



UK court decision highlights money laundering risks in global supply chains

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In a landmark [judgment](#), the Court of Appeal found that the National Crime Agency's (NCA) decision not to investigate cotton goods imported from the Xinjiang Uyghur Autonomous Region (the XUAR) of China, which were allegedly produced using slave labour, was unlawful.

Background

Over an 18 month period from April 2020, the World Uyghur Congress (WUC) provided evidence to the NCA regarding alleged human rights abuses in the production of cotton goods in the XUAR. The WUC invited the NCA to open an investigation into money laundering offences and potential recovery of proceeds of unlawful conduct under the Proceeds of Crime Act 2002 (POCA).

The NCA declined to investigate or commence civil recovery proceedings. The WUC brought a judicial review contending that the NCA's decision was based on two fundamental misapprehensions of law:

- that it was necessary for the NCA to identify a product as criminal property before commencing an investigation under POCA; and
- applying the exemption under section 329(2)(c) of POCA, that the payment of "adequate consideration" for goods that are criminal property would have the effect of "cleansing" the goods for any other person who subsequently acquired them in the supply chain. Under section 329(2)(c), a person does not commit a money laundering offence if a person acquired, used or had possession of criminal property for adequate consideration.

Dove J held at first instance in the High Court that the NCA had not misdirected itself in law in its decision not to investigate.

Money laundering under POCA

The principal money laundering offences under POCA, in broad terms, prohibit dealing with criminal property (which is property a person knows or suspects constitutes or represents a benefit from criminal conduct). The test for suspicion is low and requires only a possibility which is more than fanciful that a person has been engaged in or has benefited from criminal conduct.

A Defence Against Money Laundering (DAML) can be requested from the NCA where a person has a suspicion that property they intend to deal with is criminal property, and by dealing with the property they

risk committing a money laundering offence under POCA. A person does not commit a money laundering offence if a DAML is received from the NCA.

Court of Appeal decision

It was common ground between the parties that (i) serious human rights abuses are occurring in the XUAR cotton industry, and (ii) products derived from forced labour anywhere in the world can amount to criminal property for the purposes of POCA.

Prior to the appeal hearing, four key concessions were made by the NCA:

1. an investigation into proceeds of crime can start before criminal property is identified;
2. limited evidence of criminality is not a bar to the commencement of an investigation;
3. money laundering can be proven without proof of a specific offence carried out by a particular person, provided that the general type of crime is established (e.g. fraud) or the alleged criminal property was dealt with in a way which gives rise to an inference that it is the proceeds of crime; and
4. payment made in return for acquisition of property (even if satisfying the adequate consideration defence) is never a bar to an investigation under POCA.

Against the backdrop of these concessions, the Court of Appeal held that the NCA had erred in law in its decision not to investigate. WUC's appeal was therefore allowed and the Court of Appeal remitted the question of whether to carry out an investigation under POCA back to the NCA for reconsideration.

The most significant aspect of the decision is the Court of Appeal's narrow interpretation of the "adequate consideration" exemption under section 329 of POCA. Specifically, the Court of Appeal's decision suggests that payment of adequate consideration does not preclude that property from being "criminal property", rather it only serves as an exemption from liability for the purchaser while they possess the property. Critically, a purchase for market value in a supply chain does not "cleanse" the property of its criminal characteristic if passed to someone else who holds the requisite knowledge or suspicion of criminality, thereby exposing that person to the risk of committing money laundering offences under POCA. Moreover, the adequate consideration exemption only affords protection to an offence under section 329(1) of POCA and will not protect a person who, with the requisite knowledge or suspicion, deals with the property in a manner which constitutes an offence under one of the other principal money laundering offences (for example, by transferring the criminal property to another person under section 327(1)).

Key takeaways

This judgment could have a range of potentially significant consequences for businesses and the investigation of money laundering offences in the UK:

- The Court's decision to intervene in the decision making of a prosecutorial authority is itself a significant and unusual step. This case may incentivise other NGOs or activist organisations to lobby for investigations to be commenced and challenge decision making of public bodies on a

more regular basis. The case is also a good example of ESG objectives being pursued through the existing criminal law framework in the UK.

- The judgment confirms that money laundering offences and related investigations can extend to all imports into the UK. It remains to be seen whether the NCA decides to open an investigation, now the decision has been remitted back to it, but the judgment confirms the broad investigative scope the NCA, and other prosecutors including the Serious Fraud Office, have for money laundering offences in supply chains.
- The fact that the criminal nature of goods can pass downstream and that companies can no longer rely on a payment at market value (at any point in the supply chain) as a defence to any transfer or re-sale of those goods significantly increases the risk profile of global supply chains. This underscores the importance of effective due diligence procedures to understand activities of suppliers and the source of goods including their raw materials or parts. The money laundering risk will need to be assessed at each stage of a supply chain and companies will need to carefully consider the need to file a DAML request in order to deal with the goods.
- The number of Suspicious Activity Reports (SARs) and DAML requests are likely to increase above the already significant numbers (859,905 and 74,431 respectively, according to the UK Financial Intelligence Unit's SARs Annual Statistical Report 2022-2023.) The judgment is likely to further incentivise defensive and precautionary reporting, which will add to the existing burden and demand on resources placed on the NCA.

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