

TRANSPARENCY INTERNATIONAL (UK)

the coalition against corruption



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British Aerospace Systems, Al Yamamah and the UK Serious Fraud Office Briefing Note by Transparency International (UK)

(This Note is written primarily for the information and use of Transparency International National Chapters, the TI Secretariat and TI(UK) members. Parts of it are necessarily a summary of a large number of reports and other published information over many years.)

On 14 December 2006, the UK Attorney General (AG), Lord Goldsmith, informed the House of Lords that the Director of the Serious Fraud Office (SFO), Robert Wardle, had decided to discontinue its investigation into the affairs of British Aerospace Systems plc (BAeS) as far as they relate to the Al Yamamah defence contract. The decision had been taken following representations made both to the Attorney General and the SFO Director concerning "the need to safeguard national and international security". The announcement unleashed widespread criticism, both in the UK and externally.

Background to the contracts

In 1985, with the encouragement and support of the Government of Margaret Thatcher, British Aerospace (now BAE Systems/BAeS) signed a contract to supply the Saudi Air force with 200 Tornado fighter planes and related equipment and services: the "Al Yamamah" contract. There were several related contracts, involving Rolls Royce aero engines and others. The first two phases of the contract are estimated to have been worth some £40 billion (\$80 billion/€60 billion). BAeS still employs some 3,000 expatriate staff on the contract in Saudi Arabia. The sales were facilitated by the Defence Export Sales Organisation, part of the Ministry of Defence, and involved some government-to-government arrangements.

There have been persistent rumours, widely reported in the news media, that the Al Yamamah contract involved various corrupt payments. As a consequence, aspects of the Al Yamamah contract were reviewed by the UK National Audit Office and the results presented to the Parliamentary Accounts Committee; but the report has never been released and no member of the PAC has spoken publicly about its contents. In the 1990s, a dispute over the size of commissions payable by Rolls Royce in respect of their related contract for aero engines surfaced in the Swiss and English courts.

Currently, the third phase of Al Yamamah has been agreed in principle, perhaps encouraged by a visit by Tony Blair to Saudi Arabia last July. Reports varied as to whether there is much work to be done before a firm agreement is concluded, or about delivery of aircraft under the contract being imminent, or over whether confirmation of the contract was being held up by the pendency of the criminal investigation. A further £20 billion (\$40 billion/€30 billion) of sales of Eurofighter aircraft is said to be involved.

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The Serious Fraud Office's investigation

The SFO investigation commenced in November 2004 focusing on suspected false accounting in relation to a contract related to the Al Yamamah defence contract.¹ It was suggested that BAeS had channelled illegal payments to Saudi officials through offshore companies.² The press reported the existence of a so-called "slush fund" established on behalf of BAeS to channel benefits to Saudi nationals involved in the Al Yamamah contract.³ More recently, Saudi-owned Swiss bank accounts were said to be under investigation.⁴

The United Kingdom's anti-corruption law is unsatisfactory. This was recognised 10 years ago, when the Law Reform Commission reported on the domestic law on corruption, and recommended that it be replaced and simplified. This ignored the additional requirements of the OECD Anti-bribery Convention, signed in December 1997; but the UK Government assured parliament that UK laws were consistent with the requirements of the Convention, and the UK proceeded to ratify the Convention. In 1999, the OECD Working Group on Bribery held that the UK had failed to implement the core provision of the Convention: to criminalise the bribery of foreign public officials.⁵ In November 2001, the Government introduced provisions in anti-terrorism legislation before Parliament, specifically to meet this finding, and the relevant law took effect in February 2002.

The Attorney General's statement to the House of Lords on 14 December 2006 disclosed that the SFO had divided its investigation into three periods. The first, covered the period from the mid-1980s until the new law came into force. According to the AG, the SFO took the view that no prosecution should be brought in relation to any payments made in this period. The second period (post-February 2002) covered payments made around the time of the termination of the arrangements under which payments had previously been made by BAeS; and the third period covers the years since then, during which there was said to be "little hard evidence" that payments were made. To complete the investigation, the AG stated that the SFO needed a further 18 months, with no guarantee this would lead to a prosecution. The Director of the SFO is reported have taken a less negative view of the situation⁶.

Apart from Al Yamamah, the SFO has confirmed that it is continuing with investigations into defence contracts involving BAeS with Chile, Czech Republic, Romania, South Africa and Tanzania.

BAeS has at all times denied any wrongdoing.

¹ SFO Statement , 3 November 2004; http://www.sfo.gov.uk/news/prout/pr_337.asp?id=337

² BAE included in SFO investigation, BBC News, 17 November, 2004, <http://news.bbc.co.uk/1/low/business/4020905.stm>

³ The Guardian, 4 November 2004; <http://business.guardian.co.uk/story/0,,1342960,00.html>; and The Observer, 7 November 2004; <http://observer.guardian.co.uk/business/story/0,,1345223,00.html>

⁴ Leant on and lumbered — how Goldsmith 'put the state before the law', The Sunday Times, 17 December 2006, http://www.timesonline.co.uk/article/0,,2087-2508436_1,00.html

⁵ United Kingdom - Review of Implementation of the Convention and 1997 Recommendation; <http://www.oecd.org/dataoecd/8/24/2754266.pdf>

⁶ Security threats and economic fears, BBC News, 15 December 2006; <http://news.bbc.co.uk/go/pr/fr/-/1/hi/business/6182173.stm>; UK defence firm lobbied minister to drop corruption probe: report, AFP Business News, 17 December 2006; <http://au.biz.yahoo.com//061216/33/10n5f.html>: '*Speaking after Goldsmith said he thought the case "wouldn't succeed", Wardle told the paper: "There is no guarantee that charges will be brought until you've completed an investigation ... so I had perhaps a different view (from Goldsmith).'*

TI(UK) and BAeS

TI(UK) has since 2000 undertaken a major project for the Prevention of Corruption in the Official Arms Trade (COAT), with active support from departments of the UK government, and involving major defence companies. BAeS declined to attend any of the conferences of interested parties on corruption in the defence sector (in 2001, 2002 and 2004 (the 2004 conference hosted by TI UK)), although a number of other high profile defence companies did attend. In 2005, BAeS began participating in meetings of major US and Western European defence companies, facilitated by TI(UK) and chaired by Lord Robertson, former Secretary-General of NATO. In 2006, the company took the lead in the creation of the UK Defence Industry Anti-Corruption Forum and also participated in the anti-corruption initiative of the Aerospace and Defence Industries Association of Europe, which draws in most of the major EU defence companies. In its 2005 CSR report, the company declared that its anti-corruption programme had been established in alignment with international standards, specifically those of TI.

The termination of the SFO's investigation

In its 14 December 2006 announcement, the SFO said that the decision to discontinue its investigation into BAeS had been taken following "representations" made to the Attorney General and the SFO Director. The representations concerned the need to safeguard national and international security. The SFO went on to say that, "It has been necessary to balance the need to maintain the rule of law against the wider public interest"; and concluded by stating that no weight had been given to "commercial interests or to the national economic interest." This evidently referred to factors which must not influence prosecution, under Article 5 of the OECD Anti-Bribery Convention.⁷

In his statement of the same day, the AG acknowledged the strong public interest in upholding and enforcing the criminal law, "in particular against international corruption"; but he went on to draw a distinction between this public interest and considerations of national security and "our highest priority foreign policy objectives in the Middle East". On these, he had received the views of Prime Minister Tony Blair and the Foreign and Defence Secretaries, although he did not say what those views had been. He referred specifically to Article 5 of the OECD Convention and stated that the UK had not acted contrary to it.

Prime Minister Tony Blair was questioned about the decision in Brussels on the following day. He stated that he was effectively responsible for the decision. He gave various reasons; but accorded the main weight to a Saudi threat to cut off intelligence sharing which would 'jeopardise UK interests in the Middle East' and potentially increase the threat from terrorists in the UK. Mr Blair was going the next day to visit several leaders in the Middle East region.

The negative public reaction to this has been strong and sustained. While a few individuals and journalists have argued that the fight against corruption must give way to the economic interests of securing jobs and protecting the company's

⁷ Article 5 goes much further in specifying that: *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*". [emphasis added].

business interests by abandoning the threat of prosecution, most leading figures and media have deplored the decision. Many have acknowledged the force of the OECD Convention and new 'anti bribery laws'. TI(UK) has been active in briefing the media on the regulatory environment (e.g. see the Economist's 2006 Christmas edition).

TI(UK) decided at an early stage that it was in its interests to look beyond the initial damage caused by the Government's decision. This does not mean that we feel any less outraged by the decision to discontinue the investigation. Nor that we do not share the strong feeling, extending far beyond TI, that the UK's actions are very damaging to the anti-corruption movement in general and the OECD Anti-bribery Convention and the UN Convention Against Corruption (UNCAC) in particular. There have been many such voices raised. The OECD has reacted with concern, and the issue is expected to be discussed at the next meeting of the Working Group on Bribery this month. Politicians in the UK and elsewhere have questioned or condemned the decision.

There is at least one significant legal challenge, threatened by Corner House and Campaign Against the Arms Trade, who have demanded full information about the reasons for the decision and for its withdrawal, failing which they intend to seek judicial review of the conduct of the SFO Director, the AG and Tony Blair. This is a serious challenge, with good prospects of obtaining a review by the English courts. TI(UK) welcomes this challenge and its prospects of success; but decided that it was not appropriate for TI(UK) to participate in legal proceedings.

As a matter of general policy, TI(UK) adopted some years ago a strategy of engagement rather than confrontation. We believe that the best interests of the movement lie in persuading the UK government and UK business to adopt anti-corruption policies, laws and programmes. Progress can be slow (e.g. in persuading the government to present a clear and enforceable anti-corruption law); but we already have a major investment in such a strategy. The COAT project in particular has made considerable progress in helping to change the climate in which the international arms trade is conducted today. By working with business - companies and associations - in the construction and engineering industries, the climate against bribery in that notoriously vulnerable sector is also improving steadily.

Our primary concern is that the UK government's conduct over this decision will discourage the excellent progress that has already been made. Corruption is not just bad for business; it must be **seen** to be bad for businesses that have broken the law. If a major business believed to have broken the law by bribing foreign officials can do so with impunity, the entire movement fails, and we revert back 30 years to the Lockheed episode in Japan, which gave birth to the 1977 US Foreign Corrupt Practices Act.

The point has been made forcefully by major investment managers, including TI(UK) corporate supporter, F&C Asset Management, in a letter to the UK Minister for Defence Procurement⁸: well-organised and stable markets depend on companies acting lawfully and independent enforcement of the rule of law. If a major company can act without fear of prosecution, the integrity of the entire market is undermined.

⁸ "City attacks ending of BAE Probe" The Sunday Times 24 December 2006
<http://www.timesonline.co.uk/article/0,,29390-2517483,00.html>

Here, the Government's actions in causing the investigation to be discontinued leave BAeS with little or no prospect of demonstrating what the company has long maintained, namely that it has not been guilty of wrongdoing. The AG's statement on 14 December 2006 left little doubt that the Al Yamamah payment arrangements in place before the new anti-corruption provisions entered into force in February 2002 would have been illegal bribes if made after that date.

Such payments to foreign officials had to be prosecuted by the UK as soon as the OECD Convention took effect in early 1999. Whatever the inadequacies of UK anti-corruption law, other governments have been entitled for seven years to expect UK companies to conduct their businesses according to the Convention. With the investigation closed, how is BAeS to demonstrate the truth of its maintained innocence? How is the UK Government to show that its promotion of good governance is no more than hypocrisy?

Unprosecuted corruption not only breaches the binding obligations of the States party to the OECD Anti-bribery Convention. It encourages all States, whether parties or not, to believe that the Convention and UNCAC are meaningless, and can be left aside whenever there seems to be a difficulty of a purely subjective character to overcome. We are particularly concerned about the UK government's 'excuse' for urging the decision, namely the UK's national security interests. This is the 'poison pill' defence to international obligations, which responsible States understand cannot be used because an international obligation is meaningless if individual States can plead their selfish and objectively unjustified interests as entitling them to ignore the express provisions of the convention.

TI(UK) and TI-S have joined with many other NGOs in writing to Tony Blair to express concern about the implications for the OECD Convention and asking for a re-opening of the SFO's investigation.

But the main thrust of TI(UK)'s actions will be to urge the UK Government to re-commit to, and place real resources behind, its stated policy of eradicating international corruption wherever it manifests itself, by promoting good governance. The Government cannot do this while its reputation has been tarnished by its decision. Therefore, it must either reverse the advice on the basis of which the decision was made; or it must set out publicly the fullest explanation to defend it. If the reasons cannot be made public, there can be no justification for the decision.

There are no circumstances in which the public interest in upholding and enforcing the rule of law can be outweighed by any other national interest, still less by one undisclosed to the public. TI(UK) believes the UK government has adopted an unsustainable and very damaging position. TI(UK)'s immediate actions are directed to ensuring that these factors emerge as clearly as possible so that the damage already done can be restricted and reversed. If this can be achieved quickly, in place of the damage felt by all of us, the anti-corruption movement may be reinvigorated and reinforced.

We expect to inform other NCs of developments in the situation on a periodic basis, and welcome views and information from other Chapters.