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D.C. Circuit Reverses Rejection of Deferred Prosecution Agreement

It has been a longstanding practice for courts to defer to the judgment of the government regarding the terms of a deferred prosecution agreement ("DPA"). A key component of this deference is a willingness by courts to toll the seventy-day clock between indictment and trial established by the Speedy Trial Act, 18 U.S.C. §§ 3161-3174, to permit the defendant to demonstrate compliance with the law and the terms of such an agreement. This deference was recently called into question by a decision in the District Court for the District of Columbia. In *U.S.* v. *Fokker Services*, the District Court cited substantive criticisms of the terms of a DPA as grounds to reject a joint motion by the parties to toll the deadlines established by the Speedy Trial Act.[1] This week, the U.S. Court of Appeals for the District of Columbia Circuit overruled that decision, affirming the limited scope of judicial review of the terms of deferred prosecution agreements.[2]

Background

The Speedy Trial Act generally requires trial to begin within seventy days of the filing of an information or indictment by the government.[3] However, the Act permits tolling of this seventy-day period during "[a]ny period of delay during which 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."[4] This provision permits the government to enter into a DPA with a defendant and defer the start of trial for lengthier periods of time, permitting the defendant to demonstrate compliance with the law and the terms of the DPA during the term of the agreement.

In 2010, Fokker Services, a Dutch aerospace services company, proactively self-reported violations of federal sanctions and export control laws concerning Iran, Sudan, and Burma to the United States Departments of Treasury and Commerce.[5] The company subsequently cooperated in a four-year federal investigation, including by facilitating witness interviews, expediting document requests to Dutch

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[1] *See generally U.S.* v. *Fokker Services*, 79 F. Supp. 3d 160 (D.D.C. 2015).

[2] *See generally U.S.*v. *Fokker Services*, Nos. 15-3015, 15-3017, 2016 WL 1319266 (D.C. Cir. Apr. 5, 2016).

[3] *See* 18 U.S.C. § 3161(c)(1).

[4] *Id.* at § 3161(h)(2).

[5] *Fokker Services*, 2016 WL 1319266, at *3.

authorities under a Mutual Legal Assistance Treaty, and initiating an internal investigation.[6] The parties ultimately negotiated a resolution requiring repayment of the gross revenues gained by the illegal transactions and an eighteen-month deferred prosecution agreement.[7] Pursuant to the agreement, the government filed a one-count information against Fokker Services, and the parties filed a joint motion for the exclusion of time under the Speedy Trial Act to allow Fokker Services "to demonstrate its good conduct and implement certain remedial measures."[8]

After repeatedly expressing dissatisfaction about the provisions of the agreement and the absence of criminal prosecutions of individual company officers, Judge Richard J. Leon of the District Court for the District of Columbia denied the joint motion for the exclusion of time.[9] The court based its decision on the government's failure to prosecute individuals for Fokker Services' sanctions violations and on its view that the terms of the agreement were too lenient toward Fokker Services.[10] According to the District Court, the DPA was an "[in]appropriate exercise of prosecutorial discretion."[11] The District Court's decision was the first time any federal court denied such a joint request.[12]

Judicial Review of Deferred Prosecution Agreements Under the Speedy Trial Act

Accepting jurisdiction through a writ of mandamus, the Court of Appeals for the District of Columbia Circuit vacated the District Court's denial of the joint request. In doing so, the Court of Appeals denied the existence of "free-ranging authority in district courts to scrutinize the prosecution's discretionary charging decisions."[13] Rather, the court repeatedly emphasized that "decisions to dismiss pending criminal charges—no less than decisions to initiate charges and to identify which charges to bring—lie squarely within the ken of prosecutorial discretion."[14] The court made clear that both the decision to enter into a DPA and the terms of such an agreement fall within this ambit of discretion.[15] More broadly,

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[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at *4; *see also Fokker Services*, 79 F. Supp. 3d at 167.

[10] *Fokker Services*, 79 F. Supp. 3d at 167.

[11] *Fokker Services*, 2016 WL 1319266, at *8.

[12] *Id.* at *4.

[13] *Id.*

[14] *Id.* at *5.

[15] *Id.* at *7.

the court observed that the statutory exclusion of time for deferred prosecution agreements was "essential" to create "the leverage that engenders the defendant's compliance with a DPA's conditions."[16]

The court made clear that the Speedy Trial Act only permits judicial review to "assure that a DPA does not exist merely to allow evasion of speedy trial time limits, but instead serves the bona fide purpose of confirming a defendant's good conduct and compliance with law."[17] Expressly condemning more rigorous or substantive review, the court further stated that withholding approval of a DPA, as the District Court did, based on "a belief that more serious charges should be brought against the defendant (or against a third party) … would amount to a substantial and unwarranted intrusion on the Executive Branch's fundamental prerogatives."[18] The court emphasized the judiciary's "lack of competence" to evaluate the considerations guiding such an agreement's provisions, including "factors such as the strength of the government's evidence, the deterrence value of a prosecution, and the enforcement priorities of an agency," all "subjects that are ill-suited to substantial judicial oversight."[19]

In this instance, the court found "no indication that the parties entered in to the DPA to evade speedy trial limits rather than to enable Fokker to demonstrate its good conduct and compliance with law."[20] Crucially, the court did not evaluate the merits of the District Court's criticism of the agreement as too lenient. Rather, the court found that issue beyond the scope of judicial review, holding that "the [district] court should have confined its inquiry to examining whether the DPA served the purpose of allowing Fokker to demonstrate its good conduct" and that "[t]here is no reason to question the DPA's bona fides in that regard."[21]

Implications

The Court of Appeals for the District of Columbia Circuit broadly affirmed the authority of the executive to make charging decisions and narrowly circumscribed the scope of judicial review of DPAs. In this way, the court enhanced the level of certainty and protection for the terms of such agreements as negotiated with the government, even in the face of potential disagreement with the substance of such agreements by a court.

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[16] *Id.* at *2.

[17] *Id.* at *9.

[18] *Id.* at *7.

[19] *Id.*

[20] *Id.* at *10.

[21] *Id.* at *11.

The Court of Appeals' holding echoes the Second Circuit's reasoning in vacating and remanding the Southern District of New York's disapproval of a consent decree between the SEC and Citigroup.[22] The Court of Appeals' decision thus reaffirms the practice of judicial deference to executive decisions about the appropriate scope of criminal charges and pre-trial dispositions. Taken together, these decisions suggest that courts should be willing to preserve the negotiated terms of settlements and deferred prosecution agreements entered into by federal prosecutors and regulatory enforcement agencies.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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[22] *U.S. S.E.C.* v. *Citigroup Global Markets*, 752 F.3d 285 (2d Cir. 2014).