SULLIVAN & CROMWELL LLP

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Judicial Review of Deferred Prosecution Agreements

United States v. *Fokker Services B.V.*: District Court Rejects as "Grossly Disproportionate" a Deferred Prosecution Agreement in U.S. Economic Sanctions Case

SUMMARY

On February 5, 2015, Judge Richard J. Leon of the United States District Court for the District of Columbia rejected a proposed Deferred Prosecution Agreement ("DPA") between the Department of Justice and Fokker Services, B.V. ("Fokker") arising from admitted violations of U.S. sanctions laws. In the strongest rejection of a DPA to date, Judge Leon found the agreement too lenient, "grossly disproportionate" in light of the conduct charged by the government, expanding upon a recent trend of increased judicial scrutiny of DPAs and similar settlement agreements, and carving out a robust role for federal judges in overseeing the DPA process. This decision may shift the dynamic even further as prosecutors and companies consider the resolution of government investigations short of a criminal plea.

BACKGROUND

Fokker, a Dutch Aerospace company, was charged with violating U.S. export laws by exporting aircraft parts, technology, and services to Iran (including its Air Force and other branches of its military), Burma, and Sudan. Specifically, the Information alleged that, from 2005 through 2010, Fokker engaged in a scheme of deliberate conduct to evade the sanctions, including falsifying tail numbers, deleting references to Iran in materials sent to U.S. subsidiaries and repair shops, and removing fields relating to end-user information in an internal parts-tracking database. The Information alleged that Fokker's president and senior management were aware of both the laws Fokker was accused of violating and of certain violative policies and practices.

In 2010, Fokker self-reported this conduct to U.S. authorities, hired outside counsel to conduct an internal investigation, and began cooperating with the U.S. government's subsequent investigation.

In June 2014, the DOJ filed the DPA with the Court. The DPA provided that Fokker would pay $10.5 million in fines (and an additional $10.5 million to settle related investigations by the Department of Treasury's Office of Foreign Assets Control and the Department of Commerce's Bureau of Industry and Security); continue to cooperate with the U.S. authorities' investigation; implement new compliance programs and policies; and comply with U.S. export laws. If Fokker successfully complied with these terms for 18 months, the DOJ agreed to dismiss the charges with prejudice.

At a hearing in July 2014, Judge Leon expressed initial misgivings about the size of the settlement and the lack of individual prosecutions. In October, Judge Leon again warned the lawyers that they may have made "too good a deal," and that they should consider alternative resolutions that might be acceptable to the court. On February 5, 2015, Judge Leon issued a written decision denying approval of the DPA.

DISCUSSION

In rejecting the proposed settlement, Judge Leon drew upon a recent decision by Judge Gleeson in the Eastern District of New York. *See United States* v. *HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161, at *3 (E.D.N.Y. July 1, 2013). As in *HSBC*, the parties in the *Fokker* case jointly requested an exclusion of time under a provision of the Speedy Trial Act that expressly calls for court approval for periods of delay "during which prosecution is deferred . . . pursuant to written agreement with the defendant." 18 U.S.C. § 3161(h)(2).

Like Judge Gleeson, Judge Leon found the source of his authority to accept or reject a DPA to lie with the Court's inherent supervisory power to protect the integrity of the judicial process. Also, like Judge Gleeson, Judge Leon emphasized that the DOJ has absolute authority *not* to prosecute a case, and that the Court would have no role if the DOJ had decided to proceed via a Non-Prosecution Agreement ("NPA") rather than a DPA. According to Judge Leon, however, "by requesting the Court to lend its judicial imprimatur to their DPA," the parties invited its scrutiny.

Judge Leon found the terms of the DPA too lenient in light of the conduct alleged. The Court emphasized that Fokker's conduct aided Iran and its military "during the post-9/11 world when we were engaged in a two-front War against terror in the Middle East" and consisted of "voluminous violations" that were "knowing and willful, and were orchestrated at the highest levels of the company." Judge Leon also noted that the company had earned $21 million in revenue by dealing in parts excluded for sale for national security and anti-terrorism reasons.

But despite this "egregious" conduct, Judge Leon found that the DPA did not require Fokker to "pay as its fine a penny more than the $21 million in revenue it collected from its illegal transactions," did not install an independent monitor, and permitted a number of employees who were directly involved in the

transactions to remain with the company (notwithstanding that some of those employees received demotions or had some of their duties reassigned). Judge Leon went so far as to ask how "a company with such a long track record of deceit and illegal behavior ever convinced the Department of Justice to agree" to the DPA. The Court described the proposed settlement as "anemic," and ultimately concluded that the agreement was "grossly disproportionate to the gravity of Fokker Services' conduct in a post-9/11 world" and would, if approved, "undermine the public's confidence in the administration of justice and promote disrespect for the law."

IMPLICATIONS

Corporations facing law enforcement investigations in the U.S. have increasingly been at risk that the negotiation of a settlement agreement with the prosecutors is no longer the final step to achieving resolution. Rather, federal judges—whose involvement in the settlement process historically was quite limited—have become far more willing to question, and as in this case to reject, proposed settlements.

The *Fokker* decision is the strongest rejection to date of a corporate DPA. The Court's criticisms, however, are broadly consistent with those expressed in recent years by a number of federal judges who have hesitated before ultimately approving DPAs and other similar government settlements. In those other instances, the courts' criticisms commonly have included assertions that those settlements *lacked*:

- a large enough penalty amount (relatedly, several judges have expressed concern that companies will begin to view monetary penalties merely as "a cost of doing business");
- admissions of wrongdoing by the company;
- charges against the individuals who were responsible for the offense;
- sufficient factual detail for the judge to evaluate the agreement;
- sufficient remedial obligations for the company; and
- sufficient reporting to the court, over the term of the DPA, about the company's compliance with the agreement.

One notable exception to this trend was the Second Circuit's recent decision in *SEC* v. *Citigroup Global Markets, Inc.*, 752 F.3d 285 (2d Cir. 2014). There, the Second Circuit reversed the district court's rejection of an SEC settlement and articulated a standard of broad judicial deference to the SEC's settlement discretion. Judge Leon did not cite *Citigroup* in *Fokker* and there are significant differences between settlements in the civil and criminal context.

Citigroup notwithstanding, increasing judicial scrutiny raises the question of whether the government will seek to resolve criminal investigations in a form other than a DPA. The DOJ has the option of resolving cases via NPAs, which are quite similar to DPAs, including that they commonly contain concessions from the company, a detailed statement of facts that sets forth the improper conduct and, occasionally, even an unfiled criminal information that the DOJ is "prepared to file" in the event of a breach of the NPA. Importantly, however, NPAs, unlike DPAs, do not typically involve filings that require court approval.

Similarly, other U.S. law enforcement agencies—including the SEC and the Commodity Futures Trading Commission—have the ability to pursue settlements via administrative proceedings, without seeking court approval.

Alternatively, although a criminal plea requires court approval, the *Fokker* decision may accelerate an already pronounced trend for the DOJ to insist upon guilty pleas, or to pursue harsher penalties in a DPA.

The *Fokker* decision underscores the high degree of uncertainty that corporations face while judges consider (often for many months) whether to approve settlements. This uncertainty has been an unwelcome development for the companies involved, and is heightened by the fact that the level of judicial scrutiny may vary by jurisdiction or even by the judge assigned to the case. In light of this uncertainty, it would be beneficial for all involved if Circuit courts, a judicial conference or a bar group would issue rulemaking or guidance on the court's role in evaluating and overseeing deferred prosecution agreements.

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