



Spotlight on the Netherlands – Marike Bakker

[00:00:08] Welcome back to the podcast Bribe, Swindle or Steal. I'm Alexandra Wrage and my guest today is Marike Bakker. Marike is a partner with NautaDutlih in Amsterdam. She specializes in internal investigations and defending corporate clients in complex criminal and regulatory matters. Thank you for joining me, Marike.

[00:00:27] It's my pleasure.

[00:00:28] Five years ago, the OECD hit the Netherlands pretty hard for inadequate enforcement, but a lot has happened since then. Can you review some of the highlights for us? Why is it the Netherlands are suddenly right at the forefront of enforcement?

[00:00:46] I like to believe that because of the OECD report, but frankly, I think that we just got a little lucky. I think that, since the OECD report, a lot of foreign bribery investigations have been initiated by the Dutch Public Prosecution Service, and a few of them involve investigations of the U.S. authorities as well, like the SBM Offshore case, the VimpelCom case, the Tilia company case. I think it's because of the U.S. involvement and the global enforcement and cooperations between the U.S. and Dutch authorities. It is why the Dutch were able to step up the way they did in the enforcement of foreign corruption.

[00:01:38] It's interesting, though, because the U.S. is willing to cooperate with any OECD country - or any country, for that matter - to advance anti-bribery enforcement, but for some reason, it really worked with the Dutch authorities. Do you have any insight into a special relationship, or is it just coincidental that there were so many cases in such a short time?

[00:01:59] I think that's partly because, coincidentally, there were a lot of cases with the Dutch nexus. The Netherlands is an exporting country, so a lot of Dutch companies have subsidiaries in other jurisdictions, amongst which are high risk jurisdictions. Also, the Dutch authorities are very pragmatic in the way they work together with other authorities. Back then - but still now - we do not have a lot of guidelines like the U.S. have under the FCPA to enter into settlement or large settlement with companies, so I think we just adopted the U.S. approach, basically.

[00:02:49] Let's work through some of these cases. If you could give us an overview - maybe we'll start with the SBM Offshore case that was resolved in November of last year. US\$238 million. Could you give us a sense of misconduct there and how the enforcement action unfolded?

[00:03:11] Actually, the SBM Offshore case is a good example because it's, I think, the first large global investigation into foreign corruption in which the Dutch have participated. In fact, it's the first, and as far as I know, the only case in which the U.S. authorities - at least in first instance - were prepared to step back and to let the Dutch authorities enter into a DPA with SBM Offshore. Of course, we know now that the U.S. did the second round and that SBM Offshore is under enforcement and under investigation of the U.S. authorities as well, or at least was. But I think it all started with SBM in the Netherlands.

[00:04:01] Why don't we turn to the KPMG matter. That resulted in a 7 million-euro fine and I think was surprising to the compliance community. Can you help us understand the facts of that case?

[00:04:14] KPMG was being fined or entered into a settlement with regard to their audit client, Ballast Nedam. It's a building construction company, a Dutch building construction company. Ballast Nedam was suspected of having bribed officials abroad, and the public prosecutor took the view that KPMG, or at least the accountants of KPMG, knew about that and approved of the financial accounts of Ballast Nedam and issued an unqualified opinion with these financial accounts. Ballast Nedam entered into a settlement, KPMG entered into a settlement and the public prosecutor decided to go after the individual accountants that handled Ballast Nedam as an audit client. It's just late-breaking. I think two, three weeks ago that the District Court in the Netherlands rendered judgment saying that the public prosecutor's office is not allowed to prosecute these individual accountants because one of the reasons being that KPMG was offered the possibility to settle. Ballast Nedam was offered the possibility to settle. It was not fair to not give this possibility to these individual accountants. Another factor that was taken into account by the district court is that the responsible executives at the time at Ballast Nedam - the case against them was even being dismissed. Actually, I think the Legal was quite surprised by this judgment because it goes into the policy adopted by the Dutch Public Prosecutor Service, further to the Yates memo, to offer a settlement or a DPA to the company and to go after the responsible executives, so that's quite surprising, actually.

[00:06:35] It seems surprising. Companies have an incentive to settle, but a big part of the reason that enforcement agencies will accept a settlement of a company is because they do, in fact, offer up the culpable individuals. It doesn't work in quite the same way when you're offering a settlement to the individuals themselves.

[00:06:55] That's right, but we should bear in mind that it was a very old case and that there were a few other factors that the court took into account. For instance, the public prosecutor did negotiate a settlement with the individual accountants under the condition that they had to get the approval of the head of the Public Prosecutor Service, but the money was already in the bank account of the Public Prosecutor Service. When the public prosecutor came back to the individual accounts saying, "We don't have any approval, so here's your money back," that was also a factor taken into account by the court.

[00:07:42] You very kindly spoke at a TRACE event recently in Amsterdam, and I recall that you commented then that there seems to be a shift in attention towards gatekeepers. KPMG is, of course, one example of that, but do you see that as a surprising trend?

[00:07:58] I'm not sure if it is surprising because the head of the Public Prosecution Service in the Netherlands has actually announced this in a newspaper that, further to going after the responsible companies and executives, the policy is to go after the gatekeepers. We have some recent examples of that. Further to VimpelCom and Telia Company, EY and ING are now being investigated and targeted by the Dutch Public Prosecution Service, and that's mainly for BSA/AML compliance. Both gatekeepers are being under investigation because the public prosecutor believes that they should have reported the transactions VimpelCom and Telia entered into and the money flows as what we call a suspicious transaction to the Financial Intelligence Unit in the Netherlands, which, apparently, they didn't. Not reporting where you're supposed to report constitutes a criminal offense under Dutch law, and that's partly where the investigation is now focused on.

[00:09:19] It's interesting, particularly in light of the problems KPMG is facing in South Africa right now. I think enforcement agencies seem to follow trends, and I think this gatekeeper trend is one we're seeing elsewhere. You've mentioned Vimplecom and Telia. Let's turn to those now because those, of course,

are the largest and best-known cases involving the Dutch authorities now. Perhaps you could start by talking through VimpelCom and that US\$800 million enforcement action.

[00:09:52] Let me start by saying that I represent Telia company in the Netherlands, so I know a lot about the case and also about the VimpleCom case but, of course, I can't share all these details. But VimpleCom entered into a settlement, I think, in February 2016 with the U.S. and the Dutch authorities. The set of facts underlying the settlements are more or less comparable to the Telia Company case. They used the same company in Gibraltar and, basically, the public prosecutor both in the U.S. and in the Netherlands hold the view that both companies paid money to be able to enter into the Uzbek markets and to be able to get licenses and number blocks to be a provider in that country, whereas in the VimpelCom case, only two jurisdictions were involved: the Netherlands and the U.S. In the Telia Company case, we had three jurisdictions, and that's why it took a little longer also, before Telia was able to enter into a global settlement. We also had the Swedish authorities involved. As you may know, Telia Company is a half-Swedish, half-Finnish company, and the public prosecutor in Sweden - not being able to investigate and prosecute companies - is conducting an investigation into the responsible executives at the time at Telia Company, whereas the Dutch and the U.S. part of the investigation focuses on the company. In the U.S. and in the Netherlands, it's possible to prosecute and also to enter into settlements with companies.

[00:11:56] I think most people listening will be aware of the Telia case, and many will know the countries involved and the huge sums of money involved, but can you just describe for us the underlying misconduct, the scheme that led to the settlement?

[00:12:16] Basically, what the view of the public prosecutor and the other authorities, including the SEC, is that both VimpelCom and Telia Company paid large bribes to the daughter of the then-president in order to be able to enter the Uzbek market. That's basically what the suspicions were, so that resulted in suspicions of bribery of foreign officials and also in books and records offense, both in the U.S. and in the Netherlands. The difference in the settlement conditions that's worth mentioning, I think: In the VimpelCom case a monitor was imposed, be it by the U.S. authorities and not by the Dutch because the Dutch system does not allow as such for a monitor, but in the Telia case, no monitor was imposed, and that was mainly because Telia had already an enhanced compliance program in place and, also, Telia had made the decision to divest all operations in the so-called Eurasia region. That was a remarkable difference, I think, in terms of the conditions of the settlements in both cases, but also quite recently happened in the Netherlands talking about a monitor. Like I said, the Dutch law does not as such allow for imposing a monitor as part of a DPA, but it was only a few weeks ago in the Dutch financial newspaper - it was being reported that, in the ING case I was just referring to - that's both U.S. and Dutch enforcement and, apparently, settlement negotiations are ongoing. Rumor has it that the Dutch authorities require, as part of the settlement with ING in the Netherlands, to impose a monitor. We're all monitoring that quite closely, if you will, to see what the outcome of this settlement is because that would be unprecedented in the Netherlands. Frankly, the question is what the legal basis is for such a monitor.

[00:14:56] How is the role of the Americans perceived by the Dutch legal community? Is it considered overbearing and bullying, or is it really a strong relationship and considered collaborative and productive?

[00:15:10] I think that depends who you ask, Alexandra, but I think both is true. "Bullying" would not be the word I would be using, but I think that the cases we just discussed show that the U.S. is in the lead. Even if it's a global investigation and a global resolution in the end, it's still the U.S. setting, under the FCPA guidelines, the amount of the fines and the amount of the disgorgements to be imposed on the company. And, yes, the Dutch will then get a fair share of that and other jurisdictions involved as well, but because of the fact that we don't have any FCPA guidelines, we do have guidelines for calculating disgorgement in the Netherlands, but we do not have any guidelines in the Netherlands for calculating the fine. I think that doesn't really help in getting more of the lead in these kinds of discussions.

[00:16:29] That all makes sense. One area, though, where the Dutch are following the lead of the Americans - and you're not alone in this, we're seeing this in a large number of countries - is the use of deferred prosecution agreements, DPAs. How is that working in the Netherlands, and how is that tool perceived in the legal community there?

[00:16:50] I guess it also depends on who you ask. There's a lot of criticism lately on these large settlements because even representatives of the community of judges, they criticize these large, out-of-court settlements and feel that these cases should be put to court or, at least that for such large settlements, the approval of judges is required, but we don't have any judicial review. It's just a settlement between the Public Prosecutor Service and the company. We do have some lessons learned from the recent DPA. The instrument of DPA is very old in the Netherlands, but the way it's being used in the foreign corruption cases is a remarkable, I think. Like I said, we don't have any guidelines, so that means that if a company asks my advice - "Look, we may have suspicions of foreign bribery. Should we self-report to the Dutch authorities, and what's in it for me as a company?" - it's very difficult to advise because, in the U.S., you can tell your clients, "If you self-report and you cooperate and you remediate, that will give you a discount ranging from X percentage to Y percentage." In the Netherlands, you can only tell your client, "We need to go in and hope for the best," because we don't have any of these guidelines. On the other hand, if you look at the recent cases, the large settlements the companies entered into with the Dutch Public Prosecutor, and if you look at the press releases the Dutch Public Prosecutors Service issued, you see that self-reporting cooperation and remediation is also - even without a clear policy or guideline - is considered to be very important, even as a requirement to be able to enter into a settlement. Unlike in the U.S., in the Netherlands a lot of companies are still being prosecuted and being brought before the court for corporate misconduct. What the public prosecutor is actually saying, "Look, if you want to enter into a settlement, you need to cooperate, you need to remediate and you have to have an enhanced compliance program in place because, otherwise, we're not going to offer you an out-of-court settlement, and we will bring you to trial." I think, in the end, the same factors as in the U.S. are taken into account in the Netherlands, also in terms of calculating the amount of the fine, but it's just not written and clear policy in the Netherlands.

[00:19:58] Which has got to be a little bit unnerving for companies operating there. If it's difficult to predict the way the enforcement agents will respond, it's difficult to advise companies accordingly, but just to wrap up, I'll ask you to do that. If you were speaking to a multinational company, a non-Dutch company, looking to extend its operations into the Netherlands, what advice do you have for them in the current climate?

[00:20:24] I'd say you'd be very welcome. We have a very political, stable climate, and a lot of foreign companies actually have their headquarters in the Netherlands, but you just have to make sure that you

have an internationally accepted compliance program in place before starting up in the Netherlands, I think.

[00:20:47] There's really a sense now that best practices apply that the expectations for a company operating in the Netherlands are as high as anywhere in Europe, perhaps higher than most places.

[00:21:01] I totally agree, and that is partly because of the increased enforcement and attention of the Dutch authorities, and partly also because a lot of companies that are based in the Netherlands also fall under the jurisdiction of the UK or the U.S., so they also need to be compliant under the UK Bribery Act and the FCPA. That actually calls for an international approach on compliance.

[00:21:33] We really are seeing the internationalization of these standards. I know we've been talking about it for a number of years, but when we see this level of enforcement in a country like yours, in concurrent with what's going on in Brazil and elsewhere, there was a time when we were only sitting around and talking about U.S. enforcement. That's just not the case anymore, and I understand that VimpleCom and Telia were enforced in conjunction with - in partnership with - the Americans. But one of the things that we learned from the German experience - and particularly that of the Munich prosecutor's office after the Siemens case - is prosecutors learn how to make these cases and get an appetite for these cases, and then it takes on a life of its own, and soon, they can be prosecuting them without the partnership of the Americans.

[00:22:22] We are very anxious to see what will happen with anti-bribery investigations of foreign anti-bribery investigation without U.S. involvement to see whether the Dutch authorities will still be applying the same approach as they are doing in cases where they worked together with the U.S. authorities. We have a few examples pending without U.S. involvement, but they are still in the investigation stage, so it's hard to predict the outcome of them, but I agree that the awareness has increased a lot, and they know how to do it. They really adopted the American approach pretty quickly, so to say.

[00:23:11] It will be interesting to watch and, as you say, these independent cases will be the real barometer of the of the way forward for the Dutch compliance community. Thank you so much for your time today, Marike, and for NautaDutlih's support of TRACE as our longstanding partner firm there in Amsterdam.

[00:23:33] It's my pleasure Alexandra.

[00:23:35] Thank you.