ALERT MEMORANDUM

# D.C. Circuit Significantly Limits District Courts' Review of Deferred Prosecution Agreements

*April 13, 2016*

In a case with significant implications for the power of district judges to review the terms of deferred prosecution agreements ("DPAs") between the Department of Justice ("DOJ") and corporations to resolve criminal investigations, on April 5, 2016, the United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") took the extraordinary step of granting a writ of mandamus and vacated a lower court decision that had the practical effect of rejecting a DPA between the DOJ and an aerospace services company, Fokker Services, B.V. ("Fokker Services").

The district court's decision came in the context of denying a joint motion by the DOJ and Fokker to exclude time under the Speedy Trial Act (the "Act") pending assessment of the company's adherence to the terms of a proposed DPA between the parties.[1] DPAs ordinarily include such exclusions of time under the Act, but the district court used its authority to approve that exclusion as an opportunity not only to deny the request, but to criticize the terms of the DPA and the DOJ's decision not to prosecute any individuals as part of its investigation. In reversing the district court, the D.C. Circuit concluded that a district judge's authority in reviewing DPAs (and approving Speedy Trial Act exclusions in that context) was extremely limited because "[criminal charging] determinations [including entry into a DPA] are for the Executive—not the courts—to make."[2] The case has significant implications in light of a judiciary that has been increasingly questioning the terms (and in some instances, the wisdom) of the DOJ's decisions to enter into DPAs.

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[1] United States v. Fokker Servs. B.V., No. 15-13016, 15-3017, 2016 App. LEXIS 6176 (D.C. Cir. Apr. 5, 2016).

[2] Id. at *4-5.

**Background**

A company entering into a DPA to resolve a criminal investigation must typically agree to the filing of charges (often in the form of a Criminal Information), admit to stipulated facts, and comply with "conditions designed . . . to promote compliance with applicable law and to prevent recidivism."[3] In return, the government agrees to request the dismissal of the charges at the end of an agreed upon period of time, assuming compliance with the conditions of the DPA. The filing of the charges triggers the running of the speedy-trial clock under the Act, but contains a carve out for 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."[4] The meaning and scope of the "approval of the court" language in this exception outlined in § 3161(h)(2) was at issue in this appeal.

In 2010, Fokker Services voluntarily disclosed to the U.S. government its potential violations of federal sanctions and export control laws related to Iran, Sudan, and Burma. There had been no prior investigation into the company by any government agency. Through its own internal investigation, Fokker Services determined that it had engaged in 1,147 illicit transactions between 2005 and 2010 resulting in $21 million in gross revenue. In addition to launching an internal investigation, Fokker Services took remedial measures and helped the government by expediting the government's document requests to the Dutch government pursuant to a Mutual Legal Assistance Treaty, improving its sanction compliance program, and terminating its president who had allegedly been involved in the unlawful activities.

After much negotiation, on June 5, 2014, the government entered into a DPA with Fokker Services, and pursuant to that agreement, the government filed a one-count information in the district court charging Fokker Services with conspiracy to violate the International Emergency Economic Powers Act.[5] On the same day, the parties jointly moved for exclusion of time under the Speedy Trial Act for a period of 18 months, to permit Fokker Services to comply with the terms of the DPA. During the period of the DPA, Fokker Services was to continue cooperating with the government, carry out a new compliance program, and pay $21 million in fines and penalties. Fokker Services also accepted responsibility for the facts laid out in the DPA related to its illegal activities.

**Procedural History**

After the joint motion for exclusion of time was filed, the district court had the government submit written briefing on why approval of the DPA was in the interests of justice and addressing whether the information provided by Fokker Services to the government was made voluntarily. On February 5, 2015, the district court denied the joint motion for the exclusion of time pursuant to the DPA finding the DPA to be an "[in]appropriate exercise of prosecutorial discretion."[6] The district court noted in its decision that certain employees were not fired, that the size of the fine was not larger than the revenues made through the illicit transactions, and that the approval of the agreement would "promote disrespect for the law."[7]

**The Decision**

In its decision, the Court vacated the district court's denial of the motion for exclusion of time, granted the government's petition for a writ of mandamus, and remanded the case to the district court. The Court construed the "approval of the court" language in § 3161(h)(2) narrowly, noting that "[in denying the] exclusion of time under § 3161(h)(2) based on a belief that the prosecution had been unduly lenient in its charging decisions and in the conditions agreed to in

[3] U.S. Attorney's Manual § 9-28.1100 (2015).

[4] 18 U.S.C. § 3161(h)(2).

[5] See 18 U.S.C. § 371; 50 U.S.C. § 1705.

[6] United States v. Fokker Servs. B.V., 79 F. Supp. 3d 160, 167 (D.D.C. 2015).

[7] Id. at 166-67.

the DPA . . . . the [district] court *significantly overstepped its authority*."[8] According to the Court, a district judge has limited ability to question the quintessential prosecutorial decision about whether or not to bring criminal charges, a matter which is committed to the Executive Branch.[9] In particular, "a DPA's provisions manifest the Executive's consideration of factors such as the strength of the government's evidence, the deterrence value of a prosecution, and the enforcement priorities of an agency, subjects that are ill-suited to substantial judicial oversight."[10]

According to the Court, the "approval of the court" requirement in the Speedy Trial Act is intended to ensure that the DPA is not used by the government to evade the Act's time limits but rather is used to show that a defendant can and will comply with the law.[11] The Court relied on the Senate Committee Report accompanying the Speedy Trial Act which states that the "approval of the court" provision is intended to promote the use of DPAs to allow defendants to rehabilitate.[12] The exception for excluding time for DPAs provides prosecutors with "leverage that engenders the defendant's compliance with a DPA's conditions. The statutory exclusion of time for DPAs therefore is essential to the agreements' effective operation."[13] The Court grounded its view in interpretations of other similarly worded provisions that have been narrowly construed and declined in this case to recognize a broader ability by courts to evaluate prosecutorial charging decisions related to a DPA.[14]

**Significance of the Decision**

As district judges have increasingly taken issue with the terms of DPAs, this ruling makes clear that such DPAs will be largely insulated from judicial review barring illegal or unethical terms.[15] While judges can, of course, criticize the terms of a DPA, they have almost no authority to reject it (including, as the opinion makes clear, by withholding approval of an exclusion of time under the Speedy Trial Act). Practically speaking, the decision significantly reduces the risk that a district judge – as was the case with Fokker Services – can disrupt a carefully negotiated DPA.

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[8] Fokker Servs. B.V., 2016 App. LEXIS 6176, at *29 (emphasis added).

[9] See id. at *1-2.

[10] Id. at *20 (internal citations omitted).

[11] Id. at *22.

[12] Id. at *23 (citing S. Rep. No. 93-1021 (1974)).

[13] Id. at *7.

[14] Id. at *19.

[15] See id. at *28-29