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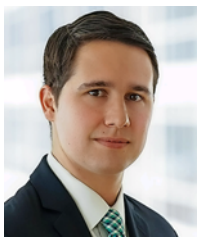
White Collar Crime Report™

CRIMINAL INVESTIGATIONS

Three DLA Piper attorneys discuss the distinct differences between deferred and non-prosecution agreements. The authors examine the nuances of both agreements, using recent court cases to elaborate on details that businesses should be aware of as they're facing criminal investigations.

Sticking to the Bargain: The D.C. and Second Circuits Uphold Limits on Courts' Authority to Supervise, Modify, or Challenge DPAs





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Over the past decade or so, federal prosecutors have been relying increasingly on deferred prosecution agreements (DPAs) and nonprosecution agreements (NPAs) to resolve criminal investigations of business organizations. *See* Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013*, 70 Bus. Law. 61, 62 (2015). In federal practice, both NPAs and DPAs are pretrial agreements that, among other things, require the organizations entering into these agreements to sign detailed—and often voluminous—statements of fact or statements of offense (factual statements). The companies must also agree that the facts set forth in the factual statements establish violations of federal law. NPAs and DPAs frequently place other potentially onerous requirements on business organizations, including:

- paying a fine or other monetary penalty;
- agreeing to enhance the company's compliance program;
- continuing to cooperate with the government; and

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■ even paying for, and subjecting the organization's operations to, an independent monitor.

Needless to say, the decision about whether to enter into these agreements is a complex one that no business organization takes lightly. And deciding whether to enter into a DPA is even more complicated than deciding whether to enter into an NPA because of a critical difference between an NPA and a DPA: an NPA, unlike a DPA, is *not* filed in court. As a result, a business organization knows the NPA will go into effect immediately after it is executed, and the business organization can transition from investigating and litigating to implementing the NPA's requirements. Of course, negative press coverage typically follows an NPA's public announcement, but certainty that the deal struck with the government will go into effect after it is executed also follows, thereby allowing an organization to immediately and confidently move forward.

DPAs negotiated with federal prosecutors, on the other hand, inherently carry more uncertainty because they are filed with a court. Once DPAs are filed, criminal procedure commences and court oversight attaches. Every hearing on the DPA is an opportunity for the public to be reminded that the company has acknowledged that it has committed a crime. And the fact that the business organization has conceded wrongdoing leaves it with little leverage should a court attempt to exercise its oversight over, or even altogether reject, the DPA.

Historically, courts showed little interest in challenging the terms of a DPA. But recently two district courts in jurisdictions in which many DPAs are filed, the D.C. and Second Circuits, found that they had the authority to review and evaluate DPAs; indeed, one of these courts outright refused to ''approve'' a DPA. *See United States v. HSBC Bank USA N.A.*, No. 1:12-cr-00763, Memorandum and Order (E.D.N.Y. July 1, 2013); *United States v. Fokker Services B.V.*, 79 F. Supp. 3d 160 (D.D.C. 2015). The potential significance of these cases was enormous. Had the views expressed by these courts prevailed, businesses and their counsel would have had to seriously reconsider whether they would ever enter into a DPA, and the stakes in a NPA-versus-DPA negotiation would have climbed considerably higher.

Fortunately, both the D.C. and the Second Circuits overruled their lower courts in *United States v. Fokker Services, B.V.*, 818 F.3d 733 (D.C. Cir. 2016) (*Fokker*) and *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125 (2d Cir. 2017) (*HSBC*), restating and restoring the limitations on the role that a trial court plays in reviewing and approving DPAs. Together, these cases ensure that a DPA remains a viable—even if not optimal—vehicle for resolving a federal criminal investigation.

DPAs and Potential Bases for Courts To Review Their Terms

Generally speaking, criminal charging decisions are left to the Executive, which includes decisions about whether to charge, whom to charge, which specific charges to bring, and whether to dismiss charges. *Fokker*, 818 F.3d at 737. The Judiciary is generally without power to second guess those decisions and impose its own charging preferences. *Id.* Rather, the court's role is to adjudicate guilt and determine the appropriate sentence. *Id.*

When a DPA is filed with the court, the Speedy Trial Act, which—subject to several important exceptions—requires trial within 70 days of a company's initial appearance, becomes a factor. *See* 18 U.S.C. § 3161(c)(1). The key statutory exception in the DPA context allows the parties, with ''the approval of the court,'' to exclude ''[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant . . . for the purpose of allowing the defendant to demonstrate his good conduct.'' *Id.* § 3161(h)(2). Prior to *Fokker* and *HSBC*, few courts had examined the nature of this approval or treated excluding this time as anything more than a formality. Not surprisingly, therefore, joint motions to exclude time on the basis of this exception are routine and, usually, perfunctory.

Furthermore, once a matter is filed, a court has inherent supervisory authority to manage all of the cases on its docket. This inherent supervisory authority ''permits federal courts to supervise 'the administration of criminal justice' among the parties before the bar.'' *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980) (quoting *McNabb v. United States*, 318 U.S. 332, 340 (1943)). While courts have employed the supervisory authority to establish rules of evidence and procedure and to govern the administration of justice, *HSBC*, 863 F.3d at 135-36 (citations omitted), they rarely invoke the authority, and when it is cited, it is most commonly cited by defendants seeking redress for alleged improprieties that occurred during criminal proceedings.

The Second and D.C. Circuits Hold That Courts' Supervisory Powers Are Quite Limited

Fokker In *Fokker*, a Dutch aerospace company, Fokker Services B.V. (Fokker), admitted violating U.S. export laws by doing business with sanctioned countries. *United States v. Fokker Services B.V.*, 79 F. Supp. 3d 160, 162-63 (D.D.C. 2015), *vacated by Fokker*, 818 F.3d at 751. To resolve the charges, Fokker and the government entered into a DPA that included a $10.5 million fine and an agreement to implement a new compliance program. *Id.* at 164. According to the DPA, if Fokker complied with the agreement throughout its 18-month term, the government would not prosecute the conduct described in the factual statement. *Id.*

To effectuate the DPA, the parties filed it with the court and jointly moved to exclude time under the Speedy Trial Act. *Id.* At the initial status conference on the DPA, the court ordered the parties to submit additional briefing on the appropriate standard of review, why the DPA adequately reflected the seriousness of the company's conduct, and why the DPA served the interests of justice. *United States v. Fokker Services B.V.*, No. 1:14-cr-00121, at Doc. Nos. 8, 11-13 (D.D.C. filed July 7, 18, 21, 2014). In response, the parties argued that the court's approval authority under the Speedy Trial Act was limited, but the district court disagreed. *Fokker Services B.V.*, 79 F. Supp. 3d at 164. After reviewing the DPA, the court explained that ''it would undermine the public's confidence in the administration of justice and promote disrespect for the law for [the

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court]'' to preside over what the court believed was an overly lenient DPA. *Id.* at 167. As a result, the district court denied the joint motion to exclude time under the Speedy Trial Act, and, consequently, prevented *Fokker*, whose payment of the fine was contingent on the court approving the DPA, from complying with a material term of the agreement. *Id.* (It bears noting that had Fokker's performance not been contingent, in part, on an approved DPA, Fokker would have been able to comply with all of its obligations under the DPA regardless of whether the district court ''approved'' the agreement.)

The government and Fokker immediately filed a petition for writ of mandamus with the D.C. Circuit to challenge the ruling. The court of appeals granted the writ and reversed. In vacating the district court's order, the D.C. Circuit held that the Speedy Trial Act does not empower a court to withhold approval based on concerns that the government should bring different charges or prosecute different defendants. *Fokker*, 818 F.3d at 738. While the court acknowledged the Speedy Trial Act conferred *some* authority to the district court to approve a DPA, the court concluded the district court erred by embracing a ''free-ranging authority . . . to scrutinize the prosecutor's discretionary charging decisions.'' *Id.* at 741. It also admonished that a ''presumption of regularity'' applies to prosecutorial decisions, which means, absent ''clear evidence to the contrary,'' courts presume prosecutors have properly discharged their official duties. *Id.* According to the court, the approval authority for the exclusion of time for a DPA should have a ''particular focus: . . . 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 intended merely to evade the Speedy Trial Act's time constraints.'' *Id.* at 744-45. While the court did not opine on the ''precise contours'' of that authority, it did affirm that a court cannot use that authority to impose its own views about the adequacy of the underlying criminal charges. *Id.* The court found no indication that the parties in *Fokker* entered into the DPA to evade speedy trial limits. *Id.* at 746. Thus, by denying the motion to exclude on grounds that the prosecution should have brought different charges or sought different remedies, the district court exceeded its authority under the Speedy Trial Act. *Id.*

Unfortunately for both sides, by the time the appeal concluded, the 18-month term of the negotiated DPA had lapsed. *See id.* at 733, 739 (DPA filed June 5, 2014 but case decided April 5, 2016). This unforeseen procedural hurdle caused additional uncertainty about when the DPA term should have commenced, when it ended, and whether the Speedy Trial Act applied at all if the matter was to be dismissed. Of course, such practical complications exemplify the kinds of problems that can arise in DPA-related litigation.

HSBC Although the lower court in *HSBC* addressed the same question presented in *Fokker*, it did so in a slightly different procedural context. In that case, the government and HSBC entered into a five-year DPA, in which HSBC agreed to adopt measures to enhance its compliance program and to retain an independent monitor to evaluate its progress. *HSBC*, 863 F.3d at 130. The monitor was required to submit periodic, confidential reports to HSBC and the government with detailed findings and recommendations. *Id.* If the government was satisfied with HSBC's adherence to the DPA at the end of the five-year term, it would dismiss the charges. *Id.* If, however, the government determined in its ''sole discretion'' that HSBC breached the DPA, then the government could prosecute HSBC. *Id.* As in *Fokker*, the parties moved for an exclusion of time under the Speedy Trial Act.

The district court in *HSBC* viewed the Speedy Trial Act's ''approval'' requirement as turning on whether the court approved of the DPA itself. *United States v. HSBC Bank USA N.A.*, No. 1:12-cr-00763, Memorandum and Order (E.D.N.Y. July 1, 2013), *rev'd by HSBC*, 863 F.3d at 142. And, it reasoned, the court's approval authority stemmed from its supervisory authority because the parties chose to involve the court by filing the DPA. *Id.* at 5. According to the court, the mere placement of the matter on the docket subjected the DPA to the court's supervision because the parties were, in effect, asking the court to lend the DPA a judicial imprimatur. *Id.* at 6. Although it acknowledged that its approach was ''novel,'' the court said it was easy to imagine a DPA that ''so transgresses the bounds of lawfulness or proprietary as to warrant judicial intervention to protect the integrity of the Court.'' *Id.* The court ultimately approved the DPA, finding ''no impropriety that implicates the integrity of the [c]ourt and therefore warrants the rejection of the [DPA].'' *Id.* at 7. But the court went further and required the parties to file quarterly status reports on significant developments in the DPA's implementation. *Id.* at 11.

Almost three years later, after reviewing one of the quarterly reports, the district court ordered the government to file the independent monitor's report with the court, which the government proposed to do under seal. *HSBC*, 863 F.3d at 132. Although the court initially accepted the report under seal, a member of the public later requested that the report be unsealed. *Id.* The court granted the motion in part, finding that the monitor's report was a judicial document subject to a presumptive right of public access, and the parties' concerns could be addressed with tailored redactions. *Id.* at 133. Both the government and HSBC appealed the district court's unsealing order, challenging the underlying premise that the court had broad authority to ''approve'' the DPA. *Id.*

The Second Circuit reversed, holding that—absent a present, non-hypothetical showing of misconduct by the government, the company, or both—the district court erred in invoking its supervisory authority to ''approve'' the DPA and assume a monitoring role in the implementation of the DPA. *Id.* at 136-37. The court conceded that some level of misconduct, *i.e.*, ''conduct that smacks of impropriety,'' might justify a court invoking its supervisory authority. *Id.* at 137. But the district court erred by speculating about hypothetical, future instances of misconduct. Relying on *Fokker*, the court also embraced a narrow view of the court's approval authority under the Speedy Trial Act. *Id.* It found the vague ''approval'' requirement in Section 3161(h)(2) as authorizing courts to determine only that a DPA is *bona fide* before granting a speedy trial waiver. *Id.* at 138. And that inquiry is limited to determining whether the DPA is genuinely intended to allow a defendant to demonstrate good conduct, rather than an effort to circumvent the time strictures of the Speedy Trial Act. *Id.* Otherwise, a district court does not have authority to second-guess the parties' agreement.

Deferred Prosecution Agreements Moving Forward

These two decisions, from courts of appeals for jurisdictions in which a number of DPAs are filed, sharply limit the court's role in assessing the merits of a DPA. They both stand for the proposition that a presumption of regularity attaches to a prosecutor's decision to enter into a DPA, which means companies should feel more confident that a painstakingly negotiated DPA will not be challenged by a court after filing. Moreover, the limited nature of the review contemplated by *Fokker* and *HSBC* should lead to relatively quick reviews of DPAs (at least in the D.C. and Second Circuits) and reduce the likelihood of months of protracted hearings and filings regarding DPAs. To be sure, a number of reasons still exist for business organizations and their counsel to aggressively negotiate for NPAs instead of DPAs. But if an NPA is not an option, *Fokker* and *HSBC* provide comfort that a DPA remains a viable and reliable option for a resolution.

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