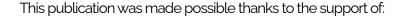


UNEXPLAINED WEALTH ORDERS: A NEW TOOL FOR ASSET RECOVERY?

**CIFAR RESEARCH PAPER** 

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#### UK UNEXPLAINED WEALTH ORDERS - IN SHORT

#### WHY

In order to make dirty money appear legitimate, criminals often use real estate to hide the illegitimate source of their wealth. In a world of complex ownership schemes and financial secrecy, law enforcement can find it challenging to investigate shady property investment



#### WHAT

A UWO is an investigative tool, which requires owners and responsible officers of real estate property to explain the source of the wealth used to acquire that property. This way, it shifts the burden of proof to the defendant and allows law enforcement authorities to gather more evidence for a potential recovery proceeding.



#### HOW

If the suspected person does not respond or does not provide sufficient evidence to the court, a UWO allows law enforcement agencies to initiate civil proceedings to have the property confiscated for the benefit of the state.







#### **ACRONYMS**

Anti-Corruption and Economic Crimes Act 2003 - ACECA

Asset Confiscation Enforcement - ACE

Account Freezing Order - AFO

Asset Recovery Incentivisation Scheme - ARIS

Civil Society Organisation - CSO

Civil Recovery Order - CRO

Ethics and Anti-Corruption Commission - EACC

European Economic Area - EEA

Her Majesty's Revenue and Customs - HMRC

Interim Freezing Order - IFO

Joint Asset Recovery Database - JARD

National Crime Agency - NCA

Persons with Significant Control Register - PSC

Politically Exposed Person - PEP

Proceeds of Crime Act - POCA

Suspicious Activity Report - SAR

Unexplained Wealth Order - UWO

United Nations Convention Against Corruption - UNCAC

### EXECUTIVE SUMMARY



#### **EXECUTIVE SUMMARY**

Unexplained Wealth Orders were introduced to the legislation of the United Kingdom with the aim of facilitating the fight against organised crime and, uniquely, also grand corruption of foreign origin. A UWO, as a form of disclosure order that reverses the burden of proof, is intended to achieve confirmation of interest in a certain real estate property and the source of wealth that was used to acquire it. The need for new legislation was understood and pushed for by civil society, as well as public officials, recognising the numerous obstacles faced by investigations into illicit wealth of foreign origin. UWOs were set up, therefore, to offer a new tool for the use of law enforcement agencies in situations where they require additional information to investigate and potentially confiscate suspicious wealth in the real estate sector, and where cooperation with the host jurisdiction might be hindered.

Several authorities in the UK are able to apply for a UWO to be granted by a court. While the potential application of the tool is quite broad, there are several criteria that need to be satisfied for the order to be issued successfully and to satisfy judicial scrutiny. In cases of suspected kleptocracy, the tool targets non-European politically exposed persons (PEPs) who own real estate in the UK. There might either be reasonable grounds to suspect that the person's known sources of income were not sufficient to obtain the UK property or that that the property has been obtained through unlawful conduct. The respondents to the order - either the beneficial owners or responsible officers - are then required to explain their interest in the property and how they acquired it. If no answer to the UWO request is provided to the court, then the property is considered to be 'recoverable property' and can be pursued via a civil recovery path.

Even though the tool shifts the burden of the proof onto the respondent, the subsequent confiscation proceedings of the property follow automatically only in cases where a respondent does not provide any answer, which is unlikely. If an answer to the UWO request is produced by the respondent, law enforcement can decide whether to continue to pursue the property in civil recovery proceedings. In both cases, the respondent then has an additional opportunity to satisfy the court that on the balance of probabilities, the property has not been purchased unlawfully.

While it was initially assumed that they would be applied in tens of cases a year, since their inception in January 2018, when UWOs officially came into practice, and until May 2022, UK law enforcement agencies had obtained only 15 UWOs relating to four cases. Two of these cases concerned PEPs, all of whom mounted a substantial legal defence after being served a UWO. A case targeting properties worth GBP 80 million owned by Kazakh nationals Dariga Nazarbayeva and her son Nurali Aliyev, and initially linked to the convicted Rakhat Aliyev, was successfully challenged by the respondents. Another one of these cases and the first UWO case, targeting properties of Azerbaijani Zamira Hajiva and her husband, is still ongoing.

The only successful recovery so far relates to property worth approximately GBP 9.8 million and targeted a UK citizen linked to serious organised crime and money laundering. In practice, UWOs have encountered a number of challenges and have so far failed to meet the high expectations placed upon them by politicians, civil society and the media.

The analysis of the failed case against property owned by the Kazakh nationals,





often referred to as NCA v Baker, as well as a reflection of the reasons behind the underutilisation of the UWOs, points to a number of obstacles. These include:

- Difficulties in overcoming information and legislative gaps between the UK and the foreign jurisdiction when validating and accepting evidence
- Challenges in the validation of and low evidentiary threshold for proving the respondent's income
- Issues with identifying and targeting the property's beneficial owner
- High costs for court proceedings and a lack of financial and legal resources for public law enforcement agencies

While recent updates to the legislation at least partially remedy some of the shortfalls behind the underutilisation of the tool, it remains to be seen whether they are substantial enough. Despite a reform to the legislation in 2022, no UWO has been obtained by law enforcement since July 2019. Therefore, the impact of UWOs on the fight against high-level kleptocracy has been very limited. However, as experience with tools targeting unexplained wealth from other countries show, these laws often meet setbacks in the initial periods of their application.

Beyond the impact of UWOs in terms of gathering information and seizing illicit assets, the analysis of their impact on kleptocracies points predominantly to reputational damage. Moreover, analysis of the accountability and transparency of the tool's use point to considerations that are already taken by the lawmakers and investigators but also improvements that could be made. This is especially with

regards to the availability of information on how cases are chosen and how they progress, the way confiscated funds are reused, and how the strengths of civil society are leveraged.

Despite the unique focus of UWOs on targeting illicit wealth of foreign origin, an analysis of best practices from similar investigative tools shows several improvements that should be considered for countries who might wish to implement similar tools targeting illicit wealth:

- Increase transparency in property ownership through legislative requirements to identify beneficial owners registered in foreign jurisdictions; this can assist authorities and civil society in gathering the evidence that a UWO may be needed.
- Ensure sufficient resources are available for financial investigations and for litigation; UWO processes can be expensive and time consuming, this should be factored in.
- 3. Provide adequate support for law enforcement agencies more general; this will support detection of potential cases.
- Close information gaps in the judiciary on how kleptocratic practices are carried out; assist judges to understand how corrupt schemes work.
- 5. Undertake reviews of UWO legislation as necessary to ensure they are working effectively.
- Strengthen legislation against the financial enablers of kleptocracy; to reduce barriers to understanding corrupt weath.



# INTRODUCTION



#### INTRODUCTION

As cross-border kleptocracy cases continue to make headlines and put pressure on governments across the world to take action, new and innovative tools are being developed to address grand corruption and to return the money to the people it belongs to. One such tool that has been introduced into a number of jurisdictions over recent years and which addresses both domestic and transnational corruption and asset recovery is the Unexplained Wealth Order.

In 2017, Unexplained Wealth Orders (UWOs) were introduced in the United Kingdom (UK) as an illicit enrichment measure, with the promise of speeding up investigations and prosecutions for the harbouring of stolen wealth abroad, particularly in situations where cooperation from the country of origin is not forthcoming. By reversing the burden of proof, a UWO requires respondents to explain their source of wealth if certain criteria are met and if there are reasons to believe that they could not have obtained the property in question from their known income.<sup>1</sup>

While similar tools to the UK's UWO already existed in a number of jurisdictions, such as in Ireland and Australia, their adoption in the UK created high expectations, particularly with regards to targeting foreign kleptocrats. It was believed that questioning and seizing the vast illicit wealth stashed in the UK's thriving real estate market would now finally be within reach.<sup>2</sup>

Both civil society organisations<sup>3</sup> and public bodies<sup>4</sup> had previously highlighted the challenges when overcoming secrecy and lack of ownership information during investigations into suspicious wealth from abroad, especially in the real estate market. The need of law enforcement agencies to often rely on cooperation from partners

in other jurisdictions causes difficulties in obtaining sufficient evidence to undertake civil or criminal proceedings. UWOs as a type of disclosure order were supposed to improve this situation.

While it is impossible to know exactly how much of the UK's property has been purchased with tainted money, some estimates and infamous cases are illustrative of the overall picture. In 2017, Transparency International UK identified 140 properties worth GBP 4.2 billion in London alone regarded as being purchased by persons at high risk of money laundering.5 When it comes to property under criminal investigation for suspicion of being the proceeds of corruption, the value of such property investigated by the Metropolitan Police's 'Proceeds of Corruption Unit' (POCU) between 2004 and 2014 was over GBP 180 million.<sup>6</sup> Due to the challenges in investigating corruption and financial crime, the assets eventually successfully seized to the state have, however, been much lower.7

Corruption tied to kleptocratic practices leaves behind many victims, and negatively impacts people across borders. Stolen wealth deprives citizens of public budgets in the country of origin - the country where the corrupt dealings took place. In destination countries, like the UK or Germany, dirty money laundered in the real estate market has been suggested as having an impact on rising property prices and instability in the housing market.8 Furthermore, the illicit proceeds of corruption can also cause damage to third countries, where dark money can be used to fuel further illicit activity or political destabilisation. Russia's invasion to Ukraine in 2022 was a painful reminder of such negative spill over effects9 and many countries were compelled to act and come up with improved solutions to tackle





suspicious Russian assets in response to the aggression. In the UK, this prompted a speedy adoption of a UWO reform in March 2022, which aimed to make the tool more easily used and effective in facilitating the investigation and seizure of illicit wealth.<sup>10</sup>

At the time of their initial adoption, UWOs were forecasted to be issued around 20 times per year.11 In reality, only 15 UWOs granted in four different cases have been reported until now. This means that hopes for the frequency of their application were much higher, and their real-life application has encountered obstacles that were not envisioned in theory. In other words, the tool has encountered several legislative and operational setbacks, beyond those foreseen and contemplated in advance.12 The disappointing results of UWOs for anti-corruption practitioners, as well as the anticipation of CSOs and governments in other countries who might be contemplating the adoption of some form of unexplained wealth legislation, warrants a deeper analysis of the tools' successes and failures.

This report aims to assess the effectiveness of UWOs in the UK in terms of fighting corruption and promoting international asset recovery. In the process, it also contemplates the impact of UWOs on the countries where the corruption originated. To this end, the report first introduces the UWO legislation, then explores how, when and where UWOs have been used to date. Secondly, the report assesses the efficiency of UWOs to advance asset recovery and the fight against grand corruption by considering their application, comparing them to other, similar tools, and reflects on transparency, accountability and resourcing considerations. Lastly, the report examines how civil society has and could be involved in the process.



# WHAT IS AN UNEXPLAINED WEALTH ORDER?



### WHAT IS AN UNEXPLAINED WEALTH ORDER

A UK Unexplained Wealth Order (UWO) is an investigative tool – a type of disclosure order – that allows law enforcement agencies to require information about the source of wealth used to purchase a property suspected to be of illicit origin.

A UWO request shifts the burden of proof from the law enforcement to the owner of a property, who needs to provide the necessary evidence that their income is sufficient in order for the purchase of the property to be considered lawful.

In cases where a respondent targeted by a UWO fails to answer this request and offers no explanation for the wealth used to buy the property in question, then this property is considered to be 'recoverable property' that can be pursued via civil recovery proceedings.<sup>13</sup> In the case that a respondent answers, they can either seek an appeal regarding the decision to grant a UWO in the first place or submit the required documents and have them reviewed by a court. If the answer is not deemed satisfactory, this again can trigger standard civil recovery proceedings concerning the property, if there is enough evidence for these to be initiated.

UWOs can be granted by a court only if several principle conditions are met;

- if the property in question exceeds GBP 50,000 in value;
- if the respondents' known income is insufficient to obtain the property or if the property has been obtained through unlawful conduct; and
- if the respondent is either a Politically Exposed Person (PEP) from outside the European Economic Area or if there are

reasonable grounds to suspect they have been involved in a serious crime, which applies also to UK citizens.<sup>14</sup>

The following section looks at why UWOs have been adopted in the UK and then introduces the legislative requirements for a UWO and the process for granting an order.

#### BACKGROUND TO THE ADOPTION OF UWOS

Unexplained Wealth Orders were introduced to the anti-corruption toolkit of the United Kingdom via the Criminal Finance Act 2017 and became available to law enforcement in 2018.15 Their adoption was the result of a lack of progress in tackling illicit wealth and money laundering in the UK, both of domestic origin from organised criminal activity and as a result of cross-border grand corruption. This legislation, especially its focus on fighting corruption, had been strongly advocated for by UK civil society organisations,16 with their messages echoed by politicians. In 2016, quoting Transparency International, then Home Secretary Amber Rudd said that UWOs are perhaps 'the most important legislation to be passed in the UK in the past 30 years', which will 'make sure that the UK is no longer seen as a safe haven for corrupt wealth'.17

What deficiencies within the UK's anticorruption infrastructure was the UWO legislation seeking to address?

While UK law enforcement have the ability to use civil recovery proceedings, the progress in investigating and pursuing money laundering cases tied to kleptocracy was seen as limited and insufficient.





Together with the criminal asset confiscation architecture, the UK civil recovery regime is established in the Proceeds of Crime Act 2002 (POCA), including 'non-conviction-based asset recovery'.18 These provisions allow UK law enforcement to take action against property (as opposed to against a person) if they can prove 'on the balance of probabilities' (as opposed to 'beyond reasonable doubt' in criminal cases) that the property was 'obtained through unlawful conduct'. Therefore, in order to retain their assets, the respondent must refute the case made by the state that the assets represent the proceeds of crime.19

While the civil standard of proof required in these cases is significantly lower and does not require a criminal conviction for the offence in question, civil recovery proceedings still face many obstacles, especially in cases related to individuals from other jurisdictions. In cases with a cross-border nature, law enforcement agencies often need to rely on cooperation and mutual legal assistance from their counterparts and agencies in other countries. In cases where this cooperation might be hindered by a lack of political will, independence of agencies, or state capture, the evidence provided might be problematic, if received at all.20

It is exactly this issue of gathering sufficient evidence to undertake civil or criminal proceedings in cases concerning suspicious wealth, which UWOs as a type of disclosure order, were supposed to help overcome. By placing the burden of proof on the respondent targeted by a UWO to explain their interest in and a wealth used to buy a particular property, this tool was aimed at creating an additional step early in the investigative process on the pathway to a potential civil recovery. As described by the researcher Anton Moisenko, UWOs are 'like a hybrid beast with the head of a disclosure order and the body of a civil recovery tool'.<sup>21</sup>

In this sense, UWOs do not give new powers to law enforcement agencies, they only allow them to gather more information for financial investigations where, due to complex secretive ownership structures, as well as cross-border operational difficulties, they might otherwise face challenges.

#### **HOW DOES A UWO WORK?**

#### Step 1: UWO application

To start a UWO, law enforcement agencies need to file an application with the High Court (Court of Session in Scotland), which is a superior court able to hear first instance cases when of a serious nature. Only specifically designated enforcement authorities<sup>22</sup> can apply for a UWO.<sup>23</sup> If other agencies or bodies believe that they have evidence of unexplained wealth linked to a property, they are not able to apply for a UWO themselves but can refer a case to one of the aforementioned enforcement authorities.<sup>24</sup>

In the application for an unexplained wealth order, law enforcement must specify:<sup>25</sup>

- a. (a) the property in respect of which the order is sought, and
- b. (b) the person whom the enforcement authority thinks holds the property ("the respondent")

While the possible application of UWOs is quite broad, there are several qualifying criteria regarding targeted persons and properties that law enforcement officers need to consider and follow during the UWO drafting process, in order to to file a successful UWO application to the court.

Firstly, a UWO can be currently applied to people fulfilling one of three categories:

1. Foreign Politically Exposed
Persons (PEPs), from outside the
UK or European Economic Area
(EEA), as defined in the POCA
legislation and in reference to the
EU's Fourth Money Laundering





Directive. This includes not only those with an important political function but also their family members and close associates.<sup>26</sup>

- 2. People for whom there is reasonable grounds to suspect that they have been involved in a serious crime or that they are connected to someone involved in a crime.<sup>27</sup> Therefore, spouses, relatives, and business partners of people suspected of crime can also be targeted by a UWO.<sup>28</sup>
- 3. 'Responsible officers', such as directors behind property owning entities. This is to facilitate information gathering from those who might have a control over property, even if they do not own it. This means if the respondent is not an individual, the application may be directed at a responsible officer of the respondent. This category was added in the 2022 UWO reform.<sup>29</sup>

Secondly, a UWO is applicable only in relation to properties, not to bank accounts of these individuals. For a property to qualify for consideration for a UWO, it must be worth at least GBP 50,000, which is notably not a high threshold for property in the UK.

#### Step 2: Court hearing in consideration of a UWO

The application of law enforcement agencies to have a UWO granted by the court is considered in an ex parte (without notice) hearing, meaning without the presence of the respondent targeted by the UWO, for example the property owner.<sup>30</sup> This means that the person who may be subject to the UWO will or may not be aware of the proceedings taking place to initiate the order.

In addition to the technical criteria of the UWO applications, detailed in the Step 1 above, when a court assesses the relevance of a UWO order, it must be satisfied that:

- 1. The respondent holds the property.
- There are reasonable grounds to suspect that the person's known sources of lawfully obtained income are not sufficient to enable them to obtain the property in question or that that the property has been obtained through unlawful conduct.

The second option was added to the legislation in the recent 2022 UWO reform. This way, it might not be necessary to analyse a person's income and wealth but rather focus on the unlawful conduct, which can be beneficial in cases of a wealthy person. Law enforcement is able to choose either path.<sup>31</sup>

When assessing whether the property in question was obtained through lawful income, the court can consider publicly available information from registries to ascertain known sources of income. It may also look at various financial securities available to the person, such as mortgages.<sup>32</sup>

Unless the technical and evidentiary requirements of the UWO applications are not met, the UWO is granted by the responsible court after this closed hearing.

The granted order directed towards a respondent must specify:

- a. the form and manner in which the respondent's statement in response to UWO is to be given,
- b. the person to whom it is to be given, and
- c. the place at which it is to be given or, if it is to be given in writing, the





address to which it is to be sent.

Alongside a UWO, the relevant enforcement authority would likely apply at the same time for an interim freezing order (IFO). Such a freezing order would prohibit the person targeted by the UWO, and any other person with an interest in that property, from dealing with the propert and, for example, selling it.<sup>33</sup>

#### Step 3: Respondents' answer to UWO and further proceedings

After being notified of a UWO issued against them, people targeted an order need to provide a statement within a "response period" specified by the court granting the order. A response to a UWO might contain written explanations and various supporting documents, depending on the UWO request. Specifically, the statement needs to explain:<sup>34</sup>

- a. What interest do they have in a particular property
- b. How they obtained and funded the property.
- c. If the property is held by trustees, the details of the arrangement need to be specified
- d. Any other information about the property requested in the order.

The respondent has also the opportunity to challenge the order in a further High Court hearing. If this challenge fails, they must comply with the order by explaining the sources of wealth used to purchase the property. If the respondent does not comply with the order, then the law presumes that the property is the proceeds of unlawful conduct and is thus deemed "recoverable property" under POCA and can be seized through separate civil recovery proceedings.35 If the respondent does produce an answer to the UWO, law enforcement then has 60 days to decide whether to start separate civil recovery proceedings, in which they may

try to continue to pursue the property and use the evidence in the UWO answer to establish that, more likely than not, it was obtained unlawfully.

To start civil recovery proceedings, law enforcement agencies can apply for a civil recovery order (CRO) and request the court to confiscate the property on the assumption that it constitutes the proceeds of crime. To confiscate the property, the court needs to be satisfied on the balance of probabilities (more likely that not) that the property has been purchased through unlawful activity.<sup>36</sup> During these proceedings, the respondent has a final opportunity to satisfy the court that on the balance of probabilities the property has not been purchased with the proceeds of crime. If they fail to do so, the property will be confiscated to the state.

The response to the UWO by the targeted person can also be used as evidence in a criminal prosecution if they respond to a UWO in a false or misleading way (with the offence punishable by up to two years in prison), or if their statements do not match those made in another crime they could be prosecuted for.<sup>37</sup>

In the words of Andy Lewis, Head of Asset Denial at the NCA:

"Unexplained Wealth Orders are a helpful tool, but far from simple. They are designed to be targeted against those involved in serious crime or Politically Exposed Persons (PEPs) outside the EEA with assets that do not match their income. UWOs require a person to provide an explanation for their wealth. Failing to respond can result in the immediate forfeiture of the property – however the reality is that when dealing with high net worth targets and those involved in serious crime, you can expect a fight. When we're seeking to recover the property of foreign PEPs in particular, we find





ourselves up against individuals who have the incentive and the means to challenge all of our actions before the property is finally forfeited. Over time I believe we'll see that UWOs are almost invariably going to be a gateway into a longer, adversarial, processes of civil

asset recovery played out in court. Nevertheless, UWOs remain a really important tool in enabling us to start investigations and progress cases that we may otherwise not be able to take forward."38

#### LAW ENFORCEMENT TOOLS

Law enforcement agencies have several tools available during the course of an investigation. Some of these tools help them to gather information related to the case being investigated,<sup>39</sup> and have a similar purpose but a different application criteria to UWOs, for example disclosure orders. Others, such as asset freezing orders, are complimentary to UWOs and are applied simultaneously with them. The following section describes several key tools to illustrate their differences, and circumstances under which they might be used.

#### **Account Freezing Orders**

Together with UWOs, account freezing orders (AFOs) were also introduced as a new tool to fight against corruption and organised crime under the Criminal Finances Act 2017 and came into force in January 2018.<sup>40</sup> In this case, if law enforcement officers have reasonable grounds to suspect that money (of a minimum value of GBP 1,000) on an investigated account has either been obtained through unlawful activity or is intended for unlawful use, they can freeze these funds for up to two years. Following an AFO, authorities can then pursue a forfeiture order and apply to seize the contents of the bank account.

While the purpose of UWOs is to gather information, AFOs serve to give law enforcement officers time to investigate the origin of the funds while they are frozen and see if they should be forfeited. AFOs are often made after a suspicious activity report (SAR) from a financial institution.<sup>41</sup>

Unlike UWOs, which have only been used by the NCA, AFOs have been pursued by the Metropolitan Police and Her Majesty's Revenue and Customs (HMRC) alongside the NCA. In 2019, the NCA alone used AFOs more than 85 times to freeze GBP 180 million in financial assets. While forfeiture was not applicable in all cases, several successful recoveries were publicised in the media, such as the forfeiture of nearly GBP 500,000 from an account belonging to the son of a former prime minister of Moldova, Vlad Luca Filat.<sup>42</sup>

#### **Asset Freezes**

An asset freeze is a general term indicating an action that makes funds and economic resources of a person unavailable for the period during which it is in force. This process does not, however, involve confiscation or a change in the ownership of the frozen funds and economic resources. The term asset freeze is usually used in relation to financial sanctions imposed on individuals suspected of involvement in human rights violations, terrorism or serious corruption.<sup>43</sup>

When financial sanctions in the form of an asset freeze are applied on certain individuals and entities, financial institutions and businesses are prohibited from dealing with any





assets belonging to or owned, held or controlled by that person or entity. They are also prohibited from making funds and economic resources available to them.<sup>44</sup> Therefore, despite a similar terminology, asset freezes differ in their application from account and property freezing orders established by POCA.

#### Disclosure orders

Disclosure orders are investigative tools available in different types of investigation under the Proceeds of Crime Act 2002, which give law enforcement permission to request information from a respondent, with the threat of criminal sanctions in case of a non-compliance.<sup>45</sup>

In order to grant a disclosure order in a civil recovery investigation, the court has to be satisfied that there are reasonable grounds for suspecting that property has been obtained through unlawful conduct, information which may be provided would be of substantial value to the investigation, and that the application is in the public interest.<sup>46</sup>

A respondent - anyone that the officer thinks has information relevant to an investigation - will be prompted to answer questions, provide information or to produce documents. Therefore, the purpose of a disclosure order is to gather information during an investigation.<sup>47</sup> While initially disclosure orders could not be used in relation to money laundering investigations, the amendments introduced via the Criminal Finances Act in 2017 changed that.<sup>48</sup>

Interestingly, disclosure orders were initially also not applicable in cases where the respondent resides outside of the UK but this part of POCA legislation has been amended via Schedule 19 of the in the Crime and Courts Act 2013.<sup>49</sup>

In addition to sharing similarities with UWOs, disclosure orders also have same requirements that must be satisfied before an order can be made as **customer information orders and account monitoring orders**. As the names suggest, customer information orders are issued to a person or a financial institution about whether a person holds or has held certain financial account(s), and account monitoring orders entitle law enforcement agencies to monitor transactions in a financial account.<sup>50</sup>



# HOW AND IN WHAT CASES HAVE UWOS BEEN USED SO FAR



## HOW AND IN WHAT CASES HAVE UWOS BEEN USED SO FAR

As of May 2022, only four investigations that have utilised UWOs are known to have taken place. Of the four UWO investigations that have been completed as of May 2022, two centred on UK citizens suspected of involvement in serious and organized crime. The other two concerned Politically Exposed Persons (PEPs) from Eurasia, even though one – the Nazarbayeva case – was pursued on the basis of a link to serious crime, and each resulted in a very different outcome. This section provides an overview of all four cases, with an emphasis and more detailed analysis of the first and third UWO case, both of which concerned PEPs.

#### 1. ZAMIRA HAJIYEVA, AZERBAIJAN

- Date issued: February 2018
- Status: Ongoing. UWO granted, respondent's appeal rejected by all courts.
- · Number of properties: -
- Value of assets targeted: at least GBP 22 – 23.5 million (USD 27.5 - 30 million) publicly known<sup>51</sup>
- Value of assets seized: none to date but likelihood of upcoming successful seizure high.

Immediately following the adoption of this new anti-corruption legislation in 2018, the first people to be served a UWO in the UK were an Azerbaijani couple. Ttwo UWOs were issued against Jahangir Hajiyev and Zamira Hajiyeva, each corresponding to a different property believed to be owned by them. The UWOs concerned a GBP 11.5 million (USD 14.3 million) house in Knightsbridge, London and also a golf

course at Ascot, England worth GBP 10.5 million. The couple are believed to own further wealth in the UK, including a luxury jet worth USD 42.5 million.<sup>52</sup>

The property of the couple was targeted by UWOs because of the evidence of spending of Ms. Hajiyeva, who had been found to have to purchased items worth GBP 16 million in London's luxury department store Harrod's over a ten-year period.53 This was suspicious as Ms Hajiyeva's had no known income herself, and her husband's known income in 2008 was around USD 70.600. with some additional dividends.<sup>54</sup> Moreover, in 2016, Mr Hajiyev was convicted by a court in Baku and sentenced to 15 years in prison for fraud, embezzlement and abuse of office offences committed during his role as a Chairman of the International Bank of Azerbaijan.55 Therefore, the suspicion that funds that Hajiyevs used to purchase UK properties are of illegal origin was high, and he was seen by the court as a PEP with an income/wealth discrepancy.56

Ms Hajiyeva's lawyers appealed the UWO on five different grounds, including that there were no reasonable grounds to suspect income/wealth discrepancy.<sup>57</sup> Both the Court of Appeal<sup>58</sup> and the Supreme Court<sup>59</sup> dismissed their claims. As of June 2022, the properties in question remain frozen. Experts argue that if Hajiyeva fails to account for her and her husband's wealth, the NCA can then issue a civil recovery order and pursue the confiscation of these properties.<sup>60</sup>

Further assets linked to the Hajiyevs might also be targeted in civil recovery proceedings. For example, it has been publicised that during the course of the





investigations, the NCA seized various pieces of jewellery belonging to the family worth around GBP 1.5 million.<sup>61</sup> This would bring the total value of assets linked to the Hajiyevs that might be confiscated to nearly USD 30 million. However, Mrs Hajiyeva's lawyer has recently tried to make a case for the seized jewellery to be released back to the family because of the long-time law enforcement is taking to proceed with the legal action.<sup>62</sup> Therefore, whether the seizing of assets in this case will lead to any successful confiscation is yet to be seen.

Cross-border corruption proceedings are complex and require a lot of personnel resources and dedicated time to pursue, which are also costly. One such illustration of complexity, which has been said to slow down the ongoing forfeiture proceedings involving the first UWO case imposed on Zamira Hajiyeva is the fact that law enforcement officers need to travel to Azerbaijan to serve notice of the legal action to the country's general prosecutors' office, who will then pass it on to Mr Hajiyev in prison.

#### 2. MANSOOR MAHMOOD HUSSAIN, UNITED KINGDOM

- Date issued: May 2019
- Status: Settlement agreement issued in October 2020.
- Number of properties: 8 properties
- Value of assets targeted: unknown
- Value of assets seized: GBP 9.8 million

The second UWO case in May 2019 targeted eight properties of a Leeds businessman: Mansoor 'Manni' Mahmood Hussain, suspected to be involved in serious organised crime. Despite his lengthy response to the UWO request,

which contained more than one hundred folders of documentation, the NCA argued that he did not comply fully with the order and failed to explain his source of wealth. Moreover, the NCA obtained further evidence of potential criminal activity and extended the investigations to an additional nine properties.<sup>63</sup>

Ultimately, the NCA reached an out-of-court agreement with Mr Hussain in August 2020, validated by court two months later. As a result, he handed over assets valued together at GBP 9,802,828, consisting of 45 properties in London, Cheshire and Leeds, four parcels of land, as well as other assets and GBP 583,950 in cash.<sup>64</sup>

#### 3. RAKHAT ALIYEV, DARIGA NAZARBAYEVA, NURALI ALIYEV, KAZAKHSTAN

- Date issued: May 2019
- Status: Unsuccessful. UWO granted but then successfully challenged
- · Number of properties: -
- Value of assets targeted: GBP 80 million
- Value of assets seized: None.
   Additional cost for the NCA to cover the court proceedings, minimum GBP 1.5 million.

In the third UWO case, the NCA issued three UWOs in May 2019 targeting properties worth GBP 80 million owned by Dariga Nazarbayeva and her son Nurali Aliyev, although the property was initially thought to be owned by Dariga's former husband. Unlike the first case of a UWO applied to a politically exposed person, targeting the Hajiyevs, who lost support and business ties with their government in Azerbaijan, this UWO case was issued





against people who still enjoyed the support of the Kazakh regime and who were entrepreneurially active. 65 This UWO case and a surrounding investigation is often referred to as 'NCA v Baker' because the UWOs were issued against a British solicitor based in Liechtenstein - Andrew Baker - and four legal entities that were all linked to the legal ownership of the targeted properties. 66

The properties were investigated due to an alleged link to Rakhat Aliyev, Dariga Nazarbayeva's former husband and Nurali Aliyev's father. Rakhat Aliyev had held several senior public roles in Kazakhstan including Deputy Foreign Affairs Minister and Ambassador to Austria, while succeeding in building a business empire. However, he fell out with the Kazakh regime after announcing his candidature against former President Nazarbayev, Dariga's father. He was stripped off all government posts, divorced Dariga Nazarbayeva, and became critical of the regime. In 2015, he committed a suicide in an Austrian prison, where he was awaiting a trial for abducting and murdering two former Nurbank bankers.67

Drawing on the allegations of high-level political corruption in Kazakhstan, <sup>68</sup> as well as Rakhat Aliyev's tainted wealth, it is understandable, why the NCA would be suspicious of properties linked to him and his closest family members. The UWOs of this case were, however, discharged by the High Court and the NCA was denied an appeal by the Court of Appeal as having 'no real prospects of success'. <sup>69</sup> This constituted a serious failure for the NCA, which not only could not proceed to an attempt to confiscate the property but it actually faced a payment of at least GBP 1.5 million in legal fees pursued by the defendants. <sup>70</sup>

A detailed analysis of the *NCA v Baker* case conducted by Global Integrity's Anti-

Corruption Evidence Research Programme found that the failure could be attributed to three main reasons, which are described in more detail in the following section:

- the NCA could have brought more evidence that was readily available to support their claim and flexibly react to new evidence;
- 2. the ability of enablers from the legal sector to construct a plausible narrative in response;
- the potential lack of understanding of the business models of foreign kleptocracies in the current legislation and by the judiciary.<sup>71</sup>

The ruling of the court in this case has been seen as a potential precedent, highlighting the difficulties in pursuing a successful UWO against officials who are on good terms with the ruling regime in their country, which might support their claims about the legality of suspicious transactions investigated in the UK. Moreover, once a certain financial transaction is considered legal by a court in a UWO case, it would be unlikely to be considered evidence of illicit finance in a civil recovery proceeding. Therefore, successful civil recovery proceedings on the basis of a failed UWO are also unlikely.<sup>72</sup>

#### 4. ANONYMOUS NORTHERN IRISH WOMAN, UNITED KINGDOM

- Date issued: July 2019
- Status: Unknown. No public information available beyond the issuance of UWO
- Number of properties: 6 properties
- Value of assets targeted: GBP 3.2 million





#### Value of assets seized: Unknown

The fourth, and at date of publication the latest, investigation, with one UWO issued concerned a Northern Irish woman resident in London who allegedly had links to criminals involved in paramilitary activity and cigarette smuggling. The UWO aimed at explaining the financing behind the purchase of six properties worth around GBP 3.2 million in total, two of which are located in London and two in Northern Ireland.<sup>73</sup> Even though three years have passed since the UWO was issued in July 2019, there is no publicly available information about further details of the case, including potential litigation and recovery of the concerned assets.

Table 1: The balance sheet of UWOs from their inception in 2018 until May 2022 (estimated)

Number of corruption cases investigated	4
Number of UWOs issued:	Reportedly 15
Successful UWO cases leading to confiscation:	1
Amount of assets targeted:	GBP 143 million (USD 140 million)
Amount of assets recovered:	GBP 9.8 million (USD 12.2 million)

While the 2017 impact assessment from the Home Office forecasted that there would be 20 UWOs per year,<sup>74</sup> in reality, as of May 2022 only four investigations are known to have taken place, reportedly targeting assets valued at GBP 143 million.<sup>75</sup> No new UWO has been obtained by law enforcement since July 2019 and the total number of UWOs imposed is likely 15, although there are discrepancies in reports.<sup>76</sup>



# THE IMPACT OF UNEXPLAINED WEALTH ORDERS



## THE IMPACT OF UNEXPLAINED WEALTH ORDERS

In order to assess the impact of UWOs in the fight against corruption, the following section first looks at some of the challenges behind the limited application of UWOs in the UK and summarises the UWO reform introduced in 2022. Subsequently, a reflection is carried out of the impact of UWOs on the countries of origin, where suspected corrupt acts linked to the PEP respondent are alleged to have taken place.

#### 1 CHALLENGES IN THE APPLICATION OF UWOS

While the NCA was undoubtedly very quick to apply the first UWO against Ms Hajiyeva immediately after the law was enacted, as Table 1 above shows, their impact in advancing investigations has been limited. Since their inception in January 2018, when UWOs officially came into practice, until May 2022, the NCA had only obtained 15 UWOs relating to 4 cases, and from these only one has led to the successful completion of a case, which involved a plea bargain. No other enforcement body has applied for or obtained a UWO.77

While the first of the two UWO cases concerning PEPs withstood a judicial challenge and is still ongoing, the second, NCA v Baker case involving Ms Nazarbayeva, has not. Therefore, many lessons learnt about challenges facing the UK law enforcement pursuing potentially corrupt wealth in the country are drawn mainly based on this one case, as well the fact that there have not been any other attempts to use a UWO following this failed application in 2019.78 While certain proportions of any investigative efforts and cases will always result in failures, the fact that the UWOs have so far not been able to

aid in any case related to corruption abroad is astounding, especially considering the expectations surrounding their adoption.

Based on the analyses conducted by the Global Integrity's Anti-Corruption Evidence Research Programme, the main challenges which arose during the failed NCA v Baker case proceedings are centred on the issues with the way the NCA built the case, the successful narrative created by respondent's lawyers, and the judge's analysis.<sup>79</sup>

#### a) Difficulty in overcoming information and legislative gaps between UK and foreign jurisdictions when validating and accepting evidence

UWOs were adopted to aid in difficult cases, where it might be challenging to obtain information or cooperate with the respondent's home jurisdiction. In practice, the documentation that the PEP defendants table to the court will often be of foreign origin, which might be difficult to validate. Therefore, it is key to scrutinise the evidence presented by the respondents, especially when provided by the foreign institutions of the country of origin. The evidence provided in the NCA v Baker case has been potentially misleading in a number of instances.

While Dariga Nazarbayeva with Nurali Aliyev have been actively building a number of business ventures, their legitimate nature has been repeatedly questioned. So has been the independence of Kazakh institutions. Therefore, the evidence tabled should be highly scrutinised. However, the legislation sees income as "lawfully obtained" if it is obtained lawfully under





the laws of the country from where the income arises. This is highly problematic in the cases of well-connected high-level individuals who might be able to influence domestic authorities in their favour.

This is similar to challenges existing in traditional asset recovery cases and demonstrates that the UWO, despite its promise of overcoming some of the difficulties involved in asset recovery, is not able to fully overcome the need to rely on the country of origin for evidence in these cases.

#### b) Issues with purported compliance

UWO respondents can avoid the presumption that their property was criminally obtained by demonstrating attempted compliance rather than complying fully with the order. While this issue has not yet materialised, it might hinder successful civil recovery proceedings following a UWO. This is because if the respondent complies, or purports to comply with the UWO, the property would not be seen as to be likely acquired by criminal proceeds in civil recovery order (CRO) hearings. This means that the NCA would have to proceed further and prove that the property was acquired by criminal proceeds against a higher evidentiary standard.

#### c) Difficult validation and low threshold for evidentiary standard of respondent's income

The UWO legislation allows for asserting uncorroborated publicly stated information as evidence of known sources of the respondent's income. It is very problematic when such information is seen as legitimate and sufficient on its own. This was also demonstrated in the NCA v Baker case in which media statements about the personal wealth of Ms Nazarbayeva, as well as from a LinkedIn profile of Mr Aliyev were

accepted. Even if these sources could be relied upon for estimating and explaining the respondents' wealth, this should not automatically translate into belief of legitimate wealth.

#### d) Difficulty in identifying and targeting the property's beneficial owner

Because it was not known who the true beneficial owner of the properties in questions, the NCA issued a UWO against a solicitor and wealth manager Andrew Baker who was a president of private foundations that owned two of the targeted properties. However, the true beneficial owners -Dariga Nazarbayeva and Nurali Aliyev came forward and challenged the order. The fact that Andrew Baker did not fully fulfil the target criteria of the legislation by not having effective control of the property nor was himself believed to be involved in serious crime contributed to the failure of this case. While the difficulty in identifying beneficial owners remains, the legislative mismatch has now been partially remedied by reform which allows the targeting of responsible officers as well, such as directors of entities owning property.

#### e) Court proceeding costs and the lack of financial and legal resources by public law enforcement agencies

Persons targeted by UWOs linked to luxury residences often enjoy access to vast financial resources and political connections that they can leverage. At the same time, the legal costs incurred in the case of an unsuccessful UWO can be very high in relation to the budget of law enforcement agencies and can thereby act as a deterrent for this tool to be employed. While the legislature considered that the law enforcement agencies might need to cover these costs, it was estimated that the extra expenses per UWO case would be between GBP 5-10,000.80 However, in reality, after the first failed case, the NCA





received a request to settle GBP 1.5 million in legal fees pursued by the defendants.<sup>81</sup> This shortcoming has recently also been reformed and agencies are no longer required to cover fees after failed cases.

#### 2. 2022 UWO REFORM

Following Russia's invasion to Ukraine, the legislative process underway to reform UWOs was sped up and changes were made to remedy some of the technical shortcomings that emerged during their use. These changes were introduced via the Economic Crime (Transparency and Enforcement) Act on 15th March 2022<sup>82</sup> and were aimed at:

- lifting the requirement for law enforcement agencies to pay the legal costs of failed proceedings;
- allowing the targeting of responsible officers as well as the beneficial owner of a property;
- 3. providing for an alternative test to the income requirement;
- extending the period for which interim freezing orders have effect; and
- mandating annual reports on the use of UWOs in England and Wales.

In response to concern that the potential costs of obtaining UWOs were deterring enforcement authorities, the Act provides that a court cannot make an order requiring the authority to pay costs to the respondent (the other side in the case) unless the public authority has acted unreasonably, dishonestly or improperly.<sup>83</sup> This means that a respondent could only in very rare cases be able to obtain an order for their legal costs to be paid by the enforcement agency, even if they

successfully resist the granting of the UWO. This should make it less risky and in turn more likely for the law enforcement agencies to pursue UWOs.

Moreover, the Act added the possibility of targetting a company director or other responsible officer in addition to the beneficial owner of a property, in cases where real owners are not known due to anonymous company structures.<sup>84</sup> This measure will thus allow law enforcement to gain information from relevant 'responsible officers' in cases where the ultimate owner is not easily identified.

Moreover, the Act amends the grounds on which the court may grant an application for an UWO, which might help in widening its application in challenging cases. In addition to the income test – that the known sources of the person's wealth are insufficient to have obtained the property legally – the court may now also grant an application where it has grounds to suspect that a property has been obtained through unlawful conduct.<sup>85</sup>

The reform also makes it possible to grant a judicial extension of an additional 126 days, following an initial 60-day period for freezing orders. This is to provide extra time for law enforcement to review material in response to a UWO, before an interim freezing order is deemed expired.<sup>86</sup> Additionally, the reform mandates the creation of annual reports on the use of UWOs in England and Wales.<sup>87</sup>

#### 3. IMPACT OF UWOS ON PEPS AND FOREIGN JURISDICTIONS

While the use of UWOs and therefore their impact has been limited, the two UWO cases concerning PEPs certainly brought a lot of media attention onto the targeted individuals and on corruption issues in the countries of origin.





While allegations of undue profit of public officials and ownership of suspiciously lavish foreign real estate is nothing new for the Kazakh public, they create concern and raise questions of legitimacy. Indeed, although the investigations into Kazakh wealth might be on hold in the UK, Kazakh civil society has been actively pushing the United States to apply sanctions against the former president Nazarbayev's inner circle, including his family members.

Further, the case pertaining to Hajiyevs touches on a large set of allegations contained in the Azerbaijani laundromat scheme, where USD 2.9 billion was laundered via anonymous companies registered in the UK. The UK UWO procedure made at least part of the stolen assets from Azerbaijan within reach of the law enforcement. However, whether and when further assets linked to the public officials still in power might be questioned remains to be seen. Azerbaijani civil society has been restricted for years, with a number of international anti-corruption initiatives being forced to close their offices due to security reasons.90 Therefore, domestic action remains unlikely.

#### 4. TRANSPARENCY, ACCOUNTABILITY, AND THE INVOLVEMENT OF CIVIL SOCIETY

When contemplating the impact of UWOs and civil recovery proceedings that follow them, it is important to consider guidance from international treaties and best practice recommendations regarding the whole process. Important considerations that are often overlooked are transparency and accountability from the point of the start of investigations, to proceedings and asset restitutions, including considerations paid to victims of corruption or other crimes.

The Civil Society Principles for Accountable Asset Return<sup>91</sup> can serve as a useful guiding point of such considerations

of broader impact, especially, but not exclusively, when a successful recovery takes place. These principles offer guidance for the accountable and transparent return of public assets stolen through corruption and hidden overseas, including the initial investigative stages of asset recovery.

#### a) Anti-corruption investigations leading to UWOs and the choice of cases

While only a limited amount of information surrounding investigations can be made public, a level of transparency to the extent compatible with rules on confidentiality of investigation is highly desirable. Even though the NCA made several public announcements with regards to ongoing investigations, why only a fraction of 100 cases they were examining was pursued and how cases were chosen is unclear.<sup>92</sup>

With regards to the general criteria that stand behind a decision to pursue a case pertaining a serious crime investigation, the authorities highlighted the prioritisation of cases which have the 'biggest impact on tackling serious and organised economic crime'93 and those that cause 'the most harm' to local communities.94 Even though we are missing similar accounts of criteria used for civil investigations using UWOs linked to PEPs, it can be assumed that impact, as well as the likelihood of a success, were important considerations.

#### b) Information and data availability

The availability of information in the public domain is key to track the success of UWOs, oversee the work of law enforcement and suggest reforms if needed. Until now, most of the information and data regarding the use of UWOs has been published in media stories, anticorruption evaluation reports<sup>95</sup> or on the website of the NCA, since it is the only law enforcement agency that has pursued a UWO so far.<sup>96</sup>





The 2022 UWO reform mandates the Secretary of State to prepare annual reports on the use of UWOs in England and Wales and present them to the parliament, which should improve data availability in this area. The first report will gather data on the 12 months from the publication of the Economic Crime (Transparency and Enforcement) Act 2022 and should be published within the four following months, beginning with the end of the relevant period to which the report relates. The first report should thus be published by July 2023.

Data on confiscations from Scotland are currently not being included in the asset recovery statistical bulletin compiled for England and Wales, Northern Ireland. 8 To date, there does not seem to have been a UWO case in Scotland. However, the Scottish Parliament debated and rejected the imposition of a UWO against Donald Trump over his ownership of two golf courses in Scotland. 99

#### c) The reuse of confiscated funds

In the United Kingdom, assets recovered from confiscations, including those involving UWOs, are utilised according to the Asset Recovery Incentivisation Scheme (ARIS). Under ARIS, 50% of the recovered proceeds are kept by the Home Office and 50% are kept by the law enforcement agencies to fund future asset recovery efforts. This opens discussion around appropriate incentives offered to law enforcement agencies, as well as a need to offer reparations to victim populations.

The objective of the ARIS scheme is to provide law enforcement agencies with incentives to pursue asset recovery, especially pertinent in times of governmental budgetary cuts. <sup>101</sup> In pursuit of making the allocation of funds under ARIS more transparent and effective, a 'top-slice' of approximately GBP 5 million was

set aside and earmarked to fund national asset recovery capabilities, namely the Joint Asset Recovery Database (JARD), the regional Asset Confiscation Enforcement (ACE) Teams, new Crown Prosecution Service resources, as well as additional intelligence resources for the NCA.<sup>102</sup>

Past critiques of the scheme have highlighted the need to distribute additional funding to align financial investigators to Regional Organised Crime Units;103 the benefits of proportional allocation of funds through ARIS to reflect relative contribution of different bodies or on the contrary to pool the assets into a central fund;104 or the need to return some of the assets to the communities affected by criminality.105 Over the past decade, the vast majority of the ARIS budget has been used to fund further asset recovery work. Community projects received about GBP 1-2 million, crime reduction projects between GBP 2-7.6 million, and a miscellaneous projects category has recently risen sharply and now exceeds GBP 12 million annually.106

In cross-border corruption cases, countries are obliged by the United Nations Convention Against Corruption (UNCAC) to return as much as possible in terms of recovered assets - after deducting reasonable expenses - to the 'prior legitimate owners', in this case the victims of corruption in the place of origin.<sup>107</sup> Since there are no recovery cases involving UWOs that could be discussed yet, returns from account freezing orders (AFOs) and criminal investigations can serve as an illustration. According to the Home Office, the UK returns assets in a wider range if cases than those mandated by the Convention. In the year 2020/2021, the UK returned more than GBP 4 million. Negotiations with foreign governments are underway about the terms of returns worth another GBP 1,7 million.108





#### d) The role of civil society

Civil society can and often does aid law enforcement agencies in the process of targeting illicit wealth. While this help is often indirect, it can act in support of each step of the process, from investigations and public awareness, to advising how recovered money should be spent and also conducting own litigation to pursue illgotten gains.<sup>109</sup>

Civil society in the UK followed the new developments around UWOs and tried to highlight suspicious properties to law enforcement. On the day when UWOs came into force and one month before the first UWO application, Transparency International UK highlighted five different UK properties linked to five different owners from across the world with potential links to illicit wealth. 110 While none of these properties has been investigated so far, the investigative research of CSOs and journalists can undoubtedly inform the work of law enforcement agencies. Similarly, the consortium of investigative journalists, the Organized Crime and Corruption Reporting Project (OCCRP), has been mapping the impact of UWOs and undertakes its own investigations into unexplained wealth of foreign PEPs.<sup>111</sup>

Work of civil society organisations (CSOs) has seemed to have influenced the second UWO case and investigation into the property subject of the NCA v Baker case owned by Dariga Nazarbayeva and Nurali Aliyev. A 2015 Global Witness report 'Mystery on Baker Street' identified several properties, predominantly on London's famous Baker Street, worth GBP 147 million, linked to a charged criminal Rakhat Aliyev. Interestingly, even though the NCA did draw on the Global Witness report when building its case, from the three properties against which UWOs were eventually issued only one was mentioned

in the Global Witness report, which also described other suspicious properties. However, the leading judge presiding and ultimately ruling against the case did not view the supporting evidence obtained by the work of civil society favourably. The judge said that the NCA had 'heavily relied' upon the report, echoed by the defendant's spokeswoman which critiqued that 'NCA's entire case theory, and much of its evidence, came from uncorroborated public source material. 114

The advocacy of civil society that led to the creation of a public beneficial ownership register in the UK in 2016 - the Persons with Significant Control (PSC) Register also had a significant impact on corruption investigations in the UK relating to the orders. In 2018, evidence from the PSC register played a key role in enabling the NCA to issue the first UWOs against Ms Hajiyeva. Data in the UK register proved that Zamira Hajiyeva had been a beneficial owner of a company behind a golf course targeted in the UWO proceedings together with a London mansion – even though only for a single day in August 2016. Since the company was incorporated in Guernsey which does not publish beneficial ownership information, without the publicly available UK register of beneficial owners, which can be easily searched, this information would be difficult to come by.115

Whenever possible, the involvement of civil society from the country of origin of the PEP also increases the chances for a particular case to succeed and the recovered funds to be used effectively. In the case of the potential recovery of funds linked to the first UWO case against the Hajiyevs, this could mean consulting local actors on the specific terms of the reuse of assets. However, due to the severely restricted and weakened civic space in Azerbaijan, 116 international backing and oversight mechanisms would likely need to accompany such a return.



# OTHER LEGISLATION TARGETTING UNEXPLAINED WEALTH



# 5. OTHER LEGISLATION TARGETTING UNEXPLAINED WEALTH

A wide variety of legislative arrangements exist across jurisdictions to pursue undue personal enrichment, even without a deliberate cross-border element. Several countries, such as Ireland, have adopted UWO legislation in the past with varying degree of success. Many more countries, however, opted for adopting legislation which directly empowers the court to impose sanctions if they are satisfied that the act of illicit enrichment has taken place, without the need to establish any underlying criminal activity. A number of other countries have also been contemplating adopting UWO legislation recently, notably the British Virgin Islands, 117 and the United States.118 This chapter reviews these so-called illicit enrichment laws, and other tools similar to the UK's UWO.

#### 1 IRISH PROCEEDS OF CRIME ACT

One of the most similar pieces of legislation to the UK's UWOs is Irelands' non-conviction forfeiture civil recovery proceedings arising from the Irish Proceeds of Crime Act 1996 ('the POCA'). 119 Even though it is often referred to as an Unexplained Wealth Order, it does not bear this name and it was created to target predominantly terrorist financing and organised crime, not PEPs. At the time of its adoption in 1996, it led the way in non-conviction-based-forfeiture laws in Europe. 120

Similarly to the UK's UWOs, the Irish model also reverses the burden of proof require the respondent to prove the source of an asset. Also similarly, the Irish POCA evaluates evidence according to the civil

standard, on the balance of probabilities. However, the litigation process is different and relies on 'belief evidence'. During the proceedings judges will scrutinise the case documentation and if they are satisfied that there are reasonable grounds for the belief, the belief of law enforcment is then regarded as evidence that the property is connected to the proceeds of crime.<sup>121</sup>

If these criteria are satisfied, the proceedings go through further 3 stages, each triggering the issuance of a different order. First, the court can make an 'interim order' under the Section 2 of POCA which requires the respondent to prove that the property is not the proceeds of criminal conduct. This evidentiary period can be extended up to seven years via an 'interlocutory order' under the Section 3. Finally, if the court deems a particular property to constitute, directly or indirectly, the proceeds of crime or to be in connection with property that constitutes the proceeds of crime, it can issue a 'disposal order' under the Section 4 to confiscate assets in question to the state.122

This Irish civil recovery model is deemed highly effective and has marked consistently high recovery rates in comparison with other jurisdictions. The Irish Criminal Assets Bureau publishes regular updates on progress under POCA legislation in its annual reports, with information disaggregated according to assets targeted by each of the sections of the law, as well as by the type of asset. In 2020, the value of assets transferred to the state was EUR 1,838,507. Because of the seven-year waiting period for





the conclusion on the confiscation, the money confiscated is linked to cases that commenced years back.<sup>124</sup>

The Irish PoCA legislation has reacted to an issue with the country's organised criminality and has received wide public support. This support, together with a robust and effective set up of the legislation, backed up by effective cooperation of different law enforcement agencies are seen as a reason behind the tool's success, 125 as well as behind withstanding legal challenges. The legislation has proved resilient in the face of several judicial challenges and demonstrated sufficient safeguards to protect respondents' rights, including around the presumption of innocence. 126

Even though often described as a sibling of the UK UWO, the PEP element in the Irish legislation is missing and it is unclear if and how could it be used in such cases. Therefore, the impact of the tools can be directly compared only with regards to tackling organised crime.

#### 2. ILLICIT ENRICHMENT LEGISLATION

Another type of legislation directly attempting to pursue undue personal enrichment are the so-called illicit enrichment laws. The requirement to consider implementing criminal offences for public officials who fail to explain legitimate sources for large increases in their wealth is required from all signatories of the UNCAC - the only legally binding international anti-corruption multilateral treaty. What constitutes the offence of the illicit enrichment varies widely across jurisdictions.

While illicit enrichment is synonymous with other similar terms, such as 'illegal enrichment', 'unjust enrichment', or the acquisition of 'unexplained wealth', there is a difference between UWOs as they have

been established in the UK and what is now understood as illicit enrichment legislation. A review of illicit enrichment laws across the world by the Basel Institute established them as laws that 1) empower a court to impose a criminal or civil sanction if they are satisfied that the act of illicit enrichment has taken place; and 2) do not specify that a separate or underlying criminal activity needs to be proven before the sanction can be imposed.<sup>128</sup>

Because sanctions can be imposed only on the basis that a person has enjoyed an amount of wealth that has not been justified by their legal sources of income, illicit enrichment laws are less strict than non-conviction-based confiscation provisions. They do not require the state to establish that these assets are the product of, or were used in, criminal activity. Similarly to UWOs, rather than the original criminal or corrupt act that might be incredibly difficult to prove, the focus of illicit enrichment laws lies in the demonstrable results of corruption and criminality.

Since criminal illicit enrichment laws can impose fines and administrative sanctions besides prison sentences, a person convicted would be required to return the amount of wealth deemed to have been illicitly acquired. This could be done through the payment of a fine or a fine plus the value of the illicitly acquired wealth. However, illicit enrichment laws are increasingly built into civil, as opposed to criminal, proceedings and therefore the sanctions after often in the form of compensation for the value of the proven enrichment.<sup>130</sup>

#### a) Australia

Similarly to the Irish legislation, Australia established proceedings against unexplained wealth as a reaction to organised crime, especially drug trafficking and related violence. The





first law was adopted by the territory of Western Australia in 2000, four years later than in Ireland. It was followed by the by the Northern Territory and others, and eventually also on the federal (Commonwealth) level via the Proceeds of Crime Act 2002.<sup>131</sup>

Different forms of this legislation across the territories have resulted in varying levels of success. Unlike in Ireland, confiscation rates recorded are rather low, even though they vary across the states. No UWOs seemed to have been imposed at the Commonwealth level yet.<sup>132</sup>

Some reasons behind the less successful use of the legislation have been identified. This includes risk aversion due to the financial costs following failed proceedings; the preferred use of other tools; a lack of competence in financial investigations and non-conviction-based forfeiture; and a lack of cooperation between different agencies.<sup>133</sup>

#### b) Kenya

One of countries that has decided to go a step further in pursuing illegitimate wealth and applying sanctions on the basis that a person has enjoyed wealth that is not justified by a reference to their lawful income is Kenya. Kenya's legislation is established as civil illicit enrichment legislation, although it is often referred to as Unexplained Wealth Order legislation.<sup>134</sup>

Kenya's unexplained wealth legislation was established by the Anti-Corruption and Economic Crimes Act 2003 (ACECA), Section 55 'Forfeiture of unexplained assets'. The proceedings under this provision take place in civil courts, making it possible to target assets for which there is strong evidence of illegally acquired wealth that cannot be matched with a persons' income but where a criminal conviction is not possible.

The legislation faced a thorough scrutiny and initial resistance from the Kenyan courts. The judiciary felt, for example, that that there 'were inconsistencies in the standard of proof when the evidentiary burden shifted from the [law enforcement] to the defendant'. The provisions were also challenged regarding their constitutionality and potential violation of the rights to privacy, property and fair administrative action. Due to these court challenges, it took thirteen years for the first proceeding to be completed in 2020. The sample of the second court of

After these initial setbacks and the increased clarity of the court process itself, the tool has been recognised as beneficial in fighting corruption, and it has been utilised in a number of domestic cases by the Ethics and Anti-Corruption Commission (EACC) since then. From 2020 until the August of 2021, it has seen success in five cases, with approximately USD 6.4 million recovered.<sup>138</sup>

While untested yet, the law does not provide restrictions in pursuing the assets of foreign PEPs. In terms of pursuing assets in other countries, issues of mutual cooperation, obtaining evidence from abroad and issues regarding dual criminality might arise. <sup>139</sup> This is also the case with the Irish and Australian legislation which are not tailored to fight cross-border corruption and which makes the UK UWO a unique, albeit so far underutilised, tool.

#### c) The UK's illicit enrichment law

Even though the legislation varies greatly, interestingly, from 98 countries identified by the Basel Institute as having illicit enrichment laws, only two of them are European countries: Moldova and Lithuania. This might be due to the fact that many European countries already have established, even if underused, non-conviction-based systems or due to concerns of ensuring due process in line





with their legal systems and human rights considerations.<sup>141</sup>

In 2012, the UK government reported that it had not established illicit enrichment as a criminal offence as advised by Article 20 of UNCAC out of concern that it could 'unjustifiably infringe the presumption of innocence' and because it already criminalises public officials for offences such as bribery or money laundering.142 Later in 2016, the UK government committed to explore whether the adoption of an illicit enrichment offence would be effective, and whether it would be compatible with the UK's legal system. In the end, the Criminal Finances Act 2017 did not contain the offence of illicit enrichment but introduced new investigative and freezing powers such as the UWOs and AFOs.

At that time, it was also the view of civil society that this is the preferred path forward, and that introducing a criminal offence of illicit enrichment should be done only after the exhaustion of civil routes.<sup>143</sup>



### CONCLUSIONS



#### **CONCLUSIONS**

Unexplained Wealth Orders have been introduced to the anti-corruption toolkit in the United Kingdom to tackle the slow progress in the fight against money laundering from foreign politically exposed persons. UWOs, as an investigative tool requesting respondents to account for their property, were a reaction to accounts of wealthy public officials enjoying a lifestyle in the UK that is not compatible with their official salary from their domestic jurisdictions.

UWOs have failed to meet high expectations placed upon them and after the initial 4.5 year period after their adoption they remain underutilised. Of the four UWO investigations that have been completed as of May 2022, two concerned PEPs from Eurasia. A first case concerning the Hajiyev couple is still pending, with assets worth millions of dollars remaining frozen. The UWO brought against properties linked to Kazakh nationals in the NCA v Baker case was successfully challenged by the defendant.

The underutilisation of UWOs, together with the failed case, reveal several legislative and procedural shortcomings, some of which have already been addressed by the UWO reform in March 2022. Particularly worrying is the difficulty in overcoming the information and legislative gap between the UK and the foreign jurisdiction when validating and accepting evidence – which the introduction of UWOs aimed to overcome. High court proceeding costs and the lack of financial and legal resources by public law enforcement agencies has also proved to be detrimental for complex financial investigations.

Clearly, the UWOs brought the issue of money laundering via schemes such as the Azerbaijani laundromat to the attention of the public and have had negative reputational consequences on their targets. However, because they still rely on evidence from foreign jurisdictions, their potential to target those who enjoy the support of their home government or where the government is non-responsive, is low. Therefore, the impact on kleptocracy in the home country will also be limited.

Even though the UK's UWOs are often compared to legislation in other countries, such as Ireland's Proceeds of Crime Act and Kenya's Anti-Corruption and Economic Crimes Act, the UWOs focus on the illicit wealth of foreign politically exposed persons makes it a unique piece of legislation. Even though it cannot, therefore, be directly compared to other tools in their efficacy in targeting cross-border corruption, useful lessons from other countries can be drawn on the effective implementation of legislation targeting illicit wealth in general.

As this experience in unexplained wealth from other countries shows, these laws often meet setbacks in the initial periods of their application. It takes time to respond to judicial challenges that might arise due to a perceived incompatibility of the tools with the country's legal system, to establish precedent, or to iron out legislative shortcomings. To overcome the challenges, working with all sectors of society, including civil society, private actors and the judiciary, is crucial. Only collaborative action can establish a common understanding of the goals behind each piece of legislation, as well as galvanising the resources needed to tackle illicit wealth.







#### RECOMMENDATIONS

Based on the impact analysis of cases where UK UWOs have been applied to and drawing on the comparison with other similar legislative instruments targeting illicit wealth in other jurisdictions, there are several recommendations that apply both to the UK and to other jurisdictions considering the adoption of some form of unexplained wealth legislation.

#### 1. Increase transparency in property ownership through legislative requirements to identify beneficial owners registered in foreign jurisdictions

The prevailing secrecy in property ownership structures seriously hinders financial investigations and makes it difficult to ascribe property ownership to concrete individuals, as shown in the NCA v Baker case. Significant improvements in this area could be brought about by the adoption of registers requiring the identification of beneficial owners registered in foreign jurisdictions who own property in the country. In the UK, this should be brought about by the long awaited and called for Registration of Overseas Entities Bill.

#### 2. Increase resources available for financial investigations and litigations

While the adoption of cost capping of failed cases is seen as important, UK experts and professional associations<sup>144</sup> often highlight that UWOs will only be able to bear fruit when they are accompanied by an increase in financial resources available to law enforcement agencies. Cross-border corruption proceedings are complex and require a lot of staff resources and dedicated time to pursue and to match the resources available on the side of the respondent.

The increase in available financial resources could be done directly via topping up the budget of law enforcement, or indirectly,

by opening the proceedings to and joining forces with civil society or the private sector. Private sector lawyers and investigators could be rewarded in civil recovery proceedings on the basis of their success. While this arrangement should be approached with caution, it would enable access to the expertise of the private sector, as well as the capacity to take risk.

#### 3. Support strengths and the resilience of law enforcement agencies

Investigations, court proceedings, and the enforcement of enacted legislation in the face of top lawyers hired by individuals targeted by UWOs is not only incredibly costly but public officials also need to have sufficient capacity and time to commit resources as the case evolves and needs adjustment in light of a new evidence.

Experience from countries, such as Ireland and Australia shows that strong agencies with high skills and low turnover rates, which are encouraged to cooperate among themselves, increase the chances of success.

#### 4. Close information gaps in the judiciary on kleptocratic practices

The NCA vs. Baker case highlighted that UWOs are best at gathering information about suspicious properties in cases where the targeted individual is no longer on good terms with authorities in their home jurisdiction. On the contrary, in cases when the target is enjoying support or is part of a ruling government, documents tabled by the respondent should be thoroughly scrutinised.

To aid investigators and judges, courts could consider using expert witness testimonies to assess the lack of independence of authorities located in kleptocracies or to create a specialised criminal court experienced in analysing





complex financial cases with an overseas element. Furthermore, civil society should be empowered to work alongside the government to raise awareness of the workings of kleptocracy amongst investigators and the judiciary and help to gather information via investigative research.

5. Undertake regular reviews of UWO legislation as necessary

Legislation needs to be regularly reviewed and amended to react to issues that arise during its practical application and that might not have been foreseen initially. In the UK, even after the March 2022 reform of the UWO legislation, there remain some potential weak points, such as the acceptance of the respondent's income information from publicly available sources; reliance on the definition of "lawfully obtained income" under the laws of a foreign jurisdiction; or the possibility of avoiding the presumption that the respondent's property was criminally obtained by merely 'purporting to' but not fully complying.

In this light, legislatively framing the nature of corruption in kleptocracies to aid in the analysis of the provided evidence could be considered.

#### 6. Strengthen legislation against enablers of kleptocracy

Another much needed measure that would help to tackle the issue of unexplained wealth pre-emptively is the adoption of more stringent regulation of the so-called enablers. It is often the accountants, lawyers and other financial brokers who often turn a blind eye or even facilitate the flow of shady foreign assets into the country from overseas.

Corrupt individuals can spend extensively on lawyers to support ways to circumvent UWOs or other legislation. Therefore, it is key to ensure appropriate legislation is in place to make such actions difficult. Inspiration for an effective legislation could come from United States, where an Enablers Bill has been introduced into Congress.



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