ALERT MEMORANDUM

Second Circuit Holds that U.S. Deferred Prosecution Agreements Are Not Subject to Substantive Judicial Review

July 14, 2017

On July 12, 2017, the Second Circuit held in *United States v. HSBC Bank USA, N.A.*, __ F.3d __, 2017 WL 2960618 (2d Cir. 2017), that federal courts have no authority, absent impropriety, to supervise the implementation of deferred prosecution agreements ("DPAs"), and that their role with respect to the approval of DPAs is limited to ensuring that the DPA is genuine and not a means of circumventing the requirements of the Speedy Trial Act.

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The Second Circuit's decision, which is consistent with the analysis of the D.C. Circuit last year in the only other circuit court decision to reach the issue, makes clear that a DPA, like a non-prosecution agreement, is a tool that the Executive can use to resolve criminal cases largely without judicial scrutiny. In doing so, it rejects the position adopted by certain district courts that either their inherent authority or the Speedy Trial Act confers on the court a substantive role in reviewing the terms of a DPA or monitoring its implementation. This decision provides greater certainty for companies, individuals and practitioners considering resolving a criminal case through a DPA, as well as those for whom a DPA is currently in place.

Reinforcing the largely extrajudicial nature of DPAs in the U.S. contrasts with the approach taken in various other countries that have adopted DPA frameworks more recently. For example, in both the U.K. and France, whose legislatures have recently codified a DPA framework, courts are given a substantial role in substantively reviewing and approving proposed DPAs.

Background

The issue in *United States v. HSBC Bank USA, N.A.*, was not the judicial supervision of HSBC's DPA *per se*, but rather whether the district court erred in unsealing a report prepared by the monitor appointed pursuant to that agreement. The court held that because the district court did not have authority to supervise the implementation of HSBC's DPA, the monitor's report was not a "judicial document" subject to a public right of access.

There is no express statutory framework for concluding and approving a DPA. In contrast, Rules 11(b) and (c) of the Federal Rules of Criminal Procedure require federal courts to substantively review and approve any plea agreement a defendant enters into with the U.S. government. Nonetheless, DPAs virtually always require court approval because their implementation necessitates the suspension of the 70-day deadline for bringing a federal prosecution to trial under the 1974 Speedy Trial Act. That time limit excludes "[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."[1]

In December 2012, the U.S. government entered into a five-year DPA with HSBC Holding plc and HSBC Bank, USA, N.A. (collectively, "HSBC") resolving charges under the Bank Secrecy Act, International Emergency Economic Powers Act, and Trading with the Enemy Act. A term of the DPA was that HSBC agreed to implement remedial measures and retain an independent compliance monitor, to be approved by the government, who would submit periodic reports to HSBC and the government, and which reports, under the terms of the DPA, were intended to remain non-public.

As is typical, when the government filed the DPA with the district court, the government and HSBC jointly requested that that district court place the matter into abeyance and exclude time from the Speedy Trial Act clock for the period of the DPA. In what he acknowledged was a "novel" approach, U.S. District Judge John Gleeson concluded that both the Speedy Trial Act and the court's "inherent supervisory authority" permitted it to engage in a substantive review of the DPA to, at a minimum, satisfy itself that it does not "smack[] of lawlessness or impropriety."[2] Having examined the merits of the DPA with HSBC under that standard, the district court approved the agreement, but imposed a condition that such approval was "subject to [the court's] continued monitoring of its execution and implementation."[3]

In April 2015, in connection with its "monitoring" of the DPA, the district court directed the government to file the monitor's first annual report, which it did under seal. In December 2015, a member of the public wrote to the district court seeking a copy of the monitor's report, which the district court construed as a motion to unseal the report. Over the objection of the government and HSBC, the district court concluded that the report was a "judicial document" and was therefore subject to a presumptive right of public access, ordering in January 2016 the unsealing of a redacted version of the monitor's report.[4] The government and HSBC appealed.

The Ruling

On July 12, 2017, the Second Circuit reversed the district court's unsealing order, holding that the monitor's report was not a judicial document and therefore not subject to public access. In so holding, the Second Circuit concluded, as a threshold issue, that the district court had exceeded its authority by subjecting the DPA to judicial oversight with respect to its implementation. Chief Judge Robert A. Katzmann, writing for a unanimous panel, considered, and rejected, arguments that either the court's inherent

[1] 18 U.S.C. § 3161(h)(2) (emphasis added).
[2] *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).
[3] *Id.*
[4] *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2016 WL 347670(JG) (E.D.N.Y Jan 28, 2016).

authority or the Speedy Trial Act conferred such authority.

First, the court rejected the argument that the district court had inherent supervisory power to monitor the implementation of the DPA absent any showing of prosecutorial impropriety. Rather, the court held, under Article II of the Constitution, the Executive Branch has the duty to "take Care that the Laws be faithfully executed," which includes "decid[ing] whether prosecute."[5] In discharging that duty, moreover, the circuit recognized that federal prosecutors are entitled to a "presumption of regularity." That presumption is "turned … on its head," the court held, by the district court's reasoning that judicial supervision was necessary to guard against "lawlessness or impropriety." Rather, it held, "in the absence of clear evidence to the contrary," prosecutors who enter into DPAs with defendants are entitled to a presumption that they "have properly discharged their official duties."[6] Accordingly, only in cases where a showing of impropriety is made, is it appropriate for the district court to call upon its inherent supervisory powers to second-guess the Executive Branch's decision to defer prosecution.

Second, the court rejected the argument that the reference to court approval in Section 3161(h)(2) of the Speedy Trial Act "imbu[ed] courts with an ongoing oversight power over the government's entry into or implementation of a DPA."[7] While noting that the approval requirement in the provision was vague, the Second Circuit agreed with the D.C. Circuit's interpretation in *United States v. Fokker Servs. B.V.*, 818 F.3d 733 (D.C. Cir. 2016), that 18 U.S.C. § 3161(h)(2) only authorizes courts to assess whether a DPA is entered into in good faith and "does not constitute a disguised effect to circumvent the speedy trial clock," but does not allow the court to engage in a further substantive review of the DPA's terms.[8] The Court reasoned that this reading of the statute best aligned with the constitutional role of the Executive to decide whether to prosecute and for which charges: "Put simply, our role is not to act as 'superprosecutors,' second-guessing the legitimate exercise of core elements of prosecutorial discretion, but rather as neutral arbiters of the law."[9]

Finally, the Second Circuit rejected arguments that the monitor's report was a judicial document because it could be relevant in deciding whether to dismiss the charges at the end of the DPA's term or to adjudicate a possible future claimed breach of the DPA, concluding that whether or not the document would be relevant to such proceedings (if they even occurred) was "speculative."[10] Because the district court had no present reason to consider the monitor's report, or to take any present action as a result of it, the Second Circuit reasoned that the report was "not unlike a document exchanged by the parties in the course of litigation that has not yet been brought to the attention of the court" and therefore "'entirely beyond the…reach' of the presumption of public access."[11]

The Concurrence

In a concurring opinion, Judge Pooler observed that Congress added 18 U.S.C. § 3161(h)(2) to the Speedy Trial Act at a time when deferred prosecution agreements were entered into primarily with individual defendants in programs that were seen as a functional equivalent of a sentence to pretrial probation supervised by probation officers, who are employed by the courts. Judge Pooler observed that the application of DPAs has since shifted to primarily corporations, in which "[t]he prosecution retains sole discretion to decide if the corporation adequately complied with the agreement, allowing the prosecution to act as prosecutor, jury and judge."[12] While noting that DPAs can be positive – for instance, in preventing a "death blow to a corporation" – Judge Pooler argued that the time is ripe for Congress to implement legislation to

[5] *United States v. HSBC Bank USA, N.A.*, No. 16-308(L), slip op. at 21 (2d Cir. July 12, 2017).
[6] *Id.* at 25.
[7] *Id.* at 30-31.
[8] *Id.* at 31.
[9] *Id.* at 30.
[10] *Id.* at 39.
[11] *Id.* at 32-33.
[12] Concurring Op. at 3.

impose more meaningful court review of DPAs to prevent prosecutorial overreach.[13]

The International Perspective

It is timely that the U.S. courts are grappling with the role of the court in approving DPAs as the DPA procedure, essentially pioneered in the U.S., is being exported to other countries around the world through legislation. In most cases, other countries that have expressly adopted DPA procedures have subjected them to judicial supervision.

For example, in February 2014 a provision of the Crime and Courts Act 2013 introduced DPAs to the United Kingdom. The statutory regime in the U.K. describes in detail the attributes that a DPA must adhere to in order to be accepted, and these requirements are amplified by a Code of Practice adopted by the Serious Fraud Office and the Crown Prosecution Service. Accordingly, both at the stage of negotiations *and* prior to final approval of a DPA in the U.K., the Crown Court must enter formal findings that the DPA is "likely to be in the interests of justice" and that its terms "are fair, reasonable and proportionate." These findings must be supported by formal written findings.[14]

Likewise, in December 2016, new French anti-corruption legislation (commonly referred to as "Sapin II") brought into force a new regime for resolving corruption cases through DPAs. Article 22 of Sapin II permits the resolution of domestic and foreign corruption cases through a DPA pursuant to which the signatory is required to agree to a set of enumerated facts but under which admission of a criminal violation is not required. As in the U.K., formal court approval of a DPA in a public hearing is required under the new French legislation.

Takeaways

With this decision, the Second Circuit joins the D.C. Circuit in effectively limiting judicial oversight of DPAs, absent extraordinary circumstances. The Second Circuit's decision will likely provide comfort to U.S. defendants that a DPA, once negotiated with the government, is unlikely to be revised or undone by the courts. On the other hand, the decision further consolidates a prosecutor's power in negotiating a DPA, leaving defendants without the ability to temper a potentially overreaching prosecutor's zeal with the specter of an eventual merits review by a neutral court. The resulting shift in balance of power may prompt Congress to move ahead on proposed bills that impose more oversight over the DPA process, as the concurring opinion encourages and as legislatures in other countries have done. Time will tell whether such proposals will gain political momentum in the U.S. Congress and whether the Executive Branch would support curtailing the power of its own prosecutors.

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[13] In her concurrence, Judge Pooler refers to the Accountability in Deferred Prosecution Act of 2014, which was introduced in the House in 2014 to provide more oversight of DPAs. *Id.* at 4-5. The bill has since stalled.

[14] *See* Crime and Courts Act 2013, sch. 17 s. 7-8.