Three Essays on

Anti-Corruption Legislation and Reform

Der Wirtschaftswissenschaftlichen Fakultät

der Universität Passau eingereichte

DISSERTATION

zur Erlangung des Grades eines

doctor rerum politicarum (Dr. rer. pol.)

vorgelegt von

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Passau, Dezember 2007

Für meine Mutter und meinen Vater

Zusammenfassung

In Kapitel I werden Nachteile aufgezeigt, die traditionellen Maßnahmen wie Repression, Prävention und Transparenz innewohnen und die deren Schlagkraft für die Korruptionsbekämpfung in Frage stellen. Vor diesem Hintergrund werden drei neue Antikorruptionsansätze entwickelt. Die Konzeption dieser ist motiviert dadurch, dass Schmiergeldvereinbarungen insbesondere durch ein hohes Risiko an Opportunismus gekennzeichnet sind. Betrug, Verrat und Erpressung sind Unsicherheiten, denen korrupte Akteure vielfach ausgesetzt sind. Dies muss die Gesetzgebung berücksichtigen, um nicht zum Zweck der Durchsetzung von Schmiergeldvereinbarungen missbraucht zu werden. Andererseits kann sie sich diesen Schwachpunkt zunutze machen, um Korruption wirkungsvoll zu bekämpfen.

In Kapitel II wird in formal-theoretischer Weise dargelegt, wie das Instrument der kodifizierten strafmildernden Selbstanzeige strategisch eingesetzt werden kann, um den Pakt des Schweigens zischen (Bestechungs-) Nehmer und Geber aufzubrechen und gleichzeitig gezielt opportunistisches Verhalten zu fördern. Es wird gezeigt, dass ein (Bestechungs-) Nehmer weniger für die Annahme eines Bestechungsgeldes als für die Erbringung der hierfür geforderten Gegenleistung bestraft werden sollte. Strafmilderung sollte einem Nehmer demgemäß nur dann gewährt werden, wenn dieser sein Vergehen nach Annahme des unrechtmäßigen Vorteils zur Anzeige bringt. Ebenso wird veranschaulicht, dass ein (Bestechungs-) Geber für das Gewähren eines Bestechungsgeldes aber nicht für die Annahme der von ihm hierfür geforderten Gegenleistung bestraft werden sollte. Die Selbstanzeige sollte nur dann zur Strafmilderung führen, wenn der Geber die von ihm geforderte Gegenleistung erhalten hat. Letztlich wird konstatiert, dass die Strafmilderung selbst zur größten Abschreckung für korrupte Akteure werden kann.

Die formal-theoretischen Ergebnisse münden in Kapitel III in Politikempfehlungen für das Instrument der kodifizierten strafmildernden Selbstanzeige. Bezugspunkt hierfür sind auch einerseits die Bestimmungen des türkischen Strafgesetzbuches, andererseits jene der United Nations Convention against Corruption (UNCAC). Zudem werden in Kapitel III die entsprechenden Rechtsvorschriften aus 56 Ländern untersucht. Die Querschnittsanalyse legt die Vermutung nahe, dass der Tatbestand der aktiven und passiven Bestechung weitgehend strafrechtlich verankert ist, in starkem Kontrast zum Instrument der kodifizierten strafmildernden Selbstanzeige. Weniger als die Hälfte der 56 Länder macht Gebrauch von

diesem Instrument. Nur drei sogar für die passive Bestechung. Die Querschnittsanalyse zeigt demnach erhebliche Defizite in der Anwendung aber auch in der Ausgestaltung des Instruments der kodifizierten strafmildernden Selbstanzeige auf.

Kapitel IV widmet sich im Gegensatz zu den vorangehenden Kapiteln dem Zivilrecht und seiner Funktion für die Korruptionsprävention. Insbesondere werden die Nichtigkeit und die schwebende Unwirksamkeit von auf Schmiergeldvereinbarungen beruhenden (Haupt-) Verträgen untersucht. Es wird konstatiert, dass sowohl die Nichtigkeit und die schwebende Unwirksamkeit einer zielgerechten Korruptionsbekämpfung entgegenstehen und Verträge, die auf einer Schmiergeldvereinbarung beruhen, demnach gültig oder lediglich teilnichtig sein sollten. Es wird ferner dargelegt, dass andere (zivilrechtliche) Instrumente für die Korruptionsprävention geeigneter sind.

Kapitel V schließt die Arbeit ab.

Summary

In Section I disadvantages are identified that traditional measures as repression, prevention and transparency inhere in and that put their clout for the fight against corruption in question. Against this background, three novel anti-corruption approaches are developed. Their conception is motivated by the fact that bribe agreements are particularly characterized by a high risk of opportunism. Double-dealing, whistle-blowing and extortion are uncertainties that corrupt actors are in many cases exposed to. Legislation has to account for this in order to avoid being abused for the enforcement of bribe agreements. What is more, legislation can also take advantage of these chinks to fight corruption effectively.

In Section II it is demonstrated in a formal-theoretical manner how the instrument of a voluntary disclosure program can be applied strategically to break the pact of silence between a bribe-taker and a bribe-giver and to simultaneously further opportunism. It is shown that a bribe-taker should be penalized less for taking bribes and more for reciprocating a bribe. Accordingly, leniency should be conceded to a bribe-taker only if he reports his misconduct after having obtained a bribe. Likewise, it is pointed out that a bribe-giver should be punished for giving a bribe, but not for accepting the bribe-taker's reciprocity. Self-reporting should result in leniency only if a bribe-giver was successful in obtaining the requested favor. Ultimately it is stated that leniency itself can become the biggest deterrence for corrupt actors.

The formal-theoretical findings in Section III result in policy recommendations for voluntary disclosure programs. For this purpose the Turkish Penal Code and the provisions of the United Nations Convention against Corruption (UNCAC) are used as benchmarks. In addition, the respective legal provisions from 56 countries are studied. The cross-section analysis suggests that the elements of active and passive bribery are largely part of penal codes, in stark contrast to voluntary disclosure programs. Less than half of the 56 countries make use of this instrument, and even only three do so for passive bribery. The cross-section analysis therefore shows significant deficits in the implementation but also in the design of voluntary disclosure programs.

In contrast to the preceding sections, Section IV is devoted to civil law and its function for preventing corruption. Particularly, nullity and voidability of contracts induced by means of bribery are analyzed. It is stated that both nullity and voidability run counter to effective anti-corruption. Therefore, it is argued that contracts induced by means of bribery should be valid.

Furthermore, it is expounded that other (civil law) instruments are more suitable for preventing corruption.

Section V concludes.

Contents

I Introduction

Until the 1970s corruption was a topic hardly discussed. In fact, it is only since the 1990s that the anti-corruption movement has gained significant momentum, spurred by myriad media reports, articles and scientific studies from different disciplines all showing the detrimental effects of corruption. A vast number of researchers as well as of practitioners all over the world have concentrated their intellectual efforts on unearthing the causes and consequences of corruption, on analyzing the mechanisms of corruption as well as on devising the means to fight it.[1] Our knowledge on corruption and anti-corruption is thus increasing at a remarkable speed. And as reform ideas are tested throughout the world and experiences are rapidly and broadly exchanged, significant steps in establishing good practices have been made. Yet, there is hardly an overarching framework available that helps to organize our thinking.

A first approach intended to inspire anti-corruption relates to repression: draconic penalties and higher probabilities of detecting malfeasance. While this approach has its merits it is doubtful whether it can be the guiding principle for the future. If the effects follow an economic law of decreasing marginal gains and increasing marginal costs, the likely outcome would be that criminals are less deterred by higher penalties while the pursuit of absolute integrity becomes more and more expensive, bringing about unpleasant side effects. Law enforcement is costly and requires an honest judiciary. Administrative procedures are complex due to enhanced monitoring, and may adversely affect the intrinsic motivation of the bureaucracy. Even worse, sanctioning minor malfeasances may backfire. If those guilty of negligible malfeasance have to fear severe prosecution, they may become entrapped in a corrupt career. Repression would become ineffective if it did not provide an emergency exit for the petty sinners. These drawbacks may increasingly materialize in the future, and other guiding principles have to be sought that inspire anti-corruption efforts.

Another approach to anti-corruption focuses on prevention. This approach may likely be subject to similar limitations. These confines particularly relate to incentives and ethical training. Ethical training will certainly be an important issue for the years to come. It can help on communicating more clearly the conflicts of interest unique to specific sectors and countries. Furthermore, ethical training can help on developing an atmosphere of transparency

[1] For a recent review of cross-country research see Lambsdorff (2006).

and stewardship among a firm's and bureaucracy's employees. At the same time, it is costly and time consuming, and it may sometimes serve to camouflage a firm's or a bureaucracy's true interests. Private firms, for instance, might be in a prisoner's dilemma, paying lip service to anti-corruption, but at the same time profiting from a corrupt contract. Ethical training would be given to those supposed to stay clean, while the dirty work would be outsourced. In the end ethical training may simply provide firms with official excuses when their employees are caught, resulting for instance in exemption from corporate liability. Ethical training of bureaucrats is likely to face similar limitations.

Using incentives instead of ethical training for inducing honesty in the bureaucracy and in politics is arduous to implement. Firstly, there is no measurable economic surplus that might serve as a yardstick for remuneration. Bureaucratic departments and political initiatives cannot be transformed into profit centers. Secondly, incentive schemes imply a variation of public servants' income, lowering the security equivalent of their pay and crowding out the risk-averse (and potentially less corrupt) from obtaining a public position. The consequence is that incentive schemes in the bureaucracy and in politics fall short of economists' prescriptions. Incentive theory, at best, helps us detect the variety of inconsistencies and disincentives that exist in the public sector. Yet incentives per se will hardly ever be sufficient to outbid the briber, as is sometimes suggested by formal principal-agent modeling. Realistically, incentive schemes can provide a helpful contribution that complements other factors such as public servants' intrinsic motivation, cultivation of professional ethics and anti-corruption norms in society.

Fostering transparency still seems to be an overarching principle with latent benefits. Its potential in reducing corruption is immense. The administrative costs of increasing transparency are limited, albeit often mentioned as an excuse for inactivity. But this principle might at least be fine-tuned to some extent in the future. One concern is that transparency may in fact support the monitoring of corrupt reciprocity, (Pechlivanos 2005). Likewise, non-transparent bureaucracies may at times prevent corruption, because bribers would have a hard time 1) finding the right person to compromise and 2) observing whether the bribe-taker reciprocates honestly. In a similar spirit it is standard practice that public procurement requires some limits on transparency: Bidders are not supposed to know the incoming bids of their competitors until all bids are jointly opened. The reason is that bid-rigging would be facilitated if transparency is introduced at the wrong stage. The principle of transparency,

therefore, will undergo a more fine-tuned interpretation. Instead of advocating unlimited disclosure of all information, comprehensive information management systems that provide key figures to stakeholders will have to be put in place. Their design will remain an important issue for the years to come.

Given these limitations of some principles for anti-corruption I contend that other approaches must be explored to guide our thinking. The general approach suggested here, relating to concepts of the New Institutional Economics, posits that reform measures should promote betrayal among corrupt parties and destabilize corrupt arrangements.

While high levels of corruption are generally deplored, academics commonly wonder why they are not even higher. With self-seeking being the presumed nature of human beings, opportunities for self-enrichment should always be seized; distrusting public decision makers should be the natural consequence; trusting them appears to be a naïve attitude. Given that we sometimes have reason to wonder about astonishingly high levels of integrity, social scientists must confess that they are lacking a theoretical explanation. Also in recent experiments, researchers found that rational, self-seeking optimization is not universally followed and that an intrinsic motivation lowers an individual's corrupt zeal, (Schulze and Frank 2003).

One approach to explain this paradox is to focus on the (mostly informal) institutions needed for arranging and securing a corrupt deal, (Lambsdorff 2002; Lambsdorff 2007a). Partners in a corrupt exchange face a challenging task in negotiating the terms of their agreement and in making sure that each side adheres to its promises. At the same time they are constantly tempted to betray each other. Such betrayal can be a good thing from the point of view of society at large, because it assures that corruption is a troublesome business, and convinces potential participants to refrain from becoming involved in corrupt deals. The three essays show how both criminal law and civil law can be designed such as to promote opportunism, thereby lowering levels of corruption.

II Fighting Corruption with Asymmetric Penalties and Leniency

II.1 Introduction[2]

The power of economic thinking crucially builds on the notion of the invisible hand. Competition substitutes for benevolence by guiding self-seeking actors to serve the public. Individual morality loses relevance as a guiding principle for directing behavior in private markets. With respect to fighting corruption we may not have a mechanism as powerful as the invisible hand. If something comes close to it, it is the failure to make credible promises once actors are willing to give and take bribes. The risk of betrayal may operate like an "invisible foot", making life hard for those who fail to commit to honesty, (Lambsdorff 2007a). This contribution is along the lines of this approach.

I develop a simple game-theoretic approach to determine which acts corrupt perpetrators should be penalized for, and when leniency should be exercised. Unable to rely on legal recourse, corrupt partners face the challenging task of ensuring that each side abides by the agreement. At the same time they are continuously tempted to betray each other. Such betrayal is a good thing from the point of view of society at large. It ensures that corruption is a troublesome business and induces potential participants to refrain from getting involved in corrupt arrangements in the first place.

When public officials are paid with counterfeit money, as happened recently in India, or are given fake antiques, as in China, they can no longer rely on being given 'fair' treatment by bribers. The resulting insecurity may effectively deter them from asking for or accepting bribes in the future.[3] Similarly, when corrupt public servants renege on their promises, business people may become less likely to continue with their illegal strategy, (Husted 1994; della Porta and Vanucci 1999; Rose-Ackerman 1999: 91-110; Lambsdorff 2002; Lambsdorff, Schramm and Taube 2005; Lambsdorff 2007a).

Courts usually reject the enforcement of corrupt agreements, forcing actors to explore alternative safeguard mechanisms against opportunism. They must employ methods to make

[2] The content of Section II is for the most part based on Lambsdorff and Nell (2007).
[3] See Herald Tribune (8 March 2002: "One corrupt city shows the plague that afflicts all of China"); The New Zealand Herald (28 March 2002: "It's hard graft when bribes are crooked"); Asia Times (4 April 2002: "Rampant corruption threatened by corruption").

their agreements self-enforcing. Various forms of institutional solutions come into play and provide guidance to reform. Corrupt parties lacking trust in each other, for example, often use intermediaries as a way to credibly link the two parties. Practical insights into the corrupt dealings of intermediaries, and the problems involved in their engagement, have recently been provided, (Aburish 1986; Andvig 1995; Moody-Stuart 1997; Bray 2005).

Pre-existing social relationships may lay the foundation for economic exchange by providing the required protection from opportunism. Certain social structures facilitate economic exchange by embedding individuals in long-term (personal) relationships (of trust), (Granovetter 1992; Ogilvie 2004; Greif 2006). For members of a group, the advantages to be gained from honesty may outweigh the motivation to behave opportunistically. Social structures and ties may thus facilitate the sealing corrupt deals as well, (Rose-Ackerman 1999: 98; Kingston 2007).

In the course of established ongoing exchanges yet another mechanism to enforce corrupt agreements is available to the business partners. Relationships of mutual trust and respect, formed by repeated legal exchange or hierarchical control, can be misused for striking corrupt agreements. Corrupt transactions may thus be embedded in a broader context of exchange, and legal transactions may act as 'guarantors' for corrupt deals. Once trusted relationships have emerged and mutual threats have been established, these can be exploited to secure corrupt side-contracts. Consequently, the threat to end legal relationships may effectively prevent opportunism in corrupt arrangements, (Lambsdorff and Teksoz 2005).

Acts of opportunism, including (self-) reporting, are not uncommon. In fact, insiders are often a vital source of information for the prosecuting authorities, (Anderson 1995; Rose-Ackerman 1999: 53). For those who decide to expose a deal there are miscellaneous motivations. For example, the largest company in France, Elf Aquitaine, allegedly set up an internal financial network aimed at providing funding for corrupt political purposes. This so-called "Investment Board" consisted of relatives and friends of the chairman of the board. This institution was well established, and succeeded for a while. Yet the booting out of one member put an end to its operation. The outcast took revenge, and reported operations of the network.[4] Clearly,

[4] See Rheinischer Merkur (27 November 1997: "Schmutzige Geschäfte").

some type of conflict can stimulate one party to take revenge, or to prefer honesty to involvement in illegal transactions.

Another motive for providing information on illegal transactions may also result from monetary inducements by third parties. While prosecutors may offer witnesses a reward in exchange for inside information, private agents may also bid on such information, e.g. as a means to regain access to markets lost to corrupt competitors, (Rose-Ackerman 1999: 56). For the media it is common practice to pay for tip-offs, enabling them to report on political scandals.

The link between corruption and leniency has already been taken up by Rose-Ackerman (1999: 53): "Successful detection of corruption depends on insiders to report wrongdoing. Often this requires officials to promise leniency to one of the participants." A different finding is reported by Buccirossi and Spagnolo (2005, 2006) and Spagnolo (2006). They argue that leniency may backfire and help entrepreneurs to enforce their corrupt deals by threatening self-reporting in case of non-delivery. This section will provide suggestions on how their concern can be mitigated.

There have been recent experimental investigations of bribery games, for a review see Lambsdorff and Frank (2007). This publication reports the findings of a game closely related to the one investigated here. The authors find a significant number of (students allotted the role of) public servants who reciprocated a bribe although this reduced their payoffs. Also there was substantial retaliation among (students taking the role of) bribers who were cheated.[5] The authors also report a framing effect in the sense of a preference for blowing the whistle even where this reduced payoffs. I will utilize these findings by considering also non-monetary returns in the analysis of the game.

Sections I.2 and I.3 develop the basic models for asymmetric penalties and (ex-ante) leniency and present the results. Section I.4 presents variations of the models in order to test the robustness of the findings. In section I.5 policy implications and recommendations are derived.

[5] Further findings embrace differences between men and women and on preferences to call a payment a bribe instead of a gift so as to signal the willingness of retaliation in case of opportunism.

II.2 A Model of Asymmetric Penalties

In the subsequent one-shot game, shown in Figure II.1, there are two rational, risk-neutral players: A bureaucrat (player *B*) and an entrepreneur (player *E*). *B* is in the position to award a public contract whose value for *E* is denoted by v. *E* may give a bribe, i.e. a payment that has the potential of influencing *B*'s decision, whose value for *B* is denoted by b. Without (the promise of) a bribe the entrepreneur will not get the contract, resulting in a payoff of zero.

In the basic model, *E* moves first by giving a bribe. This appears to be the standard sequence, evidenced in many cases of corruption.[6] This sequence implies that opportunistic behavior, i.e. failing to reciprocate, is primarily an option for *B*. In the extensions the sequence is reversed (see section II.4).

Both *B* and *E* have to weigh the monetary payoffs against non-monetary concerns. If *B* delivers the contract (and is not cheated) he may feel 'positive reciprocity' (doing good to those who did him good). This is denoted by S. If *B* was cheated and retaliates, this gives him the satisfaction of 'negative reciprocity' (doing bad to those who did him bad), denoted by R. If either of the actors blows the whistle he acts honestly and feels non-monetary returns, H, for this action. Behavioral economists may consider further issues and use more complex functional forms, (Camerer 2003). But one observes that the parsimonious specification is intuitive and sufficient to explain experimental evidence, (Lambsdorff and Frank 2007).

In the basic game there are four actions that may be subject to legal punishment. On the one hand, *B* may be penalized for accepting a bribe, denoted by F_B^b. On the other hand, *B* may be punished for awarding the public contract to *E*, denoted by F_B^a. In other words, after having accepted the bribe, F_B^a is the penalty *B* may additionally face for reciprocating it. On *E* criminal sanctions may on the one hand be imposed for giving a bribe, F_E^b. On the other hand,

[6] One theoretical justification for this sequence relates to the monopoly position enjoyed by bureaucrats in placing contracts, awarding licenses or granting permits, alongside with a bureaucrat's potentially higher desire to avoid risk. Given that business people at times compete for preferential treatment by deploying illegal means, the bureaucrats may easily shift the risk of opportunism to the private sector.

E may be penalized for accepting the public contract, captured by F_E^a. In other words, after having given the bribe, F_E^a is the penalty *E* faces for accepting *B*'s favor.[7]

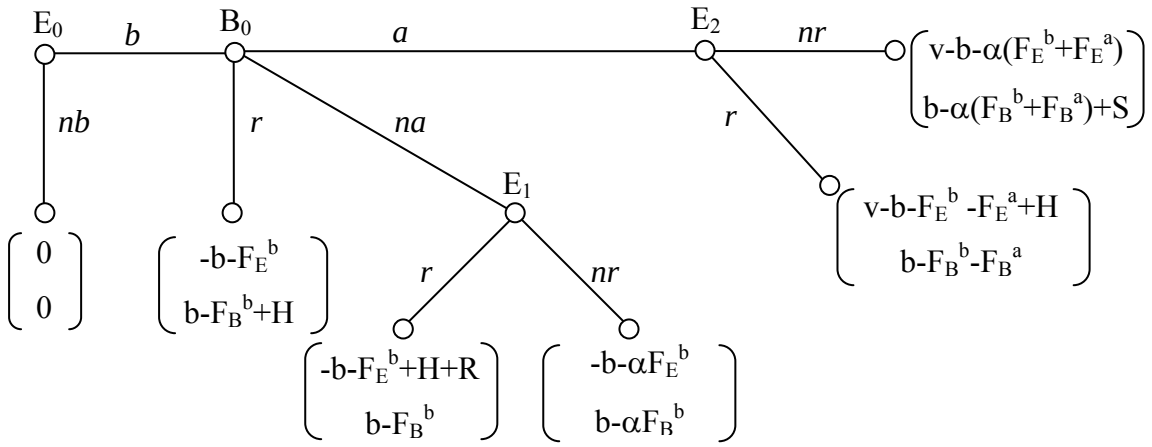

Figure II.1: One-Shot Game with Asymmetric Penalties

Figure II.1 captures the one-shot game in its extensive form.[8] At the start of the game (at node E_0), *E* chooses either to seek influence by giving a bribe (action "*b*") or to stay out of the corrupt arrangement (action "*nb*"). If *E* gives the bribe, *B* has three options (at node B_0). *B* may choose to comply with the illicit agreement and to award the contract (action "*a*"), or *B* decides to renege on his promises (action "*na*"). Additionally, *B* may choose to report the deal (action "*r*"). For the sake of simplicity it is assumed that $b - F_B^b > 0$; otherwise, rather than taking the bribe and reporting, the bureaucrat would reject the bribe upfront. Without loss of generality this option is dropped. As long as *B* does not already report at node B_0, *E* then has the choice of reporting (action "*r*") or to stay silent (action "*nr*"), both at nodes E_1 and E_2. The ensuing payoffs are depicted in Figure 1. The parameter α denotes the probability of random detection and conviction for both *B* and *E*, with $0 < \alpha < 1$.

[7] There might exist optima F^a and F^b for the total criminal sanctions, i.e. $F_B^a + F_E^a = F^a$ and $F_B^b + F_E^b = F^b$. The respective optimal levels may be set so as to outbalance the gains expected from the illegal action, (Rose-Ackerman 1999: 54-55), or they may relate to the damage caused to society, usually referred to as social harm. Since Becker (1968), research has mostly focused on determining the optimal level of these penalties, F^a and F^b. We are primarily interested in how a given level of F^a and F^b should be divided among the perpetrators. Thus, the assumption of optimal levels F^a and F^b is not central to the approach.

[8] For a similar model setup see Buccirossi and Spagnolo (2005: 21).

The entrepreneur will participate only if his preferred outcome (B_0=*a*; E_2=*nr*) is positive, $v - b - \alpha\left(F_E^b + F_E^a\right) \geq 0 \Leftrightarrow b \leq v - \alpha\left(F_E^b + F_E^a\right)$. The same applies to the bureaucrat, yielding $b - \alpha\left(F_E^b + F_E^a\right) + S \geq 0 \Leftrightarrow b \geq \alpha\left(F_B^b + F_B^a\right) - S$. Both players participate in the corrupt deal if a bribe can be found that satisfies both inequalities. This requires $v \geq \alpha\left(F_B^b + F_B^a + F_E^b + F_E^a\right) - S$.

Deterrence in its strict legal sense is understood as "preventing [corruption] with the threat of sufficiently heavy and prompt expected sanctions", (Buccirossi and Spagnolo 2005: 8). This unfolds if $v < \alpha\left(F_B^b + F_B^a + F_E^b + F_E^a\right) - S$. This condition reveals a wide latitude in the design of criminal codes as any of the four penalties could suffice for general deterrence.

Realistically, the risk of detection and conviction, α, can vary considerably with the circumstances of a particular transaction. Moreover, detection and conviction involve costs that increase in α. Thus, relying only on one constraint is not advisable. Further complementary constraints should be employed to ensure that entrepreneurs and bureaucrats abstain from corrupt transactions. These constraints might prove less costly than the conventional deterrence effect which involves expenses for prosecutors, judges and prisons, (Buccirossi and Spagnolo 2005: 9-10). In order to investigate these constraints one must determine if the corrupt actors' preferred outcome (B_0=*a*; E_2=*nr*) is a subgame perfect Nash-equilibrium. Depending on *E*'s decision in E_1 there are two cases to be investigated.

Case 1: *E* prefers to report in E_1 (E_1=*r*)

If $-b - F_E^b + H + R > -b - \alpha F_E^b \Leftrightarrow H + R > (1-\alpha)F_E^b$, *E* will retaliate in E_1 by reporting (action "*r*"). In this case the bureaucrat would strictly prefer "*r*" to "*na*" because $b - F_B^b + H > b - F_B^b$. Thus, *B* would then compare (B_0=*r*) and the respective payoff $b - F_B^b + H$ to his payoff in the players' preferred outcome (B_0=*a*; E_2=*nr*), $b - \alpha\left(F_B^b + F_B^a\right) + S$. He will play "*a*" if $b - \alpha\left(F_B^b + F_B^a\right) + S > b - F_B^a + H$. But this requires *E* to prefer "*nr*" to "*r*" in E_2. This is given if $v - b - F_E^b - F_E^a + H < v - b - \alpha\left(F_E^b + F_E^a\right) \Leftrightarrow H < (1-\alpha)\left(F_E^b + F_E^a\right)$.

Case 2: *E* does not report in E_1 (E_1=*nr*)

If $H + R < (1-\alpha)F_E^b$, *E* will not report in E_1 (E_1=*nr*). *B* will prefer "*a*" only to "*na*" and "*r*" if $b - \alpha\left(F_B^b + F_B^a\right) + S > \max\left(b - \alpha F_B^b; b - F_B^b + H\right)$. Again, this requires *E* to prefer "*nr*" to "*r*" in

E_2, which is given if $H < (1-\alpha)(F_E^b + F_E^a)$.

Proposition 1: A bureaucrat should be heavily punished for reciprocating a bribe and less so for taking a bribe (strictly speaking, within the confines of this model, he should even be rewarded).

The proof follows immediately from cases 1 and 2. *B* can be kept from awarding the contract (action "*a*") by setting $b - \alpha(F_B^b + F_B^a) + S < b - F_B^a + H \Leftrightarrow F_B^a < (\alpha F_B^b + H - S)/(1-\alpha)$. This condition is met if F_B^a is large and F_B^b as small as possible, virtually even below zero. Punishing the reciprocation of a bribe, F_B^a, has the strongest deterring effect by not only increasing the expected losses from punishment, but by additionally making reciprocity less likely. The higher F_B^a the better does the legal norm operate against private attempts to enforce the corrupt deal.

A strategy for fighting corruption entails setting F_B^b low, or even rewarding a bureaucrat for taking bribes. In this case the bureaucrat retains his incentive to report after taking the bribe. From a deterrence perspective, this would be a desirable outcome, because creating incentives for *B* for reporting the deal would reduce *E*'s willingness to give a bribe in the first place. I will discuss subsequently the lacking feasibility of such a proposal. While there are various caveats that arise, it is fair to point out that harsh penalties for accepting minor gifts backfire by bolstering the 'pact of silence' among bribe-givers and -takers. Criminal codes also tend to encourage confiscation of bribes, an aspect that is disregarded in the model. This aspect is also in contrast to the recommendations as it hurts all bribe-takers, even those who cheated the briber or those who reported.

Lemma 1: Corrupt actors prefer Case 1 to Case 2.

The proof follows from observing that Case 2 introduces an additional constraint: *B* prefers "*a*" to "n*a*" if $b - \alpha(F_B^b + F_B^a) + S > b - \alpha F_B^b$. If this constraint is violated, the preferred outcome (B_0=*a*; E_2=*nr*) is not the Nash-equilibrium anymore. In Case 2, *B* is therefore more easily distracted from the corrupt equilibrium by preferring to cheat the briber.

Proposition 2: An entrepreneur should be heavily punished for giving a bribe.

Case 2 is relevant if $H + R < (1-\alpha)F_E^b$. Given Lemma 1 we know that this condition is preferable for containing corruption. This condition is reached if F_E^b is large, that is, if entrepreneurs are heavily penalized for giving bribes.

Proposition 3: An entrepreneur should not be punished but rewarded for accepting a favor.

The entrepreneur will prefer to report in E_2 if $H > (1-\alpha)(F_E^b + F_E^a)$. Apparently, this condition can be supported by imposing low overall penalties on *E*. A low penalty F_E^b would run counter to the condition in Proposition 2, though. But a low penalty F_E^a is a feasible recommendation. One may try to pursue $H + R < (1-\alpha)F_E^b$ (from Proposition 2) and $H > (1-\alpha)(F_E^b + F_E^a)$ simultaneously. Inserting the first into the second condition results in $H > (1-\alpha)F_E^b + (1-\alpha)F_E^a > H + R + (1-\alpha)F_E^a \Leftrightarrow F_E^a < -R/(1-\alpha)$. One would thus have to reward *E* for accepting the contract. The logic would be to encourage reporting as soon as the contract is awarded, making it unpleasant for the bureaucrat to reciprocate.

While practitioners may rightly argue that this goes too far, it is fair to point out that *E* should be punished for paying bribes and less for accepting the favor. For example, civil codes tend to declare contracts void if they were achieved by means of bribery (see Section III). One can implement this swiftly in the model by introducing the additional penalties in E_2 of v in case of reporting and αv in case of non-reporting. This is a measure that runs counter to the recommendation, though, because the penalty is inflicted only on those who were awarded the contract. Penalties should instead be inflicted on all entrepreneurs who paid bribes, irrespective of whether or not they obtained the contract.

II.3 A Model of Asymmetric Penalties and Leniency

Penal codes may consider a reduced sanction for actors who report their misconduct before legal proceedings commence (voluntary disclosure). For this case I introduce a rebate, l_i, on the original penalty, with $0 \le l_i \le 1$. I allow this rebate to depend on the nodes of the game, as shown in Figure II.2. l_b denotes the reduction in the penalty inflicted on the bureaucrat who took a bribe. l_a denotes the reduction in the penalty inflicted on the entrepreneur who obtained the contract. l_{na} denotes the alternative case where the entrepreneur did not obtain the contract.

Case 1: *E* prefers to report in E_1 (E_1=*r*)

If $-b-l_{na}F_E^b+H+R>-b-\alpha F_E^b \Leftrightarrow H+R>(l_{na}-\alpha)F_E^b$, *E* will retaliate in E_1 by reporting (action "*r*"). As in section II.2, the bureaucrat would again strictly prefer "*r*" to "*na*". Thus, he would then compare (B_0=*r*) and the respective payoff $b-l_bF_B^b+H$ to his payoff in the players' preferred outcome (B_0=*a*; E_2=*nr*), $b-\alpha(F_B^b+F_B^a)+S$. He will play "*a*" if $b-\alpha(F_B^b+F_B^a)+S>b-l_bF_B^a+H$. But this requires *E* to prefer "*nr*" to "*r*" in E_2. This is given if $v-b-l_a(F_E^b+F_E^a)+H<v-b-\alpha(F_E^b+F_E^a)\Leftrightarrow H<(l_a-\alpha)(F_E^b+F_E^a)$.

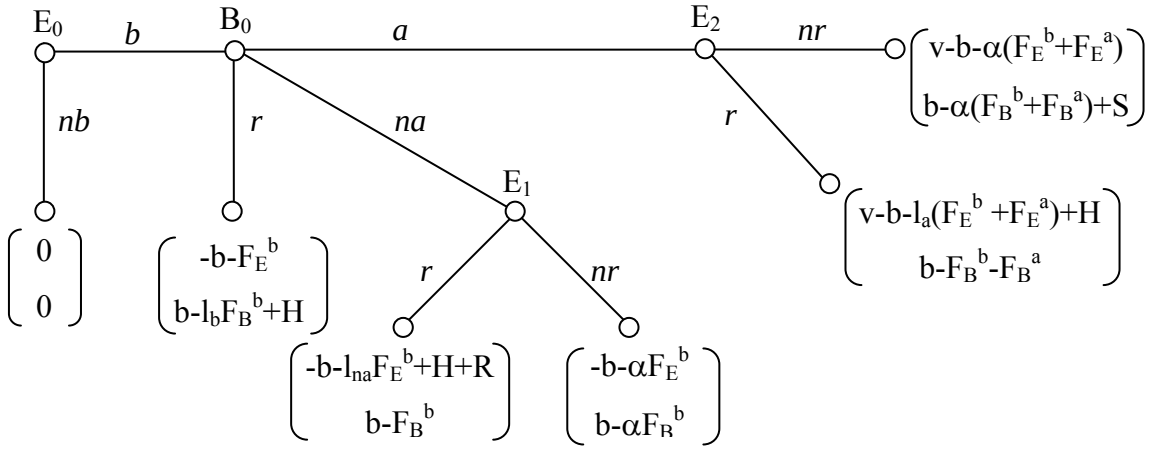

Figure II.2: One-Shot Game with Leniency

Case 2: *E* does not report in E_1 (E_1=*nr*)

If $H+R<(l_{na}-\alpha)F_E^b$, *E* will not report (E_1=*nr*). As in section II.2, *B* prefers "*a*" to "*na*" and "*r*" only if $b-\alpha(F_B^b+F_b^a)+S>\max(b-\alpha F_B^b;b-l_bF_B^b+H)$. Again, this requires *E* to prefer "*nr*" to "*r*" in E_2, which is given if $H<(l_a-\alpha)(F_E^b+F_E^a)$.

Proposition 4: A bureaucrat should be granted leniency for reporting the taking of a bribe.

The proof follows immediately from cases 1 and 2. The bureaucrat will prefer action "*r*" to "*a*" only if $b-\alpha(F_B^b+F_B^a)+S<b-l_bF_B^b+H\Leftrightarrow(l_b-\alpha)F_B^b<\alpha F_B^a+H-S$. This can be achieved if l_b is low. The argument is trivial: The entrepreneur fears reporting by the bureaucrat and may thus abstain from paying a bribe. *B* cannot credibly commit to non-reporting, undermining his trustworthiness. This is a result already noted by Buccirossi and

Spagnolo (2005: 8). I note in passing from Proposition 1, i.e. a bureaucrat should be heavily punished for reciprocating a bribe, that this is also valid in this model with leniency.

Proposition 5: An entrepreneur should be granted leniency for reporting if he already obtained the contract, $l_a = 0$, but not if he was cheated, $l_{na} = 1$.

The proof is similar to that of Proposition 2. The introduction of leniency has no impact on Lemma 1, which is still valid. The lemma states that corrupt actors prefer Case 1 to Case 2. Case 2 is relevant now if $H + R < (l_{na} - \alpha)F_E^b$. Any reduction of l_{na} would thus help corrupt actors and run counter to containing corruption. Likewise, the entrepreneur will prefer to report in E_2 if $H > (l_a - \alpha)(F_E^b + F_E^a)$. Apparently, this condition can be supported by setting $l_a = 0$.[9]

Penalties for accepting bribes can backfire because they force bureaucrats into a 'pact of silence'. A first, yet controversial suggestion in section II.2 was to set $F_B^b \leq 0$. An alternative and feasible option to prevent the 'pact of silence' from materializing is to grant leniency to a bureaucrat for reporting, $l_b = 0$.

Ex-ante (pre-detection) leniency, i.e. leniency that is explicitly and unambiguously laid down in the respective legal codes, and, hence, definitely granted, may prove to be more adequate for fighting corruption than ex-post (post-detection) leniency, i.e. leniency that is up to the discretionary powers of prosecutors and judges. The reason is simple: ex-ante leniency shatters both players trust in reciprocity and non-reporting right at the start of their relationship, i.e. at nodes E_0 and B_0. The same would not hold true for ex-post leniency. First, judges' and prosecutors' commitments may not be credible, as shown by various cases in which the one cooperating with the authorities ultimately received a higher punishment than negotiated with the prosecutors. Second, some of the recommendations might not be in line with prosecutors' gut feelings of fairness and deterrence. For example, if an entrepreneur reported after having obtained the contract, he would walk away rich and unpunished. While a commitment to such a design of penalties would be desirable, prosecutors and judges may dislike enforcing it if they are endowed with sufficient discretion. Third, prosecutors and

[9] Buccirossi and Spagnolo (2005: 8) investigate the case of equal rebates, that is, $l_a = l_{na}$. Not surprisingly, they obtain ambiguous results with respect to the usefulness of leniency programs.

judges might themselves be susceptible to misusing their discretionary power. In the worst case they would grant leniency in exchange for favors, increasing corruption in the judicial system rather than helping to deter corruption.

II.4 Extensions

For prosecutors it might be arduous to prove the *quid pro quo*: while both a monetary payment and the awarding of a contract might be observed, linking the two is oftentimes tricky. The *quid pro quo* might hence be private knowledge of *B* and *E* and information on it would be revealed only in case of self-reporting. This would be problematic because the awarding of a contract per se is sometimes not a punishable offense, as long as it is given to a qualified firm. Only the linkage to a bribe reveals the violation of official duties. If that relation were private information, in case of random detection penalties could only relate to the payment of bribes, not to the awarding of the contract. Only in case of self-reporting, where private knowledge of the link is revealed, would it be possible to punish the awarding of a contract. This modification becomes relevant in (B_0=*a*; E_2=*nr*), where the payoffs would have to be altered to $v - b - \alpha F_E^b$ and $b - \alpha F_B^b + S$. A low (or negative) penalty for taking bribes, F_B^b, as suggested in section II.2, would no longer achieve its goal. A similarly undesirable outcome would result if a public official harassed business people and attempted to extort a bribe. Penalizing bureaucrats only for awarding the contract may then go too far because often it would not be possible to inflict adequate penalties on the bureaucrat. One shall keep this caveat in mind when drawing policy conclusions.

Another extension relates to the sequence of actions. In some cases bureaucrats award a contract first and expect a payment from the entrepreneur afterwards. The entrepreneur may support such expectations by making related promises upfront. Figure II.3 denotes the game in extensive form. Again I assign non-monetary payoffs for bureaucrats who retaliate after being cheated by entrepreneurs, R, for entrepreneurs who feel positive reciprocity, S, and for whistleblowers, H.

The penal code again offers leniency to entrepreneurs who have received a contract, l_a. With respect to bureaucrats the leniency program now distinguishes between leniency granted to those who have awarded the contract and obtained the bribe, l_b, or to those who failed to obtain the bribe, l_{nb}.

Once *B* awards the contract, *E* has three options (in E_1). First, paying the bribe as promised (action "*b*"); second, reneging on his promise and not paying the bribe (action "*nb*"); or, third, reporting the deal (action "*r*"). In the latter case the game ends, resulting in the payoffs $v - l_a F_E^a + H$ and $-F_B^a$. In the former two cases *B* has the option either to stay silent (action "*nr*" in B_1 and B_2) or to report the deal (action "*r*" in B_1 and B_2), with the ensuing payoffs depicted in Figure II.3.

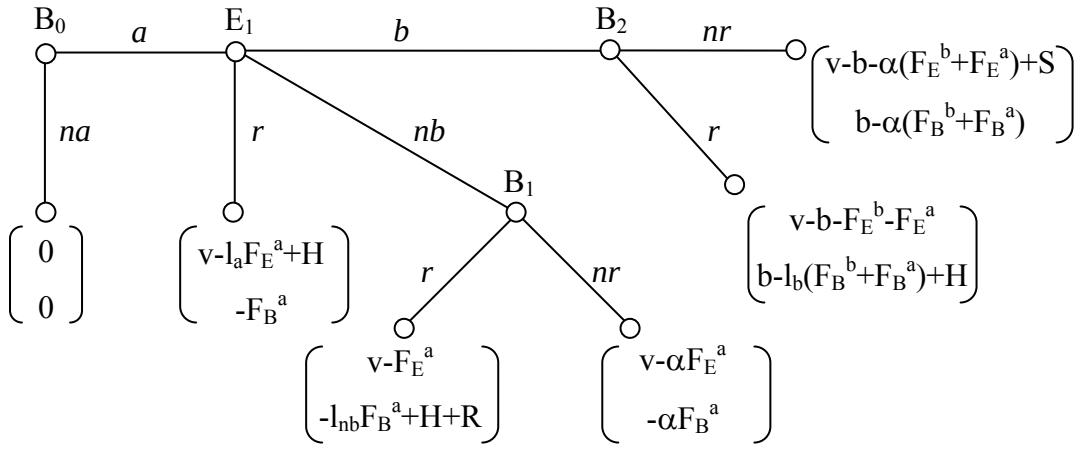

Figure II.3: Reversed One-Shot Game with Leniency

One has to find out whether the corrupt actors' preferred outcome (E_1=*b*; B_2=*nr*) is a subgame perfect Nash-equilibrium. Depending on *B*'s decision in B_1, there are two cases to be investigated.

Case 1: *B* prefers to report in B_1 (B_1=*r*)

If $-l_{nb}F_B^a + H + R > -\alpha F_B^a$ *B* will retaliate in B_1 by reporting (action "*r*"). In this case the entrepreneur will prefer the payment of the bribe (action "*b*") if $v - b - \alpha\left(F_E^b + F_E^a\right) + S > \max\left(v - l_a F_E^a + H; v - F_E^a\right)$, as the other alternatives bring about lower payoffs. But this requires *B* to prefer "*nr*" to "*r*" in B_2. This is given if $b - \alpha\left(F_B^b + F_B^a\right) > b - l_b\left(F_B^b + F_B^a\right) + H \Leftrightarrow H < \left(l_b - \alpha\right)\left(F_B^b + F_B^a\right)$.

Case 2: *B* does not report in B_1 (B_1=*nr*)

If $-l_{nb}F_B^a + H + R < -\alpha F_B^a$, *B* will not retaliate in B_1 (action "*nr*"). In this case the entrepreneur will prefer the payment of the bribe (action "*b*") if

$v - b - \alpha\left(F_E^b + F_E^a\right) + S > \max\left(v - l_a F_E^a + H; v - \alpha F_E^a\right)$. Again this requires *B* to prefer "*nr*" to "*r*" in B_2. This is given if $H < \left(l_b - \alpha\right)\left(F_B^b + F_B^a\right)$.

Lemma 2: Corrupt actors prefer Case 1 to Case 2.

The proof follows immediately from observing that the second condition is less easily satisfied, due to the fact that $v - \alpha F_E^a > v - F_E^a$. The third condition is identical in both cases. This suggests that Case 2 imposes harsher restrictions on (B_0=*a*; E_1=*b*; B_2=*nr*) to be the Nash-equilibrium.

Proposition 6: A bureaucrat should be given leniency if he reports the taking of a bribe, $l_b = 0$. But he should not be given leniency if he failed to obtain a bribe, $l_{nb} = 1$.

Proof: If $l_b = 0 < \alpha$ we obtain $H > 0 > \left(l_b - \alpha\right)\left(F_B^b + F_B^a\right)$ and both in Case 1 and Case 2 the third condition is violated. Thus, even at the end of the game a bureaucrat retains an incentive to report. Furthermore, given Lemma 2 we know that Case 2 is preferable to prosecutors, which requires $-l_{nb} F_B^a + H + R < -\alpha F_B^a$. This is better achieved by setting $l_{nb} = 1$.

I note in passing that none of our previous propositions is contradicted by this model with reverse sequence. In particular, entrepreneurs should be penalized for paying bribes rather than for accepting the favor. The proof follows immediately from the second condition in Case 1 and Case 2.

A final extension relates to the question of whether leniency should be withheld from a bureaucrat who reciprocated a bribe. This issue is beyond the models. On the one hand, a no-mercy policy towards such bureaucrats may deter them from awarding the contract in the first place. On the other hand, such a policy could easily backfire. For example, at a court in Bochum, Germany, an employee of the road construction authority confessed to accepting bribes for contracts relating to marking roads. Beginning in 1987, and lacking business experience, he passed on names of competing firms in a public tender. After this incident, he received an envelope filled with DM 2.000 (EUR 1.000) from the private firm who obtained the favor. "Suddenly I knew that I had begun to be at his mercy," was the statement made in court and the justification for why he afterwards became entrapped in this corrupt relationship. A leniency program may have helped in avoiding this start of a corrupt career.

Apparently, in this case leniency should not be withheld from those bureaucrats who handed out a favor in exchange for a bribe.

II.5 Policy Implications and Conclusion

Because of its potential to shatter corrupt actors' trust in reciprocity and in mutual silence, an asymmetric design of sanctions, coupled with strategically granting leniency, might unleash higher deterrent effects of anti-corruption legislation, if deterrence is understood in the broader sense of reducing potential perpetrators' willingness to participate in illegal acts. Yet, in most countries sanctions for bribery tend to be symmetric. Moreover, ex-ante leniency is the exception rather than the rule. And if at all, leniency is usually granted only to bribe-givers, see Section III and Nell (2007a).

In Germany, as in many other countries[10], symmetry prevails under §§331-335 of the Penal Code (StGB), because law scholars treat the integrity and the public's trust in the immaculateness of the administrative authorities as well as the objectivity of governmental decisions as the laws' subject of protection, (Bannenberg 2002: 18-19; Kargl 2002: 782-783).[11] It is argued that both parties in a corrupt deal jeopardize the subject of protection similarly and should thus be punished equally.

As I see it, however, reasoning that both parties equally interfere with the subject of protection of §§331-335 is not indisputable. From an economic perspective, it is only true to a minor extent that soliciting or accepting a bribe leads to economic losses. In fact, the acceptance of a bribe merely constitutes a redistribution of resources from the private to the public sector. It is rather the act of reciprocating bribes that offends the integrity of public office, runs contrary to the notion of governmental objectivity, distorts allocative efficiency, and annuls fair competition. Likewise, it may not be business peoples' willingness to accept favorable treatment that distorts decisions in public office, but rather the initiative to sidestep competition by giving bribes.

How may the proposals translate into legal practice? First, the recommendations with respect to the size of penalties can be swiftly implemented: the highest penalties should be inflicted on entrepreneurs who pay bribes and expect favorable treatment in return, but not for the

[10] One notable exception is Taiwan, where only those taking bribes are penalized, (Hepkema and Booysen 1997).
[11] The subject of protection is designed similarly in §§299-300 (corruption in commerce).

acceptance of that favor. Equally, high penalties should be inflicted on bureaucrats who provide a favor to an entrepreneur who paid or promised to pay a bribe, but less harsh penalties should be considered for the bureaucrats who only accepted bribes but did not reciprocate.[12]

Eliminating the punishment for accepting bribes, as implied by the model in section II.2, would go too far. As I noted before, prosecutors have a hard time proving the *quid pro quo* and linking bribes to favors. In this context, the exchange of gifts and monetary inducements may be the clearest indicator for misbehavior, which must be subject to legal sanctions. But the model shows that the penalizing of public servants for accepting (and also for soliciting and agreeing to accept) bribes would squeeze them into a 'pact of silence'. The authorities may resolve this dilemma by reversing the onus of proof. In this case the acceptance of a bribe is taken as proof of reciprocity unless the bureaucrat can prove the opposite. For a detailed legal treatment of this issue see de Speville (1997).

A second approach is to grant leniency to bureaucrats who engage in self-reporting. Three conditions must be met for leniency to be exercised as described in this section. First, leniency ought to be granted only if a bribe was actually paid, and not if the entrepreneur promised it but then decided to cheat the bureaucrat. Second, leniency ought to be granted only if preliminary proceedings have not already been initiated in order to distinguish random detection from actual self-reporting. Third, the information provided must have the potential to convict the briber (testimony). This would be violated if, for instance, it were known that the briber cannot be prosecuted – maybe due to observable loopholes in trans-border crime legislation, or, in the most extreme case, if the briber has already died.[13]

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[12] In contrast to paying bribes, already the promising or offering of bribes in most jurisdictions are punishable acts because of their potential of influencing *B*'s decision. Likewise, *B* is often threatened with a penalty for signaling the willingness to accept or the demanding of a bribe. This sanction is imposed once *B* acts on the promise or the offer of the bribe, i.e. by awarding the contract. We can swiftly add these additional penalties to the game. Some penal codes go as far as considering it irrelevant whether a bribe was actually paid and a return actually given, the mere promising and demanding are sufficient. It can be swiftly argued that this goes way too far. It appears justifiable to disallow corruptive attempts. But the models reveal that heavy penalties must be inflicted on those who actually pay a bribe, expecting a favor in return. Equally heavy penalties must be inflicted on those who award a contract to a person who paid or is expected to pay a bribe. Thus, punishment for offering or promising a bribe must be less harsh than punishment for actually giving bribes. Likewise, public servants must face less harsh punishment for promising favorable treatment than punishment for the actual delivery of a favor. Penalties for promising and demanding must also be annulled in case of self-reporting.

[13] Conditioning leniency to the actual conviction of the briber might go too far because prosecutors may fail in achieving this due to random errors or political constraints.

Likewise, ex-ante leniency should be granted to a briber only on condition that the public official has already reciprocated on the bribe, preliminary proceedings have not already been initiated and the reporting bears the potential to help the justice system in penalizing the bureaucrat (testimony).

Interestingly, some legal provisions are likely to inhibit opportunism rather than to encourage it. Former Article 215 (2) of the Turkish Penal Code granted leniency only if the public official had not yet reciprocated on the bribe, (Tellenbach 1997: 642). Remarkably, according to Article 215 (2), the bribe-giver was even entitled to reclaim the bribe in case of self-reporting. Such provisions run contrary to our recommendations, because they strengthen the briber in requesting illegal reciprocity. Subject to this legislation, bribe-givers could credibly threaten public servants who failed to reciprocate. The design of the former Turkish Penal Code may have thus forced public servants to deliver on their corrupt promises.[14]

A ruling that occurred in Italy is also revealing. A Sicilian court overruled a verdict relating to Mario Campana, a director of a civil court in Potenza, who received 88 pounds of fish in return for helping to expedite the case of a plaintiff. The court explained that "the law punishes the false boast of being able to exert influence, and not the real traffic of influence", (Stanley 2001: A4). In other words, the Italian court ruled that "the director could only be convicted of *pretending* to influence higher authorities; punishment would be warranted only if the official *couldn't* deliver", (Uslaner 2005: 79), implying that in the absurd judgment of this court, if an illicit favor works successfully, it ceases to be a crime.

Questions remain about exactly what criminal sanctions and leniency ought to encompass (e.g. should disciplinary penalties also be abandoned), but also about potential civil litigation and the ensuing indemnifications. May a bribe-giver, for instance, retain the public contract, license or permit? Or may the bribe-taker keep the bribe? From the perspective of destabilizing corrupt arrangements the second question could clearly be affirmed because it would strengthen a bribe-taker's willingness to cheat. However, this recommendation may be at odds with the public's notion of justice and fairness. Similarly, if an entrepreneur could keep the contract, license or permit in case of reporting, the corrupt arrangement would further be destabilized. The incentive to self-report, however, would be reduced if the public

[14] The Turkish Penal Code was revised in 2005, with new but equally disputable clauses taking effect. For a detailed discussion see Section III and Nell (2007a).

preferred to seek a more competent or 'ethical' entrepreneur for the execution of the contract. The public's sentiments may, of course, not be the suitable guide for the design of anti-corruption legislation. Investigation of these issues is an avenue for future research.

Given the risks of both being cheated upon and whistle-blowing, there may result additional deterrent effects from our design of criminal codes. Bribe-givers would be dissuaded from entering corrupt arrangements not only because of harsh and prompt expected sanctions, but also because public servants may become unreliable partners in corrupt transactions. Thus, I am hinting at a broader concept of deterrence, i.e. one that does not exclusively relate to the expected disutility from exposure to legal punishment. The models suggest that deterrence, in the broader sense of reducing potential perpetrators' willingness to participate in illegal acts, also entails the disincentives created by a specific design of the relevant criminal sanctions. It is this deterrent effect that legal codes can legitimately draw upon by devising criminal sanctions so as to destabilize corrupt arrangements.

The suggestions have been shown to be robust to various modifications of the model, for example, to the precise sequence of actions or prosecutor's failure to prove a *quid pro quo*. The conclusions are also valid for the case where bribes are solicited or extorted rather than offered freely. Prosecutors will always try to judge on the personal guilt of a public official and an entrepreneur, demanding higher penalties for the part that was more active in arranging the illicit deal. My suggestions leave room for such considerations.

One final caveat has to be borne in mind. Obviously, in cases of repeated transactions asymmetry and leniency may be fruitless. Where corrupt partners are in an enduring relationship, the design of legal sanctions will have little bearing on actual behavior. Rather, the proposals will unfold their effects in one-shot, large-scale transactions which oftentimes are part of schemes of grand corruption.

III Strategic Aspects of Voluntary Disclosure Programs for Corruption Offences

III.1 Introduction[15]

Most attempts towards curbing corruption entail repressive and preventive measures as well as the fostering of transparency. However, these avenues towards anti-corruption have various serious limitations, see Section I and Lambsdorff and Nell (2006). Given these drawbacks, novel approaches towards fighting corruption have been explored. The New Institutional Economics provides guidance for reform (Lambsdorff 2007a). Moreover, representatives of industrial organization economics and game theory have recently shed light on new ways of tackling corruption, also including the optimal design and implementation of leniency programs. See for instance Gneuß (2002), Buccirossi and Spagnolo (2005, 2006) and Spagnolo (2006) for a review of the relevant literature.

Offering captured wrongdoers lenient treatment in exchange for information valuable to investigation and prosecution has been a standard tool for centuries. Plea bargains, for example, have for a long time been an important element of investigation and prosecution. They entail an agreement in which the detected and indicted person agrees to plead guilty or no contest, and in some cases also agrees to provide testimony against another person. In return the person is promised by a prosecutor a mitigated punishment or is charged with a lesser crime. Accordingly, plea bargains are applied at the time an offender is detected.

Voluntary disclosure programs differ from plea bargains and similar post-detection exchanges in two important aspects. First, they are directed at wrongdoers who have not yet been exposed. In Germany, for instance, a tax evader is exempted from criminal proceedings if he turns himself in prior to detection. Similarly, a voluntary disclosure program for corruption offences grants leniency if a bribe-taker or bribe-giver self-reports his offence before detection. Active repentance, expressed by the act of self-reporting, is thus the primary circumstance removing criminal liability. In contrast, a plea bargain is struck to reduce the costs of prosecution and conviction and sometimes to obtain evidence against other offenders. Active repentance does not play a crucial role.

Second, voluntary disclosure programs grant a reduction in the applicable penalty not on a case by case, crime by crime basis. Rather, leniency is conceded to anybody who is in a certain codified situation and meets the conditions that the program sets, (Spagnolo 2006: 7).

[15] The content of Section III is for the most part based on Nell (2007a)

Leniency is thus universal and automatic. The reduction in the penalty is definitely bestowed and not subject to discretion by prosecutors or judges, as in a plea bargain.

For three primary reasons voluntary disclosure programs may prove to be more adequate for fighting corruption than post-detection exchanges such as plea bargains, (Lambsdorff and Nell 2007). First, voluntary disclosure programs codify the extent of leniency and thus reduce legal uncertainty. Consequently, they give wrongdoers an 'exit option' that they can definitely rely on and thus promote self-reporting. The same does not hold true for plea bargains since their credibility and reliability may succumb to prosecutors' and judges' discretion.

This is corroborated by a recent case involving German soccer referee Robert Hoyzer. After having been detected in 2005 and indicted for fixing soccer games, Hoyzer struck a plea bargain with the prosecuting authorities and provided testimony against some members of the German-Croatian gambling mafia. However, the judge sentenced Hoyzer to a higher prison term than the prosecution in fact had asked for in its final plea.[16]

Second, prosecutors and judges might themselves be susceptible to misusing their discretionary powers for private benefit. In the worst case this would increase corruption also in the judicial system.[17] Voluntary disclosure programs, however, significantly strip judges and prosecutors of their discretionary powers and therefore also of the possibility to administer justice corruptly. Third, voluntary disclosure programs can be designed such to reflect the unique nature of corrupt deals and to exploit their Achilles heel.

Corrupt deals are afflicted with several risks. Corruption requires cooperation among several agents to perform the illegal activity. The prerequisite of cooperation in turn implies a governance problem, (Spagnolo 2006: 4). In particular, corrupt crooks have to fear that they will be cheated by their counterparts. For instance, a firm bribing a public official to be awarded a lucrative contract may in the end see the official awarding the contract to a competitor. Similarly, the public official may be cheated by the firm. After he awarded the contract the firm rejects payment, (Lambsdorff and Nell 2007).

[16] See (Pressemitteilung des BGH Nr. 174/2006), http://www.hrr-strafrecht.de/hrr/pm/2006/174-2006.html, downloaded on 26 November 2007.
[17] For a comprehensive review of corruption in judicial systems see Global Corruption Report (2007).

That corrupt actors oftentimes do not get what they were promised is corroborated by a recent case involving German-Canadian lobbyist Karlheinz Schreiber. In 1993 and 1994 Schreiber, who is still fighting his extradition from Canada to Germany, where he faces tax evasion, bribery and fraud charges, paid CAD 300,000 to former Canadian Prime Minister Brian Mulroney. In March 2003 Schreiber sued Mulroney, alleging that he failed to provide any services for the CAD 300,000 he was paid. Schreiber said that he hired Mulroney to help establish a Quebec factory to build light-armored vehicles for German behemoth Thyssen AG but that Mulroney failed to advance the project. Moreover, Schreiber claimed that Mulroney "further defaulted on his promise" to promote his pasta business, Reto Restaurant Systems International. In July 2007 the Superior Court in Ontario acceded to Schreiber's claim and ordered Mulroney to pay Schreiber CAD 470,000 (300,000 plus interest) since he did not meet the time limit for filing an objection.[18]

Normally, however, corrupt actors cannot solve their disputes through courts or arbitration councils since they have to fear criminal proceedings. Thus, they have to look for alternative mechanisms to avoid opportunism and to enforce their deals. For instance, corrupt partners oftentimes integrate vertically to form a new company with common ownership and control; or firms hand out put or call options as bribes instead of direct monetary payments in order to ensure compliance, (Lambsdorff 2002). In many cases social ties and cohesion between corrupt actors play an important role for enforcement as well, (Kingston 2007). And in rougher environments opportunism by either party may be cut off by threats to life or physical condition, backed, for instance, by organized crime groups, (della Porta and Vanucci 1999: 232-236; Gambetta 1993).

Another fundamental feature of corruption is that those involved automatically end up having information on each others' misdemeanor such as on the initiation of the corrupt deal, its design, the payment schemes and where the money or the valuables can be found, (Spagnolo 2006: 4). Therefore, if a deal turns sour or runs the risk of being detected, each party has to fear that its counterpart will reveal these pieces of information to the prosecuting authorities in exchange for a mitigated punishment.

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[18] See Welt Online (28 July 2007: "Schreiber bekommt Schmiergeld zurück"), http://www.welt.de/welt_print/article1061283/Schreiber_bekommt_Schmiergeld_zurck.html, downloaded on 27 November 2007; CityNews (14 November 2007: "Brian Mulroney, Karlheinz Schreiber Case Chronology"), http://www.citynews.ca/news/news_16761.aspx, downloaded on 27 November 2007.

For example, the largest company in France, Elf Aquitaine, allegedly set up an internal financial network aimed at providing funding for corrupt political purposes. This so-called "Investment Board" consisted of relatives and friends of the chairman of the board. This institution was well established, and succeeded for a while. Yet the booting out of one member put an end to its operation. The outcast took revenge, and reported operations of the network. Clearly, some type of conflict can stimulate one party to take revenge, or to prefer honesty to involvement in illegal transactions, (Lambsdorff and Nell 2007).

Voluntary disclosure programs can be designed such as to exploit these Achilles heels of corruption. In particular, if leniency is granted to those who self-report only at a certain stage of a corrupt deal, the trust in mutual compliance and silence among corrupt partners can be severely shattered. Moreover, if voluntary disclosure programs require testimony to be provided against accomplices, their power is further strengthened, see Section II and Lambsdorff and Nell (2007).

III.2 Strategic Aspects of Voluntary Disclosure Programs – Benchmark Case Turkey

The Turkish Penal Code well serves as a benchmark for illustrating the strategic aspects of voluntary disclosure programs. Active and passive bribery are criminalized pursuant to Article 252. Subsections (1) and (3) are of relevance[19]:

> (1) Any public officer who receives a bribe shall be sentenced to a penalty of imprisonment for a term of four years to twelve years. The person giving the bribe shall be sentenced as if he were a public officer. Where the parties agree upon a bribe, they shall be sentenced as if the offence were completed. […]
>
> (3) A bribe is defined as the securing of a benefit by a public officer by his agreeing with another to perform, or not to perform, a task in breach of the requirements of his duty.

The offence of bribery is completed at the time a public official receives or agrees to receive a bribe. For Article 252 (1) to take effect, there is no need of the public official actually to perform the task demanded by the bribe-giver. Accordingly, a bribe-giver is punished at the time he gives or offers a bribe. It is again not a prerequisite that the public official thereupon performs the demanded task. The corresponding voluntary disclosure programs are codified in Article 254 (1) and (2):

[19] Translations in this subsection were provided by Dr. Vahit Biçak, Associate Professor at the Faculty of Security Sciences at the Police Academy, Ankara, Turkey. […] indicates omissions.

> (1) Where, prior to the commencement of investigation, the person in receipt of the bribe presents […] such, in its original state, to the authorities, no penalty shall be imposed for the offence of bribery. Where, prior to the commencement of an investigation, a public officer who, after having agreed to receive a bribe, informs the authorities of such, no penalty shall be imposed.
>
> (2) Where, prior to the commencement of investigation, a person who offered and gave a bribe to a public officer informs the authorities responsible for investigation of such, no penalty shall be imposed and the bribe he gave to the public officer shall be taken from the public officer and handed back to him.

Article 254 is an example of a voluntary disclosure program. It requires self-reporting prior to detection and investigation. Moreover, it is codified, automatic and public. Anyone who commits a crime pursuant to Article 252, but fulfils Article 254's requirements, is granted leniency to the extent formulated in Article 254. However, the voluntary disclosure program contains several strategic weaknesses that may impede its effectiveness in curbing corruption.

Weakness 1: Supplying a bribe-giver with a credible threat against opportunism

According to Article 254 (2) no punishment is imposed on a bribe-giver if he notifies the authorities before the commencement of investigation. Such an exit option is important for extracting information indispensable for detection, investigation, prosecution and conviction. Moreover, it is important for preventing a bribe-giver from becoming entrapped in his criminal career. However, leniency must be granted in a strategic way so as not to run the risk of assisting corrupt actors with enforcing their illicit deals. To illustrate this, let us consider the following exemplary case (Figure III.1).

The government invites tenders for a contract involving the construction of several apartment buildings. The public official (*E*) is commissioned by the government to solicit and evaluate the bids. The private firm is one of the bidders. Its director (*D*) is in charge of preparing the bid. In the course of the bidding process *D* gives *E* a bribe and expects *E* to award the contract.

As Figure III.1 illustrates, *D* can be cheated by *E* insofar as *E* does not award the contract after having received the bribe from *D*. The risk of such acts of double-dealing on part of E is a good thing because it makes corruption a troublesome business for *D*, (Lambsdorff and Nell 2007). For example, if Karlheinz Schreiber had known that Brian Mulroney did not intend to

wield his power for promoting both the Thyssen factory and his own pasta business, he would most likely not have paid the CAD 300,000 in the first place.

Figure III.1: Opportunism by Bribe-Taker

However, Article 254 (2) supplies *D* with a 'weapon' against potential opportunism. Since exemption from punishment is granted to *D* at any stage of a corrupt deal as long as he self-reports before the commencement of investigation, he can force E into awarding the contract by threatening to make a report. The threat is credible because Article 252 (1) punishes *E* once he has agreed to accept or accepted the bribe. The penalty is imposed irrespective of him returning the favor. Hence, if *D* makes a report, *E* has to reckon with being subjected to criminal sanctions, while *D* goes unpunished. By conceding leniency to *D* at any stage of a corrupt deal, Article 254 (2) thus supplies *D* with a credible threat that he can misuse for seeing to it that E awards the contract after having taken the bribe.

To eliminate this credible threat, leniency should only be granted to *D* on condition that he self-reports after *E* reciprocated the bribe. Besides stripping *D* of a powerful enforcement mechanism, the voluntary disclosure program would then be designed in a strategic way that undermines both players' trustworthiness. *D* could no longer credibly promise that he will not report the deal once the bribe (or the offer of such) has been reciprocated by *E*. Reckoning with the possibility of being reported if he reciprocates, *E* would in turn abstain from

returning the bribe favor (or the offer of such). The strategic design thus has a dual effect that destabilizes corrupt deals and relationships and may ultimately lead to the entire deal's collapse at the stage of initiation.[20]

Let us look at this against the background of the Mulroney-Schreiber affair and let us assume for a moment that Turkish legislation applies. Schreiber paid CAD 300,000 to Mulroney and expected him to help establish a factory for light-armored vehicles in Quebec operated by Thyssen AG. Moreover, Schreiber wanted Mulroney to promote his private pasta business. But Mulroney allegedly did nothing of the sort. Schreiber could have abused Article 254 (2) to pressure Mulroney into fulfilling his part of the deal. This is because Schreiber would have gone unpunished while Mulroney would have faced criminal proceedings pursuant to Article 252 (1). To avoid such abuses of a voluntary disclosure program, leniency should only be granted if Schreiber reported his wrongdoing after Mulroney pulled his strings on Schreiber's behalf.

Consistent with this logic, Article 254 (2) should be reformulated as follows (changes highlighted in italics):

> (2) Where, prior to the commencement of an investigation, a person who offered and gave a bribe to a public officer informs the authorities responsible for investigation of such, *but only after the public officer performed the task in the interest of such person*, no penalty shall be imposed […].[21]

Weakness 2: Supplying a bribe-taker with a credible threat against opportunism

Article 254 (1) grants exemption from punishment at any stage of a corrupt deal as long as *E* self-reports before investigations have been initiated. *E* thus has the opportunity to report the deal also after its finalization, i.e. after having reciprocated on the bribe (or on the offer of such). This incentive should clearly be upheld because it produces uncertainty on part of *D* about not being turned in by *E* even if the deal has gone through smoothly. Moreover, it gives

[20] See Section II and Lambsdorff and Nell (2007) for a formal derivation of this result.

[21] It is noteworthy that according to Article 254 (2) the bribe is returned to the bribe-giver in case of self-reporting: "…and the bribe he gave to the public officer shall be taken from the public officer and handed back to him". This creates an even stronger incentive for a bribe-giver to report a corrupt deal and further undermines his trustworthiness. However, while a bribe-giver who shows signs of sincere repentance should be granted leniency, he should not be able to seek the law's protection by reclaiming his expenses. Returning the bribe can clearly not be supported. Thus, Turkish legislators should consider eliminating this rider.

E the opportunity to escape from a vicious circle of being pressured by *D* into corrupt deals again and again. Mulroney could have reported the deal with Schreiber even if he had already pulled his political and business strings to promote the Thyssen factory and Schreiber's pasta business. On this account, the formulation of Article 254 (1), sentence one, requires no change.

However, as Figure III.2 illustrates, *E* may also award the contract before actually being paid the bribe. *D* can now behave opportunistically insofar as not to pay the promised bribe. Article 254 (1), sentence two, equips *E* with a 'weapon' against such an act of opportunism, though. He can threaten *D* with reporting the deal and thus ensure *D*'s compliance.

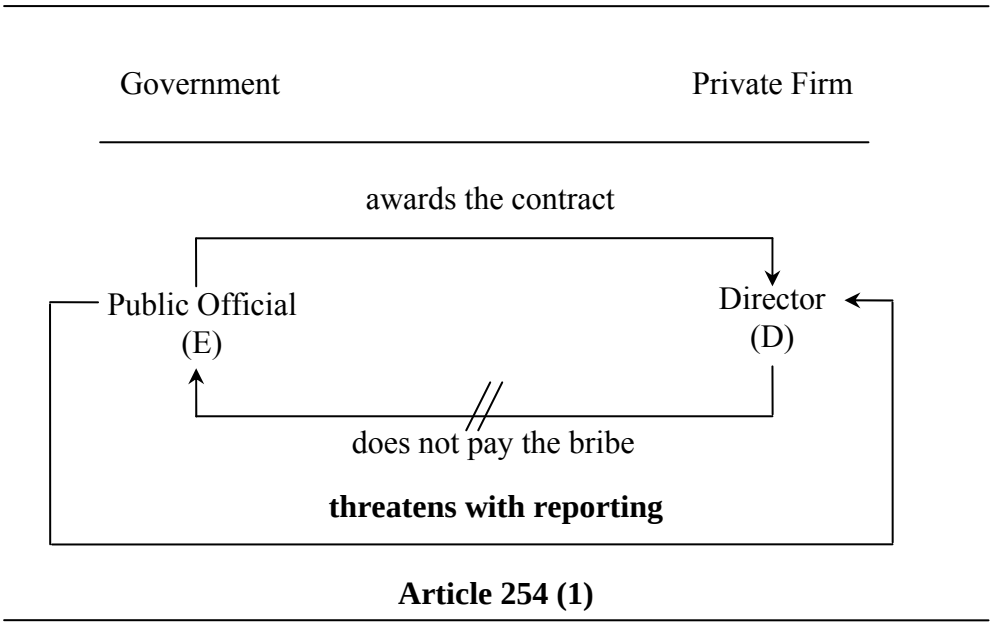

Figure III.2: Opportunism by Bribe-Giver

The threat is credible because *E* is exempted from punishment in case of self-reporting. Moreover, the offering or promising of a bribe already is a punishable act according to adjudication pertaining to Article 252 (2). Hence, *D* has to reckon with being subjected to punishment, while *E* goes unpunished.

To strip *E* of such a credible threat, the voluntary disclosure program should codify that exemption from punishment is granted to *E* only if the bribe was actually given to him.[22] The formulation in Article 254 (1), sentence two, however, runs counter to this. The well-intended Turkish leniency program may thus be abused by *E* to put pressure on *D* to be paid the bribe.

Let us again look at this in face of the Mulroney-Schreiber affair. But let us now assume that Schreiber promised to pay CAD 300,000 once Mulroney successfully wielded his influence to promote the Thyssen factory and his past business. Schreiber could have then cheated Mulroney by failing to make the payment as agreed. Assuming anew that Turkish legislation applies, Mulroney could have misused Article 254 (1) to force Schreiber to pay. Since Schreiber had been on Canadian and German prosecutors' radar for a long time, Schreiber would have likely complied and pay the agreed sum.

On this account, a strategic design would have to encompass the elimination of sentence two of Article 254 (1).

> (1) Where, prior to the commencement of an investigation, the person in receipt of the bribe presents […] such, in its original state, to the authorities, no penalty shall be imposed for the offence of bribery. ~~Where, prior to the commencement of investigation, a public officer who, after having agreed to receive a bribe, informs the authorities of such, no penalty shall be imposed~~.

The voluntary disclosure programs then interact such as to shatter the mutual trust in reciprocity. *E* has to reckon with being cheated by *D* and will thus in most instances demand the bribe prior to the award of the contract. *D* then faces the risk that *E* does not award the contract, though. Since *D* is granted leniency only in case E reciprocated, *D* cannot make sure that *E* complies as he lacks a credible threat. Moreover, even if *E* awards the contract, he may self-report at a later stage to avoid punishment. In the end, the circular effects of the voluntary disclosure programs strip both D and *E* of the trust in reciprocity necessary for striking a corrupt deal.[23]

[22] See Section II and Lambsdorff and Nell (2007) for a formal derivation of this result.
[23] See Lambsdorff and Frank (2007) for an experimental validation of the results.

III.3 Policy Recommendations

The United Nations Convention against Corruption (UNCAC) in Article 15 (a) and (b) puts forth recommendations on the criminalization of active and passive bribery.[24] Moreover, Article 37 provides for a guideline for leniency provisions to be considered by signatory and ratifying parties.[25] Against these Articles' background I propose the following voluntary disclosure programs.

Active Bribery

> (1) A person offering, promising or giving, directly or indirectly, an undue advantage to a public official, for the official himself or herself or another person or entity, in order that the official, in the exercise of his or her official duties, act on behalf of the giver of an advantage or another person or entity shall be punished with […].

Voluntary Disclosure Program for Active Bribery

> (2) A person liable pursuant to (1) shall be exempted from punishment if he or she reports to the competent authorities before preliminary proceedings have been taken, if the public official acted on behalf of him or her or another person or entity, and if he or she provides testimony against the public official.[26]

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[24] Article 15: Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: **(a)** The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; **(b)** The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties. See UNODC (2003: 11)

[25] Article 37: **1.** Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds. **2.** Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention. **3.** Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention. **4.** Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention. **5.** Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article. See UNODC (2003: 19).

[26] Conditioning leniency on actual conviction of the public official would push things too far because prosecutors my fail in achieving it due to random errors or political constraints. However, making testimony a condition for leniency is important to strengthen the risks that self-reporting entail.

Passive Bribery

(1') A public official, who, directly or indirectly, solicits, agrees to accept or accepts an undue advantage, for himself or herself or another person or entity, in order that he or she, in the exercise of his or her official duties, act on behalf of the giver of an advantage or another person or entity shall be punished with […].

Voluntary Disclosure Program for Passive Bribery

(2') A person liable pursuant to (1') shall be exempted from punishment if he or she reports to the competent authorities before preliminary proceedings have been taken, if the undue advantage was given to him or her, and if he or she provides testimony against the giver of the undue advantage.[27]

Table III.1 summarizes the key elements.

Form of Bribery	Elements of Strategic Voluntary Disclosure Programs	
Active Bribery	Leniency is granted only if the bribe was reciprocated	- Leniency is granted in case of self-reporting - Self-reporting is required to encompass testimony
Passive Bribery	Leniency is granted only if the bribe was given and not if the bribe was only promised	

Table III.1: Strategic Elements of Voluntary Disclosure Programs

It remains questionable whether the solicitation of a bribe should really be exempt from punishment in case of self-reporting. If *E* solicited the bribe through coercion or intimidation or the threatening with physical harm, I believe that he should not be exempt from punishment. *E*'s self-reporting should then at most be seen as a reason for mitigating his applicable sentence. However, the decision about this should be that of prosecutors and judges as they should be able to weigh the gravity of *E*'s offence against eventual mitigating circumstances such as active repentance.

[27] Again, conditioning leniency on actual conviction of the bribe-giver would push things too far because prosecutors may fail in achieving it due to random errors or political constraints.

In less severe instances of solicitation, however, conceding leniency automatically may be reasonable. A reliable backdoor is necessary because otherwise *D* can in the future turn the tables on *E* and demand the supply of corrupt services. Without the possibility of being granted leniency in case of self-reporting, *E* would be entrapped in a long-lasting criminal career. What develops is a vicious circle of mutual dependencies that fosters corruption.

Accordingly, the voluntary disclosure program for active bribery also encompasses cases in which the bribe was solicited. Its formulation implies that *D* is exempted from punishment only if he reports after *E* awarded the contract. This may seem strange at first view. However, if leniency is granted at an earlier stage, *D* is equipped with a credible threat against *E* who solicits a bribe but does not deliver thereupon.

In fact, *E* can continue soliciting bribes from *D* as long as he does award the contract. He can do so because *D* cannot escape from this trap as he is only conceded leniency if *E* awarded the contract. Besides, if *E* can expect leniency if he self-reports, he can credibly threaten *D* with reporting unless *D* does not continue giving bribes. Anticipating this two-sided opportunistic behavior (non-reciprocity and ongoing solicitation), *D* would likely abstain from ceding to *E*'s demands in the first place.

III.4 Cross-Section Analysis

This section analyzes the relevant provisions in the penal codes of 56 countries. In 2006, 181 criminal law scholars and anti-corruption practitioners from 100 countries were contacted via e-Mail. The experts were identified by means of Internet research (law faculties of universities and members of bar associations) as well with the aid of the German Development Agency (GTZ) and the International Criminal Defence Attorneys Association (ICDAA).

The experts were described the research project and asked to support it by providing an "up-to-date and official version" of their home country's penal code in English, or in French or Spanish where these are official languages. Of the 181 people contacted 68 replied. 37 provided an English version of their home country's penal code. The remaining 31 experts replied that they were not aware of an English translation of their country's penal code. No one provided either a French or Spanish version. Therefore, further research was conducted at the Max-Planck Institute for Foreign and International Criminal Law (Freiburg, Germany) in

December 2006. The Institute's database of approximately 100 penal codes was searched for penal codes available in French or Spanish. 31 penal codes fulfilled the language criterion. However, due to time constraints 15 of the 31 penal codes were randomly selected and translated from French and Spanish into English and entered the study. 3 penal codes were available in English at the Institute and therefore also entered the study. One further penal code was available in English on the Internet.

The countries included in the cross-section analysis are (in alphabetical order): Albania, Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bolivia, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Burundi, Canada, Chile, China, Colombia, Costa Rica, Croatia, the Czech Republic, Estonia, Ethiopia, Finland, Germany, Honduras, Hungary, Iceland, India, Iraq, Japan, Kazakhstan, Kuwait, Latvia, Macedonia, Malta, Mexico, Moldova, Mongolia, Montenegro, Nicaragua, Nigeria, Panama, Peru, Philippines, Romania, Russia, Senegal, Serbia, Slovakia, Slovenia, Sweden, Tajikistan, Tunisia, Turkey, Ukraine, Uruguay, Uzbekistan.[28]

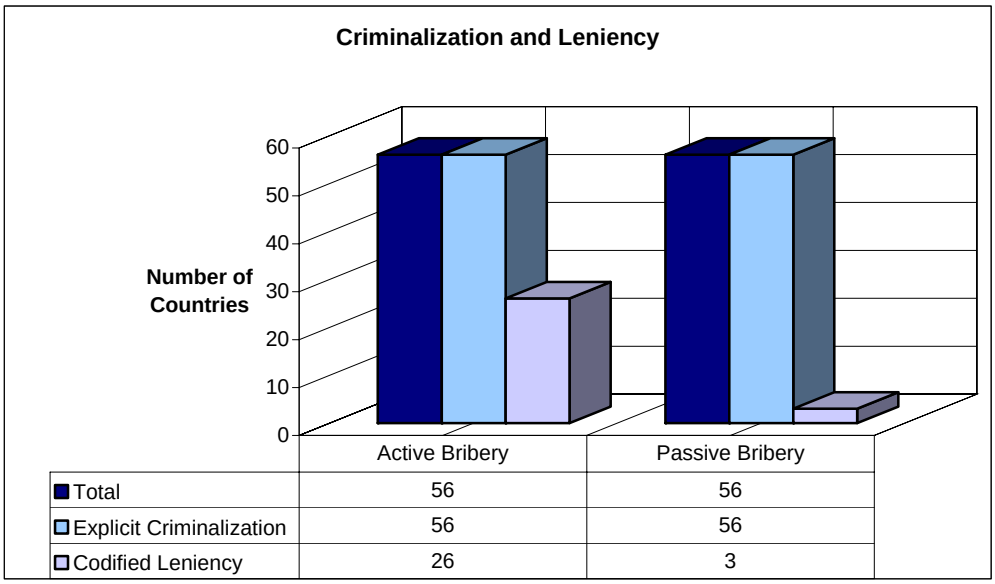

Figure III.3: Criminalization and Leniency

In the course of the penal codes' analysis it was assessed whether or not active and/or passive bribery are criminal offences (explicit criminalization). If so it was further analyzed whether

[28] Appendix 2 lists the sections in the respective penal codes. The paragraphs' wording is included in Appendix 3, available online at (http://www.icgg.org/downloads/Appendix%20III%20Penal%20Codes.pdf).

or not voluntary disclosure programs for these offences exist (codified leniency). Accordingly, a provision was counted as a voluntary disclosure program if it requires self-reporting prior to detection/investigation and if it explicitly relates to active or passive bribery. Thus, leniency provisions that are part of codes of criminal procedure were not counted as they usually do not explicitly relate to active or passive bribery. For the same reason, provisions in the penal codes' general parts, listing circumstances mitigating liability and punishment, were not counted either.

Even though the exact elements and the degree and type of penalties of the offenses vary, both active and passive bribery are criminalized in all 56 countries (Figure III.3). There is no country in the sample criminalizing only active or passive bribery. These results may be subject to a sample selection problem. Some experts may have not provided a penal code if bribery is not criminalized in their respective country. Moreover, some experts may have been averse to providing a penal code if they felt that criminalization of active and passive bribery in their country is insufficient. However, this sample selection problem is to some extent mitigated by the fact that 19 penal codes (34 %) were randomly selected.

26 of the 56 countries (46%) employ voluntary disclosure programs for active or passive bribery. All of these 26 do so for active bribery. In stark contrast, voluntary disclosure programs for passive bribery exist in only 3 of the 26 countries (18%). This indicates that, if voluntary disclosure programs are employed, they apply mostly to active bribery. Explicitly granting leniency also in cases of self-reporting acts of passive bribery is clearly the exception rather than the rule. However, such an asymmetry may produce negative effects by entrapping public officials in a corrupt career, and if improperly designed, by supplying bribe-givers with a means to enforce corrupt deals.

A potential explanation for this asymmetry, namely that a bribe is oftentimes solicited or extorted and that in these cases leniency ought to be conceded to a bribe-giver, is not strongly supported by the cross-section analysis. Just 7 of the 26 countries grant leniency only in case of solicitation or extortion. All others concede leniency also if a bribe was offered, promised or given on the bribers own accord (see next subsection).

The statistics concerning the voluntary disclosure programs are representative. The experts were told that "the research project involves the analysis of elements of bribery offences". However, they were not told that the analysis would primarily focus on the existence and the

design of voluntary disclosure programs pertaining to these offences. Therefore, it can be largely excluded that any expert provided a penal code only if voluntary disclosure programs exist in it. A sample selection problem seems not to influence the conclusion that voluntary disclosure programs are applied asymmetrically.

Voluntary Disclosure Programs for Active Bribery

The countries employing voluntary disclosure programs for active bribery are Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, China, Croatia, the Czech Republic, Hungary, Iraq, Kazakhstan, Latvia, Macedonia, Moldova, Mongolia, Montenegro, Romania, Russia, Senegal, Serbia, Slovakia, Slovenia, Tajikistan, Tunisia, Turkey, Ukraine and Uzbekistan.[29]

The voluntary disclosure programs of these countries can be divided into three types. The first type grants leniency to a bribe-giver only if he reports and the bribe was solicited or extorted from him (VDP I). Voluntary disclosure does not result in leniency if he offered, promised or gave the bribe on his own accord. This type of a voluntary disclosure program can be found in 7 of the 26 countries (27%): Bosnia and Herzegovina, Croatia, the Czech Republic, Macedonia, Slovakia, Slovenia and Tajikistan. This is a clear deficiency since self-reporting should result in leniency also in case a bribe was offered, promised or given without request in order to promote voluntary disclosure and to destabilize corrupt deals.

The second type concedes leniency if a bribe-giver reports the offering, promising or giving of a bribe or if the bribe was solicited or extorted from him. In case of extortion self-reporting is not necessary (VDP II). This type of a voluntary disclosure program is present in 3 of the 26 countries (12%): Armenia, Azerbaijan, and Bulgaria. This is again a deficient design since a bribe-giver need not come out in the open. He could always claim that the bribe was solicited or extorted from him if detected randomly even if he in fact was the ‘active’ part. In many instances it will be difficult for prosecution to prove the contrary. Self-reporting should thus clearly be required also in case of solicitation or extortion in order to distinguish the victims from the culprits.[30]

[29] The Chinese and the Montenegrin penal codes state that the perpetrators can be acquitted from punishment, i.e. exemption from punishment is not definite, leading to counterproductive legal uncertainty on behalf of potential whistle-blowers.

[30] Exceptions can be made in case a bribe-giver had to fear for his well-being because he was threatened with physical harm if he should report.

The third type concedes leniency in all instances if a bribe-giver reports. Reporting is also required if the bribe was solicited or extorted from the bribe-giver (VDP III). This type of a voluntary disclosure program can be found in 16 countries (61%): China, Hungary, Iraq, Kazakhstan, Latvia, Moldova, Mongolia, Montenegro, Romania, Russia, Senegal, Serbia, Tunisia, Turkey, Ukraine and Uzbekistan. This type of a voluntary disclosure program is clearly preferred to the above types because self-reporting is necessary in all instances of active bribery and also in case of solicitation or extortion. Corrections are necessary in China and Montenegro, though. There, leniency is not granted automatically but is at the discretion of judges.

What becomes obvious, however, is that none of the countries employs a voluntary disclosure program that takes into consideration the unique nature of corrupt deals. All countries grant leniency at any stage of a corrupt deal. As pointed out in Sections II.3-4 and III.2, such voluntary disclosure programs run the risk of being abused by corrupt crooks to enforce their deals. To counter this, leniency should only be granted if the bribe was reciprocated. No country does so, though.[31]

Another interesting aspect is illustrated in Table III.2. In 18 of the 26 countries (69%) that have a voluntary disclosure program for active bribery the bribe is not returned to the bribe-giver if he self-reports. In 3 countries (12%) the bribe may be returned and in 5 countries (19%) the bribe is returned to the bribe-giver if he reports.

In a voluntary disclosure program necessitating that the bribe was solicited or extorted for leniency to be conceded (VDP I) the bribe is returned in 3 countries, may be returned in 1 country and is not returned in 3 countries. In a voluntary disclosure program of the second type (VDP II) the bribe is never returned. Neither if the briber offered, promised or gave a bribe on his own accord nor if the bribe was solicited or extorted from him. In a voluntary disclosure program of the third type (VDP III), which necessitates self-reporting in any case, the majority of the countries do not return the bribe. Only in 4 countries the bribe is or may be returned.

[31] Table VI.1 in Appendix 1 lists the respective elements country by country.

Type of VDP / Bribe	VDP I (no. of countries)	VDP II (no. of countries)	VDP III (no. of countries)	∑ (% of total)
Bribe is not returned	3	3	12	18 (69%)
Bribe may be returned	1	0	2	3 (12%)
Bribe is returned	3	0	2	5 (19%)
∑ (% of total)	7 (27%)	3 (12%)	16 (61%)	26 (100%)

Table III.2: Return of the Bribe

Whether or not the bribe should be returned to a briber is a controversial issue, see Section II and Lamsdorff and Nell (2007). On the one hand, returning the bribe to the giver would most likely be at odds with the public's notion of justice and fairness. Those who tried to exercise influence by illicit means and to annul fair competition should not be financially rewarded even if they show signs of sincere and active repentance through self-reporting. In fact, that this stance prevails is supported by the fact that in the majority of countries the bribe is not returned even in case of voluntary disclosure. However, from a strategic perspective one would have to take another position. If a briber were given back the bribe, his incentive to report would increase and corrupt arrangements would further be destabilized. The public's sentiments may thus not be the suitable guide for the design of anti-corruption legislation.

Voluntary Disclosure Programs for Passive Bribery

Voluntary disclosure programs for passive bribery exist in Hungary, Senegal and Turkey. In all three countries leniency is granted if a public official solicits or extorts, agrees to accept or accepts a bribe. [32] This is to be supported because a public official can thus escape the trap of a long-lasting criminal career. However, from the perspective of destabilizing corrupt deals

[32] Table VI.2 in Appendix 1 lists the respective elements country by country.

leniency should only be conceded to a public official if the bribe was actually given to him. Such a strategic destabilization element is missing in all three countries.

The bribe is confiscated in case of reporting by the public official. The rationale behind this is that the "state is considered a victim of corruption because the moneys taken by a corrupt public official legally belong to the state. The bribes taken are held, technically, in trust for the state. Therefore, the state can sue the official for the full amount of the value of the bribes he or she has received […]", (Pope 2000: 276). From the perspective of destabilizing corrupt arrangements, however, it would strengthen a public official's willingness to cheat if he could keep the bribe, see Sections II and Lambsdorff and Nell 2007. Investigation of this issue is an avenue for future research.

III.5 Conclusion

Even though high penalties for corruption offences have a deterrent and preventive effect, they also entrap bribe-takers and bribe-givers in their corrupt relationship. Moreover, pending penalties can be misused to make threats against opportunistic behavior and can thus stabilize risky bribe agreements. Voluntary disclosure programs can be strategically applied to break the 'pact of silence' and to promote opportunism in a targeted way.

The proposed voluntary disclosure programs for acts of active and passive bribery bear the potential to destabilize corrupt deals and to lead to their collapse at the stage of initiation. This particularly holds for one-shot, large-scale transactions where corrupt actors have not established good formal and informal ties beforehand. Then the risk of opportunism and exposure is especially high. Strategic voluntary disclosure programs can increase both risks. In contrast, the suggested programs may not unfold their effects when it comes to corrupt transactions where there is long-lasting and repeated formal and informal exchange between the corrupt actors.

As the cross-section analysis shows, voluntary disclosure programs are not universally applied. And if so, they mostly relate to active bribery. Granting leniency also for acts of passive bribery is clearly the exception rather than the rule. Such an asymmetry may produce the negative effect of entrapping public officials in corrupt relationships. Moreover, strategic considerations have thus far not entered the design of voluntary disclosure programs. Consequently, corrupt actors may in many instances abuse existing voluntary disclosure

programs for their malicious purposes.

Several important questions for future research remain. Labor legislation would in most instances stipulate a disciplinary transfer or dismissal of the person revealing his involvement in a corrupt deal, (Ax and Schneider 2006: 101-129). Thus, self-reporting is inhibited. Moreover, the pending risk of a transfer or dismissal can again be abused by a corrupt actor to pressure his counterpart into compliance. This especially holds for public officials who oftentimes do not have an outside option to their work in public administration. Therefore, it stands to reason that labor legislation should take into consideration some of the strategic issues discussed here. In particular, those who voluntarily disclose their offence at a certain point in time may be exempted not only from criminal proceedings but also from labor law consequences such as disciplinary transfers or dismissals.

Similarly, contracts obtained by means of bribery are oftentimes void or voidable, (Berg 2004; Schlüter 2005; Ax and Schneider 2006). Again, nullity and voidability inhibit voluntary disclosure because "the bribing party does not only lose its bribe, but also the economic advantage, the induced contract, that has been the motive for corruption", (Schlüter 2005: 233). Moreover, nullity and voidability can be abused to apply pressure on non-conforming corrupt actors. Against both backgrounds one can argue that contracts induced by bribery should be severable or valid, see next section and Nell (2007b).

Similar adverse effects may surround debarment (exclusion) as an administrative remedy available to a government that prevents or disqualifies contractors from obtaining new contracts. Voluntary disclosure as a sign of active repentance should be considered a mitigating circumstance limiting or eliminating debarment.

IV Contracts Induced by Means of Bribery – Should they be Void or Valid?

IV.1 Introduction[33]

Asia Media: Taipei City Government annuls EMG arena deal

"The Taipei City Government announced yesterday it would annul a contract with scandal-ridden Eastern Multimedia Group (EMG) to run the Taipei Arena after EMG chairman Gary Wang was indicted on Monday for allegedly bribing city government officials to win the nine-year contract. The city government announced it would form a special team to run the arena before finding a new operator through a new public tender. 'The group won the bidding illegally, and the city government has to annul the contract. We will protect the rights of consumers and companies,' Taipei Mayor Hau Lung-bin said yesterday after a municipal meeting at Taipei City Hall."[34]

BBC News: Nigeria suspends Siemens dealings

"Siemens was found guilty of paying bribes to Nigerian officials and fined 201m euros ($248m; £122.3m) by a Munich court on 4 October. A Nigerian anti-corruption agency has since begun investigating former ministers alleged to have taken bribes. […] Mr Yar'Adua [Nigeria's President] ordered the investigation into allegations that Siemens paid 10m euros in bribes to officials, including ministers, in Nigeria between 2001 and 2004. […] The Nigerian government cancelled a 128.4m naira ($1.1m; £532,683) contract with Siemens for the supply of circuit breakers and other power generation accessories on Wednesday. '[The] Council cancelled the contract bid won by Siemens Nigeria because of the current investigation against the company relating to corrupt practices,' information and communications minister John Odey said. '[The] Government will not have any dealings with Siemens Nigeria in terms of contracts until the investigation is concluded and the company is exonerated or otherwise,' Mr Odey said."[35]

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[33] The content of Section IV is for the most part based on Nell (2007b).
[34] See AsiaMedia (15 August 2007: "Taipei City Government annuls EMG arena deal"), http://www.asiamedia.ucla.edu/article-eastasia.asp?parentid=75998, downloaded on 21 August 2007.
[35] See BBC News (6 December 2007: "Nigeria suspends Siemens dealings"), http://news.bbc.co.uk/1/hi/business/7130315.stm, downloaded on 14 December 2007.

Times Online: Blow for EADS as India cancels deal for 197 Eurocopter aircraft

"The Indian Army yesterday scrapped a $600 million (£295 million) deal for 197 helicopters with Eurocopter, the world's largest maker of civil and military helicopters, after complaints about the bidding process and allegations of illegal use of middlemen. Government officials said that they would issue a new tender next year after ending exclusive talks with the subsidiary of EADS, the European defence and aerospace group. […] The move also denies Eurocopter, a supplier to the Indian Army, a chance to fulfill an order pipeline estimated at $2 billion. […] Eurocopter's contract was suspended in June after allegations that agents that it used had links to an army general. India prohibits middlemen in military deals. […] *Eurocopter said it would reapply for the contract depending on any fresh criteria from the Indian Army."*[36]

Bribes are paid with the aim of obtaining an economic advantage. The economic advantage regularly involves the conclusion of a contract whose legal fulfilment is the intended result. However, as the above cases illustrate, contracts obtained by means of bribery can be annulled. Or in many cases they are void or voidable by law, (Ax and Schneider 2006: 73-88).

Nullity and voidability of contracts induced by corruption are oftentimes adjudicated significant powers for preventing corruption as they entail substantial costs and risks, especially for the bribe-giving party, (Schlüter 2005; Acker, Froesch and Kappel 2007; Meyer 2007). While this is certainly true, they are also afflicted with many deficiencies that run counter to effective anti-corruption. Nullity and voidability decrease the incentive for voluntary disclosure and thus potentially cancel penal deterrence. They assist corrupt actors with enforcing their bribe agreements. Besides, there is ample leeway for abuse. The nullity of a contract tainted with bribery may be used as a pretext to opt out of disadvantages contracts or to gain power in renegotiations. The usefulness of nullity and voidability for anti-corruption is thus contestable.

[36] See TimesOnline: (7 December 2007: "Blow for EADS as India cancels deal for 197 Eurocopter aircraft"), http://business.timesonline.co.uk/tol/business/industry_sectors/engineering/article3013247.ece, downloadeded on 14 December 2007. See also Süddeutsche Zeitung (8/9 December 2007: "Indien storniert großen Auftrag für EADS"), Süddeutsche Zeitung Nr. 283, p. 28.

IV.2 Important Preliminaries

A contract can be void, voidable or valid. In economic crimes a contract is void when it violates specific statutory prescriptions. Collusive agreements between firms geared to limit competition are in breach of competition law and are null and void. The same is commonly true for bribe agreements as these secret agreements between one party and another about the giving or promising of an illicit benefit in return for unjustified preferential treatment infringe upon criminal law or violate good customs, (Ax and Schneider 2006: 73-87, 81-88). Similarly, a contract induced by such bribe agreements is oftentimes void conclusively, either from the beginning (rescission ab initio) or for the future (termination ex nunc), (Schlüter 2005: 129).

In turn, voidability means that a contract is void as long as its validity is not induced. The decisive criterion for the contract's legal status then is affirmation. The contract is void conclusively if not affirmed and valid conclusively if affirmed. In corruption cases conclusive nullity is induced if the party harmed by a bribe agreement does not affirm the contract because it deems it unbalanced and disadvantageous, (Ax and Schneider 2006: 87). Such disutility stems from the fact that bribe agreements regularly lead to an inflated purchase price. Accordingly, conclusively validity is induced if the harmed party affirms the contract because it nevertheless deems it balanced and advantageous, (Schlüter 2006: 103; Meyer 2007: 95-97). In principle, nullity and voidability are not imperative, however. A contract induced by bribery can also be valid conclusively without the requirement of advance affirmation. The contract, albeit tainted with corruption and possibly disadvantageous due to an inflated purchase price, is then nevertheless inalterably binding and enforceable.

The three systems aim at different objectives. Above all, conclusive nullity is targeted on protecting collective interests such as those in the community of values and in fair competition by refusing legal effectiveness of a contract that is deemed immoral and anti-competitive due to it being induced by bribery, (Meyer 2007: 95). By doing so, conclusive nullity seeks also to protect the legal estate of competitors that lost out due to bribery. Moreover, the system aims at preventing corruption by making bribery a risky business because the briber loses his legal entitlements to the contract's benefits and profits.

The protection of the contractual partners' legal estate is clearly secondary in a system of conclusive nullity. This particularly holds in public tenders. Bribery usually violates statutory

prescriptions laid out in official contracting terms. If a contract is thereupon declared void conclusively, commonly new tenders have to result, (Ax and Schneider 2006: 198-199). This certainly is in the interest of the losing bidders. But it involves substantial costs for the contractual parties, especially if the contract is already at a late stage of performance. However, in a system of conclusive nullity, these costs are accepted for protecting the community of values and fair competition. In fact, these costs also explain conclusive nullity's preventive powers, (Schlüter 2005: 233).

In a system of voidability, in contrast, the protection of the contracting body's legal estate is prioritized. The protection of collective interests, of losing bidders or of the contractor's legal estate is subordinate, (Meyer 2007: 96). The contracting body, as the party usually harmed, for instance, by an inflated purchase price, is given the right to decide whether to annul the contract or to continue it based on a simple cost-benefit calculation. It can refuse affirmation if the benefits associated with nullity outweigh its costs and can affirm the contract if does not. The general public, the losing bidders, as well as the contractor have to submit to this decision.

Accordingly, in a system of conclusive validity, the contractor's legal estate is primarily protected. The contract, albeit tainted with corruption, is valid. If the contracting body wishes to cancel it, it can only do so via a contractual notice of dismissal. One may thus infer that conclusive validity is not adequate for protecting collective interests, for preventing corruption or for protecting the harmed parties' legal estate. This conclusion is, however, premature. As will be shown in the subsequent section, conclusive validity may well be better suited for anti-corruption. It may correspond more with the general public's ultimate interest of seeing corruption curbed. Moreover, the harmed parties' legal estate can be protected in other ways.

IV.3 Void or Valid? – Nullity and its Effects

Voluntary Disclosure and Due Diligence

For illustrating the effects of nullity, let us consider the following exemplary case (Figure IV.1). The contracting body *A* invites tenders for a contract involving the construction of several apartment buildings. Employee *E* is commissioned by *A* to solicit and evaluate the bids and to award the contract. Both price and quality are relevant for the contract award. The

contractor *B* is one of the bidders. *B*'s director *D* is in charge of preparing the bid. *D* offers *E* a bribe which the latter readily accepts. To 'price in' the bribe, *E* and *D* agree to add the bribe to the purchase price. The contract is made between *A* and *B*.[37]

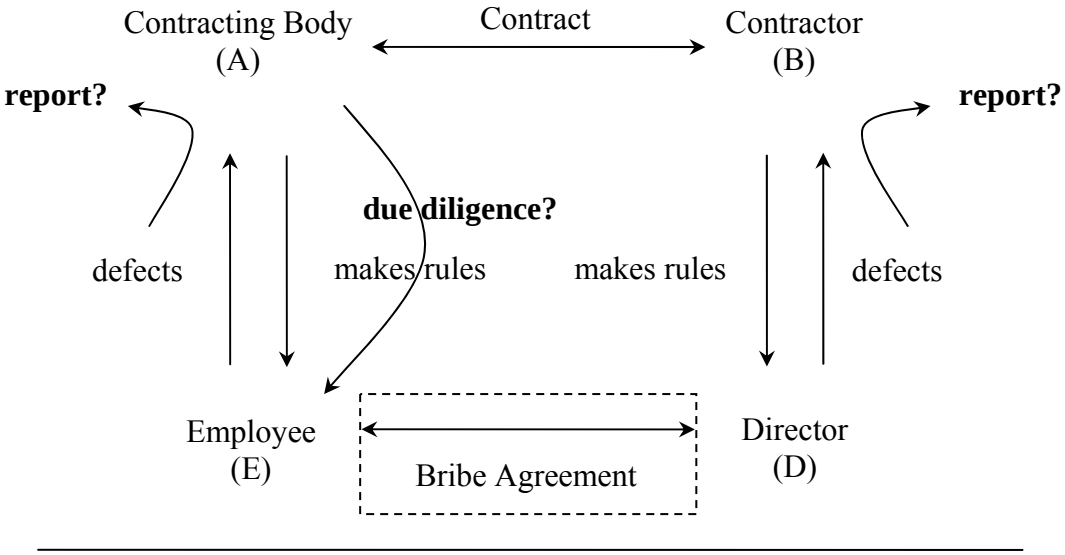

Figure IV.1: Nullity, Voluntary Disclosure and Due Diligence

A and *B* are not implicated in the bribe agreement. The bribe agreement is struck secretly between *E* and D. Both agents act without the consent and authorization of their respective principals. *E* breaks his fiduciary duties by taking a bribe from *D* for awarding the contract in return. He thereby acts mala fide towards *A*. Moreover, owing to the inflated purchase price, *E* harms *A*'s interest and legal estate, (Ax and Schneider 2006: 85). Due to the secret bribe agreement *D* exceeds his empowerment to act as *B*'s representative. Thus, even though he may act in the financial interest of *B*, *D* acts mala fide.

As stated in the preceding section, the three systems differ from each other in one important aspect. Conclusive nullity takes effect at the time the bribe agreement between *E* and *D* is verified by a court via a "balance of probabilities", (Pope 2000: 275).[38] Voidability passes

[37] For a similar constellation see Acker, Froesch and Kappel (2007: 1509).
[38] A conviction of E and/or D is mostly not a precondition. It suffices if a civil court ascertains the bribe agreement, (Ax and Schneider 2006: 84).

into conclusive nullity only if *A*, as the damaged party, does not affirm the contract. Otherwise, the contract is valid. Conclusive validity by definition does not result in nullity.

From the perspective of preventing corruption on the bribe-giving side, the system of conclusive nullity is often seen as superior to voidability or conclusive validity "because the bribing party does not only lose its bribe, but also its economic advantage, the induced contract, that has been the motive for corruption", (Schlüter 2005: 233). Or, as Pope (2002: 277) puts it: "A bidder's knowledge that such contracts rest on shaky ground may be a further inducement against corrupt conduct."

This is certainly a crucial point. Nullity entails substantial costs and risks for *B*, especially in public procurement. First, *B* loses the contract and thus the profits accruing from it. Second, transaction specific investments are largely sunk. Third, *A* can lodge considerable claims for refund as well as for damages while oftentimes *B* cannot do the same, (Acker, Froesch and Kappel 2007). *B* may thus specifically prohibit bribery by *D* and closely attend to its duties of supervision to ensure *D*'s compliance. This is not the whole business, however. Despite *B*'s efforts to prevent bribery, *D* may nevertheless find a loophole. Would *B* expose *D*? Most likely not if the contract is void conclusively. Rather, *B* would supposedly decide to seek private and covert compensatory and disciplinary measures against *D*.[39]

This also holds for voidability. If it is likely that *A* deems nullity beneficial, *B* has to reckon with losing the contract and remains silent about *D*'s misconduct. Because it is difficult for *B* to anticipate *A*'s decision, the safest bet is to maintain silence. While nullity and voidability create an incentive for *B* to prevent corruption by instigating due diligence measures, they, at the same time, do not offer *B* a real incentive for voluntary disclosure.

This is counterproductive as corrupt deals, by nature, involve a high degree of secrecy. Rates of random detection are usually low and prosecution and conviction of those involved are difficult and tedious. Therefore, effective anti-corruption significantly depends on relevant information given by insiders and whistle-blowers or by people of the (work) environment of the bribe-giver.

[39] With the ever-present threat of making a penal report *B* will in most instances easily be able to ditch *D* – in order to avoid risky malevolence potentially also with a 'golden handshake'.

If voluntary disclosure leads or is likely to lead to conclusive nullity, however, *B* hardly has an incentive to report *D*'s deviance. As a result, *D* may also feel pretty safe that he will not be prosecuted and convicted. Neither would he have to fear civil action taken against him because this would necessitate *B*'s disclosing. Conclusive nullity and voidability ultimately also lower the deterrent and preventive effect of both criminal and civil law. It is only the system of conclusive validity that really induces *B* to report *D*'s misdemeanor, assists with uncovering corruption by means of voluntary disclosure, and that does not undermine criminal and civil law's deterrent and preventive powers.

A similar train of thought applies to *A*. In contrast to conclusive nullity, voidability and conclusive validity tend to result in *A*'s failing to instigate comprehensive systems of due diligence since *A* can at any rate avoid the costs and risks associated with nullity. This is especially true for voidability since *A* can cancel or maintain the contract at will and assert claims for damages against *B*. The risk and costs associated with nullity, then, do not play a role. The only reason for *A* to apply due diligence would be for fear that contracts harming its legal estate would not be detected otherwise.

However, while conclusive nullity motivates preventive measures it, at the same time, reduces *A*'s incentive for voluntary disclosure. The costs of nullity, even though they can, to some extent, be absorbed by claims for damages, may still be too high, especially if the contract is already at a late stage of performance. Since irregularities are oftentimes detected only long after the initial bidding, *A* may prefer to cover up the affair and manage it behind closed doors rather than to expose *E*. Conclusive nullity thus reinforces *A*'s incentive for secrecy. Penal deterrence and prevention by civil law are again undercut. Voidability and conclusive validity countervail these adverse effects. *A* can expose *E*, assert claims for damages against both *B* and *E* and affirm/continue the contract. Voluntary disclosure is supported by both systems.

One important caveat has to be kept in mind, however. In a private law system applying conclusive nullity or voidability, *A* can have a decided interest in *E*'s venality because this gives it the opportunity to induce the contract's nullity at any time. This can be a very valuable option, particularly if *A* would like to back out of a contract that runs the risk of becoming too expensive or that is fiercely criticized by opposition, (Stremitzer 2007). The possibility of inducing nullity of a contract because it is tainted with corruption, coupled with ensuing claims for damages, is a valuable 'opting-out clause' for *A*.

Furthermore, the threat of inducing nullity by refraining from affirming the contract can be used by *A* to renegotiate with *B* parts of the contract. Not only with regards to the purchase price, but beyond that, e.g. materials used or dates of completion. *B* will hardly be able to counter this, especially if *B* cannot make claims for damages, (Acker, Froesch and Kappel 2007: 1511), or if *B* has already made significant unverifiable transaction specific investments, (Aghion, Dewatripont and Rey 1994).

Put cynically, in some tenders A may even have an explicit interest in the corruptive behavior of *E* in order to come into the possession of a valuable opting-out clause or to have significant bargaining power in renegotiations at a later stage. Less cynically, *E*'s venality may come in surprisingly handy for *A*.

This is supported by a recent case involving the purchase of 18 Eurofighter (Typhoon) fighter jets by the Austrian government from aerospace corporation EADS. The sales order in the amount of EUR 2 billion was reached in 2002 between EADS and the former conservative government. The contract, however, is (since 2006) subject to a parliamentarian inquiry due to alleged irregularities in the fighter jets' procurement.

The wife of indicted, and now-suspended and for misuse of authority, Austrian major general Erich Wolf obtained an 87.600 EUR loan from EADS-lobbyist Erhard Steiniger. Mrs. Wolf was, at that time, director of the firm Creativ Promotion Werbe- und Sportvermarktungsgesellschaft, a firm providing marketing services. Mr. Wolf was limited partner and authorized signatory of that firm. However, he was also a member of the committee that evaluated the purchase of the fighter jets.

The inquiry commission's findings prompted the new coalition-government, led by the social democratic party that always fiercely opposed the fighter jets' purchase, to inquire into possibilities of canceling the contract. EADS threatened to sue for damages in the amount of EUR 1.2 billion in that case. Finally an 'amicable settlement' was reached involving the reduction of the 18 fighter jets to a number of 15 for lower unit costs. Finance minister

Norbert Darabos was able to successfully renegotiate the contract also because of the suspected irregularities.[40]

It certainly cannot be claimed that the former Austrian government either abetted or took a permissive stance towards the irregularities involving the purchase of the Eurofighters. Still, the story underscores the point that corruptive misconduct can, at some time, come in quite handy for a contracting body in order to opt out of an objectionable contract or to increase its renegotiation power. As one commentator puts it: "The pattern is well known: The old government orders expensive toys, the new government regards this as waste of money and wants to cancel the order."[41]

Against this background, it is not evident that "civil law should […] clearly state that contracts which are obtained through corrupt means are enforceable only at the discretion of the state" and that it should be enabled "to decide […] whether or not to be bound by a contract tainted by corruption", (Pope 2000: 276). Rather, the future possibility to cancel a contract (or to credibly threaten with cancellation) may sometimes even tend to result in a contracting body's failing to seriously exercise due diligence and to rather pursue window-dressing. This runs counter to an honest commitment to tackling corruption among bureaucrats. Conclusive validity would strip a contracting body of such abuse and more adequately promote due diligence than conclusive nullity or voidability.

Enforcement of Bribe Agreements

Nullity may also help in the enforcement of the bribe agreement. In Figure IV.2, E again acts mala fide towards *A* by agreeing to take a bribe and harms *A*'s interest and legal estate. *D*, however, now promises or pays the bribe with *B*'s explicit knowledge and consent.

With respect to the bribe agreement, both *D* and *E* can behave opportunistically. In the extreme case, the bribe is not paid after the contract was awarded, or *E* does not award the contract after having received the bribe. *E* may also claim that changes in the contract's form or the maintenance of silence of others who also want a piece of the cake necessitate a higher

[40] See Die Presse (6 April 2007: "Eurofighter: U-Ausschuss deckt dubiose Geldflüsse auf"); Der Spiegel (18 April 2007: "Streit um Eurofighter: EADS droht Österreich mit Klage").
[41] See Süddeutsche Zeitung (13 December 2007: „Made in Austria"), Süddeutsche Zeitung Nr. 287, p. 4, own translation.

payment. Similarly, *D* may claim that continuing payment as agreed upon was impossible because financial controls were tightened and thus stops payment or procrastinates *E*. Many other ways to behave opportunistically are conceivable, (Lambsdorff 2002: 234-236; Lambsdorff and Nell 2007).

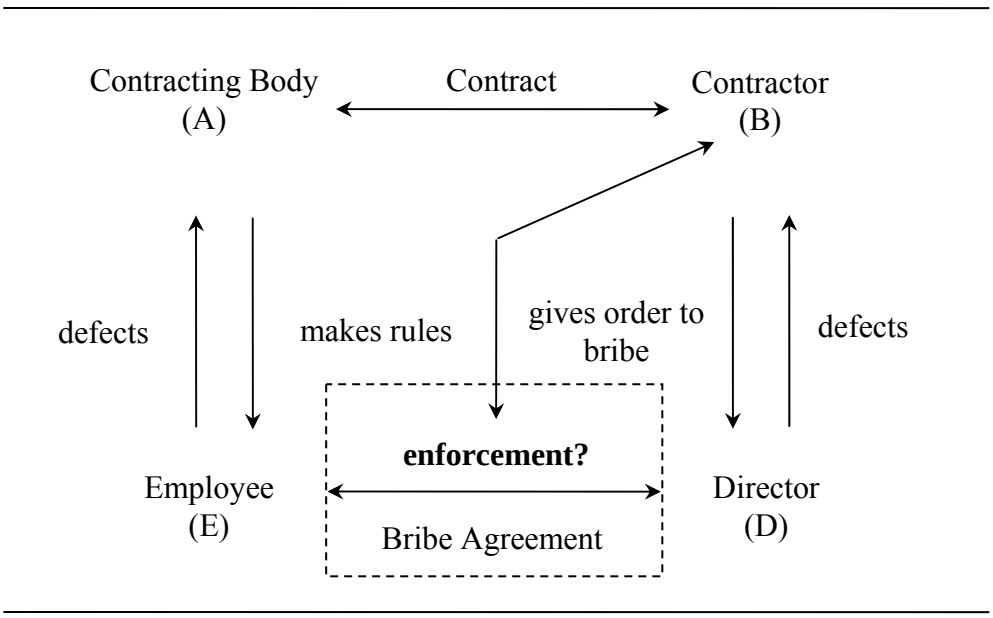

Figure IV.2: Nullity and Enforcement

Generally, obfuscation of corruption usually requires the quid to be separated in time from the quo. Besides, bribes are oftentimes not paid directly but through elaborate schemes involving offshore accounts and third persons. There is thus ample room for opportunism that corrupt actors seek to avoid. For instance, corrupt partners in many cases integrate vertically to form a new company with common ownership and control to 'align' the actors' interests. Or, they hand out free shares or put/call options as bribes instead of direct monetary payments in order to ensure long-term compliance, (Lambsdorff 2002: 232). Oftentimes, social ties and cohesion play an important role, as well, (Lambsdorff 2002: 233-234; Kingston 2007). And in rougher environments, opportunism may be cut off by threats to life or physical condition, backed, for instance, by organized crime groups, (della Porta and Vanucci 1999: 232-236; Gambetta 1993).

Also the omnipresent risk of nullity or voidability may ensure that a bribe agreement goes off without a hitch. *B* and *D* cannot afford to scare off *E*, as he can strike back. Outright exposure

on *E*'s part is unlikely if criminal and disciplinary penalties are severe. However, *E* may be conceded leniency if he self-reports, (Gneuß 2002; Buccirossi and Spagnolo 2006; Lambsdorff and Nell 2007; Nell 2007a; Sections II and III). Or, *E* may be able to throw up enough dust or may have sufficient political clout to evade criminal charges. In the worst case, he may even enjoy outright immunity from prosecution. In any case, his threat to expose the deal if *B* or *D* should not adhere to the bribe agreement; therefore, raising the risk of nullity or voidability then carries weight.

Even if *B* and *D* do not have to reckon with *E*'s reporting, cheating him can, nevertheless, backfire. As an insider, *E* may have information that he can use against both *B* and *D*. For instance, *E* may know that *B* uses inferior building materials and can make anonymous tips to the building inspection agency. In other cases, *E* may have information on violations of environmental or safety regulations that can constitute the basis for nullity or voidability. Moreover, *E* may know that *B* and *D* are implicated in other corruption cases.

That the risk of anonymous tips is significant is corroborated by the following case involving German behemoth Siemens. In 2004, Siemens prematurely terminated a contract with a Saudi distributor. The Saudi retaliated and demanded a multimillion 'payment of compensation'. Former chief financial officer Heinz-Joachim Neubürger is said to have testified to German prosecutors that the Saudi, in fact, extorted Siemens. If Siemens would not pay, the Saudi is said to have threatened to accord the American Securities and Exchange Commission (SEC) documents revealing illegal payments made by Siemens in the late 1990s concerning Saudi Telecom contracts. Neubürger is said to have testified that thereupon Siemens paid EUR 50 million to the Saudi.[42] If Siemens had not acceded to the payments, the ensuing SEC investigations would have likely resulted not only in severe penalties, but also in the probing of the legitimacy of many contracts that Siemens obtained both in the U.S. and abroad.

The omnipresent risk of nullity and voidability hovers above *D* like the sword of Damocles and ensures compliance with the bribe agreement. Against this background, the system of conclusive validity is clearly to be preferred to either conclusive nullity or voidability. If a contract induced by means of bribery is valid, *E* cannot use the threat of nullity or voidability

[42] See Berliner Zeitung (15 December 2006: "Diesem Spuk ein Ende machen"), http://www.berlinonline.de/berliner-zeitung/archiv/.bin/dump.fcgi/2006/1215/wirtschaft/0005/index.html; Netzzeitung.de (31 January 2006: "Siemens hatte Geheimcode für Schmiergeld"), http://www.netzeitung.de/wirtschaft/unternehmen/516089.html, downloaded on 20 November 2007.

to enforce the bribe agreement. This is also supported by another corruption case from Germany.[43]

A German firm owning several apartment buildings in 1992 invited bids for a redevelopment contract. An architect promised the firm's director a monthly bribe amounting to DM 5.000 (EUR 2.500) if he was awarded the contract. The director readily accepted the offer and the architect got the contract. In the contract, advance payments to the architect amounting to DM 100.000 (EUR 50.000) once a month were agreed upon. But, in May 1993, the firm suddenly stopped paying the installments. Thereupon, the architect informed the firm about the bribe payments to its director. The firm fired the director and cancelled the redevelopment contract, referring to incomplete and poor services on part of the architect.

The case ended up in court. The architect claimed residual fees amounting to DM 3.68 (EUR 1.84) million while the firm claimed back the installments amounting to DM 1.34 (EUR 0.67) million. The district court dismissed the architect's and acceded to the firm's claim. It substantiated its verdict by saying that the contract was induced by means of bribery and was thus void. The appellate court confirmed the district court's sentence. In 1999, however, the Federal Court of Justice annulled the appellate court's judgment. It ruled that while the redevelopment contract was induced by means of bribery, the contract per se was not illicit since the architect's services were accounted for pursuant to the official Fee Structure for Architects and Engineers. Since the bribe agreement did not result in a higher purchase price, the contract was valid, so the Federal Court of Justice ruled, (Meyer 2007: 96).

The exact reasons for the architect's reporting were not revealed in court. Disputes concerning the bribe agreement are likely. This is supported by the fact that the architect stopped paying the bribes in February 1993 and the firm stopped paying the installments only two months later, possibly at the director's ordering. It stands to reason, though, that the architect would have neither stopped the payments nor reported the bribe agreement if he had known that the contract was void. Rather, the differences concerning the bribe agreement could have easily been settled. Running the risk of losing a contract worth several millions just because of disputes about a few thousand of euros simply does not pay. Against this background, the

[43] See (BGH, 6.5.1999 – VII ZR 132/97), http://lexetius.com/1999,871, downloaded on 14 November 2007.

Federal Court of Justice's ruling is to be welcomed because it preserves the incentive for mutual betrayal and hence supports anti-corruption.

Competitors and Impugnment

Taipei Mayor Hau Lung-bin justified the Taipei City Government's step to annul the contract with EMG by saying that "the group won the bidding illegally, and the city government has to annul the contract. We will protect the rights of consumers and companies."[44] In many cases, a contract induced by bribery is annulled to protect competitors (and consumers). But oftentimes the contracting body will be interested in protecting its own legal estate rather than that of competitors and remains silent about the bribe agreement or affirms the contract if it can. The question then is whether firms that presumably or knowingly lost out due to bribery should be able to impugn a contract induced by bribery. To answer this question, the principal-agent constellation is extended by a direct competitor *C* of *B* (Figure IV.3).

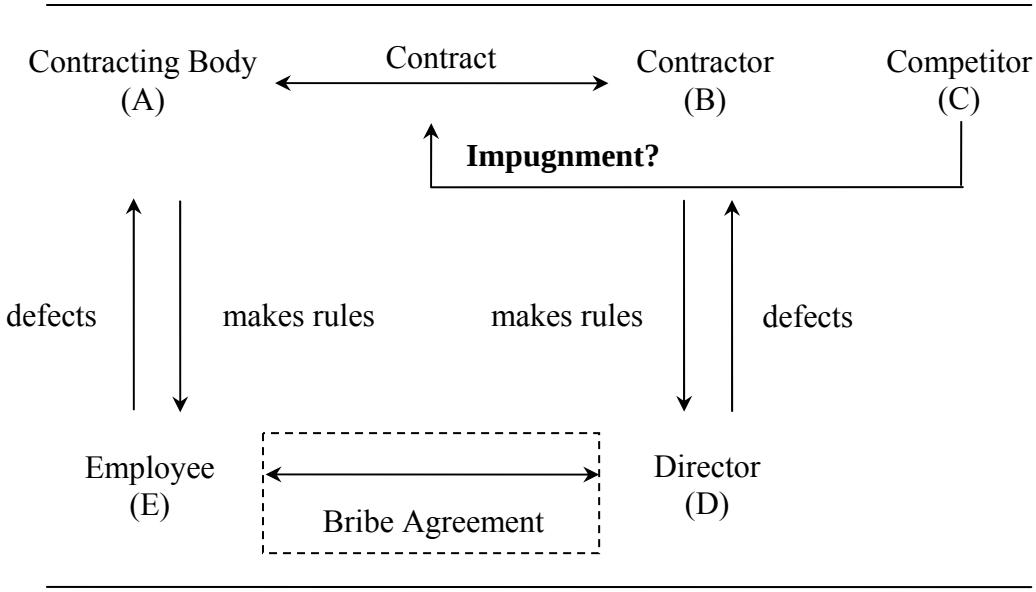

Figure IV.3: Nullity and Impugnment

In Germany, for instance, *C* could sue for damages or file for injunctive relief, (Meyer 2007: 101). Oftentimes, these are idle means of restitution, (Meyer 2007: 101-103). Rather, *C*'s legal estate would be more effectively protected if the contract was rescinded ab initio or

[44] See AsiaMedia (15 August 2007: "Taipei City Government annuls EMG arena deal"), http://www.asiamedia.ucla.edu/article-eastasia.asp?parentid=75998, downloaded on 21 August 2007; see subsection IV.1.

terminated ex nunc, giving *C* the chance to (re-)bid for the contract. The possibility to impugn a contract tainted with corruption, for example, via a negative declaratory judgment, would comply with this.

Besides protecting *C*'s legal estate there is also an economic argument in support of rescission proceedings by means of impugnment. *B* and *C* may be in a prisoner's dilemma. Collectively *B* and *C* are better off by not engaging in or abetting bribery because they increase their joint profit. But both *B* and *C* have an incentive to bribe. *B* obtains an edge over *C*, or loses by refraining from bribery when *C* bribes, and vice versa, (Søreide 2007: 338). In the end, both *B* and *C* may end up paying bribes.

To assist firms in overcoming this dilemma, so-called integrity pacts were developed and are now frequently used in (public) procurement, (Boehm and Olaya 2006). In these integrity pacts *A*, *B* and *C* pledge themselves on pain of penalties not to pay, offer, demand or accept bribes.[45] The possibility to contest a contract tainted with bribery increases such integrity pacts' effectiveness by stepping up the consequences of violations. Still, there are strong arguments that militate against the usefulness of impugnment.

On the one hand, voluntary disclosure on the acts of corruption in their ranks on the part of both *A* and *B* becomes less likely. This is because the unveiling of the bribe agreement gives *C* the evidence necessary for activating rescission proceedings and for filing requests for a new tender. This is supported by a survey carried out by Søreide (2007) in 2004.

In the survey, executives of Norwegian exporting firms were asked why firms do not formally complain about corruption. Twelve per cent of the 82 respondents cited 'lack of proof' as a probable explanation. That is, "even if convinced that a competitor had been favoured on an illegitimate basis, many firms would not react against it because of the difficulties of proving the case in court", (Søreide 2007: 340). Unveiling of the bribe agreement gives *C* the evidence necessary for activating rescission proceedings and for filing requests for a new tender.

[45] Developed by Transparency International, an integrity pact "is a tool aimed at preventing corruption in public contracting. It consists of a process that includes an agreement between a government or a government department (at the federal, national or local level) and all bidders for a public contract. It contains rights and obligations to the effect that neither side will: pay, offer, demand or accept bribes; collude with competitors to obtain the contract; or engage in such abuses while carrying out the contract." See Transparency International, http://www.transparency.org/global_priorities/public_contracting/integrity_pacts, downloaded on 11 November 2007.

Voluntary disclosure on the part of *A* and *B* becomes less likely. This suggests that if firms had the proof they would contest the illegitimate awarding of a contract.[46] This is substantiated by a case involving irregularities in U.S. Pentagon procurement.[47]

In 1988, Comptek Research Inc., a Buffalo-based producer of military electronic equipment, was eliminated during the first round of competition for a Navy contract involving a Marine Corps system for controlling and directing tactical aircraft in combat. Amid federal investigations into alleged bribery by one of its competitors, Norden Defense Systems, Comptek filed a protest with the General Accounting Office. The protest contended that the investigations have shown that illegal acts were committed during the selection process and that those acts "render invalid any award resulting from the process". As a consequence the contract, which should have been awarded in July 1988, was held up by the Comptek protest. Members of the House Armed Services Committee thereupon warned in a statement that "the problem of potential 'tainted' contracts is compounded by the potential for a legal gridlock that could paralyze the defense acquisition system for an indefinite period." In the end Comptek's plea was dismissed by the General Accounting Office.

Clearly, if irregularities are suspected in the bidding stage, these should be probed and the contract award postponed. Yet, the case also corroborates the point that potential impugnment impairs the incentive for voluntary disclosure. Would the more honest at Norden Defense Systems have reported this in light of potential impugnment? Probably not. Risking the loss of a multimillion contract may, in the end, crowd out honesty. As stated, this is counterproductive as effective anti-corruption significantly depends on relevant information given by insiders and whistle-blowers or by people of the (work) environment of those entangled in corruption.

On the other hand, impugnment also assists corrupt actors with enforcing their bribe agreements. In our case, *E* can now threaten *B* and *D* with public disclosure, with making anonymous tips to the building inspection agency and, in addition, with tip-offs to *C*. Having to fear recourse not only by *A* but also by *C*, *B* and *D* would likely comply with the bribe

[46] Another reason for not formally complaining was "Concern about future business cooperation" (31%). For the whole survey see Søreide (2006).
[47] See The New York Times (25 August 1988: "Losing Bidder Contests Contract Involved in Pentagon Case), http://query.nytimes.com/gst/fullpage.html?res=940DE4DA133EF936A1575BC0A96E948260, downloaded on 20 November 2007.

agreement instead of scaring off *E*. The risk of nullity or voidability induced by a competitor can stabilize corrupt deals.

IV.4 Policy Implications and Conclusion

Nullity and voidability of contracts induced by bribery are adjudicated significant powers for preventing corruption as they entail substantial costs and risks for the bribe-giving party. Moreover, the view is held that they guarantee the protection of the legal estates of the harmed parties, particularly of the contracting body and of competitors. These are important aspects. Nullity and voidability have several considerable disadvantages, though, that render their usefulness for anti-corruption contestable.

First, those who make a report on corrupt conduct of their employees are punished. Voluntary disclosure becomes less likely. This ultimately reduces the deterrent and preventive powers of criminal and civil law. Second, nullity and voidability undermine due diligence since the option to terminate or renegotiate a contract on the grounds of corruption can be very valuable. Third, nullity and voidability assist corrupt actors with enforcing their bribe agreements, thereby stabilizing rather than breaking up corrupt deals. Fourth, nullity and voidability only punish those who successfully obtained a contract. The unsuccessful but nevertheless corrupt are not punished. An effective anti-corruption strategy has to entail consequences for all who try to seek influence by giving bribes, and not only of those who were successful in doing so.

For these reasons, I argue that contracts obtained by means of bribery should not be void or voidable, but valid. Nullity and voidability are neither imperative for preventing corruption nor for protecting the legal estates of the harmed parties. Rather, there are instruments that have similar preventive and protective effects but that at the same time avoid the disadvantages of nullity and voidability.

Corporate liability, for instance, determines when and to what extent a corporation is liable for acts of corrupt conduct of its employees, (Lederman 2000). Corporate liability is a collective punishment, as are nullity and voidability. It induces *B* to exercise due diligence in a similar fashion. One advantage of corporate liability, however, is that it can be reduced in the case of voluntary disclosure. The incentive for reporting *D* can be sustained, especially if *B* exercised due diligence and hence did nothing wrong. Similar incentive-compatible

concessions are not possible in the case of nullity or voidability. Here, the materialization of the bribe agreement between *D* and *E* usually suffices to induce nullity or voidability of the contract. Whether or not *B* exercised due diligence does not play a role in this outcome.

The same train of thought in principle applies to contract penalties. These oblige a contractual party to pay a fine if it does not fulfill its obligations. As a bribe agreement commonly violates statutory prescriptions laid out in (official) contracting terms, it would inflict a contract penalty. The pending penalty also urges *B* to exercise due diligence, (Noll 2001, 2004). One advantage over nullity and voidability is that contract penalties can be designed such to reflect the economic advantage obtained by corruption, (Lambsdorff 2007b). Contract penalties are proportionate while nullity and voidability in many cases are not.

Moreover, specific clauses can also be applied that formulate that the contract penalty is reduced by, say, 50 per cent if *B* voluntarily discloses acts of corrupt conduct of *D*. Similar concessions are again not possible with nullity or voidability. Either the contract is void or not. There is no in-between that maintains the incentive for reporting. Moreover, as Lambsdorff (2007b) points out, the contract penalty can be paid to the losing bidder *C*, thereby protecting its legal estate.[48] Besides, in the course of an integrity pact, contract penalties can be imposed on all firms (*B* and potentially *C*) and not only on the successful one (B).

Debarment (exclusion) as an administrative remedy available to a government that prevents or disqualifies contractors from obtaining new contracts is yet another tool available in the anti-corruption arsenal. However, debarment may not be proportionate to the severity of the crime. Moreover, if designed improperly, it shares some of the disadvantages of nullity and voidability disadvantages. Debarment, for instance, can also reduce the incentive for voluntary disclosure if no clear guidelines exist on how to deal with a firm that proactively reports acts of wrongdoing. But such potential disadvantages of debarment can be cleared out whereas this would be elusive in the case of nullity or voidability. The World Bank's voluntary disclosure program, for instance, is a case in point.[49] Corrupt contractors in World Bank-financed contracts are not debarred if they voluntarily report acts of wrongdoing and

[48] If the contract penalty accrued to *A*, there is an adverse incentive. *A* would benefit from its own organizational failure and may thus allow *E* to take bribes so as to demand the payment, (Lambsdorff 2007b).
[49] See www.worldbank.org/vdp for more information.

work with the World Bank on measures to prevent future misconduct, (Williams 2007: 277-306).

Finally, severability deserves close attention. Severability refers to a provision in a contract which states that if parts of a contract are held to be illegal or otherwise unenforceable, all other contractual elements nevertheless remain valid. As discussed, corruption usually leads to an inflated purchase price because the bribe is oftentimes 'priced in'. Severability implies that a bribe agreement only renders the price agreement void or voidable while the rest of the contract remains valid.

In fact, this was subject to a ruling made by the higher regional court in Munich, Germany, (Meyer 2007: 97). In 2004, Karl-Heinz Wildmoser, Jr. was indicted for corruption in connection with the awarding of the construction of the Allianz Arena, a football stadium in the North of Munich. Wildmoser, Jr. was director of the Allianz Arena München Stadion GmbH, the contracting authority for the Allianz Arena. He awarded the construction contract at an inflated price, provided the Austrian construction company, Alpine, with inside information that enabled the company to win the contract, and in return received EUR 2.8 million from Alpine. In 2005, Wildmoser, Jr. was convicted and sentenced by a Munich court to four and a half years in prison. He was released on bail pending his appeal. In 2006 the German Federal Court of Justice rejected the appeal and Wildmoser, Jr. is since serving his sentence, (ZRFG 2006: 137-138).

Following several civil proceedings, Wildmoser, Jr. had to pay back EUR 2.8 million to the Allianz Arena München Stadion GmbH, the equivalent of the bribe he accepted. According to present German adjudication, the construction contract would have had to be void because the bribe agreement led to a higher purchase price. However, in 2007, the higher regional court in Munich independently ruled that only the price agreement is void while the other parts of the contract remain valid, (Meyer 2007: 97).

Because severability only affects the price agreement, it largely avoids the considerable disadvantages that nullity or voidability entail. Still, it may not be the adequate instrument in some cases. Illicit construction projects in nature reserves, for instance, should be annulled and the buildings erected demolished. Moreover, if contracts were obtained by means of threats to life and physical condition, nullity or voidability may also be necessary. Aside from such special cases, though, I argue that nullity and voidability are not imperative for anti-

corruption. Other instruments such as corporate liability, contract penalties, debarment and severability serve the purpose of curbing corruption in a better way.

V Conclusion

Anti-corruption is society's perpetual endeavor to discipline its public servants, politicians and private actors in order that these do not misuse their positions for private benefit. It cannot be imagined that this goal will ever be reached solely by intellectual effort. Courage and commitment among civic-minded people will remain a prerequisite for low levels of corruption. Still, societies' ventures require some thorough guidance, also on technical issues of anti-corruption. In particular, anti-graft measures have to reflect the characteristics of corrupt deals and have to be designed such that they cannot be abused by corrupt actors for their mischievous intentions. Moreover, new reforms should promote betrayal among corrupt parties and destabilize corrupt arrangements.

In this context, this paper contests the use of high penalties for combating corruption and proposes an asymmetric design of sanctions as well as of voluntary disclosure programs. It is argued that a bribe-taker should be penalized less for taking bribes and more for reciprocating a bribe. Accordingly, leniency should be conceded to a bribe-taker only if he reports his misconduct after having obtained a bribe. Likewise, it is pointed out that a bribe-giver should be punished for giving a bribe, but not for accepting the bribe-taker's reciprocity. Self-reporting should result in leniency only if a bribe-giver was successful in obtaining the requested favor. Such a strategic design has the potential of breaking the 'pact of silence' and of destabilizing corrupt deals.

Moreover, it is challenged that contracts induced by means of bribery should be void or voidable, because both nullity and voidability impede the incentive for voluntary disclosure, assist corrupt actors with enforcing their illicit deals and provide leeway for abuse.

In the end, combating corruption is like judo. Instead of bluntly resisting the criminal forces, one must redirect the enemy's energy to his own decay, (Lambsdorff and Nell 2006; Lambsdorff 2007a). Instead of proclaiming a policy of zero tolerance, one must recognize that the imperfections of human behavior will endure. Instead of demanding a world of absolute integrity, fighting corruption foremost is the art of exploiting these imperfections for our battle.

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Appendices

Appendix 1

Active Bribery			
Country	Leniency is granted in case of self-reporting	Self-reporting is required to encompass testimony	Leniency is granted only if the bribe was reciprocated
Armenia*	Yes, or if the bribe was extorted[50]	No	No
Azerbaijan*	Yes, or if the bribe was extorted	No	No
Bosnia and Herzegovina‡	Yes, but only if the bribe was extorted	No	No
Bulgaria*	Yes, or if the bribe was extorted	No	No
China* Δ	Yes	No	No
Croatia†	Yes, but only if the bribe was extorted	No	No
Czech Republic*	Yes, but only if the bribe was extorted	No	No
Hungary*	Yes	Yes	No

[50] See comments at the end of the table.

Country	Leniency is granted in case of self-reporting	Self-reporting is required to encompass testimony	Leniency is granted only if the bribe was reciprocated
Iraq*	Yes	No	No
Kazakhstan*	Yes	No	No
Latvia*	Yes	No	No
Macedonia†	Yes, but only if the bribe was extorted	No	No
Moldova*	Yes	No	No
Mongolia*	Yes	No	No
Montenegro‡ Δ	Yes	No	No
Romania†	Yes	No	No
Russia*	Yes	No	No
Senegal*	Yes	Yes	No
Serbia‡	Yes	No	No
Slovakia*	Yes, but only if the bribe was extorted	No	No
Slovenia‡	Yes, but only if the bribe was extorted	No	No

Country	Leniency is granted in case of self-reporting	Self-reporting is required to encompass testimony	Leniency is granted only if the bribe was reciprocated
Tajikistan*	Yes, but only if the bribe was extorted	No	No
Tunisia*	Yes	No	No
Turkey†	Yes	No	No
Ukraine*	Yes	No	No
Uzbekistan*	Yes	Yes	No

Comments:

"Yes": Leniency is granted to a bribe-giver if he reports. Reporting is required also if the bribe was extorted from him.

"Yes, or if the bribe was extorted": Leniency is granted to a bribe-giver if he reports the offering, promising or giving of a bribe or if the bribe was solicited or extorted from him. In case of extortion self-reporting is not necessary.

"Yes, but only if the bribe was extorted": Leniency is granted to a bribe-giver only if he reports and the bribe was solicited or extorted from him. No leniency if he offered, promised or gave the bribe on his own accord.

* bribe is not returned to the giver

† bribe is returned to the giver

‡ bribe may be returned to the giver

Δ exemption from punishment not automatic (discretionary)

Table VI.1

Passive Bribery			
Country	Leniency is granted in case of self-reporting	Self-reporting is required to encompass testimony	Leniency is granted only if the bribe was given and not if the bribe was only promised
Hungary*	Yes	Yes	No
Senegal*	Yes	Yes	No
Turkey*	Yes	No	No
Comments: "Yes": Leniency is granted if the bribe-taker solicits or extorts, agrees to accept or accepts a bribe. * bribe is confiscated			

Table VI.2

Appendix 2

Form	**Active Bribery**		**Passive Bribery**	
Country	Liability	Leniency Program	Liability	Leniency Program
Albania	244, 245	-	259, 260	-
Algeria	129	-	126-128	-
Argentina	258, 259	-	256, 259	-
Armenia	312, 313, 350	312 (4)	311	-

Country	**Active Bribery**		**Passive Bribery**	
Australia	82, 99	-	82, 99	-
Austria	307	-	304	-
Azerbaijan	312	312 (Note)	311	-
Bolivia	158	-	145	-
Bosnia and Herzegovina	218	218 (3)	217	-
Bulgaria	304, 304a.	306	301, 304a.(3), 307	-
Burkina Faso	158, 160	-	158, 159	-
Burundi	303	-	300, 301, 302	-
Canada	119-121, 123 (1)	-	119-121, 123 (1), 125	-
Chile	250, 250bis.	-	248, 248bis., 249	-
China	389, 390, 392	390, 392	385, 386,	-
Colombia	407	-	405, 406	-
Costa Rica	343	-	338-341	-
Croatia	348	348 (3)	347	-

Country	**Active Bribery**		**Passive Bribery**	
Czech Republic	161, 162(2)	163	160	-
Estonia	297, 298	-	293, 294	-
Ethiopia	437	-	423, 425	-
Finland	Chapter 13: 13, 14	-	Chapter 40: 1, 2, 3	-
Germany[51]	333, 334, 335, 336	-	331, 332, 335, 336	-
Honduras	366	-	361-365	-
Hungary	253	255/A (2)	250	255/A (1)
Iceland	109	-	128	-
India	171	-	171	-
Iraq	310, 313	311	307, 308, 309	-
Japan	198	-	197, 197-3	-
Kazakhstan	312	312 (Notes)	311	-
Kuwait	115, 117	-	114, 118, 119	-

[51] In Germany leniency is only granted if the benefit was previously authorized or is authorized by the competent public authority upon reporting. Consequently, self-reporting without the proof of prior authorization would not result in exemption from punishment. Therefore, §§ 331 (3) and 333 (3) are not counted as voluntary disclosure programs.

Country	Active Bribery		Passive Bribery	
Latvia	323	324 (1), (2)	320	-
Macedonia	358	358 (3)	357	-
Malta	120	-	115	-
Mexico	222 (2)	-	222 (1)	-
Moldova	325	325 (4)	324	-
Mongolia	269	269 (Note)	268	-
Montenegro	424	424 (4)	423	-
Nicaragua	427	-	421, 422, 423	-
Nigeria	521 (2)	-	521 (1), 523, 525	-
Panama	162	-	160, 161	-
Peru	399	-	393, 394	-
Philippines	212	-	210, 211	-
Romania	309	309 (4), (5)	308, 310	-
Russia	291	291 (Note)	290	-
Senegal	161	160	159, 160	160

Country	**Active Bribery**		**Passive Bribery**	
Serbia	368	368 (4)	367	-
Slovakia	161	163	160	-
Slovenia	268, 269	268 (3), 269a (3)	267	-
Sweden	Chapter 17, Section 7	-	Chapter 20, Section 2	-
Tajikistan	320	320 (Note)	319	-
Tunisia	91, 92	93	83-85, 88	-
Turkey	252	254 (2)	252	254 (1)
Ukraine	369	369 (3)	368, 370	-
Uruguay	159	-	157, 158	-
Uzbekistan	211	211	210	-

Table VI.3