

SFO OPERATIONAL HANDBOOK

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"Parallel Proceedings" for the purposes of this chapter are proceedings or investigations that run concurrently with an SFO investigation and/or prosecution.

This section considers:

- the types of parallel proceedings the SFO is likely to encounter;
- factors affecting whether the SFO should seek a stay of parallel proceedings pending the outcome of the SFO's case;
- evidence that may be obtained from parallel proceedings;
- sharing SFO information and use of it with others.

Types of parallel proceedings

Parallel proceedings are likely to fall into one or more of the following categories:

1. Civil or criminal proceedings involving suspects/witnesses [*subject of this chapter*];
2. Domestic investigation/proceedings by another Government department / prosecutor or regulator;
3. Parallel family court proceedings e.g. divorce / ancillary relief / insolvency proceedings.
4. Investigation/ proceedings by a disciplinary body.
5. Overseas investigations/prosecutions [See the "Parallel Proceedings – Overseas" topic]

Issues & Distinctions arising from Parallel Proceedings

By their nature, parallel proceedings may be different from and have competing procedural and evidential requirements relative to the work of the SFO and issues involved. Examples include:

- different investigative powers including evidence obtained under the powers of compulsion (e.g. the Financial Conduct Agency (FCA) or the Insolvency Service).
- as regards regulatory proceedings, there may be a different approach to the proceedings such as a more inquisitorial approach of fact finding as opposed to adversarial in which there are opposing views and assessment of the facts
- disclosure requirements and implications.
- different burdens of proof in criminal and civil trials.
- different outcomes and penalties – such as punitive [custodial sentence / fine] and remedial [prohibition / suspension / damages].

The types of serious fraud and corruption cases dealt with by the SFO, could realistically fall within the remit of a number of different prosecuting, Version OGW 1, Published 6th September 2017 © Crown Copyright, 2017.

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investigative and regulatory agencies who also deal with financial misconduct cases e.g. City of London Police, Crown Prosecution Service (CPS), Competition and Markets Authority (CMA), Department for Business, Energy and Industrial Strategy (BEIS), Her Majesty's Revenue and Customs (HMRC) and the FCA.

It is possible for there to be active concurrent investigations (including criminal) into the same parties and on the basis of the same facts. For example there be a regulatory investigation into a corporate body, whilst at the same time there is a criminal investigation into a connected individual.

Information sharing

Once it is established that there may be parallel proceedings and provided there are no obvious conflicts or case sensitive reasons preventing it or any other legal impediments, there should be strong lines of communications between the various agencies to keep each other updated on the progress of investigations. A formal agreement about information sharing should be entered into.

Where appropriate there should also be sharing of information between organisations with an interest in the case according to the prevailing relevant gateways or legal provisions.

For further information see the "Information Gateways" topic and the CPS guidance.

Anyone involved in information sharing should follow and enforce any existing:

1. **'Memoranda of Understanding', Protocols and Conventions** such as the Prosecutor's Convention between the respective organisations. This is to ensure that all affected organisations consult on cases and the issues arising from concurrent jurisdiction
2. **Cabinet Office and Ministry of Justice guidance and protocols** on sharing of data and information between government departments. This is to ensure that there is control over the wider dissemination of data and information. Guidance and protocols may be found at the following links;
 - [Law Commission: Data Sharing between Public Bodies](#)
 - [MOJ Public Sector data sharing : guidance on the law](#)
 - [ICO Data Sharing Code of Practice](#)

Where possible cooperative approaches should lead to co-ordinated strategies whilst maintaining the independence of the different organisations ability to deal with cases according to its established procedures. Greater consultation and

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sharing of information could benefit each organisation in terms of coordinating who is best placed to conduct the most effective prosecution or civil litigation or whether existing proceedings or investigations should be continued or discontinued in light of steps taken or not taken by other organisations.

Prosecutors should also be aware that whilst Criminal Procedure and Investigations Act 1986 (CPIA) obligations may require disclosure of relevant documents, they may have to inform and if necessary ask permission from the other organisations of how they are proposing to deal with information and documents.

In summary the practical steps to consider are:

1. Ascertain who may have information,
2. Consider the extent of the information
3. Whether any restrictions have been placed by the ultimate provider of the information or its original source in terms of its use and its wider dissemination. e.g. an undertaking.
4. Is there a gateway to share information e.g. section 3 (5) Criminal Justice Act 1987 (CJA87).
5. Consider any prevailing guidance and protocols governing data and information sharing between government departments (e.g. an MOU).

Civil & Criminal Proceedings

Civil litigation may arise out of the same facts as an SFO investigation. It may involve a civil claim against a suspect or a witness or a third party relevant to an SFO investigation or prosecution.

Common examples are:

- Potential victims suing SFO suspects, defendants or witnesses.
- Potential victims suing companies which employ or employed the SFO suspects, defendants or witnesses.
- SFO suspects, defendants or witnesses suing their employers
- SFO suspects or witnesses challenging disciplinary finding by their professional or regulatory bodies
- SFO expert witnesses who have been given evidence or are giving evidence on the same subject matter in other proceedings.
- auditors who are witnesses in the SFO investigation being sued for negligence;
- creditor banks who are witnesses in the SFO investigation claiming the assets of the company as security;
- Proceedings in the commercial court for a money claim, following a refusal by the relevant law enforcement body to consent to transfer funds under money laundering regulations.

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All such claims are capable of affecting the SFO investigation and prosecution.

Ideally, the civil proceedings should either by agreement or independently be stayed, pending the outcome of the conclusion of the criminal proceedings on the basis that to continue might be a potential abuse of process and / or prejudice the criminal investigation. However this is not always possible, and a civil party or tribunal may decline such a request, particularly where an investigation may take some time to complete and civil proceedings have already commenced. In these situations careful consideration will have to be given as to how to mitigate the effects of the civil proceedings on the criminal investigation and any prospective prosecution.

Other Parallel Proceedings

Investigations/proceedings by other Government departments

If a parallel investigation is being undertaken by another Government department it will be necessary to examine the purpose behind both investigations/proceedings. Particular consideration should be given as to whether it is in the public interest for the proceedings to run concurrently or jointly. This decision should be taken in light of the nature and seriousness of the offences, the Prosecutors' Convention 2009 and the Code for Crown Prosecutors (see below). Where possible, it should be determined at the start which proceedings/investigation will lead.

All correspondence between departments and policy decisions should be recorded on the decision log. This includes recording details such as who has instituted proceedings, what if any overlapping interests exist and the subject matter being prosecuted and for what offences.

Disciplinary proceedings or enforcement

Examples of disciplinary proceedings, which are civil in nature that may run parallel to an SFO investigation/prosecution, are:

- proceedings of the Financial Reporting Council ("FRC") [formerly known as Accountancy & Actuarial Discipline Board];
- Enforcement proceedings brought by the FCA. Similar considerations apply to disciplinary proceedings and civil proceedings. An exchange of information may be facilitated by an "information gateway" [See "Information Gateways" topic].

Civil Recovery Orders

Civil recovery proceedings whilst not parallel are alternative to criminal proceedings. However, it may be the case that in a multiple defendant case, some individuals linked to the case may be pursued as a civil recovery alternative.

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If it is in the interests of justice the SFO will use its civil recovery powers under the Proceeds of Crime Act 2002 as a suitable alternative to instituting criminal proceedings. The Attorney General issued guidance for use of these powers on 5 November 2009 [See "Attorney General Guidance"].

See "Civil Recovery" topic for further information or contact the Proceeds of Crime Division.

Evidential and Practical Considerations

Where two agencies are dealing with a case(s) involving similar facts / persons and other common information, they must have regard to:

- whether there are advantages of combining the proceedings into a single set or whether to remain separate
- fairness to the defendant and whether any challenges could be mounted on the basis of having 2 sets of proceedings to the same conduct.
- impact on and interests of witnesses
- financial costs and savings to be factored as a result of either pursuing separate proceedings or a single set of proceedings

Other factors to consider include:

- agreeing and coordinating the mechanisms for preserving and sharing evidence and information
- communications with witnesses and public
- press announcements
- press announcements Strategy and Policy will offer guidance and advice liaising with the Attorney General's Office as and when necessary.

Prosecutors' Convention 2009

The Prosecutors Convention (the "Convention") is an agreement between the Attorney General and prosecution authorities. It is designed to improve relations between the authorities by developing a coordinated approach between the signatories to the convention in relation to decision making, case management strategies and other related matters where there is common interest / subject matter.

The terms of the convention are mandatory so it is essential that it is adhered to fully.

The Convention sets out the responsibilities of prosecutors where the financial conduct under investigation could be dealt with via the criminal route or by a combination of criminal or civil / regulatory sanctions. This is a realistic issue for agencies such as the SFO and the FCA that are equally able to deal with

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financial conduct matters and who may have overlapping interest in the same case.

The Convention also highlights the need for communication and dialogue between the various agencies at the outset of a case which could impact the choice of criminal charges or civil or regulatory sanction. This also ensures that the public interest and confidence is met and factored into informed decision making.

The public interest requires that the prosecutor considers whether a case could be appropriately dealt with out of court and / or disposed of by other non-prosecution means. This will depend on the facts of the case, the seriousness of the matter and the interest of potential victims in respect of possible sanctions. [See "Prosecutors' Convention"].

Disclosure

Arrangements should be in place to cover what reasonable lines of enquiry are necessary to determine, retain and be provided with relevant material and where necessary the processes for disclosing such material where the criminal procedure and legal obligations require such disclosure to take place.

When another government organisation is involved in parallel proceedings, information in the possession of that organisation could be of relevance to the criminal proceedings in which the SFO is engaged. This issue should be considered in any agreement between organisations.

Witness Character

Any adverse findings made against a witness in civil proceedings, may affect the ability of the SFO to rely upon that witness for its criminal proceedings. This should be discussed with Counsel.

Documents which undermine the witness will be primarily disclosable under the CPIA regime. See "Disclosure" topic.

Code for Crown Prosecutors / PACE

As a Prosecutor, the SFO must comply with the Code for Crown Prosecutors and Police and Criminal Evidence Act 1984 (PACE) in order to ensure that charging and other prosecution decisions are fair and consistent with both these criteria to ensure cases are properly and justly disposed of.

Procedural unfairness

There may be SFO cases in which there are regulatory proceedings conducted e.g. by the FCA against the same individual or institution where the allegations arise out of the same factual facts. In particular, the defendants in such scenarios may have the option of applying to stay the civil proceedings pending the completion of the criminal proceedings or discharge criminal proceedings

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conducted by the SFO due to (a) double jeopardy / autrefois acquit or convict and / or (b) procedural unfairness arising from the civil proceedings.

A further dimension to be aware of is European Union law and the law emanating from the European Convention on Human Rights.

Obtaining material from Parallel Proceedings

Civil Proceedings

Material from civil proceedings may be useful even if it cannot be used in evidence. The material may be important for intelligence purposes, or to expose inconsistencies in a defendant's account.

The SFO may want to see what has been pleaded in a civil case, particularly if the civil action is against a suspect or defendant in an SFO investigation.

The SFO is usually able to obtain copies of statements from a case used in civil proceedings (including, amongst other things, the claim form, particulars of claim, defence and reply to defence) from the Court file by making a written request to the Court under the Civil Procedure Rules ("CivPR") 5.4C and 5.4D. In relation to other documents held on the Court file, the SFO will need to make an application, usually outlining the document or class of documents and grounds relied upon. This may also require notice be given to the parties.

Legal Professional Privilege

Material protected by Legal Professional Privilege ("LPP") is immune from production to the SFO. [See the "LPP" topic].

Material may be withheld from the SFO by individuals and organisations involved in civil proceedings on the basis that it is the subject of LPP.

If the SFO requires material from parallel proceedings to which an LPP claim has been made and the SFO wishes to challenge that claim, it can make an application to the Court in which the parallel proceedings took place. This will typically be the High Court but may be the tribunal of a disciplinary or regulatory body. That decision will relate to the ability of the SFO to obtain the material, not to any subsequent admissibility.

Use of Evidence obtained in Parallel Proceedings

Compulsory Powers

Some material used in the civil proceedings may have come into being as a result of the use of compulsory powers by, for example:

- Liquidators / Official Receivers in insolvency proceedings;
- the FCA;
- the CMA

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Following the decision of the ECHR in *Saunders v UK* (1997) 23 EHRR 313 the use, in a criminal trial, of an interview with a suspect which took place under compulsion is prohibited, in particular, against the subject of the compulsory interview in criminal proceedings

The *Saunders* rule will only apply if a party seeks to use evidence obtained under compulsion against the maker or provider in criminal proceedings. If a party seeks to adduce evidence in civil proceedings that has been obtained from a third party under compulsion, it may be allowed into evidence.

This does not prevent the use of material (self-incriminating material or otherwise) obtained using compulsory powers but which existed prior to the requirement to produce it or existed independently of any compulsory questioning / searches.

The SFO will not seek to use transcripts of answers given by a suspect under compulsion as evidence. However a transcript may be used in other ways, to further the investigation or to establish whether a suspect is consistent. For example, the transcript of a suspect's Court examination under section 236 Insolvency Act 1986 may be vital in discovering further assets (for the purpose of tracing money through bank accounts or for confiscation investigations, for example). If the same suspect has been interviewed under section 2 CJA 87, differences between the two accounts could lead to a prosecution by the SFO under section 2(14) CJA 87, in relation to false explanations given during the section 2 interview.

Material from other Regulators/Prosecutors

Material obtained from other investigators or prosecutors may be used by the SFO in evidence, subject to the normal rules of admissibility of evidence in Criminal Proceedings.

Applications made in Civil Proceedings for material held by the SFO

Suspects, defendants, witnesses or third parties may approach the SFO making requests for disclosure of material it holds or make applications in civil proceedings for the SFO to disclose material which it holds. Such requests and applications need to be considered carefully as such requests or applications may advertently or inadvertently prejudice the investigation or lines of enquiry being pursued.

Where such a request is made of the SFO or the SFO is put on notice that an application to the civil tribunal may be pursued in the event of the SFO not complying with the request, consideration should be given that any response may be put before the civil tribunal. Where an application is made before the civil tribunal seeking material from the SFO, consideration should be given to whether it is appropriate to instruct counsel to intervene in the proceedings.

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Where material has been supplied by the SFO to an organisation or an individual under section 3(5) to assist the SFO investigation, consideration has to be given as to what impact this is likely to have on both sets of proceedings and whether any restrictions ought to be set by the SFO on the use of that material. See the "**Information Gateways and MoUs**" topic.

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