

# BRIBE, SWINDLE OR STEAL



## Spotlight on the UK – Michelle de Kluyver

[00:00:08] Welcome back to the podcast. I'm Alexandra Wrage, and I'm in London today talking about the U.K. Bribery Act and the compliance landscape here with Michelle de Kluyver. Michelle is a partner with Addleshaw Goddard's corporate crime and investigations team. She has extensive experience in complex cross-border crime investigations, including bribery, money laundering and fraud. Michelle has been a great supporter of TRACE, traveling for our events to locations as far flung as Dubai and Manila for which we're very grateful. Michelle, thank you for joining me.

[00:00:39] Thank you very much, Alexandra.

[00:00:41] Most people listening will be generally familiar with the U.K. Bribery Act, but perhaps you can summarize some of the highlights - and especially the features - that distinguish this law from similar laws in other countries.

[00:00:54] I think there are probably three differences to highlight, and certainly we saw this when the Bribery Act came into force that these were the three areas that international companies were really focusing on changing in their compliance programs. Very importantly, in terms of what amounts to bribery, the U.K. Bribery Act does cover commercial bribery. There are many jurisdictions where bribery is really focused on bribery of public officials. The U.K. Bribery Act does include bribery of foreign officials, but commercial bribery is also illegal.

[00:01:35] Can you just give us an example of purely commercial bribery? Because this does distinguish the U.K. Bribery Act from older laws, like the US FCPA.

[00:01:44] Right. An example might be where a company is bidding for a contract, and it in some way influences the procurement process and obtains a valuable contract from a purely commercial counterparty. There may be no public officials involved in the procurement side at all.

[00:02:06] If we can just stay with that for a minute, what do you think is the public policy behind that? I know in the United States, the sense was that if there was bribery of foreign officials, that was something that the citizens of foreign countries needed to be protected from. But pure commercial-to-commercial bribery seems a considerable step farther.

[00:02:27] I think the idea behind it is that business should be conducted on a fair playing field. It's almost an extension of competition law, which is really to say that if there are a number of commercial parties competing for the same business, it's not right as a matter of public policy if one of those commercial parties wins the business by effectively corrupting people who are awarding those contracts. I think bribery in the U.K. is very, very focused on the notion that if you're working for an employer - say you're on the procurement side, and you're working for an employer - you owe your duties to the employer to do the best possible thing for your employer. Obviously, if someone gives you a bribe, and you choose somebody who's not the best counterparty but you choose them because you've received a kickback, that's a breach of your duty and your responsibility to your own employer. The law sets itself against those kinds of behaviors.

[00:03:30] That makes a lot of sense. I should point out that in the United States, for example, the FCPA wouldn't capture that conduct, but there are other American laws that would, but I stopped you before you could complete your comparisons.

[00:03:42] I think the other important element is that the U.K. Bribery Act doesn't distinguish between payments and facilitation payments. Facilitation payments are capable of constituting bribes in this jurisdiction, which is obviously different from the FCPA.

[00:04:01] Do we think it's very likely that they will be prosecuted for facilitation payments?

[00:04:06] Well, we constantly probe the Serious Fraud Office on these issues. The Serious Fraud office is the organization that is primarily responsible for enforcing the Bribery Act. I think it's probably fair to summarize their response as, "Never say never." I think if in relation to occasional facilitation payments, where people are unduly pressured, provided they're recorded and proper compliance follows the escalation of that information to the company - I mean, you'd be unlucky if you were prosecuted. However, if there is systematic and systemic payment of facilitation payments, that would be looked at differently. The mere fact that they are small payments in the nature of grease payments doesn't mean that they can't also be as effective as - let's put it this way - normal bribes, in inverted commas.

[00:05:03] The cumulative effect, as you say, can be quite substantial, and we've had a recent change at the top - the Serious Fraud Office - and prosecutorial priorities can change as well. Having it on the books, even though I think it's not more worrying aspects of the U.K. bribery act, is still something people have to keep an eye on.

[00:05:22] I think the Serious Fraud Office recognizes that it's very hard to eliminate demands for facilitation payments across the world, and that is something they can take into account in exercising their prosecutorial discretion - whether or not to proceed with a prosecution. But there is a line that they draw, and if it just looks like old-fashioned bribery and that there isn't a real drive towards compliance in the company, I think they might exercise their discretion to proceed. Then I would say the third element of the Bribery Act, which really mobilized companies on the compliance front, was the introduction of what is called Section 7 Bribery Act offense. Sometimes it's referred to as "the corporate offense." Now, this isn't an offense of bribery. What it is a standalone criminal offense that says if somebody who's associated with you - and that just means somebody who's providing services to you. It doesn't matter whether they're an agent, a business partner, distributor. It really is a substance over form test. If that person bribes somebody to obtain business on your behalf, then you are responsible for failing to prevent bribery. There is a defense, and that is what is called the "adequate procedures" defense. That's all about compliance. It's all about being able to demonstrate that you had proportionate compliance systems in place - and, of course, something has gone wrong because a bribe has been paid - but that, as an organization, you had met the relevant standards required to have adequate procedures in place.

[00:07:05] There is a strange circularity to that because, as you say, a criminal offense for failing to prevent but then an adequate procedures defense, but a cynic could say that, by definition, you didn't have adequate procedures if you've failed to prevent. How do people manage that balancing act?

[00:07:25] What is very interesting because there has been a recent case that went to the jury on the question of adequate procedures, and the company ended up being convicted, so the jury clearly wasn't convinced they had adequate procedures. We do know from that case that the standards are very high,

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and the Serious Fraud Office, I think, always says exactly what you've just said, which is, "If someone's managed to get through the processes, our starting point is going to be, 'Were they really adequate?'" But I think what the company has to show is that they've done proper risk-mapping, so they've analyzed where the risks are in their business; that they have put in place policies, procedures and financial controls that were appropriate and proportionate to deal with that risk; that senior management have really bought into the compliance agenda. Now, with all the good will in the world, companies can't always prevent rogue employees from doing something that they're clearly not allowed to do, and I think that's where the balance comes in. If the Serious Fraud Office can see that this company is committed to compliance; it has done the right thing; it has implemented its programs; it constantly monitors behaviors; it recalibrates its programs in response to incidents, then they might say, "Well, you've done everything that you can. This was a particularly enterprising, rogue employee who managed to find a way around, but we can't hold you to account for that because, really, you've invested in a proportionate way, and you've got the right compliance mindset, if you like." But it is a tough standard it's very very high hurdle.

[00:09:19] For context, can you walk us through a recent case and how all of this played into it?

[00:09:27] I shall do. I think that there is only been one case where the adequate procedures defense was actually left to the jury, and it's slightly out of the ordinary in the sense that it was a very small company, and the company also ended up having no assets, so it was a slight oddity that it was prosecuted. But in that particular company, no specific compliance program had been put in place in response to the Bribery Act, and some of the reasons for that were given to the court and to the jury. In particular, the company highlighted features like, "There were only 30 employees." I think it was a very small company. Everybody knew what the right thing was to do. There was a laminated sheet stuck up some way reminding people of their obligations to conduct ethical business. But at the end of the day, that simply wasn't enough. I think what really influenced the jury in that case is a member of senior management had been involved in paying the bribe. Because it was such a small company, it's very hard to blow the whistle in an effective way in those circumstances. I believe that the prosecution put to the jury that there should have been a non-executive director on the board to whom concerned employees could have blown the whistle. In reality, a company that small wouldn't actually have an NED on the board, so it wasn't a real-world submission, but nonetheless, it seemed to influence the jury. This case was heard only a few weeks ago, and already the SFO is pointing publicly to the case and saying it is an example of how high the standards are for adequate procedures. Although it's not a multinational company, it's not a complex bribe, I don't think we can completely dismiss that case. I think it does show that the hurdle is a very high one indeed.

[00:11:36] David Greene, who until very recently was the head of the Serious Fraud Office, famously said, "We are not going to be Serious Champagne Office." When clients talk to you about setting up defensible hospitality procedures, given that comment from the head of the SFO, how do you advise them on managing this in a way that's sane and business friendly and still defensible?

[00:12:05] This is an area that companies focus on a lot.

[00:12:08] Disproportionately, I would say.

[00:12:12] Some would say disproportionately. I think the Serious Fraud Office might have felt it was the disproportionate focus at the time that the Bribery Act was coming into force, and that's probably what led to that comment being made. The absolute key here is proportionality. There is some formal

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guidance, which is published under Section 9 of the Bribery Act, and that's accessible, and they do give some examples of what is and isn't considered proportionate. I think David Greene has said publicly, "I really don't care about taking clients to Wimbledon or taking them to the football or whatever."

[00:12:54] Although, after he said that about Wimbledon, we did some online research, and center-court seats at Wimbledon can be thousands of pounds. It's not really what we would consider "de minimus."

[00:13:06] No, and I think his point is you have to look at hospitality in the round. For example, if you were to take a client to Wimbledon in circumstances where you were competing to win some work, for example, the Serious Fraud Office would look at that very differently because there are circumstances which suggest that you are trying to influence then the outcome of their decision-making, so that would be a factor to take into account. But if you're not in those circumstances and you take somebody to Wimbledon, that is perfectly acceptable practice. Where I think you start to cross the line - I think the real risk areas are travel, travel with spouses, spending money, expensive theatre tickets where you're not going to be present.

[00:13:59] Right, sending people rather than accompanying them.

[00:14:02] Correct. Correct. I think if you're not present, that would be a red flag to the Serious Fraud Office. Proportionality is absolutely key. You have to take into account all the surrounding circumstances. First-class travel, expense expensive hotels - I think they would look askance at those sorts of gifts and that sort of level of hospitality.

[00:14:27] And spouses, as you say. I don't hear any compelling business arguments for taking spouses at this point.

[00:14:36] One just really sees that now. It just seems to be completely off the agenda.

[00:14:41] What else should companies know about the U.K. Bribery Act? We've had a few years of it now, not an enormous number of cases, but some. It's starting to get some momentum. It'll be interesting to see how things change, if at all, under new leadership at the SFO. What should people, particularly those practicing primarily outside the U.K., know about this law?

[00:15:03] I think it's important to be aware of the huge jurisdictional reach of the Bribery Act. You really need to have a very, very slight nexus to the U.K. for it to apply. In particular, given that we do have Section 7, the corporate offense, and associated persons is really anybody who's providing services to you, you really have to be conscious of carrying the obligations under the Bribery Act with you if you're a multinational company, unless, for some reason, you're just not at all in this jurisdiction, which is unusual. I think that's important. I think the second development that is definitely a trend that will continue is cooperation with authorities overseas. The SFO has cooperated obviously with the U.S. authorities, Singapore authorities, Hong Kong. We also see the European authorities now, the French and the Dutch, for example, becoming more active, and they do all speak to each other. I think that's also very important for companies to be aware of, that in whatever jurisdiction they are, there's a very good chance that the Serious Fraud Office will be getting intelligence from other agencies about potential breaches of the Bribery Act. Finally, with my compliance hat on, I always say that compliance is the gift that keeps on giving for a number of reasons. First of all, before the Serious Fraud Office brings a prosecution, it does have to consider whether or not it's in the public interest, and if there is a company that has been really committed to compliance, and that's genuine, and they can demonstrate that, the

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Serious Fraud Office might exercise its discretion not to prosecute the company, which would obviously be a big advantage. If that doesn't happen and the matter goes to trial, then, as we know, the ability for the company to argue that it had adequate procedures in place can provide a complete defense to a prosecution. If all that fails, and you end up in the worst possible position where you're being convicted and sentenced, then the ability to demonstrate your compliance procedures and your commitment to compliance will have an effect on sentencing and would reduce the sentence. I think the Bribery Act has served its purpose of really driving investment in compliance, and I think it is an investment that pays off.

[00:17:47] We're certainly seeing companies ramp up their compliance efforts for all the reasons that you described. Final question before we wrap up: I'm curious for people, particularly those based outside the U.K., do you imagine an impact on all of this by Brexit?

[00:18:04] I think it's an excellent question. We looked at this very, very closely at the time that Brexit was in play. In terms of the substantive laws, for example, in relation to bribery and sanctions, the U.K. either already has the gold standard legislation, which is what the Bribery Act is characterized as. Alternatively, in relation to sanctions, they already follow the European model and intend to do so in the future. I don't think, in terms of substantive law, there will be any change or that the standards will somehow slip below those of the rest of the member states. I don't think that's at all likely. Where people were more concerned is the extent to which intelligence agencies would be able to cooperate with each other, organizations like Europol, which are for member states. I think the consensus view was that there really is no incentive for the member states not to fully cooperate with the U.K. and vice versa and that there were other arrangements that the U.K. had in place with, for example, Commonwealth countries that were very effective intelligence-sharing mechanisms. As we constantly hear from the Serious Fraud Office, as prosecutors, they also are building, have built and continue to build effective networks across the EU and across the world. There's just absolutely no reason to think that that is going to change. Overall, I don't think that there will be a negative impact from Brexit in terms of economic crime.

[00:19:50] OK. Interesting. Well, we'll have to keep an eye on that. Thank you so much for your time today and for your support of TRACE over the years. We're very grateful.

[00:19:58] It's a pleasure, Alexandra. It's lovely to see you.

[00:19:59] And you.