Will judicial scrutiny of DPAs become a new trend?

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On 5 February 2015, a US federal judge refused to approve a settlement between the US government and Dutch aerospace firm Fokker on grounds of "disproportionality". According to the judge, Fokker had exported US-origin aircraft parts, technologies and services to controversial regimes such as Iran, Sudan and Burma. This was a violation of the US International Emergency Economic Powers Act. The judge did not accept the Deferred Prosecution Agreement in its current form, but indicated that he would be open to considering a modified version. This new development indicates that voluntary reporting of irregularities to US authorities is a delicate process with some unexpected twists.

As reported previously in In context, the US Department of Justice (DoJ) and Fokker Services B.V. entered into a Deferred Prosecution Agreement (DPA) in June 2014. Fokker Services self-disclosed, cooperated with the authorities, and accepted all responsibility for its actions. Under the DPA, Fokker Services settled the matter for a total amount of USD 21 million.

When a DPA is entered into, the DoJ files charges with the court, but simultaneously requests that prosecution be deferred or postponed to allow the company to demonstrate its good conduct. If the company meets the terms of the agreement within the period set – typically two or three years – the DoJ will then move to dismiss the charges.

In the Fokker Services case, the federal judge for the first time refused to accept the terms of the DPA, which is highly unusual. According to the judge, the agreement did not constitute an appropriate exercise of prosecutorial discretion. He could not therefore approve the DPA in its current form and added that the DPA was "grossly disproportionate to the gravity of Fokker Services' conduct in a post 9/11 world" and "would undermine the public's confidence in the administration of justice".

This approach by the judge may be the next step in a new trend where more court scrutiny can be expected. In 2013, a judge in New York expressed reservations about a DoJ deal with HSBC. Although he did eventually approve the DPA, it was clear that he considered asserting the authority to reject the DPA.

Another noteworthy element in this case was that Fokker's self-reporting of its conduct and extensive cooperation did not lead to a more lenient approach, even though the DoJ emphasised these points when it announced the DPA in June 2014.

These new developments not only suggest a new and more critical judicial approach when it concerns DPAs, but they also suggest that self-reporting does not guarantee leniency.