ALERT MEMORANDUM

Second Circuit Rules Foreign State-Owned Bank Does Not Have Sovereign Immunity From Criminal Prosecution

November 23, 2021

The U.S. Court of Appeals for the Second Circuit recently held in *U.S. v. Halkbank*[1] that a Turkish state-owned bank did not have sovereign immunity from criminal charges that it engaged in a conspiracy to launder $20 billion of Iranian oil and gas proceeds in violation of U.S. sanctions.

While the district court had joined other Circuit courts in ruling that the Foreign Sovereign Immunities Act ("FSIA") does not confer on foreign sovereigns immunity from criminal prosecutions, the Second Circuit declined to decide that unsettled issue, except insofar as it held that the FSIA is not the only source of criminal jurisdiction over a foreign sovereign. Instead, the Second Circuit assumed *arguendo* that the FSIA confers immunity in the criminal context and held that the conduct at issue would fall under the FSIA's commercial activity exception to immunity.

The Second Circuit did, however, hold that common-law sovereign immunity defenses are categorically precluded by the FSIA and in any event inapplicable where the U.S. government chooses to bring criminal charges. And in reaching these rulings, the Second Circuit also confirmed that a foreign sovereign has a right to interlocutory appeal from a decision rejecting sovereign immunity in criminal proceedings.

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[1] *United States v. Turkiye Halk Bankasi A.S.*, 16 F.4th 336 (2d Cir. 2021) ("*Halkbank*").

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Background

Our prior October 9, 2020 Alert Memorandum provides a full description of the background of this case. In summary, Halkbank, one of Turkey's largest state-owned banks, was indicted in 2019 on six counts of conspiracy, bank fraud, and money laundering, for allegedly laundering over $1 billion of Iranian oil and gas proceeds through the U.S. financial system, and approximately $20 billion through the international financial system, in violation of U.S. and other sanctions.

Halkbank moved to dismiss the indictment, arguing *inter alia* that as a majority state-owned Turkish bank, it is immune from criminal prosecution under the FSIA and common law. U.S. District Judge Richard M. Berman of the Southern District of New York denied Halkbank's motion, holding that the FSIA does not apply in criminal cases and, even if it did, the exception to immunity for commercial activity in the United States would deprive Halkbank of immunity, based on Halkbank's interactions with the U.S. Department of Treasury in and outside the United States in connection with its use of the U.S. financial system for the alleged scheme.

The district court also rejected Halkbank's argument that it was entitled to immunity under the common law, noting that the U.S. Attorneys' Office ("USAO")'s decision to prosecute manifested the Executive Branch's view that no such immunity should be recognized.

Halkbank appealed the district court's immunity rulings. The USAO moved to dismiss the appeal, arguing that the district court's order was not subject to interlocutory review. On motion by Halkbank, the Second Circuit granted a stay of the district court proceedings pending the resolution of the appeal.

The Second Circuit's Decision

The Second Circuit first denied the USAO's dismissal motion, finding that it had appellate jurisdiction under the "collateral order doctrine," which permits an interlocutory appeal where a decision would (1) "'conclusively determine the disputed question'"; (2) "'resolve an important issue completely separate from the merits of the action'"; and (3) "'be effectively unreviewable on appeal from a final judgment.'"[2]

The Second Circuit noted its consistent holdings in the civil context that "'[a] threshold [foreign] sovereign-immunity determination is immediately reviewable under the collateral-order doctrine.'"[3] But these authorities did not dictate the result here, because "the Supreme Court has made clear that the collateral order doctrine is to be applied in criminal cases with the 'utmost strictness'" given the U.S. constitutional directive to conduct a "speedy trial."[4]

Applying this heightened standard, the Second Circuit found that the collateral order doctrine's requirements were satisfied in this criminal case as the "District Court's sovereign immunity determination conclusively determined the issue against Halkbank" and that issue was "distinct from the merits of the charges."[5] As to the third requirement, the Second Circuit held that a

[2] *Id.* at 343 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), *superseded on other grounds by* Fed. R. Civ. P. 23(f)).

[3] *Id.* (quoting *Funk v. Belneftekhim*, 861 F.3d 354, 363 (2d Cir. 2017)).

[4] *Id.* at 344 (citation omitted).

[5] *Id.*

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"'denial of immunity is effectively unreviewable after final judgment because [the sovereign] must litigate the case to reach judgment and, thus, lose the very immunity from suit to which [it] claim[s] to be entitled.'"[6]

Turning to the merits of Halkbank's appeal, the Second Circuit affirmed the district court's ruling that it had subject matter jurisdiction over the criminal indictment and that Halkbank was not immune under the FSIA or the common law.

First, the Second Circuit rejected the contention that the FSIA is the sole source of jurisdiction over a sovereign in criminal proceedings, in contrast to the civil context where it has been consistently held to be the sole source of jurisdiction over a sovereign. Like the D.C. Circuit, the Second Circuit invoked 18 U.S.C. § 3231—which provides federal district courts with jurisdiction over "*all* offenses against the laws of the United States"—observing that this provision has no "exemption for federal offenses committed by foreign sovereigns."[7] Adopting the D.C. Circuit's view, the Second Circuit noted that the existence of subject matter jurisdiction was not affected by potential sovereign immunity.[8]

Second, as to sovereign immunity, the Second Circuit declined to rule on whether the FSIA's conferral of and exceptions to immunity apply in the criminal context. Even assuming *arguendo* that they did, the Second Circuit found that Halkbank's challenged conduct fell within the FSIA's commercial activity exception, which applies where a claim is based upon commercial activity carried on by a foreign sovereign in the United States or with the requisite nexus to the United States.[9]

Here, the action was based upon Halkbank's alleged participation "in the design of fraudulent transactions intended to deceive U.S. regulators and foreign banks" and "lie[s] to Treasury officials regarding the nature of these transactions in an effort to hide the scheme and avoid U.S. sanctions."[10] This alleged conduct satisfied each of the commercial activity exception's three independent prongs:

(1) Halkbank's communications with U.S. Treasury officials were "plainly the type of activity in which . . . privately owned correspondent banks[] routinely engage."[11] Accordingly, they constituted commercial activity carried on in the United States.

(2) The conduct also constituted acts in the United States in connection with Halkbank's commercial activity elsewhere.

(3) Halkbank's acts outside the United States "caused a 'direct effect' in the United States by causing victim-U.S. financial institutions to take part in laundering over $1 billion through the U.S. financial system in violation of U.S. law."[12]

[6] *Id.* (An "appeal from [a] final judgment cannot repair the damage caused to a sovereign that is improperly required to litigate a case.").
[7] *Id.* at 347 (quoting 18 U.S.C. § 3231) (emphasis added).
[8] *Id.* (citing *In re Grand Jury Subpoena*, 912 F.3d 623, 628 (D.C. Cir. 2019).
[9] *See* 28 U.S.C. § 1605(a)(2) (providing an exception to sovereign immunity for a suit based upon (1) "a commercial activity carried on in the United States by the foreign state"; (2) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or (3) "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").
[10] *Halkbank* at 348.
[11] *Id.* at 349.
[12] *Id.*

Third, Halkbank's invocation of sovereign immunity at common law failed for three independent reasons: (i) the FSIA "displaced any pre-existing common-law practice";[13] (ii) foreign sovereign immunity at common law also had an exception for commercial activity; and (iii) common law sovereign immunity determinations "were the prerogative of the Executive Branch" and the USAO's decision to bring criminal charges "necessarily manifested the Executive Branch's view that no sovereign immunity existed."[14]

Takeaways

The Second Circuit is now the fifth federal appeals court to be presented with the question of the FSIA's application in criminal proceedings. It joins the D.C. Circuit in holding that unlike in the civil context, the FSIA is not necessarily the sole source of jurisdiction over a sovereign in the criminal context (see our previous alerts on the D.C. Circuit's ruling here and here).[15] As to sovereign immunity, neither the Second Circuit nor the D.C. Circuit squarely ruled on whether the FSIA's grant of and exceptions to sovereign immunity apply in criminal proceedings—instead both found that the respective allegations had in any event met the burden under the FSIA's commercial activity exception.

In the Sixth Circuit and Tenth Circuit cases, defendants argued that sovereigns cannot commit a predicate "indictable" act for a civil RICO claim because they are immune from criminal proceedings under the FSIA. Whereas the Sixth Circuit held the FSIA "grants immunity to foreign sovereigns from criminal prosecution, absent an international agreement stating otherwise," the Tenth Circuit held that if Congress intended for sovereign entities to be "immune from criminal indictment under the FSIA," it "should amend the FSIA to expressly so state."[16] The Tenth Circuit cited the Eleventh Circuit's previous statement in the context of a head-of-state immunity claim that the FSIA does not address "foreign sovereign immunity in the criminal context."[17]

The Second Circuit's ruling avoids the district court's categorical conclusion that the FSIA does not confer immunity as to criminal proceedings. And the Second Circuit's holding that "a threshold sovereign immunity determination is immediately appealable pursuant to the collateral order doctrine—even in a criminal case" fortifies the interlocutory appeal rights available to foreign sovereigns.[18]

Nevertheless, the Second Circuit's *Halkbank* ruling also potentially expands the U.S. government's power by restricting the defenses available to foreign state-owned entities in criminal proceedings against them, including based on the Second Circuit's analysis of the FSIA's commercial activity exception. Moreover, the ruling precludes the invocation of common law immunity wherever the U.S. government chooses to bring criminal charges.

[13] *Id.* at 350-51; *see also WhatsApp Inc. v. NSO Grp. Techs. Ltd.*, No. 20-16408, 2021 WL 5174092 at *1 (9th Cir. Nov. 8, 2021) (rejecting common-law immunity for entities because "the FSIA's text, purpose, and history demonstrate that Congress displaced common-law sovereign immunity doctrine as it relates to entities").
[14] *Halkbank* at 351.
[15] *See in re Grand Jury Subpoena*, 912 F.3d 623, 634 (D.C. Cir. 2019) (affirming criminal contempt order against foreign state-owned entity for non-compliance with grand jury subpoena).
[16] *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002); *Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1215 (10th Cir. 1999).
[17] *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997).
[18] *Halkbank* at 344.

Halkbank and other cases involving criminal proceedings have all been directed at a foreign state-owned entity. To date, such charges have never been brought against a foreign state itself. That may reflect comity or international relations concerns of the executive branch more than immunity concerns *per se*. In any event, the *Halkbank* reasoning did not distinguish states from their instrumentalities or companies and could potentially be applied in either context.[19]

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[19] On November 5, 2021, Halkbank filed a petition for rehearing/rehearing *en banc*, which is pending. The stay of district court proceedings remains in effect pending disposition of the petition for rehearing.