

## **ATTORNEY GENERAL'S GUIDELINES ON PLEA DISCUSSIONS IN CASES OF SERIOUS OR COMPLEX FRAUD**

### **A FOREWORD**

- A1. These Guidelines set out a process by which a prosecutor may discuss an allegation of serious or complex fraud with a person who he or she is prosecuting or expects to prosecute, or with that person's legal representative. They come into force on the 5th day of May 2009 and apply to plea discussions initiated on or after that date.
- A2. The Guidelines will be followed by all prosecutors in England and Wales when conducting plea discussions in cases of serious or complex fraud. For the purposes of the Guidelines, fraud means any financial, fiscal or commercial misconduct or corruption which is contrary to the criminal law. Fraud may be serious or complex if at least two of the following factors are present:
- The amount obtained or intended to be obtained is alleged to exceed £500,000;
  - There is a significant international dimension;
  - The case requires specialised knowledge of financial, commercial, fiscal or regulatory matters such as the operation of markets, banking systems, trusts or tax regimes;
  - The case involves allegations of fraudulent activity against numerous victims;
  - The case involves an allegation of substantial and significant fraud on a public body;
  - The case is likely to be of widespread public concern;
  - The alleged misconduct endangered the economic well-being of the United Kingdom, for example by undermining confidence in financial markets.

Taking account of these matters, it is for the prosecutor to decide whether or not a case is one of fraud, and whether or not it is serious or complex.

- A3. The decision whether a person should be charged with a criminal offence rests with the prosecutor. In selecting the appropriate charge or charges, the prosecutor applies principles set out in the Code for Crown Prosecutors ("the Code"). Charges should reflect the seriousness and extent of the offending, give the court adequate sentencing powers and enable the case to be presented in a clear and simple way. The Code also states that prosecutors should not go ahead with more charges to encourage a defendant to plead guilty to a few; equally, prosecutors should not charge a more serious offence to encourage a defendant to plead to a less serious one.
- A4. Once proceedings are instituted, the accused may plead guilty to all of the charges selected. If the defendant will plead guilty to some, but not all, of the charges or to a different, possibly less serious charge, the Code states that a prosecutor is entitled to accept such pleas if he or she assesses that the court could still pass an adequate sentence. In taking these decisions the prosecutor

also applies the Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise ("the Acceptance of Pleas Guidelines").

- A5. The purpose of plea discussions is to narrow the issues in the case with a view to reaching a just outcome at the earliest possible time, including the possibility of reaching an agreement about acceptable pleas of guilty and preparing a joint submission as to sentence.
- A6. The potential benefits of plea discussions are that:
- Early resolution of the case may reduce the anxiety and uncertainty for victims and witnesses, and provide earlier clarity for accused persons who admit their guilt (subject to the court's power to reject the agreement);
  - The issues in dispute may be narrowed so that even if the case proceeds to trial, it can be managed more efficiently in accordance with Rule 3.2 of the Criminal Procedure Rules 2005. If pleas are agreed, litigation can be kept to a minimum.
- A7. Where plea discussions take place prior to the commencement of proceedings, the charges brought by the prosecutor will reflect those agreed, rather than those that the prosecutor would necessarily have preferred if no agreement had been reached. Also, any criminal investigation may not be complete when these discussions take place. For these reasons it is important that the procedures followed should command public and judicial confidence; that any agreement reached is reasonable, fair and just; that there are safeguards to ensure that defendants are not under improper pressure to make admissions; and that there are proper records of discussions that have taken place.
- A8. The Guidelines are not intended to prevent or discourage existing practices by which prosecutors and prosecuting advocates discuss cases with defence legal representatives after charge, in order to narrow the issues or to agree a basis of plea. Neither do they affect the existing practice of judicial sentence indications at the plea and case management hearing or later in accordance with the guidance in *R v Goodyear (Karl)* [2005] EWCA 888 (see also the Acceptance of Pleas Guidelines). They complement, and do not detract from or replace, the Code and the Acceptance of Pleas Guidelines, or any other relevant guidance such as the Prosecutor's Pledge, the Victim's Charter and the Code of Practice for Victims of Crime.
- A9. Where a plea agreement is reached, it remains entirely a matter for the court to decide how to deal with the case.

## **B GENERAL PRINCIPLES**

- B1. In conducting plea discussions and presenting a plea agreement to the court, the prosecutor must act openly, fairly and in the interests of justice.
- B2. Acting in the interests of justice means ensuring that the plea agreement reflects the seriousness and extent of the offending, gives the court adequate sentencing powers, and enables the court, the public and the victims to have

confidence in the outcome. The prosecutor must consider carefully the impact of a proposed plea or basis of plea on the community and the victim, and on the prospects of successfully prosecuting any other person implicated in the offending. The prosecutor must not agree to a reduced basis of plea which is misleading, untrue or illogical.

- B3. Acting fairly means respecting the rights of the defendant and of any other person who is being or may be prosecuted in relation to the offending. The prosecutor must not put improper pressure on a defendant in the course of plea discussions, for example by exaggerating the strength of the case in order to persuade the defendant to plead guilty, or to plead guilty on a particular basis.
- B4. Acting openly means being transparent with the defendant, the victim and the court. The prosecutor must:
- Ensure that a full and accurate record of the plea discussions is prepared and retained;
  - Ensure that the defendant has sufficient information to enable him or her to play an informed part in the plea discussions;
  - Communicate with the victim before accepting a reduced basis of plea, wherever it is practicable to do so, so that the position can be explained; and
  - Ensure that the plea agreement placed before the court fully and fairly reflects the matters agreed. The prosecutor must not agree additional matters with the defendant which are not recorded in the plea agreement and made known to the court.

## **C. INITIATING PLEA DISCUSSIONS**

*When and with whom discussions should be initiated and conducted*

- C1. Where he or she believes it advantageous to do so, the prosecutor may initiate plea discussions with any person who is being prosecuted or investigated with a view to prosecution in connection with a serious or complex fraud, and who is legally represented. The prosecutor will not initiate plea discussions with a defendant who is not legally represented. If the prosecutor receives an approach from such a defendant, he or she may enter into discussions if satisfied that it is appropriate to do so.
- C2. Where proceedings have not yet been instituted, the prosecutor should not initiate plea discussions until he or she and the investigating officer are satisfied that the suspect's criminality is known. This will not usually be the case until after the suspect has been interviewed under caution.
- C3. The prosecutor should be alert to any attempt by the defendant to use plea discussions as a means of delaying the investigation or prosecution, and should not initiate or continue discussions where the defendant's commitment to the process is in doubt. The prosecutor should ensure that the position is preserved during plea discussions by, for example, restraining assets in anticipation of the making of a confiscation order. Where a defendant declines

to take part in plea discussions, the prosecutor should not make a second approach unless there is a material change in circumstances.

*Invitation letter*

- C4. In order to initiate the plea discussions, the prosecutor will send the defendant's representatives a letter which:
- Asks whether the defence wish to enter into discussions in accordance with these Guidelines; and
  - Sets a deadline for a response from the defence.

*Terms and conditions letter*

- C5. Where the defence agree to engage in plea discussions, the prosecutor should send them a letter setting out the way in which the discussions will be conducted. This letter should deal with:
- The confidentiality of information provided by the prosecutor and defendant in the course of the plea discussions;
  - The use which may be made by the prosecutor of information provided by the defendant; and
  - The practical means by which the discussions will be conducted.

*Confidentiality and use of information*

- C6. In relation to confidentiality, the prosecutor will indicate that he or she intends to provide an undertaking to the effect that the fact that the defendant has taken part in the plea discussions, and any information provided by the defence in the course of the plea discussions will be treated as confidential and will not be disclosed to any other party other than for the purposes of the plea discussions and plea agreement (applying these Guidelines), or as required by law. The undertaking will make it clear that the law in relation to the disclosure of unused material may require the prosecutor to provide information about the plea discussions to another defendant in criminal proceedings.
- C7. The prosecutor will require the defendant's legal representative to provide an undertaking to the effect that information provided by the prosecutor in the course of the plea discussions will be treated as confidential and will not be disclosed to any other party, other than for the purposes of the plea discussion and plea agreement or as required by law.
- C8. In relation to the use of information, the prosecutor will indicate that he or she intends to undertake not to rely upon the fact that the defendant has taken part in the plea discussions, or any information provided by the defendant in the course of the discussions, as evidence in any prosecution of that defendant for the offences under investigation, should the discussions fail. However, this undertaking will make it clear that the prosecutor is not prevented from:
- Relying upon a concluded and signed plea agreement as confession

- evidence or as admissions;
  - Relying upon any evidence obtained from enquiries made as a result of the provision of information by the defendant;
  - Relying upon information provided by the defendant as evidence against him or her in any prosecution for an offence other than the fraud which is the subject of the plea discussion and any offence which is consequent upon it, such as money laundering; and
  - Relying upon information provided by the defendant in a prosecution of any other person for any offence (so far as the rules of evidence allow).
- C9. In exceptional circumstances the prosecutor may agree to different terms regarding the confidentiality and use of information. However, the prosecutor must not surrender the ability to rely upon a concluded and signed plea agreement as evidence against the defendant. The prosecutor may reserve the right to bring other charges (additional to those to which the defendant has indicated a willingness to plead guilty) in specific circumstances, for example if substantial new information comes to light at a later stage, the plea agreement is rejected by the court, or the defendant fails to honour the agreement.
- C10. Until the issues of confidentiality and use of information have been agreed to the satisfaction of both parties, and the agreement reflected in signed undertakings, the prosecutor must not continue with the substantive plea discussions.

## **D. CONDUCTING PLEA DISCUSSIONS**

### *Statement of case*

- D1. Where plea discussions take place prior to proceedings being instituted, the prosecutor will provide a statement of case to the defence. This is a written summary of the nature of the allegation against the suspect and the evidence which has been obtained, or is expected to be obtained, to support it. The statement of case should include a list of the proposed charges. Material in support of the statement of case may also be provided, whether or not in the form of admissible evidence. However, the prosecutor is not obliged to reveal to the suspect all of the information or evidence supporting his case, provided that this does not mislead the suspect to his or her prejudice.
- D2. Where plea discussions are initiated after proceedings have been commenced, but before the prosecutor has provided the defence with a case summary or opening note, the prosecutor may provide a statement of case to assist the defendant in understanding the evidence and identifying the issues.

### *Unused material*

- D3. These Guidelines do not affect the prosecutor's existing duties in relation to the disclosure of unused material. Where plea discussions take place prior to the institution of proceedings, the prosecutor should ensure that the suspect is not misled as to the strength of the prosecution case. It will not usually be necessary to provide copies of unused material in order to do this.

### *Conducting and recording the discussions*

- D4. Having provided the defence with the statement of case and supporting material, the parties will then be in a position to conduct the plea discussion proper. Whether this is done by correspondence, by face-to-face meetings or by a combination of the two is a matter for the parties to decide in the individual case.
- D5. It is essential that a full written record is kept of every key action and event in the discussion process, including details of every offer or concession made by each party, and the reasons for every decision taken by the prosecutor. Meetings between the parties should be minuted and the minutes agreed and signed. Particular care should be taken where the defendant is not legally represented. The prosecutor should only meet with a defendant who is not legally represented if the defendant agrees to the meeting being recorded, or to the presence of an independent third party.

### *Queen's Evidence*

- D6. If the defendant offers at any stage to provide information, or to give evidence about the criminal activities of others, any such offer will be dealt with in accordance with sections 71 to 75 of the Serious Organised Crime and Police Act 2005 ("SOCPA"), the judgment of the Court of Appeal in *R v P, R v Blackburn* [2007] EWCA Crim 2290 and the guidance agreed and issued by the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions.

### *Discussion of pleas*

- D7. In deciding whether or not to accept an offer by the defendant to plead guilty, the prosecutor will follow sections 7 and 10 of the Code relating to the selection of charges and the acceptance of guilty pleas. The prosecutor should ensure that:
- The charges reflect the seriousness and extent of the offending;
  - They give the court adequate powers to sentence and impose appropriate post-conviction orders;
  - They enable the case to be presented in a clear and simple way (bearing in mind that many cases of fraud are necessarily complex);
  - The basis of plea enables the court to pass a sentence that matches the seriousness of the offending, particularly if there are aggravating features;
  - The interests of the victim, and where possible any views expressed by the victim, are taken into account when deciding whether it is in the public interest to accept the plea; and
  - The investigating officer is fully appraised of developments in the plea discussions and his or her views are taken into account.
- D8. In reaching an agreement on pleas, the parties should resolve any factual issues necessary to allow the court to sentence the defendant on a clear, fair

and accurate basis. Before agreeing to proposed pleas, the prosecutor should satisfy him or herself that the Full Code Test as set out in the Code will be made out in respect of each charge. In considering whether the evidential stage of the test will be met, the prosecutor should assume that the offender will sign a plea agreement amounting to an admission to the charge.

#### *Discussion of sentence*

- D9. Where agreement is reached as to pleas, the parties should discuss the appropriate sentence with a view to presenting a joint written submission to the court. This document should list the aggravating and mitigating features arising from the agreed facts, set out any personal mitigation available to the defendant, and refer to any relevant sentencing guidelines or authorities. In the light of all of these factors, it should make submissions as to the applicable sentencing range in the relevant guideline. The prosecutor must ensure that the submissions are realistic, taking full account of all relevant material and considerations.
- D10. The prosecutor should bear in mind all of the powers of the court, and seek to include in the joint submission any relevant ancillary orders. It is particularly desirable that measures should be included that achieve redress for victims (such as compensation orders) and protection for the public (such as directors' disqualification orders, serious crime prevention orders or financial reporting orders).
- D11. Due regard should be had to the court's asset recovery powers and the desirability of using these powers both as a deterrent to others and as a means of preventing the defendant from benefiting from the proceeds of crime or funding future offending. The Proceeds of Crime Act 2002 requires the Crown Court to proceed to the making of a confiscation order against a convicted defendant who has benefited from his criminal conduct where the prosecutor asks the court to do so, or the court believes that it is appropriate to do so. Fraud is an acquisitive crime, and the expectation in a fraud case should be that a confiscation order will be sought by the prosecutor reflecting the full benefit to the defendant. However, in doing so it is open to the prosecutor to take a realistic view of the likely approach of the court to the determination of any points in dispute (such as the interest of a third party in any property).
- D12. In the course of the plea discussions the prosecutor must make it clear to the defence that the joint submission as to sentence (including confiscation) is not binding on the court.

#### *Liaison with another prosecutor or regulator*

- D13. The prosecutor may become aware that another prosecuting authority or regulatory body (either in England and Wales or elsewhere) has an interest in the defendant. The prosecutor should liaise with the other agency, in accordance with the Prosecutors' Convention and any other relevant agreement or guidance. The other agency may wish to take part in the plea discussions, or they may authorise the prosecutor to discuss with the defendant the matters which they are interested in, with a view to resolving all matters in

one plea agreement. The prosecutor should warn the defendant that a plea agreement will not bind any other agency which is not a party to it.

## **E. THE WRITTEN PLEA AGREEMENT**

- E1. All matters agreed between the prosecutor and the defence must be reduced to writing as a plea agreement and signed by both parties. The plea agreement will include:
- A list of the charges;
  - A statement of the facts; and
  - A declaration, signed by the defendant personally, to the effect that he or she accepts the stated facts and admits he or she is guilty of the agreed charges.
- E2. Any agreement under the SOCPA regarding the giving of assistance to the prosecutor by the defendant should be in a separate document accompanying the plea agreement.
- E3. Once a plea agreement is signed in a case where proceedings have not yet been commenced, the prosecutor will review the case in accordance with the Code and, assuming the evidential stage of the Full Code Test is satisfied on the basis of the signed plea agreement and the other available evidence, will arrange for proceedings to be instituted by summons or charge.
- E4. In advance of the defendant's first appearance in the Crown Court, the prosecutor should send the court sufficient material to allow the judge to understand the facts of the case and the history of the plea discussions, to assess whether the plea agreement is fair and in the interests of justice, and to decide the appropriate sentence. This will include:
- The signed plea agreement;
  - A joint submission as to sentence and sentencing considerations;
  - Any relevant sentencing guidelines or authorities;
  - All of the material provided by the prosecution to the defendant in the course of the plea discussions;
  - Any material provided by the defendant to the prosecution, such as documents relating to personal mitigation; and
  - The minutes of any meetings between the parties and any correspondence generated in the plea discussions.
- E5. It will then be for the court to decide how to deal with the plea agreement. In particular, the court retains an absolute discretion as to whether or not it sentences in accordance with the joint submission from the parties.

## **F. FAILURE OF PLEA DISCUSSIONS**

- F1. There are several circumstances in which plea discussions may result in an outcome other than the defendant pleading guilty in accordance with a plea agreement. The prosecutor or the defendant may break off the discussions. They may be unable to reach an agreement. They may reach an agreement, but intervening events may lead the prosecutor to decide that proceedings should not be instituted. Proceedings may be instituted but the court may reject the plea agreement. The defendant may decline to plead guilty in accordance with the plea agreement, either as a result of a sentence indication given under the procedure set out in R v Goodyear, or for some other reason.
- F2. If any of these situations arises, the prosecutor may wish for further enquiries to be made with a view to bringing or completing proceedings against the defendant. If proceedings have already been instituted, the prosecutor will use the appropriate means to delay them – either discontinuing under section 23 or 23A of the Prosecution of Offences Act 1985 or (if the indictment has already been preferred) applying for an adjournment or stay of the proceedings. The prosecutor and the defendant's representatives will continue to be bound by the preliminary undertakings made in relation to the confidentiality and use of information provided in the course of the plea discussions.
- F3. Where plea discussions have broken down for any reason, it will be rare that the prosecutor will wish to re-open them, but he or she may do so if there is a material change in circumstances which warrants it.

**HER MAJESTY'S ATTORNEY GENERAL**

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