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BNA Insights: Imbalance of Power: Federal Prosecutors' Nearly Unilateral Discretion to Resolve Allegations of Corporate Misconduct After D.C. Circuit Panel Overrules District Court's Rejection of Deferred Prosecution Agreement in *U.S. v. Fokker*



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Relying upon the Separation of Powers doctrine, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit unanimously held, in no uncertain terms, that district court judges are not empowered to reject deferred prosecution agreements (“DPAs”) because they disagree with the prosecutors’ charging decisions or elements of the agreement. *U.S. v. Fokker Services B.V.*, No. 15-3016 at *3 (D.C. Cir. Apr. 5, 2014) (Memorandum Opinion, C. J. Srinivasan). DPAs were virtually unknown in the 20th Century, but the use of these pre-plea agreements between putative defendants and the Department of Justice (“DOJ”) to address corporate culpability has now become the commonplace method for resolving a federal corporate criminal investigation. The increasing use of DPAs by federal pros-

ecutors spawned instances of conflict between prosecutors, who negotiated the agreements, and judges who viewed their role as “approving” those agreements. Last year, K&L Gates LLP chronicled this conflict through an analysis of the dispute between federal prosecutors, who entered into a DPA with Fokker Services B.V., and U.S. District Court Judge Richard Leon who refused to approve the agreement because he believed it was too lenient. Bloomberg BNA World Securities Law Report, *U.S. District Court Judge Rejects Deferred Prosecution Agreement with Non-U.S. Company: Lessons for Companies Considering Similar Agreements*, V. 21, No 5. (May 2015). Judge Leon’s ruling left many speculating whether judicial scrutiny and oversight of the terms of DPAs could lead to a shift by prosecutors to greater use of non-prosecution agreements (“NPAs”), which do not require the approval of the court.

A shift to NPAs now seems highly unlikely to occur. Judge Leon’s refusal to invoke the tolling provisions of the Speedy Trial Act spawned an appeal with a somewhat odd arrangement; both parties challenged the court’s ruling and sought the same outcome. The D.C. Circuit’s decision to overturn Judge Leon resets the scales and eliminates judicial review over a prosecutor’s discretion in negotiating the terms of DPAs. Corporate defendants who feel they must plead guilty to a corporate offense again appear to be at the mercy of

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DOJ, as the D.C. Circuit held that district court judges are foreclosed from evaluating the substance or merits of DPAs.

The D.C. Circuit Court's Opinion Finds DPAs Not Subject to District Court Scrutiny

DOJ's use of the DPA hinges on its ability to extend or "defer" the time between when charges have been filed and a trial must be initiated. To accomplish this, DOJ and the corporate defendant typically file a joint "Speedy Trial Act" motion at the same time the information is filed. The Speedy Trial Act "establishes time limits for the completion of various stages of a criminal prosecution." *Fokker*, No. 15-3016 at *4. Subject to a number of exceptions, DOJ must bring a case to trial within seventy days. 18 U.S.C. § 3161(c)(1). One of those exceptions, 18 U.S.C. § 3161(h)(2), allows additional delays when "prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." This provision was originally intended by Congress to allow drug-addicted individual defendants to enter rehabilitation programs in lieu of prosecution for drug-related offenses. *See generally* ANTHONY PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 (1980). But the statute generated unintended consequences. DOJ has appropriated the plain language of Section 3161(h)(2) for its own benefit, forcing corporate defendants without realistic options to fight an impending prosecution to enter into DPAs that include the public and highly visible filing of a criminal information, accompanied by a detailed and damaging factual admission of guilt while simultaneously waiving certain rights to an expeditious resolution under the Speedy Trial Act.

At the district court level, Judge Leon relied upon the "approval of the court" language in Section 3161 to exercise judicial oversight over the terms of the *Fokker* DPA. In the district court's view, *Fokker's* punishment was too lenient considering the gravity of the underlying charges. The issue, at its core, was that *Fokker* engaged in sales and export conduct involving several nations with which the United States forbids trade, most notably Iran. Judge Leon contended that trading with enemies of the United States was a far more serious action than the single count of Conspiracy to Unlawfully Export U.S.-Origin Goods and Services, *see* 18 U.S.C. § 371 (conspiracy to commit offense against the United States); 50 U.S.C. § 1705 (International Emergency Economic Powers Act), with which DOJ charged *Fokker* and that the punishment should be far more serious than disgorgement of profits. Failure to acknowledge this, according to Judge Leon, would promote disrespect and disdain for the law. Most importantly, Judge Leon expressed a strong dissatisfaction with DOJ's failure to prosecute any individuals for conduct the district court viewed as egregious. *U.S. v. Fokker Services B.V.*, No. 14-cr-121 (RJJ), at *11 (D.D.C. Feb. 5, 2015) (Memorandum Opinion, J. Leon).

Coincidentally, while the *Fokker* appeal was pending, DOJ adopted the "Yates Memorandum" which seeks to reemphasize DOJ's commitment to prosecuting individuals and holding corporate defendants to a more stringent standard in disclosing individual culpability to

receive cooperation credit. *See* K&L Gates Alert, *New DOJ Guidance Sharpens the Focus on Prosecuting and Suing Individuals in Corporate Criminal Investigations*. In other words, DOJ has announced that it will attempt to remedy the disparity in charging decisions that caused Judge Leon to reject the *Fokker* DPA.

In the 28-page opinion for the D.C. Circuit, Judge Srinivasan found that the district court erred in rejecting the DPA negotiated by DOJ and *Fokker Services B.V.* and essentially laid to rest the issue of whether district courts should play any role in evaluating the substantive terms or perceived merits of a DPA, at least with respect to the D.C. Circuit. The D.C. Circuit focused its analysis on the intended scope of the "approval of court" clause in Section 3161(h)(2) against "the background of settled constitutional understandings" analyzing the respective roles of the executive and judicial branch in charging decisions. *Fokker*, No. 15-3016 at *9.

Judge Srinivasan framed the situation as analogous to judges who are required to approve dismissal of charges under Federal Rule of Criminal Procedure 48(a) or approve civil consent decrees in antitrust cases. *Id.* at *15. The D.C. Circuit observed that the factors the prosecution must consider in entering into a DPA are "ill-suited to substantial judicial oversight" and ultimately determined that the statutory requirement of court permission is not an invitation to judges to insert themselves as supervisors over prosecutors. *Id.* Rather, the court viewed the "leave of court" language to evidence a "principle object" of "protect[ing] a defendant against prosecutorial harassment." *Id.* at *12. Simply put, the job of the district court is to ensure that the prosecutor is using the statutory exception for its proper purpose, not to determine if better uses are available. *Id.* at *16-17.

Speaking as "appellee" through court-appointed amicus curiae (who represented the district court's position), the lower court argued that the "approval of the court" language was more analogous to certain plea agreements, which do involve limited judicial authority. The D.C. Circuit outright rejected the argument and sought to distinguish it on technical bases. For example, the court pointed out that the punishment a defendant corporation submits to under a DPA is not technically a sentence and that even in a Rule 11 guilty plea, the district court's "discretion is not unfettered." *Id.* at *18. The court, however, never squarely addresses an important reality: a DPA amounts in sum and substance to a guilty plea and a conviction; the corporate defendant must admit facts sufficient to support a finding of guilt, pay substantial fines and/or forfeiture, and typically subject itself to government oversight for the length of the deferral period—in essence a probationary period.

Nonetheless, following the D.C. Circuit Court's opinion in *Fokker*, at least for the immediate future, the likelihood that a DPA will be rejected by the judiciary has dropped precipitously. This largely unfettered discretion is a double-edged sword. Where the government's potential case is weak, or where the corporation has self-reported, there is an opportunity to negotiate an agreement that both vindicates the government's legitimate interests and avoids the use of unnecessarily burdensome or punitive terms on the company. On the other hand, while prosecutions are solely within the providence of the executive branch, punishment had

traditionally been the providence of the judiciary where defendants could argue for more lenient sentences—even where the parties agree to a sentence under Federal Rule of Criminal Procedure 11(c)—and the court could reject the plea. The D.C. Circuit’s *Fokker* ruling removes punishment from the judiciary, effectively making DOJ judge and jury unless a corporate defendant is willing to proceed with an indictment and trial.

Practical Considerations Moving Forward: Negotiating with an Unfettered DOJ

In the past two decades, DPAs have become an often preferred method of resolving alleged corporate criminal misconduct. Typically, few corporate defendants can afford to risk the severe consequences of pursuing a case to trial, where the effects can be far-reaching and sometimes economically fatal even in the event of vindication. See Carrie Johnson, *U.S. Ends Prosecution of Arthur Andersen*, THE WASHINGTON POST, Nov. 23, 2005. The tradeoff between entering into DPAs and avoiding trial has allowed DOJ to incrementally extract larger and larger fines and impose stiffer penalties in the form of more invasive monitoring requirements. Bloomberg BNA World Securities Law Report, *U.S. District Court Judge Rejects Deferred Prosecution Agreement with Non-U.S. Company: Lessons for Companies Considering Similar Agreements*, V. 21, No 5. (May 2015). Also, until the *Fokker* appeal was decided, depending on the particular facts, the corporate defendant had some room to negotiate either a declination or an NPA, because each side was required to accept some risk with a DPA as a result of anticipated judicial oversight. The *Fokker* decision may effectively remove any concerns about judicial scrutiny. The D.C. Circuit thus solidified the DPA’s recent status as the preferred method of resolution for DOJ prosecutors.

Moving forward, with less concern regarding judicial oversight, DOJ may begin insisting on even more punitive terms in DPAs, particularly given the renewed focus under the “Yates Memorandum,” whereby the government is pressuring corporate defendants to identify specific “guilty” employees in order to receive any credit for cooperation as part of the agreements. See SALLY QUINLAN YATES, INDIVIDUAL ACCOUNTABILITY FOR CORPORATE WRONGDOING (September 9, 2015). Despite the D.C. Circuit Court’s insistence, the terms of many DPAs seem much more like sentencing and punishment than the opportunity for the defendant to “demonstrat[e] good conduct and compliance with the law,” which the Speedy Trial Act’s tolling provision is intended to provide. *Fokker*, No. 15-3016 at *19.

The *Fokker* decision does provide corporate defendants one benefit: certainty. Following this decision, corporations negotiating with DOJ should expect no relief from a federal district court should the terms of the agreement be too draconian. Further, corporate defendants should expect to see little motivation from DOJ

prosecutors to entertain NPAs if any prosecution is warranted. Conversely, in the event that a corporation is able to negotiate more favorable terms to resolve alleged misconduct, greater certainty now exists that those terms will not be rejected as insufficiently punitive. Regardless, corporate defendants should expect the negotiated terms to be final, free from any significant judicial oversight, for better or for worse.

On the Horizon: Effects on Law Outside of the D.C. Circuit

As for *Fokker*’s effect on law outside of the D.C. Circuit, there are two points worth noting: the ruling is a statutory interpretation and it was based on a rather unusual DPA.

First, although the court does a significant amount of constitutional posturing, the ruling is an interpretation of the Speedy Trial Act. Although this has no immediate effect, the fact that the court did not find a constitutional bar to judicial review of DPAs leaves the door open for the legislature to step in and modify the situation.

Second, the D.C. Circuit put little emphasis on arguments that the admissions often required in a DPA are the functional equivalent of a guilty plea and that any fines beyond the proceeds from the conduct are punitive, both of which may cause another circuit court to take a different position on the issue. In *Fokker*, the DPA in question was actually far less punitive in nature than many others and the D.C. Circuit’s finding that this DPA was a charging decision, rather than a sentencing decision, may have been based partly on the “lenient” nature of the agreement.

Another circuit, in a case where the DPA was far more aggressive, might be more inclined to find that there is a point where a punitive DPA crosses the line from “charging,” conduct within the traditional bounds of the executive branch, into “sentencing,” the province of the judiciary. Across that line, prosecutors may find their DPAs are subject to judicial review. Courts inclined to take this view might even find that the most punitive elements of DPAs, such as large punitive fines or requirements that a corporation support the prosecutions of their employees, are inappropriate without the safeguards provided by a formal guilty plea. Such a finding would begin to establish a hard “ceiling” for what prosecutors may demand as part of a DPA.

A likely candidate for further appellate review is the Second Circuit. Judge John Gleeson (E.D.N.Y.) and Judge Jed Rakoff (S.D.N.Y.) have also pushed back regarding DPAs they view as too lenient, refusing to act as either “rubber stamps” or “potted plants” and, instead, taking more substantive looks at the merits of DPAs. See Bloomberg BNA World Securities Law Report, *U.S. District Court Judge Rejects Deferred Prosecution Agreement with Non-U.S. Company: Lessons for Companies Considering Similar Agreements*, V. 21, No 5. (May 2015).