Special Issue
Ethical Challenges of Corrupt Practices

Personal Gain or Organizational Benefits? How to Explain Active Corruption

By Markus Pohlmann,[*] Kristina Bitsch[**] & Julian Klinkhammer[***]

Abstract

Corrupt practices in organizations are commonly explained via the rational choice of individual employees, with the benefits of deviant actors at the heart of the theoretical approach. This Article challenges the rational choice perspective with reference to cases of corruption in which the organizational benefits are crucial and personal gains negligible. The authors propose to embed the concept of “useful illegality” (Luhmann) into an institutional theory framework and develop a set of indicators for the systematic comparison of individual case studies. Exemplary analyses of two landmark cases of corporate bribery on behalf of German corporations’ subsidiaries abroad (*Siemens Argentina* and *Magyar Telekom*) show that active corruption was neither simply a function of individual deviance, nor of personal gain. In contrast, institutional theory allows the modeling of organizational deviance as a function of unwritten rules that lend legitimacy to the deviant behavior of bribe payers. Despite plentiful opportunities in the periphery of these two multinational corporations, the few instances of personal gain were either in line with the organizational incentive structures (as in *Telekom*) or attributable to the loss of membership (as in *Siemens*). Mostly high-ranking employees, loyal to their organization, committed those crimes at high personal risks. The discussion of factors that explain why these “company men” nonetheless complied with the unwritten rules, in support of organizational benefits, leads the authors to conclude with likely consequences for effective regulation. They argue that it is the usefulness of the illegal behavior for the organization, its entrenchment in organizational cultures, and amplified adaptation problems with regard to changing institutional environments that explain what makes corrupt practices so hard to control and to regulate in a formal legal organization.

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A. Introduction

This Article challenges the idea that corrupt practices in organizations are an outcome of rational choices of individual actors by focusing on bribe payers. It aims to clarify the rules that guide the high-ranking employees' strategic decision of whether or not to pay bribes. To this end, we apply the sociological concept of "useful illegality" to the field of corruption in organizations, and we develop a framework for the comparative analysis of individual case studies. The concept of useful illegality was introduced by sociologist Niklas Luhmann in 1964,[1] but it has not been applied systematically to empirical research. Adopting Luhmann's concept for the use within an institutional theory approach, this Article argues that it is particularly suited to understand the phenomenon of active corruption.

Research on corruption usually grapples with the idea of "bad apples" and the complementary role of "rotten barrels." Corrupt behavior is often attributed to individual characteristics such as greed for personal gain, lack of self-control,[2] and deviant personality traits.[3] It is argued that Psychopathy and Machiavellianism mark the personalities of corrupt actors.[4] The basic assumption of such approaches, which are located within the rational choice theory, is that organizations become corrupt through individual deviance—the longing for individual benefit or personal gain. In the case of managers, this means that the very personality traits that help managers advance in the corporate hierarchy also make them more prone to individual deviance.[5] Thus, stricter laws and consistent compliance measures serve as viable deterrents against corruption; they raise both the likelihood of detection of corruption and the costs the deviant actor faces if caught. In this way, corruption is commonly perceived as being adverse to the organization's objectives.[6]

This Article challenges this paradigm by focusing on active corruption from the bribe giver, as opposed to the bribe taker. In this study, most of the bribe givers are high-ranking, well-educated, and well-paid managers. They commit crime at high personal risks without being

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[1] NIKLAS LUHMANN, FUNKTIONEN UND FOLGEN FORMALER ORGANISATION 304 (1964).

[2] MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME (1990).

[3] FRIEDEMANN NERDINGER, UNTERNEHMENSSCHÄDIGENDES VERHALTEN ERKENNEN UND VERHINDERN (2008); Tanja Rabl & Torsten M. Kühlmann, *Understanding Corruption in Organizations—Development and Empirical Assessment of an Action Model*, 82 J. BUS. ETHICS 477 (2008); Ingo Zettler & Gerhard Blickle, *Zum Zusammenspiel von "wer" und "wo": Eine psychologische Betrachtungsweise personaler und situationaler Determinanten kontraproduktiven Verhaltens am Arbeitsplatz*, 6 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 143 (2011).

[4] Thomas Knecht, *Das Persönlichkeitsprofil des Wirtschaftskriminellen*, 60 KRIMINALISTIK 201 (2006); Thomas Knecht, *Persönlichkeit von Wirtschaftskriminellen*, 4 PSYCHIATRIE 25 (2009).

[5] *See* SVEN LITZCKE, RUTH LINSSEN, SINA MAFFENBEIER & JAN SCHILLING, KORRUPTION: RISIKOFAKTOR MENSCH: WAHRNEHMUNG—RECHTFERTIGUNG—MELDEVERHALTEN 19, 20 (2012).

[6] *See, e.g.*, Blake E. Ashforth *et al.*, *Re-Viewing Organizational Corruption*, 33 ACAD. MGM'T REV. 670, 672 (2008).

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primarily oriented toward a wealth grab. Until the crime is revealed, the illegal actions are intended to be useful to the organization. Using the concept of useful illegality, we scrutinize whether it is possible to categorize a specific kind of bribery as organizational deviance. The purpose of this Article is not to exonerate those who sustain such organizational actions—especially where an actual crime has been committed—but rather to explain how such deviance takes place and why it is difficult for organizations to prevent the crime.

From a sociological perspective, bribe giving seems more difficult to explain, so the analysis will focus on bribe giving in the corporate sector. In analyzing bribe taking, a rational choice approach might fit well—personal gain is often the driving force behind this category of deviance. In cases of bribe giving, where personal gain is not the main driving force, the rational choice approach is insufficient—instead, an institutional theory or a system theory approach is more appropriate.

Most corrupt practices depend on the supply of bribes from the private sector.[7] This Article applies the case study approach—a field-tested method of research on white-collar crime[8]—to judicial decisions on corporate bribery. Case studies of corporate bribery on behalf of German corporations' subsidiaries abroad, in the *Siemens* and *Telekom* cases, exemplify our analytic approach. The parent companies involved—Siemens AG and Deutsche Telekom—are ranked within the Top Ten largest German companies and are popular icons of the German economy. Both also rank among the largest corporations in Europe with strong operations abroad, generating more than half their revenues outside of Germany.[9] We review cases of corporate bribery carried out by regional subsidiary companies both owned and controlled by their respective parent company. The *Siemens* and *Telekom* cases are recent examples of Foreign Corrupt Practices Act (FCPA) enforcement actions by U.S. government authorities concerning German companies' business conduct abroad. In both cases, the illegal activities were revealed in 2006 and were settled with the U.S. Government in 2008 (*Siemens AG*) and 2011 (*Deutsche Telekom*). We selected the FCPA violations of two regional subsidiaries in South America and in Europe because the publicly available evidence—gathered largely from United States Securities and Exchange Commission (SEC) and United States Department of Justice (DOJ) enforcement actions—allows for a similar degree of internal validity. The legal

[7] Deborah Hardoon & Finn Heinrich, *Bribe Payers Index Report 2011*, TRANSPARENCY INTERNATIONAL 15 (2011), *available at* http://issuu.com/transparencyinternational/docs/bribe_payers_index_2011/15?e=2496456/2293452.

[8] John Braithwaite, *White Collar Crime*, 11 ANN. REV. SOC. 1 (1985); Gilbert Geis, *The Case Study Method in Sociological Criminology, in* A CASE FOR THE CASE STUDY 200 (J. R. Feagin, A. M. Orum & G. Sjoberg eds., 1991); DAVID FRIEDRICHS, TRUSTED CRIMINALS: WHITE COLLAR CRIME IN CONTEMPORARY SOCIETY (2007).

[9] WULF STOLLE, GLOBAL BRAND MANAGEMENT 7 (2013); MIRKA C. WILDERER, TRANSNATIONALE UNTERNEHMEN ZWISCHEN HETEROGENEN UMWELTEN UND INTERNER FLEXIBILISIERUNG 257, 258 (2010).

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scrutiny of Defendants' behavior by social control agents provides social scientists with sufficient evidence to reconstruct the *modus operandi* of active corruption. Concerning the organizational ranks of the bribe payers and the company's advantage derived from bribe paying, it is a debatable issue whether both the *Siemens* and *Telekom* cases represent typical cases of active corruption of German companies and their subsidiaries. According to data from the German Federal Criminal Police Office (*Bundeskriminalamt*), almost sixty percent of bribe payers are high-ranking executives or CEOs.[10] Directors, and even presidents, have been among the defendants in FCPA cases.[11] Vincenzo Dell'Osso's analyses of SEC enforcement actions revealed that in more than seventy percent of FCPA cases, the purpose for giving a bribe was to get a contract or to realize competitive advantages on a company level.[12] Notwithstanding the lack of elaborate information about the population of FCPA enforcement actions (for example, information on the organizational structure of corporate defendants), both cases are typical examples of active corruption. Do they also represent cases of useful illegality?

Section B analyzes prior research, distinguishing rational choice explanations in social sciences from structural and institutionalist accounts. Taking the latter as a starting point, the concepts of organizational deviance and useful illegality are introduced in Section C, along with the indicators for the analysis of our case studies. Sections D and E describe and thoroughly analyze the cases. The questions concerning the internal validity and the generalizability of our findings are raised in Section F. After determining whether the cases are instances of useful illegality, this article uses the conclusions to address the specific challenges in the fight against organizational deviance.

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[10] BUNDESKRIMINALAMT, BUNDESLAGEBILD DER KORRUPTION (2013), *available at* http://www.bka.de/nn_193376/DE/Publikationen/JahresberichteUndLagebilder/Korruption/korruption__node.html?__nnn=true (last visited Nov. 5, 2015).

[11] Vincenzo Dell'Osso, *Empirical Features of International Bribery Practice: Evidence from Foreign Corrupt Practices Act Enforcement Actions*, *in* PREVENTING CORPORATE CORRUPTION 236 (Stefano Manacorda et al. eds., 2014).

[12] *Id*.

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B. State of the Art

The "business of bribery" is a persistent problem that has been characterized as an "epidemic" on a discourse level.[13] Corrupt practices have been resilient against tough domestic anti-corruption laws and compliance efforts at the firm-level.[14] Even seventy years ago, Edwin Sutherland[15] observed "the persistence of commercial bribery in spite of the strenuous efforts of business organizations to eliminate it."[16] But the supplying side of corrupt transactions has since received considerably less attention than the demand for bribes in the political sphere. International bribery has only recently generated attention from various social science disciplines, which have developed a number of competing explanations for corporate corruption. From a rational-choice perspective, the persistence of bribery in international business raises the suspicion that corporations are reluctant to control corruption effectively, especially in cases of active corruption that benefit the firm.[17] Criminologists[18] stress the general theoretical distinction between crimes that are attributable to the business organization—for example, corporate crime—and crimes regarded as non-organizational—for example, occupational crime.[19] While mainstream criminology traditionally focuses on the benefits of corruption for the perpetrators, the typical personality traits of these individuals, and the linkage of corruption with organized crime,[20] organizational criminology takes into account the role of structure and social mechanisms within the rotten barrels that make good individuals behave badly.[21]

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[13] James W. Williams & Margaret E. Beare, *The Business of Bribery: Globalization, Economic Liberalization, and the "Problem" of Corruption*, 32 CRIME, L. & SOC. CHANGE 115 (1999).

[14] Miriam F. Weismann, *The Foreign Corrupt Practices Act: The Failure of the Self-Regulatory Model of Corporate Governance in the Global Business Environment*, 88 J. BUS. ETHICS 615 (2009).

[15] Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOC. REV. 1 (1940).

[16] *Id*. at 11.

[17] SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 191–93 (1978).

[18] *See* Braithwaite, *supra* note 8, at 1.

[19] *See* MARSHALL B. CLINARD & RICHARD QUINNEY, CRIMINAL BEHAVIOR SYSTEMS: A TYPOLOGY 188 (1973) (explaining corporate crime encompasses "offences committed by corporate officials for the corporation and the offences of the corporation itself"); *see also* GARY S. GREEN, OCCUPATIONAL CRIME (1990) (describing occupational crime as relating to organizations only in terms of an opportunity structure that serves as the trigger for individual offences committed for private gain).

[20] GOTTFREDSON & HIRSCHI, *supra* note 2; NERDINGER, *supra* note 3; Rabl & Kühlmann, *supra* note 3; Zettler & Blickle, *supra* note 3; Knecht, *supra* note 4.

[21] *See, e.g.*, EDWIN H. SUTHERLAND, WHITE COLLAR CRIME (1949); MARSHALL B. CLINARD & RICHARD QUINNEY, CRIMINAL BEHAVIOR SYSTEMS: A TYPOLOGY (1973); MARSHALL B. CLINARD & PETER C. YEAGER, CORPORATE CRIME (1980); Braithwaite, *supra* note 8, at 1 ; Wim Huisman & Gudrun Vande Walle, *The Criminology of Corruption*, *in* THE GOOD CAUSE: THEORETICAL PERSPECTIVES ON CORRUPTION 115 (Gjalt Graaf et al. eds., 2010); Ronald C. Kramer, *Corporate Crime: An*

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In contrast, business ethicists are usually in line with the rational-choice perspective; they argue for the strict condemnation of corrupt practices by management and stress the need for a consistent tone at the top.[22] Josef Wieland calls for a new sort of values management to provide wayward employees with moral incentives that prevent corruption.[23] In this view, even structural corruption is first and foremost a matter of unethical choices made by agents to maximize personal gain. The role of the principal is also faulted if the principal fails in terms of control (for example, with respect to compliance management) or does not sufficiently incentivize "good" employee behavior.[24]

Business economists have pointed to cognitive normalization processes rooted in organizational cultures. Normalization processes might lead morally upright employees down a "slippery slope," to the point where corrupt practices become mindlessly performed aspects of organizational behavior. Blake E. Ashforth and Vikas Anand[25] provide a theoretical framework by explicating the organizational processes and social psychological mechanisms that underpin structural corruption—a popular model that has informed many studies on corruption,[26] including research on the *Siemens* case.[27]

Management scientists[28] and Criminologists[29] have examined the influence of firm and top management team characteristics with regard to crimes against competition. Sally S. Simpson and Christopher S. Koper[30] have found that company structure—for example,

Organizational Perspective, *in* WHITE-COLLAR AND ECONOMIC CRIME: MULTIDISCIPLINARY AND CROSS-NATIONAL PERSPECTIVES 75 (Peter Wickman & Timothy Dailey eds., 1982).

[22] Diana Ziegleder, *Business and Self-Regulation: Results from a Comparative Study on the Prevention of Economic Crime*, 28 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 203 (2007).

[23] Josef Wieland, *Die Governance der Korruption*, *in* KORRUPTION: UNAUFGEKLÄRTER KAPITALISMUS—MULTIDISZIPLINÄRE PERSPEKTIVEN ZU FUNKTIONEN UND FOLGEN DER KORRUPTION 43 (2005).

[24] Josef Wieland, *Die Kunst der Compliance*, *in* WIRTSCHAFTSKRIMINALITÄT UND ETHIK 155 (Albert Löhr & Eckhard Burkatzki eds., 2008).

[25] Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 RES. ORGANIZATIONAL BEHAV. 1 (2003).

[26] Ashforth et al., *supra* note 6.

[27] PETER GRAEFF, KARENINA SCHRÖDER & SEBASTIAN WOLF, DER KORRUPTIONSFALL SIEMENS, ANALYSEN UND PRAXISNAHE FOLGERUNGEN DES WISSENSCHAFTLICHEN ARBEITSKREISES VON TRANSPARENCY INTERNATIONAL DEUTSCHLAND (2009).

[28] Anthony J. Daboub, Abdul M. A. Rasheed, Richard L. Priem & David Gray, *Top Management Team Characteristics and Corporate Illegal Activity*, 20 ACAD. MGM'T REV. 138 (1995).

[29] Sally S. Simpson & Christopher S. Koper, *The Changing of the Guard: Top Management Team Characteristics, Organizational Strain, and Antitrust Offending*, 13 J. QUANTITATIVE CRIMINOLOGY 373 (1997).

[30] *Id*.

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decentralized management structures—increases the likelihood of corporate illegality only in interaction with declining firm performance, which produces organizational strain.[31] Thus, the pressure to perform, on behalf of influential administrative or financial officers, on the subunit level—especially in view of divisional losses—might not only increase the likelihood of antitrust offenses but also increase active corruption—for example, corporate crimes against competition—as well.

Historically, sociologists have viewed corrupt practices in relation to institutional changes that take effect on the organizational level and social networks that may contradict both institutional and organizational rules. Peter Graeff's principal-agent analysis of the *Siemens* case reached the conclusion that close social networks, based on familiarity, interpersonal trust, and group control, were necessary to circumvent the company's formal structure.[32] From an institutional theory perspective, this might indicate that the formal rules were part of the myths and ceremonies of the organization. Changes in the organization's formal front side, however, can also trigger informal dynamics, such as the necessity to live up to the company's standards when faced with external pressure to do so.[33] Bertrand Venard and Mohamed Hanafi[34] also show that corruption on behalf of financial institutions varies among emerging economies, depending on the quality of the business environment and its legal institutions. They also find empirical support for their neo-institutional hypothesis that organizations mimic the behavior of their competitors, and higher competition, as well as the perception of unfair practices in the respective industry, leads to more corruption. While Venard[35] finds multinational companies as generally less inclined to succumb to local corrupt practices in Russia, Hung-En Sung[36] used data from Transparency International's Bribe Payers Survey to argue that the propensity of multinationals to bribe depends on the exporting countries' governance and institutions. In the case of Germany and other major trading powers, a late but rapid and radical legal change occurred at the

[31] *Id*. at 394.

[32] Peter Graeff, *Im Sinne des Unternehmens? Soziale Aspekte der korrupten Transaktionen im Hause Siemens*, *in* DER KORRUPTIONSFALL SIEMENS: ANALYSEN UND PRAXISNAHE FOLGERUNGEN DES WISSENSCHAFTLICHEN ARBEITSKREISES VON TRANSPARENCY INTERNATIONAL DEUTSCHLAND 151 (Peter Graeff, Karenina Schröder & Sebastian Wolf eds., 2009).

[33] STEFANIE HIß, WARUM ÜBERNEHMEN UNTERNEHMEN GESELLSCHAFTLICHE VERANTWORTUNG? EIN SOZIOLOGISCHER ERKLÄRUNGSVERSUCH 17 (2006).

[34] Bertrand Venard & Mohamed Hanafi, *Organizational Isomorphism and Corruption in Financial Institutions: Empirical Research in Emerging Countries*, 81 J. BUS. ETHICS 481, 495 (2008).

[35] Bertrand Venard, *Organizational Isomorphism and Corruption: An Empirical Research in Russia*, 89 J. BUS. ETHICS 59 (2009).

[36] Hung-En Sung, *Between Demand and Supply: Bribery in International Trade*, 44 CRIME, L. & SOC. CHANGE 111 (2005).

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end of the 1990s—the criminalization of the formerly tax deductible bribe payments abroad.[37]

C. The Institutional Theory Approach to Organizational Deviance and Useful Illegality

Taking the above-mentioned findings as a starting point, we first have to differentiate between when it is reasonable to classify corruption as a crime of corrupt individuals and when is it to be classified as organizational corruption.[38] This is a difficult task. While it is easier to find corruption cases where the organization as a whole may not have been involved—for example, in the case of granting an undue advantage by officeholders taking bribes—it will be difficult to find cases of organizational deviance where an individual can deny deviant behavior. In our perspective, the most important characteristic of organizational deviance is that the unwritten rules of an organization, the incentives to reach organizational goals, and the actors representing the organizations lay the groundwork for the use of illegal means despite the existence of strict formal compliance rules that ban illegal behavior. On the one hand, this has to be distinguished from individual deviance in organizations (i.e., occupational crime), which is carried out for the sake of personal gain at the cost of the organization's profits. On the other hand, it is not similar to organized crime because the organizations operate on a formal legal basis. Organizational deviance requires that illegal means serve organizational ends—not personal gain, as in organized crime and individual deviance in organizations. The outcome is beneficial for the organization unless and until the illegal behavior is detected. Personal gain is only legitimate if it is backed by the incentives of the organization and does not go beyond conventional compensation.[39]

Borrowing from an institutional approach to organizational analysis,[40] we have to answer the question of whether the organizational rules have been, at least in part, responsible for the criminal activity of an actor. For this diagnosis, it would not be enough to argue simply that the acknowledged rules in an organization have been too loose to prevent the criminal action. We have to show instead that these rules fostered the criminal behavior, although the actors usually work hard to signal compliance with the formal legal front side of an organization. According to the institutional approach, organizations have formal rules

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[37] *Id.*; *see also* Sebastian Wolf, *Modernization of the German Anti-Corruption Criminal Law by International Legal Provisions*, 7 GERMAN L.J. 785 (2006).

[38] *See* Jonathan Pinto, Carrie R. Leana & Frits K. Pil, *Corrupt Organizations or Organizations of Corrupt Individuals? Two Types of Organization-Level Corruption*, 33 ACAD. MGMT. REV. 685, 688 (2008).

[39] Lawrence Lessig, *Institutional Corruptions* 5 (Edmond J. Safra Ctr. for Ethics, Working Paper No. 1, 2013).

[40] John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. OF SOC. 340 (1977); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983); MARKUS POHLMANN & HRISTINA MARKOVA, SOZIOLOGIE DER ORGANISATION: EINE EINFÜHRUNG 54 (2011).

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as well as unwritten informal rules that are even more important than the formal ones. Formal rules are often myths and ceremonies in organizations.[41] Organizations like to dress their windows to receive legitimacy and subsequently more resources. Their operating procedures are often very different from these formal rules, even deviating from the formal, legal side of an organization. Thus, to define organizational deviance in an institutional perspective, we assume that four criteria are necessary:

(1) An organizational field where the deviant rules are common and acknowledged;
(2) Organizational goals that are incentives to reach organizational objectives by also using illegal means;
(3) Informal rules that promote corrupt action by acknowledging and legitimizing illegal means; and
(4) Actors in high-ranking positions representing the organization.

Although borrowing from Niklas Luhmann's early work,[42] we are not employing the general theoretical frame of systems theory. In his first book, Luhmann deals with formal rules and non-compliance to formal rules. In the chapter on "useful illegality," he declares his interest in the adaptive strategies of actors—i.e., members of organizations—during periods of doubtful legality of organizational actions.[43] For him, grey zones of organizational actions are quite normal because all organizations have to deviate from formal rules. The price one has to pay for a consistent formal order is to accept deviance from that order. This deviance is defined by Luhmann as "useful" if it is in line with the organizational purpose—though such deviance does not necessarily lead to unlawful behavior. By addressing the functions of informal order, his line of reasoning is very close to an institutional approach in his early works. In an institutional approach one would also analyze the functions of the informal order by highlighting the rules, the deviance from formal rules, and how actors adapt in an organization to contradictory and inconsistent norms—like Luhmann did in his early work.[44] Thus, employing his notion of useful illegality, we tailor Luhmann's early idea into a model that helps us analyze active corruption from an institutional theory point of view. Based on this model, we ask whether paying bribes can be categorized as a specific type of organizational deviance that Luhmann called useful illegality. Although Luhmann mostly used examples from the context of public administration to illustrate his concept, he developed a sociology of organizations that applies to business organizations as well.

[41] Meyer & Rowan, *supra* note 40.

[42] LUHMANN, *supra* note 1, at 304.

[43] *Id*.

[44] *Id*.

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Luhmann's idea points to the functional requirement that every organization depends on certain forms of illegal behavior—i.e., behavior that violates formal organizational expectations—in order to survive.[45] A consistent formal structure will then only increase the dilemma for members about how to adapt to contrary expectations in the environment when they are threatened with the loss of their membership—for example, loss of employment. Persistent adaptation problems, such as a demand for bribes ("passive corruption"), thus increase the likelihood for corporate deviance only if the relevant deviant acts—here, active corruption—gain informal legitimacy as "useful" actions for the organization. Revising Luhmann's model in order to fit an institutional approach, we draw on three basic assumptions:

(1) If personnel in an organization strictly work according to rules, the organization cannot survive. Each organization therefore requires its members to deviate from formal rules to some extent. This may include unlawful behavior.
(2) The unwritten rules determine what kind of deviations are useful and legitimate within an organization, and what kind of deviations its members should avoid if they want to stay on.
(3) Due to the fact that these are deviations from formal rules, they cannot be sufficiently controlled by introducing more formal rules.

We extend this basic explanatory frame to encompass organizational deviance and we operationalize our approach by asking the following questions about the behavior:

(1) Whether it is useful according to organizational goals;
(2) Whether it is in violation of a formal rule (i.e., illegal) but legitimized by unwritten rules of an organization and its organizational field;
(3) Whether it is carried out for the sake of organizational gains and covered by the organizational incentive systems; and/or
(4) Whether it is carried out by high-ranking, representative actors who neither take money nor try to boost their own careers.

This sociological concept of organizational deviance interpenetrates criminological accounts of corporate crime[46] and is in line with an organizational strain perspective.[47] It

[45] *Id.* at 305.

[46] Julian Klinkhammer, *On the Dark Side of the Code: Organizational Challenges to an Effective Anti-Corruption Strategy*, 60 CRIME, L. & SOC. CHANGE 191 (2013).

[47] Simpson & Koper, *supra* note 29; Diane Vaughan, *Toward Understanding Unlawful Organizational Behavior*, 80 MICH. L. REVI. 1377 (1982).

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emphasizes that cultural factors—especially traditional values—are able to undermine ordinary modes of corruption control in cases of active corruption.[48]

D. Bribery as a "Moral" Obligation in Business Relations—Siemens in Argentina

Within Latin America, "Argentina is perceived as one of the most corrupt"[49] countries with comparatively high levels of structural corruption,[50] which have repeatedly been attributed in part to weak or moderate checks and balances as well as to the persistence of elite cartels.[51] Thus, corporate bribery at Siemens SA (Siemens Argentina) might represent a rather typical case for doing business in Argentina. However, the corrupt practices of Siemens in Argentina bear a lot of resemblance to corruption cases at the company's other divisions. In this section, we compare this case to the findings of Klinkhammer,[52] who reviewed criminal cases that were tried in Germany.

I. The Benefit

One contract alone for the production of national identity cards would have generated revenues for Siemens of approximately one billion U.S. dollars. According to the DOJ's indictment, regional top managers of Siemens Argentina promised that Siemens would eventually pay almost 100 million U.S. dollars in bribes in order to win the DNI contract.[53]

II. The Illegal Behavior

With the help of intermediary Carlos S., the regional top managers of Siemens Argentina—then-CEO and then-CFO, among others—promised money to members of the government, including not only then-president Carlos Menem, but also to members of the opposition

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[48] Markus Pohlmann, *Management und Moral*, *in* INTEGRIERTE SOZIOLOGIE: PERSPEKTIVEN ZWISCHEN ÖKONOMIE UND SOZIOLOGIE, PRAXIS UND WISSENSCHAFT 161 (Tobias Blank et al. eds., 2008); POHLMANN & MARKOVA, *supra* note 40.

[49] Manuel Balán, *Competition by Denunciation: The Political Dynamics of Corruption Scandals in Argentina and Chile*, 43 COMP. POL. 459, 463 (2011).

[50] *Id*. at 459.

[51] ARANZAZU GUILLAN-MONTERO, AS IF: THE FICTION OF EXECUTIVE ACCOUNTABILITY AND THE PERSISTENCE OF CORRUPTION NETWORKS IN WEAKLY INSTITUTIONALIZED PRESIDENTIAL SYSTEMS. ARGENTINA (1989-2007) 30, 196 (2011); MICHAEL JOHNSTON, CORRUPTION, CONTENTION AND REFORM: THE POWER OF DEEP DEMOCRATIZATION 20 (2013).

[52] Julian Klinkhammer, *Varieties of Corruption in the Shadow of Siemens. A Modus-Operandi Study of Corporate Crime on the Supply Side of Corrupt Transactions*, *in* THE ROUTLEDGE HANDBOOK OF WHITE-COLLAR AND CORPORATE CRIME IN EUROPE 318 (Judith Van Erp, Wim Huisman & Gudrun Vande Walle eds., 2015).

[53] United States v. Sharef, No. 1:11-CR-01056 at 14, *indictment filed* (S.D.N.Y. Dec. 12, 2011), http://www.scribd.com/doc/75578125/DOJ-Indictment-Against-Former-Siemens-Executives-and-Agents [hereinafter *Indictment*].

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such as likely candidates for office. The government awarded Siemens the contract in 1998. Menem alone allegedly received sixteen million U.S. dollars. When Argentina was struck by the onset of a financial crisis, it suspended the costly DNI contract. Subsequent political turmoil ousted the Menem administration and instead brought Fernando de la Rùa to power. The new administration under de la Rùa maintained the decision to suspend the DNI contract in 1999. By then, work on the DNI project had already begun under the lead of subsidiary Siemens Business Services' (SBS) "major projects" sub-division and only a portion of the promised bribes had been rolled out. With regard to corporate illegality, we even found that a so-called "crisis management team" subsequently used similar means as managers in other Siemens divisions to revive the project and to circumvent administrative controls, such as complex transactions, financial intermediaries, and the use of about seventeen dummy companies. Quite unique was that the 'crisis management' included the corruption of arbitral proceedings between 2002 and 2007.[54] In view of Siemens' strict *Business Conduct Guidelines*, we have to assume that these actions violated formal terms of membership. As of the time of the guideline's revision in July 2001, we may assume that the employees' behavior was deviant and, by and large, illegal.

III. Goals and Incentives

Early in 2000, the board of the Siemens AG assigned Herbert S., a former CEO and then-chairman of Siemens Argentina, the task of reviving the DNI project "whatever the cost," according to internal communication.[55] Later in 2000, he teamed up with a Latin American expert and newly appointed Siemens board member Uriel S., and together they allegedly led Siemens' efforts to reboot the DNI project. Along with others, they decided to fulfill Siemens' prior bribe obligations. In order to continue with the corrupt practices, they persuaded the new administration to continue the DNI project. Whereas the prior practice had largely relied on so-called "black contracts"—unwritten contracts and cash or wire transfer of bribes via top managers—, now the meeting agreed to conceal the future flow of bribe money via sham ("white") contracts. Despite extensive lobbying and continued bribe payments, the Argentine government officially terminated the DNI project around May 2001—about the same time that Siemens AG listed on the New York Stock Exchange, thus becoming subject to U.S. jurisdiction with regard to securities law, particularly the FCPA. In this situation, the crisis management team led by Uriel S. was supposed to

> (i) ensure that Siemens recognized the economic benefits of the contract for the DNI project, notwithstanding its termination and the corrupt manner by which it had been procured, (ii) prevent public disclosure of the bribery associated with the DNI

[54] *Id*. at 22, 32.

[55] *Id*. at 18.

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> project, and (iii) ensure Siemens's ability to secure future government contracts in Argentina and elsewhere in the region.[56]

IV. The Unwritten Rules

In contrast to other Siemens divisions, the case in Argentina illustrates not only the known management problems[57] and organizational challenges[58] that render the control of useful illegality difficult, but also it highlights the informal adaptation to dynamic legal and political environments that eventually paved the way to thinking that the corruption of arbitral proceedings in two countries[59] would be useful for the company. The vicious circle of bribery and extortion increasingly blurred the boundaries of "deviant-but-still-legitimate" behavior. This process is less an outcome of supposedly rational cost-benefit calculation; it is rather a function of organizational cultures at Siemens that labeled corruption as "the topic,"[60] bribe agreements as "black contracts,"[61] and the conduit entities as "the project group"[62]—all semantic indications or variations of legitimate business conduct. Herbert S., as a member of the crisis management team, even tried to persuade the newly appointed CFO of SBS, Bernd R., to authorize bribe payments to Argentinean officials in 2002, arguing "that SBS had a 'moral duty' to make at least an 'advance payment' of $10 million to [Carlos S.] and the other payment intermediaries."[63] The disputable moral duty to stand to black contracts was backed by his claim that top managers and employees of Siemens Argentina had received threats because some promised bribes remained unpaid. According to the SEC's complaint, Bernd R.—who was not charged by the DOJ—sought guidance from Siemens' top management on the matter and he subsequently talked to

[56] *Id*. at 22.

[57] Pohlmann, *supra* note 40.

[58] Klinkhammer, *supra* note 46; POHLMANN & MARKOVA, *supra* note 40.

[59] The corrupt practices undermined both the procedural rules set by the International Chamber of Commerce (an international NGO) as well as the "procedural culture" of the respective jurisdiction. Joe Tirado, Matthew Page & Daniel Meagher, *Corruption Investigations by Governmental Authorities and Investment Arbitration: An Uneasy Relationship*, 29 INT'L CENTRE FOR SETTLEMENT OF INVESTMENT DISP. REV. 493 (2014); SEARCH FOR "TRUTH" IN ARBITRATION: IS FINDING THE TRUTH WHAT DISPUTE RESOLUTION IS ABOUT 77 (Marcus Wirth, Christina Rouvinez & Joachim Knoll eds., 2011).

[60] U.S. S.E.C. v. Sharef, No. 11-Civ.-09073, at 10, 11 (S.D.N.Y. Dec. 13 2011).

[61] *See* Indictment, *supra* note 53; Sutherland, *supra* note 15; Weismann, *supra* note 14.

[62] *See* Jury Trial Demand at 8, 9, U.S. S.E.C. v. Sharef, No. 11-9073 924 F. Supp. 2d 539 (S.D.N.Y. 2013), https://www.sec.gov/litigation/complaints/2011/comp22190.pdf.

[63] *Id.* at 14.

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> Siemens' Head of Compliance, Chief Financial Officer, Chief Executive Officer, and two members of the Managing Board, one of whom was defendant [Uriel S.]. In each instance, [Bernd R.] explained that the payment demands lacked any legitimate commercial basis and that he was reluctant to authorize them. In each instance, [Bernd R.'s] superiors gave every indication that they were familiar with the DNI Contract and with the nature of the payment demands. And in each instance, his superiors told [Bernd R.] that it was his responsibility to find a solution to the problem. [Bernd R.] understood these responses from his superiors to be an instruction that he authorize the bribe payments.[64]

As observed in other Siemens divisions, corruption served as the traditional informal remedy to amplified adaptation problems in Argentina. Of course, it is a particularly risky business environment and we have to take the personal gain on the demand side into account as well. It takes two to tango; so what about the personal gain of actors on the supply side?

V. The Actors

Although the above analysis of the DOJ indictment does not allege that Siemens' managers acted primarily for personal gain, we do find that the former Siemens managers Andres T. (Siemens Argentina) and Ulrich B. (SBS) were at the receiving end of shady transactions as well. They were consultants to Siemens at that time and thus, not part of the formal hierarchy anymore. Both individuals received three hundred thousand U.S. dollars after they threatened to compromise their former peers and partners in crime.[65] Their extortive behavior does not help explain the corrupt practices at Siemens Argentina, whereas paying "hush money" to its former employees might even represent useful illegality on behalf of Siemens. Despite the varieties of corruption in the shadow of Siemens' strict formal structure, Klinkhammer[66] found that all Siemens' managers who were tried in Germany had served the economic purposes of the corporation, and that none of them acted primarily for personal gain. Only one other individual experienced secondary personal gain

[64] *Id.* at 14–15.

[65] *Id*. at 47.

[66] Klinkhammer, *supra* note 46, at 202.

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similar to Andres T. and Ulrich B., thus here personal gain merely represents an adjunct to the predominant corporate crime on the system level.[67]

We do not find upward mobility among defendants in this case during the relevant period. Instead, all defendants—except the intermediaries—had long tenures with the company, from twenty-two up to forty-one years in 2001.[68] It would be difficult to argue that this case is structurally different from corruption at the center of the system because projects acquired in its periphery were "typically run out of Germany by units within the Siemens AG operating groups, with support, as needed, from regional companies."[69] In this vein, next to middle managers who assumed control and senior managers who executed the "dirty work," we also find top managers who were involved in the decision-making process with regard to corruption in Argentina. Similarly, board members of Siemens played minor parts in corruption cases at the business unit Siemens Automation and Drives (Hermann F., Günter W.) or were informed about the corrupt practices at the business unit Siemens Communications (Thomas G.). Despite the fact that neither the U.S. nor the German authorities were able to establish criminal responsibility at the highest corporate ranks such as Uriel S.,[70] Siemens successfully sought compensation from its former board members, including former CEO Heinrich von Pierer, for their violations of occupational duties with regard to effective anti-corruption.[71]

VI. The Outcome

During the relevant period from 2001 till 2007, Siemens AG lost more than three hundred million U.S. dollars due to corrupt practices in its regional offices or subsidiaries abroad—that is almost twenty-five percent of all dubious payments that were discovered as a result of the investigations. The corruption case at Siemens Argentina provides insight into the close cooperation among Siemens divisions with subsidiaries in Germany and its regional offices abroad. While the criminal cases filed by the DOJ were still pending at the time of writing, the SEC concluded its corresponding civil proceedings against individuals from the Siemens Argentina case. In the Siemens Argentina case, the SEC dropped the lawsuit against Carlos S. for reasons unknown, whereas it settled the charges against Uriel S.,

[67] *See*, Pinto, Leana, & Pil, *supra* note 38; Klinkhammer, *supra* note 46.

[68] Indictment, *supra* note 53, at 5–7.

[69] *Id.* at 3.

[70] The judge who dismissed the case against Uriel S. asserted procedural errors of the prosecution and argued that middle managers downplayed their own part by shifting the blame to superiors. *See* Cornelia Knust, *Richterin macht Sharef-Ankläger lächerlich*, Handelsblatt, May 30, 2014, *available at* http://www.handelsblatt.com/unternehmen/industrie/siemens-prozess-richterin-macht-sharef-anklaeger-laecherlich/9970032.html (last visited Mar. 6, 2015).

[71] Siemens AG, *Legal Proceedings Q4 FY 2012*, 3 (2012).

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Andres T., and Bernd R. without them admitting or denying any wrongdoing. Ulrich B. and Stephan S. were both ordered to pay $524,000 in penalties—the highest amount imposed on individuals under the FCPA up to that point. Ulrich B. was further ordered to pay $316,452 in disgorgement and $97,505 in interest for the hush money that he received.

VII. Conclusion

In view of these consistent findings—and drawing on Luhmann,[72] Pohlmann,[73] Pohlmann & Markova,[74] and Klinkhammer[75]—corruption at the system level can be explained as useful illegality by arguing that violations of occupational duties occurred due to their informal legitimacy as profitable actions for the good of the company.

E. How to Avoid Competition?—A Lesson Taught by *Telekom*

The corruption case of Magyar Telekom, the leading Hungarian telecommunications company and an almost sixty percent-owned subsidiary of Deutsche Telekom comprises two complex cases of bribery stretching over two countries (Macedonia and Montenegro, 2005–2006). Internal investigations as well as the investigations of the DOJ and the SEC revealed that besides Magyar Telekom executives, government officials, consultants, intermediaries, and a family member of a government official were engaged in the bribery schemes. For the purpose of this article, we concentrate on the Macedonian case, making just a few remarks on the Montenegro case to illustrate the entanglement of the two.

I. The Benefit

The purpose of the corruption scheme in Macedonia was to resolve concerns about legal changes that jeopardized the market leadership of the company's subsidiary Makedonski Telekommunikacii AD Skopje (MakTel). Hungary, Montenegro, and Macedonia have been in the past and still are today Magyar Telekom's core business regions.[76] In line with developments throughout the entire telecommunications industry, Magyar Telekom faced competitive pressures due to the liberalization of markets and a decline in its services prices, especially in its core regions. The resulting pressure to balance expected losses and to keep the businesses running is particularly evident in the 2005 annual report on Macedonia: "In the Macedonian fixed line operations outgoing domestic traffic revenues

[72] LUHMANN, *supra* note 1, at 304.

[73] Pohlmann, *supra* note 48.

[74] POHLMANN & MARKOVA, *supra* note 40.

[75] Klinkhammer, *supra* note 52.

[76] Magyar Telekom, Annual Report (2007).

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decreased due to lower usage, partly compensated by price increases in July 2004 and in August 2005."[77] At the same time the purchase of the former state-owned telecommunications company Telekom Crne Gore A.D. (TCG) in Montenegro seemed an appropriate strategy to compensate for the losses caused by the shift in market: "The consolidation of TCG's revenues in 2005 partly offset these decreases . . . From the second quarter of 2005, the consolidation of TCG's fixed line operation had significant effect on the results of the international fixed line operations."[78] It can be concluded that the bribes, totaling around 12.23 million euros, seemed to be at first a risky but profitable investment and therefore useful for Magyar Telekom's organizational goals.

II. The Illegal Behavior

The Macedonian part of the corruption scheme began its course in early 2005 when the Macedonian parliament enacted an "Electronic Communication Law" to liberalize the Macedonian telecommunications market. This was going to be disadvantageous for the formerly sole supplier, Magyar Telekom and its Macedonian subsidiary MakTel. Alarmed at the new resolution, Elek S., Magyar Telekom's Chairman and Chief Executive Officer (CEO), Andras B., Director of Central Strategic Organization, Tamas M., Director of Business Development and Acquisitions, and Greek intermediaries in their function as "lobbying consultants"[79] arranged a meeting with senior officials from both of the coalition parties of the Macedonian government at the end of January 2005 in Skopje. The executives "informed" the officials "that a third mobile license was not acceptable."[80] On 25 May 2005, after some negotiations, executives resolved their concerns with two secret agreements, entitled "Protocol of Cooperation,"[81] between the executives and the senior government officials. The Protocol of Cooperation stated that the government officials would stall the issue of a further mobile telephone license for the Macedonian telecommunications market or even prevent access to the market. Furthermore, the officials agreed to reduce other adverse effects of the new law on Magyar Telekom by ensuring that MakTel would not be obliged to pay increased duties. In return, the executives of Magyar Telekom arranged bribes of 4,875 million euros and a business opportunity for the officials, and concealed the illegal payments in the company's records by using sham contracts with consultants. The investigations by the company itself, the

[77] *Id.* at 10.

[78] *Id.* at 10, 16.

[79] Deferred Prosecution Agreement (DPA) at para. A–4, 13–14, U.S. v. Magyar Telekom, Plc., No. 11 Cr. 597 (E.D. Va. Dec. 29, 2011).

[80] *Id.* at para. A–7, 22.

[81] *Id.* at para. A–8, 25c.

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DOJ, the SEC, and other relevant entities involved[82] clearly demonstrated the illegality of the bribery scheme in a legal sense—e.g., since November 1997 Magyar Telekom was listed on the New York Stock Exchange and thus became subject to U.S. jurisdiction with regard to the FCPA. Nevertheless, it still has to be determined whether the actors' corrupt actions were accompanied by a breach of Magyar Telekom's formally specified conditions of membership.

Those membership rules were published in the form of a "Code of Conduct" by Magyar Telekom. In its 2005 edition, at a time when the bribery scheme already took place, this company sets out the ethical guidelines that ban illegal behavior.[83] Furthermore, with its stock market launch in 1997, Magyar Telekom committed itself to complying with the rules and regulations of the FCPA. We assume that the regulations of the FCPA and associated legal changes were communicated at least to the top-management level.

III. The Unwritten Rules

It remains to be determined how the deviant acts gained informal legitimacy as "useful" actions. As a result of the assumed anchoring in organizational cultures, no direct access to the unwritten rules of behavior is possible. Therefore, the jointly implicit expectations should be reconstructed in the present case with reference to the argument structure[84] of the perpetrators among themselves. Here, as well as the Siemens case,[85] it is striking that the offenders avoided the use of criminally loaded vocabulary to describe their apparently illegal operations. Instead, they always used semantic alternatives, which re-characterized the corrupt actions as economically profitable practices. An example of this is Elek S.'s refusal to reproduce a version of the "Protocol of Cooperation," arguing that the "special circumstances" surrounding the protocol justified his decision.[86] Likewise, one executive's wish "to avoid attracting too much attention,"[87] was the excuse used to obfuscate the true

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[82] Financial Supervisory Authority of Hungary, National Bureau of Investigation of Hungary, Public Prosecutor's Office of Macedonia, Supreme State Prosecutor of Montenegro, Central Investigative Chief Prosecutor's Office of Hungary, Bonn Public Prosecutor's Office of Germany. *See* Trace International, *Trace Compendium Magyar Telekom* (2015).

[83] Magyar Telekom, *Magyar Telekom Group Code of Ethics* (2005), *available at* https://web.archive.org/web/20051224144340/http://www.magyartelekom.hu/english/aboutmagyartelekom/sustainability/main.vm (last visited Jan. 26, 2015).

[84] LUHMANN, *supra* note 1.

[85] Julian Klinkhammer, *Korruption powered bei Siemens*, *in* NEUE WERTE IN DEN FÜHRUNGSETAGEN? KONTINUITÄT UND WANDEL IN DER WIRTSCHAFTSELITE 136 (Markus Pohlmann & Georg Lämmlin eds., 2011); POHLMANN & MARKOVA, *supra* note 48.

[86] *See* para. 26d, U.S. v. Magyar Telekom, Plc., No. 11 Cr. 597 (E.D. Va. Dec. 29, 2011).

[87] Complaint, S.E.C.ß v. Elek S., Andras B., and Tamas M., No. 11 Civ. 96459, 21 F. Supp. 2d 244 (S.D.N.Y. 2013) [hereinafter *Complaint*].

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purpose of the sham contracts, preventing bystanders from becoming aware of the illegal conduct. The illegal collusions were repeatedly described as "cooperations" in terms of performance and reward, which indicates that the offenders made use of cognitive justification mechanisms that allowed corrupt actions to appear rationally related to the economic purpose of Magyar Telekom. This could also be seen in corrupt actors' use of the terms "logistics"[88] and "Letter of Intent"[89] to designate the coordination surrounding bribes under the sham contracts.

These unwritten rules intervened as a protective mechanism especially at a time when Magyar Telekom was threatened with losses due to liberalization in the telecommunications markets and the interests of the organization were not achievable via formally recognized paths. By means of corrupt actions, Elek S. and other executives managed to defy the general trend towards liberalization of markets, which seemed to affect the telecommunications industry at large. Magyar Telekom was highly respected for these achievements in Germany.[90] Unlike situational corruption, the bribery schemes in both countries extended—network-like and set for repetition—over a long period and included bribes amounting to several million euros. The preceding and subsequent meetings concerning the signing of the "Protocol(s) of Cooperation,"[91] the persistent pursuit of the two-thirds majority in TCG, and the use of intermediaries also demonstrate that the decision to implement corrupt practices was carefully planned and did not arise out of a single situation due to a spontaneous decision. The offenders acted presumably in terms of their long-term intentions to secure benefits for Magyar Telekom and proceeded carefully with the "professional" settlement of the illegal transactions—by giving the secret agreements outside the company into the care of the intermediary[92] and by backdating the sham consulting contracts so as to conceal the illegal actions. It must be admitted—as

[88] *Id.* at 32.

[89] DPA, *supra* note 79, at para. A–7, 24.

[90] Reinhold Vetter, *Elek Straub: Der heimliche Star der Telekom*, Handelsblatt (Apr. 5, 2002), *available at* http://www.handelsblatt.com/archiv/der-57-jaehrige-ist-chef-der-ungarischen-matav-elek-straub-der-heimliche-star-der-telekom/2155012.html (last visted Mar. 6, 2015).

[91] The aspect of absolute secrecy is particularly evident in the following quotes: "At a meeting at the Holiday Inn in Skopje, Magyar Telekom Executive 2 [Andras B.], Magyar Telekom Executive 3 [Tamas M.], Greek Intermediary 2, Greek Intermediary 3, and various Macedonian officials discussed the Protocol of Cooperation and agreed to keep the existence and purpose of the agreement from others, including Magyar Telekom's auditors and the public." *See* Information, *supra* note 86, at para. 26b.

[92] As stated in the documents of the U.S. District Court for the Eastern District of Virginia: "The only executed copies of the two secret Protocols of Cooperation with the government officials were retained by Greek Intermediary 1, and the existence and true purpose of the agreements were unknown to anyone within Magyar Telekom and DT [Deutsche Telekom] other than Magyar Telekom Executive 1 [Elek S.], Magyar Telekom Executive 2 [Andras B.], and a relatively small number of additional participants." *See* Information, *supra* note 86, at para. 30.

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other researchers have observed—that Eastern Europe still offers an economically constricted post-socialist context that prompts some people to rely on informal exchange rather than legal channels for attaining prosperity.[93] The Magyar Telekom executives adapted their businesses to this environment by using corruption as a form of corporate strategy in this region. Nevertheless, the actors strived to carry out their actions surrounding the bribes in a way that the detection of illegal actions and subsequent negative consequences of criminal investigations for both the actors and the organization seemed unlikely. Therefore, the usefulness of the bribery scheme for the organization can be considered as independent of the offenders' actual motives.

IV. The Actors

Neither the court documents nor the press coverage reveal evidence of a direct financial gain. Instead, the court always justified the actions of the offenders on the basis of the commercial interests of Magyar Telekom: "During 2005 and 2006, certain senior executives . . . engaged in a course of conduct with consultants, intermediaries and other third parties, including contracting through sham contracts . . . *with the intention of obtaining business and advantages for Magyar Telekom*."[94] And further, "[C]ertain of the Magyar Telekom executives entered into a second Protocol of Cooperation with representatives of Macedonian Political Party B . . . *to obtain the same business and regulatory benefits for Magyar Telekom*."[95]

The plaintiff SEC also embeds criminal acts of the actors within its civil complaint in the entrepreneurial intention of the offenders: "*In their effort to secure the benefits sought by Magyar Telekom*, Elek S., Andras B. and Tamas M. also corruptly promised to provide a valuable business opportunity to the minority political party"[96] and further:

> Elek S., Andras B. and Tamas M. knew that all or a portion of the payments under the seven contracts described above would be used corruptly in furtherance of their offers to pay government and political party officials in Macedonia and Montenegro *for the purposes of influencing their acts and decisions, securing an improper advantage, or inducing them to*

[93] David Jancsis, *Imperatives in Informal Organizational Resource Exchange in Central Europe*, J. OF EURASIAN STUD. 1 (2014).

[94] DPA, *supra* note 79, at A–6, 20 (emphasis added).

[95] *Id*. at A–8, 27 (emphasis added).

[96] Complaint, *supra* note 87, at 9, 29 (emphasis added).

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> *use their influence, to assist Magyar Telekom in obtaining or retaining business* . . .[97]
>
> Elek S., Andras B. and Tamas M. failed to disclose to *Magyar Telekom's* auditors the existence of the Protocol of Cooperation, the Letter of Intent . . . and other documents . . . concerning the scheme to bribe Macedonian government officials and political party officials *to obtain secret competitive advantages and regulatory benefits*.[98]

Because no concrete evidence of direct personal enrichment can be found, it will now be discussed how the offenders could have achieved indirect financial benefits or an intangible benefit. In an organizational context, the latter could first of all be analyzed in terms of upward career mobility and the position sequences of the offenders during and shortly after the bribery took place.

Andras B. went from being an officer in the "Central Strategic Organization" to the head of the same department in 2004. Admittedly, this happened *before* the first major economic event for Magyar Telekom that was apparently linked to the bribery scheme (the acquisition of TCG in Montenegro in the end of 2004). The other alleged criminal events in the years 2005 and 2006 also seemed to have no prompt influence on Andras B.'s career until his exiting from office on 8 August 2006. Rather, the fact that Andras B. remained in his position as head of the Central Strategic Organization for the duration of the criminal events demonstrates that the bribery scheme did not boost his career. Following a rational choice perspective it remains questionable whether the high (criminal) costs that Andras B. was risking by a possible detection of illegal activities could outweigh the expected individual benefit. For Tamas M.—who started his career at MakTel as a member of the Board of Directors in February 2004—the situation was different. He was later appointed head of Business Development, and went on to make two further career moves within the relevant period of bribery. Particularly interesting, he became a member of the Board of Directors in TCG in April 2005, shortly after the successful completion of the two-thirds takeover of TCG by Magyar Telekom had occurred. Although Tamas M. was not accused of any financial enrichment, a (intended) relationship between Tamas M.'s commitment in the bribery affairs and relevant steps in climbing the corporate ladder cannot be denied.

Of particular note is the situation of Elek S., the current CEO of Magyar Telekom, while the bribery scheme took place Elek S. enjoyed high recognition during his ten-year tenure as CEO and Chairman of Magyar Telekom, not only within the Deutsche Telekom-group, but

[97] *Id*. at 19, 66 (emphasis added).

[98] *Id*. at 20, 68 (emphasis added).

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also in social circles. In 1999, he was elected "CEO of the Year" in Hungary and, in 2000, "Emerging Markets CEO of the Year" by ING Barings—a financial investments member of the ING bank group—and *Emerging Markets*, a financial journal.[99] Then, in 2004, he was awarded with the First Class Cross of Distinction of the Order of the Federal Republic of Germany and the Officers Cross of the Order of Merit of the Republic of Hungary[100] in the same month by the acting president of Hungary for his valuable contribution to the expansion of the Hungarian information society and telecommunications industry.

Before the bribery scheme took place, Elek S. had already accomplished much and had reached a high position—holding a long-term employment contract to lead Magyar Telekom that was designated to run until he would be close to retirement age. He was widely recognized both inside and outside the company for his accomplishments. This fact weakens the commonly made argument that it might have been his career aspirations, a desire for further power, or pursuit of general fame that motivated him in the bribery scheme.

V. The Outcome

The DOJ charged Magyar Telekom with one count of violating the anti-bribery provisions of the FCPA[101] and two counts of violating the books and records provisions of the FCPA.[102] On 29 December 2011, the board of Magyar Telekom and the DOJ entered into a two-year deferred prosecution agreement. The company agreed to pay a combined $63.9 million penalty to resolve the FCPA investigation and settle the SEC charges, which additionally made up more than $31.2 million in disgorgement and prejudgment interest.[103] No final judgment has yet been made in the civil lawsuits against Elek S., Andras B., and Tamas M.

[99] Deutsche Telekom, *Press Releases* (Sep. 26, 2000), *available at* http://www.telekom.hu/about_us/press_room/press_releases/2000/september_26 (last visited Mar. 6, 2015).

[100] SEC, *Report of Foreign Private Issuer* (Dec. 5, 2006), *available at* http://www.sec.gov/Archives/edgar/containers/fix049/1047564/000110465906079414/a06-25043_26k.htm (last visited Oct. 16, 2015); Matáv Group, Annual Report, 13 (2004).

[101] 15 U.S.C. § 78dd–1; DPA, *supra* note 79, at 1.

[102] 15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(5) & 78ff(a).

[103] DOJ, *Press Release* (Dec. 29, 2011), *available at* http://www.justice.gov/opa/pr/magyar-telekom-and-deutsche-telekom-resolve-foreign-corrupt-practices-act-investigation-and (last visited Oct. 16, 2015); Final Judgment, SEC v. Magyar Telekom, Plc. and Deutsche Telekom, AG, No. 11CIV9646 (S.D.N.Y. Jan. 3, 2012).

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F. Conclusions

This article aimed to clarify which rules take effect when high-ranking employees pay bribes. Although the bribe takers were not themselves analyzed, what has been revealed is that the stories behind active corruption differ from crimes where personal gain is the driving force. While bribe-taking could more simply be explained within the dominant rational choice perspective, an explanation of active corruption requires a radically different approach that offers mechanisms beyond personal gain, wealth grab, or individual greed at the expense of an organization. To this end, it is worthwhile to revive Luhmann's old sociological concept of useful illegality. We embedded it into an institutional theory approach, and subsequently examined its applicability to recent cases of major FCPA violations. Further, we defined a set of indicators that allows us to compare cases of active corruption and to decide whether they qualify as organizational deviance.

The cases above illustrate a similar pattern with regard to their modus operandi: The crimes were committed by members in high-ranking positions and in pursuit of the organizational purpose. Bribe-paying as illegal behavior was usually supported by the unwritten rules within the organizational field and by organizational cultures. What is puzzling is that the actors were complying with the unwritten rules of the organization even though they deviated from its formal rules and from the law. Unlike cases of individual deviance in organizations, the perpetrators here were hardly disloyal, but in fact remained loyal to their employer. If they were not highly committed, they probably would not have resorted to using illegal means on behalf of their organization, given the high stakes and increasing personal risk. Thus, the rules behind this type of organizational deviance are completely different from those behind organized crime. Personal benefits were usually backed by the incentive structures of the organization. The few instances of personal gain occurred in the wake of organizational deviance that provided the necessary opportunity structure. We conclude that both corruption cases are to be classified as organizationally-useful illegality.

In the remainder of this section, we discuss the explanatory power of our approach in view of three methodological issues. We also delineate four theoretical implications for the social control of bribe payers.

First, we are not yet in a position to assert that our findings in the two case studies can be methodically generalized or that they reveal a pattern behind corporate corruption. However, we have collected thirty cases of corporate bribery from the last two decades where the FCPA was violated and sufficient administrative data from U.S. authorities was available. Five of those cases have been analyzed so far. Measured by our set of indicators, all five case studies of bribe-paying reveal the same pattern of organizational deviance, which we call organizationally-useful illegality (see table 1). Only in rare instances were personal gain and upward mobility detected among the already high-ranking defendants. If the same holds true for the remaining twenty-five FCPA cases, this would validate our

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concept of useful illegality for known criminal cases of active corruption among big companies listed on U.S. stock markets. Of course, the case study method is vulnerable to the selection biases of the relevant law enforcement agencies in this regard. However, it is of high scientific relevance to find a sound explanation for this partial population of corporate corruption before extending the empirical observation to other jurisdictions, and to populations that we initially excluded from our analyses, such as non-issuers and small and medium-sized enterprises.

Table 1: Comparative Findings from Five Case Studies on Active Corruption[104]

Company (Country) / Indicators	Siemens PG (Italy)	Siemens SA (Argentina)	Magyar Telekom (Macedonia)	Magyar Telekom (Montenegro)	Willbros Group (Nigeria)
Organizational Benefits	✓	✓	✓	✓	✓
Personal Gain (N. of Actors)	0/2	2/7[105]	0/3	0/3	1/6
Upward Mobility	0/2	0/7	1/3	1/3	1/6
Unwritten rules and Incentive Systems	✓	✓	✓	✓	✓

[104] We compare the cases country-wise, even if they were tried as a whole before the court.

[105] Carlos S., the main financial intermediary for Siemens in Argentina, was omitted from this analysis because he was only loosely coupled to Siemens in terms of membership. He probably received about 7.5 million U.S. Dollars—but we do not know to which end, to personal or organizational gain. *See La Nación* (Dec. 27, 2013), http://www.lanacion.com.ar/1651137-el-caso-de-los-dni-procesan-a-17-directivos-de-siemens-por-el-pago-de-sobornos (last visited Mar. 6, 2015).

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Second, with regard to methodological issues, it is questionable whether we have sufficient internal validity to make a case for useful illegality. Our five case studies show that we have to take the legal debates and concerns seriously.[106] A document analysis that observes and interprets "social control agent actions to determine what behaviors are wrongful"[107] is definitely a good starting point, but we need additional sources to cross-validate the reconstruction of events. Where first-hand accounts are missing or fragmented in public documents, it would be worthwhile to use complementary methods of qualitative research in the future—for example, post-settlement, problem-centered interviews with the alleged perpetrators. Although it might seem more reasonable to stick with the judicially-validated case law, we believe that the sociological view needs to evolve from the legal interpretation. This enables us to make good use of the facts that help reveal the social mechanisms that, in turn, explain the perpetuation of structural corruption in a formal legal corporate setting.

Third, it is often questioned whether bribe payers act primarily because of altruistic motives, if not for undisclosed personal gain. According to Pinto et al., individuals caught in organizational deviance-type corruption "typically defend their actions by stating that they were doing what was best for others—for example, shareholders, employees—or carrying out the orders of superiors. Both of these fit into a good soldier self-conception."[108] The truth of this is unclear because through analyzing the output of social control agents, we cannot be sure about the true motives of the defendants. What we do know is a lot about what they did and what they did not do. Prosecutors, judges, and private investigators did not find enough evidence to prove that there was undue enrichment of the bribe payers in the cases above. Why then did the perpetrators not take advantage of an often-convenient opportunity structure? Often they had already reached their highest possible rank in the firm but, of course, there are bonus systems, stock options, reputation effects that have to be taken into account too. Thus, we do not argue that personal interest or personal gain should be excluded entirely as a factor that helps to explain bribery. We did find that the personal gain involved was, in most cases, either secondary—for example, unrelated to bribery—or acknowledged by the organization's incentive systems. To quote Lessig again: "As long as they acquire those advantages in ways that do not undermine the organizational goals, they are simply doing their job."[109]

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[106] MIKE KOEHLER, THE FOREIGN CORRUPT PRACTICES ACT IN A NEW ERA (2014). Vincenzo Dell'Osso, *Empirical Features of International Bribery Practice: Evidence from Foreign Corrupt Practices Act Enforcement Actions*, *in* PREVENTING CORPORATE CORRUPTION 204–07 (Stefano Manacorda et al. eds., 2014).

[107] DONALD A. PALMER, NORMAL ORGANIZATIONAL WRONGDOING: A CRITICAL ANALYSIS OF THEORIES OF MISCONDUCT IN AND BY ORGANIZATIONS 31 (2012).

[108] Pinto *et al.*, *supra* note 38, 690; Thomas S. Bateman & Dennis W. Organ, *Job Satisfaction and the Good Soldier: The Relationship between Affect and Employee "Citizenship,"* 26 ACAD. OF MGMT J. 587 (1983).

[109] Lessig, *supra* note 39, at 6.

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An institutional explanation does not provide a psychological explanation of true motives. It merely provides a sociological diagnosis of those rules that are acknowledged within an organization that may enforce unlawful behavior. Furthermore, an institutional explanation can make a new post to previous research, which has analyzed the problem of useful illegality and the importance of particularistic or implicit norms in the context of a principal-agent relationship[110] or "strategic ignorance"[111] of the companies' top management. Against this methodological backdrop, we are now able to outline how the emergence of organizational deviance in the form of organizationally-useful illegality in big companies can be explained. Borrowing again from new institutional theory, we stress the following four factors:

(1) The "everybody did it" factor: It is obvious that during the 1990s and early 2000s, bribery was still widely regarded as a both a prerequisite for doing business abroad and a trivial offense, especially because the bribery of foreign officials had long been legal or even tax deductible in Germany and other OECD countries. Like the research group "Crime and Culture," we proceed from the assumption that the perceptions of corruption, determined by "cultural dispositions," have significant influence on a country's or an organization's respective awareness of the problem.[112] Referring to that commonly acknowledged spirit of corruption might help to explain why bribe paying was a highly legitimate and common deviant behavior in businesses like *Siemens* and *Telekom*. Changes within the organizational cultures that had internalized the spirit of corruption did not occur prior to scandals that started in 2006 and even later.

(2) The "To put a ban on bribery will be sufficient" factor: The *Siemens* and *Telekom* cases illustrate how implementing new regulatory institutions with severe negative sanctions may not be sufficient deterrents. They were not able to address the unwritten rules that legitimized this kind of organizational wrongdoing. Regulatory institutions such as laws, formal rules, and codes of conduct can easily be changed by a decision. Cultures, with their unwritten rules, cannot be changed so easily.

(3) The "being a Siemens Man" factor: Even more than Telekom, Siemens was well known for its strong organizational culture. Personnel were very proud to work for Siemens, and many families did so over a number of generations. The stronger the organizational

[110] Graeff, *supra* note 32.

[111] Rainer Dombois, *Von organisierter Korruption zu individuellem Korruptionsdruck? Soziologische Einblicke in die Siemens-Korruptionsaffäre*, *in* DER KORRUPTIONSFALL SIEMEN: ANALYSEN UND PRAXISNAHE FOLGERUNGEN DES WISSENSCHAFTLICHEN ARBEITSKREISES VON TRANSPARENCY INTERNATIONAL DEUTSCHLAND 131 (Peter Graeff, Karenina Schröder & Sebastian Wolf eds., 2009).

[112] DIRK TÄNZLER, KONSTADINOS MARAS & ANGELOS GIANNAKOPOULOS, THE SOCIAL CONSTRUCTION OF CORRUPTION IN EUROPE 1 (2012).

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culture, the more important the unwritten rules in an organization become. Although most companies would like to cultivate such an established culture, they have to consider the associated risks of corruption and organizational deviance.

(4) The "Organization Man" factor: All the high-ranking managers involved in the five cases under scrutiny spent long periods of their careers with their companies. They were loyal insiders without relevant criminal records, well socialized in the company, and committed to organizational goals. These company men internalized the unwritten rules of the company. Although unlawful and extremely risky, these rules became natural for the actors.

These four factors are compatible with some of the predictions of institutional theory and the early Luhmann's works. Organizations are in need of deviant behavior that is useful and legitimate. Formal compliance rules and measures become, in some cases, facades that organizations use as window dressing. According to new institutional theory,[113] the real operations in an organization are supposed to be different from the formal rules that make up the facades. For actors socialized in an institutional environment, the unwritten rules become natural ones. The more "institutionalized" they are, the less they will be questioned.

This is why, according to early Luhmann and institutional theory, it is a challenge to fight against useful illegality. It is an illegal but informal compliant behavior by high-ranking executives that is in line with the organizational purpose. Thus, the successful fight against useful illegality is mainly a function of the self-control of the organization and its self-regulatory capacities. Laws, compliance measures, and formal compliance rules can help but they are not sufficient. According to institutional theory, they do not help because of deterrence and tougher penalties, but they add to the pressure to adapt to their new order. The wider the gap between the formal rules, the laws, and the actual operations in an organization, the higher the probability that deviant behavior will be scandalized. When the pressure arises to adapt to the rules, steps towards delegitimizing the unlawful and unwritten rules at work will be taken. However, deeper and broader organizational development and changed incentive systems will be necessary to support this change in organizational cultures and, as we know, this takes a long time. An optimist may believe that there is just a cultural lag at work and the problem of corruption will eventually vanish in the future, but it is unlikely that organizational deviance will disappear.

[113] Meyer & Rowan, *supra* note 40; Powell & DiMaggio, *supra* note 40.

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