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United States v. Fokker Services B.V.: U.S. District Court Dismisses Case After U.S. Appellate Court Limited Judicial Review of Deferred Prosecution Agreements

On June 10, 2016, the U.S. District Court for the District of Columbia dismissed with prejudice the criminal Information against Fokker Services B.V., thus ending the litigation that began over two years ago with the filing of the Information pursuant to Fokker Services' deferred prosecution agreement ("DPA") with the DOJ. This was the first district court action in the case since the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), in an appeal briefed and argued by Clifford Chance US LLP, issued an opinion that vacated the district court's earlier order refusing to approve the DPA, and created a new standard limiting the scope of judicial review of DPAs in the United States. Importantly, the new standard issued by the D.C. Circuit on April 5, 2016 (the first by any federal appellate court in the United States) limits the ability of lower courts to second-guess the validity of the DOJ's charging decisions, or to review the specific terms of any DPA settlement agreed to by the parties. This standard will allow parties seeking to resolve U.S. enforcement actions through DPAs greater flexibility in negotiating terms with the DOJ.

The new standard came in an appeal brought to the D.C. Circuit by Fokker Services B.V.– represented by Clifford Chance US LLP. Fokker Services took the appeal to the D.C. Circuit after the trial judge rejected the DPA, finding that the resolution was "too good a deal for the defendant," and denied the parties' an extension of time under the Speedy Trial Act meant to effectuate the period of deferred prosecution.

On appeal, the D.C. Circuit agreed with Fokker Services and the DOJ that the lower court had committed legal error in refusing to allow the deferral of prosecution. Relying on "constitutionally rooted principles" that respect the DOJ's primacy in criminal charging decisions, the D.C. Circuit held that while DPAs are subject to court approval under the Speedy Trial Act, "a court's approval authority" is limited to "a particular focus: i.e., to assure that the DPA in fact is geared to enabling the defendant to demonstrate compliance with the law, and is not instead a pretext merely to evade the Speedy Trial Act's time constraints." In a clear recognition of the DOJ's discretionary authority to enter into a DPA, the D.C. Circuit held that when reviewing a DPA, the district court may not "impose its own views about the adequacy of the underlying criminal charges." Moreover, the D.C. Circuit

opined that while criminal charges remain pending on the court docket pursuant to the DPA, "the court plays no role in monitoring the defendant's compliance with the DPA's conditions;" rather, "the prosecution – and the prosecution alone – monitors a defendant's compliance . . . and determines whether the defendant's conduct warrants dismissal of the pending charges."

As the D.C. Circuit noted in its opinion, the DOJ's use of DPAs, along with their out-of-court analogues, non-prosecution agreements (NPAs), has seen a significant rise in recent years. The D.C. Circuit's new standard governing judicial review of DPAs aligns with that trend, and recognizes that allowing courts to scrutinize de novo the terms of a criminal settlement could have the adverse effect of discouraging the use of DPAs. This standard will not be binding on federal courts outside of the District of Columbia, but will undoubtedly be relied upon as persuasive precedent. Parties negotiating similar settlements with the DOJ, particularly those with venue within the District of Columbia, will enjoy greater flexibility in negotiating terms based on this new standard.

Notably, in a separate appeal currently pending before the U.S. Court of Appeals for the Second Circuit in New York, the scope of judicial oversight over the implementation of a DPA is also at issue. In a January 28, 2016 ruling issued by the federal district court overseeing the HSBC DPA, the lower court ordered that a redacted version of the Monitor's report on HSBC's compliance with its DPA be made public because it was a "judicial record . . . that the public has a First Amendment right to see . . . ." This ruling turned in part on the judge's analysis that "without judicial review of the Report," the court would be unable to properly evaluate whether HSBC had complied with the conditions of the DPA. Both HSBC and the DOJ have appealed this ruling, which appears to conflict with the D.C. Circuit's new standard of judicial review. Until the Second Circuit resolves the HSBC appeal, there will continue to be some uncertainty in the U.S. regarding the level of scrutiny that courts will bring to bear in evaluating DPAs.

The limited role for U.S. federal courts under this new standard sharply contrasts with the U.K. position, where legislation provides for a far more active role for courts. (*See* Schedule 17 of the Crime and Courts Act 2013.) The U.K. Crime and Courts Act prescribes a detailed timetable under which, through a series of private and public hearings, judges will take an early and active part in shaping the terms of DPAs. For example, even before the terms of an agreement are finalized between the parties, the U.K. prosecutor must apply to the court for a preliminary declaration that the DPA is "likely to be in the interests of justice," and that "the proposed terms of the DPA are fair, reasonable and proportionate." Once the terms are agreed between the parties, the prosecutor must apply to the court for a declaration that the DPA *is* in the interests of justice, and the terms of the DPA *are* fair, reasonable and proportionate. A DPA only comes into force once approved by the court. The first DPA in the UK received final court approval on November 30, 2015. (*See* briefing.) Thus, parties considering or negotiating DPAs with both U.S. and U.K. authorities must keep these procedural differences in mind when formulating a strategy.

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