Second Circuit Upholds Prosecutorial Discretion in Deferred Prosecution Agreements

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On July 12, 2017, the U.S. Court of Appeals for the Second Circuit ruled in *United States v. HSBC Bank USA, N.A.* that a federal district court does not have the authority to supervise the implementation of a deferred prosecution agreement (DPA) absent a showing of impropriety, and therefore a compliance monitor's report prepared pursuant to a DPA was not a "judicial document" subject to a presumptive right of public access. The ruling is consistent with a 2016 decision by the D.C. Circuit in *United States v. Fokker Services B.V.*, which held 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] But *HSBC Bank* and *Fokker Services* contrast with recently introduced DPA frameworks in Europe that contemplate more robust judicial supervision of DPAs. While DPAs in practice have been used for many years as a mechanism to resolve corporate criminal liability, the law governing DPAs has remained relatively undeveloped on both sides of the Atlantic. Thus, the Second Circuit's decision in this high-profile case provides critical guidance concerning the role of federal district courts in overseeing DPAs.

DPAs in the United States

DPAs have become increasingly prevalent in criminal cases involving corporate defendants — over 168 since 2007 compared to 33 in the preceding 15 years.[2] But because DPAs involve a federal prosecutor filing criminal charges with a district court and seeking a ruling that the term of the DPA can be excluded from the ticking clock of the Speedy Trial Act, this involvement of the district court has given rise to the question of what power — if any — the court has to consider the merits of and supervise the implementation of the DPA.

When the U.S. Department of Justice (DOJ) and a defendant enter into a DPA, the DOJ files charges against the defendant and the defendant acknowledges facts sufficient to support a conviction, but the DOJ agrees not to pursue the case if the defendant adheres to certain agreed-upon requirements. Under the Speedy Trial Act, though, a trial must begin within 70 days of when a defendant is charged or makes an initial appearance. Time can be excluded from the speedy trial clock for any period of delay during which the prosecution is deferred by the government pursuant to a written agreement — such as a DPA — with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate its good conduct.[3] Some district courts have taken the position that this requirement of court approval, as well as the parties' use of the court's docket, grants the district court discretion to consider the merits of and supervise the implementation of the underlying agreement. The two appellate courts that have addressed this question, though, have both found that DPAs reflect charging (as opposed to sentencing) decisions and therefore fall squarely within the prerogative of the executive branch to determine what charges to bring and, if charges are brought, whether to pursue them. These appeals courts have, therefore, concluded that, except for determining whether a DPA involves misconduct, such as a disguised effort by the prosecution and/or defense to circumvent the speedy trial clock, a district court has no authority to consider the merits or implementation of a DPA.

[1] *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 738 (D.C. Cir. 2016).

[2] *See* Brandon L. Garrett & Jon Ashley, *Corporate Prosecution Registry*, U. Va. Sch. Law, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/browse/browse.html (including data through June 30, 2017).

[3] 18 U.S.C. § 3161(h)(2).

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Fokker Services reached the D.C. Circuit after the U.S. District Court for the District of Columbia issued an order refusing to exclude from the speedy trial clock the term of a June 2014 DPA between the DOJ and Fokker Services B.V., a Dutch aerospace firm that allegedly violated U.S. economic sanctions and export controls laws. The district court held that it had the ability to approve or reject a DPA pursuant to its inherent supervisory power over matters before it and concluded that the terms of that DPA did not serve the public interest. The district court found that the DPA "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."[4] Both the DOJ and Fokker Services appealed that order to the D.C. Circuit, and in April 2016, a three-judge panel vacated the district court's order, holding 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."[5] The D.C. Circuit cited the executive's primacy in criminal charging decisions under the Constitution's Faithful Execution clause and the judicial branch's general lack of authority to second-guess such decisions.[6] 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 is rooted in the judiciary's power over criminal sentencing, which itself is limited and does not permit judges to withhold approval based on disagreement with the prosecutor's underlying charging decisions.

HSBC Bank reached the Second Circuit following a December 2012 DPA between the DOJ and HSBC Bank USA, N.A. and HSBC Holdings plc (together, HSBC) relating to alleged economic sanctions and Bank Secrecy Act violations. As part of the DPA, HSBC agreed to the imposition of an independent monitor charged with preparing periodic reports on HSBC's compliance with anti-money laundering laws and with the terms of the DPA. The district court determined that it had supervisory authority to approve or reject the DPA and conditioned its approval of the DPA on its own continued monitoring of the DPA's implementation. Later, when the monitor issued a report pursuant to the DPA, the district court ordered the DOJ to file the report on the docket. Although the court initially ordered the report sealed at the parties' request, a member of the public, Hubert Dean Moore, later sought access to the report in connection with a separate suit against HSBC, and the district court construed the request from Mr. Moore as a motion to unseal the report. The district court found that the monitor's report was a "judicial document" subject to a presumptive right of public access and ordered it to be unsealed with limited redactions.[7] The DOJ and HSBC both appealed to the Second Circuit, arguing that the report is not a judicial document subject to disclosure and that the district court's order ran counter to separation of powers principles vesting prosecutorial discretion solely with the executive branch.

A three-judge panel of the Second Circuit agreed with the DOJ and HSBC, reversing the district court's order. The Second Circuit reasoned that "[a]bsent unusual circumstances ... a district court's role vis-à-vis a DPA is limited to arraigning the defendant[and] granting a speedy trial waiver if the DPA does not represent an improper attempt to circumvent the speedy trial clock."[8] The Second Circuit determined that the district court had encroached on the executive branch's prerogative to make prosecutorial decisions by "*sua sponte* invoking its supervisory power to monitor the implementation of the DPA in the absence of a showing of impropriety."[9] Moreover, the Second Circuit found that "[a]t least in the absence of any clear indication that Congress intended courts to evaluate the substantive merits of a DPA or to supervise a DPA," the Speedy Trial Act should not be read to alter the traditional roles of the executive and judicial branches.[10] Because the district court lacked supervisory authority to oversee the implementation of the DPA, the Second Circuit concluded that the monitor's report was not a judicial document and therefore should not be unsealed.

The decisions in *Fokker Services* and *HSBC Bank*, issued in two prominent circuits for corporate DPAs, are particularly significant for several reasons. First, they clarify the respective roles of the judiciary and the executive branch in the DPA process. Second, they enable the DOJ and corporate defendants to negotiate DPAs without fear of having to win substantive approval from a district court, thus providing parties with greater certainty in negotiations and lowering the risk that a court will second-guess a DPA after it has been finalized. Third, they reduce the risk that documents generated or produced pursuant to a DPA, such as monitor reports, would become public as judicial documents.

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

[5] *Fokker Servs.*, 818 F.3d at 738.

[6] *See id.* at 741 (citing U.S. Const. art. II, § 3 ("[The President] shall take care that the laws be faithfully executed")).

[7] The common law right of public access to judicial documents is said to predate the Constitution and has been endorsed by the Supreme Court and the numerous circuit courts that have addressed the issue. S*ee Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597-98, 612 (1978); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 92 (2d Cir. 2004) (collecting cases).

[8] *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 129 (2d Cir. 2017).

[9] *Id.* at 135.

[10] *Id.* at 138.

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DPAs in France and the UK

DPAs are still relatively novel in Europe, as countries such as France and the U.K. have only recently authorized their use. Unlike the approach in the United States, exemplified in *Fokker Services* and *HSBC Bank*, however, France and the U.K. have both opted for judicial supervision over the substance of agreements between prosecutors and defendants.

In France, DPAs — known as a *convention judiciaire d'intérêt public* (CJIP) under the Sapin II framework — are "validated" during a public hearing by a judge who reviews both the substance (including the facts of the case) and the procedural aspects of the CJIP.[11] While the judge's decision to validate the CJIP cannot be appealed, companies have 10 days to withdraw from and renounce the agreement. If they do so, the CJIP becomes null and void, and none of the statements or documents provided by the company to the prosecutor during the CJIP process can be used by the prosecutor as part of a subsequent formal proceeding against the company. Similar to DPAs, CJIPs do not require companies to plead guilty. Rather, they defer the prosecution until the agreement's provisions have been executed by the company. CJIPs may also contain provisions requiring the company to establish a remediation plan for a maximum period of three years under the control of the newly established French Anti-Corruption Agency. The CJIP process also contemplates restitution to victims injured by the conduct underlying the CJIP.[12]

In the U.K., DPAs have been available in England and Wales since February 2014, having been introduced by the Crime and Courts Act 2013. They are a discretionary tool that may be used by prosecutors to dispose of a narrowly defined list of serious economic offenses committed by a corporate defendant. Before a prosecutor considers entering into a DPA, the prosecutor must be satisfied that there would be sufficient evidence to establish a reasonable prospect of conviction and that the public interest would be properly served by entering into a DPA with the defendant rather than pursuing a prosecution. During the DPA negotiations, there is no requirement for the corporate organization to make formal admissions of guilt; however, it is necessary to admit the contents and meaning of key documents referred to in the statement of facts. Full guidance on whether to proceed with a DPA, and the procedure for doing so, is set forth in the Deferred Prosecution Agreements Code of Practice.

The English courts play a significant role in approving DPAs. This approval process consists of two stages. The first stage involves a preliminary hearing, held in private, where the outcomes of the DPA negotiations are presented to the court in the form of a proposed indictment and an agreed-upon statement of facts. If the judge is not satisfied with the terms of the proposed DPA or the facts or evidence of the alleged offense, directions can be given to the parties to provide more information or evidence, or to amend the proposed terms of the DPA. Before making a determination at the preliminary hearing, the judge must be satisfied that entering into a DPA, rather than proceeding with prosecution, is in the interests of justice and that the proposed terms of the DPA are fair, reasonable and proportionate.

After the preliminary hearing, the parties have an opportunity to address any concerns raised by the court. If these concerns are satisfactorily resolved, the proposed DPA is brought before the court at a final hearing, which is held in public. This is the second stage of the approval process, and it is at this stage that the court is invited to approve the terms of the DPA to which the parties have agreed. If the court approves the agreement and the draft indictment, the corporate organization is charged with the stipulated offenses but the case is immediately treated as having been suspended.

The court continues to perform a supervisory function after the approval of the DPA. The prosecutor may apply to the court to amend the terms of or terminate the DPA if, for example, the prosecutor believes that the defendant has breached the terms. If the DPA is terminated before its term expires, the prosecutor may apply to the court to lift the suspension of the prosecution and proceed with its case before the court. The prosecutor must also make an application to the court to discontinue the prosecution once the term of the DPA expires.

Corporate defendants do not have a right to be offered a DPA: Whether a DPA is offered is in the discretion of the prosecutor and the courts. For this reason, a corporate defendant cannot challenge a decision not to offer a DPA. It is, at least in theory, possible for an interested third party to challenge a DPA by way of judicial review, although the requirements for bringing a successful application for judicial review are complex and limited.

Possible Legislative Action in the United States

Although *Fokker Services* and *HSBC Bank* envision only a minimal role for judicial supervision of DPAs, Congress could provide increased supervision and review. Indeed, in a concurring opinion in *HSBC Bank*, Judge Rosemary S. Pooler urged Congress to revisit the legal framework surrounding DPAs, noting that without legal reform, "[p]rosecutors can enforce

[11] The CJIP procedure is regulated by article 41-1-2 of the French Criminal Procedure Code and by decree n° 2017-660 du 27 avril 2017.

[12] When victims of the offense underlying the CJIP are identifiable, they are informed by the prosecutor of the decision to offer a CJIP to the company. The prosecutor is required to consider the harm to victims of the company's conduct and may require the company to pay damages to the victims as part of the CJIP.

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legal theories without such theories ever being tested in a court proceeding" and that "[a]s the law governing DPAs stands now ... the prosecution exercises the core judicial functions of adjudicating guilt and imposing sentence with no meaningful oversight from the courts."[13] A 2014 bill introduced in the House of Representatives would have addressed some of these concerns by requiring a district court to consider whether a DPA is in the interest of justice, but the bill did not receive a committee vote and has not been reintroduced in the current Congress.[14] Nonetheless, DPAs could again come under congressional scrutiny, and reforms could shift the U.S. legal framework toward increased judicial supervision similar to the current frameworks in Europe.[15]

[13] *HSBC Bank*, 863 F.3d at 143 (Pooler, J., concurring).

[14] Accountability in Deferred Prosecution Act of 2014, H.R. 4540, 113th Cong. (2014).

[15] Although they would not increase judicial supervision *per se*, several bills in the current Congress would affect the legal framework of DPAs. For example, section 393 of the Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017), which passed the House in June, would prohibit the DOJ from entering into a DPA that would "direct or provide for payment to any person who is not a victim of the alleged wrongdoing."

Conclusion

As prosecutors in the United States and Europe continue to use DPAs to resolve criminal cases involving corporate defendants, they may face future scrutiny within their respective legal and political systems. For now, the decisions in *Fokker Services* and *HSBC Bank* provide corporate defendants in the United States with increased comfort that DPAs that they enter into with the DOJ will generally not be second-guessed by district courts. In France and the U.K., though, corporate defendants should expect to engage in dialogue not only with prosecutors, but also with the judiciary when entering into DPAs.

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