

# Exploring Mechanisms to Recover the Proceeds of Kleptocracy<sup>1</sup>

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## 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. In addition, while the intention to move ‘from freeze to seize’ is high on the government’s agenda, it is important that any future solutions do not undermine the UK’s status as a rule-of-law jurisdiction and supporter of fundamental human rights.

This briefing note summarises research that explores alternative asset recovery mechanisms that could help respond to the immediate policy goal surrounding Russian-linked sanctioned assets, and also contribute to strengthening the broader asset recovery framework in the UK for the longer term. It uses the example of kleptocratic assets to set out the current limitations of UK civil recovery mechanisms. Given these challenges, the research looks at examples of three alternative mechanisms: lowering the standard of proof, reversing the burden of proof, and ‘societal danger’ models, across four jurisdictions – Australia, Switzerland, Ireland and Italy – weighing their potential and legal applicability in UK legislation.

With these factors in mind, the research concludes with a set of considerations for UK policymakers, which apply equally to the global debate, 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, it suggests that amendments to the current asset recovery mechanisms to incorporate a social damage or national security basis for asset recovery may be a starting point for discussion. Incorporating such concepts into the UK’s asset recovery framework may ensure they have better reach. Alongside this, some adjustments to existing legislation to include certain elements, such as a full reverse burden of proof and, most importantly, appropriate resourcing of law enforcement, will place law enforcement on the front foot when recovering the proceeds of crime and corruption in the UK.

1 For the full research paper see Nizzero, M. (2023). *How to seize a Billion: Exploring Mechanisms to Recover the Proceeds of Kleptocracy*. SOC ACE Research Paper No. 16. University of Birmingham.

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## Background

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',<sup>3</sup> 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.<sup>4</sup> Following years of calls<sup>5</sup> to recognise the national and international security implications of these individuals' growing financial footholds in Western democracies, the invasion of Ukraine proved a tipping point in the recognition of the role of illicit finance as a national security priority and the need to do something about it.<sup>6</sup>

One of the key ways in which this is manifesting is in the so-called 'freeze to seize' debate: how to move from temporary sanctions-based asset freezes of Russian-linked assets towards more permanent asset deprivation via criminal justice confiscation mechanisms. However, operationalising this policy is proving difficult in practice, due to the need to balance policy aims with the UK's adherence, as a rule of law jurisdiction, to human rights standards and due process in its court proceedings.<sup>7</sup>

While some jurisdictions<sup>8</sup> are considering permanent confiscation on the basis of a sanctions designation, the use of sanctions – a political tool that is intended to be temporary and aims to change behaviours in the future – presents significant challenges. This is mainly due to the fact that the basis for a sanctions designation is a low evidential bar, far below even the civil standard of proof, and the case is often based on sensitive intelligence which cannot be submitted as evidence in court.

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- 3 According to Heathershaw et al., 'Oligarchs' tend to refer to a member of the country's business elite or a close family member, lacking formal power but sometimes with political influence'. See: Heathershaw, J. et al. (2021, December). *The UK's kleptocracy problem: How servicing post-Soviet elites weakens the rule of law*, p.6. Chatham House. <https://www.chathamhouse.org/sites/default/files/2023-01/2021-12-08-uk-kleptocracy-problem-heathershaw-mayne-et-al.pdf>
- 4 Belton, C. (2020). *Putin's People: How the KGB Took Back Russia and Then Took on the West*. Harper Collins). The oligarchs' importance is recognised by the UK government. See: Foreign, Commonwealth & Development Office (FCDO). (2022, November 2). *UK sanctions Russian steel and petrochemical tycoons funding Putin's war* [Press release]. <https://www.gov.uk/government/news/uk-sanctions-russian-steel-and-petrochemical-tycoons-funding-putins-war>
- 5 Johnson, B. (2021, December 9). PM remarks – Summit for Democracy: 9 December 2021. <https://www.gov.uk/government/speeches/pm-remarks-summit-for-democracy-9-december-2021> (accessed: 13 January 2023); European Commission. (2014, June 5). *The Brussels G7 Summit Declaration*; Home Office (2021, September). G7 Interior and Security Ministers' Meeting September 2021 (2021, updated December 24). *Annex 3: statement against corruption and kleptocracies (accessible version)* <https://www.gov.uk/government/publications/g7-interior-and-security-ministers-meeting-september-2021/annex-3-statement-against-corruption-and-kleptocracies-accessible-version>; Keatinge, T. (2020, July 28). *Get Serious: Illicit Finance is a UK National Security Threat*. RUSI Commentary. <https://rusi.org/explore-our-research/publications/commentary/get-serious-illicit-finance-uk-national-security-threat>; Keatinge, T. (2021, March 25). *Getting Serious? Illicit Finance Is Finally a UK Foreign Policy Issue*, RUSI Commentary. <https://rusi.org/explore-our-research/publications/commentary/getting-serious-illicit-finance-finally-uk-foreign-policy-issue>; Wood, H. (2021, April 14). *Keep the Home Fires Burning: Why the Integrated Review Matters for the UK's Domestic Response to Economic Crime*, RUSI Commentary. <https://www.rusi.org/explore-our-research/publications/commentary/keep-home-fires-burning-why-integrated-review-matters-uks-domestic-response-economic-crime>
- 6 House of Commons Foreign Affairs Committee. (2022, June 30). *The Cost of Complacency: Illicit Finance and the War in Ukraine* (Second Report of Session 2022–23, HC 168). <https://publications.parliament.uk/pa/cm5803/cmselect/cmfa/168/report.html>
- 7 Allowing permanent confiscation on the basis of a sanctions designation could infringe human rights protected by the European Convention on Human Rights (ECHR), to which the UK is signatory. Specifically, it risks infringing 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.
- 8 See: Parliament of Canada. (2022, April 28). *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. (2021, November 24). *Bill S-217: An Act Respecting the Repurposing of Certain Seized, Frozen or Sequestered Assets: First Reading*. See: Wintour, P. (2022, September 18). *West wavers on Ukraine proposals to seize Russian assets as reparations*. *The Guardian*. <https://www.theguardian.com/world/2022/sep/18/west-wavers-on-ukraine-proposals-to-seize-russian-assets-as-reparations>. See: Quinn, J. (2022, December 23). *U.S. to Fund Ukraine Reconstruction Using the Seized Assets of Russian Oligarchs*. *National Review*. <https://www.nationalreview.com/corner/u-s-to-fund-ukraine-reconstruction-using-the-seized-assets-of-russian-oligarchs/>. See: *Hansard* HC, Vol. 711 (2022, March 22). *Sanctions: Assets Seizure*.

Meanwhile, attempts to use existing asset confiscation frameworks in the context of UK-based assets linked to a range of kleptocratic regimes<sup>9</sup> have demonstrated the limitations of the country's existing legal frameworks to confiscate assets. Although the oligarchs do not entirely fit the 'kleptocrat' definition,<sup>10</sup> their financial footprint in the UK does share several traits with those of kleptocratic origin, whose assets have hitherto proved beyond the reach of the UK's asset confiscation mechanisms.<sup>11</sup> Such shared traits do not make it easy to link specific assets to unlawful conduct – an essential prerequisite for asset confiscation action under the UK's Proceeds of Crime Act (POCA), the country's main piece of legislation as relates to asset recovery.

This research seeks to contribute to the debate in this field by examining a range of established asset confiscation concepts – and their operationalisation in specific jurisdictions – which have their basis not in sanctions designations, but in evidentially-driven and judicially-overseen criminal justice processes. The key findings below reflect the results of a literature review, semi-structured expert interviews and analysis of

four country contexts, which all pointed at asset recovery mechanisms that could strengthen the broader asset recovery framework in the UK for the longer-term. These mechanisms are: reverse burden of proof, a lower standard of proof, or societal danger models.

## Key findings

Experience of UK civil confiscation tools to date suggests that they have limited ability to overcome the challenges in building an evidential case against assets believed to be the proceeds of corruption and kleptocracy. The limited literature in this field<sup>12</sup> also calls into question these tools' long-term ability to deal with illicit finance challenges in the UK given they are complicated and costly to pursue.<sup>13</sup>

The literature review<sup>14</sup> highlighted that there are certain challenges that are shared by all cases of grand corruption and kleptocracy, with tracing the assets and procuring evidence of underlying criminality identified as the biggest obstacles, even at the lower civil evidential standard. Several elements were outlined:

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- 9 To say, individuals 'empowered to gain from the system through their political connections and status and by a lack of institutional oversight and accountability.' Heathershaw, J. et al. (2021, December), p. 5. See Appendix for definition of 'kleptocracy'. For other references to kleptocracies and how they work, see: Bullough, O. (2018). *Moneyland: Why Thieves and Crooks Now Rule the World and How to Take it Back*, Profile Books; Burgis, T. (2020). *Kleptopia: How Dirty Money Is Conquering the World*, William Collins; Chayes, S. (2015). *Thieves of State: Why Corruption Threatens Global Security*, WW Norton & Company.
- 10 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: Mayne, T. (2022, July 4). *What is Kleptocracy and How Does it Work?* Chatham House. <https://www.chathamhouse.org/2022/07/what-kleptocracy-and-how-does-it-work>. See Appendix for a definition of 'kleptocracy'.
- 11 See: Heathershaw, J. et al. (2021, December); Brillaud, L. & Manzi, M. (2020). *Stop kleptocrats: the EU must not be a vault for the world's stolen assets*. Transparency International EU. [https://transparency.eu/wp-content/uploads/2021/01/Asset-Recovery\\_Policy\\_Report\\_2020.pdf](https://transparency.eu/wp-content/uploads/2021/01/Asset-Recovery_Policy_Report_2020.pdf) (accessed: 9 January 2023); Spotlight on Corruption (2020, April 17). From Hajiyeva 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); Moiseienko, A. (2021, February 11). *Unexplained Wealth Orders in the UK: What will This Year Bring?* RUSI Commentary. 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.
- 12 See, for instance, Heathershaw, J. et al. (2021, December), pp. 27-28; Spotlight on Corruption. (2020, April 17); Wood, H. (2022, January 27). *The Party's Over: Confiscating Proceeds of Crime and Corruption in the UK*, RUSI Commentary.
- 13 Aside from the literature review, this opinion is supported by the outcomes of the few UWO applications and the data on asset recovery in the UK provided by the Annual Statistical Bulletin. See: Home Office. (2021, September 9). *Asset recovery statistical bulletin: financial years ending 2016 to 2021*. <https://www.gov.uk/government/statistics/asset-recovery-statistical-bulletin-financial-years-ending-2016-to-2021/asset-recovery-statistical-bulletin-financial-years-ending-2016-to-2021> (accessed 9 January 2023).
- 14 See, for example, Cooley, A., Heathershaw, J. & Sharman, J.C. (2018). The Rise of Kleptocracy: Laundering Cash, Whitewashing Reputations. *Journal of Democracy*, 29(1); Stephenson, K., Gray, L. & Power, R. (2011). *Barriers to asset recovery: An analysis of the key barriers and recommendations for action*. World Bank Publications; Brun, J. et al. (2020). *Asset Recovery Handbook: A Guide for Practitioners*, 2<sup>nd</sup> edition (StAR), pp. 190–191; Dornbierer, A. (2021) *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*. Basel Institute of Governance.
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- Assets are often held via complex, multi-jurisdictional 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.<sup>15</sup>
  - Collection of evidence from other cooperative jurisdictions and coordination with them is limited as a result of cumbersome mutual legal assistance processes,<sup>16</sup> constraints relating to other countries' domestic legislation,<sup>17</sup> 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.<sup>18</sup>
- difficulty of procuring evidence and relieve the burden on enforcement authorities to prove the link between assets and unlawful activity – as proven in jurisdictions such as Switzerland or Western Australia;
- **a lower standard of proof:** lowering the standard of proof below the civil standard of balance of probabilities, within the limits of due process. This mechanism – included in Irish legislation – would relieve law enforcement of some evidentiary burden by reducing the amount, as well as broaden the typology, of evidence that needs to be brought forward for a recovery case, reducing the burden on law enforcement;<sup>19</sup>
  - **'societal danger' models:** focusing on the danger to society represented by the owner's assets due to their association with a group which represents a threat to national and/or international security, rather than creating a link between specific assets and criminality happening at a given place and time. These mechanisms – whose application can be seen in Swiss and Italian legislation – may provide a useful starting point to develop mechanisms that may overcome the evidential challenges inherent in these cases.

Three types of asset recovery mechanisms identified in the four country contexts reviewed by this research (Australia, Ireland, Italy and Switzerland) were found to go beyond the established norms of asset recovery and may provide alternative avenues to broaden the UK framework specifically to deal with the problem of sanctioned proceeds and more broadly with kleptocracy proceeds. These mechanisms are:

- **a reverse burden of proof and focus on unexplained or disproportionate wealth:** making the respondent prove the lawful origin and use of a given asset, so as to overcome the

While the research focused on the limitations of the UK's legislative mechanisms, a consistent theme encountered in the research was that reforming asset recovery in the UK is not exclusively a matter of legislation but requires further consideration of how existing laws are applied in practice, including through resourcing. Making such changes alongside the suggested legislative reframing requires significant political leadership and will to channel resources into tackling these issues, which has been lacking in the UK to date. As other SOC ACE research has

<sup>15</sup> See: Cooley, A., Heathershaw, J. & Sharman, J. C. (2018), pp. 39–53; Brun, J.P. et al. (2020).

<sup>16</sup> For more information, see Home Office. (2022, September 26). Mutual Legal Assistance. <https://www.gov.uk/guidance/mutual-legal-assistance-mla-requests> (accessed 23 November 2022).

<sup>17</sup> 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.

<sup>18</sup> See: Heathershaw, J. & Mayne, T. (2022, March). *Criminality Notwithstanding: The Use of Unexplained Wealth Orders in Anti-Corruption Cases*. ACE Research Programme.

<sup>19</sup> Research could not find any evidence in the literature that would support such opinion.

shown,<sup>20</sup> building on earlier research by Carmen Malena on ‘getting from political won’t to political will’,<sup>21</sup> political will is rarely a simple case of ‘political want’ or even ‘political need’ but also requires ‘political can’: the resources, capacity and capabilities needed, at a sufficient level, to deliver on political ambitions. Given the high number of individuals and organisations sanctioned in the UK under the current regime, and the levels of resourcing made available for supporting Ukraine’s military efforts, this is an important and urgent discussion to have.

## Implications

Notwithstanding the sense of urgency aroused by Russia’s war in Ukraine, this research comes from the standpoint that there are inherent limitations in using sanctions as the basis for permanent asset deprivation in a rule of law jurisdiction. However, this research aimed to offer useful starting points for a discussion on mechanisms that may help overcome some of these limitations through ways which maintain their basis within a criminal justice process. With these factors and the broader findings of the research in mind, this briefing note concludes with a set of considerations for policymakers when thinking about reforming the country’s asset recovery mechanisms:

### ***Observation 1: Societal danger and national security models may be a useful alternative basis for confiscation proceedings.***

The concept which stands out most clearly in this research as a useful starting point for discussion is the establishment of the basis for asset confiscation on ‘societal harm’ or ‘national interest’, as highlighted by the Italian and Swiss models respectively. By doing so, such a model may overcome the (often insurmountable) challenge of gathering evidence to link assets to

underlying criminality, challenges evident in the situation in hand.

Given the growing recognition of the national security threat posed by illicit finance located within the UK economy, including that of the oligarchs and kleptocrats, currently the focus of policy attention, the timing may be right to consider such a concept. 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.<sup>22</sup> Similarly, 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.<sup>23</sup>

### ***Observation 2: It may be time to consider full reverse burden, with protections.***

While other jurisdictions have moved forward with full reverse burden – with lesser and greater success – the UK has previously shied away from taking this concept to its ultimate conclusion. However, as analysis grows on the limitations of UK UWOs (some of which is set out above) when faced with sophisticated, high-level (and well-resourced) targets, so the arguments in favour of full reverse burden mechanisms grow. Given their limited success, it may be time to consider moving towards more comprehensive reverse burden in a limited set of circumstances. The research highlighted that there are numerous precedents of the use of reverse burden tools in Western Australia, Switzerland and Ireland where tools have been developed in line with human rights and due process protections. Indeed, within the Swiss model, combining the reverse burden concept with the above notion of ‘national interest’ may prove to be a powerful combination.

20 Idris, I. (2022, May). *Political will and combatting serious organised crime*, SOC ACE Evidence Review Paper No. 1.

21 Malena, C. (2009). Building political will for participatory governance: An introduction. In: Malena, C. (ed.) *From Political Won’t to Political Will: Building support for participatory governance*. Eurospan.

22 Goldsmith Chambers. (2020, November 17). *Finance for Restorative Justice - Opinion*. p. 51.

23 See: *Hansard* HC, Vol. 719, Sanctions; HM Government (2021, March 16) *Global Britain in a Competitive Age: The Integrated Review of Security, Defence, Development and Foreign Policy*, CP 403; House of Commons Foreign Affairs Committee. (2022, June 30). *The Cost of Complacency: Illicit Finance and the War in Ukraine* (Second Report of Session 2022–23, HC 168).

**Observation 3: Legislation will only get you so far. Resources, coordination and (importantly) political will need to be prioritised.**

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. In fact, some UK-based interviewees for this research suggested that a limited number of cases could already be brought against oligarchs and kleptocrats if investigators had enough time and resources to trace assets and provide the evidence needed to bring strong cases to court.<sup>24</sup>

Beyond this, it is clear that the limited success in tackling complex asset links to complex illicit finance in the UK requires considerable upskilling in the disciplines of financial investigation within law enforcement and increasing awareness at the judicial level of POCA mechanisms. Furthermore, beyond the UK’s boundaries, it is essential that measures to improve international cooperation in asset tracing and confiscation move forward at pace.<sup>25</sup>

In summary, confiscating the proceeds of grand corruption and kleptocracy is not going to be an easy task. More importantly, it will not be quick. Whatever the solution decided upon, 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 that legislation is backed by the political will to back it with resources. Any future response must be systemic, ensuring that no caveat would allow the targets an easy day in court. It must adhere to human rights protections and the rule of law whilst establishing an equality of arms between parties in the case.

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24 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, Beizsley, D. & Hawley, S. (2022, January). *Closing the UK’s Economic Crime Enforcement Gap: Proposals for Boosting Resources for UK Law Enforcement to Fight Economic Crime.* Spotlight on Corruption.

25 Enhancing cooperation was one of the main recommendations for improving cross-border tracing, seizure, and confiscation of criminal assets at the FATF-INTERPOL Roundtable Engagement (FIRE) event held in September 2022 in Singapore. See: FATF. (2022, September 13). FATF and INTERPOL intensify global asset recovery. <https://www.fatf-gafi.org/publications/methodsandtrends/documents/fatf-interpol-2022.html> (accessed 13 January 2023).

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The Serious Organised Crime & Anti-Corruption Evidence (SOC ACE) research programme aims to help 'unlock the black box of political will' for tackling serious organised crime, illicit finance and transnational corruption through research that informs politically feasible, technically sound interventions and strategies. Funded by the UK's Foreign, Commonwealth & Development Office (FCDO), SOC ACE is a new component in the Anti-Corruption Evidence (ACE) research programme, alongside Global Integrity ACE and SOAS ACE. SOC ACE is managed by the University of Birmingham, working in collaboration with a number of leading research organisations and through consultation and engagement with key stakeholders.

SOC ACE is funded by the UK Foreign, Commonwealth, & Development Office. The views expressed here do not necessarily reflect the UK Government's official policies.

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