

# UK Court of Appeal Moves ESG Issues Closer to the Mainstream of UK Financial Crime Enforcement

4 July 2024

**Background.** In a brief judgment with potentially significant implications, the Court of Appeal has held that the UK National Crime Agency (“NCA”) applied a flawed analysis when deciding not to investigate alleged money laundering offences in relation to consignments of cotton products imported into the UK which originated from the Xinjiang Uyghur Autonomous Region of China (“XUAR”).<sup>1</sup> While the Court could not itself direct the NCA to carry out a money laundering investigation, it held that the reasons the NCA provided to the applicant (a non-governmental organisation) for deciding not to investigate were based on errors of law. The question as to whether to carry out an investigation was therefore remitted to the NCA for reconsideration.

**Commencing Money Laundering Investigations.** The Proceeds of Crime Act 2002 (“POCA”) sets out expansive money laundering offences in Part 7 (which essentially prohibit any dealing with criminal property resulting from a criminal offence) and civil recovery powers in Part 5 (permitting the recovery of assets in civil proceedings if they were obtained through unlawful conduct). The NCA’s first basis for its decision not to investigate possible offences under Part 7 or Part 5 of POCA was that specific criminal property or civilly recoverable property must be identified *before* an investigation can begin. Here, the applicant had not pointed to any specific consignment of goods that was the product of forced labour. The Court overturned the first instance decision and held that the NCA’s reasoning was wrong—often, the purpose of investigations is to uncover evidence of criminality. There is no need to establish criminal conduct or criminal property before a POCA investigation can begin.

**Relying on the ‘Adequate Consideration’ Defence.** The second basis for the NCA’s decision was that once a buyer of criminal property pays ‘adequate consideration’ for it, that provides a defence not only to the buyer under POCA s329(2)(c) but anyone else who subsequently purchases the goods, effectively ‘cleansing’ the property throughout the downstream value chain and leaving nothing to be investigated. The Court explained that anyone buying goods that he or she suspects are the proceeds of crime may rely on the adequate consideration defence in relation to the purchase. However,

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<sup>1</sup> *R (oao World Uyghur Congress) v National Crime Agency* [2024] EWCA Civ 715.

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the goods remain tainted and the buyer may still commit other money laundering offences when handling the property in question. Subsequent buyers may also commit money laundering offences by dealing with the property, depending on their knowledge or suspicion of its criminal origins.

**Key Takeaways.** The judgment raises some important issues given the novel bases of international criminality that arise in the broader ESG context:

- Traditionally, companies have focused on predicate offences such as bribery, fraud, tax evasion and sanctions violations as generating criminal funds that lead to the risk of money laundering by receiving or using such funds. This judgment illustrates that companies should assess their exposure to a wider range of criminal offences. For example, products or profits derived from modern slavery, other human rights abuses or environmental crimes can amount to criminal property or recoverable property under POCA. Here, the Court noted that it was not in dispute that products derived from forced labour could constitute criminal property or recoverable property.
- While it will likely be extremely difficult, if not impossible, for the NCA (let alone companies) to investigate conduct in XUAR, POCA's very broad jurisdictional scope means that offences committed anywhere in the world can produce criminal property. The required jurisdictional link to the UK is that an act constituting money laundering occurred in the UK, or a significant part of the underlying criminality occurred in the UK and it had harmful consequences in the UK.
- In turn, the extremely broad definition of criminal property means that the original property can change forms (including into money) and be split up or combined with 'clean' property while remaining criminal in nature. Properly reviewing each link in a complex international supply chain may be very challenging.
- Mitigating against the risk of receiving criminal property by conducting due diligence on counterparties and transactions is plainly advisable, but it is not a panacea.
- The direction of travel is to do more diligence rather than less, as exemplified by the EU's Corporate Sustainability Due Diligence Directive, which will require larger companies to conduct risk-based human rights and environmental due diligence regarding their own businesses, their subsidiaries' operations and their

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upstream and downstream business partners.<sup>2</sup> In general, that approach is certainly prudent and if an issue is identified, the risk of committing the offence of receiving or using criminal property can be countered by paying adequate consideration.

- However, that defence does not apply to the POCA ss 327 and 328 offences of transferring, converting or removing criminal property from the UK, or arranging the acquisition, use or control of criminal property. A buyer suspecting that they hold criminal property may then be left with assets that they are severely restricted in handling, unless they file a Suspicious Activity Report with the NCA seeking 'consent' to deal with the property.



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<sup>2</sup> See our client update: <https://www.debevoise.com/insights/publications/2024/06/european-union-finally-adopts-corporate-sustain>

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