



THE
CORNER
HOUSE

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Campaigners continue to raise concerns about SFO-BAE settlement process

Campaign Against Arms Trade (CAAT) and The Corner House today announce with regret that they are withdrawing their application for a judicial review of the 5 February 2010 decision by the Serious Fraud Office (SFO) to enter a controversial plea bargain settlement with BAE Systems and to drop “conspiracy to corrupt” charges against a BAE former agent, Count Alfons Mensdorff-Pouilly.

Kaye Stearman of CAAT says:

“We are disappointed we cannot take the judicial review process further. Anyone looking at the details of the numerous corruption allegations regarding BAE that have emerged over the last six years can draw their own conclusions as to whether or not justice has been served by the plea bargain that SFO has accepted from this large, well-connected company.”

Nicholas Hildyard of The Corner House stated:

“Many searching questions still need to be asked about a plea bargain process in which corporates negotiate their crime and punishment. Legal guidance needs to be strengthened if the SFO Director is to fulfil his duty of upholding the law rather than helping companies avoid its consequences.”

Our challenge was brought relying upon the facts as we understood them to be. A significant factor in our understanding was an SFO press release of 1 October 2009 in which the SFO stated that it intended “to prosecute BAE Systems for offences relating to overseas corruption . . . in Africa and Eastern Europe”.

The SFO has now admitted “with hindsight” that while “the ordinary language of the press release” conveyed the impression that its investigation was complete and the SFO had decided to prosecute, the press release in fact

“overstated the stage which had been reached in both the investigative and prosecutorial decision-making process”.[1]

The SFO’s admission, coming in response to our judicial review application, makes it difficult to sustain any legal challenge to the lawfulness of the plea bargain agreement with BAE on the lesser charge of accounting misdemeanours in Tanzania. CAAT and the Corner House do not now believe that they can succeed in persuading the Court that the SFO should have prosecuted for the more serious corruption offences in Eastern and Central European countries if, contrary to the impression given in October 2009, the SFO was not then in fact in a position to mount such a prosecution.

This is despite the SFO itself stating in preliminary court hearings to prosecute Count Alfons Mensdorff-Pouilly that “from 2002 onwards, BAE adopted and deployed corrupt practices to obtain lucrative contracts for jet fighters in central Europe” in a “sophisticated and meticulously planned operation involving very senior BAE executives.”[2]

Despite withdrawing their legal challenge, the groups remain deeply concerned at many aspects of the settlement and the process that led up to it.

- The SFO has apparently given an undertaking to BAE that it will never in future prosecute any individual if doing so involves alleging that BAE was guilty of corruption.[3]
- No explanation has been given as to why the US plea bargain settlement on BAE’s deals in Eastern and Central European countries took priority over the SFO’s prosecution in the UK, given that BAE Systems is headquartered in the UK and the allegations relate to activities emanating from the UK.[4]
- The SFO Director acknowledges that “a conviction for an offence of corruption would have had the effect of debarring BAe for tendering for public contracts in the EU” under Article 45 of the European Union Public Sector Procurement Directive 2004. The SFO’s own *Guidance on Corporate Prosecutions* states that “a decision not to prosecute because the Directive is engaged will tend to undermine its deterrent effect”, which “is intended to be draconian”. Yet the SFO Director states that this consequence would have been “a disproportionate outcome.”[5]

ENDS

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Campaign Against Arms Trade (CAAT) works for the reduction and ultimate abolition of the international arms trade. www.caat.org.uk.

The Corner House aims to support democratic and community movements for environmental and social justice through analysis, research and advocacy. www.thecornerhouse.org.uk

1. Director of the Serious Fraud Office Summary Grounds for Contesting the Claim, para 10.
http://www.caat.org.uk/issues/bae/jr/SFO_Grounds_2010-3-10.pdf

The SFO's statement misled not only CAAT and The Corner House, but also the press, parliamentarians and those around the world most directly affected by BAE's alleged activities, into believing that the SFO was then in possession of sufficient evidence to meet the Code for Crown Prosecutors' test to move ahead with a prosecution of BAE.

In light of the SFO's press briefing, media reports repeated the understanding that corruption investigators were poised to press criminal charges for corruption. The SFO made no attempt to correct or clarify its press release at that time.

See, for example:

- Michael Peel and Jeremy Lemer, "SFO prepares to charge BAE Systems", *Financial Times*, 30 September 2009;
- David Leigh and Rob Evans, "Fraud watchdog poised to decide on BAE bribery prosecution", *The Guardian*, 30 September 2009;
- Amy Wilson and Rowena Mason, "BAE Systems faces SFO charges", *Daily Telegraph*, 30 September 2009.

2. David Leigh and Rob Evans, "BAE chiefs 'linked to bribes conspiracy'", *The Observer*, 7 February 2010.

3. "[O]n 4 February 2010, during the plea discussions, BAe *requested* an undertaking from the SFO that in any future prosecutions (to which BAe was not a party) the prosecution would not allege that the company was guilty of corruption. The Defendant [SFO Director] concluded that without such an undertaking, a plea agreement could not be achieved. . . . [I]n a prosecution of Count Mensdorff, or any of the individuals under investigation in connection with the Eastern Europe transactions, it would not be possible to proceed without making an allegation of corruption against BAe. . . . the Defendant took the view that it was in the public interest to give the undertaking to BAe, thereby enabling the plea agreement to be achieved."

para. 18,
Director of the Serious Fraud Office Summary Grounds for Contesting the Claim, *italic emphasis added*.
http://www.caat.org.uk/issues/bae/jr/SFO_Grounds_2010-3-10.pdf

4. The SFO was aiming to finalise its case on Eastern Europe by the end of January and to submit papers in mid-February to the Attorney General requesting consent to prosecute. On 29 January, however, the US Department of Justice:

“contacted the SFO and indicated that a plea agreement with BAe was imminent. The agreement involved BAe entering pleas of guilty in respect of offences connected to the investigations concerning Eastern Europe and Saudi Arabia, and a payment of \$400 million.”

(Director of the Serious Fraud Office
Summary Grounds for Contesting the Claim, para. 12,
http://www.caat.org.uk/issues/bae/jr/SFO_Grounds_2010-3-10.pdf)

The SFO contends that the Eastern Europe aspect of the proposed US agreement would be “highly likely” to prevent prosecution in England for the offences involving Eastern Europe that the SFO was investigation because of “the principle of double jeopardy”(para. 13) – a defendant cannot be prosecuted twice for the same crime on the same set of facts.

CAAT and The Corner House argue that the double jeopardy claim is not justified because the charges against BAE Systems in the US were not of a similar character to those that would have been charged in the UK: in the US, BAE pleaded guilty to conspiring to make false, inaccurate and incomplete statements to the US authorities and to file false export licences; in the UK, the SFO was investigating corruption offences.

5. Director of the Serious Fraud Office Summary Grounds for Contesting the Claim, para 14.5. http://www.caat.org.uk/issues/bae/jr/SFO_Grounds_2010-3-10.pdf

6. For background about the judicial review to date see
<http://www.caat.org.uk/issues/bae/jr/>

7. For a summary of investigations into BAE see
http://www.caat.org.uk/issues/bae/bae_investigations.php

8. The Serious Fraud Office is a UK government department that investigates and prosecutes complex fraud. It aims to contribute to "the delivery of justice and the rule of law. <http://www.sfo.gov.uk>

9. BAE Systems is one of the world's largest arms producers. It makes fighter aircraft, warships, tanks, armoured vehicles, artillery systems, missiles and munitions. Its foremost markets are Saudi Arabia and the United States. It has consistently denied any wrong-doing.