

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Leffer, et al.
Plaintiffs,

v.

FEDERAL REPUBLIC OF GERMANY, et al.
Defendants.

Case No. 19-cv-3529 (CJN)

SUPPLEMENTAL MEMORANDUM OF LAW OF THE EUROPEAN UNION IN RESPONSE TO THE COURT’S MARCH 26, 2021 ORDER REGARDING WHETHER THE EUROPEAN UNION FALLS WITHIN THE BROAD GRANT OF IMMUNITY GRANTED BY THE FOREIGN SOVEREIGN IMMUNITIES ACT

Comes now the Defendant, the European Union, by counsel, stating as follows:

In this Memorandum, the EU will demonstrate that the EU for the purpose of the Foreign Sovereign Immunities Act (“FSIA”) is an agency or instrumentality of the 27 foreign states which are members of the EU and that, at its core, the EU engages in public functions on behalf of the member states.¹ *See, Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841 (5th Cir. 2000).

The EU has described itself in a document entitled *The European Union – What it is and What it Does*² thusly:

At the core of the EU are the 27 Member-States that belong to the EU, and their citizens. The unique feature of the EU is that, although the Member States all remain sovereign and independent states, they have decided to pool some of the “sovereignty” in areas where it makes sense to work together.

In practice, this means that the Member States delegate some of their decision-making powers to the shared institutions they have created, so decisions on specific matters of common interest can be made democratically at EU level.²

¹ As demonstrated *infra*. at 4 the core-functions test is not used to determine if an entity is an “agency or instrumentality” under the FSIA.

² <https://op.europa.eu/webpub/com/eu-what-it-is/en>

The EU is an international organization based on two Treaties setting out its primary law: the Treaty on the European Union³ ('EU Treaty')⁴ and the Treaty on the Functioning of the European Union ("FEU Treaty").⁵ Its members are 27 European countries (hereafter "EU member states"). As an international organization which is conferred wide competences for certain sovereign functions, including the competence to conclude treaties, the EU must be protected by sovereign immunity in non-EU member countries under the general rule of international law regarding the jurisdictional immunity of States or international organizations. In its March 26, 2021 Order, the Court specifically identified several issues it deemed important in determination of whether the EU is an agency or instrumentality of a foreign state. In the balance of this memorandum the EU will address each of these issues.

1. The EU falls within the ordinary meaning of the phrase "organ"

The Court was concerned that the EU did not address whether the EU falls within the "ordinary meaning" of the phrase "agency or instrumentality." *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769, 203 L. Ed. 2d 53, 62 (2019).

However, the EU respectfully submits that the proper question is whether the EU fits within the "ordinary meaning" of the word "organ," because the FISA defines an "agency or instrumentality" as an "organ." *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 640 (9th Cir. 2003) ("EIE Guam Corp."). (The capstone of organ designation is

³ The European Union replaced and succeeded by the European Community as a result of the 2007 Lisbon Treaty. The history of European integration through the treaties, from the Treaty establishing the European Coal and Steel Community to the Treaty of Lisbon can be found online <https://op.europa.eu/en/publication-detail/-/publication/799b11e2-aea2-4e0e-82d1-f7017a02c96d>

⁴ http://data.europa.eu/eli/treaty/teu_2016/oj

⁵ http://data.europa.eu/eli/treaty/tfeu_2016/oj

“whether the entity engages in a public activity on behalf of a foreign government.”)

An “organ” must meet these criteria:

An ‘agency or instrumentality of a foreign state’ means any entity —

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof
and

(3) which is neither a citizen of a State of the United States . . . nor created under
the laws of any third country.

28 USC § 1603(b).

There is no definitive test to determine whether an entity is an organ of a foreign government, but “[t]he FSIA’s “legislative history suggests that Congress intended the terms ‘organ’ and ‘agency or instrumentality’ to be read broadly.” *Intelsat Global Sales & Mktg., Ltd. v. Community of Yugoslav*, 534 F. Supp.2d 32, 35 (D.D.C. 2008) (citations omitted).

The Second Circuit in *European Cmty. et al. v. RJR Nabisco, Inc.*, 764 F.3d 129 (2d Cir. 2014), *rev’d and remanded on other grounds*, 136 S. Ct. 2090, 195 L. Ed. 2d 476 (2016) (“*RJR*”), specifically addressed the question of the meaning of the word “organ” and the EU adopts the Second Circuit’s analysis:

The FSIA does not include a definition of the term “organ.” A number of dictionaries we have consulted include definitions of “organ” that are altogether compatible with the European Community in its relationship to the states that formed it. *See Organ definition*, Oxford English Dictionary, [http:// www.oed.com/ view/ Entry/132421](http://www.oed.com/view/Entry/132421) (last visited July 10, 2013) (“A means of action or operation, an instrument; (now) *esp.* a person, body of people, or thing by which some purpose is carried out or some function is performed.”); American Heritage Dictionary 875 (2d College ed. 1982) (“An organization that performs certain specified functions: The FBI is an organ of the Justice Department.”); Merriam–Webster’s Third New International Dictionary of the English Language 1589 (1976) (“an instrumentality exercising some function or accomplishing some end”) . . . The European Community was formed by its member nations to serve on their collective behalf as a body exercising governmental functions over their collective territories. We see no reason why it is not properly described as an

organ of each nation.

RJR, *supra*, 764 F.3d at 144 (*emphasis added*).

The EU fits the criteria to be an “agency or instrumentality” within the meaning of 28 USC § 1603(b) because it is a separate legal person corporate or otherwise and it is not a citizen of the United States or created under the laws of any third country.

2. Section 1603(b) applies to bodies such as the EU

The Second Circuit in *RJR* also persuasively addressed whether Section 1603(b) reaches “international bodies like the EU”:

First, we turn to the text of § 1603. The fact that § 1603(b)(2) uses the term “organ of a foreign state” in the singular does not necessarily negate application to the European Community, which serves numerous foreign states. 28 U.S.C. § 1603(b)(2) (*emphasis added*). There is no logic to the proposition that an entity that serves as an organ of one foreign state cannot also serve as the organ of another. The Dictionary Act furthermore states that “[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise[,] words importing the singular include and apply to several persons, parties, or things.” 1 U.S.C. § 1. Context “means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts.” *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 199, 113 S.Ct. 716, 121 L.Ed.2d 656 (1993). The context here gives no indication that the phrase “a foreign state” must be interpreted to exclude an organ that serves as an agency of several states. Our interpretation finds support in the law of other circuits dealing with the pooling of shares to determine the status of commercial entities. *See In re Air Crash Disaster Near Roselawn, Ind.*, 96 F.3d 932, 938–39 (7th Cir.1996) (holding that an entity created by multiple governments is an “agency or instrumentality” under the FSIA); *Mangattu v. M/V IBN Hayyan*, 35 F.3d 205, 208 (5th Cir.1994) (same); *Linton v. Airbus Indus.*, 30 F.3d 592, 598 n. 29 (5th Cir.1994) (collecting cases). In these “share pooling” cases, courts have repeatedly held that corporations owned by several foreign states are covered by the FSIA, even though the statute uses the singular.

RJR, *supra*, 764 F.3d at 147.

3. A five-factor analysis and not the core-functions test is appropriate for determining whether the EU is entitled to immunity under the FSIA.

The Court’s Memorandum Opinion states that the EU failed to engage with the core-functions test that separates foreign states from their agencies and instrumentalities. Op. at 5.

The EU failed to engage with this test for good reason. Under the core-functions test “if the core functions of the entity are governmental, it is considered the foreign state itself; if commercial, the entity is an agency or instrumentality of the foreign state.” *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234 (D.C. Cir. 2003) (*superseded by statute on other grounds*). The legal significance of this test is only relevant where there is a claim that one of FSIA’s exceptions applies. In such a case if the core-functions of the agency or instrumentality are governmental then the agency is regarded as the state itself. If, on the other hand, the agencies core-functions are commercial then the agency may fall under one of the FSIA’s exceptions and may not be immune even though it is an agency or instrumentality of a foreign state. This test is irrelevant in the instant case because the Memorandum Opinion states that none of the FSIA’s exceptions apply. Op. 2-3. Therefore, there is no need to determine if the EU is an agency or instrumentality or if it is regarded as the state itself. If it is either, it is immune.

Notwithstanding this important legal point, the EU can demonstrate it performs core governmental functions. Here are some examples of EU governmental functions identified by other courts in the United States:⁶

1. The EU enters into treaties with the United States. *United States v. Moloney*, 685 F.3d 1, 10 (1st Cir. 2012) (United States signed a mutual legal assistance treaty with

⁶ In this time of pandemic, it is worth noting that the EU is has also competences in the area of public health for medical policy and administration in fighting the pandemic. Could there be a more important government function?

“EU regulator: Benefits of J&J vaccine outweigh risk of rare blood clots” – “The European Medicines Agency (EMA) said Tuesday that unusual blood clots should be listed as a ‘very rare’ side effect of Johnson & Johnson’s coronavirus vaccine, but that the benefits of the shot still outweigh the risks.” https://www.axios.com/johnson-johnson-blood-clots-europe-40772155-38ea-4f23-b442-397c9112526f.html?stream=world&utm_source=alert&utm_medium=email&utm_campaign=ale_rts_world

- the European Union ('US–EU MLAT'); *Blasko v. Thomas*, 2019 BL 78331 (E.D. Cal. Mar. 07, 2019) (Extradition request by Slovak Republic under agreement of extradition between US and EU).
2. The EU enforces antitrust laws of its member states. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 250 (2004) (Directorate General for Competition EU's primary antitrust law enforcer).
 3. The United States grants comity to the EU. *See Marti v. Iberostar Hoteles y Apartamentos S.L.*, 2020 BL 355520, 3 (S.D. Fla. Sept. 16, 2020) (S.D. Fla. 2020).
 4. The United States enters into bilateral cooperation agreements with the EU. *See, Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015)
 5. The EU has a court system, separate from its member states. *See, Novenergia II - Energy & Env't v. Kingdom of Spain*, No. 18-cv-01148 (TSC), 2020 US Dist. Lexis 12794, 2020 WL 417794 (D.D.C. Jan. 27, 2020), Court Opinion (01/27/2020).
 6. The EU is a member of the World Trade Organization ("WTO"). *Odebrecht Constr., Inc. v. Fla. Dept. of Transp.*, 715 F.3d 1268, 1279-80 (11th Cir. 2013).

The remaining question is whether the EU is an organ of a foreign government. There is no definitive test to determine whether an entity is an organ of a foreign government. Four Circuit Courts and numerous district courts, including the DC District Court, have adopted five factors to determine the status.⁷

The DC District Court has summarized them as follows: (1) did foreign state create entity for a national purpose; (2) does foreign state actively supervises entity; (3) does foreign

⁷ *Janvey v. Libyan Inv. Auth.*, 840 F.3d 248 (5th Cir. 2016), *Filler v. Hanvit Bank*, 378 F.3d 213 (2nd Cir. 2004); *EIE Guam Corp.*, *supra*; *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir. 2003); *Intelsat Global Sales & Mktg., Ltd.*, *supra*.

state require hiring of public employees and pay their salaries; (4) does entity hold exclusive rights to some right in foreign country; and (5) how the entity is treated under foreign state law.

Intelsat Global Sales & Mktg., Ltd., supra, 534 F. Supp. 2d at 35.

The Second Circuit applied these same five factors and held that the EU is an organ of the various member states because those member states (1) created the EU for a national purpose, “to establish governmental control on a collective basis over various national functions;” *RJR, supra*, 764 F3d at 145; (2) actively supervise the EU by appointing representatives to the Council of Ministers and appointing commissioners to the European Commission; *Id.* (3) pay the salaries of EU officials, who are considered public employees; *Id.* (4) give the EU the exclusive right to authorize issuance of banknotes and conclude certain multilateral agreements; *Id.* at 146 and (5) consider the EU to be a governmental entity *Id.* at 146-147.

The EU agrees with the findings of the Court in *RJR*. In addition, the EU wishes to add the following to establish its status as an “organ” under FSIA:

(1) whether the foreign state created the entity for a national purpose: The EU was created by its member states to establish a common market and monetary union, and to coordinate economic activities and policies throughout the member states. Art 3 of the EU Treaty. The United States has consistently taken the view that the public purpose factor is the most important consideration in determining an entity’s organ status. Brief for the United States as Amicus Curiae, *Powerex Corp. v. Reliant Energy Servs., Inc.*, at 6, 21–22, No. 05-85 (Sup. Ct. Mar. 2007).⁸

⁸ <https://www.justice.gov/osg/brief/05-584-powerex-corp-v-reliant-energy-servs-inc-powerex-corp-v-state-california-amicus-inv>

(2) whether the foreign state actively supervises the entity: Art 5 of the EU Treaty allows the EU to “act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.” Art 5(2) EU Treaty. In areas of the EU’s actions exclusive competence, the EU legislates and adopts legally binding acts. Outside that competence, the EU can “act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States” subject to review by national parliaments of the EU member states. Art 5 (3) EU Treaty. The European Court of Justice composed of members nominated by EU member states oversees the control of those principles. EU member states also take an important part in the creation and designation of EU institutions. The EU member states have substantial control over the EU defining the limits within which the EU can act and ensure control by the EU member states.

(3) whether the foreign state requires the hiring of public employees and pays their salaries: “[C]arrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.” Article 298 FEU Treaty. The EU’s administration is paid from EU’s budget. The service as a European Community official satisfies the European Court of Justice’s definition of “public service” because such officials exercise “powers conferred by public law and duties designed to safeguard the general interests of the state.” *RJR, supra*, 764 F3d at 145.

(4) whether the entity holds exclusive rights to some right in the foreign country: The FEU Treaty organizes the functioning of the EU and determines the areas of exercising its competences. It gives the EU in its Article 3 the exclusive right to, among other things, regulate matters relating to custom union (in particular the common external tariff of EU member states), establish the competition rules necessary for the functioning of the internal market; and

determine monetary policy for the Member States whose currency is the euro; all sovereign functions that the EU member states have delegated to the EU.

(5) how the entity is treated under foreign state law: In *Peninsula Asset Management (Cayman) Ltd. v. Hankook Tire Co., Ltd.*, 476 F.3d 140, 143-44 (2d Cir.2007), the Second Circuit determined that the final factor weighed in favor of “organ” status where the Korean government had informed the State Department and the district court that it treated the entity at issue “as a government entity.” The EU cannot provide such confirmation from its members states in this matter due the short briefing period. However, the Court should take notice that the EU member states that were parties to the *European Cmty. v. RJR Nabisco, Inc.*, suit have identified the EU as an organ: “Plaintiffs informed the district court in their briefing that they consider the European Community to be a governmental entity, and the United States Department of State has advised that it accepts this representation. *See* Brief for the United States as Amicus Curiae at 29.” *RJR, supra*, 764 F3d at 146.⁹ There is no reason to believe that the situation would be different in this matter.

Thus, weighing the various factors by giving most weight to the public purpose factor, one must conclude that the EU is an organ of its member states. The government of the United States agrees. It stated that because the EU is an organ of its member states and satisfies the other requirements under 28 U.S.C. § 1603(b), the EC is an “agency or instrumentality” of its member states. Accordingly, the EC is a “foreign state” within the meaning of the FSIA. *See* Brief for the United States as Amicus Curiae at 29 cited in *RJR, supra*, 764 F.3d at 146.¹⁰

The DC District Court has accepted that the [European]Commission qualifies as a

⁹ Brief available at <https://2009-2017.state.gov/documents/organization/194059.pdf>.

¹⁰ Brief available at <https://2009-2017.state.gov/documents/organization/194059.pdf>

“sovereign” in the context of the act of state and foreign sovereign compulsion doctrines. *Micula v. Gov’t of Romania*, 404 F. Supp. 3d 265, 281, (D.D.C. 2019).

The Court should further take notice that the European Union maintains the Delegation of the European Union in Washington, DC since 1954, which the United States recognizes as equivalent to that of a bilateral mission in the Diplomatic Corps Order of Precedence¹¹ and whose members of the diplomatic staff have diplomatic rank¹².

Lastly, the EU wishes to note that Plaintiffs have not disputed that the European Union is regarded as an agency or instrumentality of a foreign state under the Foreign Sovereign Immunity Act (FSIA) and enjoys the FSIA’s broad grant of immunity afforded foreign states and their agencies or instrumentalities.

Conclusion

The EU is for the purposes of the FSIA an organ of its member states which are all foreign states. Accordingly, the EU is an agency or instrumentality of a foreign state within the meaning of the FSIA and as such enjoys foreign sovereign immunity.

Dated: April 23, 2021

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¹¹ <https://www.state.gov/diplomatic-corps-order-of-precedence-and-dates-of-presentation-of-credentials/>

¹² <https://www.state.gov/wp-content/uploads/2020/10/Fall-2020-Diplomatic-List1.pdf>

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2021, I electronically filed the foregoing memorandum of law with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notice of Electronic Filing.

s/ Walter E. Diercks
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