

Law360, New York (July 9, 2015, 10:57 AM ET) -- Arguments about separation of powers principles dominate the controversy over a district court's refusal to approve a deferred prosecution agreement (DPA) for Fokker Services BV. In February, Judge Richard Leon of the United States District Court for the District of Columbia refused to approve that DPA as drafted and therefore denied a joint consent motion for exclusion of time under the Speedy Trial Act. (A more detailed analysis is available [here](#).) Both the United States and Fokker sought relief from the order by an appeal to the D.C. Circuit; and the United States, in the alternative, filed a petition seeking the issuance of a writ of mandamus.

The briefing not only presents the D.C. Circuit with a classic confrontation under the principles of separation of powers but also reflects judicial dissatisfaction with the government's vast powers to resolve investigations as it sees fit. In its brief, the United States raised the constitutional issue right off the bat by asserting that the executive branch has the power to direct that a criminal not be prosecuted any further and that the district court's decision violated the separation of powers principle "by improperly interfering with the executive branch's exercise of prosecutorial discretion in a criminal case." According to the United States, prosecutorial discretion serves three important purposes: (1) it reflects "well-recognized limitations on the judicial capacity to review charging decisions" (i.e., a judge may not be in the best position to evaluate the strength of a case, enforcement priorities, etc.); (2) it "safeguards liberty" by keeping separate the branches involved in the criminal process; and (3) it helps "keep the courts as neutral arbiters."

Among decisions supporting its position, the government relied upon U.S. [Securities and Exchange Commission v. Citigroup Global Markets](#), in which the Second Circuit last year reversed a similar denial by a district court. In that case, the district court had declared it would not be a "mere handmaiden" to a privately negotiated settlement involving a public agency. In its reversal, the Second Circuit restricted the district court to evaluating whether a proposed consent judgment involving an enforcement agency is fair and reasonable and that the public interest would not be disserved. In making that determination, the district court must recognize the public interest "rests squarely with the [government agency] and its decision merits significant deference."

In its briefing, Fokker emphasized its voluntary self-disclosures to the U.S. [Office of Foreign Assets Control](#) and the U.S. [Bureau of Industry and Security](#), its extensive cooperation with the agencies (including a significant internal investigation) and its development and implementation of remedial measures. It noted that the United States described these remedial efforts and the quality of Fokker's current compliance program as a "model to be followed by other corporations." Additionally, the DPA would have imposed a \$21 million penalty, which was over 3.5 times the actual gross profit Fokker earned from the transactions at issue. It also echoed the United States' arguments regarding the constitutional separation of powers.

On its own motion, D.C. Circuit appointed amicus curiae counsel to present arguments in support of the district court order. Although amicus counsel began by arguing that the Court of Appeals lacks jurisdiction to hear these interlocutory appeals, counsel joined the constitutional debate on the merits by arguing on merits that the district court possessed statutory and constitutional authority to reject the DPA. The district court had authority to consider the "substantive fairness" of the DPA per the plain language of the statutory provision of the Speedy Trial Act at issue that states a DPA requires "approval of the court." Moreover, the lower court's rejection did not pose any constitutional concerns: "The government remains free to negotiate a new DPA, try its case or dismiss the charges." Turning the constitutional argument back against the government, amicus pointed out that the executive branch had sought approval of the judicial branch. "If the government had wanted to avoid judicial involvement, it should have signed a nonprosecution agreement; by instead choosing to invoke judicial process and filing a motion to exclude time under the Speedy Trial Act, it cannot now characterize the district court's denial of that motion as a separation-of-powers violation." If anything, the amicus argued, the government and Fokker's positions raise constitutional concerns, as they suggest that the district court was "constitutionally required to blindly rubber-stamp the parties' motion," which is "fundamentally inconsistent with an independent judiciary." Analogizing to the process for accepting a plea agreement, amicus counsel pointed out that district courts routinely refuse to accept plea agreements and "[n]o court has ever suggested that this practice poses separation-of-powers concerns."

Amicus counsel sidestepped the Second Circuit's recent decision in Citigroup Global by claiming the decision was inapplicable. Amicus counsel explained that in Citigroup Global, and a similar previous decision by the D.C. Circuit, the district court committed error by basing its rejection on charges the government could have brought but did not. Fokker was vastly different because Judge Leon based his decision on the charges and facts actually presented to the court by the government. Amicus counsel asserted that the lower court did not abuse its discretion because Fokker's conduct was "shockingly egregious" as it "knowingly and willfully violated U.S. sanctions laws over 1,000 times." Under these facts, the DPA was "shockingly lenient" as Fokker was forced to pay back only the revenues it gained from illegal sales with no additional fines, employees kept their jobs and there was not an independent monitor. Amicus counsel gave almost no weight to Fokker's voluntary disclosure of its misconduct.

This constitutional dispute reflects the dissatisfaction of some courts that the traditional adversarial relationship between the government and corporate targets has changed. Especially since the 2002 collapse of Arthur Anderson following its indictment, corporations realize the critical importance of resolving investigations rather than trying to litigate. The costs of going to trial are simply too great. As a result, the overwhelming majority of cases before judges are resolved in a nontransparent manner over which judges have little input. The government impliedly recognized this pressure for more transparency about its policies by referring in the body of its brief to an April 2015 speech by Assistant Attorney General Leslie Caldwell at the New York University Center and to the corporate charging criteria outlined in the United States Attorneys' Manual. It is unclear what effect such judicial objections may have. It is worth noting, however, that in 2008 the government modified its emphasis on obtaining waiver of the attorney-client privilege as part of resolving corporate investigations in the face of intense criticism about the practice. The D.C. Circuit decision may have a similar practical consequence.

Oral argument has been set for Sept. 11, 2015.

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