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**BY FAX AND POST**

Dear Sirs,

**SFO Investigation into BAE Systems plc ("BAE")**

We act on behalf of Corner House Research and the Campaign Against Arms Trade. Our clients are not-for-profit organisations with a long history of interest and involvement in the issue of corruption in the UK arms trade.

As you will be aware, on the afternoon of Thursday 14 December, the SFO announced that **"the Director of the Serious Fraud Office has decided to discontinue the investigation into the affairs of BAE SYSTEMS Plc as far as they relate to the Al Yamamah defence contract with the government of Saudi Arabia"**.

The reasons given for the decision are sparse:

**"The decision has been taken following representations that have been made both to the Attorney General and the Director of the SFO concerning the need to safeguard national and international security.**

**It has been necessary to balance the need to maintain the rule of law against the wider public interest.**

**No weight has been given to commercial interests or to the national economic interest.”**

We consider that this decision was unlawful:

- The decision takes into account and is based on an **irrelevant consideration** – the effect that continuing the investigation might have on the relations between the United Kingdom and Saudi Arabia. The decision misconstrues and misapplies **Article 5** of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“the Bribery Convention”).
- In any event, the Prime Minister, and others advising the SFO, took into account an irrelevant consideration when giving their **advice on the public interest** to the SFO. They improperly took into account the effect on the UK’s relations with Saudi Arabia when giving their advice. Their advice is thus tainted and flawed and cannot form the basis of a lawful decision.
- The decision proceeds on the legally incorrect assumption that in questions relating to the prosecution of international bribery and corruption, that it is “necessary to balance... the **rule of law against the wider public interest**”. The United Kingdom’s domestic legal public policy and international obligations require that the two concepts be treated as synonymous.
- The ‘advice’ on the public interest to the SFO in effect amounted to a **direction to discontinue** the investigation. Such an instruction is unlawful and is a breach of domestic and international law principles of prosecutorial independence.

### **Irrelevant consideration**

The United Kingdom has ratified the Bribery Convention. Article 5 of the Convention provides:

**“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.”**

The OECD has previously expressed concern that the involvement of the Attorney-General in giving consent for a prosecution “**involves the possible consideration of UK interests that the Convention expressly prohibits in the context of decisions about foreign bribery cases**”. However, to allay the OECD’s concerns, the Attorney-General:

**“specifically confirmed that none of the considerations prohibited by Article 5 would be taken into account as public interest factors not to prosecute. Moreover, the Attorney-General noted that public interest factors in favour of prosecution of foreign bribery would include its nature as a serious offence and as an offence involving a breach of the public trust. In addition the UK authorities note that by acceding to the Convention, the UK has confirmed that the circumstances covered by the Convention are public interest factors in favour of a prosecution” (OECD UK Phase 2 Report on the Implementation of the Convention, 2005).**

The same assurance must also apply to decisions to discontinue an investigation.

It is a basic principle of English public law that where a public body announces that it will comply with an international law obligation when making a decision, the Court will review the decision for compliance with that obligation (*R v SSHD, ex parte Launder* [1997] 1 WLR 839).

Accordingly, it would be unlawful to give any weight to the effect of continuing the investigation on the UK’s relations with Saudi Arabia.

In the decision made on 14 December, the SFO stated that it had given no weight to commercial interests or the national economic interest, mirroring the wording of some of Article 5 of the Convention. However, no mention was made of the crucially important express duty under Article 5 to disregard any potential consequences of an investigation on the effect upon relations with another State.

This cannot have been an oversight on the part of the SFO, as the Director undoubtedly had Article 5 clearly in mind when taking the decision to discontinue the investigation. We therefore infer that the effect on relations with Saudi Arabia was a relevant factor the Director took into account when taking the decision to halt the investigation. Otherwise, he would have referred to this as an excluded matter in his decision notice. As such, we consider that it is apparent on its face that the decision takes an irrelevant consideration into account.

In contrast, when the Attorney-General spoke in Parliament, he claimed that he and the SFO were precluded **“from taking into account considerations of... the potential effect upon relations with another state, and we have not done so”** (Lords Hansard, 14 Dec 2006, Col 1712-13).

This assertion is plainly incorrect, because it contradicts the written decision notice published by the SFO, as Lord Thomas of Gresford QC immediately pointed out to the Attorney-General:

**“The noble and learned Lord the Attorney-General said that any serious damage to UK/Saudi security, intelligence and diplomatic co-operation would have seriously negative consequences for the United Kingdom public interest. But how can that not be forbidden by Article 5 of the OECD**

**Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which says that you cannot take into account the potential effect on relations with another state? The two statements are contradictory” (Lords Hansard, 14 Dec 2006, Col 1714).**

The Attorney-General did not respond to this point.

### **Advice on public interest**

The SFO’s decision was based on advice received from Ministers at the highest level. It is plain from public statements made by the Attorney-General and the Prime Minister that this advice on the public interest took into account the effect on the UK’s relations with Saudi Arabia:

- The Attorney General told Parliament that the view of the Prime Minister and the Foreign and Defence Secretaries of State was that **“continuation of the investigation would cause serious damage to UK/Saudi security, intelligence and diplomatic co-operation...”** (Lords Hansard, 14 Dec 2006, Col 1712).
- On 15 December, the Prime Minister expressed similar views:

**“Our relationship with Saudi Arabia is vitally important for our country in terms of counter-terrorism, in terms of the broader Middle East and in terms of helping in respect of Israel-Palestine - and that strategic interest comes first.**

**If this prosecution had gone forward all that would have happened is we would have had months, perhaps years, of ill-feeling between us and a key ally”** (*“Blair: I pushed for end to Saudi arms inquiry”*, The Times, 15 Dec 2006).

Both the Attorney-General and the Prime Minister were explaining the basis for the decision in terms of the effect that continuing the investigation might have had on relations with Saudi Arabia. However, this is a legally irrelevant consideration in light of the Attorney-General’s assurances to the OECD.

As a result, it is plain that the effect on the UK’s relations with Saudi Arabia were indeed taken into account by those giving advice to the SFO. As such this advice must be viewed as tainted and not a proper basis for a conclusion that proceeding with the investigation would not be in the public interest.

Finally, if it is to be suggested that damage to national security is in some way different from **“the potential effect on relations with another State”**, this would be entirely misconceived. If Article 5 were to be read so as to permit the SFO to take into account the alleged national security effects of damaged relations with Saudi Arabia, this would render Article 5 a dead letter and of no useful purpose. There will always be “effect[s]” if relations with another state are damaged. Article 5 requires that these effects must be

ignored because of the importance of preventing bribery and corruption in international business transactions. An international law instrument should not be given a narrow construction, contrary to its stated aims. It is notable that the wording of the Convention is considerably stronger in this regard than the OECD Council recommendations that preceded it: (“**public prosecutors... should not be influenced by considerations of... fostering good political relations**” OECD Revised Recommendation of the Council on Combating Bribery in International Business Transactions, May 1997).

### **Rule of law**

The decision proceeds on the express basis that the SFO was required to balance the rule of law and the public interest as competing and irreconcilable interests. As such, the SFO proceeded on a legally incorrect basis, misunderstanding the effect of the Bribery Convention and public policy.

English legal public policy is clear and resolute: “**obtaining contracts by bribery is an evil which offends against the public policy of this country**” (*R (Corner House) v ECGD* [2005] EWCA Civ 192 at [137]). Investigating and prosecuting those who make corrupt payments is not somehow opposed to English public policy – it is public policy.

The bribery and corruption of foreign public officials creates unique difficulties. The temptation for any particular State is always to succumb to short-term political expediency and to decline to take action because of the potential foreign policy consequences. Why should the SFO prosecute corrupt British companies if British relations with another State will be damaged? It is for this reason that the Bribery Convention was ratified by the members of the OECD. The Convention is a multilateral treaty. Each of the signatory states recognise that collective action was necessary. All signatory states introduced a criminal offence of bribery of a foreign public official, implemented enforcement mechanisms and promised to investigate and prosecute even where relations with another State would be damaged as a result. Such collective action was intended to benefit all signatory States in the long-term.

These important principles are government policy. At the 2006 G8 summit in St Petersburg, the Prime Minister confirmed:

**“Corruption threatens our shared agenda on global security and stability, open markets and free trade, economic prosperity, and the rule of law. We recognize the link between corruption and weak governance. We underscore our commitment to prosecute acts of corruption.”**

Further, it was accepted that failing to prosecute corruption offences actually damages national security by contributing to the spread of organised crime and terrorism:

**“We recognize that corrupt practices contribute to the spread of organised crime and terrorism...”**

A commitment was made by all G8 members to act:

**“Today, we advance our commitment against high level large-scale public corruption. We commit to:**

- **continue to investigate and prosecute corrupt public officials and those who bribe them, including by vigorously enforcing our laws against bribery of foreign public officials to ensure that the supply side of corruption is effectively prosecuted consistent with domestic legislation”**

In light of the Bribery Convention and UK public policy as expressed at the recent G8 meeting by the Prime Minister, the maintenance of the rule of law by effective investigation and enforcement, despite any commercial, economic or diplomatic consequences, is the public policy objective in foreign bribery cases.

### **Direction to discontinue**

The Prime Minister has confirmed that he takes full responsibility for the decision that is said to have been taken by the Director of the SFO:

**“I’m afraid, in the end, my role as Prime Minister, is to advise on what’s in the best interests of our country. I have absolutely no doubt at all that the right decision was taken in this regard and I take full responsibility” (“*Blair: I pushed for end to Saudi arms inquiry*”, The Times, 15 Dec 2006.**

The Prime Minister has no responsibility for, and should not be taking, decisions about whether to continue an investigation being carried out by an independent prosecutor. There is no reason for him to accept responsibility for a decision unless in practice it was taken by him. It appears that the so-called advice given by senior Ministers amounted in practice to a direction to the SFO to discontinue the investigation. As a result, the decision is unlawful.

### **Disclosure of relevant documents**

Please provide disclosure of the following documents and materials. Given that reliance is placed by the SFO on the judgment of Ministers, and we challenge the decision-making process adopted, these disclosure requests necessarily go wider than documents merely held by the SFO:

- All documents recording representations made by officials and Ministers to the SFO on the continuation of the investigations, or containing submissions or briefings on the public interest.

- Documents recording all representations and other contacts between BAE and its representatives and officials and Ministers on the continuation of the investigations.
- Documents recording all representations and other contacts between the Government of Saudi Arabia and officials and Ministers on the continuation of the investigations.
- Any documents setting out particulars of the full and complete reasons for halting the investigation.

### **Next steps**

Please treat this letter as a letter of claim, pursuant to the Judicial Review Pre-Action Protocol. Please also treat the request for disclosure as a request made under the Freedom of Information Act 2000.

We respectfully remind you of the importance of a full and candid response to this letter and to our requests for disclosure (*Downes*, Judgment and referral to the Attorney General of Girvan J, High Court of Northern Ireland).

We invite your immediate confirmation that the decision of 14 December will be withdrawn and re-taken applying the principles set out above.

In the event that we do not receive a satisfactory response, we are instructed to issue a claim for judicial review.

As to timing, it has been reported widely that the government of Saudi Arabia imposed a deadline on HMG to discontinue the investigation, failing which there would be various commercial consequences, including the ending of negotiations for the purchase of further Typhoon aircraft. We therefore recognise the urgency and importance of this matter. Should it be necessary to issue a claim for judicial review, we will co-operate to ensure that the case can be resolved promptly. Given the urgency, we seek a substantive response to this letter, including copies of relevant documents, by **Tuesday 2 January** at the latest.

Finally, we invite you to confirm that in the event that legal proceedings are brought, you will not seek any order for costs. This letter raises issues of great importance, which our clients are responsibly and properly pursuing in the public interest. Their financial resources are extremely limited. In the event that a claim is necessary, it will be accompanied by an application for a Protective Costs Order.

Yours faithfully,

**LEIGH DAY & CO**