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CLIENT MEMORANDUM

D.C. Circuit Overturns District Court's Rejection of Deferred Prosecution Agreement, Confirms Courts' Limited Scope of Review of DPAs

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On April 5, 2016, the U.S. Court of Appeals for the District of Columbia Circuit vacated an order by the U.S. District Court for the District of Columbia that rejected a deferred prosecution agreement ("DPA") between the U.S. Department of Justice (the "DOJ") and Fokker Services B.V. ("Fokker") "based on concerns that the government should bring different charges or should charge different defendants."[1] To effectuate a DPA, a district court must approve the parties' request to exclude time under the Speedy Trial Act to "allow[] the defendant to demonstrate his good conduct" under the DPA.[2] In *United States v. Fokker Services B.V.*, the district court rejected the parties' request to exclude time because, in its view, the DPA did not "constitute an appropriate exercise of prosecutorial discretion" as it "is grossly disproportionate to the gravity of Fokker Services' conduct in a post-9/11 world."[3] In granting the DOJ's and Fokker's writ of mandamus—a rare form of appellate jurisdiction—the D.C. Circuit found that the district court encroached on the "Executive's exercise of

1 *United States v. Fokker Services B.V.*, No. 15-3016, slip op. at 3-4 (D.C. Cir. Apr. 5, 2016).

2 *Id.* at 4 (quoting 18 U.S.C. § 3161(h)(2)).

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

discretion over the initiation and dismissal of criminal charges."[4] The D.C. Circuit's decision signals that district courts have limited authority to reject DPAs.

The District Court's Decision

On June 23, 2010, Fokker, a Dutch aerospace services company, voluntarily notified the DOJ that it may have violated U.S. sanctions and export control laws. Fokker cooperated with the DOJ's investigation and enhanced its compliance program. On June 5, 2014, the DOJ filed a criminal information charging Fokker with one count of conspiracy to violate the International Emergency Economic Powers Act (IEEPA) and the parties filed a joint consent motion to exclude time under the Speedy Trial Act, accompanied by an executed DPA. Fokker admitted to making over 1,000 illegal shipments to Iran, Sudan, and Myanmar from 2005 to 2010. Pursuant to the terms of the DPA, the DOJ agreed to dismiss the information with prejudice if Fokker complied with the terms of the DPA throughout the agreement's 18-month term. Under the DPA, Fokker agreed to (1) forfeit $10.5 million to the DOJ (in addition to $10.5 million in fines as part of a global settlement with other U.S. Government agencies); (2) continue to cooperate with the U.S. Government and its departments and agencies; (3) implement its new compliance program; and (4) comply with U.S. trade sanctions and export controls laws.

On February 5, 2015, the district court rejected the DPA by denying the parties' consent motion to exclude time under the Speedy Trial Act. The Speedy Trial Act requires that a criminal trial must begin within 70 days of the filing of an indictment or information, with certain exceptions for which the time can be tolled, including "[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."[5] Citing a single case from another district in which the court ultimately approved the DPA,[6] the district court found that it had the authority to reject the DPA under the Speedy Trial Act and the court's supervisory powers. The district court took the DOJ to task for not requiring Fokker to pay a larger fine, not mandating an independent monitor, and not prosecuting any individuals. It rejected the DPA as an inappropriate "exercise of prosecutorial discretion" because Fokker was prosecuted too "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."[7]

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4 *Fokker*, slip op. at 4.

5 18 U.S.C. § 3161(h)(2).

6 *United States v. HSBC Bank USA, N.A.,* 2013 WL 3306161 (E.D.N.Y. July 1, 2013).

7 *Fokker*, 79 F. Supp. 3d at 167.

The D.C. Circuit's Decision

The DOJ and Fokker both appealed the district court's order. The D.C. Circuit appointed *amicus curiae* to defend the district court's order. Although the threshold issue was whether the D.C. Circuit had jurisdiction to hear the appeal, given that the district court's order was not a final decision, the court addressed the merits of the district court's order first because this determination "substantially informed" the "threshold" jurisdictional question.[8]

On the merits, the D.C. Circuit explained that the district court violated the "long-settled understanding[]" that the "government's charging decisions . . . are for the Executive—not the courts—to make."[9] The D.C. Circuit's decision was rooted in the Constitution, the limited purpose of 18 U.S.C. § 3161(h)(2), and other cases in which courts have purportedly evaluated prosecutorial decisions.

First, under the Constitution's Take Care clause[10] and the pardon power,[11] the Executive is tasked with deciding "[w]hether to prosecute and what charges to file or bring."[12] The D.C. Circuit emphasized that "judicial authority is . . . at its most limited" when evaluating charging decisions because courts are "not competent" to assess considerations like "the strength of the government's evidence, the deterrence value of a prosecution, and the enforcement priorities of an agency."[13] "Indeed," the court added, "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought."[14]

Second, analyzing the plain language of the relevant portion of the Speedy Trial Act, 18 U.S.C. § 3161(h)(2), and the statute's legislative history, the D.C. Circuit found that a court's authority in evaluating a DPA is limited "to assur[ing] that the DPA in fact is geared to enabling the defendant to demonstrate compliance with the law, and is not instead a pretext intended merely to evade the Speedy Trial Act's time constraints."[15] While the D.C. Circuit did not address "the precise contours" of a district court's "authority . . . to confirm that a DPA's conditions are aimed to assure the defendant's good

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8 *Fokker*, slip op. at 9.

9 *Id.* at 4.

10 U.S. Const. art II, § 3.

11 *Id.* § 2.

12 *Fokker*, slip op. at 10.

13 *Id.* at 10-11, 15.

14 *Id.* at 11.

15 *Id.* at 17.

conduct," the D.C. Circuit indicated that it is clear that a district court's authority "does not permit [it] to impose its own views about the adequacy of the underlying criminal charges."[16]

Finally, the D.C. Circuit compared judicial authority to evaluate DPAs by excluding time under the Speedy Trial Act to judicial authority to review (i) prosecutorial decisions under Federal Rule of Criminal Procedure 48, (ii) civil consent decrees under the Tunney Act, and (iii) plea agreements under Federal Rule of Criminal Procedure 11. The D.C. Circuit found that judicial authority to review DPAs under the Speedy Trial Act—"with the approval of the court"[17]—was similar to the limited nature of judicial authority under Rule 48 and to review proposed decrees under the Tunney Act. With respect to Rule 48, which "requires a prosecutor to obtain 'leave of court' before dismissing charges against a criminal defendant,"[18] the court explained that the "principal object of the 'leave of court' requirement has been understood to be a narrow one—to protect a defendant against prosecutorial harassment . . . when the [g]overnment moves to dismiss an indictment over the defendant's objection."[19] Likewise, with respect to the Tunney Act, which "calls for a district court to enter a proposed antitrust consent decree if 'in the public interest,'"[20] the D.C. Circuit explained that "a district court should not reject a consent decree simply because it believes the [g]overnment could have negotiated a more exacting decree . . . or because it believes the government failed to bring the proper charges."[21] "[S]hort of" making "a mockery of judicial power," the court added, the authority of a district court to accept or reject a consent decree under the Tunney Act is limited.[22] Thus, the D.C. Circuit concluded that neither Rule 48 nor the Tunney Act "confer[] . . . new power in the courts to scrutinize and countermand the prosecution's exercise of its traditional authority and enforcement decisions."[23]

The D.C. Circuit also rejected the argument that the district court's rejection of the DPA was consistent with the court's authority to review proposed plea agreements under Rule 11. While a district court "must exercise discretion in deciding whether to accept or reject a guilty plea, that discretion is not unfettered."[24] "In particular," the D.C. Circuit explained, "trial judges are not free to withhold approval of guilty pleas . . . merely because their conception of the public interest differs from that of the prosecuting attorney."[25] To the extent that Rule 11 affords courts a broader review under certain

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16 *Id.*

17 18 U.S.C. § 3161(h)(2).

18 *Fokker*, slip op. at 11.

19 *Id.* at 12.

20 *Id.*

21 *Id.* at 13.

22 *Id.*

23 *Id.* at 14.

24 *Id.* at 18.

25 *Id.*

circumstances, the D.C. Circuit observed that it is critical that "a district court's authority to accept or reject a proposed plea agreement under Rule 11 is rooted in the Judiciary's traditional power over criminal *sentencing*, as the Rule itself indicates in permitting the court to defer a decision until the court has reviewed the presentence report."[26] "Whereas a district court enters a judgment of conviction and then imposes a sentence in the case of a plea agreement, the court takes no such actions in the case of a DPA. Rather, the entire object of a DPA is to enable the defendant to *avoid* criminal conviction and sentence by demonstrating good conduct and compliance with the law."[27]

The D.C. Circuit concluded its discussion on the merits by explaining that, "insofar as a court has authority to reject a DPA if it contains illegal or unethical provisions," absent such circumstances, the court's "inquiry" is "confined . . . to examining whether [a] DPA serve[s] the purpose of allowing [a defendant] to demonstrate its good conduct, as contemplated by § 3161(h)(2)."[28]

With respect to jurisdiction, by virtue of having found that the district court overstepped its bounds by "assum[ing] the role of Attorney General,"[29] the D.C. Circuit concluded that a writ of mandamus was appropriate. Although "[m]andamus is a drastic and extraordinary remedy reserved for really extraordinary cases,"[30] the D.C. Circuit found that such relief was warranted because the district court's order "amount[ed] to an unwarranted impairment of another branch in the performance of its constitutional duties."[31] The district court's "ruling cannot but have enormous practical consequences for the government's ability to negotiate future settlements . . . and could have potentially far-reaching consequences for prosecutors' ability to pursue—and fashion the terms of—DPAs."[32] The D.C. Circuit added that "the novelty of the District Court's . . . ruling, combined with its potentially broad and destabilizing effects in an important area of law, justify . . . a writ of mandamus."[33]

Despite finding that the district court erred, the D.C. Circuit rejected Fokker's request to assign the case to another district judge on remand. The D.C. Circuit expressed its confidence in the district judge's ability "to render fair judgment going forward."[34]

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26 *Id.*

27 *Id.* at 19.

28 *Id.* at 21.

29 *Id.*

30 *Id.*

31 *Id.* at 27.

32 *Id.*

33 *Id.* at 27-28.

34 *Id.* at 28.

Conclusion

Coming on the heels of the Second Circuit's reversal of a district court's rejection of the U.S. Securities and Exchange Commission's settlement with Citigroup,[35] the D.C. Circuit's opinion constitutes another rebuke of attempts by the judiciary to encroach on the Executive's prerogative to make charging and settlement decisions. Although a court can reject a DPA if it is clear that the DOJ and defendant seek to toll the speedy trial clock for reasons other than to "allow[] the defendant to demonstrate his good conduct"[36] or if the DPA "contains illegal or unethical provisions,"[37] neither the Speedy Trial Act nor the court's supervisory powers "confer free-ranging authority in district courts to scrutinize the prosecution's discretionary charging decisions."[38] A court cannot "disapprove" a DPA because it "view[s] . . . the prosecution" as "too lenient."[39]

In addition to curtailing the scope of a district court's review of DPAs, the D.C. Circuit also acknowledged the increasingly important role DPAs play in the DOJ's enforcement programs. The court observed that "DPAs have become an increasingly important tool in the government's effort to hold defendants accountable."[40] 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."[41] Moreover, DPAs "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."[42] The D.C. Circuit's decision is welcome news for both prosecutors and companies seeking certainty in settling criminal matters through DPAs. It should provide additional confidence that their agreements, often hard-fought and carefully negotiated, are unlikely to be second-guessed by the district court.

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35 *U.S. Sec. & Exch. Comm'n v. Citigroup Global Mkts., Inc.*, 752 F.3d 285 (2d Cir. 2014).

36 18 U.S.C. § 3161(h)(2).

37 *Fokker*, slip op. at 21.

38 *Id.* at 9.

39 *Id.* at 10.

40 *Id.* at 27.

41 *Id.*

42 *Id.*

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