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PERSPECTIVE

## DOJ Authority to Strike Deals With Defendants Limited

By Michael M. Farhang

On Sept. 11, the U.S. Court of Appeals for the D.C. Circuit heard oral argument in a significant case calling into question the scope of the U.S. Department of Justice's authority to strike deals with corporate defendants in criminal cases, *United States v. Fokker Services B.V.* The Fokker appeal relates to a DOJ investigation into alleged violations of the U.S. sanctions laws restricting trade with Iran, Sudan and Burma by Fokker Services, a Dutch aerospace services provider.

Following an internal investigation by the company and its disclosure of the issues to the government, the DOJ attempted to resolve the matter with a deferred prosecution agreement. The DPA imposed a criminal forfeiture amount that, when combined with accompanying civil penalties, matched the amount of revenue the company allegedly gained through trade in violation of the sanctions. It also provided for an 18-month probationary period at the end of which the company would have the opportunity to avoid a criminal conviction. Both parties submitted the DPA for approval to the district court, along with a request for an exclusion of time under the Speedy Trial Act that would allow the agreement to take effect.

In an unexpected move, U.S. District Judge Richard J. Leon of the federal district court in D.C. refused to sign off on the agreement. Reflecting on what it termed the company's "egregious" sanctions violations, including those involving trade with Iran, the court stated that it could not "help but conclude that the DPA presented here is grossly disproportionate to the gravity of [Fokker's] conduct in a post-9/11 world." The court noted that the fines and penalties appeared tailored to match to the "penny" the revenue Fokker had made and nothing more, the DPA did not call for an independent monitor, and there had been no prosecutions or terminations of any company employees. The court held that what it deemed the "anemic" nature of the

terms in the DPA did not constitute an appropriate exercise of prosecutorial discretion. Relying upon the Speedy Trial Act's requirement that exclusions of time for deferred prosecutions be subject to "the approval of the court," Judge Leon declined to approve the DPA, leaving the parties without an actionable deal.

Although *Fokker* is perhaps the most recent noteworthy example of a federal district court questioning law enforcement's leniency in settling criminal or civil charges with corporate defendants, it is by no means the only one. As the *Fokker* court noted, a district court in the Eastern District of New York had concluded two years earlier that it had authority to deny approval of a DPA pursuant to its inherent supervisory powers over criminal actions, in *United States v. HSBC Bank USA N.A.*, although the HSBC court ultimately approved the agreement after two hearings. In *SEC v. Citigroup Global*, a district court in the Southern District of New York refused to approve a proposed SEC consent judgment that did not contain an admission of liability

of the district court, on the other hand, has argued that federal courts are not required to "rubber stamp" exclusions from the Speedy Trial Act to accommodate a DPA, and must evaluate the DPA's overall fairness in making such a determination.

At oral argument, the D.C. Circuit panel did not indicate the likely outcome of the case, but some of the panel's questions appeared to suggest at least the possibility that the court's focus will be on whether the scope of the district court's review under the Speedy Trial Act extends beyond mere evaluation of the suitability of conditions in a DPA for the interests of the Speedy Trial Act itself to larger issues such as the wisdom of the charging decisions and penalties.

That the courts, as an independent branch of government, should be in a position to evaluate the fairness and reasonableness of settlements by the executive branch with corporate defendants, especially when the power of the courts is used to effectuate them, has some analogies elsewhere in the law. For example, federal courts are

review does not necessarily impact the constitutional prerogatives of another branch of government, the executive, to decide where and how to allocate prosecutorial resources and bring charges. Even assuming that the terms imposed in the *Fokker* DPA are in fact lenient by comparison to other similar cases, the government may very well conclude that settling a high-profile investigation that publicly demonstrates some of the benefits of corporate cooperation while still being able to extract a substantial penalty and reallocate the investigative resources devoted to the Fokker matter to other enforcement actions are worth the possible perception by some that a corporation received a better deal than it should have.

In addition, there is a strong argument that courts are in a much worse position than the DOJ and other federal regulators to make tough decisions that weigh the benefits of speedy and efficient resolution of large corporate investigations against the importance of adequate deterrence. In all cases, the public interest in promoting legal compliance through examples of conspicuous leniency for companies who seek to right their ships by diligent self-investigation and disclosure of misconduct should not be understated.

While the ultimate outcome of the *Fokker* is still unclear, the trial court's decision represents a clear reminder that in a constitutional system of government, the roles and responsibilities of the different branches of government in addressing corporate misconduct and incentivizing corporate cooperation continue to evolve.

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as fair, reasonable, adequate, or in the public interest, although the 2nd U.S. Circuit Court of Appeals ultimately reversed that decision.

Serious constitutional separation of power issues have been raised by the dispute over whether a district court can reject a DPA on the grounds that the resolution represents an inadequate slap on the wrist for alleged criminal or civil misconduct. Both the DOJ and Fokker have appealed Judge Leon's decision to the D.C. Circuit. On appeal, the DOJ has taken the position that its determination of what constitutes an adequate DPA resolution is a valid exercise of prosecutorial discretion and federal courts are not empowered to invade that discretion. Amicus curiae appointed to represent the posi-

required under the Federal Rules of Criminal Procedure to make sure that guilty pleas by individuals and corporations are supported by a reasonable factual basis to prevent prosecutors from using the courts to punish the innocent, and are empowered to reject pleas that threaten to undermine the administration of justice because they are the result of coercion or fraud. In addition, in civil class actions, where the rights of large groups of the public may be affected by a conclusive settlement of claims against a corporate defendant, courts are required to make fairness determinations to ensure that the parties do not use the courts to bargain away the interests of the class by means of an inadequate compromise.

In these situations, however, court

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