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Enemy of the State: Foreign Sovereign Immunity And Criminal Prosecutions after 'Halkbank'

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From sovereign wealth funds to state-owned real estate developers and every permutation in between, foreign state-owned commercial enterprises are increasingly part of the global market. It has long been the case that such entities enjoyed immunity under the Foreign Sovereign Immunity Act (FSIA) from civil suits, but the issue of whether state-owned commercial enterprises are immune from criminal prosecution has been fuzzier.

Recently, however, in appeals involving Turkiye Halk Bankasi A.S. ("Halkbank"), both the Supreme Court and the U.S. Court of Appeals for the Second Circuit have clarified that the FSIA and common law principles do not insulate foreign state-owned commercial enterprises from federal prosecution. In doing so, the courts have cleared the way for prosecutions of these ventures in U.S. courts, which may be particularly relevant given the increasing use of criminal enforcement of sanctions violations.

One aspect of the decision that folks may not have anticipated is what to do when a state-owned corporation receives a federal grand jury subpoena that calls for information that the company cannot produce under its home country law.

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What the *Halkbank* decisions make clear now is that DOJ can enforce those subpoenas through criminal contempt charges, putting those companies in a tough spot. State-owned corporations must thus think proactively about how to deal with these issues, including thinking through data storage issues, whether U.S.-based employees have access to data subject to disclosure restrictions, how to substantiate the requirements of foreign law if challenged, and how these new risks play into decisions about self-reporting misconduct to U.S. authorities.

The 'Halkbank' Decisions

In 2019, the U.S. Department of Justice charged Halkbank, a commercial bank owned by the

Republic of Turkey, for conspiring to launder oil proceeds and evade economic sanctions against Iran.In response, Halkbank argued that it was immune from prosecution under the FSIA as an entity owned by a foreign sovereign.

The district court and the Second Circuit, assuming without deciding that FSIA applied in criminal cases, held that the prosecution was permissible under FSIA's exception to immunity for commercial conduct. *United States v. Halkbank*, 2020 WL 5849512 (S.D.N.Y. Oct. 1, 2020), *aff'd sub nom. United States v. Turkiye Halk Bankasi A.S.*, 16 F.4th 336 (2d Cir. 2021).

In 2023, the Supreme Court affirmed the Second Circuit's decision, but on the grounds that the FSIA does not grant sovereign immunity to foreign sovereigns in criminal cases at all.*Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 275 (2023).

Halkbank had also argued that it was entitled to immunity under the common law of foreign sovereign immunity, but because the Second Circuit had not considered the argument, the court vacated and remanded so the Second Circuit could consider the common-law argument. *Id*. at 280-81. On remand, the Second Circuit ruled that Halkbank lacks immunity from criminal prosecution under the common law for its alleged commercial, non-governmental conduct.*United States v. Bankasi*, 120 F.4th 41 (2d Cir. 2024).

As a preliminary matter, the Second Circuit noted that foreign sovereign immunity under the common law is a creature of grace and comity that could be withdrawn by the executive branch in line with its foreign policy judgment and priorities. The Second Circuit concluded that in this case, the executive branch's desire to deny immunity to Halkbank was manifest by virtue of its prosecution.*Id*. at 46-49.

The next step of the Second Circuit's analysis was whether the executive branch's denial of immunity was entitled to deference, which required an assessment of whether the executive branch's position was consistent with the traditional scope of foreign sovereign immunity under the common law.

The Second Circuit rejected Halkbank's argument that deference is due to the executive branch's determination only when foreign sovereign immunity is granted, rather than denied, finding that operative Supreme Court precedent required deference to both determinations. *Id*. at 49-51.

Halkbank also argued that deference to the executive branch's immunity determinations is limited to civil, not criminal cases. The Second Circuit distinguished the cases identified by Halkbank, and further noted that the fact that "relatively few cases have expressly deferred to the Executive's position that foreign sovereign immunity is not warranted…can be explained by the Executive Branch's overwhelming tendency to request the application of foreign sovereign immunity." *Id*. at 51-52.

Having rejected Halkbank's threshold arguments, the Second Circuit then considered whether the denial of immunity to Halkbank specifically was within the scope of foreign sovereign immunity under the common law.

The Second Circuit first acknowledged that federal criminal prosecution of a foreign state itself would be "in derogation of the common law."*Id*. at 52.But the Second Circuit held that absolute immunity afforded to foreign states does not apply to entities owned and controlled by a foreign state.

Instead, immunity under the common law depends whether the entity's relevant conduct was governmental or commercial in nature, and state-owned entities are not immune for commercial, non-governmental conduct. *Id*. at 52-55.

The Second Circuit held that the prosecution of Halkbank was permissible under this standard, as the "gravamen" of the indictment was

Halkbank's "participation in money laundering and other fraudulent schemes designed to evade U.S. sanctions."*Id*. at 56-58.

The Second Circuit left "for another day whether deference to the Executive in this context should be cabined if, unlike here, the Executive's denial of immunity to a foreign sovereign derogated from the common law—for instance, if the Executive indicted a state *qua* state."*Id*. at 59.Because "the Executive Branch's position here is consistent with the scope of immunity extended to foreign state-owned corporations at common law," the Second Circuit found it unnecessary to "the outer limits of the deference afforded in this context."*Id*.

Federal Grand Jury Subpoenas

Foreign state-owned entities should be paying particularly close attention to the impact of the *Halkbank* decision in the context of compliance with federal grand jury subpoenas. As those who work in the legal or compliance departments of state-owned corporations know, refusal to turn over information in connection with a grand jury subpoena is not always driven by nefarious motivations.

For example, even though a grand jury subpoena traditionally cannot be used to compel production of information that is held abroad, an entity that receives such a subpoena often faces thorny questions about when a U.S. branch office of a foreign entity truly has custody and control of records, or where information held abroad has been incorporated into records housed domestically.

Similarly, many countries have their own laws or regulations that prevent disclosure of certain forms of information, even if that information is located in the United States.

This issue recently received significant judicial attention after Robert Mueller issued a subpoena to a foreign state-owned corporation as part of his investigation into the Trump administration. That corporation (which has never been publicly identified, nor has its home country) refused to comply, and was held in contempt.

In fighting the contempt, it first argued that it was immune under the FSIA. Like the district court and Second Circuit in *Halkbank*, the district court and the D.C. Circuit held that, assuming without deciding that FSIA applied in the criminal context, the corporation was engaged in commercial conduct and therefore not afforded immunity under FSIA. *See In re Grand Jury Subpoena No. 7409*, 2018 WL 8334867 (D.D.C. Sept. 19, 2018), *aff'd sub nom. In re Grand Jury Subpoena*, 912 F.3d 623 (D.C. Cir. 2019), *cert. denied*, No. 18-948, 139 S. Ct. 1378 (2019).

That corporation also argued that the subpoena must be quashed as "unreasonable or oppressive" under traditional criminal procedural rules "because it would require the corporation to violate Country A's domestic law." 912 F.3d at 633.

The D.C. Circuit's analysis of this argument provides some guidance to foreign state-owned entities that are subject to local laws restricting disclosure of information. The court first analyzed the text of that local law (which was redacted in public filings) but held that the "text of the law favors" the government's argument that the corporation could comply with the subpoena. *Id*.

In defense of its read of its domestic law, that corporation first "relied on two declarations from its retained counsel."*Id*. at 633-34. The D.C. Circuit noted that, "when evaluating a foreign state's position regarding the contents of its own law," the Supreme Court has instructed courts to scrutinize "the statement's clarity, thoroughness, and support; its context and purpose; [and] the role and authority of the entity or official offering the statement."*Id*. at 634 (quoting *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 585 U.S. 33, 34 (2018)).

The court found that these counsel declarations were insufficient to convince it to adopt the corporation's read of its local law, as they were "quite

cursory, and they contain no citations to authority or Country A's case law" and, furthermore, "come from the retained counsel of a party with a direct stake in this litigation, and they were plainly prepared with this particular proceeding in mind."*Id*.

In light of these concerns, the entity submitted a new declaration to the D.C. Circuit "from a regulatory body of Country A," but the court found that declaration "fail[ed] to cure the crucial deficiencies of the original declarations," as it "still fail[ed] to cite a single Country A court case articulating the Corporation's preferred interpretation of the law."*Id*. Those "omissions, combined with the fact that the statement was clearly prepared in response to this litigation and at a very late hour," left the court "unpersuaded that the statement accurately reflects how Country A's courts would interpret the relevant provision." *Id*.

Now that the *Halkbank* and *In re Grand Jury Subpoena* decisions have made clear that foreign sovereign immunity does not prevent DOJ from enforcing grand jury subpoenas through criminal contempt charges, state-owned corporations must understand these risks and incorporate them as the costs of doing business in the United States.

It is particularly important for state-owned corporations to think through these risks and consult counsel proactively about such issues. Initially, one would certainly hope that DOJ would tread lightly when it comes to charging contempt in these cases, and state-owned corporate actors could presumably press the same prudential arguments against charging they have traditionally employed, such as the economic ramifications of charges or the impact on innocent employees and bystanders.

But the strength of those arguments will likely turn on, among other things, the nature of DOJ's investigation and the company's role in the underlying conduct. State-owned corporate actors should think through these issues proactively so that they are best positioned to advance such arguments.

Moreover, recognizing that those arguments may fall on deaf ears in some cases, these companies need also to review their data storage policies and assess the level of access that U.S.-based employees have to data that may be shielded from disclosure by foreign law.

Furthermore, given the court's focus in *In re Grand Jury Subpoena* on the fact that the counsel declarations about another country's law were drafted in response to litigation and offered insufficient detail about the law, companies should consider whether they can get ahead of those considerations by seeking out neutral and comprehensive expert opinions on the requirements of their native country's law before the need for litigation.

And finally, if a state-owned corporation does discover conduct that could lead to criminal exposure in the United States, these companies need to now balance the risk of finding themselves in this new quandary—subject to subpoenas with real teeth behind them—against the risks created by voluntary self-disclosure. Time will tell whether DOJ uses this newfound power with respect to grand jury subpoenas, but given the magnitude of the potential consequences, companies cannot afford to take a wait-and-see approach.

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