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D.C. Circuit Substantially Limits Judicial Power to Review Deferred Prosecution Agreements

In an important and sweeping decision, the D.C. Circuit Court of Appeals recently granted mandamus and overturned a district court's earlier rejection of a carefully negotiated deferred prosecution agreement resolving federal sanctions and export control law charges against a Dutch aerospace services company. [\*United States v. Fokker Services B.V.\* \(No. 15-3016, April 5, 2016\)](#). In recent years, a number of district courts have expressed concern over the apparently limited scope for judicial involvement in the review of DPAs and have sought to assert power, grounded in various legal theories, to subject DPAs to close judicial scrutiny (see our [memo](#) on *U.S. v. HSBC* (EDNY 2011) and the court's [opinion](#) in *U.S. v. Saena Tech Corp.*). But it was not until *Fokker Services* that any district court had actually rejected a DPA, in that case, on the ground that the government had been too lenient, thereby setting the stage for appellate review of this assertion of broad judicial power to scrutinize DPAs.

The D.C. Circuit's response was definitive and fundamental: the Court invoked the constitutionally grounded principle that the Executive Branch has primary authority to make criminal charging decisions, noting that the "'judicial authority is . . . at its most limited' when reviewing the Executive's exercise of discretion over charging determinations." The Court of Appeals went on to consider whether the Speedy Trial Act – which permits a prosecution to be deferred, "with the approval of the court," in order to allow the defendant to "demonstrate his good conduct," [18 U.S.C. § 3161\(h\)\(2\)](#) – grants district courts broad power to scrutinize DPAs. The Court held that the Act's "approval of the court" language does not "empower the district court to disapprove [a] DPA based on the court's view that the prosecution had been too lenient" nor does it "confer free-ranging authority in district courts to scrutinize the prosecution's discretionary charging decisions."

Consistent with that principle, the D.C. Circuit also ruled that the district court had no role to play in monitoring a defendant's compliance with the DPA's conditions, stating that "the prosecution – and the prosecution alone – monitors a defendant's compliance with the agreement's conditions." Thus, as the Court held, the district court "should have confined its inquiry to examining whether the DPA served the purpose of allowing Fokker to demonstrate its good conduct, as contemplated by § 3161(h)(2)." Because the district court plainly rejected the DPA solely based on its view that the prosecution had failed to be tough enough, and not on the basis of any question or concern about the DPA's aim to permit Fokker to demonstrate its good conduct through agreed-upon remedial measures, the Court of Appeals found the district court had "significantly overstepped its authority."

This decision has widespread practical significance. If followed in other circuits, it will restore predictability and stability necessary to the effective use of this important tool for resolving corporate white-collar investigations. Many commentators had predicted that if the district court's approach in *Fokker Services* had been upheld, both prosecutors and corporations seeking to resolve cases through DPAs would be subject to unfettered judicial second-guessing. The D.C. Circuit recognized that DPAs are the result of extended negotiations and reflect a

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careful balancing of relevant considerations by the government, including weighing a company's self-reporting of misconduct, the breadth of its cooperation, the depth of its commitment to remediation, its financial condition, the weight of the evidence and potential collateral consequences of a criminal prosecution. Indeed, the ambitions of the DOJ's Pilot Program for FCPA investigations, on which we [reported](#) last week, could well have been undermined if the district court's approach in *Fokker Services* had been allowed to stand. The D.C. Circuit's decision thus restores the value of DPAs – but it also underscores how important it is for companies to have in place effective compliance policies and procedures designed to prevent, detect, investigate and report on potential misconduct. Without those elements clearly and effectively in place, the chances of securing the benefits of a DPA are significantly reduced.

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