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The Second Circuit Rejects Immunity from Criminal Prosecution for Foreign-Sovereign-Owned Bank

by Jake Gardener

On October 22, 2021, the Second Circuit held that the Foreign Sovereign Immunities Act ("FSIA") did not shield Turkiye Halk Bankasi A.S. ("Halkbank"), a commercial bank that is majority-owned by the government of Turkey, from criminal liability for allegedly violating U.S. sanctions and other laws. The decision stands as a useful reminder to foreign-sovereign-owned financial institutions that they may be subject to prosecution in the U.S. if they engage in criminal activity that is commercial in nature, and possibly even if it is not.

Halkbank was charged in the Southern District of New York with participating in a scheme to launder billions of dollars' worth of Iranian oil and natural gas proceeds in violation of U.S. sanctions against Iran. The purpose of Halkbank's alleged scheme was to move the Iranian government's money from accounts with Halkbank to intermediary accounts in the U.A.E. and Turkey so the funds could be disbursed throughout the world, including through the U.S. financial system, with the Iranian nexus to the funds concealed. Through a sophisticated system of trade-based money laundering, falsified documents, front companies, and payment intermediaries, the scheme allegedly induced U.S banks to unwittingly export funds and financial services for Iran in violation of sanctions laws and the banks' compliance and anti-money laundering policies. Halkbank also allegedly lied to U.S. Treasury Department officials in order to conceal the scheme and avoid U.S. sanctions.

The indictment charged Halkbank with six counts: (1) conspiring to defraud the U.S. by obstructing the lawful functions of the Treasury; (2) conspiring to violate or cause violations of licenses, orders, regulations, and prohibitions issued under the International Emergency Economic Powers Act; (3) bank fraud; (4) conspiring to commit bank fraud; (5) money laundering; and (6) conspiring to commit money laundering.

Halkbank moved to dismiss the indictment, arguing that FSIA rendered it immune from criminal prosecution because it is owned by the Turkish government, and that FSIA's exceptions to immunity are inapplicable in criminal cases; that, even if FSIA's exceptions did apply, they did not encompass Halkbank's alleged conduct; and, lastly, that, even if FSIA did not bar Halkbank's prosecution, the common law did.

The district court denied the motion, and Halkbank immediately appealed. The Second Circuit, permitting the interlocutory appeal under the collateral order doctrine because foreign sovereign immunity was at issue, affirmed.

Assuming, without deciding, that FSIA confers immunity in criminal cases, the Second Circuit held that Halkbank's alleged conduct fell within FSIA's "commercial activity" exception (28 U.S.C. § 1605(a)(2)), which provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case" in which the action is based upon (1) "a commercial activity carried on in the United States by the foreign state"; (2) "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or (3) "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." The Court concluded that Halkbank's alleged conduct qualified as commercial activity under all three categories.

The Court first explained that conduct is commercial in nature if it is the type "by which a private party engages in trade and traffic or commerce." It then ruled that, although Halkbank may have had a sovereign purpose by serving as the Turkish government's repository for Iranian oil and natural gas proceeds, Halkbank's alleged offense conduct was nonetheless commercial, and not sovereign, because such conduct "could be, and in fact regularly is, performed by private-sector businesses." And the Court found the requisite connection to the U.S. based on Halkbank's alleged lies to Treasury officials and its alleged manipulation of U.S. banks to help launder money through the U.S. financial system.

Finally, the Court rejected Halkbank contention that it was immune from criminal prosecution under the common law. It held that FSIA's enactment displaced any pre-existing common-law practice, and that, in any event, there could be no sovereign immunity under the common law where, as here, the executive branch refused to recognize it.

In conclusion, Halkbank serves as a warning to foreign-government-owned entities that their sovereign identity does not immunize them from criminal liability for "commercial activity," meaning acts that private-sector businesses could also perform. Moreover, the Second Circuit explicitly left open the possibility that these sovereign entities could face prosecution even if their criminal acts do not fall within FSIA's "commercial activity" exception. Such entities would be well-advised not to be the test case.

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