

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's response to the Home Office
consultation on the Code of Practice
issued under Section 377 of the
Proceeds of Crime Act 2002

January 2002

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research. It is the largest organisation of its kind in Europe and is democratically run.

1. Liberty welcomes the opportunity to respond to this consultation.
2. As the consultation paper recognises, the Part 8 investigative powers are “fairly intrusive and go beyond what is permissible in present legislation in respect of investigations into the proceeds of crime” and “involve significant interference with privacy of those whose premises are searched or on whom personal information is obtained or personal material or documents are seen and/or seized by an investigator.” Liberty’s principal concern in commenting on the draft Code is to ensure that the Code in its final form properly brings home to all those who have functions under chapter 2 of Part 8 the legal obligation (correctly identified in para 10 of the draft Code) which rests upon them to justify and explain the decision to apply for an order or warrant in any given case.
3. The proper approach to the European Commission’s investigatory powers to regulate anti-competitive activity (Regulation 17) was recently considered by the European Court of Justice in the case of *Roquette Freres SA v. Commission* (C-94/00, Judgment 22nd October 2002). In reaching its conclusions, the Court drew on its own case law as well as the Article 8 ECHR case law and Liberty believes that its analysis of the means by which proper judicial oversight of intrusive investigatory powers can best be achieved is directly relevant to the content of any Code of Practice issued under POCA.
4. The ECJ began by affirming that the obligation to state reasons for any decision to order an investigation by specifying its subject matter and purpose is a fundamental requirement. The requirement is designed not merely to show that, for example, a proposed entry onto premises is justified, but also to enable the person or undertaking affected to understand the scope of their duty to co-operate whilst at the same time safeguarding their rights of defence. In the context of the obligation which rests on the Commission under Regulation 17, to state as precisely as possible what it is looking for and the matters to which the competition investigation must relate, the Court went on to

emphasise that this requirement is intended to protect the rights of defence of the undertakings affected. These rights “would be seriously compromised if the Commission could rely on evidence against undertakings which was obtained during an investigation but was not related to the subject-matter or purpose thereof.”

5. In the context of Regulation 17 investigatory powers, the ECJ concluded that the information which the Commission must supply to the national court in order to ensure, in any given case, that that court is able to undertake its proportionality review, must in principle include:
 - a. A description of the essential features of the suspected infringement of competition law, that is to say, at the very least, an indication of the market thought to be affected and of the nature of the suspected restrictions of competition;
 - b. Explanations concerning the manner in which the undertaking at which the coercive measures are aimed is thought to be involved in the infringement in question;
 - c. Detailed explanations showing that the Commission possesses solid factual information and evidence providing grounds for suspecting such infringement on the part of the undertaking concerned;
 - d. As precise as possible an indication of the evidence sought, of the matters to which the investigation must relate and of the powers conferred on the Community investigators;
 - e. In the event that the assistance of the national authorities is requested by the Commission as a precautionary measure, in order to overcome any opposition on the part of the undertaking concerned, explanations enabling the national court to satisfy itself that, if authorisation for the coercive measures were not granted on precautionary grounds, it would be impossible, or very difficult, to establish the facts amounting to the infringement.

6. Liberty believes that these principles are directly relevant by analogy to the very similarly intrusive investigatory powers under POCA and that, consistently with them, the Code of Practice should spell out in much more detail (in paras 10-18 with subsequent reference back in the sections dealing with each discrete order/warrant) the obligation which rests on all appropriate persons to make a detailed written record of the subject-matter and purpose of the investigation as well as provide, in as much as detail as possible, precisely what information or material is being sought.
7. Such an obligation will bring home to investigators the need to provide individual consideration and justification, *beyond the bare words of the statutory criteria in POCA itself*, in each individual case and enable the court (often in the context of an *ex parte* application) properly to fulfil its duty of effective judicial oversight by ensuring that any order identifies with as much precision as possible what material or information is and is not within its scope. Most importantly, and consistent with the principle of maintaining the rights of the defence, the obligation to prepare a detailed contemporaneous record justifying the nature, purpose and scope of the application for an intrusive order/warrant will ensure that should there be a challenge to the order or warrant, *ex post facto* explanation or reasons will not be advanced by way of justification.
8. Liberty believes that the need for clear and compelling, contemporaneous justification is most obvious in the field of disclosure orders where the potential for abuse of power is at its greatest. The contemplated safeguards against abuse are contained in s.358 (3) and (4) of POCA which require that there must be reasonable grounds for believing that the information which may be provided is “likely to be of substantial value to the investigation” and that “it is in the public interest for the information to be provided, having regard to the benefit likely to accrue to the investigation if the information is obtained.”

9. In the light of these restrictions, Liberty believes that a disclosure order can only have a rational public interest connection to furthering an investigation where the Court is at the very least satisfied that the information sought is directly connected to determining whether someone is in possession of recoverable property and any offence through which that property was or may have been obtained. It would follow that the seeking of a disclosure order so as to obtain general background information on the movement or activities of suspected persons or suspected property would not be sufficient even if of some arguable value to an investigation. Given that, in the light of the decision of the European Court of Human Rights in *Heaney & McGuinness v. Ireland* the government has specifically elected not to introduce compulsory disclosure measures in order to facilitate criminal investigations by the police and other law enforcement agencies, the Courts will have to be particularly astute to ensure that disclosure orders are not being sought to do just that.
10. The fact that Parliament added a general public interest test, above and beyond the substantial value test first proposed, plainly indicates that disclosure orders must be sparingly used and not as fishing expeditions designed to force individuals to give evidence against themselves or others. Liberty considers that part 8 of the Draft Code should be amended to bring home the limitations which apply to the making of any application and the consequent need for a detailed contemporaneous record to be made of the nature, reasons and scope of the application for the disclosure order.

Tim Owen QC

Matrix Chambers

January 2003