

Emerging Insights

How to Seize a Billion

Exploring Mechanisms to Recover the Proceeds of Kleptocracy

Maria Nizzero



ACKNOWLEDGEMENTS

This paper was supported by the Serious and Organised Crime and Anti-Corruption Evidence research programme of the UK's Foreign, Commonwealth & Development Office and the University of Birmingham. The author would like to thank Helena Wood for her contributions to the research and endless support. Thanks are also due to Jeff Simser and Victoria Templeman for reviewing the paper. The author would also like to thank the stakeholders from civil society, practitioners, civil servants, and other experts in the global asset recovery community for engaging in this research and providing invaluable insight and feedback.

EXECUTIVE SUMMARY

The imposition of sanctions against the 'oligarchs' following Russia's invasion of Ukraine has triggered a policy conversation about the potential to move 'from freeze to seize': achieving permanent confiscation of assets that are currently temporarily frozen under sanctions. Acting against the oligarchs' assets represents a way for the UK government to reaffirm its intention to support Ukraine, but also to show that the UK is not a haven for the proceeds of patronage, bribery or corruption. However, the UK's asset recovery mechanisms have previously fallen short when dealing with the challenges related to seizing such proceeds, such as the alleged historical criminality and corruption at the root of the wealth, vast resources to hide assets and, if needed, to prove their licit origin, and the provenance of wealth in uncooperative jurisdictions. Meanwhile, the intention to move 'from freeze to seize' is high on the government's agenda and has been reflected in several parliamentary debates, and the Economic Crime Bill presented in September 2022. With such political interest, however, should come proposals that do not undermine the UK's status as a rule-of-law jurisdiction and a supporter of fundamental human rights.

This paper explores asset recovery mechanisms that could help respond to the immediate policy goal surrounding Russian-linked assets and contribute to strengthening the broader asset recovery framework in the UK for the longer term. It sets out the current challenges related to confiscation of proceeds of grand corruption and explores the limitations of UK civil recovery mechanisms when seeking to tackle such proceeds. Given these challenges, it identifies mechanisms that could overcome them, including a lower standard of proof, a reversed burden of proof, sanctions-based asset confiscation and anti-racketeering models of criminality by association. To assess their potential, the paper looks at their application in five jurisdictions – Canada, Australia, Switzerland, Ireland and Italy – weighing their potential and limitations in relation to the aforementioned challenges and their legal applicability in UK legislation.

With these factors and the broader findings of the research in mind, this paper concludes with a set of considerations for UK policymakers when

thinking about reforming the country's asset recovery mechanisms. While it does not intend to categorically push for one model to be adopted over others, as developing legislative mechanisms to facilitate the permanent confiscation of kleptocratic proceeds is a challenge that goes well beyond the UK, the paper suggests considering amendments to the current asset recovery mechanisms that take account of the social damage of and national security interests affected by criminals, kleptocrats in particular. This is a key gap in UK legislation, and these concepts need to both be included in asset recovery legislation and have full buy-in from government and law enforcement. Alongside this, some adjustments to existing legislation to include certain elements, such as a full reverse burden of proof, the involvement of expert witnesses and, most importantly, appropriate resourcing of law enforcement, will improve the odds of recovering proceeds of crime in the UK.

INTRODUCTION: ENABLING 'FREEZE TO SEIZE'

Russia's invasion of Ukraine in February 2022 has prompted an unprecedented surge in sanctions-based asset freezes directed at individuals linked to the Russian government. Among others, sanctions target so-called 'oligarchs'; ultra-wealthy elite individuals who became prominent in Russia following the collapse of the Soviet Union by amassing huge wealth in part via allegedly corrupt practices and who, to varying degrees, are believed to support the Russian government.¹ Some of these people have been embedded in UK society for a long time, introducing inflows of money into the country by purchasing assets, supporting political parties and movements, and gaining footholds in cultural, sporting and academic institutions.² Collectively, these actions have implications for UK national security.³

The rise of illicit finance to the rank of security threat presents a challenge to UK policymakers.⁴ Taking action against the oligarchs' assets represents a

1. Catherine Belton, *Putin's People: How the KGB Took Back Russia and Then Took on the West* (London: Harper Collins, 2020). The oligarchs' importance is recognised by the UK government. See Foreign, Commonwealth & Development Office (FCDO), 'UK Sanctions Russian Steel and Petrochemical Tycoons Funding Putin's War', press release, 2 November 2022.
2. While it is not possible to put a clear figure on how much money could be seized and confiscated from sanctioned oligarchs or kleptocrats, recoverable property has been estimated as at least £1 billion. See Jasper Jolly, 'Campaigners Query UK Government's Ability to Identify Oligarchs' Assets', *The Guardian*, 3 October 2022; FCDO, 'UK Hits Key Russian Oligarchs with Sanctions Worth up to £10 Billion', 14 April 2022.
3. See House of Commons Foreign Affairs Committee, 'The Cost of Complacency: Illicit Finance and the War in Ukraine', Second Report of Session 2022–23, HC 168, 30 June 2022.
4. See HM Government, *Global Britain in a Competitive Age: The Integrated Review of Security, Defence, Development and Foreign Policy*, CP 403 (London: The

way for the UK government both to reaffirm its intention to support Ukraine for the long haul and to show that ‘dirty Russian money cannot be hidden or laundered in the UK’.⁵ This means moving from ‘from freeze to seize’: achieving the permanent confiscation of oligarchs’ assets that are currently only frozen under sanctions. However, this is not a simple task.

First, although they do not entirely fit the ‘kleptocrat’ definition,⁶ the oligarchs share several traits with kleptocrats from elsewhere: historical alleged criminality and corruption at the root of their wealth; vast resources to hide their assets and, if needed, to prove their licit origin; and the provenance of wealth in uncooperative jurisdictions. These are challenges that the UK’s recovery mechanisms have yet to overcome: the UK’s asset recovery mechanisms do not have a history of successfully dealing with the proceeds of grand corruption and kleptocracy.⁷

Second, much of the debate to date⁸ has failed to develop proposals that respect due process and human rights protections, while also being capable of standing the test of time. While sanctions are an important

Stationery Office, 2021), p. 4; *Hansard*, House of Commons, ‘Economic Crime (Transparency and Enforcement) Bill’, Vol. 710, 7 March 2022.

5. Parliamentarians have expressed multiple times the intention of confiscating Russian sanctioned assets to help reconstructing Ukraine after the war. See, for instance, *Hansard*, House of Commons, remarks of Stephen Doughty MP in ‘Sanctions’, Vol. 719, 22 September 2022. Given the depth of the issue, this paper does not cover the subject of safe repatriation and sharing of forfeited assets within the international framework; David Maddox, “‘Nowhere to Hide’: Priti Patel to Seize ‘Dirty Money’ from Russian Oligarchs in UK”, *Express*, 26 February 2022.
6. According to Thomas Mayne: ‘Often oligarchs are seen as characteristic of Russia’s kleptocracy, but the Russia of the 1990s was not a kleptocracy, as the oligarchs represented a power base outside of the Kremlin, one that Putin had to dismantle by exiling or jailing those who opposed him. In a true kleptocracy, the oligarchs are the politicians themselves.’ See Thomas Mayne, ‘What is Kleptocracy and How Does it Work?’, 4 July 2022, *Chatham House Explainer*, <<https://www.chathamhouse.org/2022/07/what-kleptocracy-and-how-does-it-work>>, accessed 20 September 2022. See Appendix for a definition of ‘kleptocracy’.
7. Spotlight on Corruption, ‘From Hajiyevea to Aliyev: Where Next for Unexplained Wealth Orders?’, <<https://www.spotlightcorruption.org/from-hajiyeva-to-aliyev-where-next-for-unexplained-wealth-orders/>>, accessed 16 September 2022; Anton Moiseienko, ‘Unexplained Wealth Orders in the UK: What will This Year Bring?’, *RUSI Commentary*, 11 February 2021. While the two issues are different (see definitions in the Appendix), research for this paper found that the investigation of grand corruption and kleptocracy share similar challenges.
8. See Lily Waddell, ‘Michael Gove Supports Seizing Russian Oligarch Mansions to House Ukrainian Refugees’, *Evening Standard*, 13 March 2022; *Hansard*, House of Commons, ‘Economic Crime (Transparency and Enforcement) Bill’, Vol. 710; *Hansard*, House of Commons, ‘Economic Crime and Corporate Transparency Bill’, Vol. 720, 13 October 2022.

tool in the fight against corruption, they are a political tool that can only be used in compliance with the law. Allowing permanent confiscation on the basis of a sanctions designation could infringe human rights protected by the European Convention on Human Rights (ECHR),⁹ to which the UK is signatory. If the expectation is of a longer-term criminal justice outcome to the sanctioning activity, different mechanisms that require separate judicial proceedings are needed.

This paper seeks to identify such mechanisms, which would respond to the immediate policy goal of seizing sanctioned frozen assets, while upholding due process, human rights protections, and the rule of law. It also aims to offer pointers towards strengthening the broader asset recovery framework in the UK for the longer term, particularly as it relates to corruption proceeds. First, the paper sets out the current challenges related to confiscation of the proceeds of grand corruption. Second, it explores UK asset recovery mechanisms and their limitations when seeking to tackle such proceeds. Third, the paper analyses international asset recovery frameworks in five jurisdictions, assessing their potential and limitations in relation to the aforementioned challenges and their applicability in UK legislation. A series of recommendations to amend the broader UK asset recovery framework are then formulated, as relating to the proceeds of grand corruption.

The paper concludes that, by and large, developing legislative mechanisms to achieve the permanent confiscation of kleptocratic proceeds has been a challenge not only for the UK, but for other countries as well. However, as the paper will demonstrate, other jurisdictions' existing asset recovery mechanisms provide some useful lessons at the legislative level that, coupled with appropriate resourcing and expertise, could lead to a refined whole-of-system approach to the recovery of proceeds of kleptocracy in the UK.

METHODOLOGY

The rationale for this paper stems from the political interest in swiftly confiscating the assets of Russian oligarchs because of their alleged links to President Vladimir Putin's regime and Russia's invasion of Ukraine. However, the challenges specific to this context also apply more generally to the broader problem of how the UK government can achieve permanent confiscation of proceeds of grand corruption and kleptocracy.¹⁰ This paper

-
9. Specifically, Article 1, Protocol 1 of the Convention, which protects the right to property and according to which any interference must be justified as a proportionate means of pursuing a legitimate aim in the public interest, and Article 6(1), the right to a fair trial – which clashes with sanctions provisions due to the lack of independent judicial oversight of the designation process.
 10. Because of this, this paper does not focus on asset recovery models that have been proposed at the EU and US levels in relation to the seizure of Russian oligarchs' assets because of their link to the Russian regime's actions in Ukraine. The EU has proposed rules on freezing and confiscating assets of oligarchs who violate restrictive measures, effectively focusing on sanctions evasion; the US

therefore seeks to answer the broader question: what mechanisms can enable the UK government to achieve permanent confiscation of kleptocratic proceeds, while ensuring that considerations for due process and human rights are duly respected?

The research for this paper was conducted between March and August 2022. The methodology has three elements: a literature review; semi-structured interviews; and an analysis of international asset recovery legislation.

The literature review was based on materials identified by searches on Google Scholar for international examples of asset recovery in relation to sanctions-based asset freezes and corruption proceeds. The review covered government, NGO and academic policy and legal materials in English, French and Italian published since 2017, including RUSI's published materials on sanctions and asset recovery. The review led to the publication of a series of *RUSI Commentaries* in April, June and October 2022, whose findings are reflected in this paper.¹¹

Fourteen semi-structured interviews were conducted remotely between June and August 2022 with asset recovery and sanctions experts from academia, civil society and legal practice. Time constraints largely contributed to challenges in securing interviews with experts, which has been one of the main limitations of this research. To overcome it, interviewees were selected on the basis of their professional expertise in the field and their prior active participation between March and June 2022 in discussions with policymakers surrounding the move from freeze to seize in relation to Russian sanctioned assets.

Finally, the paper draws on examinations of international asset recovery frameworks in Australia, Canada, Ireland, Italy and Switzerland. Case studies were selected based on the literature review and consultations with practitioners, who stressed the capability of some of these countries' mechanisms to overcome some of the challenges of dealing with the proceeds of kleptocracy. Given the difficulty of subjecting individuals whose

has so far moved to seize assets on grounds of money laundering, conspiracy, and bank fraud related to the upkeep of sanctioned frozen assets. See European Commission, 'Proposal for a Council Decision on Adding the Violation of Union Restrictive Measures to the Areas of Crime Laid Down in Article 83(1) of the Treaty on the Functioning of the European Union', COM (2022) 247 final, 2022/0176 (NLE), 25 May 2022; US Department of Justice, '\$300 Million Yacht of Sanctioned Russian Oligarch Suleiman Kerimov Seized by Fiji at Request of United States', 5 May 2022, <<https://www.justice.gov/opa/pr/300-million-yacht-sanctioned-russian-oligarch-suleiman-kerimov-seized-fiji-request-united>>, accessed 29 September 2022.

11. Maria Nizzero, 'From Freeze to Seize: Dealing with Oligarchs' Assets in the UK', *RUSI Commentary*, 13 April 2022; Tom Keatinge and Maria Nizzero, 'From Freeze to Seize: Creativity and Nuance is Needed', *RUSI Commentary*, 7 June 2022; Maria Nizzero, 'From Freeze to Seize: How the UK Can Break the Deadlock on Asset Recovery', *RUSI Commentary*, 10 October 2022.

wealth stems from their links to grand corruption to criminal confiscation, the paper focuses primarily on those jurisdictions that have successfully applied civil recovery mechanisms.

DEFINITIONS

Asset recovery is a process that includes mechanisms whose terminology varies from country to country. An appendix with useful definitions is included in this paper. These definitions fall within three main categories: asset recovery processes and mechanisms; grand corruption and kleptocracy; and standards of proof.

DEALING WITH THE PROCEEDS OF KLEPTOCRACY IN THE UK

While sanctions may be the driver for policy and legislative change, the distinction of approach with asset recovery should be made clear. Sanctions can provide an administrative asset ‘freeze’, which precludes anyone from dealing with any funds or economic resources that are owned, held or controlled by the person or entity targeted by the freeze. They are a political tool that is intended to be temporary, as they seek to change behaviours. Sanctions do not obviate the challenge that authorities will face if they want to move from an asset freeze to legal confiscation. This is for three main reasons: the standard of proof for a designation is lower than that needed for asset recovery mechanisms; the judiciary will tend to show significant deference to the legislature on such matters; and evidence for designation is often the result of an intelligence assessment, which cannot be submitted as evidence in court. Given these limitations, permanent confiscation through criminal or civil recovery requires a judicially overseen, human rights and rule of law-compliant process – which requires evidence linking the assets to criminality or unlawful conduct.

This section assesses the challenges faced by authorities wishing to apply asset recovery processes to proceeds of grand corruption and kleptocracy. It also looks at the UK current legislative framework for asset recovery, with a focus on civil mechanisms, and their potential and limitations in face of the aforementioned challenges.

CHALLENGES RELATING TO THE PROCEEDS OF KLEPTOCRACY

There are certain challenges that are shared by all cases of grand corruption and kleptocracy, regardless of whether they are linked to sanctions-based asset freezes. All those interviewed for this paper identified tracing the assets and procuring evidence of underlying criminality as the biggest obstacles. Several elements were outlined:

- Assets are often held via complex, multijurisdictional ownership structures that are difficult for even the most skilled investigators to unravel.

- The underlying criminality at the root of the wealth is historical, meaning the wealth has gone through several laundering processes and there is limited evidence of the crime ever happening.
- Any evidence of criminality that does exist is in an uncooperative or hostile jurisdiction, with national enforcement authorities unwilling to share evidence due to the individual's political connections.¹²
- Collection of evidence from other cooperative jurisdictions and coordination with them is limited as a result of cumbersome mutual legal assistance (MLA) processes,¹³ constraints relating to other countries' domestic legislation,¹⁴ and the appetite of the requestee to pursue the action.
- Kleptocrats' often ostensibly legitimate sources of wealth complicate attempts to prove the link between the crime and the assets.¹⁵

THE UK ASSET RECOVERY LEGISLATIVE FRAMEWORK

The Proceeds of Crime Act 2002 (POCA) sets out two primary pathways to recovery of assets in the UK: criminal and civil confiscation.¹⁶ While the former requires prosecutors to obtain a criminal conviction against the individual (in personam), the latter (known as 'in rem' proceedings) allows asset recovery without a conviction and at a lower standard of proof – on the balance of probabilities, rather than 'beyond a reasonable doubt'. Due to the challenges highlighted in the previous section all interviewees for this paper apart from one said that civil recovery, rather than criminal, was their preferred pathway when dealing with cases of grand corruption or kleptocracy.¹⁷

-
12. See Alexander Cooley, John Heathershaw and J C Sharman, 'The Rise of Kleptocracy: Laundering Cash, Whitewashing Reputations', *Journal of Democracy* (Vol. 29, No. 1, 2018), pp. 39–53; Jean-Pierre Brun et al., *Asset Recovery Handbook: A Guide for Practitioners*, 2nd edition (Washington, DC: StAR, 2020), pp. 190–91.
 13. For more information, see Home Office, 'Mutual Legal Assistance', last updated 26 September 2022, <<https://www.gov.uk/guidance/mutual-legal-assistance-mla-requests>>, accessed 23 November 2022.
 14. For instance, if jurisdictions where assets related to a similar case are held do not have a civil or equivalent asset recovery regime, coordination or parallel investigations will be more difficult.
 15. See John Heathershaw and Tom Mayne, 'Criminality Notwithstanding: The Use of Unexplained Wealth Orders in Anti-Corruption Cases', ACE Research Programme, March 2022.
 16. For definitions, see the Appendix.
 17. Although they recognised that civil recovery tools should be more often used to deal with these cases, non-UK based professionals from jurisdictions where there is no civil recovery suggested that the criminal route should not be discarded completely. They pointed, for example, to the French '*biens mal acquis*' case (see Tutu Alicante, 'To Catch a Kleptocrat: Lessons Learned from the Biens Mal Acquis Trials in France', National Endowment for Democracy, June 2019). This route is, however, a more demanding one for investigators, as,

The legal basis for the UK's civil confiscation regime can be found in Part 5 of POCA. Civil recovery proceedings¹⁸ may be undertaken in the High Court, where enforcement authorities must prove, on the balance of probabilities, that property represents the proceeds of 'unlawful conduct'.

Among the UK's civil recovery mechanisms, Unexplained Wealth Orders (UWOs) were introduced in the Criminal Finances Act 2017 to obviate the challenge of procuring evidence from uncooperative jurisdictions. They are an investigative tool to be used against 'politically exposed persons' (PEPs) or individuals suspected of being involved in 'serious criminality',¹⁹ where there are 'reasonable grounds for suspecting that the known sources of the respondent's income would have been insufficient for the purposes of enabling the respondent to obtain [a given] property'.²⁰ They require the subject to explain the origin of any assets that appear to be disproportionate to their legitimate income.

There are two common misconceptions surrounding UWOs. First, a UWO does not, in itself, grant law enforcement authorities any power to confiscate assets. A UWO compels the disclosure of information about how an individual could afford a specific property and only in case of non-compliance is the property presumed to be liable to civil recovery. Second, the burden of proof is not fully reversed onto the individual to prove the legitimate origins of their assets to avoid confiscation: 'an unconvincing response does not amount to non-compliance'.²¹

unlike in civil recovery, success requires investigators to prove a case 'beyond a reasonable doubt'.

18. This paper does not focus on the other UK civil recovery tool, Account Forfeiture Orders, as they target money held in bank accounts and not all assets.
19. According to the Financial Action Task Force (FATF), PEPs are 'individuals who are or have been entrusted with prominent public functions ... for example heads of state or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials'. The focus of recovery mechanisms on PEPs becomes problematic when dealing with wealthy elites, such as the oligarchs, who do not hold prominent public functions and thus fall out of scope of such mechanisms. See FATF, 'Glossary of FATF Recommendations', <<https://www.fatf-gafi.org/glossary/n-r/>>, accessed 9 December 2022. According to James Mather, 'In contrast to the provision relating to persons involved in serious crime, where the requirement is of reasonable grounds for suspecting such involvement, no express words qualify the requirement that the court be satisfied that the respondent is a PEP. So far as PEPs are concerned, it is likely to be a matter of public record whether a person occupies an office satisfying the definition. Whether persons are family members of, or in particular whether they are known associates of or connected with, a PEP may well be more susceptible to dispute'. See James Mather, 'Unexplained Wealth Orders: Practical and Legal Issues', Serle Court, 2018, p. 10, <https://www.serlecourt.co.uk/images/uploads/documents/James_Mather_UWOs.pdf>, accessed 23 November 2022.
20. POCA 2002, 362B (3).
21. Moiseienko, 'Unexplained Wealth Orders in the UK'.

All interviewees based in the UK agreed that civil recovery proceedings are complicated and costly to pursue. Even with the introduction of UWOs, it remains difficult to overcome the challenges mentioned in the previous section when applied to assets owned by alleged kleptocrats.²² Four cases involving UWOs have been brought by the National Crime Agency (NCA) since their inception, all of which have yet to result in successful confiscation from PEPs.²³ Despite some amendments to the UWO regime under the Economic Crime (Transparency and Enforcement) Act 2022,²⁴ all interviewees, with the exception of one civil society researcher, recognised that this tool had limited ability to overcome the challenges presented above.²⁵

INTERNATIONAL ASSET RECOVERY EXPERIENCES

This section assesses international recovery mechanisms and their application in Canada, Australia, Switzerland, Ireland and Italy, and their potential applicability in the UK. These countries were selected after the literature review and interviews highlighted how their mechanisms could potentially overcome some of the challenges of dealing with proceeds of kleptocracy, and limitations of the current UK asset recovery framework. These mechanisms are: pure sanctions-based asset confiscation; a reverse burden of proof; a lower standard of proof; and criminality-by-association models.

CANADA: SANCTIONS-BASED CONFISCATION

Following Russia's invasion of Ukraine in February 2022, international interest in achieving permanent confiscation of sanctioned assets led to several proposals. Driven by a sense of urgency of linking the confiscation to the alleged international crimes committed in Ukraine, some countries

-
22. See John Heathershaw et al., 'The UK's Kleptocracy Problem', Chatham House, December 2021, pp. 27–28.
 23. Citing two UWOs involving Zamira Hajiyeva and Nurali Aliyev, Spotlight on Corruption reports difficulties in disentangling legitimate and illegitimate wealth, problems with the quality of evidence around legitimacy of funds, and complex structures, as the main reasons for failure. See Spotlight on Corruption, 'From Hajiyeva to Aliyev'. For a comprehensive list of limitations of the UWO regime, see Heathershaw and Mayne, 'Criminality Notwithstanding'.
 24. See Ali Shalchi and Steve Browning, 'Economic Crime (Transparency and Enforcement) Act 2022', House of Commons Library, 23 March 2022; HM Government, 'Economic Crime (Transparency and Enforcement) Act 2022', <<https://www.legislation.gov.uk/ukpga/2022/10/contents/enacted>>, accessed 23 November 2022.
 25. Four interviewees also pointed out that, due to the difference between an oligarch and a kleptocrat, most oligarchs would not fall within the remit of UWOs, as they do not meet the requirements to be considered PEPs (see footnote 19). Author interview 1, 27 July 2022; author interview 3, 1 August 2022.

proposed using a sanctions designation as a starting point for permanent asset deprivation proceedings.²⁶

In Canada, measures were introduced in May 2022 to amend the country's sanctions regime, building on an earlier proposal aimed at allowing Canadian courts to confiscate the assets of foreign officials deemed responsible for causing forced displacement and other humanitarian needs.²⁷ At the request of the Minister of Foreign Affairs, a Superior court can now issue a confiscation order on assets of designated individuals and entities where there has been 'a grave breach of international peace and security, gross and systematic human rights violations in a foreign state, or acts of significant corruption involving a national of a foreign state'.²⁸ The amendments do not specify what evidentiary standard would apply.

APPLICABILITY TO THE UK

Three interviewees, all UK-based law practitioners, suggested that, in the UK, this proposal could be applicable, with some adjustments, to thematic sanctions regimes such as anti-corruption or human rights sanctions. One proposed that a designation under an anti-corruption sanctions regime could be a trigger for a reverse burden of proof by creating a presumption that the assets of a designated individual are proceeds of crime.²⁹ However, such a move would require more stringent standards for sanctions designations – something that all interviewees believed would undermine the efficacy of sanctions and their temporary measure status.

The Canadian model has not yet been put to the test in court. In Canada, as in the UK, sanctions designations are political decisions not subject to evidentiary review, and as such are liable to raise constitutional and due process concerns. The vagueness of the evidentiary standard also indicates that the enforcement of the amendments is still an open question. One interviewee, a legal professional based in Canada, pointed out that giving the Minister of Foreign Affairs, rather than a judge, the capacity to request a confiscation order of the provincial courts already represented a tension with the rule of law, due to the necessarily political element of such a decision. Additionally, any contested confiscation will likely involve a rule of law challenge: there is a common-law presumption against the retrospective

26. See, for example, The White House, 'Fact Sheet: President Biden's Comprehensive Proposal to Hold Russian Oligarchs and Elites Accountable', 28 April 2022.

27. See Parliament of Canada, 'Government Bill (House of Commons) C-19 (44-1): First Reading: Budget Implementation Act, 2022, No. 1'. For the earlier proposal, see Senate of Canada, 'Bill S-217: An Act Respecting the Repurposing of Certain Seized, Frozen or Sequestered Assets: First Reading', 24 November 2021.

28. Government of Canada, 'Budget Implementation Act 2022', No. 1, SC 2022, c. 10, Part 5, Division 31, 5.6, <https://laws-lois.justice.gc.ca/eng/annualstatutes/2022_10/FullText.html>, accessed 23 November 2023.

29. A similar model is applied in the Italian Anti-Mafia Code.

The majority of experts interviewed ... agreed that reversing the burden of proof ... would help in overcoming the difficulty of procuring evidence from an uncooperative jurisdiction

application of law in both Canada and the UK. Finally, all the legal practitioners interviewed for this paper³⁰ pointed out that this tool would be likely to have patchy application in the UK because of the UK's political closeness to countries that could fall within the definition of 'responsible for gross and systematic human rights violations'³¹ and have links to grand corruption.

(WESTERN) AUSTRALIA: ILLICIT ENRICHMENT

The majority of experts interviewed for this paper – 12 out of 14 – agreed that reversing the burden of proof so that the respondent must prove the lawful origin and use of a given asset would help in overcoming the difficulty of procuring evidence from an uncooperative jurisdiction. They also suggested that taking an approach that focuses on wealth that is disproportionate to explained income would help relieve the burden on enforcement authorities to prove the link between assets and unlawful activity. Along these lines, 'illicit enrichment' provisions introduce a rebuttable presumption that property is recoverable as crime proceeds unless the respondent can prove otherwise.

The first Australian territory to introduce unexplained wealth provisions was Western Australia, in its Criminal Property Confiscation Act 2000. The law is based on a principle of illicit enrichment,³² which allows for a civil order to be made against an individual who has acquired disproportionate wealth without the need to demonstrate that a criminal activity has taken place. Instead, the burden is on the individual to prove to the civil standard (in other words the balance of probabilities) that their wealth was not sourced through criminality. It should be noted that, although in theory the law does not require a predicate offence, when it comes to pursuing cases, the Australian Director of Public Prosecutions has attested that, in practice, some evidence that the subject of an order has been engaged in criminal activity must in fact be shown by the Australian courts – a complicated task if law enforcement lacks staff and expertise.³³

-
- 30. Legal practitioners represented a third of the individuals interviewed for this paper.
 - 31. Government of Canada, 'Budget Implementation Act 2022', No. 1, SC 2022, c. 10, Part 5, Division 31, 5.6.
 - 32. Illicit enrichment can be defined as: 'The enjoyment of an amount of wealth that is not justified through reference to lawful income.' See Andrew Dornbierer, *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth* (Basel: Basel Institute of Governance, 2021), pp. 20, 79. For the purposes of this paper, it is important to highlight that the UK's UWOs are a type of unexplained wealth regime that do not quite fit into the category of illicit enrichment laws, as they are not a standalone mechanism for the recovery of assets.
 - 33. Florence Keen, 'Unexplained Wealth Orders: Global Lessons for the UK Ahead of Implementation', *RUSI Occasional Papers* (September 2017). Similar findings were highlighted by a study by Transparency International UK. See Matthew Race, *Empowering the UK to Recover Corrupt Assets: Unexplained Wealth Orders and Other New Approaches to Illicit Enrichment and Asset Recovery* (London: Transparency International UK, amended 2016).

APPLICABILITY TO THE UK

The literature review highlighted criticism of illicit enrichment laws over human rights concerns surrounding presumption of innocence, the right to silence and privilege against self-incrimination, and principles of legality and against retrospectivity. While most legal challenges on these grounds have not been successful,³⁴ in 2017 the UK decided to adopt its UWO regime instead of introducing an illicit enrichment process, due to these concerns.³⁵ It should be noted, however, that the UK was also among the G7 countries that released a joint statement in 2019 urging Ukraine to reinstate criminal liability for illicit enrichment when the country moved to scrap it.³⁶ If there is an intention in the UK to adopt such a process, then it is important that practitioners are consulted to understand what protections could be built in to overcome the hesitancy over human rights concerns.

Questions also arise regarding enforcement. In Western Australia, the tool has been used rarely,³⁷ and mostly against individuals involved in serious organised crime or drug trafficking, not corruption cases. According to Florence Keen,³⁸ there are various explanations for low recovery rates: there are less controversial ways to recover assets; staff move between departments;³⁹ there is risk aversion regarding the financial costs and reputational damage law enforcement agencies would incur if unsuccessful; and courts can be unsympathetic towards reverse-burden mechanisms.

-
34. For instance, the European Court of Human Rights ruled that the offence is compatible with the presumption of innocence, so long as the primary responsibility for proving matters of criminal substance against the accused rests with the prosecution, and the presumptions are rebuttable. See Skirmantas Bikelis, 'Prosecution for Illicit Enrichment: The Lithuanian Perspective', *Journal of Money Laundering Control*, May 2017.
 35. As reported by Andrew Dornbierer, 'There is some confusion over the classification of the UK's UWO regime, and many publications and media articles often categorise the UK's UWO as the same type of recovery mechanism as unexplained wealth orders in other jurisdictions. Unlike the other "unexplained wealth" [orders] ... the UK's UWO is not a standalone mechanism for the recovery of assets. Instead, it is only an investigative mechanism that can be used to acquire evidence that can then be presented under a separate civil recovery proceeding that seeks to establish that certain property was unlawfully acquired and can be recovered by the state.' See Andrew Dornbierer, *Illicit Enrichment*, p. 79.
 36. See Matthew Stephenson, 'G7 Hypocrisy on Illicit Enrichment Crimes', Global Anticorruption Blog, 9 April 2019, <<https://globalanticorruptionblog.com/2019/04/09/g7-hypocrisy-on-illicit-enrichment-crimes/>>, accessed 23 November 2022.
 37. Marcus Smith and Russell G Smith, 'Procedural Impediments to Effective Unexplained Wealth Legislation in Australia', *Trends & Issues in Crime and Criminal Justice* (No. 523), December 2016.
 38. Keen, 'Unexplained Wealth Orders', p. 12.
 39. *Ibid.*, p. 15.

Similar issues have been highlighted in relation to UK law enforcement authorities, casting doubt on the applicability of this tool to the UK context.

SWITZERLAND: UNEXPLAINED OR DISPROPORTIONATE WEALTH

Switzerland's Foreign Illicit Assets Act (FIAA) is another unexplained wealth mechanism. It targets foreign PEPs and their close associates.⁴⁰ The process consists of two steps. First, the country's Federal Council may order an asset freeze in anticipation of initiating proceedings for the confiscation of assets if these

- a. have been made subject to a provisional seizure order within the framework of international legal assistance proceedings in criminal matters instigated at the request of the country of origin;
- b. the country of origin is unable to satisfy the requirements for mutual legal assistance owing to the total or substantial collapse, or the impairment, of its judicial system (failure of state structures);
- c. the safeguarding of Switzerland's interests requires the freezing of the assets.⁴¹

Second, legal action before the Federal Administrative Court for the confiscation of the frozen assets may be instructed if these are found to be of illicit origin. 'Illicit origin' is presumed if the following conditions are fulfilled:

- a. the wealth of the individual who has the power of disposal over the assets or who is the beneficial owner thereof increased inordinately, facilitated by the exercise of a public function by a foreign politically exposed person;
- b. the level of corruption in the country of origin or surrounding the foreign politically exposed person in question was notoriously high during his or her term of office.⁴²

If such a presumption is made, the affected person is able to reverse it only by demonstrating with overwhelming probability that the assets in question were acquired legitimately.

APPLICABILITY TO THE UK

Switzerland has demonstrated an increased willingness to freeze and seize assets over recent years. According to a study published in 2015 by the

40. UNODC, Open-Ended Intergovernmental Working Group on Asset Recovery, 'Foreign Illicit Assets Act (FIAA) of 18 December 2015', 25–26 August 2016, <<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1605154e.pdf>>, accessed 23 November 2022.

41. Fedlex, 'Federal Act of 18 December 2015 on the Freezing and the Restitution of Illicit Assets Held by Foreign Politically Exposed Persons (Foreign Illicit Assets Act, FIAA)', Article 4.2, <<https://www.fedlex.admin.ch/eli/cc/2011/38/en>>.

42. *Ibid.*, Article 15.

Independent Expert of the UN's Human Rights Council, the country has returned around US\$2 billion of illicit proceeds to their country of origin over the previous 20 years.⁴³ Some notable freezing cases include the freezing of assets of the former presidents of Egypt and Tunisia in 2011 and the former Ukrainian president in 2014.⁴⁴

The FIIA appears to be a promising tool with potential applicability in the UK as its freezing and seizing mechanisms do not require a clear link between a specific crime and the assets to be established, but rather draw a connection between disproportionate wealth and illicit origins. It is also an interesting model as it introduces the idea of permanently depriving of their assets persons connected to identified regimes, not because their assets are the proceeds of crime, but for the purpose of furthering the specific objective of safeguarding national interests. In light of this, one interviewee suggested amending the definition of 'unlawful conduct' in Section 241 of the UK POCA – which has already been amended to include 'gross human rights violations' – to include, for instance, 'property obtained through links to/patronage with a regime hostile to the UK'.

The FIIA has an important caveat, noted in the first b) subclause quoted above. The Swiss Federal Council can issue a freezing order for assets only if the country of origin cannot meet the requirements for MLA due to the 'total or substantial collapse, or the impairment', of its judicial system. Under the law, Switzerland also cannot freeze any assets of PEPs while they are still firmly in power. This has represented an obstacle to Swiss authorities' efforts to recover assets. For this reason, the Independent Expert of the UN Human Rights Council has recommended 'strengthening the Swiss legal framework for asset recovery by reversing the burden of proof to the extent permitted by international human rights standards. The Swiss authorities should be empowered to seize assets ... where there are well-founded reasons to believe that those assets derive from corruption or other criminal conduct'.⁴⁵ If this issue was effectively tackled, this mechanism would have a better application in the UK.

43. UNODC, Open-Ended Intergovernmental Working Group on Asset Recovery, 'Foreign Illicit Assets Act (FIAA) of 18 December 2015', p. 2.

44. UN Human Rights Council, 'Report of the Independent Expert on the Effects of Foreign Debt and Other Related Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social, and Cultural Rights, on his Visit to Switzerland', A/HRC/37/54/Add.3, 15 March 2018, pp. 11–12, <https://www.ohchr.org/en/documents/reports/report-independent-expert-effects-foreign-debt-and-other-related-international>, accessed 14 December 2022.

45. *Ibid.*, p. 13.

REPUBLIC OF IRELAND: LOWERING THE STANDARD OF PROOF

With underlying unlawful activity difficult to prove even on the civil standard, all interviewees coming from a law enforcement background⁴⁶ suggested lowering the standard of proof below the balance of probabilities, within the limits of due process. These interviewees suggested the Republic of Ireland's model as a successful example of asset recovery that could be replicated in the UK. Introduced through the Proceeds of Crime Act (POCA) and the Criminal Asset Bureau (CAB) Act of 1996, Ireland's asset recovery mechanisms create provisions that partly reverse the burden of proof and foresee that property may be forfeited if 'it appears to the court' that a person is 'in possession or control' of property that 'constitutes, directly or indirectly, proceeds of crime' or 'was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime'.⁴⁷

This legislation is based on 'belief evidence', a lower burden of proof than in the UK's civil confiscation tools. Ireland's CAB is responsible for producing evidence (which can be drawn from a range of sources, such as tax returns and benefits statements) that constitutes reasonable grounds for belief that property is, or is connected to, the proceeds of crime, and then the burden of proof switches to the respondent to prove that the property is not. If the threshold is met, the High Court can make an order under Section 2 of the POCA, a freezing mechanism that reverses the burden onto the individual to prove that the property is not the proceeds of criminal conduct and that lasts for 21 days, unless an application under Section 3 of the Act⁴⁸ is brought. This application can last up to seven years, during which the respondent can bring evidence contrary to the CAB's – after that, property is forfeited.⁴⁹ In practice, Irish courts require other evidence to corroborate belief evidence that property is proceeds of crime.⁵⁰

There have been several challenges to the legislation, including before the ECHR, which so far have been unsuccessful. Among the grounds for legal challenge have been the removal of criminal law safeguards such as the presumption of innocence and a higher standard of proof; and violations of the right to property.⁵¹

-
- 46. Law enforcement figures represented a third of the total of interviewees for this paper.
 - 47. 'Proceeds of Crime Act 1996 (Ireland)', Article 2 (ii), <<https://www.irishstatutebook.ie/eli/1996/act/30/enacted/en/html>>, accessed 23 November 2022.
 - 48. In a Section 3 application, a respondent can bring evidence to show that the property is not the proceeds of criminal conduct. See 'Proceeds of Crime Act 1996 (Ireland)', Section 3, <<https://www.irishstatutebook.ie/eli/1996/act/30/section/3/enacted/en/html>>, accessed 22 November 2022.
 - 49. *Ibid.*, Section 2, Section 3.
 - 50. Andrew Dornbierer, *Illicit Enrichment*.
 - 51. Colin King, 'The Difficulties of Belief Evidence and Anonymity in Practice: Challenges for Asset Recovery', in Colin King et al. (eds), *Palgrave Handbook of*

APPLICABILITY TO THE UK

It is difficult to assess whether the Irish model would be a successful option for dealing with kleptocratic proceeds, as there are few examples of it being used in similarly high-profile and complex cases, and it has primarily been used to target individuals suspected of serious and organised crime.⁵² Factors outside the legislation itself, notably the multidisciplinary structure of the CAB, are widely cited as important contributors to its success, as it has allowed for better information sharing and top-level expertise to be involved in civil recovery. Four interviewees pointed to two features of Ireland's model that they viewed as key to its success: an adequately resourced and cross-deputised Bureau, with access to comprehensive financial and tax information, career progression schemes and rotation among investigation teams; and a two-year tenure for judges presiding over public interest cases.⁵³

All interviewees bar two agreed that lowering the burden of proof below that currently used for UWOs was the best route to ensuring confiscation of the proceeds of crime. However, they also pointed out that belief evidence would potentially be challenged in UK courts, which could require more evidence than the Irish courts, thus incurring similar problems to those encountered for UWOs. The fact that this tool has been barely tested against kleptocrats also made interviewees with a legal background question its applicability in relation to individuals capable of challenging a Section 3 (or equivalent) application for several years, which could exhaust law enforcers' resources and litigation costs.

ITALY: CRIMINALITY BY ASSOCIATION

Italy has developed preventative seizure and confiscation measures that sit under the Anti-Mafia Code,⁵⁴ which was designed specifically to overcome the difficulties in securing criminal convictions for mafia members and associates. These measures, which are classified as administrative proceedings, target individuals who fall mainly into two categories: those

Criminal and Terrorism Financing Law (Cham: Palgrave Macmillan, 2018), p. 582.

52. Interestingly for this paper's purposes, Florence Keen reports that the CAB 'cite[s] two foreign international corruption cases that commenced in 2014 and [were] brought to full Section 3(1) hearing during 2015 as the reason for the decrease [in assets recovered between 2014 and 2015]'. See Keen, 'Unexplained Wealth Orders', p. 9.
53. See also Booz Allen Hamilton, 'Comparative Evaluation of Unexplained Wealth Orders', Report Prepared for the US Department of Justice, Order No. 2010F-10078, 31 October 2011, pp. 1–4.
54. Altalex, 'Codice delle leggi antimafia e delle misure di prevenzione e nuove norme in materia di documentazione antimafia 2022' ['Code of Anti-Mafia Laws and Prevention Measures, as well as New Provisions on Anti-Mafia Documentation 2022'], <<https://www.altalex.com/documents/codici-altalex/2014/07/24/codice-antimafia-edizione-giugno-2014>>, accessed 22 November 2022.

whose past conduct gives rise to the suspicion that they have committed a serious crime and may commit more in the future; and those suspected of being in the process of committing a crime. Article 4 of the Code specifies the types of criminal conduct in scope.⁵⁵

Preventative confiscation is based on the establishment of the asset's owner as a 'danger to society', determined by their involvement in criminal activity or unlawful association with an organised crime group. According to legal practitioners, it 'is neither quite in rem nor in personam; identification of an individual as a target may be considered a means to identify assets that are deemed to be dangerous, and therefore appropriate for confiscation. They do not have to be linked to specific criminal conduct'.⁵⁶

The proceedings occur in two steps: a temporary order freezing the property is issued; then a confiscation order is issued, through which the assets are forfeited. It is up to the competent authority to prove that the targeted individual comes under one of Article 4's categories and that they directly or indirectly control property that is suspicious, either because it is disproportionate to their declared income, or because it is known to be of illicit origin. There is not full clarity on the issue of standard of proof: while there is no reference in the law itself to the application of a civil standard of proof, case law indicates a standard below that of 'beyond a reasonable doubt'. Once the requirements above are satisfied, the burden shifts to the defendant to show that the assets in question were lawfully obtained.

While originally targeting mafia members, the code has been expanded to include individuals sanctioned under counterterrorism powers. Article 16 s.1(b) of the code also extends the list to include those who appear on the United Nations Security Council Consolidated List and those designated by any other competent international institution, where there is a well-founded reason to believe funds may be being dispersed, concealed, or used to finance terrorist organisations or activities.⁵⁷ The Italian example highlights that confiscation can flow from international-level designations, for which reasonable grounds to suspect an international crime need to be proven before the burden of proof can be reversed back to the defendant. There does not have to be a direct causal link between the reason for the

55. Article 4 specifies a wide range of characteristics and practices that would make an individual subject to recovery measures, including some that might be viewed as typical of mafia organisations, including membership of a mafia association, aiding and abetting, embezzlement, illicit waste trafficking, kidnapping and extortion, but also including crimes linked to membership of a terrorist or subversive organisation, such as 'insurrection against the state'. 'Codice delle leggi antimafia e delle misure di prevenzione e nuove norme in materia di documentazione antimafia 2022', ['Code of Anti-Mafia Laws and Prevention Measures, as well as New Provisions on Anti-Mafia Documentation 2022'] Article 4.

56. Goldsmith Chambers, 'Finance for Restorative Justice Opinion', 17 November 2020, p. 49.

57. *Ibid.*, p. 46.

designation and the assets targeted for confiscation. However, conversations with Italian law enforcement officials show that this tool has rarely, if ever, been used for these purposes.

The Italian model has repeatedly survived challenges before domestic and supranational courts, including the ECHR, which ruled that both the seizure and confiscation aspects of this system were proportionate to its aim. However, the Italian provisions lack clarity on the conditions required to establish an individual as ‘dangerous’ for the purposes of the code. In relation to this issue, speaking to the *Financial Times*, an Italian prosecutor argued: ‘If you want to apply something similar to the oligarchs, the social danger must be based on a link with the regime that ordered the war’.⁵⁸

APPLICABILITY TO THE UK

When asked about the potential usefulness of anti-racketeering laws, of which Italy’s Anti-Mafia Code is an example, to UK attempts to ‘freeze and seize’, the experts interviewed presented mixed views, both in relation to their application to kleptocratic proceeds, and their application in the UK specifically. Two legal practitioners and academics based in Italy and the US suggested making greater use of organised crime laws to recover kleptocratic proceeds, on the grounds of the similarities between grand corruption and racketeering.⁵⁹

According to one interviewee, a key advantage of the Italian Anti-Mafia Code and other anti-racketeering laws is that they allow

consolidation of a variety of offences in one case, so [it] can be more efficient and streamlined as a process and ... [the law] really comes into its own when targeting the networks of grand corruption, because it focuses on the individuals and associations of the enterprise, rather than particular transactions or events in isolation. This makes it easier to include the elites who generally otherwise escape accountability because they get intermediaries to do the dirty work.⁶⁰

58. Sam Fleming, James Shotter and Amy Kazmin, ‘EU Debates Tapping Sanctions-Hit Russian Assets to Pay for Rebuilding Ukraine’, *Financial Times*, 27 April 2022.

59. See Appendix for definitions of ‘grand corruption’, ‘kleptocracy’ and ‘organised crime group’, and their similarities.

60. Author interview 14, 23 August 2022. There are several racketeering laws that focus on such criminality by association. For example, Section 2 of the South African Prevention of Organised Crime Act makes it an offence to be associated with an enterprise that is engaged in a pattern of racketeering activity, which is defined in the Act as the ‘planned, ongoing, repeated or continuous participation’ in any of the over 30 crimes listed in the law’s first schedule. To establish such a pattern, one needs to show that at least two offences were committed within a 10-year period, and that they were related. The scope is quite broad: it not only covers receiving/using property derived from racketeering activity, but also participating in the enterprise’s affairs. There can be an indirect or direct relation to a pattern of racketeering activity or enterprise. Actual knowledge need not be established, as there

Anti-racketeering laws often enable law enforcement agencies to go after a criminal organisation as a whole rather than its members for single acts. The liability is thus extended beyond those who intentionally organise or direct the criminal activities to include secondary parties and accomplices who are not themselves principal offenders.⁶¹ There are also cases of anti-racketeering laws having been applied to governments.⁶²

A similar model in the UK would assume that individuals linked with listed kleptocratic regimes benefited from this association, thus presuming that some of their assets were the proceeds of crime. To be effective, the model would need to be based on reverse burden mechanisms linked to listings processes, and to clearly specify that the standard of proof applied was one of a balance of probabilities. However, designating a government as a kleptocracy would be difficult from a political standpoint.⁶³ There are also definitional challenges regarding what elements define a 'kleptocracy', and whether figures such as the oligarchs would fall within such category. Definitions would need to be very clear to be able to show an entire regime as a kleptocratic enterprise, as opposed to so designating specific individuals who benefited from association with that regime.

The groundbreaking element in the Italian model, however, which makes it different from the other models presented in this paper, is that it is focused not only on the unlawfulness of the activities perpetrated by the subjects of preventative measures, but also on the societal impact of their involvement in criminal activity, or unlawful association with an organised crime group. If this model was to be applied in the UK, it would be fundamental that this understanding was built into the underlying legislation.

is a reasonableness standard which the court applies, i.e., if a person 'ought reasonably to have known'. The court can accept a range of evidence about the alleged offences including hearsay, similar-fact evidence and previous convictions, as long as this would not render the trial unfair. See 'Prevention of Organised Crime Act 1998 (South Africa)', <https://www.gov.za/sites/default/files/gcis_document/201409/a121-98.pdf>, accessed 22 November 2022.

61. B Tarlow, 'RICO Forfeitures of Business: The Scope of Forfeiture Should Fit the Crime', *Trial* (Vol. 24, No. 9, September 1988).
62. For instance, the state of Illinois. See US Department of Justice, Organized Crime and Gang Section, 'A Manual for Federal Prosecutors', Criminal RICO 18 U.S.C. §§1961-1968, 6th Revised Edition, May 2016, p. 75, <<https://www.justice.gov/archives/usam/file/870856/download>>, accessed 30 August 2022.
63. An option could be defining the individuals as members of a 'grand corruption enterprise', thus detaching them from the regime itself – however, this would likely incur the same definitional challenges as 'kleptocracy'.

BEYOND LEGISLATION: WIDER ISSUES IN THE UK REGIME

This paper has analysed the limitations of the UK's legislative framework in tackling the problem of kleptocratic assets. However, a consistent theme encountered in the research for the paper has been that reforming asset recovery in the UK is not exclusively a matter of legislation, but requires further consideration of how existing laws are applied. The paper highlights four points for policymakers to take into account when considering reforming the UK's asset recovery frameworks.

1. **Resourcing:** All interviewees agreed that moving 'from freeze to seize' is not just about finding a single legislative solution, but also about having appropriately resourced law enforcement agencies that can do the work. UK-based interviewees from such agencies suggested that some cases could already be brought against oligarchs and other kleptocrats if investigators had enough time and resources to trace assets and provide the evidence needed to bring strong cases to court.⁶⁴
2. **Expertise:** Retaining skilled financial investigators, as well as prosecutors, judges and lawyers, will be crucial to the success rate of asset recovery cases. All interviewees recommended the establishment of specialist courts dealing only with such proceedings.⁶⁵ This paper also recommends including expert witnesses with expertise in specific jurisdictions to overcome the problem of procuring evidence from uncooperative jurisdictions.⁶⁶ Such witnesses could help, for example, to confirm the corrupt nature of a kleptocrat's government, understand foreign laws, and assess the veracity of evidence brought by the defendant.
3. **Coordination between sanctions and asset recovery powers:** Most interviewees (11 out of 14) advised against creating mechanisms that would link confiscation to geographical sanctions, because of the lower standard of proof associated with sanctions, and their political character. However, some suggested that better coordination between the sanctions and asset recovery regimes in the UK is necessary, as sanctions evolve towards being used more in relation to unlawful activity. As a first step, this paper recommends better coordination between the NCA, which issues the freezing orders,

UK-based interviewees ... suggested that some cases could already be brought against oligarchs ... if investigators had enough time and resources to trace assets

64. Author interviews 11 and 12, 11 August 2022. Several civil society organisations in the UK have called for boosting law enforcement agencies' resources to fight economic crime. See, for instance, Daniel Beizsley and Susan Hawley, 'Closing the UK's Economic Crime Enforcement Gap: Proposals for Boosting Resources for UK Law Enforcement to Fight Economic Crime', Spotlight on Corruption, January 2022.

65. See also Keen, 'Unexplained Wealth Orders', p. 15.

66. See Ministry of Justice, 'Civil Procedure Rules: Rules and Directions: Part 35: Experts and Assessors', <<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35>>, accessed 20 September 2022.

and the Office for Financial Sanctions Implementation (OFSI), which issues special licences, to prevent asset dissipation.⁶⁷

4. **International cooperation:** Kleptocracy cases are transnational in nature. This paper recommends ensuring that international cooperation and information sharing become a priority. This needs to include better guidance for the drafting of MLA requests; enhanced information sharing between origin and destination countries and among destination countries; the strengthening of international mechanisms such as the Camden Asset Recovery Inter-Agency Network;⁶⁸ and the sharing of best practice, for example, through workshops. International legislation and treaties should also reflect the multijurisdictional nature of these types of investigations. Alongside this, consideration should also be given to establishing recognised mechanisms for asset sharing and shared repatriation of assets.

CONCLUSION

Developing legislative mechanisms to facilitate the permanent confiscation of kleptocratic proceeds is a challenge that goes well beyond the UK. The two models that stand out from this paper's analysis of international asset recovery mechanisms are those of Italy and Switzerland. The common theme of these two models is the recognition of the social damage and national security interests affected by criminals, kleptocrats in particular. This is a key gap in UK legislation, and these concepts need to both be included in asset-recovery legislation and to have full buy-in from government and law enforcement.

Alongside this, some adjustments to existing legislation to include certain elements, such as a full reverse burden of proof, the involvement of expert witnesses and, most importantly, appropriate resourcing of law enforcement, will improve the odds of recovering proceeds of crime in the UK. This study is not a comprehensive analysis, and it does not intend to categorically push for one model over others. However, it suggests considering the following points for future reforms in the UK that should be part of the response.

-
67. Research from Spotlight on Corruption has highlighted that lack of coordination between the NCA and OFSI's licensing process could lead to asset dissipation. In one case surrounding the assets of a Russian sanctioned individual brought to court in October 2022, it was argued that NCA freezing orders were jeopardised by the ambiguous application of OFSI licences. See Spotlight on Corruption, 'UK Court Rules Frozen Funds Can be Used to Pay Sanctioned Russian Billionaire's Luxury Expenses', 18 July 2022; Alice Johnson, 'NCA Freezing Orders Jeopardised in Petr Aven Sanctions Probe', *Global Investigations Review*, 19 October 2022.
 68. Camden Asset Recovery Inter-Agency Network, 'Camden Asset Recovery Inter-Agency Network', <<https://www.carin.network/>>, accessed 23 November 2022.

The social damage and national security interests affected by ... kleptocrats ... is a key gap in UK legislation

RECOMMENDATIONS

Recommendation 1: The Italian example shows that it is possible (provided that requirements are set carefully) for members or affiliates of enterprises that represent a ‘social danger’ to be subject to actionable offences that allow for asset seizure. The Swiss case introduces permanent deprivation of assets in cases where this is deemed to accomplish a specific objective, such as safeguarding national interests. Given the security threat posed by oligarchs and kleptocrats, both categories of person could come under such definitions.

Policymakers should start looking at kleptocracy from an organised crime angle and, rather than linking kleptocrats’ assets to a specific activity, view them as proceeds of crime due to their association with a specific criminal network. Relatedly, they should explore the applicability of anti-racketeering provisions to kleptocracy.

This paper recommends wider cultural recognition of the societal and security impact of kleptocracy and building a recognition of this impact into legislation. Recognition should also be given to the difficulty for policymakers of making this connection: both the Swiss and Italian legislation came about at a specific point in time when public and political sentiment came together to make dramatic changes in response to a heightened domestic threat.⁶⁹ Nevertheless, in the UK the national security threat posed by illicit finance and kleptocracy and the urgency of moving from freeze to seize are also now recognised at the policy and legislative level.⁷⁰ As a result, this rhetoric could be operationalised in the legislation, by amending the definitions of ‘recoverable property’ in POCA 2002 and continuing to include illicit finance in national security strategies.

Recommendation 2: The Swiss case, while providing strong foundations, also makes the case for drafting requirements that need to be actionable even if the foreign official or their associates are still firmly in power. Looking at this example, policymakers should also seek to enhance information sharing with both origin countries and other destination countries to strengthen international asset recovery mechanisms.

Recommendation 3: Analysis of UK UWOs shows the limitations of unexplained wealth tools that operate as a compliance mechanism rather than as a standalone process. In line with Western Australia’s and Ireland’s cases, policymakers should consider the benefits of applying a full reverse burden of proof, provided it is accompanied by human rights and due process protections and appropriate resourcing.

Policymakers should start looking at kleptocracy from an organised crime angle

69. Goldsmith Chambers, ‘Finance for Restorative Justice Opinion’, p. 51.

70. See *Hansard*, House of Commons, ‘Sanctions’, Vol. 719; HM Government, *Global Britain in a Competitive Age*; House of Commons Foreign Affairs Committee, ‘The Cost of Complacency’.

Recommendation 4: Resources and specialisms need to be prioritised. This paper recommends including expert witnesses in specific jurisdictions to reduce the difficulties of procuring evidence.⁷¹

Recommendation 5: While this paper does not recommend creating mechanisms that would link confiscation to country-based sanctions, better coordination between the sanctions and asset recovery regimes in the UK is recommended. Consideration should also be given to the motivations behind sanctioned activity and kleptocratic behaviour. Geographic and thematic sanctions are often lumped in together, even though they serve different ultimate goals. The solution in terms of asset recovery, in the same way, needs to be distinct.⁷²

Recommendation 6: Once the enforcement issue is tackled, it is important to test the current mechanisms. Without testing these powers in court, there is no way of knowing if they are actually effective.

Confiscating the proceeds of grand corruption and kleptocracy, including those linked to Russian kleptocracy, is not going to be an easy task. More importantly, it will not be quick. Notwithstanding the sense of urgency aroused by Russia's war in Ukraine, sanctions cannot be used as a tool for permanent asset deprivation, as tools for permanently depriving individuals of their property must be subject to judicial oversight. Every line of future legislation will need to be carefully drafted to ensure that any changes to domestic legislation are compatible with established international treaties and political will; that there is no caveat that would allow the targets an easy escape; and that they all pass the tests of human rights protection and the rule of law.

ABOUT THE AUTHOR

Maria Nizzero is a Research Fellow at the Centre for Financial Crime and Security Studies at RUSI. Her research examines the UK economic crime landscape; asset recovery, with a focus on sanctioned frozen assets and proceeds of kleptocracy; and the foreign policy dimension of illicit finance. Prior to moving to London, Maria was an Associate Professor of EU Politics and Institutions at Pompeu Fabra University in Barcelona, where she is completing her PhD in International Public Law and International Relations.

71. See Ministry of Justice, 'Civil Procedure Rules: Rules and Directions: Part 35: Experts and Assessors'.

72. See Nizzero, 'From Freeze to Seize'.

APPENDIX: DEFINITIONS

Asset recovery	The process whereby the proceeds of crime are seized by authorities and returned to the victim (individual or country) from which they were originally stolen. In the UK, this process captures ‘all activities to investigate (search, trace and identify) illicit finance that enables the process for the timely and successful recovery (freezing and seizure) of assets’. ⁷³	
	Asset freeze	A temporary measure that precludes a person or business from dealing with any funds or economic resources that are owned, held or controlled by the person or entity targeted by the freeze.
	Asset seizure	‘[T]o prohibit the transfer, conversion, disposition or movement of property on the basis of an action initiated by a competent authority or a court under a freezing mechanism ... that allows the competent authority or court to take control of specified property. The seized property remains the property of the natural or legal person(s) that holds an interest in the specified property at the time of the seizure, although the competent authority or court will often take over possession, administration or management of the seized property.’ ⁷⁴
	Criminal confiscation	‘The confiscation of the proceeds of crime following a criminal conviction.’ ⁷⁵
	Civil recovery (also known as non-conviction-based asset forfeiture, civil forfeiture, civil confiscation)	A subset of asset recovery, civil recovery is the process of recovering the proceeds of crime, in the absence of a criminal conviction for the predicate crime, via civil proceedings. These proceedings are taken against the asset (in rem) rather than the person (in personam).
Asset confiscation (also known as asset forfeiture)	‘[T]he permanent deprivation of assets by order of a court or other competent authority’. ⁷⁶ This can follow a criminal conviction by a court or be non-conviction based, or administrative. Confiscation can happen in two ways: property-based confiscation, which requires the identification of a particular asset; or value-based, which is based on the monetary value of assets.	

73. Home Office, ‘Asset Recovery Action Plan’, updated 13 September 2019, <<https://www.gov.uk/government/publications/asset-recovery-action-plan/asset-recovery-action-plan>>, accessed 22 November 2022.

74. FATF, ‘Seize’, in ‘Glossary of the FATF Recommendations’, <<https://www.fatf-gafi.org/glossary/s-t/>>, accessed 2 September 2022.

75. Home Office, ‘Asset Recovery Action Plan’.

76. FATF, ‘Glossary of FATF Recommendations’, <<https://www.fatf-gafi.org/glossary/a-c/>>, accessed 2 September 2022.

Grand corruption	'[T]he abuse of high-level power that benefits the few at the expense of the many. It typically has three main features: a systematic or well-organised plan of action involving high-level public officials that causes serious harm, such as gross human rights violations'. ⁷⁷	
Kleptocracy	'[A] government controlled by officials who use political power to appropriate the wealth of their nation'. ⁷⁸	
Organised crime group	(1) a group of three or more people; (2) acting together to commit a crime (3) for the purpose of obtaining a benefit. ⁷⁹	
Standards of proof	Reasonable grounds to suspect	There is enough information for an average person, exercising normal and honest judgement, to decide to report the occurrence of a crime.
	Probable cause	Reasonable grounds to believe that a particular person has committed a crime, especially to justify making a search or preferring a charge.
	Balance of probabilities	A court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not.
	Beyond a reasonable doubt	The prosecution must convince the jury or judge that there is no other reasonable explanation that can come from the evidence presented at trial. In other words, the jury must be virtually certain of the defendant's guilt to render a guilty verdict. This is the legal standard of proof required to affirm a conviction in a criminal case.

77. Transparency International, 'Grand Corruption', <<https://www.transparency.org/en/our-priorities/grand-corruption>>, accessed 30 August 2022.

78. The White House, 'United States Strategy on Countering Corruption', December 2021, p. 6, <<https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>>, accessed 22 November 2022.

79. UNODC, 'Transnational Organized Crime: The Globalized Illegal Economy', <<https://www.unodc.org/toc/en/crimes/organized-crime.html#:~:text=Transnational%20organized%20crime%20encompasses%20virtually,than%20one%20country%20is%20involved>>, accessed 20 October 2022.

About RUSI

The Royal United Services Institute (RUSI) is the world's oldest and the UK's leading defence and security think tank. Its mission is to inform, influence and enhance public debate on a safer and more stable world. RUSI is a research-led institute, producing independent, practical and innovative analysis to address today's complex challenges.

Since its foundation in 1831, RUSI has relied on its members to support its activities. Together with revenue from research, publications and conferences, RUSI has sustained its political independence for 191 years.

The views expressed in this publication are those of the author(s), and do not necessarily reflect the views of RUSI or any other institution.

Published in 2022 by the Royal United Services Institute for Defence and Security Studies. RUSI is a registered charity (No. 210639).



This work is licensed under a Creative Commons Attribution – Non-Commercial – No-Derivatives 4.0 International Licence. For more information, see <<http://creativecommons.org/licenses/by-nc-nd/4.0/>>.

Royal United Services Institute
for Defence and Security Studies
Whitehall
London SW1A 2ET
United Kingdom
+44 (0)20 7747 2600
www.rusi.org

RUSI is a registered charity (No. 210639)