Halkbank: Second Circuit Holds Foreign State-Owned Entities Not Immune from Prosecution for Commercial Activity

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Last week, a U.S. appellate court held that federal common law does not grant foreign state-owned entities immunity from criminal prosecution concerning an entity's commercial (rather than governmental) activities. The October 22, 2024 decision by the U.S. Court of Appeals for the Second Circuit in *United States v. Bankasi*[1] permits prosecutors in the Southern District of New York to proceed with an indictment alleging that the Turkish State-owned bank Turkiye Halk Bankasi A.S. ("Halkbank") participated in a wide-ranging scheme to violate U.S. economic sanctions on Iran.

The Second Circuit rendered its decision on remand from the U.S. Supreme Court, which had held last year that the Foreign Sovereign Immunities Act ("FSIA") does not grant foreign sovereigns or their instrumentalities immunity from criminal prosecution and instructed the Second Circuit to consider the question of common law immunity.[2] Although U.S. prosecutions of foreign state-owned entities are rare, foreign state-owned banks, wealth funds, and other entities should take seriously the risk of criminal liability for commercial activity that violates U.S. laws.

Background. Halkbank is majority-owned by Turkey's sovereign wealth fund, and it was uncontested in the litigation that Halkbank qualified as an instrumentality of a foreign state for purposes of the FSIA.[3] In October 2019, the Department of Justice indicted Halkbank for charges including money laundering, bank fraud, and conspiracy to violate the U.S. economic sanctions regime for Iran.[4] Halkbank moved to dismiss the indictment, including by invoking the FSIA to argue that, as a foreign state-owned financial institution, it was immune from prosecution.[5] After the U.S. District Court of the Southern District of New York denied Halkbank's motion to dismiss and the Second Circuit affirmed the denial, Halkbank successfully petitioned the Supreme Court for review.

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1 No. 20-3499, 2024 WL 4536795, at *1 (2d Cir. Oct. 22, 2024).

2 *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264 (2023).

3 *Id.* at 267, 268, 272.

4 *United States v. Halkbank*, No. 15 CR. 867 (RMB), 2020 WL 5849512, at *1 (S.D.N.Y. Oct. 1, 2020).

5 *Id.* at *4 (S.D.N.Y. Oct. 1, 2020).

The Supreme Court Weighs In. In April 2023, the Supreme Court held that "the FSIA does not grant immunity to foreign states or their instrumentalities in criminal proceedings."[6] The seven-justice majority explained that Congress, via the FSIA, had "enacted a comprehensive scheme governing claims of immunity in civil actions against foreign states and their instrumentalities," but was "silent as to criminal matters."[7] The Supreme Court declined to address Halkbank's argument that it was nonetheless immune from prosecution under federal common law, and remanded the case to the Second Circuit with instructions to consider that argument in the first instance.[8]

The Second Circuit Permits the Prosecution to Proceed. On remand, the Second Circuit first held that, under the federal common law, U.S. courts "defer to the Executive Branch's determination as to whether a party should be afforded common-law sovereign immunity," including where that decision is expressed "by the initiation of a federal criminal prosecution."[9] The court observed that the FSIA "transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch" when the statute applies, but concluded that in the common-law context, the Judicial Branch still defers to the "Executive's determination of the scope of immunity."[10]

The Second Circuit then assessed whether the Executive Branch's decision to prosecute Halkbank was consistent with common law principles of sovereign immunity, and determined that there is "no basis in the common law to conclude that a foreign state-owned corporation is absolutely immune from prosecution by a separate sovereign for alleged criminal conduct related to its commercial activities, and not to governmental functions."[11] Faced with a seldom-tested area of federal common law, the Second Circuit based its assessment primarily on precedent addressing foreign sovereign instrumentalities' immunity in civil proceedings. Because the Second Circuit concluded that the Department of Justice's position on immunity was consistent with the court's view of the common law, it reserved judgment as to whether judicial deference to the Executive Branch would extend to a prosecution that contravened common law principles of sovereign immunity. Notably, the Government acknowledged that a criminal prosecution of Turkey itself—rather than its state-owned entity—would be in derogation of the common law.

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6 *Turkiye Halk Bankasi A.S.*, 598 U.S. at 272.

7 *Id.* at 273–74.

8 *Id.* at 280–81 ("The Court of Appeals did not fully consider the various arguments regarding common-law immunity that the parties press in this Court []. Nor did the Court of Appeals address whether and to what extent foreign states and their instrumentalities are differently situated for purposes of common-law immunity in the criminal context. We express no view on those issues and leave them for the Court of Appeals to consider on remand.") (internal citations omitted).

9 *Bankasi*, No. 20-3499, 2024 WL 4536795, at *1, *3.

10 *Id.* at *5 (internal quotations omitted).

11 *Id.* at *1.

In holding that the activity charged in the indictment was commercial rather than governmental—and thus not protected by any common law immunity—the Second Circuit left open whether the test for characterizing conduct as commercial is the same under the common law as under the FSIA.[12] The court had previously concluded that Halkbank's alleged participation in money laundering via private, commercial banking channels was commercial for purposes of the FSIA, which looks to whether the activity "could be, and in fact regularly is, performed by private-sector businesses," rather than to the activity's purpose.[13] On remand, Halkbank argued that the activity's purpose is relevant under the common law, but the Second Circuit held that "the indictment concerns Halkbank's commercial activity, even if we consider the purpose of the alleged conduct," and thus did not decide whether courts should take purpose into account in cases concerning common law immunity.[14]

What's Next? Last week, Halkbank reportedly issued a public statement that it will pursue all legal rights to appeal the decision, including petitioning the Supreme Court once more.[15] In the meantime, the Second Circuit's decision makes clear that foreign state-owned entities cannot rely on sovereign immunity from criminal prosecution in U.S. courts for commercial activity.

The decisions of the Supreme Court and the Second Circuit concerning Halkbank also leave a number of questions unanswered, including the common law test for assessing whether a sovereign instrumentality's conduct is commercial (as discussed above), and the extent to which U.S. states (rather than the federal government) may prosecute foreign sovereign instrumentalities in state courts. In light of the Supreme Court's 2019 ruling in *Jam v. International Finance Corporation* that, under the International Organizations Immunities Act ("IOIA"), international organizations enjoy the same immunity from suit in U.S. courts as foreign governments currently do, the *Halkbank* decisions may well impact certain international organizations as well.[16]

The extent to which foreign sovereigns may be subjected to suit in the United States continues to be a very active area of litigation, with the Supreme Court set to address whether foreign sovereign instrumentalities are entitled to due process protections

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12 *Id.* at *12.

13 *United States v. Turkiye Halk Bankasi A.S.*, 16 F.4th 336, 350 (2d Cir. 2021) (internal quotations omitted).

14 *Bankasi*, No. 20-3499, 2024 WL 4536795, at *13.

15 *See* REUTERS, "US can prosecute Turkish bank in Iran sanctions case, US appeals court rules" (Oct. 23, 2024), *available at* https://www.reuters.com/world/no-immunity-turkeys-halkbank-iran-sanctions-case-us-appeals-court-rules-2024-10-22/.

16 *Jam v. Int'l Fin. Corp.*, 586 U.S. 199, 202 (2019) ("The International Organizations Immunities Act of 1945 grants international organizations such as the World Bank and the World Health Organization the 'same immunity from suit … as is enjoyed by foreign governments.'"). For additional analysis of the current protections for international organizations, see our 2023 article in the Transnational Litigation Blog.

from suit, among other issues, in its October 2024 Term.[17] How those decisions will reshape the landscape for foreign sovereigns, their agencies, and their instrumentalities remains to be seen.

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Please do not hesitate to contact us with any questions.

Natalie L. Reid
Partner, New York
+1 212 909 6154
nlreid@debevoise.com

Shannon Rose Selden
Partner, New York
+1 212 909 6082
srselden@debevoise.com

William H. Taft V
Partner, New York
+1 212 909 6877
whtaft@debevoise.com

Natascha Born
Associate, New York
+1 212 909 6821
nborn@debevoise.com

Sebastian Dutz
Associate, New York
+1 212 909 6192
spdutz@debevoise.com

Duncan Pickard
Associate, New York
+1 212 909 6568
dpickard@debevoise.com

Beatrice A. Walton
Associate, New York
+1 212 909 6558
bawalton@debevoise.com

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[17] *See CC/Devas (Mauritius) Limited, et al., v. Antrix Corp. Ltd.*, et al., No. 23-1201 (presenting issue of whether plaintiffs must establish minimum contacts for courts to assert personal jurisdiction over foreign sovereign instrumentalities); *Republic of Hungary et al., v. Simon et al.,* No. 23-867 (presenting issues of pleading standards and burden of proof in FSIA cases).