IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N:

CAMPAIGN AGAINST ARMS TRADE

First Claimant

and

CORNER HOUSE RESEARCH

Second Claimant

v

DIRECTOR OF THE SERIOUS FRAUD OFFICE

Defendant

BAE SYSTEMS PLC

and

COUNT ALFONS MENSDORFF-POUILLY

Interested Parties

Claim form Parts 5 and 8
STATEMENT OF FACTS AND GROUNDS

Introduction

1. Campaign Against Arms Trade ('CAAT') is a not for profit unincorporated association that opposes the arms trade and supports the promotion of peace, justice and democratic values, and the prevention and resolution of conflicts by peaceful means. Corner House Research ('Corner House') is a not for profit company limited by guarantee which aims to support democratic and community movements for environmental and social justice. In this application the Claimants seek permission to judicially review the 5 February 2010 decision of the Defendant, following years of investigation into allegations of corruption by the first interested party, BAE Systems Plc ("BAE"), (i) to enter into a plea agreement with BAE for an offence under s221 of the Companies Act 1985 and

(ii) to withdraw the charge brought on 29 January 2010 against Count Alfons Mensdorff-Pouilly, a former agent of BAE.

Facts

2. The Serious Fraud Office ("SFO") has been formally investigating BAE over allegations of bribery and false accounting since 2004. In December 2006 the investigation into the "Al Yamamah" contract with Saudi Arabia was discontinued following pressure from BAE and the Saudi regime and a direct intervention from then Prime Minister Tony Blair. However, inquiries into BAE's practices in connection with deals with other countries, including the Czech Republic, Hungary, South Africa and Tanzania continued.

3. From at least 2007, US Department of Justice investigators were also examining BAE's business dealings with a view to mounting a prosecution in the US.

4. In a press release dated 1 October 2009 the SFO announced that it "intends to seek the Attorney General's consent to prosecute BAE Systems for offences relating to overseas corruption". The press release confirmed that the prosecution "follows the investigation carried out by the SFO into business activities of BAE Systems in Africa and Eastern Europe."

5. On 29 January 2010 the SFO charged Count Alfons Mensdorff-Pouilly, a former agent for BAE, with conspiring with others, between 1 January 2002 and 31 December 2008:

> "to give or agree to give corrupt payments (contrary to section 1 of the Prevention of Corruption Act 1906) to unknown officials and other agents of certain Eastern and Central European governments, including the Czech Republic, Hungary and Austria as inducements to secure, or as rewards for having secured, contracts from those governments for the

supply of goods to them, namely SAAB/Gripen fighter jets, by BAe Systems plc."[1]

6. On 4 February 2010 Count Mensdorff-Pouilly appeared in court and was granted bail.

7. In an article dated 7 February 2010[2], *The Observer* reported that in the course of Count Mensdorff-Pouilly's preliminary hearings at Highbury Corner and Westminster magistrates' courts the SFO told the courts how:

> "From 2002 onwards, BAE adopted and deployed corrupt practices to obtain lucrative contracts for jet fighters in central Europe." It was a "sophisticated and meticulously planned operation involving very senior BAE executives."

8. On 5 February 2010 the SFO announced a "settlement" with BAE:

> "The SFO has today reached an agreement with BAE Systems that the company will plead guilty in the Crown Court to an offence under section 221 of the Companies Act 1985 of failing to keep reasonably accurate accounting records in relation to its activities in Tanzania. The company will pay £30 million comprising a financial order to be determined by a Crown Court judge with the balance paid as an ex gratia payment for the benefit of the people of Tanzania.
>
> In conjunction with this agreement the SFO has taken account of the implementation by BAE Systems of substantial ethical and compliance reforms and the company's agreement with the DoJ announced today, and has determined that no further prosecutions will be brought against

[1] SFO press release 29 January 2010
[2] "BAE chiefs 'linked to bribes conspiracy'", David Leigh & Rob Evans – The Observer, Sunday 7 February 2010.

BAE Systems in relation to the matters that have been under investigation by the SFO."

9. In a joint announcement the US Department for Justice declared that it had also entered into a plea bargain agreement with BAE. BAE had admitted conspiring to 'knowingly and willfully impede and impair the lawful governmental functions of the United States government...by making certain false, inaccurate and incomplete statements', including filing export licences 'that failed properly to disclose fees or commissions made...in connection with the sales of defense articles'.

10. The detail of the lengthy charges admitted by BAE in the US included:

- Not revealing that they were retaining "market advisers" to assist in securing sales of defence articles, by which substantial payments (over £135,000,000) were made without internal scrutiny;
- Making payments of more than £19,000,000 connected with solicitation to secure leases of Gripen fighter jets to the Czech Republic and Hungary;
- Providing "substantial benefits" to a Saudi Arabian public official and his associates in connection with the sale of Tornado aircraft to the Kingdom (including a payment of £10,000,000 made to a Swiss bank account that BAE were aware was likely to be accessed by the official).

11. Back in the UK the Director of the SFO, in an interview available for 'podcast' on the SFO website (http://www.sfo.gov.uk/press-room/media-room.aspx), explained his reasons for concluding that entering into the plea bargain with BAE over an offence of failing to keep accurate accounting records was "in the public interest":

"There were a lot of factors here because this has been an exceptionally difficult case. Obviously I look at the public interest in ensuring that the sorts of control failures that we have been talking about here are brought before the appropriate courts, but I look as well at the impact on the

company, its employees, its shareholders, its customers and I look as well at what the company has done – and I have to say I have been very impressed at the changes that new management have made in this corporate over the last few years. As I balance all of this and consider what is appropriate, I have regard to the overall global settlement and I have to think what is in the public interest here and I firmly believe that the overall decisions here in this global settlement represent the public interest for this country and what we need to do."

12. Later on 5 February the SFO made a further announcement:

> "Following our announcement today about the global agreement between the SFO, the US Department of Justice and BAE Systems plc, the Director of the Serious Fraud Office has considered the position in relation to individuals.
>
> The Director has taken into account that the company has agreed to plead guilty to serious offences both in the UK and in the US and to pay substantial financial penalties. In all the circumstances he has decided that it is no longer in the public interest to continue the investigation into the conduct of individuals. Consequently the charge brought on 29 January 2010 against Count Alfons Mensdorff-Pouilly in relation to certain European countries is to be withdrawn.
>
> This decision brings to an end the SFO's investigations into BAE's defence contracts."

13. No further reasons have been given for dropping the proceedings against Count Mensdorff-Pouilly.

14. In a 7 February 2010 article entitled 'An Affront to Justice' on *The Guardian* newspaper's 'Comment is Free' website, Andrew Feinstein (former S. African MP and co-director of Corruption Watch) and Susan Hawley (Corruption Watch) commented that:

> "As recently as Friday morning, the SFO team was still taking formal witness statements in relation to a multibillion-pound deal in which BAE sold jets to South Africa that its air force didn't want and are hardly used. Over £100m in bribes was allegedly paid to agents, senior politicians, officials and political parties. The SFO felt it had a strong case.
>
> Then out of the blue the SFO allowed BAE to plead guilty to a minor accounting offence in relation to Tanzania, and settled for £30m. It dropped its charges against individuals. There was no mention why the SFO dropped charges relating to the Czech Republic, Hungary, Romania and South Africa."

15. A 10 February 2010 article in the Mail Online[3] reported that Richard Evans, Chairman of BAE during the period under investigation, is still a paid consultant for the company and a member of its 'home market advisory board for Saudi Arabia'. On 18 February 2010 *The Guardian*'s website reported BAE's Chief Executive Ian King as confirming Evans' continuing role:

> "King also said the company would continue to employ former chairman and chief executive Sir Dick Evans as a paid adviser. Evans, who was the architect of the al-Yamamah deal, provides advice on strategy in Saudi Arabia, which remains an important customer. "He is an adviser to the company," King said. "We are very clear what his terms of reference are."[4]

[3] "Ex-BAE boss Evans earns £1.5m in fees"
[4] "BAE forced into the red by probes into sales to Saudi Arabia"

Pre-action correspondence

16. On Wednesday 10th February 2010 a letter was sent on behalf of the Claimants to the Defendant giving him notice that a letter before action would shortly be served and asking him to:

> "confirm by return that no steps will be taken to bring the matter before the Crown Court for the time being. If you are not prepared to give this assurance, please confirm by return that you will give us at least 7 days notice of the date of any proposed hearing in the Crown Court in this matter."

17. On Friday 12th February 2010 a letter before claim was sent on behalf of the Claimants to the Defendant, in accordance with the pre-action protocol for judicial review. The letter was also copied to the interested parties[5]. In the letter the Claimants requested the Director to confirm within 14 days that he would both withdraw the plea agreement with BAE and proceed with a prosecution on charges of corruption and also reinstate the charges against Count Mensdorff-Pouilly. The Director was also asked again to confirm that the criminal proceedings would not be brought before the Crown Court or alternatively to agree to provide at least 7 days notice.

18. By email on 15 February, the Director confirmed that no Crown Court hearing would take place that week.

19. On 16 February 2010 the Claimants' solicitor received a substantive response from the Director. The letter stated that he acted consistently with his guidelines and that his decisions on the public interest were correct. The Director declined to put on hold the Crown Court proceedings or give any commitment to provide 7 days notice, stating only that they were likely to take place in "very late February

[5] It was not served on Count Mensdorff-Pouilly until the following week as his address for service was unknown.

or early March" and that he would keep the Claimants informed of the timing of the proceedings.

20. In a letter of 22 February the Claimants' solicitor made a further enquiry as to the criminal proceedings and re-iterated the Claimants' request that no action be taken pending resolution of the potential judicial review claim. In the alternative, the Claimants' solicitors requested 7 days notice of any court hearing in the criminal proceedings.

21. In a letter of 25 February, the Director informed the Claimants' solicitors that it was likely that proceedings would be instigated in the magistrate's court in the week beginning 1 March 2010.

Law & Policy

22. Section 1 of the Criminal Justice Act 1987 established the SFO and sets out the powers of the Director of the SFO ('the Director') to investigate and to institute criminal proceedings:

> **"1 The Serious Fraud Office**
>
> (1) A Serious Fraud Office shall be constituted for England and Wales and Northern Ireland.
>
> (2) The Attorney General shall appoint a person to be the Director of the Serious Fraud Office (referred to in this Part of this Act as "the Director"), and he shall discharge his functions under the superintendence of the Attorney General.
>
> (3) The Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud.
>
> (4) The Director may, if he thinks fit, conduct any such investigation in conjunction either with the police or with any other person who is, in the opinion of the Director, a proper person to be concerned in it.
>
> (5) The Director may—
>
> (a) institute and have the conduct of any criminal proceedings which appear to him to relate to such fraud; and

(b) take over the conduct of any such proceedings at any stage.

..."

23. The Director operates under the "superintendence" of the Attorney General, but "any decision he makes as to investigation or prosecution is for him to reach independently" (Moses J in *R (Corner House & another) v Director of SFO* [2009] 1 AC 756 at para 50). In respect of the investigation into the affairs of BAE Systems the relevant prosecutor was the SFO, therefore the ultimate decision on prosecution lay with the Director.

24. The limits on the Director's discretion were summarised by Lord Bingham in *R (Corner House & another) v Director of SFO*:

> "[T]he discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice."

25. Thus a decision to prosecute or not to prosecute is challengeable by way of judicial review, albeit that "the power of review is one to be sparingly exercised" (Lord Bingham in *R v DPP, ex parte Manning* [2001] QB 330).

26. The exercise of the Director's discretion has been structured over time by the adoption of policy guidance. In *R v Director of Public Prosecutions, ex parte C* [1995] 1 Cr App Rep 136, 159 JP 227 it was held that the court would intervene if it were demonstrated that the DPP had arrived at the decision not to prosecute because of a failure to act in accordance with settled policy (see also *R (B) v DPP* [2009] 1 WLR 2072). The same principle applies to the Director of the SFO.

Policy guidance

27. There are a number of different guidance documents applicable to the Director's decision-making in this case. The following is a list of those documents together with relevant excerpts:

(A) 'Attorney General's Guidance on Plea Discussions in Cases of Serious or Complex Fraud' – 18/03/09

28. This guidance is specifically designed to apply to plea discussions of the type engaged in by the SFO with BAE:

> "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."

29. It is made clear at para A2 that *"The Guidelines will be followed by all prosecutors in England and Wales when conducting plea discussions in cases of serious or complex fraud"* (emphasis added). Para A3 confirms that:

> "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 offending, give the court adequate sentencing powers and enable a case to be presented in a clear and simple way.**"
>
> "A4. ... 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")." [See below]

30. At A5 the purpose of plea discussions is identified:

".. 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 on sentence."

31. A6 identifies the benefits flowing from such early resolution: the reduction of the anxiety and uncertainty for victims and witnesses, and earlier clarity for accused persons who admit their guilt (subject to the court's power to reject the agreement).

32. Paragraph A7 stresses the importance of the agreement commanding public and judicial confidence, and the requirement that any agreement reached is reasonable, fair and just. These key principles are reiterated in section B, which sets out the "General Principles".

"B1. .... In conducting plea discussions and presenting a plea agreement to the court, the prosecutor must act, openly and 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."

33. Section D deals with the conduct of plea discussions. At D7 it provides:

"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."

***(B) 'The Code for Crown Prosecutors'* (issued under section 10 of the Prosecution of Offences Act 1985) – November 2004**

34. The '*Guidance on Plea Discussions in Cases of Serious or Complex Fraud*' confirms that this Code applied to the Director's decision making. Unsurprisingly the Code asserts that:

> 2.3 It is the duty of Crown Prosecutors to make sure that the right person is prosecuted for the right offence. In doing so, Crown Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.

35. The Code explains the 'Full Code Test' for deciding whether charges should be brought. This is a two stage test. The first stage is that the prosecutor must be satisfied that the evidence available provides a 'realistic prospect of conviction'. The second part of the test is of relevance to this claim and involves an assessment of whether the prosecution is in the public interest. The following guidance is given on this second stage:

"5.7 ...Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed. A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour..."

36. At para 5.9 the Code states that "a prosecution is likely to be needed if":

"...
b a conviction is likely to result in a confiscation or any other order;
...
g there is evidence that the offence was premeditated;
...
l there is a marked difference between the actual or mental ages of the defendant and the victim, or if there is any element of corruption;
...
o there are grounds for believing that the offence is likely to be continued or repeated , for example, by a history of recurring conduct;
...
q a prosecution would have a significant positive impact on maintaining community confidence."

37. Para 5.10 covers factors that make a prosecution less likely to be needed.

"**a** the court is likely to impose a nominal penalty;
b the defendant has already been made the subject of a sentence and any further conviction would be unlikely to result in the imposition of an additional sentence or order...;
c the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);
d the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgement;
e there has been a long delay between the offence taking place and the date of the trial, unless:

- the offence is serious;

- the delay has been caused in part by the defendant;
- the offence has only recently come to light; or
- the complexity of the offence has meant that there has been a long investigation;

f a prosecution is likely to have a bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence;
g the defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is real possibility that it may be repeated...;
h the defendant has put right the loss or harm that was caused (but defendants must not avoid prosecution or diversion solely because they pay compensation); or
i details may be made public that could harm sources of information, international relations or national security."

38. In relation to selection of charges the Code states that:

"**7.1** Crown Prosecutors should select charges which:
a reflect the seriousness and extent of the offending;
b give the court adequate powers to sentence and impose appropriate post-conviction orders; and
c enable the case to be presented in a clear and simple way."

***(C) 'Attorney General's guidelines on the acceptance of pleas'* – 01/12/09**

39. The '*Guidance on Plea Discussions in Cases of Serious or Complex Fraud*' confirms that these more general guidelines on the acceptance of pleas also apply - and would have applied to the Director's decision making. The following passages are of relevance:

"A5. The Guidelines should be followed by all prosecutors and those persons designated under section 7 of the Prosecution of Offences Act 1985 (designated caseworkers) and apply to prosecutions conducted in England and Wales."

"B2. The Code for Crown Prosecutors governs the prosecutor's decision-making prior to the commencement of the trial hearing and sets out the circumstances in which pleas to a reduced number of charges, or less serious charges, can be accepted."

"C1. The basis of a guilty plea must not be agreed on a misleading or untrue set of facts and must take proper account of the victim's interests. An illogical or insupportable basis of plea will inevitably result in the imposition of an inappropriate sentence and is capable of damaging public confidence in the criminal justice system."

(D) DPP's 'Guidance to accompany the Attorney General's Guidelines on Plea Discussions in cases of Serious or Complex Fraud' – 06/08/09

40. This Guidance provides clarification of the AG's guidelines above, including the following:

"The over-riding duty of the prosecutor is, of course, to see that justice is done. The procedures must command public and judicial confidence. (A7)"

"Selection of Charges

The decision on appropriate charges must be made in accordance with sections 7 and 10 of the Code. The prosecutor must ensure that: (D7)

- 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 apprised of developments in the plea discussions and his or her views are taken into account."

(E) SFO 'Guidance on Corporate Prosecutions'

41. This guidance applies "to the prosecution in England and Wales of corporate offending other than offences of corporate manslaughter". Attention is drawn to the following paragraphs:

> "8. Prosecution of a company should not be seen as a substitute for the prosecution of criminally culpable individuals such as directors, officers, employees, or shareholders. Prosecuting such individuals provides a strong deterrent against future corporate wrongdoing. Equally, when considering prosecuting individuals, it is important to consider the possible liability of the company where the criminal conduct is for corporate gain."

> "32. In addition to the public interest factors set out in section 5 of the Code for Crown Prosecutors, the following factors may be of relevance in deciding whether the prosecution of a company is required in the public interest as the proper response to alleged corporate offending. This list of additional public interest factors is not intended to be exhaustive. The factors that will apply will depend on the facts of each case.
>
> **Additional public interest factors in favour of prosecution:**
>
> a. A history of similar conduct (including prior criminal, civil and regulatory enforcement actions against it); failing to prosecute in circumstances where there have been repeated and flagrant breaches of the law may not be a proportionate response and may not provide adequate deterrent effects;
>
> b. The conduct alleged is part of the established business practices of the company;
>
> c. The offence was committed at a time when the company had an ineffective corporate compliance programme;

d. The company had been previously subject to warning, sanctions or criminal charges and had nonetheless failed to take adequate action to prevent future unlawful conduct, or had continued to engage in the conduct;

e. Failure to report wrongdoing within reasonable time of the offending coming to light; (the prosecutor will also need to consider whether it is appropriate to charge the company officers responsible for the failures/ breaches);

f. Failure to report properly and fully the true extent of the wrongdoing.

Additional public interest factors against prosecution

a. A genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice, involving self-reporting and remedial actions, including the compensation of victims:

In applying this factor the prosecutor needs to establish whether sufficient information about the operation of the company in its entirety has been supplied in order to assess whether the company has been proactively compliant. This will include making witnesses available and disclosure of the details of any internal investigation;

b. A lack of a history of similar conduct involving prior criminal, civil and regulatory enforcement actions against the company.; contact should be made with the relevant regulatory departments to ascertain whether investigations are being conducted in relation to the due diligence of the company;

c. The existence of a *genuinely* proactive and effective corporate compliance programme;

d. The availability of civil or regulatory remedies that are likely to be effective and more proportionate:

Appropriate alternatives to prosecution may include civil recovery orders combined with a range of agreed regulatory measures. However, the totality of the offending needs to have been identified. A fine after conviction may not be the most effective and just outcome if the company cannot pay. The prosecutor should refer to the Attorney's

Guidance on Civil Recovery (see 'Proceeds of Crime Act 2002: Section 2A [Contribution to the reduction of crime] Joint Guidance given by the Secretary of State and Her Majesty's Attorney General') and on the appropriate use of Serious Crime Prevention Orders.

e. The offending represents isolated actions by individuals, for example by a rogue director.

f. The offending is not recent in nature, and the company in its current form is effectively a different body to that which committed the offences – for example it has been taken over by another company, it no longer operates in the relevant industry or market, all of the culpable individuals have left or been dismissed, or corporate structures or processes have been changed in such a way as to make a repetition of the offending impossible.

g. A conviction is likely to have adverse consequences for the company under European Law, always bearing in mind the seriousness of the offence and any other relevant public interest factors.

Any candidate or tenderer (including company directors and any person having powers of representation, decision or control) who has been **convicted** of fraud relating to the protection of the financial interests of the European Communities, corruption, or a money laundering offence is excluded from participation in public contracts within the EU. (Article 45 of Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts). The Directive is intended to be draconian in its effect, and companies can be assumed to have been aware of the potential consequences at the time when they embarked on the offending. Prosecutors should bear in mind that a decision not to prosecute because the Directive is engaged will tend to undermine its deterrent effect.

h. The company is in the process of being wound up.

33. Prosecutors dealing with bribery cases are reminded of the UK's commitment to abide by Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: investigation and prosecution of the bribery of a foreign public official

shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

34. A prosecutor should take into account the commercial consequences of a relevant conviction under European law, particularly for self-referring companies, in ensuring that any outcome is proportionate."

(F) Approach of the Serious Fraud Office to Dealing with Overseas Corruption – 21/07/09

42. Significantly this guidance deals explicitly and exclusively with 'self-referral', as can be seen from the introduction:

> "Many corporates have welcomed what they have heard about self reporting at conferences. They have asked for a document setting out the issues covered in speeches and the approach we are likely to take. This Guide is a first attempt to set this out."

43. For this reason, the 'Overseas Corruption' guidance is of no relevance to the case of BAE, in which no self-reporting took place, except to the extent that it indicates that a failure to self-report will be regarded as "a negative factor" which make "the prospects of a criminal investigation followed by prosecution and a confiscation order...much greater" (see para 24).

Grounds

Decision to agree to plea

44. On 1 October 2009 the SFO announced publicly that it intended to seek the AG's consent to prosecuting BAE for "offences related to overseas corruption" relating to "business activities of BAE Systems in Africa and Eastern Europe". This

announcement indicated that at that time the Director considered (a) that the SFO had sufficient evidence for there to be a realistic prospect of conviction and (b) that the prosecution was in the public interest. The alleged offending which was the subject of the Director's investigations was of the utmost gravity and concerned not an isolated incident, but many instances of serious corruption involving very senior BAE executives.

45. On 5 February 2010 the Director decided, purportedly in the public interest, not to prosecute BAE for offences related to overseas corruption but rather to accept a guilty plea to a charge of failing to keep accurate accounting records in connection with its deal with Tanzania. BAE's deals with South Africa, Hungary and the Czech Republic do not form the basis of any agreed offences even though in October 2009 there was sufficient evidence to charge for corruption. While the US Department of Justice agreement does relate to Hungary, the Czech Republic and Saudi Arabia, it does not encompass any of the alleged offending against South Africa.

46. This decision by the Director was unlawful in the following ways:

A. In reaching his decision the Director failed to apply the clear and settled applicable guidance, including that promulgated by the SFO. For example:

i. Having reached a decision that it was in the public interest to prosecute BAE for any offences, the guidance required the Director to prefer charges that reflect the seriousness and extent of the offending and give the court adequate powers to sentence. Nothing less than charges involving an allegation of corruption can meet that requirement. The public interest factors on which the Director relied were irrelevant once the conclusion was reached by him that the public interest required a prosecution.

ii. The plea agreement process was applied for an improper purpose, namely to reduce the charges below those which reflect the seriousness and extent of the offending and give the court adequate powers of sentence. The sole permissible purpose of the process is as set out in paragraph A5 of the Attorney General's '*Guidance on Plea Discussions in Cases of Serious and Complex Fraud*'.

iii. Further or in the alternative, if the public interest test did remain relevant once the Director had decided it was in the public interest to prosecute, then the Director wholly failed to apply the guidance on assessing the public interest.

a. None of the factors against prosecution in the *Code for Crown Prosecutors* apply, while several of the factors indicating that a prosecution "is likely to be needed" do apply;

b. All of the additional factors supporting prosecution set out in the '*Guidance on Corporate Prosecutions*' apply. None of the factors against prosecution apply. Specifically, in relation to para 32(f), the Director gave as part of his reasoning on public interest that he was "very impressed at the changes that new management have made in this corporate over the last few years". Para 32(f) requires that "the company in its current form is effectively a different body to that which committed the offences" and that "all of the culpable individuals have left or been dismissed, or corporate structures or processes have been changed in such a way as to make a repetition of the offending impossible". The changes at BAE do not meet this test, particularly in light of the fact

that Richard Evans, Chairman during the period under investigation, is still a paid consultant for the company.

iv. Further, the Director failed to take into account a relevant consideration in the form of Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) as his own '*Guidance on Corporate Prosecutions*' required him to do. This is evidenced by the Director identifying that he took into account the impact on the company, its employees, its shareholders, and its customers.

v. The decision was not made in the interests of justice as required by the '*AG's Guidance on Plea Discussions in Cases of Serious or Complex Fraud*', and neither did the decision satisfy the requirements that:

a. The charges reflect the seriousness of the offending;

b. They give the court adequate powers to sentence;

B. The Director's decision was irrational. In the circumstances, he could not reasonably conclude that the public interest factors tending against prosecution, 'clearly outweigh those tending in favour' as he was required to do by para 5.7 of the *Code for Crown Prosecutors*.

a. None of the factors against prosecution identified in the Director's own guidance, or the more general guidance contained in the Code, applied;

b. The factors which according to the Director did apply and which tended against a prosecution were (1) that BAE had pleaded guilty to offences in the United States which related to deals struck with the Czech Republic, Hungary and Saudi Arabia (2) the changes made by new management over the last few years; and (3) the impact on the company, its employees, its shareholders and its customers;

c. The key factors tending in favour of prosecution were:-

i. The seriousness of the crime of corruption and the responsibility of states to take measures to combat it. It is an 'insidious plague' which constitutes a threat to democracy and the rule of law, allows crime and terrorism to flourish and impedes a country's development: see Jack Straw MP, the UK's Anti-Corruption Champion in his speech at the 5th European Forum on Anti-Corruption, 23 June 2009. This includes the impact upon the victim populace in the states where corrupt payments are made.

ii. All the factors in the Director's own guidance on corporate prosecutions favouring a prosecution.

iii. Neither the UK settlement, nor the global settlement capture the severity of the alleged offending and in particular do not even begin to address the alleged offending against South Africa.

iv. BAE had not engaged in 'self-reporting' or other co-operation.

v. The Director's own conclusion that the public interest did require BAE to be prosecuted in respect of its alleged misconduct.

vi. That BAE would be able to advance in mitigation all the factors identified by the Director against prosecuting on more serious charges.

vii. The agreed 'settlement' including the global settlement will have little or no impact on BAE[6] and thus cannot reflect the seriousness of BAE's offending and will not serve to prevent re-offending.

viii. Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).

Decision to drop charges against Mensdorff-Pouilly

47. The decision of the Director to discontinue the proceedings against Count Mensdorff-Pouilly was unlawful for the following reasons:

A. The Director failed to follow para 8 of his own '*Guidance on Corporate Prosecutions*'.

B. The Director failed to act in the public interest and the interests of justice;

C. The Director's decision was irrational. On 29 January he brought charges having plainly concluded that the public interest test was met. He

[6] Indeed, it was reported that BAE's share price rose following the announcement on 5 February 2010

discontinued days later, on the basis of the same public interest factors as he applied in relation to BAE. These have no rational application to the case against Count Mensdorff-Pouilly.

International law

48. Article 5 of the Organisation for Economic Co-operation and Development's '*Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*' (1997) provides:

> **Article 5 - Enforcement**
>
> Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

Interim relief

49. By way of interim relief the Claimants seek an order requiring the SFO to take no further steps in the criminal proceedings against BAE Systems until this claim has been determined or further order.

50. This application is set out in the attached N463 application for urgent consideration.

Remedies

51. The court is requested to grant the Claimant permission to pursue this claim for judicial review. If permission is granted, the Claimant will be seeking:

A. a declaration that the Defendant's decision to enter into a plea agreement with BAE Systems was unlawful;

B. an order quashing that decision;

C. a mandatory order requiring the Defendant to reconsider the prosecution of BAE in accordance with the law;

D. a declaration that the decision to withdraw the criminal charges against Count Mensdorff-Pouilly was unlawful;

E. an order quashing that decision;

F. a mandatory order requiring the Defendant to reconsider the prosecution of Count Mensdorff-Pouilly in accordance with the law;

G. costs.

Protective Costs Order

52. The Court is respectfully invited to grant the Claimants a protective costs order, limiting their liability to costs to the aggregate sum of £20,000. This case clearly meets the guidelines set out in *Corner House* [2005] 1 WLR 2600 for the grant of a protective costs order:

52.1 The case is clearly arguable and raises very important points of general legal and public importance that should be resolved by the Court. The proper interpretation of the guidance to prosecutors on pleas bargaining and the extent of the criminal investigator's discretion once a decision to prefer charges in the public interest has been reached are matters of significant public importance and legal novelty. Underlying the legal challenge are facts and issues of the gravest public importance relating as they do to serious crimes of corruption and bribery and the fact that

investigations into these crimes have been abandoned in favour of far more minor accountancy offences. There are all matters of the highest public interest and legal importance.

52.2 Neither CAAT nor Corner House have any private interest in the outcome of this litigation. They are bringing this claim as watchdogs acting in the public interest with the aim of upholding the criminal law.

52.3 The Claimants are not seeking a full protective costs order. Between them, the Claimants are able to offer a cost-cap of £20,000. This is a substantial sum and compares very favourably with the amounts that other public interest bodies have been able to offer in other PCO cases. But this is all they can afford. Full details of the financial circumstances of the Claimants and the figure they are able to offer in lieu of potential costs liability are found in the witness statements of Ann Feltham Nicholas Hildyard.

52.4 If CAAT and Corner House are not granted a protective costs order they will be forced to withdraw their claim and these important questions of fact and law will go unresolved.

DINAH ROSE QC
Blackstone Chambers

PHILLIPPA KAUFMANN
ALEX GASK
Doughty Street Chambers