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SDNY Case Raises Provocative Questions On US Jurisdiction

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The U.S. Office of Foreign Assets Control has continued enforcement activity demonstrating an interest in advancing U.S. foreign policy interests covered by its regulations. This activity includes not only civil enforcement actions but also criminal indictments or prosecutions that address a number of potentially open issues when interpreting the extent to which the OFAC sanctions apply to activities or individuals outside the United States. In a recent case involving multiple defendants, U.S. v. Reza Zarrab et al., S4-15-CR-867 (RMB), the U.S. District Court for the Southern District of New York is considering the extent to which the International Emergency Economic Powers Act (IEEPA) authorizes OFAC and other enforcement authorities to criminalize and prosecute in federal district court a non-U.S. person's activities occurring outside the United States that may be sufficient to result in civil or administrative secondary sanctions penalties, such as designation of specially designated nationals (SDN) status, but where no U.S. nexus is alleged in connection with the non-U.S. person's behavior.

One of the defendants in the Zarrab case, Mehmet Hakan Atilla, has challenged the government's actions through a motion to dismiss, and the matter is currently under consideration. The court's decision — whether in support of the defendant or the government — is likely to affect the manner in which entities and individuals decide how to comply with OFAC secondary sanctions, and the case represents a critical interpretive question.

Atilla, a deputy chief executive officer at Turkiye Halk Bankasi AS, a Turkish bank, is accused of conspiring with Reza Zarrab, an Iranian-Turkish gold trader, and others to launder millions of dollars through the U.S. financial system on behalf of the government of Iran and Iranian parties. Atilla was taken into physical custody in the United States in March 2017, and the U.S. government issued Superseding Indictment No. 4 on Sept. 6. Atilla filed a motion to dismiss on Oct. 9, and the government responded on Oct. 16. On Oct. 23, Atilla filed a "Reply Memorandum of Law in Support of Defendant Atilla's Motion to Dismiss Superseding Indictment S4, or Alternatively for Severance [reply memorandum]." This reply memorandum raises nuanced arguments about the manner in which U.S. jurisdiction may extend to criminally prosecute a non-U.S. person under the IEEPA (50 USC §§ 1701-1706)

for prohibited Iran-related economic secondary sanctions activities which Atilla alleges do not have a U.S. nexus sufficient to allow criminal prosecution but which could permit civil enforcement for Iran secondary sanctions violations.

Atilla argues that there is a difference between conduct that can be civilly or administratively sanctioned by the United States, such as placing him (based on the particular facts alleged in Superseding Indictment No. 4) on the specially designated nationals list and conduct that can be criminally prosecuted under IEEPA, i.e., as if Atilla were a "U.S. person" facing primary sanctions criminal charges.

Atilla asserts that there must be a U.S. nexus (e.g., use of the U.S. banking system) for the United States to criminally prosecute him, arguing that U.S. v. Yousef, 327 F.3d 56 (2d Cir. 2003) incorrectly suggested that 31 CFR 560.204 dispensed with the presumption against extraterritoriality explained in Morrison v. National Australia Bank, 561 U.S. 247 (2010). Atilla argues that an indictment, as opposed to a civil action, must assert a violation of 31 CFR 560.205, which the indictment does not. He emphasizes that, in his view, the indictment does not allege facts about the U.S. nexus of his activities, and therefore the United States has overstepped its jurisdiction. He acknowledges that the government alleged he conducted discussions related to assisting a specific bank to evade the sanctions and transfer money to Iran, but he dismisses these statements as either inadequate or inaccurate. In other words, given the facts he claims Superseding Indictment No. 4 contains, a criminal prosecution against him, based on IEEPA, is beyond the judicial power of the United States.

The reply memorandum states IEEPA's penalties section (50 USC §§1705(a) and (c)) only criminalizes conduct that violates prohibitions, orders, regulations, and licenses issued under IEEPA's grant of authority (50 USC 1702(a)(1)), which is qualified by the phrase "subject to the jurisdiction of the United States. Atilla argues that because his activities had no U.S. nexus, they were not "subject to the jurisdiction of the United States," thereby depriving the U.S. government of criminal jurisdiction to prosecute him.

Atilla's arguments raise several provocative questions concerning the limits, if any, to U.S. jurisdiction, if the court confirms the government's interpretation. Not only does Atilla's argument seek to limit the penalties available for certain violations to civil remedies only, it suggests that its logic applies to the entire "sanctions regime" and could impact a number of programs and cases in the government's pipeline.

Atilla's interpretation is equally interesting because the current Export Administration Regulations (EAR), in force under the U.S. president's IEEPA authority, permit civil, administrative and criminal prosecution for violative behavior.

Indeed, the EAR states: "Conduct that violates the [Export Administration Act], the EAR, or any order, license, or authorization issued thereunder, and other conduct specified in the EAA may be subject to sanctions or other measures in addition to criminal and administrative sanctions under the EAA or EAR." (See 15 CFR § 764.3(c).)

However, the EAR ties violations to transactions involving items "subject to the EAR," the meaning of which is clearly defined in 15 CFR Part 734. Thus, for EAR purposes, all such violations involving items "subject to the EAR" are encompassed in the provision "subject to the jurisdiction of the United States" as provided in IEEPA — presumably because the items "subject to the EAR" in question have been exported from the United States or contain 10 percent or more U.S.-origin-controlled content, thus presenting an adequate basis for a U.S. nexus.

On the other hand, Attila essentially argues that the OFAC Iran-related secondary sanctions do not contain any OFAC-enunciated criteria equivalent to the EAR's jurisdictional trigger "subject to the EAR" for purposes of meeting the IEEPA's "subject to the jurisdiction of the United States" test. Thus, Atilla asserts, the United States has no jurisdiction under the facts pleaded in the indictment against him to criminally prosecute him.

It will be critical to see how the court rules on the arguments made by Atilla in light of the U.S. Supreme Court's expressed and consistent views regarding the extraterritorial reach of U.S. laws. See, e.g., RJR Nabisco v. European Community, 136 S. Ct. 2090 (2016) ("Absent clearly expressed Congressional intent to the contrary, federal laws will be construed to have only domestic application."); see also Morrison v. National Australia Bank, 561 U.S. 247 ("It is a long standing principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.").

The implications raised in this case by Atilla are very significant for non-U.S. persons currently engaged in dealings with Iran under the U.S. relaxation of secondary sanctions permitted by the Iran nuclear deal's Join Comprehensive Plan of Action (JCPOA), or North Korea, because U.S. Iran secondary sanctions may be revived or expanded as suggested by President Donald Trump's recent withholding of certification of the JCPOA as being in the U.S. national interest.

If the court rejects Atilla's arguments finding that the U.S. does have judicial power to criminally prosecute him under IEEPA, then any foreign person engaging in activities prohibited by renewed U.S. Iran secondary sanctions (or other secondary sanctions) might face criminal prosecution in the United States as well as other administrative penalties, such as landing on the SDN list.

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