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NOTE ON CK'S COMMENTS ON DRAFT ENFORCEMENT AND PROSECUTION POLICY DOCUMENT v.1.0

1. I have been through CK's comments and their suggested revisions and insertions.

2. My second draft version (v.2.0), which accompanies this note, has been drafted in light of my consideration of their comments. I have highlighted in yellow where I have agreed or part agreed with their comments and made revisions for ease of consideration.

3. I deal first with their general overview comments before coming to any revisions.

General Overview

4. In general terms, I have sought to draft a policy which is less mechanistic but more "real world" as we had discussed and agreed with Chris Aujard and others in the conference on 25 April. Some of CK's views and suggested revisions risk a return to the document they drafted. In my view, my draft serves three purposes: (1) in relatively simply language it informs members of the public how POL will conduct itself; (2) it incorporates by express reference the Full Code test and other guidance documents very familiar to prosecutors, which more than adequately provide a structure underlying ordinary prosecutorial decision making; and (3) it incorporates particular provisions customised towards POL's business and prosecution strategy.

5. While I agree with CK about, and have always been alive to, the possibility of judicial review, typically this arises in situations where a prosecuting authority declines to prosecute. It is then that a

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complainant (usually a victim) claims that the prosecuting authority has acted outwith its policy or unreasonably.

6. While POL offences are not victimless crimes, it is POL who is almost always the usual ultimate loser, whereas the customer who for instance has been defrauded will I imagine be compensated by POL. Therefore there is far less scope for judicial review of a non-decision in POL cases. It is for this reason that I am not as concerned as CK appears to be from paras 1 to 6 of their comments document.

7. I disagree with CK that the policy document might found an abuse of the process, as appears suggested in their para 1. Abuse of process is an exceptional jurisdiction and can only lead to a stay if (1) the defendant cannot have a fair trial or (2) it is unfair to try him. The latter situation (unfair to try) might arise e.g. where a promise not to prosecute has been given by the prosecution but the defendant is later prosecuted or where there has been some serious misconduct by the prosecutor as a result of which the defendant has acted to his detriment.

8. It is very hard to see how a rationally made decision to prosecute could ever be the subject of a stay of proceedings based on grounds that it is unfair to try the defendant, and I fail to see how the terms of a policy document could ever form a ground that the defendant could not have a fair trial.

9. Once a decision to prosecute is made, and the case is going through the Crown Court, then the case is not amenable to judicial review. Any conviction might be the subject of appeal but the decision to prosecute based on POL's policy could never realistically form grounds of appeal against conviction. CK's concerns are in my view overstated.

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10. CK are absolutely right at para 5: I deliberately sought to ensure that the document gave POL a wide ambit of discretion for reasons we had discussed. In fact, the wider the ambit of discretion the less opportunity there is for review unless the decision may be shown to be unreasonable or irrational.

11. I have a little difficulty understanding what CK are driving at in para 6 where they comment, "We recognise that the intention here … outside of this policy document ... the subject of challenge". If what they are saying is that a wide discretion means that factors which are not written into policy, and are therefore invisible, may be included in the decision making process, I disagree. If the decision is fully reasoned and recorded, and the record retained, then the decision is entirely open to later analysis and challenge.

12. In paras 7-9, CK critique the interplay between the enforcement options available to POL. I acknowledge that there is bound to be a tension between taking informal action and formal criminal enforcement, and that informality may prejudice the criminal process. But this is not a matter to be written into this policy document. Rather it is for POL to consider how it is to identify cases, which should go down the informal/civil route as against the criminal. What I have done is to write into the policy document in section 4 (which I have further clarified in v.2.0) how the choice of enforcement option is likely to be made.

13. At para 9, CK advocate "… a mechanism for the early identification of potential criminal cases and their consequent withdrawal from the policy's civil enforcement process". For my part, I think it would be quite impossible to cater for every situation and eventuality in this regard. The key is, I suspect, speedy identification of cases to

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undergo criminal process so that a case that ends up in the criminal courts is not prejudiced by an early informal approach that was wrongly decided by the investigators or lawyers.

14. If despite my pessimism POL feels that something can and should be written into the policy document then I would be glad to do so, but I will need the investigation and legal department first to consider and then formulate policy regarding the interplay between criminal and non-criminal action, based on POL's processes, which I can then draft.

15. I note that CK has recently advised on "Material breach of contract approach" which touches on the topic. I do not have this and if it is felt it would assist me in further drafting the document, then I would be grateful for a copy.

16. I do agree that a passage dealing with recording and retention of material is not unhelpful and so have included one at new para 8.5.

17. Para 10. I did include reference to the Attorney General's Guidelines on the acceptance of pleas at para 6.3 of v.1.0, which covers much if not all of the ground CK have suggested I insert as new para 7.6. In light of this, a new para 7.6 is in my view otiose.

Revisions

Section 4

18. I do not see the need for the suggested revision in title but what I have done is to change the section title to "Available Enforcement Options" to provide a little more clarity. I have amended the contents page accordingly.

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19. Paras 4.2 – 4.4. Here I have revised the paragraphs to take account of CK's comment on the question of seriousness. I have accordingly also somewhat amended para 4.2, and have revised the introduction to 4.3 as well as split the original paragraph to provide a revised 4.3 and a new 4.4 in order to separate out those factors that seem to me to go to the issue of seriousness (4.3) and those that do not (4.4) to make better sense of it.

20. In para 4.5 I have replaced the word "inappropriate" with "inadequate" which I agree is a happier term consistent with what CK suggested for para 7.1.1, which I have also revised.

Section 5

21. Para 5.4. I have removed the words "either to act as a deterrent or to punish for criminal misconduct" for simplicity sake.

Section 7

22. Para 7.1.1. See above.

23. I have inserted a new para 7.5 adapted from CK's suggested paragraph because of which I have made some consequential amendments to 7.2.

24. As I have indicated above, I do not think CK's suggested para 7.6 is at all necessary.

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Section 8

25. I agree with CK about this and have added a new para 8.5 adapted from their suggested insertion.

Miscellany

26. In my email of 20 May attaching the first draft I set out some explanations and queried certain things. Before I am asked to conclude the document (if I am) it would be helpful to have confirmation of the matters I queried in the second part of the email.

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