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How to Seize a Billion

Exploring Mechanisms to Recover the
Proceeds of Kleptocracy

Maria Nizzero¹

1. Research Fellow, Royal United Services Institute
All correspondence to: marian@rusi.org

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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 and 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.

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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 both reaffirm its intention to support Ukraine, and to show that the UK is no longer 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 difficult nature of investigating alleged historical criminality and corruption at the root of the wealth, the vast resources available to those who manage to hide their assets and, if needed, to prove their licit origin, and the provenance of wealth in uncooperative jurisdictions. In addition, while 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, there are concerns that such political interest and pressure to act quickly should, however, come with 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 alternative asset recovery mechanisms that could help respond to the immediate policy goal surrounding Russian-linked sanctioned 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, the research looks at examples of three alternative mechanisms across four jurisdictions – Australia, Switzerland, Ireland and Italy – weighing their potential and limitations in relation to issues such as a lower standard of proof or reversed burden of proof, as well as reframing around ‘societal danger’, 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 recommendations 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, as developing legislative mechanisms to facilitate the permanent confiscation of kleptocratic proceeds is a challenge that goes well beyond the UK,¹ the paper suggests considering amendments to the current asset recovery mechanisms that take account of the social damage and national security interests affected by criminals, and 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 and, most importantly, appropriate resourcing of law enforcement, will improve the odds of recovering proceeds of crime in the UK.

¹ While the paper is focused on the UK as a case, the discussion is likely to resonate in other countries as well.

1. Introduction: enabling the ‘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.² Sanctions target, among others, so-called ‘oligarchs’³ (Heathershaw et al., 2021, p.6) – 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 (Belton, 2020).⁴ Some of these individuals have been embedded in Western society for decades, introducing inflows of money into EU, UK and North American economies by purchasing assets, supporting political parties and movements, and gaining footholds in cultural, sporting and academic institutions (Jolly, 2022).⁵ Following years of calls by the UK government (Johnson, 2021), the European Commission (2014) and others (Keatinge, 2020; Keatinge, 2021; Wood, 2021) to recognise the national and international security implications of these 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.⁶

However, due to years of inaction, this escalation of illicit finance – particularly that of Russian origin – to the rank of national security threat has presented a challenge to policymakers around the world, including the UK government (the jurisdiction of focus for this paper), particularly in terms of translating policy rhetoric into definitive outcomes.⁷

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

² Asset recovery is a process that includes mechanisms whose terminology varies from country to country. As such, an appendix with useful definitions is included in this paper to ensure that it is accessible to as wide a readership as possible. These definitions fall within three main categories: asset recovery processes and mechanisms; grand corruption and kleptocracy; and standards of proof.

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’.

⁴ See also 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 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 also: FCDO. (2022, April 14). *UK hits key Russian oligarchs with sanctions worth up to £10 billion* [Press release].

⁶ See: 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 See: HM Government. (2021, March 16). *Global Britain in a Competitive Age: The Integrated Review of Security, Defence, Development and Foreign Policy*, CP 403. The Stationery Office. p. 4; *Hansard HC*, Vol. 710 (2022, March 7). Economic Crime (Transparency and Enforcement) Bill.

mechanisms. Within this debate, the UK government has joined ranks with allies in the European Commission (2022a), Canada (Blanchfield, 2022), and The White House (2022)⁸ in signalling its policy intent to take more conclusive action against the oligarchs' assets as a way to both 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'.⁹ 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 – particularly individual property rights – and due process in its court proceedings.¹⁰

Indeed, such debate has so far failed to develop proposals that respect due process and human rights protections while also being capable of standing the test of time.¹¹ While some jurisdictions are considering permanent confiscation on the basis of a sanctions designation – a proposal that has backing from countries like Canada¹² and Ukraine¹³ and has been discussed in countries like the United States¹⁴ and the UK¹⁵ – using

⁸ See also: US Department of Justice. (2022, September 30). *Readout of Russian Elites, Proxies, and Oligarchs (REPO) Task Force Deputies Meeting*, [Press release].

⁹ Parliamentarians have expressed multiple times the intention of confiscating Russian sanctioned assets to help reconstructing Ukraine after the war. See, for instance, remarks by Stephen Doughty MP in: *Hansard HC*, Vol. 719 (2022, September 22). Sanctions; Maddox, D. (2022, February 26). 'Nowhere to Hide': Priti Patel to Seize 'Dirty Money' from Russian Oligarchs in UK. *Daily Express*. <https://www.express.co.uk/news/politics/1572518/russia-uk-money-oligarchs-priti-patel> 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, though these are clearly relevant to this discussion more broadly.

¹⁰ 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.

¹¹ See footnote 8.

¹² 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 impacts. 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'. The amendments do not specify what evidentiary standard would apply. This paper does not cover the Canadian proposal as it does not consider sanctions-based confiscation as a viable response. However, one interviewee for this paper, 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 application of law in both Canada and the UK. Given that, at the time of writing, the Canadian amendments had not been yet tested in court, this statement could not be supported by evidence. 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.

¹³ 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>

¹⁴ 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/>

¹⁵ See *Hansard HC*, Vol. 711 (2022, March 22). Sanctions: Assets Seizure.

sanctions, a political tool that is intended to be temporary and aims to change behaviours in the future, as a basis for permanent asset deprivation presents significant challenges. This is – in the main – 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. Given these limitations, using such a political mechanism as a basis for court-overseen permanent confiscation is a high risk route, which is likely to face considerable challenges in court on human rights and due process grounds.¹⁶

Meanwhile, the debate regarding the limitations of these existing asset confiscation frameworks to tackle complex, multi-jurisdictional illicit finance, in the UK and globally, is not a new one. Specifically in the UK, attempts to use existing asset confiscation frameworks in the context of UK-based assets linked to a range of kleptocratic regimes¹⁷ have demonstrated limitations of the country's existing legal frameworks – contained, in the main, within the Proceeds of Crime Act 2002 (POCA). Although the oligarchs do not entirely fit the 'kleptocrat' definition of individuals 'empowered to gain from the system through their political connections and status and by a lack of institutional oversight and accountability' (Heathershaw, et al. 2021, p. 5),¹⁸ 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. Challenges include dealing with assets of illicit origin, embedded in the UK over a period of decades, owned via complex ownership structures and intermingled with assets of licit (or 'clean') origin (Heathershaw et al, 2021; Brillaud & Manzi, 2020; Moiseienko, 2021).¹⁹ Such shared traits do not make it easy to link specific assets to unlawful conduct – an essential prerequisite for asset confiscation action under POCA.

This paper therefore 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. It does so by exploring how other jurisdictions have overcome the evidential burden relating to assets beyond the

¹⁶ This view is shared by the limited literature on the topic: see, for instance: Basel Institute on Governance. (2022, December 10). *Asset recovery developments since the start of the war in Ukraine*. <https://baselgovernance.org/news/asset-recovery-developments-start-war-ukraine>

¹⁷ 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.

¹⁸ 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'.

¹⁹ See also: 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). 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.

reach of more established asset recovery mechanisms.²⁰ By exploring such mechanisms, it may be possible to identify useful starting points for a new asset confiscation framework in the UK, which both achieves the policy aims of removing illicit wealth from the UK whilst protecting the country's adherence to human rights and due process norms. While the primary rationale for this paper stems from the political interest in swiftly confiscating Russian-linked assets held by individuals, as noted, 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.²¹

1.1. Structure

First, the paper sets out more explicitly the current limitations of the UK's asset recovery frameworks in tackling an analogous illicit finance concern in the UK, that of the proceeds of grand corruption and kleptocracy.²² Second, the paper analyses three existing alternative asset confiscation processes and their application in practice in other jurisdictions, before assessing their potential (and limitations) in relation to the fore-mentioned problem set and applicability in the UK context. The paper then concludes with a number of recommendations for potential starting points for revisions to the UK's asset confiscation frameworks as well as for the broader context – beyond legislative reform – in which the debate must be cited.

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.

²⁰ The establishment of asset recovery mechanisms as minimum level standards are mandated by the Financial Action Task Force (FATF). See: FATF. (2022, October). Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery. <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Bestpracticesonconfiscationrecommendations4and38andaframeworkforongoingworkonassetrecovery.html>

²¹ 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 these individuals' 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 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 (2022b, May 25). *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); US Department of Justice (2022, May 5). *\$300 Million Yacht of Sanctioned Russian Oligarch Suleiman Kerimov Seized by Fiji at Request of United States* [Press release]. <https://www.justice.gov/opa/pr/300-million-yacht-sanctioned-russian-oligarch-suleiman-kerimov-seized-fiji-request-united> (accessed 29 September 2022).

²² As noted above, such proceeds share common traits with the current assets under consideration, the ones of the oligarchs. Their limitations then equally apply to the challenge in hand.

1.2. Methodology

This paper seeks to answer the research question: what mechanisms can enable the UK government to achieve permanent confiscation of assets linked to illicit finance threats to the UK, 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 using a methodology with 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 own 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 (Nizzero, 2022a; Keatinge & Nizzero, 2022; Nizzero 2022b), with observations that are also reflected in this paper.

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. 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 sanctioned Russian assets.

Finally, the paper draws on examinations of international asset recovery frameworks in Australia, 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. The jurisdictions selected have innovative mechanisms which go beyond the basic standards set by the Financial Action Task Force (FATF) and respond to the evidential burden challenges of tackling assets of crimes which are hard to link to specific assets, such as organised crime, corruption and kleptocracy, from which lessons can be drawn. Given the difficulty of subjecting individuals whose wealth stems from their alleged links to grand corruption to criminal confiscation, the paper focuses primarily on those jurisdictions that have successfully applied civil recovery mechanisms.

Before moving on to the analysis, however, it is important to set out a few caveats regarding the research.

First, there is a very limited amount of existing literature on the topic of ensuring permanent confiscation of sanctioned-frozen assets, which was partly overcome by supplementing the literature review with interviews with practitioners in the field.

Second, time constraints due to the fast-paced nature of the debate on 'freeze to seize' made it challenging to secure interviews with in-demand experts, particularly as the research was mainly conducted over the summer period. Despite this, the author is confident that the interviews conducted for this paper have helped to provide critical

insights regarding the most salient points of argument in the debate. Each interviewee plays a significant role within their own country in terms of expert discussions with policymakers surrounding the move from 'freeze to seize' in relation to sanctioned Russian assets and their in-depth understanding of these debates.

Third, due to such fast-paced debate, everything included in this paper should be considered provisional. This paper is being published in what is still the middle, and most certainly not the end, of the debate on 'freeze to seize' – as policymakers in the UK and elsewhere move at pace to identify an asset recovery solution to the politically pressing issue of the oligarchs' assets. As there is high demand for policy advice, an important aim for this research is that it might be of use in guiding decision-making now but deliberately does not categorically push for one model due to the need for more evidence and to discuss the recommendations here with a wider group of experts. It does, however, provide an important starting point for these discussions as well as the basis from which future research could evolve.

Finally, as stated, the rationale for this paper stems from the political interest in confiscating the assets of the oligarchs following Russia's invasion of Ukraine. However, the context-specificity of such assets is without existing precedent. This means that not all lessons that can be gathered on the recovery of proceeds of other illicit financial concerns, such as kleptocracy and organised crime, can be directly applied to the current situation, and it is important to consider further the ways in which this context-specificity needs to be taken into account. This paper, in conclusion, seeks to offer evidence-based starting points for further discussion rather than purporting to provide rapid, yet untested, 'solutions' to a complex, politically and legally fraught problem, but we are confident that it offers an important and original contribution to the debate.

2. Asset confiscation of the proceeds of kleptocracy and corruption in the UK

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

The Proceeds of Crime Act 2002 (POCA) is the primary legislative vehicle for confiscation of the proceeds of crime in the UK. POCA sets out two primary pathways to recovery of assets in the UK: criminal and civil confiscation.²³ 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 in gaining criminal convictions against high value illicit finance targets, such as the oligarchs and kleptocrats considered above, the literature review for the paper led to a conclusion that the civil recovery route, rather than the criminal confiscation route, is the most viable option for dealing with these categories of assets, something corroborated by most interviewees.²⁴ On this basis, this paper focused primarily on amendments to the UK’s civil recovery regime as set out below.

²³ For definitions, see the Appendix.

²⁴ Data provided by the Annual Statistical Bulletin shows that Forfeiture Order Receipts for Civil Forfeiture Powers were higher for the financial year 2021 to 2022 in England than the Confiscation Order Receipts for Criminal Confiscation Powers. See: Home Office. (2022, September 8). *Asset recovery statistical bulletin: financial years ending 2017 to 2022*. <https://www.gov.uk/government/statistics/asset-recovery-statistical-bulletin-financial-years-ending-2017-to-2022/asset-recovery-statistical-bulletin-financial-years-ending-2017-to-2022#the-proceeds-of-crime-restrained-imposed-and-recovered-through-criminal-confiscation-powers-and-civil-powers> 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 ‘*biens mal acquis*’ cases in France. ‘Biens mal acquis’ (literally: ill-gotten gains) cases refer to anti-corruption legal proceedings against kleptocrats outside of their country, followed by the seizure of their assets within the country of the legal proceedings, if successful, and the return of the assets to the country from which they were originally stolen. In France, they became an important tool corrupt heads of state of the Françafrique. See: Alicante, T. (2019, June). *To Catch a Kleptocrat: Lessons Learned from the Biens Mal Acquis Trials in France*. National Endowment for Democracy. This route, which requires criminal proceedings, is, however, a more demanding one for investigators, as, unlike in civil recovery, success requires investigators to prove a case ‘beyond a reasonable doubt’.

2.1. The UK civil confiscation regime: limitations in tackling kleptocratic assets

The legal basis for the UK's civil confiscation regime can be found in Part 5 of POCA. Civil recovery proceedings²⁵ 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'.

Despite this already lower standard of proof, the literature review (for example: Cooley, Heathershaw & Sharman, 2018; Stephenson, Gray & Power, 2011; Brun et al, 2020; Dornbierer, 2021) highlighted that there are certain challenges that are shared by all cases of grand corruption and kleptocracy. This was something confirmed by the interviewees who identified tracing the assets and procuring evidence of underlying criminality as the biggest obstacles, even at the lower civil evidential standard. Several elements were outlined:

- 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.²⁶
- Collection of evidence from other cooperative jurisdictions and coordination with them is limited as a result of cumbersome mutual legal assistance (MLA) processes,²⁷ constraints relating to other countries' domestic legislation,²⁸ 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 (Heathershaw & Mayne, 2022).

In order to overcome some of the challenges stated above, the UK government introduced a new civil recovery investigative tool – the Unexplained Wealth Orders (UWO) – in the Criminal Finances Act 2017, to obviate the challenge of procuring evidence from uncooperative jurisdictions. UWOs are an investigative tool to be used against 'politically exposed persons' (PEPs) or individuals suspected of being involved in

²⁵ 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.

²⁶ See: Cooley, A., Heathershaw, J. and Sharman, J.C. (2018) The Rise of Kleptocracy. *Journal of Democracy*, 29(1), 2018), 39–53; Brun, J. et al. (2020). *Asset Recovery Handbook: A Guide for Practitioners*, 2nd edition. StAR.

²⁷ For more information, see: Home Office. (2022, September 26). Mutual Legal Assistance. <https://www.gov.uk/guidance/mutual-legal-assistance-mla-requests>

²⁸ 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.

‘serious criminality’,²⁹ 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’.³⁰ 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 asset and only in the 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: in short, ‘an unconvincing response does not amount to non-compliance’ (Moiseienko, 2021).

Experience of these 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 (for instance, Heathershaw et al, 2021; Spotlight on Corruption, 2020; Heathershaw & Mayne, 2022; Wood, 2022) calls into question their long-term ability to deal with illicit finance challenges in the UK and all interviewees based in the UK agreed that civil recovery proceedings are complicated and costly to pursue.³¹ For instance, 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 due to legal challenges.³² Despite some amendments to the UWO regime under the Economic Crime

²⁹ 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 (n.d.). *FATF Guidance: Politically Exposed Persons (Recommendations 12 and 22)*. [https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Peps-r12-r22.html#:~:text=FATF%20Guidance%3A%20Politically%20Exposed%20Persons%20\(Rec%2012%20and%2022\)&text=A%20politically%20exposed%20person%20\(PEP,such%20as%20corruption%20or%20bribery](https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Peps-r12-r22.html#:~:text=FATF%20Guidance%3A%20Politically%20Exposed%20Persons%20(Rec%2012%20and%2022)&text=A%20politically%20exposed%20person%20(PEP,such%20as%20corruption%20or%20bribery). (accessed 21 February 2023). 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 Mather, J. (2018). *Unexplained Wealth Orders: Practical and Legal Issues*. Serle Court, p. 10. https://www.serlecourt.co.uk/images/uploads/documents/James_Mather_UWOs.pdf (accessed 23 November 2022).

³⁰ Proceeds of Crime Act 2002 (POCA), 362B (3) (UK).

³¹ Aside from the literature review (see footnote 33), 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>

³² 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 (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/> For a comprehensive list of limitations of the UWO regime, see Heathershaw, J. & Mayne, T. (2022, March).

(Transparency and Enforcement) Act 2022,³³ all interviewees, with the exception of one civil society researcher,³⁴ recognised that this tool had limited ability to overcome the challenges of confiscating proceeds of grand corruption and kleptocracy presented above.³⁵

As this short synopsis shows, the current UK asset confiscation framework has had limited success in tackling other forms of illicit finance in the UK, namely the proceeds of corruption and kleptocracy, which have a more unambiguous basis in criminality than the assets of the oligarchs. If the intention is to move from ‘freeze to seize’ under a criminal justice-based (rather than sanctions-based) model, then it is clear that alternative mechanisms are required.

³³ See: Shalchi, A. & Browning, B. (2022, March 23). Economic Crime (Transparency and Enforcement) Act 2022. House of Commons Library; HM Government (2022). Economic Crime (Transparency and Enforcement) Act 2022, <https://www.legislation.gov.uk/ukpga/2022/10/contents/enacted>

³⁴ The researcher, a civil society member from France – a jurisdiction with no civil confiscation – argued that the amendments included in the Economic Crime (Transparency and Enforcement) Act could prove beneficial to asset recovery numbers in the UK, but that it was too early to tell given that no UWO application had been filed since the introduction of said amendments.

³⁵ See also: Heathershaw, J. & Mayne, T. (2022, March), p. 4. 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 18). Author interview 1, 27 July 2022; author interview 3, 1 August 2022.

3. Alternative asset recovery mechanisms: international application

This section sets out three specific types of asset recovery mechanisms identified in the four country contexts reviewed (Australia, Ireland, Italy and Switzerland) which 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 difficulty of procuring evidence and relieve the burden on enforcement authorities to prove the link between assets and unlawful activity;
- a lower standard of proof: lowering the standard of proof below the civil standard of balance of probabilities, within the limits of due process, so as to relieve law enforcement of some evidentiary burden;
- ‘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.

The section assesses the application of such mechanisms in specific jurisdictions, such as Australia, Switzerland, Ireland and Italy. These countries were selected after the literature review and interviews highlighted how their mechanisms go beyond the tools available in the UK and thus could serve as a means of overcoming the evidential challenges presented by the current situation and broader kleptocracy challenge.

3.1. Reverse burden mechanisms

Literature in this field states 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.³⁶ These points were attested to by the majority of experts interviewed for this paper – 12 out of 14.³⁷ Interviewees also agreed with the literature that taking an approach that focuses on

³⁶ See literature on mechanisms reversing the burden of proof, including: Cizmaziova, L. (2022). *Unexplained Wealth Orders: A New Tool for Asset Recovery?* CiFAR; Keen, F. (2017, September). *Unexplained Wealth Orders: Global Lessons for the UK Ahead of Implementation*. RUSI Occasional Papers; Race, M. (2015, amended 2016). *Empowering the UK to recover corrupt assets: Unexplained Wealth Orders and other new approaches to illicit enrichment and asset recovery*. Transparency International UK.

³⁷ The two experts who did not agree were civil society researchers from jurisdictions which do not include civil confiscation measures and as a result preferred not to give an opinion on such mechanisms.

wealth that is disproportionate to explained income would help relieve the burden on enforcement authorities to prove the link between assets and unlawful activity.

3.1.1. Case study: (Western) Australia – illicit enrichment

The first Australian territory to introduce reverse burden, unexplained wealth provisions was Western Australia in its Criminal Property Confiscation Act 2000. The law is based on a principle of illicit enrichment,³⁸ 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. Illicit enrichment laws are ‘any provision in a statutory instrument that empowers a court to impose a criminal or civil sanction if they are satisfied that illicit enrichment has taken place (...). Furthermore, to qualify as an illicit enrichment law, the provision must not specify that a separate or underlying criminal activity needs to be established before the sanction can be imposed’ (Dornbierer, 2021, p.27).

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 lack staff and expertise (Keen, 2017).³⁹

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 (Dornbierer, 2021, pp. 11-12). While most legal challenges on these grounds have not been successful,⁴⁰ in 2017 the UK decided not to adopt an illicit enrichment process due to these concerns, and instead adopted the UWO regime outlined above.⁴¹ It should be noted, however, that the UK was also among the G7 countries that released a joint

³⁸ Illicit enrichment can be defined as: ‘The enjoyment of an amount of wealth that is not justified through reference to lawful income.’ See: Dornbierer, A. (2021). *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*. Basel Institute of Governance, pp. 20. 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.

³⁹ Similar findings were highlighted by a study by Transparency International UK. See: Race, M. (2015, amended 2016).

⁴⁰ 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: Bikelis, S. (2017). Prosecution for illicit enrichment: the Lithuanian perspective. *Journal of Money Laundering Control*, 20(2), 203-214 .

⁴¹ 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: Dornbierer, A. (2021), p. 79.

statement in 2019 urging Ukraine to reinstate criminal liability for illicit enrichment when the country moved to scrap it (Stephenson, M., 2019). If there is an intention in the UK to adopt such a process, it will be important to ensure that experienced practitioners are consulted to understand what protections could be built in that could overcome likely parliamentary concerns over human rights compliance.

Questions also arise here regarding enforcement. In Western Australia, the tool has been used rarely (Smith, M. & Smith, R.G., 2016) and mostly against individuals involved in serious organised crime or drug trafficking, not in corruption cases. According to Florence Keen (2017, p.12), there are various explanations for low recovery rates: there are less controversial ways to recover assets; staff move between departments (Keen, 2017, p.15); 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. Similar issues have been highlighted in relation to UK law enforcement authorities, casting doubt on the efficacy of this tool in the UK context without sufficient consideration as to whether or not these challenges are likely to be overcome, and at what cost.

3.1.2. Case study: Switzerland – unexplained or disproportionate wealth

Switzerland's Foreign Illicit Assets Act (FIIA) is another example of a reverse burden, unexplained wealth mechanism. It targets foreign PEPs and their close associates (UNODC, 2016). 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.'
- (Fedlex, 2016)

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.'
- (Fedlex, 2016).

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 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 (UNODC, 2016, p.2). 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 (UN Human Rights Council, 2018).

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.

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' (UN Human Rights Council, 2018, p.13) This caveat would also have an important impact should the FIIA be used to seize sanctioned Russian assets, given that the oligarchs are not often included in the PEP category as they, by definition, lack formal power (Heathershaw et al. 2021, p. 6). If the mechanisms targeted individuals outside the PEP category and the caveat around the total or substantial collapse of a country's judicial system was removed, this mechanism would have a better application in the UK.

3.2. Lowering the standard of proof

With underlying unlawful activity difficult to prove even on the civil standard, all interviewees coming from a law enforcement background⁴² suggested lowering the standard of proof below the balance of probabilities, within the limits of due process. A lower standard of proof would reduce 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.⁴³

3.2.1. Case study: Republic of Ireland – belief evidence

When asked about the possibility of lowering the standard of proof to overcome evidentiary challenges, 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’ (Proceeds of Crime Act, 1996 Article 2 (ii), (Ireland)).

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 Act⁴⁴ 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.⁴⁵ In practice, Irish courts require

⁴² Law enforcement figures represented a third of the total of interviewees for this paper. Legal practitioners and academics interviewed for this paper – while recognising the success of the Irish asset recovery model – highlighted that, although definitely helping in putting the odds more in favour of Irish law enforcement, lowering the standard of proof to belief evidence was not exclusively responsible for the Irish positive asset recovery rates (see paragraphs below for further details). As a result, while agreeing it was a useful tool, they preferred not to overreach themselves as much as the interviewees from law enforcement did surrounding this mechanism’s benefits. One academic and legal practitioner strongly advised against belief evidence over concerns it would remove criminal law safeguards such as the presumption of innocence. This position has been tested before the ECHR and challenges over such grounds have so far proved unsuccessful.

⁴³ We did not find any existing evidence in the literature that would support such opinion, however.

⁴⁴ 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).

⁴⁵ Proceeds of Crime Act, 1996 (Ireland), Section 2, Section 3.

other evidence to corroborate belief evidence that property is proceeds of crime (Dornbierer, 2021).

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 (King, 2018, p. 582).

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.⁴⁶ 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 (Hamilton, 2011; Keen, 2017).

All interviewees bar two⁴⁷ 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.

3.3. Societal danger as a basis for confiscation models

As highlighted in the first section, cases involving high-level targets whose assets are of mixed licit and illicit origin make it challenging to prove – to any standard of proof – a link between specific assets and criminality happening at a given place and time. However, there are examples, although limited, of mechanisms that place the basis for confiscation not on the underlying origin of the assets, but on the societal or national security threat posed by the owners of these assets. These mechanisms – in this paper

⁴⁶ 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]' (Keen, 2017, p. 9).

⁴⁷ The two interviewees that did not support this claim were civil society researchers from jurisdictions which do not have civil confiscation mechanisms, and therefore preferred not to comment on the application of such tools. Research could not identify evidence that would support either claim.

referred to as 'societal danger models' – may provide a useful starting point to develop mechanisms that may overcome the evidential challenges inherent in these cases.

3.3.1. Case study: Italy – 'preventative' grounds for asset confiscation

Italy has developed preventative seizure and confiscation measures that sit under the Anti-Mafia Code (Altalex, 2022) which was designed specifically to overcome the difficulties in securing criminal convictions for mafia members and associates. These individuals, whilst domestic criminals, share some similarities, in their financial footprints, to the targets highlighted in this paper, insofar as they often intermingle licit and illicit funds and use complex ownership structures to insulate their wealth.

These measures, which are classified as administrative (for example, non-criminal) proceedings, target individuals who fall mainly into two categories: those 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.⁴⁸

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' (Goldsmith Chambers, 2020, p. 49).

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 beyond domestic threats 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

⁴⁸ 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' (Altalex, 2022, Article 4).

being dispersed, concealed, or used to finance terrorist organisations or activities (Goldsmith Chambers, 2020, p. 46).

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, these being decided on a case-by-case basis by the courts. 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’ (Fleming, Shotter & Kazmin 2022).

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. While the domestic context behind the Italian Anti-Mafia Code differs from the multi-jurisdictional issues considered in this paper, the concept of de-linking the basis for asset recovery from the specific proceeds of a crime, to the national security threat represented by their owner is, however, one which merits further exploration, given the opportunity this offers to overcome the evidential burdens inherent in such cases whilst maintaining a criminal justice basis for confiscation.

The ground-breaking element in the Italian model, which makes it different from the other models presented in this paper, is that it is a preventative measure de-linked from specific criminal conduct. This means 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.

For example, according to one interviewee, a key advantage of the Italian Anti-Mafia Code (and of 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.’⁴⁹

⁴⁹ 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.

Such models then allow law enforcement to pursue 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 (Tarlow, 1998). There are also cases of anti-racketeering laws having been applied to governments.⁵⁰ Two legal practitioners and academics based in Italy and the US suggested making greater use of a similar model to recover kleptocratic proceeds.⁵¹

A similar model in the UK would assume that individuals associated with a kleptocratic enterprise 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 and to clearly specify that the standard of proof applied was one of a balance of probabilities. However, there are also definitional challenges regarding what elements define a 'kleptocracy', and whether figures such as the oligarchs would fall within such a category. This model would need definitional certainty and an established proximity between the assets and a kleptocratic enterprise to work.

3.3.2. Case study: Swiss FIIA law – national security grounds

It is worth noting that the Swiss FIIA laws explored above, as well as applying reverse burden concepts, also introduce the idea of permanently depriving of their assets persons connected to identified regimes, not because their assets are the proceeds of crime, but because 'the safeguarding of Switzerland's interests requires the freezing of the assets' (Fedlex, 2016).⁵²

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 is a reasonableness standard which the court applies; that is, 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).

⁵⁰ For instance, the state of Illinois. See: US Department of Justice, Organized Crime and Gang Section (2016, May). A Manual for Federal Prosecutors. Criminal RICO 18 U.S.C. §§1961-1968, 6th Revised Edition, p. 75.

<https://www.justice.gov/archives/usam/file/870856/download> (accessed 30 August 2022).

⁵¹ See Appendix for definitions of 'grand corruption', 'kleptocracy' and 'organised crime group', and their similarities.

⁵² It is also worth noting that Article 72 of the Swiss Criminal Code also foresees 'the forfeiture of all assets that are subject to the power of disposal of a criminal or terrorist organisation. In the case of the assets of a person who participates in or supports such an organisation (Art. 260), it is presumed that the assets are subject to the power of disposal of the organisation until the contrary is proven.' The grounds foreseen in this article were used by the Swiss Federal Court in 2005 to confiscate the funds stolen by former Nigeria's head of state Sani Abacha, who was accused of having founded a criminal organisation to steal money the country. The forfeiture was ordered after his descendants reportedly were unable to prove the legal acquisition of the assets in question. While some authors argue that this could be used in relation to Russia's sanctioned assets, it is important to highlight that this article could be used to target the oligarchs' assets only if it is proven that they formed a 'criminal or terrorist organisation'. See Pieth, M. (2023, January 25) "Die Schweiz hat bereits eine Rechtsgrundlage, um russische Gelder für die Ukraine zu verwenden". Swiss Info CH.

Applicability to the UK

In applying this concept, the Swiss law obviates the need to evidence a specific link between an asset and underlying criminality. 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’.⁵³ While such a measure requires further consideration to ensure its compatibility with human rights provisions, the Swiss model – given its basis in a non-domestic threat and its recognition of the national security threat of illicit finance – may offer a useful starting point for future reforms.

⁵³ Author interview 3, 08 August 2022

4. Conclusion

This paper sets out the specific challenges when seeking to translate the political imperative to move from temporary sanctions-based asset freezes of Russian-linked assets in the UK to permanent asset deprivation. By exploring previous experiences of using existing asset confiscation tools to tackle the proceeds of corruption and kleptocracy – assets which have a more unambiguous link to underlying criminal activity – research highlights that the existing frameworks will have severe limitations in responding to this policy and political imperative. While these issues go beyond simple matters of legislation (Wood, 2022) the examples explored in this paper offer useful starting points for exploring how current frameworks might go further. Even though a context-specific solution necessarily deserves more extensive consideration than this paper allows, this paper has identified a number of potentially useful starting points and observations.

4.1. Observations

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.

While challenging a different societal harm than the one targeted by current policy (that of domestic organised crime), the Italian example nonetheless demonstrates 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. In a more analogous case, the Swiss model introduces permanent deprivation of assets in cases where this is deemed to accomplish a specific objective, that of safeguarding national interests. 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 (Goldsmith Chambers, 2020, p. 51). 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.⁵⁴

⁵⁴ 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).

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

The second concept explored in this paper which may also merit further consideration is that of full reverse burden of the proof, within limited circumstances, onto the respondent. 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. As this paper shows, 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.

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

While this paper has focused on the limitations of the UK’s legislative mechanisms, a consistent theme encountered in the research for the paper (both in literature and interviews) 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.

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. In fact, some UK-based interviewees 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.⁵⁵

Beyond this, it is clear that the limited success in tackling complex assets linked 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.⁵⁶

⁵⁵ 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.*

⁵⁶ 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).

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 shown,⁵⁷ building on earlier research by Carmen Malena (2009) on ‘getting from political won’t to political will’, 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.

In summary, 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, this paper comes from the standpoint that there are inherent limitations (set out above) in using sanctions as the basis for permanent asset deprivation in a rule of law jurisdiction. However, the paper aims 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.

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.

⁵⁷ Idris, I. (2022, May). *Political will and combatting serious organised crime*, SOC ACE Evidence Review Paper No. 1; Marquette, H. (2022, May). *Moving ‘from political won’t to political will’ for more feasible interventions to tackle serious organised crime and corruption*. SOC ACE Briefing Note No. 1. <https://www.birmingham.ac.uk/documents/college-social-sciences/government-society/publications/moving-from-political-wont-to-political-will.pdf>

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6. Appendix

Table 1

Definitions	
Asset recovery	<p>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’.⁵⁸</p> <p>Asset freeze</p> <p>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.</p> <p>Asset seizure</p> <p>‘[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.’⁵⁹</p> <p>Criminal confiscation</p> <p>‘The confiscation of the proceeds of crime following a criminal conviction.’⁶⁰</p> <p>Civil recovery (also known as non-conviction-based asset forfeiture, civil forfeiture, civil confiscation)</p> <p>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).</p> <p>Asset confiscation (also known as asset forfeiture)</p> <p>‘[T]he permanent deprivation of assets by order of a court or other competent authority’.⁶¹ 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.</p>
Grand corruption	<p>‘[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’.⁶²</p>

⁵⁸ Home Office. (2019, September 13). 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).

⁵⁹ FATF. (2022, September 2). Seize. In: *Glossary of the FATF Recommendations* (n.d.) <https://www.fatf-gafi.org/glossary/s-t/> (accessed 2 September 2022).

⁶⁰ Home Office. (2019, September 13). Asset Recovery Action Plan.

⁶¹ FATF. (n.d.) Glossary of FATF Recommendations. <https://www.fatf-gafi.org/glossary/a-c/> (accessed 2 September 2022).

⁶² Transparency International. (n.d.) Grand Corruption. <https://www.transparency.org/en/our-priorities/grand-corruption> (accessed 30 August 2022).

Definitions	
Kleptocracy	'[A] government controlled by officials who use political power to appropriate the wealth of their nation'. ⁶³
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. ⁶⁴
Standards of proof	<p>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.</p> <p>Probable cause Reasonable grounds to believe that a particular person has committed a crime, especially to justify making a search or preferring a charge.</p> <p>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.</p> <p>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.</p>

⁶³ The White House. (2021, December). *United States Strategy on Countering Corruption*, p. 6. <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf> (accessed 22 November 2022).

⁶⁴ UNODC. (n.d.) 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).