

Expanding FSIA to Criminal Cases Would Not Save a Turkish Bank from U.S. Prosecution, Holds the Second Circuit

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The Second Circuit recently [held](#) that a denial of a motion to dismiss a criminal indictment based on the Foreign Sovereign Immunities Act (“FSIA”) is immediately appealable under the collateral-order doctrine but concluded that even if FSIA did provide immunity from criminal prosecutions, that immunity would not extend to a foreign sovereign’s or its instrumentality’s commercial activities.

The United States accused Halkbank—a bank majority-owned by the Turkish government—of helping Iran evade U.S. economic sanctions by laundering billions of dollars’ worth of Iranian oil and natural gas proceeds held in Halkbank, and permitting Iran to use those proceeds to purchase gold and convert it to cash for Iran’s benefit. The bank also allegedly attempted to cover up those transactions by lying to U.S. Treasury Department officials that the transactions related to the purchase of food and medicine by the bank’s Iranian customers and thus fell within the so-called “humanitarian exception” to U.S. sanctions.

Halkbank moved to dismiss the indictment arguing that FSIA—which facially applies only to civil cases—renders Halkbank immune from criminal prosecution because it is majority-owned by the Turkish government. The district court disagreed and denied the motion. Halkbank immediately appealed arguing that the district court’s denial of immunity qualified for interlocutory review under the collateral-order doctrine. A panel of the Second Circuit agreed, holding that it had jurisdiction over the appeal because, just as in the civil context, a threshold foreign sovereign-immunity determination in criminal cases is immediately reviewable under the collateral-order doctrine.

The panel, however, sidestepped the key issue: whether FSIA, which plainly confers immunity on foreign sovereigns from civil actions, also confers immunity in the criminal context. Rather, the panel concluded that even if foreign sovereigns and their instrumentalities were immune from criminal prosecution under FSIA, FSIA’s many exceptions would still apply and, in this case, preclude Halkbank from qualifying for immunity. The panel explained that Halkbank’s charged offense conduct would fall within FSIA’s exception to sovereign immunity for commercial activity. According to the panel, Halkbank’s participation in money laundering and other fraudulent schemes designed to evade U.S. sanctions constitute “an activity that could be, and in fact regularly is, performed by private-sector businesses,” and thus those acts are commercial, not sovereign, in nature.

The panel also rejected Halkbank's argument that even if FSIA did not confer foreign-sovereign immunity in criminal cases, Halkbank was nevertheless immune from criminal prosecution under the common law. The panel explained that if FSIA did in fact confer sovereign immunity in criminal cases, then it displaced any pre-existing common-law immunity. And if FSIA did not apply in the criminal context or did not supersede the common law, foreign-sovereign immunity at common law also had an exception for a foreign state's commercial activity, similar to FSIA's commercial activity exception. The panel thus affirmed the district court's order denying Halkbank's motion to dismiss the indictment.

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