# DC Circuit Affirms Primacy of Prosecutorial Discretion Over Deferred Prosecution Agreements in *United States v. Fokker Services BV*

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On April 5, 2016, the U.S. Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) overturned the decision of the U.S. District Court for the District of Columbia (the District Court) in *United States v. Fokker Services B.V.*, finding that the requirement of court approval to exclude time under the Speedy Trial Act does not grant judges the authority "to second-guess the Executive's exercise of discretion over the initiation and dismissal of criminal charges."[1] The District Court opinion had provoked considerable interest from both prosecutors and the defense bar, raising questions over the interplay between prosecutorial discretion and judicial review of criminal settlements. In finding the District Court had overstepped its authority, the D.C. Circuit confirmed that charging decisions (as opposed to sentencing) are firmly within the purview of the executive branch, and that deferred prosecution agreements concern the core prosecutorial decisions about what charges to bring and, if brought, whether to dismiss them.

## Background

Fokker Services B.V. (Fokker Services), a Dutch aerospace company, was charged by the U.S. Department of Justice (DOJ) with violating U.S. export laws in connection with the export of aircraft parts, technology and services to customers in Iran, Myanmar and Sudan during 2005-10.

In June 2014, DOJ and Fokker Services agreed to an 18-month deferred prosecution agreement (DPA). Under the terms of the proposed DPA, Fokker Services agreed to accept responsibility for its conduct and the conduct of its employees, to forfeit $10.5 million, to continue to cooperate with U.S. authorities and agencies regarding the conduct at issue, to implement its new compliance program and policies, and to comply with U.S. export laws. DOJ, for its part, agreed to dismiss without prejudice the charges against Fokker Services at the end of the 18-month term, provided that the company fully complied with the terms of the DPA during that period.

Fokker Services also reached parallel civil settlements with the Office of Foreign Assets Control and the Bureau of Industry and Security of the U.S. Department of Commerce.[2] The company agreed to pay another $10.5 million in those proceedings, for a total of $21 million to be paid in the various settlements. This total was equivalent to the amount of revenues that allegedly resulted from the improper conduct.

## District Court Holding

In June 2014, DOJ and Fokker Services filed the proposed DPA with the District Court in conjunction with a joint motion to exclude time under the Speedy Trial Act (the Motion). The Speedy Trial Act[3] requires a trial to begin within 70 days of the filing of an information or indictment, but excludes certain periods of delay, including that during which a DPA is in force, in calculating the 70-day limit.[4]

In pleadings filed at the request of the court, the parties argued that the District Court's role was "limited to reviewing the proposed exclusion of time pursuant to the Speedy Trial Act."[5] The parties also argued that the Speedy Trial Act requires a court to approve a proposed DPA unless there is an indication that the defendant did not enter into the

[1] United States v. Fokker Servs. B.V., No. 15-3016, 2016 WL 1319226, at *1 (D.C. Cir. Apr. 5, 2016)

[2] These settlements were announced on June 5, 2014, and remain in effect regardless of the status of the DOJ DPA.

[3] 18 U.S.C. § 3161.

[4] *Id.* § 3161(c)(1), (h).

[5] DOJ Supplemental Memorandum at 2, United States v. Fokker Servs. B.V., No. 14-CR-121 (RJL) (D.D.C. July 18, 2014), ECF No. 11.

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agreement willingly and knowingly, or if the agreement was designed solely to circumvent the limits of the Speedy Trial Act.

DOJ also argued in the alternative, "should the Court conclude that it has inherent supervisory authority to review and approve (or disapprove) the DPA,"[6] then the DPA should be approved on its merits "because it is in the interests of justice."[7] DOJ focused on several key facts to support this argument, including that Fokker Services: (1) voluntarily disclosed the conduct at issue "at a time when the United States government was not actively investigating it and had not even taken any investigatory steps"[8]; (2) provided extensive cooperation during the investigation; (3) engaged in significant remediation, including cessation of shipments to U.S.-sanctioned jurisdictions and disciplinary measures taken against all involved employees; and (4) agreed to a monetary settlement that represented the outer limit of its ability to pay, given what DOJ characterized as the company's "precarious financial situation."[9]

In February 2015, the District Court denied the Motion and declined to approve the proposed DPA.

The District Court rejected the parties' arguments, ruling that first, a court has the ability to approve or reject a DPA pursuant to its inherent supervisory power over matters before it, and second, that the proposed DPA was not in the public interest.[10]

The District Court held that in this role, a court "must consider the public as well as the defendant. After all, the integrity of judicial proceedings would be compromised by giving the Court's stamp of approval to either overly-lenient prosecutorial action, or overly-zealous prosecutorial conduct."[11]

Citing the Eastern District of New York's 2013 opinion in *United States v. HSBC Bank USA, N.A.*,[12] the District Court drew a distinction between the decision whether to bring charges, and if brought, the decision to dismiss them: "Indeed, this Court would have no role here if the Government had chosen not to charge Fokker Services with any criminal conduct — even if such a decision was the result of a non-prosecution agreement."[13] Once a DPA was filed, however, the District Court reasoned that the case would remain on the court's docket during the entirety of the DPA period, thereby bringing it under the supervisory authority of the court.

The District Court further noted various perceived deficiencies in the terms of the DPA in light of this conduct, including that: (1) the total forfeiture amount was "not ... a penny more"[14] than the revenue from the improper transactions; (2) an independent monitor was not imposed, and Fokker Services was not required to file periodic compliance reports; and (3) no individuals were being prosecuted, and involved employees were allowed to remain at the company.

The District Court concluded that "it would undermine the public's confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time and for the benefit of one of our country's worst enemies."[15] Accordingly, the DPA did not "constitute an appropriate exercise of prosecutorial discretion."[16] Finally, the District Court noted: "I am not ordering or advising the Government, or the defendant, to undertake or refrain from undertaking any particular action — I am merely declining to approve the document before me."[17]

## The Analysis of the DC Circuit

Both DOJ and Fokker Services promptly appealed the decision to the D.C. Circuit,[18] arguing that the District Court had erred by refusing to exclude time under the Speedy Trial Act based on its judgment that the DPA between the government and the defendant was not an appropriate exercise of prosecutorial discretion because it was too lenient, and had erred by failing to determine whether the DPA was in accordance with the Speedy Trial Act for the purpose of allowing Fokker Services to demonstrate its good conduct.

Oral argument was held on September 11, 2015. During that argument, DOJ conceded that a judge can reject a DPA under certain limited circumstances, but argued that the District Court had gone "well beyond" those circumstances in the instant case. The court-appointed *amicus curiae* argued that the court's authority over DPAs was similar to its authority over pleas.

[6] *Id.* at 3.

[7] *Id.* at 15.

[8] *Id.*

[9] *Id.* at 17.

[10] In so doing, the District Court cited to a 2013 opinion of the Eastern District of New York in which Judge John Gleeson questioned, but ultimately approved, the DPA between DOJ and HSBC (resolving sanctions-related and anti-money laundering violations by that bank) and those parties' application for abeyance under the Speedy Trial Act. United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).

[11] United States v. Fokker Servs. B.V., 79 F. Supp. 3d 160, 166 (D.D.C. 2015).

[12] HSBC, 2013 WL 3306161.

[13] Fokker Servs., 79 F. Supp. 3d at 165.

[14] *Id.* at 166.

[15] *Id.* at 167.

[16] *Id.*

[17] *Id.*

[18] DOJ filed its notice of appeal with the District Court on March 10, 2015 (United States v. Fokker Services B.V., No. 14-CR-121 (RJL) (D.D.C. filed March 9, 2015), ECF No. 29) and the D.C. Circuit assigned to the case the docket number 15-3017. Fokker Services filed its notice of appeal with the District Court on February 18, 2015 (United States v. Fokker Services B.V., No. 14-CR-121 (RJL) (D.D.C. filed Feb. 18, 2015), ECF No. 24) and the D.C. Circuit assigned to the case the docket number 15-3016. On March 10, 2015, the D.C. Circuit ordered the consolidation of these appeals as docket number 15-3016.

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On April 5, 2016, in an opinion authored by Judge Sri Srinivasan on behalf of the three-judge panel (Judge David B. Sentelle, Judge Laurence H. Silberman and Judge Srinivasan), the D.C. Circuit vacated the District Court's order. The D.C. Circuit concluded that the Speedy Trial Act "confers no authority in a court to withhold exclusion of time pursuant to a DPA based on concerns that the government should bring different charges or should charge different defendants."[19] In so finding, the D.C. Circuit cited the Constitution's allocation of primacy with respect to criminal charging decisions to the executive branch, the long-settled independence of the executive in such decisions, and the judiciary branch's general lack of authority to second-guess such decisions. The D.C. Circuit stated that nothing in the Speedy Trial Act's "terms or structure" suggested congressional intent to subvert those principles.[20]

The D.C. Circuit explained that the District Court had exceeded its authority under the Speedy Trial Act by "rejecting the DPA based primarily on concerns about the prosecution's charging choices,"[21] and stated that the court's review power under the Speedy Trial Act was limited to evaluating whether the parties entered into a DPA in order to evade speedy trial limits and whether the DPA served the purpose of allowing the defendant to demonstrate its good conduct.[22] The D.C. Circuit stated that the court approval required in order to exclude time under the Speedy Trial Act should be read "against the background of settled constitutional understandings under which authority over criminal charging decisions resides fundamentally with the Executive, without the involvement of — and without oversight power in — the Judiciary."[23]

The D.C. Circuit rejected an argument analogizing the court's review of a DPA to its review of a proposed plea agreement, explaining that the court's review of a plea agreement was rooted in the judiciary's power over criminal sentencing, which was not unfettered in any event and did not permit judges to withhold approval based on disagreement with the prosecutor's underlying charging decisions.[24]

Instead, the D.C. Circuit drew a parallel between the Speedy Trial Act's requirement of court approval and the requirement under Rule 48(a) of the Federal Rules of Criminal Procedure that a prosecutor must obtain leave of court before dismissing criminal charges. The D.C. Circuit reasoned that in the context of either a DPA or dismissal under Rule 48(a), withholding of approval by the court would be a "substantial and unwarranted intrusion on the Executive Branch's fundamental prerogatives,"[25] and concluded that there was no basis for finding that courts had greater power to second-guess charging decisions in the context of a DPA than in any other exercise of criminal charging authority. The D.C. Circuit expressly rejected the District Court's reasoning that the filing of the DPA conferred such supervisory power. The D.C. Circuit opinion thus also rejects the reasoning of the Eastern District of New York *HSBC* decision.

The D.C. Circuit also cited the judiciary branch's "lack of competence" to review the government's decision to pursue a DPA and the terms thereof, citing Supreme Court precedent regarding the executive branch's unique ability to make the decision whether to prosecute based on multiple factors, and the judiciary's inability to undertake such an inquiry.[26] The D.C. Circuit explained that the provisions of a DPA "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."[27]

## Implications

The D.C. Circuit's decision firmly clarifies the role of a district court in reviewing terms of a DPA, and emphasizes that DPAs are a charging tool subject to significant executive branch discretion. In *dicta*, the D.C. Circuit also endorsed the use of DPAs, lending legitimacy to their widespread use as an alternative between declinations and proceeding to trial:

> DPAs have become an increasingly important tool in the government's efforts to hold defendants accountable. They afford prosecutors an intermediate alternative between, on one hand, allowing a defendant to evade responsibility altogether, and, on the other hand, seeking a conviction that the prosecution may believe would be difficult to obtain or would have undesirable collateral consequences for the defendant or innocent third parties. The agreements also give prosecutors the flexibility to structure arrangements that, in their view, best account for the defendant's culpability and yield the most desirable long-term outcomes.[28]

For corporations and defense lawyers seeking the certainty of being able to negotiate a binding agreement with executive branch prosecutors, the D.C. Circuit decision provides clarity and forward-looking comfort. For those who have criticized DPAs as excessively collusive and unreviewable, the opinion is a significant setback.

[19] United States v. Fokker Services B.V., No. 15-3016, 2016 WL 1319266, at *1 (D.C. Cir. Apr. 5, 2016).

[20] *Id.*

[21] *Id.* at *4.

[22] *See id.* at *10-11.

[23] *Id.* at *4.

[24] *Id.* at *9.

[25] *Id.* at *7.

[26] *Id.* (citing Wayte v. United States, 470 U.S. 598, 607 (1985)).

[27] *Id.* In laying out the background of the case, the D.C. Circuit also had described the interplay between DPAs generally and the Speedy Trial Act's requirement that trial commence within 70 days of filing, noting that the exclusion of time provided for under the Speedy Trial Act is "essential" to the effective operation of a DPA. The D.C. Circuit explained that, without the exclusion of time, the government would lose its ability to prosecute the defendant for any violation of the agreement after 70 days, which would "largely eliminate the leverage that engenders the defendant's compliance with a DPA's conditions." *Id.* at 6.

[28] *Id.* at *14.