

# Judicial Review of Deferred Prosecution Agreements

Some interesting quotes ....

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# United States

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## Securities & Exchange Comm'n v. Citibank Global Markets

Hon. Jed S. Rakoff (2011)

- “The point, however, is not that certain narrow interests of the parties might not be served by the Consent Judgment, but rather that the parties’ successful resolution of their competing interests cannot be automatically equated with the public interest, especially in the absence of a factual base on which to assess whether the resolution was fair, adequate, and reasonable.”
- “In the end, the Court concludes that it cannot approve [the proposed Consent Judgment], because the Court has not been provided with any proven or admitted facts upon which to exercise even a modest degree of independent judgment.”

# United States

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## Securities & Exchange Comm'n v. Citibank Global Markets

United States Court of Appeals, Second Circuit (2012)

- “Today we clarify that the proper standard for reviewing a proposed consent judgment involving an enforcement agency requires that the district court determine whether the proposed consent decree is fair and reasonable, with the additional requirement that the “public interest would not be disserved, ... Absent a substantial basis in the record for concluding that the proposed consent decree does not meet these requirements, the district court is required to enter the order.”

# United States

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## DPA: Possible bases for judicial review

- No standards or procedure provided by legislation or rule.
- Rule 11 of Federal Rules of Criminal Procedure (guilty pleas) does not apply
- Speedy Trial Act permits a judge to extend mandatory trial date based on  
“Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.”
- Inherent “supervisory power” of the courts.

# United States

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## United States v. Fokker Services, BV (D.D.C. 2015)

Honorable Richard Leon:

- “I cannot help but conclude that the DPA presented here is grossly disproportionate to the gravity of Fokker Services’ conduct.
- “In my judgment, it would undermine the public’s confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time and for the benefit of one of our country’s worst enemies.
- “As such, the Court concludes that this agreement does not constitute an appropriate exercise of prosecutorial discretion and I cannot approve it in its current form.”

# United States

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## United States v. Fokker Services, BV (D. C. Circuit, 2016)

U. S. Court of Appeals for the D. C Circuit:

- “[J]udicial authority is . . . at its most limited” when “reviewing the Executive’s exercise of discretion over charging determinations.”
- “[T]he entire object of a DPA is to enable the defendant to *avoid* criminal conviction and sentence by demonstrating good conduct and compliance with the law.”
- Thus, the court’s only authority is to assure that the parties did not “enter[] into the DPA to evade speedy trial limits rather than to enable [the defendant] to demonstrate its good conduct and compliance with the law.”

# United States

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## Rule 48(a) of the Federal Rules of Criminal Procedure

The government may, with leave of court, dismiss an indictment, information, or complaint.

# United States

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## **Rinaldi v. United States, 434 U.S. 22 (1977) (per curiam)**

The “principal object” of Rule 48(a) is “to protect a defendant against prosecutorial harassment...”



## Thomas Frampton, Why Do Rule 48(a) Dismissals Require “Leave of the Court”? (Stanford Law Review, May 2020)

“Leave of court” provision in Rule 48(a) was added...

- To “arm[] the district judge with a powerful tool to halt corrupt or politically motivated dismissals of cases,” and
- “to give district judges a modest means of safeguarding the public interest” when considering a Rule 48(a) motion.

# The United Kingdom (actually England and Wales)

## Crime and Courts Act 2013, Schedule 17

- Paragraph 7:
  - After the commencement of negotiations between a prosecutor and [a corporation] in respect of a DPA but before the terms of the DPA are agreed, the prosecutor must apply to the Crown Court for a declaration that
    - (a) entering into a DPA with [the corporation] is likely to be in the interests of justice, and
    - (b) the proposed terms of the DPA are fair, reasonable and proportionate.

# The United Kingdom (actually England and Wales)

## Crime and Courts Act 2013, Schedule 17

### Paragraph 8:

- When a prosecutor and [a corporation] have agreed the terms of a DPA, the prosecutor must apply to the Crown Court for a declaration that—
  - (a) the DPA is in the interests of justice, and
  - (b) the terms of the DPA are fair, reasonable and proportionate.

# **The United Kingdom (actually England and Wales)**

## **Serious Fraud Office v. Standard Bank (2015)**

Honorable Brian Leveson:

- “Although these proceedings have been required to validate a proposal and, then, a concluded agreement ..., it is important to emphasise that the court has assumed a pivotal role in the assessment of its terms. That has required a detailed analysis of the circumstances of the investigated offence, and an assessment of the financial penalties that would have been imposed had the Bank been convicted of an offence. In that way, there is no question of the parties having reached a private compromise without appropriate independent judicial consideration of the public interest: furthermore, publication of the relevant material now serves to permit public scrutiny of the circumstances and the agreement.”

# France

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## Loi Sapin II

### La convention judiciaire d'intérêt public (CJIP/DPA)

- “The President [of the District Court] will decide whether or not to validate the CJIP proposed by the parties after verifying the appropriate basis for it, the conformity of the sanction to the limits set by this provision, and the proportionality of the proposed measures relative to the advantages [the corporation derived] from its offenses.”

# France

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## Affaire HSBC, Ordonnance de Validation (2017)

“It appears [from a review of the record] that the CJIP/DPA is fully justified in its principle and in the sanction imposed. It is thus appropriate to validate it.”

# What Difference Does It Make?

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## The Point of View of a Defense Lawyer

Comment of a US-trained lawyer to the House of Lords, commenting on judicial review in England/Wales

- [The lawyer] thought that UK corporate enforcement was “in its adolescence compared to a more mature system in the US.” In his view two differences made the US Department of Justice more effective:
  - “First, the regime offers more certainty. It does that at a certain cost, which is taking power away from judges and giving it to prosecutors. What companies want in resolving these issues is certainty. When you are dealing with DOJ prosecutors, they can give you the deal and that will be the deal.”

# What Difference Does It Make?

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## The Point of View of the House of Lords

- “Plea bargaining has never been part of our criminal law. If the maturity and effectiveness of the US system does indeed come at a cost of taking power from judges and giving it to prosecutors, this is a cost we are not prepared to pay.”