



## X. TRANSNATIONAL CORRUPTION AND ASSET FORFEITURE

### A. Switzerland – Swiss Subsidiary Fined for Inadequate Compliance Measures in Major Bribery Case

*by Daniel L. Buhr and Simone Nadelhofer<sup>1</sup>*

On 22 November 2011 the Office of the Attorney General of Switzerland (the “OAG”) issued a summary punishment order against Alstom Network Schweiz AG (“Alstom” or the “Company”) for not having taken all necessary and adequate compliance measures to prevent bribery of foreign officials in Latvia, Tunisia and Malaysia.<sup>2</sup>

The Company, the Swiss subsidiary of French Alstom SA (a world leader in transport infrastructure and power generation), was fined 2.5m Swiss francs (USD 2.7m) and ordered to pay 36.4m Swiss francs (USD 39.4m) in compensation for illegal profits derived from bribery. The punishment order closed criminal proceedings after two years of fierce investigation. The Company has renounced its right to appeal the order, which has thus become legally binding.

Since 2000, the Company has been responsible within the Alstom Group for the global management and remuneration of its consultants for the “Power Systems” and “Power Services” business lines. It functionally reports to Group headquarters in Paris.

Switzerland introduced the concept of corporate criminal liability on 1 October 2003 (Article 102 of the Swiss Criminal Code, the “SCC”). Prior to that date, only individuals were subject to criminal prosecution in Switzerland.

Under Article 102 section 1 SCC, a business entity becomes criminally liable if an offence (i) was committed by individuals acting for the entity within the scope of its business purpose, and (ii) the wrongdoing cannot be imputed to specific individuals because the business entity’s system of governance did not make it possible to identify the individual responsible for the wrongdoing. In other words, under Article 102 section 1 SCC the corporate offense relates to the impossibility of attributing a criminal act committed within a business entity to the responsible individual acting on behalf of the company. If the responsible individual can be identified and charged for the offence, the corporation is exempt from punishment.

Under Article 102 section 2 SCC, however, a business entity is criminally liable for the failure to take all necessary and reasonable compliance measures to prevent the bribery of foreign officials or other serious criminal offenses (such as money laundering). The corporate liability under section 2 applies cumulatively, i.e. in addition to the criminal responsibility of the individual(s) who committed the offence.

In both scenarios the business entity can be punished with a fine of up to CHF 5 million (USD 5.4m).

At the time it was introduced, the new provision attracted a lot of attention among legal practitioners, but for many years, there were rarely any cases where the corporate offense was applied. Therefore, the “Alstom case” is of great significance and should be carefully considered by all companies in Switzerland engaged in international business.

Alstom was fined under Article 102 section 2 SCC for its failure to take all necessary and adequate measures to prevent the bribery of foreign public officials in Latvia, Tunisia and Malaysia. In particular, the OAG

---

1 Daniel L. Buhr and Simone Nadelhofer are counsel at Lalive, Zurich.

2 [www.bundesanwaltschaft.ch](http://www.bundesanwaltschaft.ch).



noted in its press release that the use of agents on the basis of success fee remuneration schemes in countries with a high level of corruption (according to the corruption index of Transparency International) entails a considerable risk of criminal prosecution for the companies. To reduce the risk of prosecution, the OAG calls upon business entities to employ extensive efforts in compliance and to rigorously enforce and control strict internal anti-bribery policies.

In addition to the fine, Alstom was ordered to pay compensation of CHF 36.4m (USD 39.4m) for illegal profits derived from bribery. A compensatory claim of such a substantial amount against a business entity is unprecedented in Switzerland. Under Article 70 SCC, proceeds of crimes are to be confiscated by the State. If it is not possible to clearly establish the amount of the illegal proceeds, the court may estimate the total assets to be confiscated (Article 70 section 5 SCC). Since there are no strict legal guidelines for the assessment and calculation of criminal proceeds, this provision gives the judge a great deal of discretion in setting the amount to be confiscated. Furthermore, if no direct confiscation of criminal proceeds is possible, the forfeiture of an equivalent sum of money is provided for instead (compensatory claim; Article 72 SCC). In the case at hand, the OAG ordered Alstom to pay an amount equivalent to the operational profit (EBIT) derived from the affected projects. However, in other cases such as illegal drug trafficking, the courts regularly apply the “gross principle” which allows the state to confiscate the entire revenue (e.g. without deducting costs) from a criminal act.

The proceedings were originally directed against persons unknown and, after having temporarily been discontinued, were reopened in May 2008 and extended to the Company's former compliance manager for suspected qualified money laundering (Article 305bis section 2 SCC), bribery of foreign public officials (Article 322septies SCC) and disloyal management (Art.158 SCC).

In July 2009, and upon analysis of a large number of corporate documents seized at the Company's premises in Baden (Switzerland), the proceedings were extended to the Company's ultimate parent, Alstom SA in France. Furthermore, in the course of the investigation, numerous requests for mutual legal assistance were addressed to foreign criminal prosecution authorities.

During the investigation, the OAG came to the conclusion that consultants engaged by Alstom on the basis of consultancy agreements in Latvia, Tunisia and Malaysia had paid a significant proportion (up to 70%) of their success fees to foreign officials with the objective of influencing them to buy Alstom power plants and services.

The proceedings against Alstom SA, France, have finally been dismissed with regard to the actions in Latvia, Tunisia and Malaysia in consideration of its cooperation in the investigation, in particular its compliance with requests for information and documents and its consent in most cases to a simplified execution of mutual legal assistance requests from abroad. The OAG also took into account Alstom SA's considerable improvements in the internal compliance procedures before and after the opening of the investigations. Furthermore, Alstom SA donated 1m Swiss francs to the International Committee of the Red Cross as compensation. Nevertheless, the OAG held that Alstom SA, as the senior holding company, is responsible in part for the organizational deficiencies identified.

Interestingly, the underestimated Swiss corporate offense of not having taken all necessary and adequate compliance measures to prevent the bribery of foreign officials is highly similar to the much debated UK Bribery Act's new corporate offense, i.e. the 'Failure of commercial organizations to prevent bribery.'<sup>3</sup> However, Swiss law is – at least prima facie – more lenient in that the OAG bears the burden of proof regarding the inadequacy of the compliance program. In contrast, the UK Bribery Act is based on strict corporate liability in conjunction with the (sole) defense of having had in place 'adequate procedures designed to prevent persons associated with it from undertaking such conduct'.

In its decision the OAG specifically concluded that Alstom's compliance organization during the period 2003 to 2008 was inadequately staffed, in terms of both the quantity and quality of its compliance personnel. Most compliance staff hired in 2003 had no relevant professional compliance experience and Alstom's subsequent regular

---

3 Section 7 of the Bribery Act 2010.



training for its compliance personnel was qualified as insufficient. Taking into account Alstom's global workforce of 75,000 employees, the OAG also judged that it was not sufficient for the company to have only 17 compliance officers (at headquarters and in Switzerland).<sup>4</sup>

Another aspect addressed by the OAG was the independency of the compliance function as increasingly required by compliance best practice standards. The compliance function at headquarters also provided legal advice to the sales function which included the drafting of agreements with consultants. This resulted in a lack of independence of the compliance function within the organization and insufficient authority to fulfill its task.<sup>5</sup>

The OAG stated that Alstom's internal process regarding the approval of payments to consultants, which for instance required 'proofs of rendered services' and prohibited payments to offshore companies and bank accounts, was sound in its design. However, although finalized in 2001, the internal policy was only introduced in 2003 and thereafter either not followed at all, or only followed deficiently.<sup>6</sup> In addition, Alstom did not take remedial action when it detected violations of the internal rules and processes by its own employees or external consultants.<sup>7</sup>

In summary, the OAG's decision is of major relevance to all Swiss business entities engaged in international transactions. Their Boards and executive committees have a duty to regularly assess whether their compliance governance and compliance management are effective and follow best demonstrated practice. Key aspects to be revisited are the independence and authority of the compliance function, its adequate staffing and resourcing, and discipline employed in the enforcement of adequate internal policies. A good guideline with regard to current compliance governance in Switzerland (and beyond) is the recent position paper by *economiesuisse* (the Swiss Business Federation) on 'Fundamentals of effective compliance management.'<sup>8</sup>

---

4 Paragraph 6 of the OAG's decision.

5 Paragraph 7 of the OAG's decision.

6 Paragraph 8 of the OAG's decision.

7 Paragraph 15 of the OAG's decision.

8 [www.economiesuisse.ch](http://www.economiesuisse.ch); the principles of the policy paper have also been published under the title "Five Fundamentals for Taking Compliance Management Seriously", in ACC Docket, the Association of Corporate Counsel's monthly magazine, January/February issue 2011.