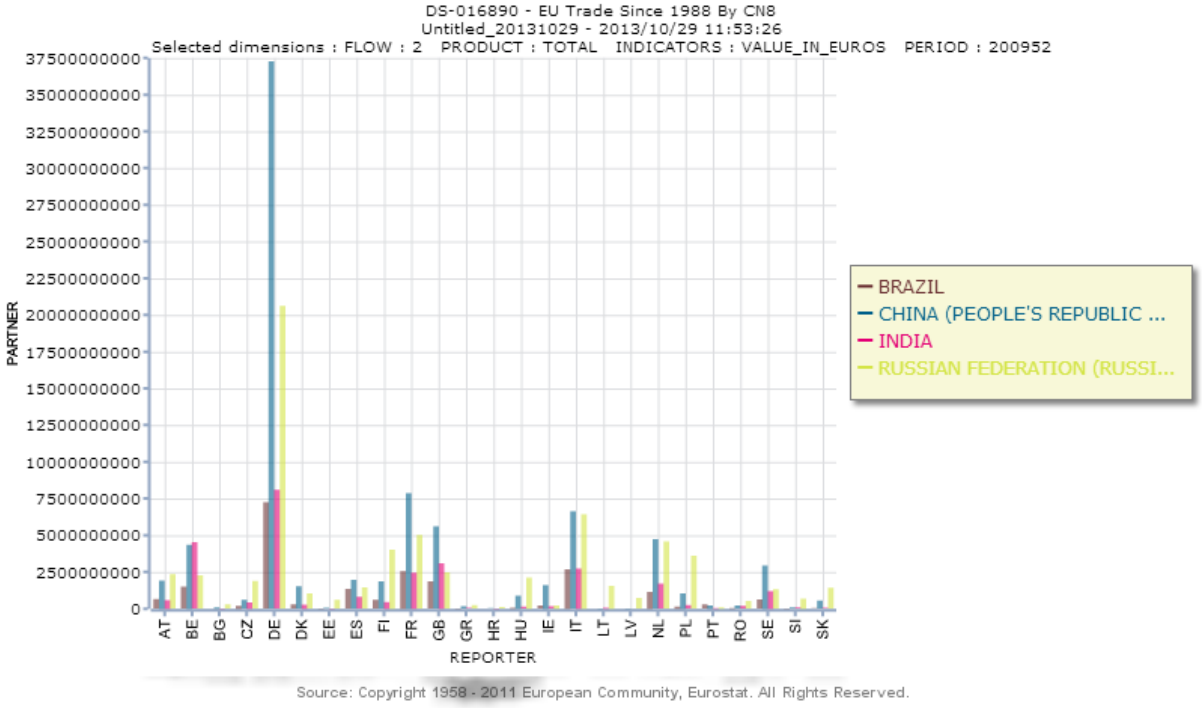
Appendix 2: Graphs Showing the Trade Flows Between the BRIC Countries and Selected EU Member States between 2009 and 2012[284]

Trade Flows 2009:

Imports



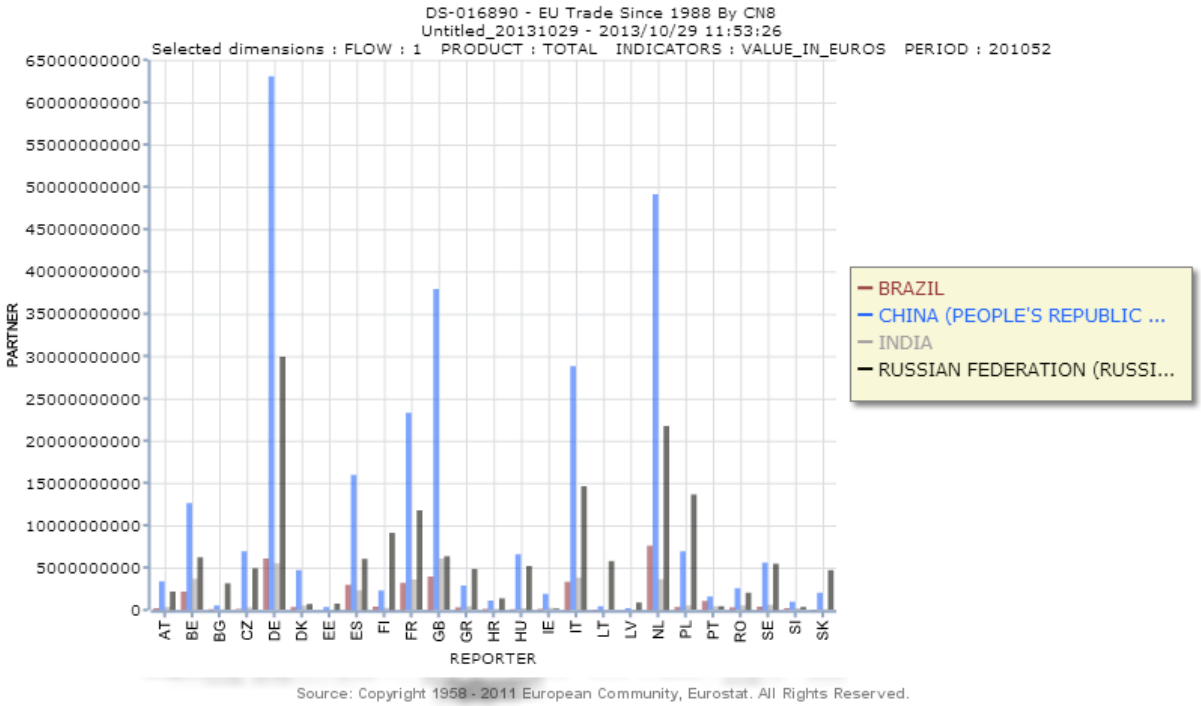
Exports



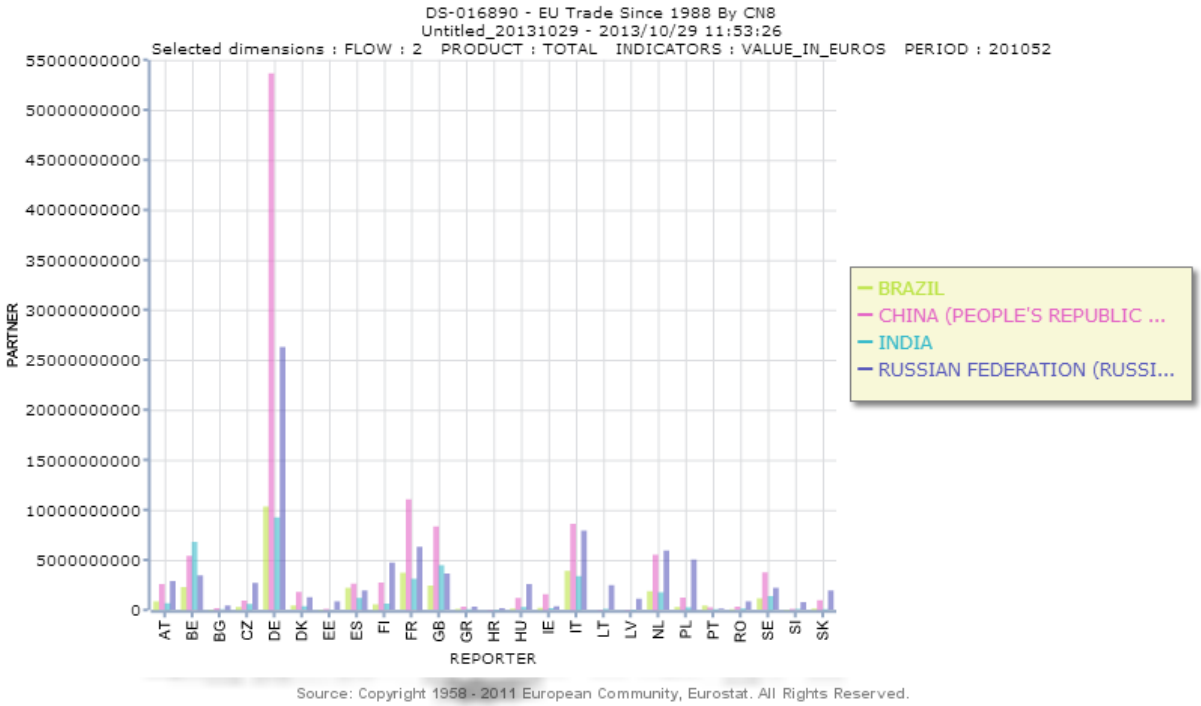
[284] European Commission (n 113).

Trade Flows 2010:

Imports

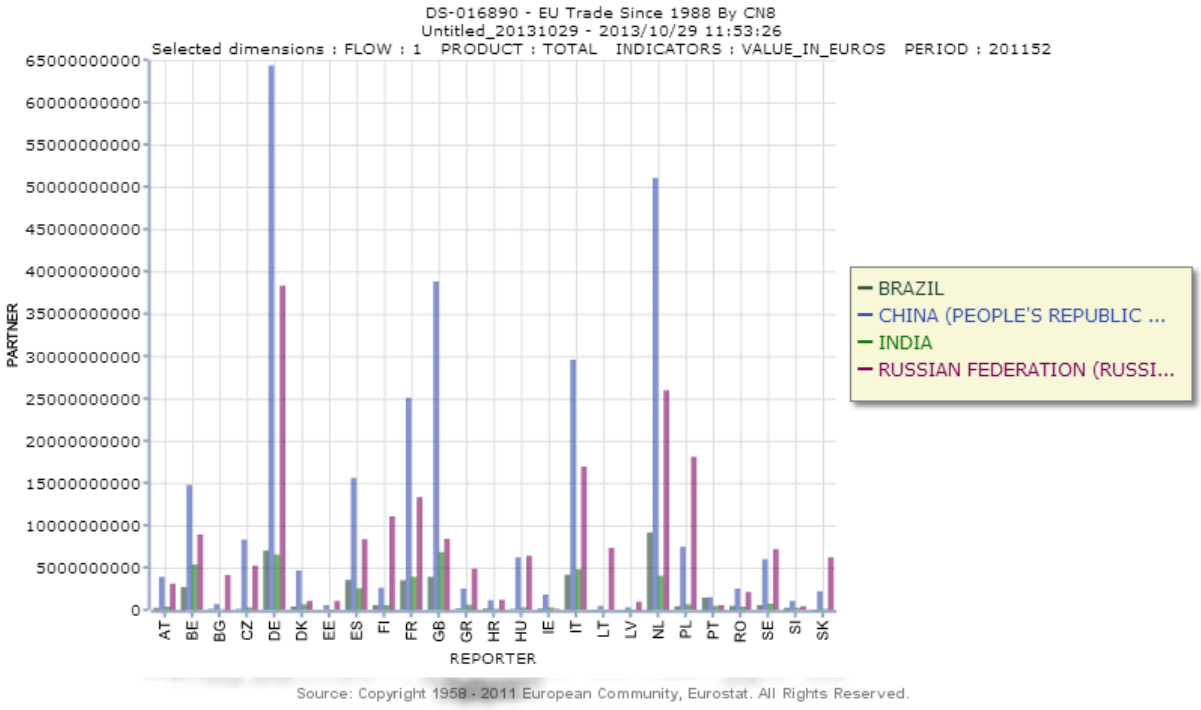


Exports

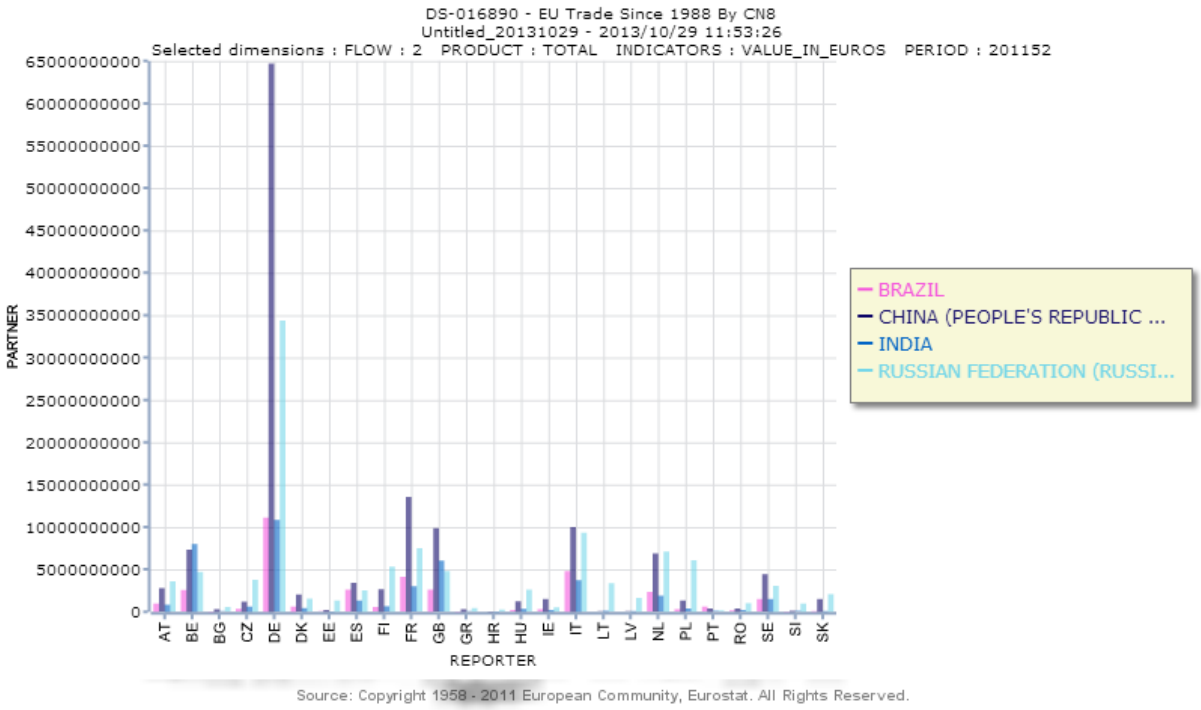


Trade Flows 2011:

Imports

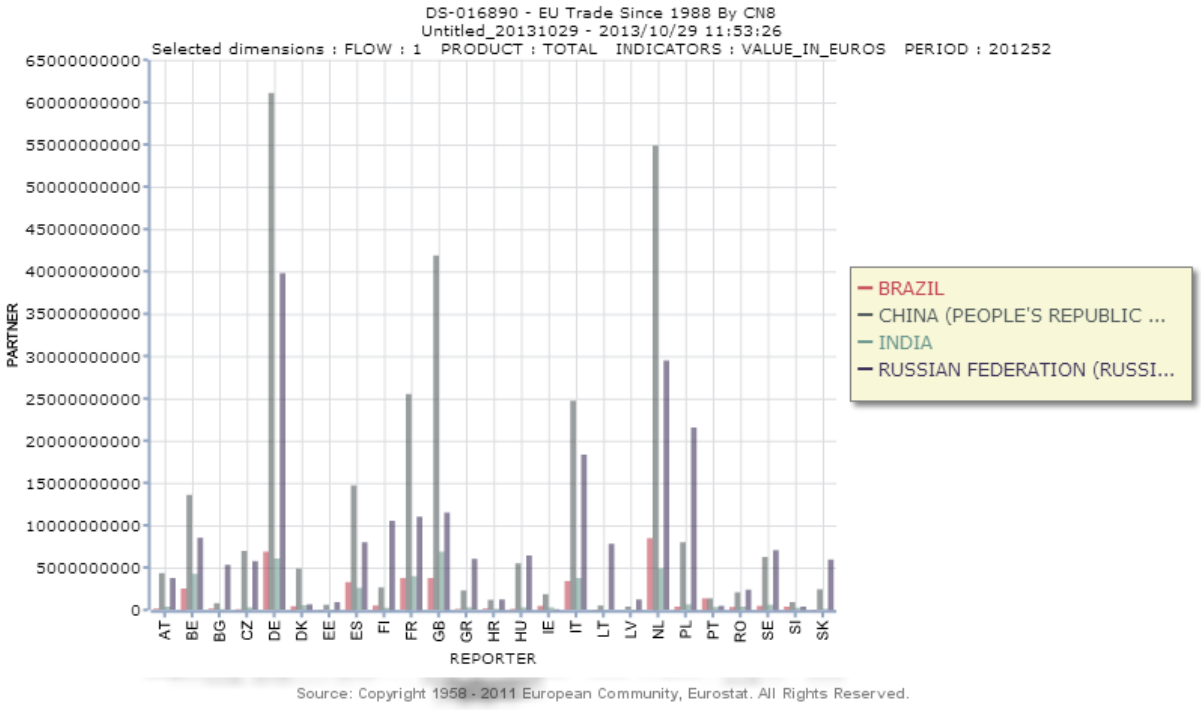


Exports

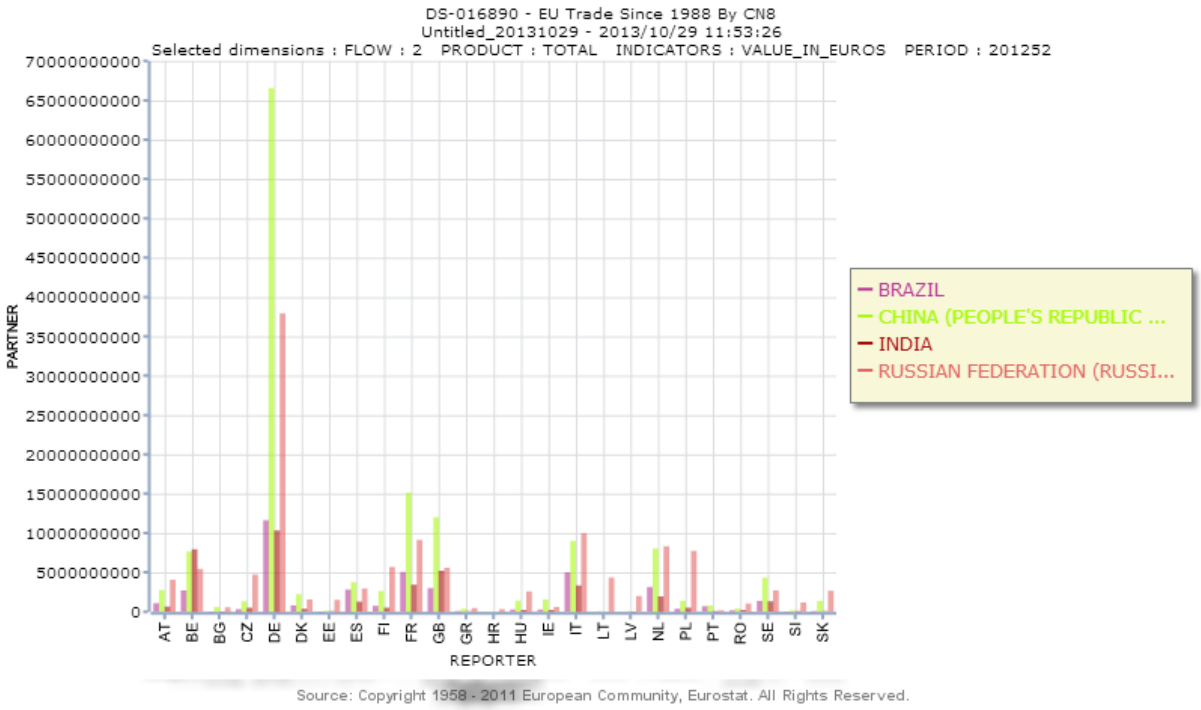


Trade Flows 2012:

Imports



Exports



Appendix 3: Relevant Sections of the UK Bribery Act 2010[285]

6 Bribery of foreign public officials

(1)A person ('P') who bribes a foreign public official ('F') is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.

(2)P must also intend to obtain or retain—

(a)business, or

(b)an advantage in the conduct of business.

(3)P bribes F if, and only if—

(a)directly or through a third party, P offers, promises or gives any financial or other advantage—

(i)to F, or

(ii)to another person at F's request or with F's assent or acquiescence, and

(b)F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift.

(4)References in this section to influencing F in F's capacity as a foreign public official mean influencing F in the performance of F's functions as such an official, which includes—

(a)any omission to exercise those functions, and

(b)any use of F's position as such an official, even if not within F's authority.

(5)'Foreign public official' means an individual who—

(a)holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),

(b)exercises a public function—

(i)for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or

(ii)for any public agency or public enterprise of that country or territory (or subdivision), or

(c)is an official or agent of a public international organisation.

(6)'Public international organisation' means an organisation whose members are any of the following—

(a)countries or territories,

(b)governments of countries or territories,

[285] 'Bribery Act 2010' (Legislation.gov.uk) <http://www.legislation.gov.uk/ukpga/2010/23/contents> accessed 30 December 2013.

(c)other public international organisations,

(d)a mixture of any of the above.

(7)For the purposes of subsection (3)(b), the written law applicable to F is—

(a)where the performance of the functions of F which P intends to influence would be subject to the law of any part of the United Kingdom, the law of that part of the United Kingdom,

(b)where paragraph (a) does not apply and F is an official or agent of a public international organisation, the applicable written rules of that organisation,

(c)where paragraphs (a) and (b) do not apply, the law of the country or territory in relation to which F is a foreign public official so far as that law is contained in—

(i)any written constitution, or provision made by or under legislation, applicable to the country or territory concerned, or

(ii)any judicial decision which is so applicable and is evidenced in published written sources.

(8)For the purposes of this section, a trade or profession is a business.

7 Failure of commercial organisations to prevent bribery

(1)A relevant commercial organisation ('C') is guilty of an offence under this section if a person ('A') associated with C bribes another person intending—

(a)to obtain or retain business for C, or

(b)to obtain or retain an advantage in the conduct of business for C.

(2)But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

(3)For the purposes of this section, A bribes another person if, and only if, A—

(a)is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or

(b)would be guilty of such an offence if section 12(2)(c) and (4) were omitted.

(4)See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.

(5)In this section—

'partnership' means—

(a) a partnership within the Partnership Act 1890, or

(b) a limited partnership registered under the Limited Partnerships Act 1907,

or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom,

'relevant commercial organisation' means—

(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),

(b)any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,

(c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or

(d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,

and, for the purposes of this section, a trade or profession is a business.

8 Meaning of associated person

(1)For the purposes of section 7, a person ('A') is associated with C if (disregarding any bribe under consideration) A is a person who performs services for or on behalf of C.

(2)The capacity in which A performs services for or on behalf of C does not matter.

(3)Accordingly A may (for example) be C's employee, agent or subsidiary.

(4)Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C.

(5)But if A is an employee of C, it is to be presumed unless the contrary is shown that A is a person who performs services for or on behalf of C.

Appendix 4: Relevant Sections from the Wetboek van Strafrecht[286]

Artikel 177

1. Met gevangenisstraf van ten hoogste vier jaren of geldboete van de vijfde categorie wordt gestraft:

> **1°.** hij die een ambtenaar een gift of belofte doet dan wel een dienst verleent of aanbiedt met het oogmerk om hem te bewegen in zijn bediening, in strijd met zijn plicht, iets te doen of na te laten;
>
> **2°.** hij die een ambtenaar een gift of belofte doet dan wel een dienst verleent of aanbiedt ten gevolge of naar aanleiding van hetgeen door deze in zijn huidige of vroegere bediening, in strijd met zijn plicht, is gedaan of nagelaten.

2. Met dezelfde straf wordt gestraft hij die een feit als in het eerste lid, onder 1°, omschreven, begaat jegens een persoon in het vooruitzicht van een aanstelling als ambtenaar, indien de aanstelling als ambtenaar is gevolgd.

3. Indien de schuldige een van de misdrijven omschreven in dit artikel in zijn beroep begaat, kan hij van de uitoefening van dat beroep worden ontzet.

4. Ontzetting van de in artikel 28, eerste lid, onder 1°, 2° en 4°, vermelde rechten kan worden uitgesproken.

Artikel 177a

1. Met gevangenisstraf van ten hoogste twee jaren of geldboete van de vijfde categorie wordt gestraft:

> **1°.** hij die een ambtenaar een gift of belofte doet dan wel een dienst verleent of aanbiedt met het oogmerk om hem te bewegen in zijn bediening, zonder daardoor in strijd met zijn plicht te handelen, iets te doen of na te laten;
>
> **2°.** hij die een ambtenaar een gift of belofte doet dan wel een dienst verleent of aanbiedt ten gevolge of naar aanleiding van hetgeen door deze in zijn huidige of vroegere bediening, zonder daardoor in strijd met zijn plicht te handelen, is gedaan of nagelaten.

2. Met dezelfde straf wordt gestraft hij die een feit als in het eerste lid, onder 1°, omschreven, begaat jegens een persoon in het vooruitzicht van een aanstelling als ambtenaar, indien de aanstelling van ambtenaar is gevolgd.

3. Indien de schuldige een van de misdrijven omschreven in dit artikel in zijn beroep begaat, kan hij van de uitoefening van dat beroep worden ontzet.

4. Ontzetting van de in artikel 28, eerste lid, onder 1°, 2° en 4° , vermelde rechten kan worden uitgesproken.

Artikel 178

1 Hij die een rechter een gift of belofte doet dan wel een dienst verleent of aanbiedt met het oogmerk invloed uit te oefenen op de beslissing van een aan diens oordeel onderworpen zaak, wordt gestraft met gevangenisstraf van ten hoogste zes jaren of geldboete van de vijfde categorie.

[286] 'Wetboek van Strafrecht' <http://maxius.nl/wetboek-van-strafrecht> accessed 30 December 2013.

2. Indien die gift of belofte gedaan wordt dan wel die dienst verleend of aangeboden wordt met het oogmerk om een veroordeling in een strafzaak te verkrijgen, wordt de schuldige gestraft met gevangenisstraf van ten hoogste negen jaren of geldboete van de vijfde categorie.

3. Indien de schuldige een van de misdrijven omschreven in dit artikel in zijn beroep begaat, kan hij van de uitoefening van dat beroep worden ontzet.

4. Ontzetting van de in artikel 28, eerste lid, onder 1°, 2° en 4°, vermelde rechten kan worden uitgesproken.