

# PLEA BARGAIN MANUAL



Presidential Advisory Committee Against Corruption



**Presidential Advisory Committee  
Against Corruption**

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## **Introduction**

The Presidential Advisory Committee on Corruption has developed these guidelines. It is to guide the decision making process when considering alternative means of disposing of criminal allegations and in plea-bargaining.

It is not every criminal case that should be prosecuted to finality through a trial if it can be resolved by alternative means. What is important is that justice is done in each case and as far as is possible, all stakeholders are dealt with fairly and equitably.

These Guidelines therefore set out the procedure by which a prosecutor, with a view to agreeing to an alternative means of disposing of an allegation of crime, may conduct discussions with a suspect, defendant or their legal representative. It is also to serve as a guide to all presiding judges who are presented with plea bargain agreements.

A decision that is taken in accordance with set down guidelines creates confidence in the decision making process by the public to whom the prosecution agency is accountable.

## **Statement of Purpose**

The aim of plea-bargaining or plea negotiations is usually for the defendant to enter into an arrangement or plead guilty in exchange for concessions by the prosecution. This may take the form of the offer of a plea by the defendant to some but not all the charges, a different offence or less serious charge or to one of multiple charges. The purpose of these Guidelines is to ensure that when decisions are to be considered or made about alternative means of disposing a case, those decisions will have integrity, accountability, credibility and transparency embedded in them.

These Guidelines set out the procedure to be followed when considering or making a decision to dispose of a criminal allegation other than:

- a. a trial, or
- b. the original charges filed or contemplated

## Abbreviations

ACA	-	Anti-Corruption Agencies
ACJA	-	Administration of Criminal Justice Act 2015
AGF	-	Attorney General of the Federation
ASSP	-	Advocate Screening and Selection Panel
ATRS	-	Audit Trail Recording System
CAW	-	Case Analysis Worksheet
CCMM	-	Corruption Case Management Manual
CEO	-	Chief Executive Officer
CEW	-	Cross-Examination Worksheet
CMP	-	Case Management Panel
ECW	-	Examination-in-Chief Worksheet
FFS	-	Fixed Fee Scheme
GFS	-	Graduated Fee Scheme
PB	-	Plea Bargain
GU	-	Gatekeeping unit
HOD	-	Head of Department or Directorate
HPCC	-	High Profile Corruption Case
NFA	-	No further Action
NPF	-	Nigerian Police Force
PCC	-	Public Complaints Commission
PST	-	Prosecution Strategy Template
RPOC	-	Realistic Prospect of a Conviction
WVCU	-	Witness and Victim Care Unit

## Definition section

**"ACA"** – Anti-Corruption Agencies, including EFCC, ICPC, CCB, NAPTIP, NDLEA;

**"Case Lawyer"** – The in-house prosecutor who leads the High Profile Corruption Case Team. The Case lawyer has the conduct of the case;

**"CEO"** – Chief Executive Officer – means the person with the executive power of the agency. It includes the executive chairman or executive secretary;

**"Charged with a criminal offence"** means a charge has been filed at court:

**"Complaint"** – means any allegation of a crime, breach or wrongdoing. Such allegation can be made in any form and it includes a written or narrated allegation or petition;

**"Gatekeeping Unit"** – the unit where petitions are sifted;

**"High Profile Corruption Case"** – where the value involves cash or assets of a significant value and one or more of the following are present:

- a. any of the suspects is a politician, a public officer or judicial officer;
- b. a person elected or nominated to a public office or position;
- c. where the subject matter of the case involves government property or funds;
- d. any allegation involving fraud against any government or corruption of its officials or involves the abuse of office;
- e. the subject matter has significant international dimensions;
- f. involves specialized knowledge of financial, commercial, fiscal or regulatory matters;
- g. involves complex financial transactions that may involve cross border or multi-jurisdictional transactions or property movement;
- h. likely to be of widespread public concern; or
- i. alleged misconduct amounting to economic sabotage.

**"Petition"** – means any allegation of a crime, breach of a law or other wrongdoing. Such allegation can be made in any format and it includes a written or narrated allegation or complaint;

**"Petitioner"** – means a person or persons who has made an allegation of a crime, breach or wrongdoing against another. It includes any aggrieved person or victim of crime who has presented or communicated a complaint or allegation that has come to the attention of a prosecuting agency;

**"Petitions Registry"** – where all petitions are received and recorded before been automatically forwarded to the Gatekeeping Unit for sifting;

**"Plea Bargain"** – means the process whereby the defendant himself or through his counsel and the prosecutor in a criminal case enter negotiations to agree a mutually acceptable way of disposing a case;

**“Prosecuting agency”** means any agency or organization with statutory power to file criminal charges at court and prosecute criminal matters with or without the power to investigate. Prosecuting agencies include: the Federal Ministry of Justice – Department of Public Prosecutions, EFCC, ICPC, CCB, NAPTIP, NDLEA

**“Prosecutor”** - means the lawyer who is working for and/or representing the prosecution agency. It includes the External Advocate to whom a case has been outsourced;

**“Statement of Case”** - means a written summary of the nature of the allegation against the suspect/defendant and evidence, which has been obtained to support it. The statement of case will include a list of the proposed charges;

**“Trial Advocate”** means the prosecutor appearing in court and presenting the case. It includes the in-house prosecutors and external advocates to whom the case has been outsourced;

**“Unused material”** – items that are discovered and/or retrieved in the course of the investigation but are not used as evidential material.

### **Guiding Principles for any Plea Bargain**

1. When considering plea-bargaining or making decisions to dispose of a case by alternative means, the prosecutor or decision maker must be guided by some core principles:

- a. Transparency – both the decision and the decision making process must be open, unambiguous and clear.
- b. Accountability – decision makers must take responsibility for their decisions and be able to explain them.
- c. Integrity – decisions must be evidence based, objective, commensurate and reflective of the criminality and gravamen.
- d. Consistency – the same set of facts are most likely to generate the same decisions every time.
- e. Predictability – no arbitrariness, every decision-making process must follow the same procedure.
- f. Credibility – trustworthy decision-making process that delivers confidence. Decisions are based on an objective analysis of the facts and special circumstances.

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.

2. In conducting negotiations, deciding on the alternative means of disposal and presenting a plea agreement to the court, the prosecutor must act openly, fairly and in the interest of justice.

a. Acting in the **interest of justice** means ensuring that whatever is agreed 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 means of disposal or 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.

b. 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 shall not put improper pressure on a defendant in the course of negotiations or 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.

c. Acting **openly** means being transparent with the defendant, the victim and the court. The prosecutor must:

I. Ensure that a full and accurate record of the negotiations or plea discussions is prepared and retained;

II. Ensure that the defendant or his legal representative has sufficient information to enable him to play an informed part in the plea discussions;

III. Communicate with the victim(s) or complainant-community before deciding on the alternative means of disposal or accepting a reduced basis of plea, wherever it is practicable to do so, so that the position can be explained; and

IV. Ensure that the charge, basis of plea, plea agreement or summary of facts placed before the court fully and fairly reflects the matters agreed. The prosecutor shall not agree additional matters with the defendant which are not recorded in the plea agreement and made known to the court.

3. Any alternative method of disposal or charges agreed or guilty plea accepted must enable the case to be presented in a clear and simple way.

4. Prosecutors shall not go ahead with more charges to encourage a defendant to plead guilty to a few.

5. Consideration of a Plea Bargain or alternative method of disposal must be premised on the suspect or defendant forfeiting all the proceeds of his crime and/or all property that he cannot reasonably account for as acquired by legitimate means. Hence all proceeds of crime must be traced before agreement.



6. Prosecutors shall only enter Plea Bargain or alternative method of disposal agreements in the public interest and for delivering justice in the particular circumstances of each case; and never for the purpose of lessening punitive measures on the accused. Hence care must be taken not to cause the appearance of an abuse of the legal process.
7. Prosecutors shall ensure that the available evidence can sustain charges selected in the agreement.

### **Framework for Plea Bargain**

1. Inherent Prosecutorial Discretion;
2. Charge Bargain;
3. Plea Discussions and Agreements – S.270 ACJA;
4. Fact Bargain; and
5. Offences taken into consideration - section 313 ACJ Act.

### **General**

When negotiating and agreeing an alternative means of disposal or plea-bargaining, the prosecutor or decision maker shall address his mind to the CCMM relating to the selection of charges and these Guidelines in relation to the acceptance of guilty pleas. Any decision taken must be justified in writing, substantiated by evidence and be based on the suspect making full admissions to the allegation.

The prosecutor or other decision maker shall ensure that all decisions:

- allow justice to be delivered to all relevant stakeholders without bringing justice and the ACA into disrepute; and
- take into account the views of the lead investigating officer, after ensuring that he is fully appraised of developments and the circumstances that gave rise to considering alternative means of disposal.

### **Procedure for the Administration of Plea Bargain**

#### **1. Inherent Prosecutorial Discretion**

1.1 Subject to the provisions of the 1999 Constitution of the Federal Republic of Nigeria as amended, in relation to a fair trial and the timing of a trial, and the Administration of Criminal Justice Act 2015 where applicable, a prosecutor shall, have discretion over:

- a. how to proceed after investigation has been completed;
- b. whether to charge a criminal offence or not;
- c. who to charge;
- d. what to charge;
- e. when to charge; and

- f. the array of alternative methods of disposing a case to choose from.
- 1.2 At the close of any investigation into a case, a prosecutor shall determine whether in the light of the investigation and available evidence:
  - a. there is reliable admissible evidence to provide a realistic prospect of a conviction for the proposed offence; and
  - b. the offence or the circumstances of its commission is of such a nature that a prosecution is required in the public interest.
- 1.3 All prosecutorial decisions shall be:
  - a. in writing – setting out the reasons for the decision;
  - b. signed by the decision maker; and
  - c. based on evidence and the public interest.
- 1.4 Investigators shall immediately alert prosecutors to the fact that a suspect wants to fully admit his role in a criminal enterprise and wants to assist the prosecution.
- 1.5 The existence of overwhelming evidence that indicates a realistic prospect of a conviction, shall not remove the discretion of the prosecutor not to charge or dispose of the case by alternative means based on public interest grounds.
- 1.6 Before a charging decision has been made, a prosecutor shall in consultation with the investigation team have the discretion, to determine whether it is in the public interest to dispose of the case by alternative means other than by a trial.
- 1.7 Any determination under paragraph 1.6 shall be subject to the approval of the Director or Head of Legal.
- 1.8 In a HPCC, only the CMP shall have the discretion to propose or review any proposal for an alternative method of disposing of the case at the investigation stage or before a suspect has been formally charged [for instance under section 14(2) EFCC Act 2004].
- 1.9 Any proposal to dispose of a HPCC by alternative means before the suspect has been formally charged, must be viewed and authorized by the CEO.
- 1.10 When a HPCC is disposed of or an agreement is reached to dispose of it by alternative means other than by a charge and/or trial, a copy of the agreement shall be forwarded to the AGF for his information.
- 1.11 Where the ACA proposes to dispose of a HPCC other than by a charge and/or trial, solely on Public Interest grounds, the CEO may refer the matter to the AGF for his views.

## 2. Charge Bargain

Subject to complying with the Guiding Principles, prosecutors can agree with the defendant or his advocate, to offer or accept fewer or lesser charges than those originally charged or filed.

- 2.1 After charges have been drafted or filed, a prosecutor shall have the discretion to consider any request from the defendant or his legal representative to review the charges.
- 2.2 Where a defendant or his legal representative offer to plead guilty to fewer charges or to a lesser charge than those originally charged, the prosecutor shall ensure that such an offer is reduced to writing and signed by the defendant and his legal representative.
- 2.3 The prosecutor shall prepare a written review of the offer in paragraph 2.2 above, stating how it complies with the Guiding Principles and shall refer both the offer from the defendant and his written review to the Director or Head of Legal for approval.
- 2.4 The approval in paragraph 2.3 above shall be in writing and signed by the Director or Head of Legal.
- 2.5 A prosecutor shall neither accept nor agree to accept guilty pleas to fewer charges or to a lesser charge than originally filed without the written and signed approval of the Director or Head of Legal
- 2.6 In high Profile Corruption Cases:
  - a. only the CMP shall have the discretion to consider any offer by the defendant to plead guilty to fewer charges or to a lesser charge;
  - b. any offer to plead guilty to any charge other than the charges filed before the court shall be referred to the CMP;
  - c. the offer from the defendant or his legal representative shall be reduced to writing and signed by the defendant;
  - d. where the CMP considers that the offer complies with the Guiding Principles, and proposes to accept it, it shall refer the defendant's offer and the CMP's written review on it to the CEO for his views;
  - e. no offer from a defendant or his legal representative to accept fewer or lesser charges than those originally filed shall be accepted without the written views of the CEO;
  - f. where an agreement is reached to accept a guilty plea to fewer or lesser charges, a copy of the agreement will be forwarded to the AGF for his information.
- 2.7 Where approval has been given to accept guilty pleas to fewer or lesser charges, the prosecutor or trial advocate shall ensure that the defendant first enters unequivocal guilty pleas to them in

court and the court accepts them before withdrawing the other or remaining charges.

### **3. Plea discussions and Agreement**

Section 270 of the ACJA allows the prosecutor to receive and consider a plea bargain from a defendant directly or indirectly or offer a plea bargain to a defendant. 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.

This section sets out the process by which a prosecutor, with a view to a plea bargain, may discuss an allegation of a crime with a person who has been charged with a criminal offence, or with that person's legal representative.

- 3.1 A prosecutor shall only entertain or initiate plea discussions:
  - a. after a thorough investigation and interview of the defendant; and
  - b. after the defendant has made admissions about his involvement in the crime and;
  - c. after the defendant has indicated a clear and confirmed willingness to return all proceeds of crime and/or make restitution to the victim of his crime and/or assist the prosecution; and
  - d. where the defendant has been formally charged and/or a charge has been filed in court [s.270(4) ACJA]; and
  - e. after the prosecution has reviewed its evidence to determine if there is sufficient evidence for a realistic prospect of a conviction or not.
- 3.2 The prosecutor shall make the decision whether to initiate, entertain or continue with plea discussions.
- 3.3 In a HPCC, the CMP shall make the decision whether to initiate, entertain or continue with plea discussions.
- 3.4 Where a plea agreement is reached, it remains entirely a matter for the court to decide how to deal with the case.

### **INITIATING PLEA DISCUSSIONS**

*When and With Whom Discussions Should be Initiated and Conducted*

- 3.5 Where a prosecutor believes it to be advantageous to do so, he may initiate plea discussions with any person who has been charged with a criminal offence.

- 3.6 "Advantageous" in paragraph 3.5 includes Public Interest, interest of justice and the circumstances where gaps in the evidence have been identified.
- 3.7 In a HPCC, only the CMP may initiate or authorise plea discussions with a person who has been charged.
- 3.8 A prosecutor shall not initiate plea discussions with a person who is not legally represented.
- 3.9 If a prosecutor receives an approach or a request for plea discussions from an unrepresented defendant, he may enter into discussions if satisfied that it is appropriate to do so.
- 3.10 The judge or magistrate shall not be involved in any plea discussions – (section 270(8) ACJA).
- 3.11 A prosecutor shall not initiate or entertain plea discussions where a person has not yet been charged with a criminal offence or a charge has not been filed before a court.
- 3.12 The prosecutor must be alert to any attempt by the defendant to use plea discussions as a means of delaying the investigation or prosecution, and shall not initiate or continue discussions where the defendant's commitment to the process is in doubt.
- 3.13 The prosecutor shall ensure that the prosecution's position is preserved during plea discussions, for example, freezing, seizing and restraining assets in anticipation of the making of a confiscation order.
- 3.14 Where a defendant declines to take part in plea discussions, the prosecutor shall not make a second approach.

*Invitation Letter*

- 3.15 In order to initiate the plea discussions, either the prosecutor shall send the defendant's legal representative a letter, or the defendant or his representative shall send the prosecution a letter which:
- a. asks whether the other party wishes to enter into discussions in accordance with these Guidelines; and
  - b. sets a deadline of **five days** for a response from the other party.

*Terms and Conditions Letter*

3.16 Where the defendant agrees to engage in plea discussions, the prosecutor shall send him or his representative a letter setting out:

- the confidentiality of information provided by the prosecutor and defendant in the course of the plea discussions;
- the way in which the discussions will be conducted;
- 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; and
- that the time frame for reaching any agreement is limited to 72 hours and no more than 3 days.

*Confidentiality and Use of Information*

3.17 The prosecutor shall indicate that he 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, or as required by law.

3.18 The prosecutor shall 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 shall 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. A prosecutor shall however not disclose any information or material that could jeopardise any subsequent prosecution.

3.19 The prosecutor shall ensure that the undertaking makes it clear that the prosecution is not prevented from:

- a. relying upon any evidence obtained from enquiries made as a result of the provision of information by the defendant; or
- b. bringing other charges against other persons based on information disclosed by the defendant.

3.20 In exceptional circumstances the prosecutor may agree to different terms regarding the confidentiality and use of information. 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.

## CONDUCTING PLEA DISCUSSIONS

### *Statement of Case*

- 3.21 Where plea discussions are initiated after the defendant has been charged, but before the prosecutor has provided the defendant with proofs of evidence, the prosecutor shall provide a **Statement of Case** to assist the defendant in understanding the case. A Statement of case is a written summary of the nature of the allegation against the suspect and evidence, which has been obtained to support it.
- 3.22 The Statement of Case shall include a list of the proposed charges and may include material in support of the Statement of Case. 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 prejudice. A prosecutor shall not disclose any information or material that could jeopardise any subsequent prosecution.

### *Conducting and Recording the Discussions*

- 3.23 The plea discussion and negotiation shall be done in face-to-face meetings.
- 3.24 The prosecutor shall keep a full written record 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.
- 3.25 There shall be at least two prosecutors present at each meeting and discussion. An investigator may also be present.
- 3.26 All meetings between the parties shall be recorded and the minutes signed by the defendant, his legal representative and all prosecutors and/or investigators present.
- 3.27 The prosecutor shall 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. All persons present must sign the record of the meetings.

### *Suspects or Defendants Becoming Prosecution Witnesses*

- 3.28 If a suspect or a defendant offers at any stage to provide information, or to give evidence about the criminal activities of others, any such offer shall be dealt with by the Head of Legal who shall inform the CEO of his decision before it is communicated to the suspect or defendant. In some special cases, and depending on the evidence given, the Director of Legal could, subject to the views of the CEO, give the suspect or defendant who provides information or becomes a prosecution witness, immunity from prosecution. The immunity shall be

premised on the suspect forfeiting all the benefits of his criminality.

- 3.29 In a HPCC, where the suspect or defendant offers at any stage to provide information, or to give evidence about the criminal activities of others, any such offer shall be dealt with by the CMP who shall inform the CEO of the offer and their decision and/or concessions.
- 3.30 The CMP may, in a HPCC, make recommendations to the CEO of immunity from prosecution and other concessions for the suspect or defendant who provides information or becomes a prosecution witness. The recommendation shall be premised on the suspect forfeiting all the benefits of his criminality. The CEO shall authorise the decision.
- 3.31 In a HPCC, a prosecutor shall not communicate or comment on any decision or recommendation on a suspect or defendant's offer without the written views of the CEO.

*Discussion of Pleas*

- 3.32 In deciding whether or not to accept an offer by the defendant to plead guilty, the prosecutor shall address his mind to the CCMM relating to the selection of charges and the "Guiding Principles for any Plea Bargain" these Guidelines.
- 3.33 Prosecutors shall obtain the necessary approvals and consents from the Head of Legal in writing before offering or accepting an offer from a defendant or entering into discussions on pleas.
- 3.34 An external advocate prosecuting on behalf of an ACA shall not enter into any discussion on pleas with a defendant or his legal representative, without the express written approval of the Head of Legal in relation to that specific case.
- 3.35 Where an external advocate has been given express written instructions to engage in discussions on pleas, an in-house prosecutor shall be present at each and every meeting to record the discussions on pleas.
- 3.36 In all cases, the prosecutor shall ensure that there is sufficient independent evidence corroborating the admissions and assertions made by the defendant during the plea discussions.
- 3.37 Before agreeing to the proposed pleas, the prosecutor shall complete a CAW compliant review in respect of each charge.



- 3.38 Where the Head of Legal is satisfied that there is sufficient evidence to accept the pleas and agrees with the offer, he shall endorse the offer indicating his acceptance of it.
- 3.39 In a HPCC, all proposals and offers shall be dealt with by the CMP and are subject to the views of the CEO.
- 3.40 In reaching an agreement on pleas, the prosecutor and defendant or his legal representative must resolve any factual issues necessary to allow the court to sentence the defendant on a clear, fair and accurate basis.
- 3.41 Where the parties cannot resolve the factual issues, the parties shall request a Fact Resolution Hearing from the court – under paragraph 7.

#### *Discussion of Sentence*

- 3.42 Where an agreement is reached as to pleas, the parties shall discuss what they consider would be an appropriate sentence with a view to presenting a joint written submission on sentence to the court.
- 3.43 The joint written submission shall 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. The prosecutor shall ensure that the submissions are realistic, taking full account of all relevant and material considerations.
- 3.44 In a HPCC, the prosecutor shall neither suggest nor agree to a non-custodial sentence in the joint written submission. Where the prosecutor and defendant or his legal representative cannot agree on a suggested appropriate sentence, they may include both their differing suggestions in the joint written submission.
- 3.45 The prosecutor shall include in the joint written submission, any relevant asset recovery and ancillary orders such as compensation, restitution, freezing, seizure and confiscation.
- 3.46 In the course of the plea discussions, the prosecutor shall make it clear to the defence that the joint written submission as to sentence (including ancillary orders) is not binding on the court.

#### *Liaison With Another Prosecuting Agency*

- 3.47 Where the prosecutor becomes aware that another prosecuting agency has an interest in the defendant, he shall liaise with that other agency through the Head of Legal to establish if they want

to take part in the plea discussion or authorise the prosecutor to discuss with the defendant the matters which they are interested in.

- 3.48 The prosecutor shall warn the defendant that a plea agreement will not bind any other agency or authority that is not a party to it.
- 3.49 In a HPCC, it is the CMP that will liaise with the other prosecuting agency.

#### 4. THE WRITTEN PLEA AGREEMENT

- 4.1 All matters agreed between the prosecutor and the defendant shall be reduced into writing as a **Plea Agreement** and signed by both parties and served on the court. The plea agreement will include:
- a. a list of the amended or new charges as agreed;
  - b. a statement of the facts as agreed; and
  - c. a declaration, signed personally by the defendant, to the effect that he accepts the stated facts in paragraph (b) above and admits that he is guilty of the agreed charges; concisely expressing that he did what is alleged and how he did it.
- 4.2 Any agreement regarding giving of assistance to the prosecution by the defendant shall be in a separate document and not included in the Plea Agreement.
- 4.3 The Head of Legal shall endorse a copy of the Plea Agreement.
- 4.4 In a HPCC, members of the CMP shall endorse a copy of the Plea Agreement.
- 4.5 The Plea Agreement shall be binding on the prosecutor and ACA unless where fraud is discovered. Fraud includes a lack of full disclosure by the suspect or defendant.
- 4.6 In HPCC, a copy of the Plea Agreement shall be forwarded to the AGF within 72 hours of the agreement [s.270(7)(d)].
- 4.7 The prosecutor shall amend the charge or indictment to reflect the Plea Agreement and file an amended indictment at court or apply to court to amend the indictment as the case might be.
- 4.8 In advance of the defendant's arraignment or next appearance at Court, the prosecutor shall send the court the following:

- a) the signed plea agreement;
- b) a joint submission as to sentence and sentencing considerations;
- c) any relevant sentencing guidelines or authorities;
- d) all of the material provided by the prosecution to the defendant in the course of the plea discussions;
- e) any material provided by the defendant to the prosecution, such as documents relating to personal mitigation; and
- f) review of facts linking the defendant to the offence: setting out the available evidence that supports each of the elements of the offences charged.

4.9 After the defendant enters a plea of guilty to the charges, the prosecutor shall review the facts to the court; setting out how each of the elements of the charges are supported with evidence. Where practical and appropriate, the prosecutor shall demonstrate the guilt of the defendant by presenting the physical evidence or other items of evidence to the court.

4.10 The court shall retain an absolute discretion as to whether or not it sentences in accordance with the joint written submission from the parties - (Sections 270(10) and (11) ACJA).

## **5. FAILURE OF PLEA DISCUSSIONS**

5.1 Where plea discussions break down, the prosecutor shall conduct a fresh CAW review of the case to determine if there is sufficient evidence for a realistic prospect of a conviction on the charges. Where he determines there is, he shall obtain the approval of the Head of Legal to commence or continue with the prosecution.

5.2 Where there is a failure of plea discussions in a HPCC, the CMP shall determine the next course of action and where a copy of the Plea Agreement had already been forwarded to the AGF under paragraph 4.6 of these Guidelines, shall inform him in writing of the failure.

## **6. Fact Bargain**

6.1 Where a defendant offers to plead guilty to a charge on a different factual basis than that advanced by the prosecutor, a prosecutor may enter into discussions with the defendant or his legal representative to agree the basis of plea.

6.2 A prosecutor shall obtain written approval from the Head of Legal before agreeing to the factual basis of plea advanced by the defendant.

- 6.3 Where the prosecutor determines that the evidence to substantiate the prosecution's version of the facts is insufficient or weak, and the defendant's version is substantiated with stronger evidence, then he may accept the defendant's version.
- 6.4 Where the prosecutor determines that, there is substantial and strong evidence to substantiate the prosecution's version of the facts, but there will be no material difference in the sentence to be imposed on either version, he may accept the defendant's version.
- 6.5 In a HPCC, the CMP shall make the decision to accept any factual basis of plea or version advanced by the defendant.
- 6.6 Before a factual basis of plea is finalised, the victims and where necessary complainant-communities should be consulted and their views taken into consideration.
- 6.7 The prosecutor shall consider the implication of accepting the defendant's basis of plea as it affects other suspects and defendants and/or the ongoing investigation or prosecution.
- 6.8 The prosecutor shall avoid any basis of plea that tends to cause reputational damage to any person or individual and the wordings of any basis of plea must be drafted with judgment, discretion and restraint.
- 6.9 Where the defendant insists on entering a guilty plea but the prosecutor and defendant cannot agree on the factual basis of plea, the prosecutor shall ask the judge to hold a Fact Resolution Hearing under paragraph 7 of these Guidelines.

## **7. Fact Resolution Hearing**

- 7.1 Where the prosecutor cannot agree on the version of facts upon which the defendant wants to enter a plea, he shall ask the court to hear evidence on the disputed facts.
- 7.2 Where the prosecutor concludes that the difference between the prosecution's version and the defendant's version of the facts will significantly affect sentence, he shall ask the court to hear evidence on those disputed facts.
- 7.3 The court may hear evidence on the disputed facts to resolve the differences where it considers that the differences in the two versions will significantly or materially affect sentence.
- 7.4 The prosecutor and defendant shall call evidence and their witnesses shall be subjected to cross-examination.

- 7.5 The burden of proof in a Fact Resolution Hearing remains with the prosecution and the standard of proof is beyond reasonable doubt.
- 7.6 There shall be no need for a fact resolution hearing in the following circumstances:
- a. where the difference in the two versions of the facts is immaterial to the sentence;
  - b. where the defence version can be described as manifestly false or wholly implausible; or
  - c. where the matters put forward by the defendant do not amount to a contradiction of the prosecution's case but rather to extraneous mitigation explaining the background of the offence or other circumstances which may lessen the sentence.
- 7.7 Any doubt that comes to light during the Fact Resolution Hearing shall be resolved in favour of the defendant.

## **8. Offences Taken into Consideration (s. 313 ACJA)**

- 8.1 Where a defendant has pleaded guilty or intends to plead guilty and admits to other pending charges before another prosecuting agency, which he wants to be taken into consideration by the instant court, the prosecutor shall contact the other agency through the Head of Legal, to seek their consent to takeover and deal with the pending charge(s).
- 8.2 Where the other agency gives consent, the prosecutor shall obtain the case file from the other agency and in addition to his own case shall review the facts of the pending matter to the court.
- 8.3 In a HPCC, the CMP shall liaise with the other prosecuting agency.
- 8.4 A charge should not be taken into consideration if the public interest requires that it should be the subject of a separate trial.
- 8.5 The prosecutor shall ensure that the court does not take into consideration an offence which it is not empowered to try; where it has no jurisdiction.
- 8.6 Once the pending charges against the defendant are considered and sentence has been passed on him with consideration to the pending charges, he can no longer be charged or tried in relation to them.

### **Aggravating factors, suggesting that plea-bargaining is not in the public interest:**

- a. Abuse of power
- b. Abuse of position of trust
- c. Deliberate targeting victims

- d. Profit or illegal benefit from the offence
- e. Planning of an offence – organised or conspiracy
- f. Defendant was the instigator or a ring leader
- g. Multiple and/or vulnerable victims
- h. Previous convictions
- i. Attempts to conceal or disguise the stolen fund
- j. Amount stolen not recovered
- k. High impact of the offence on victims and communities