CLIENT BRIEFING

JULY 2024

MONEY LAUNDERING: NOW A NEVER-ENDING CHAIN?

R (WORLD UYGHUR CONGRESS) V NATIONAL CRIME AGENCY

The Court of Appeal in *R (World Uyghur Congress) v NCA* has found that the NCA's decision not to open a money laundering investigation into the trade of cotton in the UK from the Xinjiang Uyghur Autonomous Region of China (the "XUAR"), was unlawful.

Importantly, the judgment disagreed with a widely-held (including by Government) interpretation of the money laundering offences in the Proceeds of Crime Act 2002 ("POCA"). If the Court of Appeal's interpretation is correct, it means that trading in goods that are known or suspected to have been produced with forced labour, or any other criminality, (and products containing those goods) can be a money laundering criminal offence, even if fair value has been paid. The decision has implications for how businesses should manage risks of human rights abuses, environmental risks, and other wrongdoing in their supply chains, including whether to seek a Defence Against Money Laundering ("DAML") from the NCA.

Background

WUC's attempts to persuade NCA to investigate

The World Uyghur Congress (the "WUC") is an NGO that aims to promote the interests of the Uyghurs, an ethnically and culturally Turkic people living in the XUAR. In 2020 the WUC provided a substantial package of material to the UK National Crime Agency ("NCA") to demonstrate the widespread use of forced labour in the cotton industry in the XUAR, and the trade in this cotton in the UK. The WUC alleged that such cotton was 'criminal property' under POCA because it had been produced with forced labour, and sought to persuade the NCA to investigate businesses who were trading the cotton in the UK for potential money laundering offences.

The NCA decided not to investigate. It gave several reasons for this but the key reason for the purpose of this Court of Appeal decision was its analysis of the provisions of the money laundering offences in POCA.

The money laundering offences in POCA

In summary, there are three sections in POCA that contain the money laundering offences – sections 327, 328 and 329. In reverse order:

- section 329 makes it an offence to acquire, use, or possess criminal property;
- section 328 makes it an offence to facilitate the acquisition, retention, use or control of criminal property by or on behalf of another person; and
- section 327 makes it an offence to deal with criminal property in various ways, including concealing it, disguising it, converting it, transferring it, or removing it from the UK.

In order to be liable under any of these sections, a person must know or suspect that the property is a benefit of someone's crime (i.e. that it is "criminal property").

Section 329 (acquiring, using or possessing) contains an exception that if adequate consideration is given for the criminal property, then there is no offence. However, and importantly for this decision, there is no similar exception in sections 327 or 328. Therefore, the question arises, if a person buys criminal property for a fair value, they will not commit any offence under section 329, but can they nevertheless commit an offence under section 327 when they incorporate that property into a product, and sell it on to their customers? Can the employees of the business and its advisers who are arranging the purchase commit an offence under section 328, even though adequate consideration is paid?

The NCA's decision not to investigate

It has been a longstanding and widely-held view, including within Government, that the only sensible reading of POCA is that if adequate consideration is given for the criminal property, that means there can be no

concurrent or subsequent money laundering offences in relation to that property. It was thought that the giving of adequate consideration, in effect, 'cleanses' the property so that it is no longer "criminal property." For example, money laundering guidance issued to barristers by the Bar Council, the Bar Standards Board and Legal Sector Affinity Group,[1] which was last reviewed in January 2024 and was approved by HM Treasury,[2] reflects this understanding of POCA, stating *"[i]n cases where adequate consideration has been provided the funds in possession of the recipient are no longer the proceeds of crime – regardless of whether you know or suspect that they are the proceeds of crime or not."*

Apparently, this was also the understanding of the NCA. When the NCA wrote to the WUC explaining why it was not going to investigate, it explained that, if at any point in the supply chain, a fair value had been paid for the cotton, then the operation of the adequate consideration exception in POCA meant that the cotton was, in effect, 'cleansed' of its character as criminal property, such that onward dealing with it could not be a money laundering offence. The NCA said that, given the likelihood that, at some point in the supply chain for the XUAR cotton, adequate consideration would have been paid, the chances of there being any money laundering offence was low, which supported its decision not to investigate the matter.

The WUC brought a judicial review, challenging the NCA's decision not to investigate, which failed in the High Court in January 2023. The WUC appealed to the Court of Appeal.

The Court of Appeal's decision

In a judgment on 27 June 2024, the Court of Appeal unanimously agreed with the WUC's interpretation of the money laundering offences in POCA. In summary, the Court of Appeal found that the adequate consideration exception operates only in relation to the acquiring, using or possessing of criminal property (in section 329); it does not operate to 'cleanse' the property of its criminal character. Therefore:

- the payment of adequate consideration by one party somewhere in a supply chain does not 'break the chain'; and
- a purchaser of criminal property for adequate consideration can still commit a different money laundering offence (under section 327) if they deal in that property, for example by using it to manufacture another product, and/or selling it to someone else.

In light of its interpretation of POCA, the Court of Appeal found that the NCA had misdirected itself in law when deciding not to investigate. The Court of Appeal quashed the NCA's decision and ordered the NCA to re-consider whether it should investigate money laundering offences in relation to the trade in cotton from the XUAR.

This interpretation has some striking results in the real world. To give an example, imagine a criminal defence barrister who is acting for an alleged drug lord. Because of the allegations against their client, the barrister suspects that their client is paying for legal services using the proceeds of drug smuggling. When the barrister receives payment no money laundering offence under section 329 (acquisition, use and possession) is committed, because the legal services provided are adequate consideration for the money. However, each time the barrister spends a portion of that money, whether on a small transaction such as a morning coffee or a taxi fare, or a larger transaction such as the purchase of a car, the barrister risks committing a money laundering offence (converting / transferring under section 327). When the barrister later sells a car they bought with their earnings, they risk committing another money laundering offence. Further, if the barrister's bank knows that the barrister's earnings are from defending alleged criminals, then the bank also risks committing a money laundering offence when the barrister is paid (arranging acquisition and possession under section 328), which may have knock-on implications for the smoothness with which the barrister can bank.

In short, any business or person that becomes suspicious about the property they are acquiring or have acquired for fair value, now faces greater risk of committing an offence under POCA in any onward dealing with the property (e.g. selling, transferring, or moving it) – because it cannot rely on the adequate consideration exemption to cover these steps.

Implications for international supply chains

In the corporate context, businesses that trade in goods – particularly those with supply chains through places where there is a high risk of human rights abuses, such as agricultural or manufacturing supply chains involving low-

[1] Legal Sector Affinity Group publishes anti-money laundering guidance for the legal sector in the UK.

[2] Anti-money Laundering Guidance for the Legal Sector 2021: Part 2a Specific Guidance for Barristers and Advocates dated January 2024 - AML-Guidance-LSAG-Part-2a-January-2024-1.pdf (barcouncilethics.co.uk)

paid and unskilled labour – are exposed to criminal liability under POCA if they deal in those goods once they know that they are, or suspect that they may be, tainted by human rights abuses, even if they pay a fair value for those goods. Employees working for those businesses, or their advisers are also personally exposed to criminal liability if they are involved in the acquisition, possession or use of such goods by the business and have the necessary knowledge or suspicion.

Moreover, the threshold for suspicion is low, being a perception that it is "more than merely fanciful" that the property is tainted by criminality. Since money laundering offences attract a potential penalty of an unlimited fine and, for individuals, a prison sentence of up to 14 years, this development in the understanding of how these offences apply in the corporate context is likely to cause significant concern and affect how corporates behave in relation to their supply chains.

In response to the judgment, the WUC has said that the case will *"disrupt supply chains which are complicit in the ongoing genocide of Uyghur and other Turkic peoples in East Turkestan/Xinjiang, China" because "Companies must now clean up their supply chains or risk prosecution" and that it "will have massive consequences for high street retail giants trading and importing forced labour goods, confirming they are now exposed to legal risk. If a company knowingly or with suspicion imports goods which have been made in criminal circumstances – such as through forced Uyghur labour – they could be prosecuted under the Proceeds of Crime Act for trading criminal property."*

It remains to be seen whether the judgment will lead to an increase in money laundering investigations, but there is no doubt that it has significant implications for businesses in terms of how they manage the risk of human right abuses, environmental crimes and other criminality in their international supply chains, although perhaps not in the way that the WUC hopes.

- **First**, the judgment does not compel the NCA to investigate the trade in cotton from XUAR: there might be many other reasons why the NCA may still decline to investigate this matter, and other similar cases, that are legitimate reasons from a public law point of view. It could be a hollow victory for the WUC.

- **Second**, POCA provides a mechanism for the trade in goods that are tainted by criminality to continue: the option to seek a DAML from the NCA. If a DAML is granted before a potential money laundering offence occurs, then that is a complete defence. We expect that this judgment will lead to a significant increase in the number of DAML applications made to the NCA, which will put pressure on a system that is already reportedly struggling with volume.

- **Third**, the judgment, in fact, creates a perverse incentive to limit the scope of businesses' supply chain due diligence programmes. Because a person has to at least suspect that the property is a benefit from crime in order to commit a money laundering offence, finding out information that gives rise to such a suspicion creates an exposure to criminal liability for money laundering that would not exist if the business or individual remained ignorant. As such, this case creates a strong incentive on businesses not to look for issues in their supply chains. If businesses adjust their behaviour in this way then this would go against the current trend for businesses to take more active steps to monitor their supply chains for signs of human rights or environmental risks – which is driven in part by legislation outside the UK (e.g. the EU Supply Chain Due Diligence Directive). It may be that businesses are stuck in a Sophie's Choice between competing laws and expectations when it comes to managing risk in the supply chain. This illustrates why POCA is not the right statute, from a public policy point of view, to drive good corporate behaviour in relation to supply chain due diligence.

What should businesses do now?

In light of this judgment, businesses should reflect on the processes that they have in place to monitor their supply chains for wrongdoing and what steps are taken if concerns about wrongdoing in their supply chains comes to light.

For example, to mitigate potential money laundering risks, businesses will need to consider promptly whether to take delivery of goods that are suspected to be tainted by human rights abuses or other criminality, or to apply to the NCA for a DAML in respect of those goods. Processes should be in place to ensure such concerns are quickly escalated and appropriately considered.

Businesses should also review whether the contractual terms they have in place with their suppliers allow them to reject delivery of goods that may be tainted by criminality. However, businesses should also bear in mind that any discussions with suppliers about why goods are being rejected will need to be carefully managed, not least due to the risk of 'tipping off' or prejudicing an investigation by law enforcement, which can itself, in certain circumstances, amount to a criminal offence.

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