

Briefing by Transparency International UK

## **Background**

On 5 February 2010, the Serious Fraud Office (SFO) in the UK announced that, jointly with the Department of Justice (DoJ) in the US, it had arrived at a coordinated global settlement with BAE Systems (BAES) of the long-running investigations of bribery allegations in several countries. In the UK, the company has agreed to plead guilty to 'failing to keep reasonably accurate accounting records in relation to its activities in Tanzania' for which it will be fined £30 million. In the US, the company has reportedly agreed to pay a \$400m fine and plead guilty to charges of conspiring to make false statements to the US Government in connection with regulatory filings and undertakings. Details of recent developments are in the Annex to this Note.

## **Transparency International UK's response**

The recent settlements between BAES and the SFO and DoJ show that the company has admitted to unethical behaviour in nearly all the deals and contracts about which bribery allegations have been circulating for many years. This is a significant advance, when for several years it appeared that no conviction might be obtained. It has resulted in the largest ever fines in relation to acts associated with breaches of overseas corruption laws by a UK company, and the third largest anywhere in the world.

These cases involve defence deals with Tanzania, Hungary, the Czech Republic and, most importantly, Saudi Arabia. BAES had previously denied any wrongdoing in all cases, but now the company's behaviour in relation to those deals is proven to have been illegal and unethical, and the company has admitted that it acted unlawfully by misleading the US government about the efficacy of its compliance systems and maintaining false accounts in the UK. This in itself is a victory for those who, for years, have pursued the course of justice in the face of repeated and consistent denials of wrongdoing by the company.

However, it is not clear what impact these settlements will have on ongoing investigations in

Tanzania, Switzerland, Hungary and the Czech Republic. It should be expected that the SFO has consulted prosecutors in these countries and, if requested, should cooperate with them under Mutual Legal Assistance arrangements. Also, the controversial South Africa case remains unresolved because the SFO has stated that it will undertake no further investigations.

Although the settlements undoubtedly provide some grounds for optimism, a detailed examination of the documents gives rise to significant concerns.

Transparency International UK had welcomed the October 2009 announcement by the Director of the SFO that he had asked the Attorney General for consent to prosecute BAES. Prosecutions should be the norm and there are three major advantages of bringing cases to trial: they bring evidence into the public domain which results in transparency; they have the effect of debarring convicted companies in appropriate cases; and, most importantly, they result in the full force of the law being applied to both companies and individuals, which brings justice to the victims of bribery.

However, TI-UK recognises that there are cases in which settlements, including plea bargains, are a more effective option. We have established four tests for whether such settlements are appropriate:

- If a settlement is deemed to be in the public interest, has the rationale for this been set out in a fully transparent manner?
- Is the punishment proportionate to the seriousness of the crime?
- Will the punishment deter others from committing bribery?
- Were there mitigating circumstances?

In order to make an accurate assessment of whether these four tests have been met in the case of BAES, a far greater degree of transparency is necessary about the settlements. This is particularly the case for a company where the bulk of its revenue is paid by the taxpayers of the UK and of many other States.

## **Issues of concern**

Transparency International UK's specific concerns are set out below.

## **1. Transparency of SFO settlement**

The DoJ court filing contains a level of detail about charges against BAES that has not been published by the SFO in relation to Tanzania. It is vital that all details should be disclosed fully to the public when the UK court decides on the SFO's case. If any details can be disclosed before the court hearing, this should be done immediately. In the absence of transparency, it will be impossible to judge whether justice has been done.

## **2. Will individuals be prosecuted?**

These are potentially serious crimes, in which there are real victims – notably, the people of Tanzania, Saudi Arabia, Hungary and Czech Republic. The company may have been punished, but individuals may have also broken the law on a systematic basis. The DoJ has apparently not ruled out the prosecution of individuals. Why has the SFO not adopted a similar policy?

## **3. Bribery offences and debarment: why was BAES not charged with offences that would lead to debarment?**

The UK court will decide whether the financial penalty recommended by the SFO is commensurate with the offences admitted by BAES. Inevitably, the question arises whether the penalty is sufficient. The law in the UK and in the US requires that serious corporate offences entail debarment. Was it deliberately decided to avoid charging BAES with such offences? Are BAES being treated as "too big" to be debarred? Any suspicion of a culture of impunity would undermine all UK attempts to create a bribe-free regime. There needs to be greater clarity about why the SFO chose not to pursue a charge which would lead to debarment, in contrast to its recent case against Mabey & Johnson, where the company pleaded guilty to bribery offences and has been debarred.

## **4. BAE Systems' anti-corruption procedures: how can we be certain that these work and that other deals are not tainted by corruption?**

It is almost two years since the Woolf Report made 23 recommendations that were intended to help BAES to establish a world-leading anti-corruption system. It is now admitted that the Woolf Committee was conducting its review at the same time that these skeletons lay in the cupboard and the company was consistently denying any wrongdoing. The company stated at the time that it would appoint an audit firm to give reassurance that the Woolf recommendations would be implemented in full. Since then, an audit firm has been appointed, but no report has been made public. Why should the public believe the Chairman's assurances this time, when legally binding promises made in 2000 were being systematically flouted for years afterwards? It is essential for BAES to demonstrate that independent and robust non-Executive Directors are overseeing reforms of the company's systems, as the Woolf Report recommended. The SFO says that BAES has reformed its ways. How is it or the public to judge that statement in the absence of independent, periodic audits of the company's anti-corruption systems?

**5. Compliance Monitor: will a credible, independent Compliance Monitor be appointed to oversee BAES operations in the UK, and worldwide?**

It is reported that in the settlement with the DoJ, a Compliance Monitor will be appointed – although this is not referred to in the SFO's press release. Will the Compliance Monitor report equally to the SFO as to the DoJ? TI-UK believes that a Monitor is essential in order to ensure that BAES has improved sufficiently and irreversibly its anti-bribery systems. The Monitor must be independent, credible, appointed for a renewable period of a minimum of five years, and have terms of reference and resources that are sufficiently wide to monitor all corruption risks within a very large company.

**6. Role of the company's auditors: were the company's auditors complicit in signing off false accounts – or did they fail to spot the payment of these unusual 'commissions'?**

The size and frequency of illegal payments, disguised as commissions, revealed by the DoJ documents, suggests that they should have come to the attention of the auditors. This raises questions about the complicity or competence of the company's auditors, at a time when there were frequent press allegations which they might reasonably have considered when reviewing the company's record keeping. Were the auditors investigated by the relevant UK professional associations? In general, it raises questions as to whether auditors are sufficiently trained to identify bribery when auditing high-risk companies like defence companies, and whether there are inherent conflicts of interest that would deter them from doing so.

**7. Suitability of company's directors and senior management to continue: are the Chairman, directors and senior management of BAE implicated in these corruption cases still working for the company?**

Only one individual has been named and prosecuted (this case has now been dropped); but it is clear that many individuals were involved at all levels in the company, and that there was board-level complicity at least in allowing an inadequate and improper oversight system. What sanctions have BAES applied against those responsible for the offences admitted? Has BAES fully disclosed to enforcement agencies any criminal conduct of individuals revealed by the company's internal investigations? Senior executives must be implicated; yet it is reported that the former Chairman, at the time these offences were committed, is still advising the company. Is BAES committed to the new promises made to achieve these settlements?

**8. Has BAES violated ECGD's rules?**

BAES has, until recently, been a major beneficiary of export credit cover from the ECGD. In the light of the admission that BAES deceived the US Government about its compliance with the FCPA in its applications for arms export licences, the company appears to have breached ECGD's rules. What is the UK Government's position on this?

**9. Disparities between the US and UK legal systems in relation to the prosecution of foreign bribery**

The two settlements reveal the yawning gaps between the powers available to US law enforcement agencies and the limited scope of SFO powers in this area. It is known that UK laws are inadequate; and it is essential that the greatly improved UK Bribery Bill is enacted before the forthcoming general election. Additionally, full backing and resources must be given to the SFO and Crown Prosecution Service to deal effectively with companies still steeped in a culture of denial and cover-up. These should include the power to impose civil penalties, to conclude deferred prosecution agreements, to appoint Monitors and to require independent investigation of companies' worldwide operations.

## Recent events

October 2009: 'The Serious Fraud Office has announced today that it intends to seek the Attorney General's consent to prosecute BAE Systems for offences relating to overseas corruption and will prepare its papers to be submitted to the Attorney when the SFO considers it is ready to proceed. This follows the investigation carried out by the SFO into business activities of BAE Systems in Africa and Eastern Europe.' [source: SFO]

January 29 2010: 'Count Alfons Mensdorff-Pouilly has today been charged in connection with defence contracts between BAe Systems plc and certain countries in Eastern/Central Europe. The charge is conspiracy to corrupt, contrary to section 1 of the Criminal Law Act 1977. Alfons Mensdorff-Pouilly, between 1 January 2002 and 31 December 2008, conspired with others 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.' [source: SFO]

February 5th 2010: '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.' [source: SFO]

February 5th 2010: DoJ announces that BAE has agreed to plead guilty to one charge of conspiring to make false statements to the government in connection with regulatory filings and undertakings; widely reported that BAES will pay a \$400m fine