Strengthening Anticorruption in Turkey

- Reforming the Penal Code -

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Abstract

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. This paper shows how voluntary disclosure programs in Turkey can be strategically applied to break the 'pact of silence' and to increase deterrence.

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1 Introduction

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). 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: 8). 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.[1]

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.[2] 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.

[1] See Pressemitteilung des BGH Nr. 174/2006, http://www.hrr-strafrecht.de/hrr/pm/2006/174-2006.html, download on 26 November 2007.

[2] For a comprehensive review of corruption in judicial systems see Global Corruption Report (2007).

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).

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.[3]

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.

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: 2).

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

2 Strategic Aspects of Voluntary Disclosure Programs in Turkey

In Turkey, active and passive bribery are criminalized pursuant to Article 252. Subsections (1) and (3) are of particular relevance[4]:

> (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):

> (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

[4] Bıçak, V. & E. Grieves (2007) Turkish Penal Code, p. 520.; […] indicates omissions.

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 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 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.

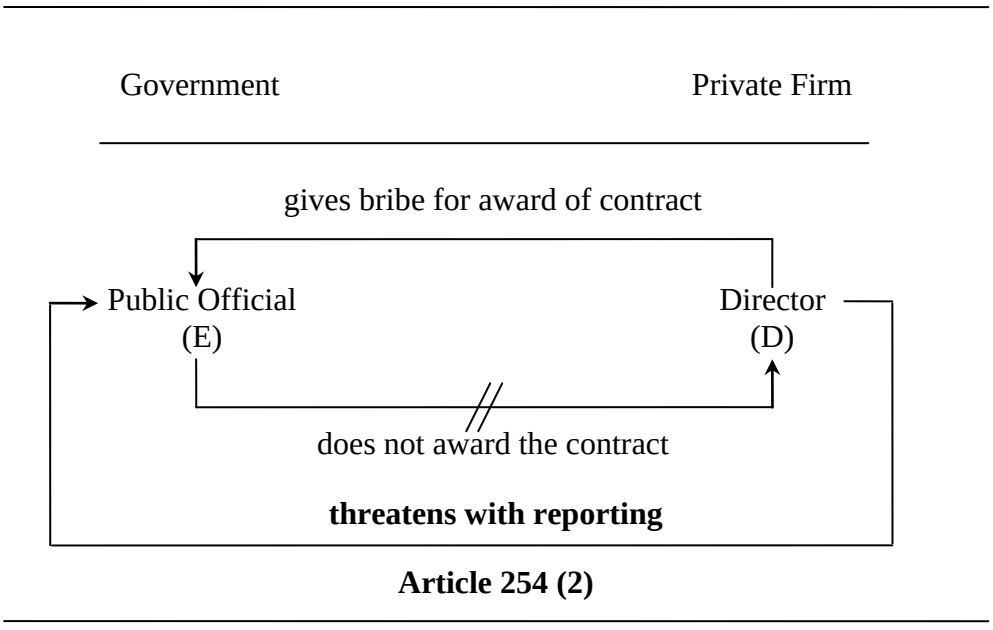


Figure 1

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.[5]

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 […].[6]

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 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.

[5] See Lambsdorff and Nell (2007) for a formal derivation of this result. See Nell (2007) for a cross-section analysis of 56 countries.

[6] 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.

However, as Figure 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.

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.[7] 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.

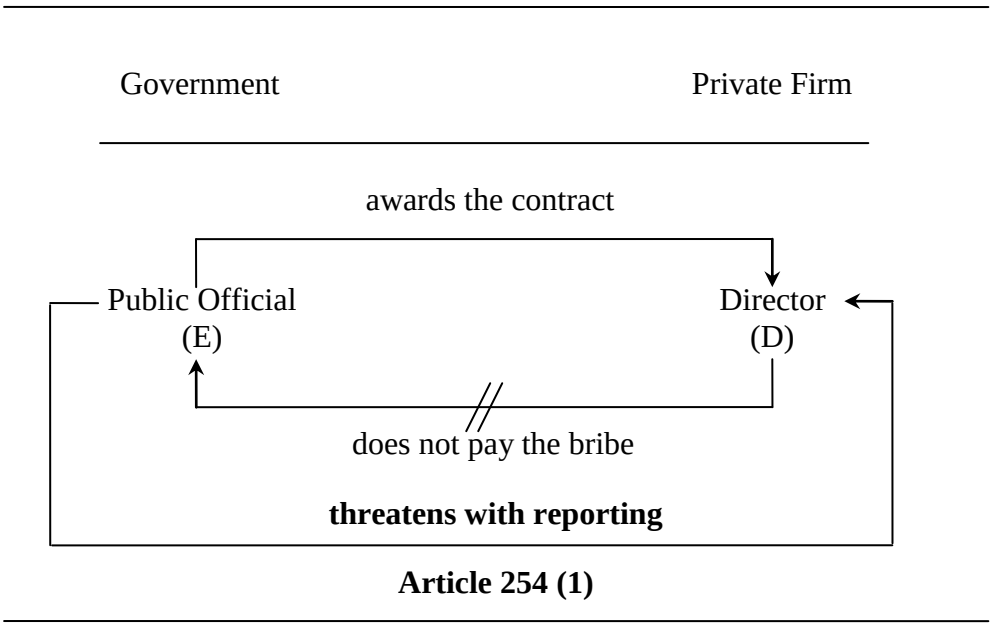


Figure 2

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).

[7] See Lambsdorff and Nell (2007) for a formal derivation of this result. See Nell (2007) for a cross-section analysis of 56 countries.

(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.[8]

3 Policy Recommendations for Turkey

The United Nations Convention against Corruption (UNCAC) in Article 15 (a) and (b) puts forth recommendations on the criminalization of active and passive bribery.[9] Moreover, Article 37 provides for a guideline for leniency provisions to be considered by signatory and ratifying parties.[10] Against these articles' background we propose the following voluntary disclosure programs for Turkey.

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 […].

[8] See Lambsdorff and Frank (2007) for an experimental validation of the results.

[9] 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)

[10] 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).

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.[11]

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.[12]

It remains questionable whether the solicitation of a bribe should really be exempt from punishment in case of self-reporting. In our stylized model from the preceding section, if E solicited the bribe through coercion or intimidation or the threatening with physical harm, we 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.

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

[11] 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.

[12] 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.

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.

4 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. Turkish legislators should hence consider reformulating the respective articles.

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