CRIMINAL LAW — SEPARATION OF POWERS — D.C. CIRCUIT HOLDS THAT COURTS MAY NOT REJECT DEFERRED PROSECUTION AGREEMENTS BASED ON THE INADEQUACY OF CHARGING DECISIONS OR AGREEMENT CONDITIONS. — *United States v. Fokker Services B.V.*, 818 F.3d 733 (D.C. Cir. 2016).

Since the Arthur Andersen prosecution in which thousands of innocent workers lost their jobs, the Department of Justice (DOJ) has increasingly turned to deferred prosecution agreements (DPAs) to avoid the collateral consequences of a corporate criminal conviction.[1] In a DPA, the government agrees to dismiss filed charges if a corporation complies with negotiated conditions that are aimed at punishing the misconduct and allowing the corporation to demonstrate rehabilitation. Traditionally, judicial scrutiny over the DPA's terms has been "essentially nonexistent."[2] However, three recent district court decisions have attempted to assert a more substantive role for the court — declaring that an Article III judge is not a "potted plant"[3] or "rubber stamp"[4] when reviewing DPAs. The D.C. Circuit subsequently curtailed these efforts in *United States v. Fokker Services B.V.*,[5] in which it held that to preserve "the Executive's long-settled primacy over charging,"[6] a court is not authorized to reject a DPA based on a finding that the "charging decisions" and "conditions agreed to in the DPA" are inadequate.[7] By ostensibly precluding judicial review of a DPA's *negotiated terms*, the D.C. Circuit overcorrected and reinforced the executive branch's unchecked discretion over DPAs by reassuring prosecutors that future courts will rubber stamp such agreements.

Fokker Services B.V. is a Dutch company that provides products and technical services to the aerospace industry. In 2010, Fokker self-reported to government officials that it had possibly violated U.S. sanctions and export control laws by selling aircraft parts to customers

---

[1] *See* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 41, 44, 55 (2014).

[2] Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 UC DAVIS L. REV. 497, 505 (2015) (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-110, CORPORATE CRIME 8, 25 (2009)); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra*, at 25 (reporting, based on a survey of twelve U.S. district and magistrate judges who handled cases involving a DPA, that judges "were generally not involved in the DPA process").

[3] United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *5 (E.D.N.Y. July 1, 2013); *see also* United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 33 (D.D.C. 2015) (quoting *HSBC Bank*, 2013 WL 3306161, at *5).

[4] United States v. Fokker Servs. B.V., 79 F. Supp. 3d 160, 164 (D.D.C. 2015).

[5] 818 F.3d 733 (D.C. Cir. 2016).

[6] *Id.* at 743.

[7] *Id.* at 747.

in Iran, Sudan, and Burma.[8] With Fokker's cooperation, a four-year federal investigation revealed that the company had unlawfully earned around $21 million from 1147 transactions.[9] The DOJ negotiated a DPA with Fokker and filed it in the United States District Court for the District of Columbia along with an information charging the company with conspiracy to violate the International Emergency Economic Powers Act.[10] The DPA provided that if Fokker would "continue full cooperation with the government, implement its new compliance policy, and pay fines and penalties totaling $21 million,"[11] the DOJ would move to dismiss the charge after eighteen months.[12]

Because the Speedy Trial Act[13] (STA) requires federal criminal trials to commence within seventy days of filing charges,[14] both parties moved to exclude the eighteen-month period under 18 U.S.C. § 3161(h)(2), which allows for the exclusion of "[a]ny 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."[15] However, District Judge Leon, noting that the request was subject to court approval, denied the joint motion after concluding the DPA was too lenient.[16] Judge Leon held that the DPA was an inappropriate exercise of prosecutorial discretion and criticized the DOJ for "prosecut[ing] so anemically" a company that had assisted some of the nation's "worst enemies."[17] Specifically, he criticized the DPA because it failed to prosecute individual actors, required such a brief probationary period, imposed a fine that did not exceed Fokker's illicit revenue, and relied on self-reporting instead of independent monitoring to ensure compliance.[18]

Fokker and the government appealed the district court's denial of the joint motion to exclude time.[19] The D.C. Circuit vacated the order and remanded with an order to exclude the time.[20] Writing for the panel, Judge Srinivasan[21] concluded that the phrase "approval of the

---

[8] *Id.* at 739; *Fokker*, 79 F. Supp. 3d at 162–63.

[9] *Fokker*, 818 F.3d at 739.

[10] 50 U.S.C. §§ 1701–1707 (2012); *see Fokker*, 818 F.3d at 739.

[11] *Fokker*, 818 F.3d at 739.

[12] *Fokker*, 79 F. Supp. 3d at 164.

[13] 18 U.S.C. §§ 3152–3156, 3161–3174 (2012).

[14] *See id.* § 3161(c)(1).

[15] *Id.* § 3161(h)(2) (emphasis added).

[16] *Fokker*, 79 F. Supp. 3d at 164–67.

[17] *Id.* at 167.

[18] *Id.* at 166.

[19] *Fokker*, 818 F.3d at 740. Since both parties moved to have the time excluded, the court appointed amici to defend the district court's decision. *Id.*

[20] *Id.* at 738.

[21] Judge Srinivasan was joined by Senior Judges Silberman and Sentelle.

court" in § 3161(h)(2) should be construed in light of its constitutional implications and potential separation of powers concerns.[22] He stated that, as a matter of established law, the judiciary is not to second-guess the Executive's decisions of "whether to initiate charges, whom to prosecute, which charges to bring, and whether to dismiss charges."[23] In addition to concluding that judicial scrutiny over charging decisions would infringe on the Executive's core duties under the Take Care Clause,[24] Judge Srinivasan further stated that courts are ill-equipped to consider "the choices reflected in the [DPA's] terms"[25] and that the district court "significantly overstepped its authority" in denying the exclusion of time based on its rejection of the "conditions agreed to in the DPA."[26]

Acknowledging that the "approval of the court" requirement implied some amount of judicial discretion, the panel compared it to the deference a court applies when the government moves to dismiss charges or enter a consent decree. In order to dismiss charges, Rule 48(a) of the Federal Rules of Criminal Procedure requires a prosecutor to obtain "leave of court."[27] But because the decision to dismiss criminal charges "lie[s] squarely within the ken of prosecutorial discretion," the Supreme Court has held that Rule 48(a)'s "leave of court" requirement should not be interpreted to "confer any substantial role for courts."[28] Similarly, while a court has discretion to accept an antitrust consent decree when "in the public interest,"[29] the D.C. Circuit has held that the "public interest" standard does not allow a court to reject a consent decree based on a belief that "other remedies [are] preferable."[30] Thus, the panel argued, the underlying separation of powers concerns that urge minimal judicial involvement in the Rule 48(a) and consent decree contexts similarly support interpreting the court's approval authority to "den[y] courts substantial power to impose their own charging preferences."[31] The panel rejected the analogy between a court's review of DPAs and a proposed plea agreement.[32] Judge Srinivasan distinguished a court's role in reviewing DPAs from its role

---

[22] *Fokker*, 818 F.3d at 742–43.

[23] *Id.* at 737.

[24] *Id.* at 741 (citing U.S. CONST. art. II, § 3).

[25] *Id.* at 744.

[26] *Id.* at 747.

[27] *Id.* at 742 (quoting FED. R. CRIM. P. 48(a)).

[28] *Id.* The Supreme Court held that the primary purpose of the "leave of court" requirement is to prevent "'prosecutorial harassment' of the defendant through repeated efforts to bring — and then dismiss — charges." *Id.* (quoting Rinaldi v. United States, 434 U.S. 22, 29 n.15 (1977)).

[29] 15 U.S.C. § 16(e) (2012).

[30] *Fokker*, 818 F.3d at 743 (quoting United States v. Microsoft Corp., 56 F.3d 1448, 1460 (D.C. Cir. 1995)).

[31] *Id.*

[32] *Id.* at 745; *see also* FED. R. CRIM. P. 11(c)(3)(a).

in evaluating plea agreements on the basis that the latter is "rooted in the Judiciary's traditional power over criminal sentencing,"[33] whereas the object of the former "is to enable the defendant to *avoid* criminal conviction and sentence."[34]

While Judge Srinivasan declined to articulate "the precise contours" of the "court's approval authority," he held that the text of § 3161(h)(2) indicated its purpose is "to assure that the DPA in fact is geared to enabling the defendant to demonstrate compliance with the law, and is not instead a pretext intended merely to evade the [STA's] time constraints."[35] The panel completed its analysis by hinting that while a DPA might be rejected for illegal or unethical terms,[36] the district court had not found such conduct here; rather it had "assume[d] the role of Attorney General"[37] by failing to limit its review to whether the DPA would allow Fokker to demonstrate good conduct.[38] Finally, Judge Srinivasan considered whether a writ of mandamus was appropriate to correct the error. Although he noted that "[m]andamus is a 'drastic and extraordinary' remedy," he concluded that in this case such a remedy was warranted.[39] The court ordered the district court to exclude the eighteen months.[40]

Fokker's unnecessarily broad conclusion that the "Judiciary's lack of competence to review the prosecution's initiation and dismissal of charges *equally applies* to review of . . . the choices reflected in the [DPA]'s terms" is not required by the STA's text.[41] Further, prohibiting courts from reviewing a DPA's negotiated terms exacerbates fears raised in legal scholarship[42] that DPAs are transforming the criminal corporate justice system into a regulatory regime run by prosecutors — threatening to erode fundamental separation of powers protections.

---

[33] *Fokker*, 818 F.3d at 745 (emphasis omitted).

[34] *Id.* at 746.

[35] *Id.* at 744.

[36] *Id.* at 747.

[37] *Id.* (alteration in original) (quoting United States v. Microsoft Corp., 56 F.3d 1448, 1462 (D.C. Cir. 1995)).

[38] *Id.*

[39] *Id.* (quoting Cheney v. U.S. Dist. Court, 542 U.S. 367, 380 (2004)).

[40] *Id.* at 750–51.

[41] *Id.* at 744 (emphasis added) (citation omitted).

[42] *See, e.g.*, Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 192 (2016) (concluding that DPAs are "inconsistent with the rule of law"); Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013*, 70 BUS. LAW. 61, 61 (2015) ("[DPAs] are controversial because prosecutors, not judges or the legislature, are changing the governance of leading public corporations and entire industries."); Richard A. Epstein, *The Deferred Prosecution Racket*, WALL STREET J. (Nov. 28, 2006, 12:01 AM), http://www.wsj.com/articles/SB116468395737834160 [https://perma.cc/2AP5-ANPS] (arguing that a DPA has the potential to "erode[] the most elementary protections of the criminal law, by turning the prosecutor into judge and jury").

Although *Fokker*'s analysis concluded with an enigmatic phrase suggesting courts might have authority to reject a DPA "insofar as . . . [the DPA] contains illegal or unethical terms,"[43] practitioners[44] and legal scholars[45] widely view *Fokker* as affirming judicial rubber stamping of DPAs. That this opinion is read to prohibit courts from reviewing the adequacy of an agreement's conditions might be an unfortunate consequence of the opinion's dicta and its failure to articulate "the precise contours" of a court's authority. To the extent that the D.C. Circuit prohibits judicial review of the adequacy of a DPA's terms, other jurisdictions should not follow *Fokker*.

Fokker's narrower holding, that a court is not permitted to challenge the prosecution's charging decisions,[46] clearly aligns with precedent and basic separation of powers principles. Judge Leon admitted that had the DOJ decided not to prosecute or to dismiss the charges, the "Court would have no role here."[47] To the degree that Judge Leon based his denial of the motion on his belief that individual actors should have been charged or that different charges should have been

---

[43] *Fokker*, 818 F.3d at 747. In suggesting that a court might have authority to reject a DPA if it contains illegal or unethical provisions, the panel cited two previous cases about judicial review of DPAs. *See id.* (citing United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 31–34 (D.D.C. 2015); United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *7 (E.D.N.Y. July 1, 2013)). However, these district court opinions envisioned a far more robust form of judicial review than *Fokker*, leaving it far from certain if *Fokker*'s citations to *Saena Tech* and *HSBC Bank* are to be considered as an endorsement of these opinions. *Compare Saena Tech*, 140 F. Supp. 3d at 31 ("[The court's] authority necessarily involves limited review of the fairness and adequacy of an agreement, to the extent necessary to determine the agreement's purpose."), *and HSBC Bank*, 2013 WL 3306161, at *7 (holding that the court's approval of the DPA "is subject to a continued monitoring of its execution and implementation"), *with Fokker*, 818 F.3d at 744 (holding that "the court plays no role in monitoring the defendant's compliance with the DPA's conditions" and that the court is not competent to review the "choices reflected in the agreement's terms").

[44] *See, e.g.*, Trevor N. McFadden & Maria McMahon, *Reluctant Handmaidens: The Role of Judiciary in Corporate Settlement Agreements*, 49 REV. SEC. & COMMODITIES REG. 159, 160 (2016) (noting that *Fokker* will "almost certainly slam the brakes" on the efforts of "respected trial judges to create a more meaningful role for the courts in the supervision of corporate settlement agreements"); John M. Hillbrecht et al., *DC Circuit Curtails Judicial Exercise of Supervisory Powers over Deferred Prosecution Agreements*, DLA PIPER (Apr. 20, 2016), https://www.dlapiper.com/en/us/insights/publications/2016/04/dc-circuit-curtails-judicial-exercise [https://perma.cc/P85R-KGC3] (arguing that broad adoption of *Fokker* would "relieve[] DOJ from having to satisfy judicially crafted standards for DPA approval").

[45] *See, e.g.*, JAMES R. COPLAND & RAFAEL A. MANGUAL, MANHATTAN INST., JUSTICE OUT OF THE SHADOWS: FEDERAL DEFERRED PROSECUTION AGREEMENTS AND THE POLITICAL ORDER 13 (2016) ("[*Fokker*] largely confirmed . . . that DPAs will largely remain unsupervised by judges, absent congressional action."); Noah Feldman, *Of Course Judges Can Reject Plea Deals*, BLOOMBERG VIEW (Apr. 6, 2016, 1:37 PM), https://www.bloomberg.com/view/articles/2016-04-06/of-course-judges-can-reject-plea-deals [https://perma.cc/X9LT-D5X5] ("[*Fokker* is] a loss for the principle of judicial discretion — and for public scrutiny of the executive branch.").

[46] *Fokker*, 818 F.3d at 744.

[47] United States v. Fokker Servs. B.V., 79 F. Supp. 3d 160, 165 (D.D.C. 2015).

brought, the panel was justified in criticizing the district court for "assum[ing] the role of Attorney General."[48] However, where *Fokker* went too far was in concluding that courts lack the authority to deny a motion to exclude time based on the remedies sought in a DPA.[49] This conclusion conflicts with the panel's statement that the purpose of the court's approval authority is to ensure that the DPA will allow a defendant to demonstrate good conduct.[50] The remedies the prosecution pursues, as reflected in the DPA's negotiated terms, are inextricably connected to this purpose.[51] Though he expressed concern that no individuals at Fokker were charged, Judge Leon was at least in part motivated to deny the motion because he did not find the DPA's conditions sufficient to allow Fokker to demonstrate good conduct. His concerns with the DPA's failure to require an independent monitor or to impose a longer probation period do not infringe on the Executive's "primacy" over which charges to file, whether to dismiss charges, or whom to charge.

Neither the text of the STA nor the analogues on which the *Fokker* court relied forbid judges from considering the substantive conditions of a DPA when it approves a time exclusion. As Judge Gleeson concluded in *United States v. HSBC Bank USA, N.A.*,[52] the STA is "silent as to the standard the court should employ when evaluating whether to grant 'approval' to a [DPA]," and "[c]ase law on this point is barren."[53] Further, the separation of powers concerns that have prompted limited judicial involvement in the Rule 48(a) and antitrust consent decree contexts are not implicated in review of a DPA's conditions. In *United States v. Saena Tech Corp.*,[54] Judge Sullivan distinguished Rule 48(a) motions to dismiss from motions to exclude time. In the former, the Executive decides not to prosecute — thus falling under the Executive's prerogative of whether to dismiss charges — while in the latter, the Court places "its formal imprimatur on the [DPA], to

---

[48] *Fokker*, 818 F.3d at 747 (quoting United States v. Microsoft Corp., 56 F.3d 1448, 1462 (D.C. Cir. 1995)).

[49] *Id.* at 742–44.

[50] *Id.* at 744. It is difficult to discern what the panel meant in concluding that the court's role is solely to prevent DPAs from being used as "pretext" for evading the STA's protections. *Id.* The purpose of § 3161(h) *is* to evade the STA's time constraints.

[51] Additionally, the case law and legislative history surrounding the STA suggest that its purpose was not only to guarantee a defendant's right to a speedy trial, but also to "serve[] as a safeguard for the public interest," such as ensuring that criminals are brought to justice in a timely manner. Mary Miller, *More Than Just a Potted Plant: A Court's Authority to Review Deferred Prosecution Agreements Under the Speedy Trial Act and Under Its Inherent Supervisory Power*, 115 MICH. L. REV. 135, 155 (2016).

[52] No. 12-CR-763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).

[53] *Id.* at *3; *see also Fokker*, 818 F.3d at 749.

[54] 140 F. Supp. 3d 11 (D.D.C. 2015).

hold open federal criminal cases, and to make various findings."[55] Additionally, DPAs require defendants to waive their right to a speedy trial, whereas defendants' rights are not implicated when dismissing charges. *Fokker*'s analogy to consent decrees is also unpersuasive. Although a court is not permitted to reject an antitrust consent decree based on a belief that the DOJ "could have negotiated a more exacting decree,"[56] the court is still permitted to reject a proposed decree that is not in the public interest. Likewise, while a court is not permitted to reject a DPA based on a preference for harsher terms, the DPA's approval *is* subject to a finding that the terms will allow a defendant to demonstrate compliance with the law. Judge Leon made it clear that he was "not ordering or advising the Government . . . to undertake or refrain from undertaking any particular action" but that he was "merely declining to approve" the DPA.[57] Such rejection of a DPA is still reviewable by appellate courts; here the D.C. Circuit could have left the outcome intact by concluding that the DPA sufficiently allowed Fokker to demonstrate good conduct.

Though the D.C. Circuit based its ruling on the Constitution's allocation of power, the current DPA regime's lack of any substantive judicial review — which *Fokker* arguably perpetuates — already threatens separation of powers protections. In refusing to even consider the district court's concerns regarding the DPA's terms,[58] the D.C. Circuit reassured DOJ prosecutors that, barring blatantly illegal terms, the government's discretion over DPAs will remain largely unchecked. Criminal law under our constitutional structure protects defendants by allocating the responsibility to make the laws in one branch, the ability to enforce the law in another, and the authority to decide whether that law has been broken in yet a third. However, the current DPA process places all three powers in the hands of a U.S. Attorney. As Professor Brandon Garrett has noted, federal prosecutors, wielding the threat of conviction over corporations, have used their superior bargaining power to "step[] far outside of their traditional role of obtaining convictions, and, in doing so, [are] seek[ing] to reshape the governance of

---

[55] *Id.* at 33 (citing *HSBC Bank*, 2013 WL 3306161, at *5 ("By placing a criminal matter on the docket of a federal court, the parties have subjected their DPA to the legitimate exercise of that court's authority.")).

[56] *Fokker*, 818 F.3d at 743 (quoting Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1237 (D.C. Cir. 2004)). Recently, district courts have also attempted, albeit unsuccessfully, to subject consent decrees to a more substantive form of judicial review. *See, e.g.*, SEC v. Citigroup Glob. Mkts. Inc., 827 F. Supp. 2d 328, 333–34 (S.D.N.Y. 2011) (disapproving a decree on the grounds that the leniency of the decree was not in the public interest and that the fines were "pocket change to any entity as large as Citigroup," *id.* at 334), *vacated and remanded*, 752 F.3d 285, 289 (2d Cir. 2014) (holding that the district court abused its discretion in determining the decree was inadequate).

[57] United States v. Fokker Servs., B.V., 79 F. Supp. 3d 160, 167 (D.D.C. 2015).

[58] *Fokker*, 818 F.3d at 747 (declining to address the merits of the district court's criticisms).

leading corporations, public entities, and ultimately entire industries."[59] Through the use of DPAs, the DOJ legislates through litigation[60] — imposing "new duties" on companies that they otherwise "could not be sanctioned for failing to undertake absent the [DPA]."[61] Additionally, without judicial review, "the laws come to mean what the *prosecutors* say they mean,"[62] and the judicial process — which emphasizes neutral decisionmakers, uniform results through stare decisis, and transparency — is replaced with a system in which each U.S. Attorney's office can enter into often private agreements that impose drastically different punishments on comparable criminal activity.[63]

Although many of these separation of powers concerns were not present in this case, *Fokker*, in its zeal to correct the district court for playing Attorney General, ignored valid concerns that the Attorney General will assume the role of judge or lawmaker. But *Fokker* did not articulate "the precise contours" of a court's authority to review DPAs, and other jurisdictions presented with DPAs might instead consider *Saena Tech*'s model of a deferential and "*limited* review of the [DPA's] fairness and adequacy."[64] *Saena Tech* suggests nine "guideposts"[65] to aid courts in reviewing a DPA's terms — guideposts that respect prosecutorial discretion over charging decisions while providing a meaningful check on the executive branch. As the first appellate court to review a rejected DPA, the D.C. Circuit's seeming foreclosure to judicial review of a DPA's terms intensifies concerns about maintaining the rule of law in corporate prosecutions — concerns that a "potted plant" cannot allay.

---

[59] Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 936 (2007); *see also* GARRETT, *supra* note 1, at 7 (discussing the "ambitious new approach to governance in which federal prosecutors help reshape the policies and culture of entire institutions"); Arlen, *supra* note 42, at 195 ("[P]rosecutors appear to have largely unfettered discretion to either pursue charges or indict the firm if the prosecutor concludes the firm violated its [DPA]. This gives the prosecutor considerable ability to bind firms to his interpretation of the mandates imposed.").

[60] Paul Larkin, *The Problematic Use of Nonprosecution and Deferred Prosecution Agreements to Benefit Third Parties*, HERITAGE FOUND. (Oct. 23, 2014), http://report.heritage.org/lm141 [https://perma.cc/M2CG-JCPT] ("[T]he [DPA] practice denies the public the opportunity to know how public funds are spent and to hold elected officials accountable for their choices. . . . [This practice also] allows the [DOJ] to pick and choose among private organizations as to which ones will receive federal funds . . . .").

[61] Arlen, *supra* note 42, at 200.

[62] Koehler, *supra* note 2, at 559 (quoting JAMES R. COPLAND, MANHATTAN INST., THE SHADOW REGULATORY STATE: THE RISE OF DEFERRED PROSECUTION AGREEMENTS 12 (2012)).

[63] *See* Arlen, *supra* note 42, at 195 n.13.

[64] United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 31 (D.D.C. 2015).

[65] *Id.* (citing Memorandum of Law of *Amicus Curiae* Law Professor, *Saena Tech*, 140 F. Supp. 3d 11 (No. 14-66) (written by Garrett and Professor Alan B. Morrison)). Judge Sullivan concluded that "[a]n agreement that contained neither punitive measures (such as fines) nor requirements designed to deter future criminality (such as compliance programs and independent monitors) could not be said to be designed to secure a defendant's reformation and should be rejected." *Id.*