

Federal Attorney:  
Chief Federal Attorney:  
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Case number:  
**Bern, 22 November 2011**

Stefan Lenz  
Walter Mäder  
Urs Köhli  
Gabriele Beyeler  
EAll.04.0325-LEN

## Order to dismiss proceedings

Art. 319 et seq. Swiss Code of Criminal Procedure

Defendants  
(art. 104 section 1(a)  
SCCP)

**ALSTOM SA**, 3, Avenue André Malraux, FR- Levallois-Perret Cedex  
and

**ALSTOM NETWORK SCHWEIZ AG (formerly ALSTOM Prom AG)**,  
Brown Boveri Strasse 7, 5400 Baden

Counsel

Maurice Harari, Esq., rue du Rhone 100, Case postale 3403, 1211  
Geneva  
and

Jürg Wernli, Esq., Länggassstrasse 7, Postfach 7161, 3001 Bern

Offense

Violation of Art. 102 Section 2 Swiss Criminal Code (SCC) in conjunction with Art. 322<sup>septies</sup> SCC: charge that the aforementioned companies did not take all necessary and reasonable organizational precautions to prevent bribery of foreign public officials (in terms of Art. 322<sup>septies</sup> SCC) in the course of their business operations.

### I. Preliminary remarks:

1. Active bribery in the public and private sector is included in the list of acts prohibited under Article 102, paragraph 2, of the Swiss Criminal Code, which as of 1 October 2003 established cumulative criminal liability for companies in addition to that of natural persons.
2. According to accepted jurisprudence, the place of commission for corporate offenses is both the place where the underlying offence was committed and the place where corporate liability is established (URSULA CASSANI: *Grenzüberschreitende Korruption – in-*

*ternationale Zuständigkeit der schweizerischen Strafjustiz in Korruption Staat und Wirtschaft*, 4. Zürcher Tagung zum Wirtschaftsstrafrecht, Zurich 2010, p. 32 with additional notes). Accordingly, companies based abroad are subject to Swiss law on corporate liability if the offence was committed in Switzerland or if the organizational error occurs in a division of that company located in Switzerland (URSULA CASSANI, I. c., p. 34).

3. As set out in detail below, the organizational errors of ALSTOM SA, based in France, also had ramifications in Switzerland. Swiss criminal law therefore applies not only to ALSTOM Network Schweiz AG, based in Baden, but also to ALSTOM SA, based in France.
4. Therefore the Office of the Attorney General (OAG) has jurisdiction to proceed against both companies.
5. The present proceedings were launched to determine whether it can be demonstrated that, during the performance of ALSTOM's business activities, bribes were paid to foreign public officials, and whether those payments can be attributed i.a. to insufficient organizational efforts by the companies to prevent such offences being committed from October 2003 (entry into effect of Art. 102 SCC).

## **II. Material facts**

### **1. History of the proceedings and procedure**

- 1.1. The Office of the Swiss Attorney General (OAG) opened an investigation (pursuant to Art. 101 Federal Criminal Procedure Act) on 9 December 2004 via its Lausanne branch, against persons unknown for suspected money laundering and corruption (Art. 305<sup>bis</sup> and 322<sup>ter</sup> et seq. SCC) following a statement by a trustee working in Switzerland that suspected money laundering was taking place. On 13 October 2006, the proceedings under Art. 106 Federal Criminal Procedure Act were temporary discontinued, with the provision that the discovery of new information might lead to the reopening of the proceedings.
- 1.2. As a result of new information the discontinued proceeding against persons unknown were reopened in an order of 16 October 2007 by a team at the OAG in Bern.
- 1.3. In an order of 7 May 2008, the proceedings (which until that point had been brought against persons unknown) were extended to include the person and acts of Bruno Arnold Eugen KÄLIN for suspected qualified money laundering under Art. 305<sup>bis</sup>(2) Criminal Code, bribery of foreign public officials under Art. 322<sup>septies</sup> SCC and disloyal management under Art. 158 SCC.
- 1.4. In an order of 2 July 2009, the proceedings were extended to include the persons and acts of:
  - ALSTOM NETWORK SCHWEIZ AG (formerly ALSTOM Prom AG), Brown Boveri Strasse 7, 5400 Baden; and

- ALSTOM SA (as the parent company of the ALSTOM Group), 3, Avenue André Malraux, 92309 Levallois-Perret Cedex, France

for suspected offences under Art.102 SCC.

- 1.5. On 21 August 2008, searches were carried out of the premises of ALSTOM Network Schweiz AG and of the work station as well as of the residence of Bruno KÄLIN and another employee of the then ALSTOM Prom AG, as well as of the headquarters of two consulting firms based in Switzerland. A considerable volume of documentation was seized during these searches.
- 1.6. A large part of the investigation focused on analyzing movements of money. In this regard, documents were ordered of numerous banks and further searches of the premises of third parties (typically consultants) were ordered and further documents seized. Alongside this, numerous applications were submitted for judicial assistance and for evidence to be gathered abroad; a large number of these applications were subsequently carried out.
- 1.7. ALSTOM Network Schweiz AG and ALSTOM SA have – to the extent possible and permitted by their status as defendants – cooperated with prosecuting authorities during the proceedings by complying with requests for information and documents and (majoritarily) consenting to the use of simplified versions of the requests for mutual legal assistance from abroad.
- 1.8. ALSTOM Network Schweiz AG was convicted in a summary punishment order dated 22 November 2011 of breaches of Art. 102(2) in combination with Art. 322<sup>septies</sup> SCC, with regard to three projects in Latvia, Tunisia and Malaysia, and was ordered to pay a fine of CHF 2.5 m, in addition to with the various procedural costs accrued as part of the proceedings, amounting to CHF 95,217.70 (fees of CHF 20,000.000 plus additional expenses of CHF 75,217.70). This summary punishment order stipulated that the breaches identified in connection with the three projects concerned in Latvia, Tunisia and Malaysia generated illegal profits, estimated at CHF 36.4 m based on the EBIT margin (operating profit margin) recorded for the three projects in the relevant period. This sum was fixed as compensatory claim as part of the summary punishment order of 22 November 2011. ALSTOM Network Schweiz AG expressly waived its right to appeal against this summary punishment order, with the result that the latter took legal effect.
- 1.9. The reasons for which the proceedings against both defendant companies (to the extent that these proceedings have not already been closed by the summary punishment order of 22 November 2011 against ALSTOM Network Schweiz AG) can be discontinued by an order under Art. 319(1)(a), (b) or (e) in combination with Art. 8(1) Code of Criminal Procedure and Art. 53 SCC, are explained below.

## **2. Underlying factual circumstances**

- 2.1. ALSTOM has - like many other groups active in these industries – a long-standing tradition of appointing consultants. These consultants were namely obliged to secure pro-

jects, and partly to provide support during the implementation and completion of projects. Consultants were typically paid a success fee, partly as a figure determined in advance ('lump sum'), agreed on for each contract concluded; this fee would generally be payable in instalments when predefined milestones were reached. In the vast majority of cases, the success fee agreed on was calculated in a 'consultancy agreement' or in a 'project development agreement' as a specific percentage of the total value of the contract. Consultants were given the task of accompanying and assisting in the award and proper contractual performance of orders as part of the relevant contracts. Consultants were thus selected on the basis they had appropriate knowledge of the country, culture, legal and state system in question, as well as of the process for awarding and carrying out projects. The use of consultants in this capacity is thus legal.

- 2.2. From approx. 2000 onwards, ALSTOM centralized its internal processing of these consultancy agreements for its various business units worldwide within the 'International Network' department in Paris. For this purpose, the two companies ALSTOM Network Schweiz AG (formerly ALSTOM Prom AG, ALSTOM Power Prom AG or ABB Alstom Power Prom AG), Baden, and ALSTOM Network UK Ltd. (formerly ALSTOM International Ltd.) were founded to centralize the execution of compliance procedure and payments. This was done on the advice of external compliance experts, with the objective of improving monitoring compared with the previous, decentralised system where compliance was performed by several different departments. Accordingly, ALSTOM Network Schweiz AG was responsible within ALSTOM for the group's compliance procedure in the "Power Systems" and "Power Services" sectors.
- 2.3. As part of this centralization, ALSTOM Network Schweiz AG, Baden was founded on 1 January 2000 as a wholly-owned subsidiary of ALSTOM Schweiz AG. In functional terms it was subsidiary to the "International Network" (known as the "Country Network" until March 2002) at the ALSTOM head office in Levallois, Paris, France. ALSTOM Network Schweiz AG, together with the two other companies ALSTOM Network UK Ltd. in the UK and ALSTOM International SA in France (which was primarily responsible for representation agreements) played a central role in the Group's overall compliance structure. Until 31 December 2005, it was de facto led by Bruno Kälin, who – as his successor – however spent most of his time working at the head office of ALSTOM in Paris and the "Country Network" or "International Network (IN) – Representation and Compliance (R&C)" department, working in Baden only sporadically.
- 2.4. ALSTOM Network Schweiz AG was primarily responsible from January 2000 onwards for checking the conformity of consultants in the "Power Systems" and "Power Services" sectors of ALSTOM (who were typically introduced by the sales divisions ("business units")) with internal compliance rules and subsequently that the payments made to those consultants were in accordance with the relevant contracts. It was incorporated into the drafting of the contracts with the consultants in such a way that it prepared and co-signed – represented by authorized signatories – the Consultancy Agreement alongside the Business Unit and the consultant involved in each case. Depending on the procedures and contractual structure chosen, the consultants had to submit their invoice to ALSTOM Network Schweiz AG once milestones pre-defined in the consultancy agreement had been reached and thus their fees had become due, and these invoices were then initially looked over before being passed on – together with any « proofs of rendered services » where applicable – to the responsible Busi-

ness Unit for further checking. If the invoice was approved by the Business Unit via a form - using a predefined process supervised solely by the ALSTOM Network Schweiz AG -, ALSTOM Network Schweiz AG itself submitted an invoice – based on an escrow agreement previously signed with the Business Unit in question – to that Business Unit for the amount invoiced by the consultant. The Business Unit would then pay the relevant amount into the account of ALSTOM Network Schweiz AG in Switzerland, which forwarded the amount on to the consultant. For this internal Group activity it initially received an administration fee of 0.3%, subsequently rising to 0.4%, of the transaction volume processed. Based on the transaction volumes processed in any given quarter, ALSTOM Network Schweiz AG invoiced the Business Units involved for the relevant amounts. The abovementioned companies in England (ALSTOM Network UK Ltd.) and France (ALSTOM International SA) were responsible for performing similar tasks in their respective business sectors under the supervision of the “International Network” (R&C from 2002 onwards) division attached to the ALSTOM head office in Paris.

- 2.5. The R&C unit, which was predominantly responsible for ensuring that compliance regulations at ALSTOM were observed, was functionally attached to the “International Network” (IN) unit in 2002, at the ALSTOM SA head office in Levallois, France, whose further duties comprised the following:

- *Business development*
- *Lobbying in countries of destination of Orders*
- *Sales support as requested by the Sectors*
- *Management of local ALSTOM multi-Sector organisations*
- *Increase ALSTOM’s awareness*
- *Set-up and management of shared services*
- *Implementation of “Ethics and procedures” policy*

To the extent that the rules on best practices imposed for a compliance unit to be independent from the sales interests of the Business Units, it is questionable whether “R&C” met this requirement with regard to its organizational and hierarchical position described above, as “IN” was also supposed to support the Business Unit during its sales work and thus - including when using the consultants proposed by the Business Unit – during its contractual negotiations. According to the opinion of the OAG, the head of the ‘R&C’ unit at that time was not given a sufficiently strong role within the organizational structure to enforce compliance provisions during his time in office.

- 2.6. ALSTOM Network Schweiz AG was mainly responsible for consultancy agreements for the “Power Systems” and “Power Services” sectors from 2000 onwards. ALSTOM Network UK, on the other hand, was primarily responsible for the transport and T&D sectors, and the French company ALSTOM International was primarily responsible for representative agreements. This division of tasks was not carried out without exception.
- 2.7. The work in Baden intended for ALSTOM Network Schweiz AG was to be carried out by 2 fulltime equivalents. ALSTOM Network Schweiz AG was supported in this work from 2003 onwards by an initial team of around 10 employees from the R&C division in Paris, rising to around 15 employees by 2008. As the compliance profession was only developing at the time, neither the director of this division nor the other two ALSTOM Network Schweiz AG employees stationed in Baden had relevant professional experi-

ence in the compliance sector at the moment they assumed their positions. The same also applied for the majority of those employees working in the “R&C” division in Paris, most of whom were employees recruited from the operative divisions of ALSTOM due to the lack of an established compliance profession. Even though ALSTOM in 2003 until 2008 offered its employees regular education on compliance issues, this training now may be described as inadequate. The overall composition of the compliance department at ALSTOM during the relevant period of 2003-2008 is therefore considered as insufficient, both in quantitative and qualitative terms, for a worldwide payroll of over 75,000 people.

- 2.8. The internal guidelines of the ALSTOM Group prohibited payments to consultants for bribes or for other illegal purposes. To avoid as far as possible the risk of illegal acts being committed, particularly illegal payments, the consultants retained by ALSTOM were in principle under obligation by virtue of the consultancy agreements or similar agreements concluded with them to detail the contractual services they actually performed in connection with contracts awarded to ALSTOM and to substantiate them by submitting “proofs of rendered services” in each case. ALSTOM had already imposed appropriate guidelines in January 2001, although these did not become sufficiently widely available until 2003. Payments to consultants should in principle not have been made until after those consultants had provided corresponding itemizations, substantiated them with documents and ALSTOM had checked them. These measures, although correct in principle and certainly suitable, were however insufficiently applied in a limited number of cases.
- 2.9. The relevant internal guidelines at ALSTOM for selecting and using consultants were introduced progressively and continually adapted and improved. In accordance with these guidelines, the consultants should preferably have been resident or should at least have had a representative in the country in which the project was carried out. In addition, the consultants were supposed to have bank accounts in the relevant project country. The consultant’s services were preferably supposed to be performed via an *“established Company with all normal office facilities and records”*. This was designed to ensure that services were performed by a legal person with an existing, operative business that was correctly established and furnished with an appropriate infrastructure. As far as consultancy agreements or other consulting agreements were concluded with offshore companies or shell companies, such was prohibited by the relevant internal provisions at ALSTOM. It must therefore in summary be concluded that there were - as determined in the Summary Punishment Order of 22 November 2011 - in part, significant failures and loopholes in the compliance department during the relevant period of 2000-2008.
- 2.10. The investigation carried out by the OAG in 2004-2006 and after the reopening of the proceedings in 2008-2011 covered the ALSTOM Group’s activities in Europe, Africa, Asia, Australia and North, Central and South America. The OAG determined that the ALSTOM Group had introduced and continually improved a compliance system. However, there are indications that this system was not always enforced with the necessary persistence. Therefore it failed to have the desired effect in the three cases already covered by the summary punishment order of 22 November 2011. The OAG considers it proven that in these three cases, consultants used some of the money for illegal purposes, whether to influence the award of contracts or to pay kickbacks to employees of

the ALSTOM Group, as far as can be ascertained without the knowledge of ALSTOM. ALSTOM therefore must be charged with corporate negligence under Art. 102 SCC, as not all necessary and reasonable organizational precautions were taken, as set out below, to prevent such offences being committed (Art. 102(2) in combination with Art. 322<sup>septies</sup> SCC).

- 2.11. ALSTOM SA was responsible as the senior holding company for introducing compliance, issuing the relevant guidelines and instructions and implementing the entire regulatory framework, including internal checks and, finally, taking the necessary action.
- 2.12. The investigations carried out reveal that the compliance structure of ALSTOM SA, France, implemented from 2000 onwards was not sufficiently effective and despite the fact that the relevant failings or inconsistencies were or should have been known within the Group, the situation failed to satisfactorily improve even after article 102 SCC came into effect resp. improvements were implemented with delay. It can therefore be said that the defendant ALSTOM companies have triggered their corporate liability for deficiencies in their organization. This corporate liability, which manifested in Switzerland by the acts or omissions of ALSTOM Network Schweiz AG and the employees thereof, enabled in the first place bribes to be paid after 1 October 2003 as part of the projects in Latvia, Tunisia and Malaysia.

### **III. Legal**

Art. 102 of the Swiss Criminal Code

<sup>1</sup>If a felony or misdemeanour is committed in an undertaking in the exercise of commercial activities in accordance with the objects of the undertaking and if it is not possible to attribute this act to any specific natural person due to the inadequate organisation of the undertaking, then the felony or misdemeanour shall be attributed to the undertaking. In such cases, the undertaking shall be liable to a fine not exceeding 5 million francs.

<sup>2</sup> If the offence committed falls under Articles 260<sup>ter</sup>, 260quinquies, 305<sup>bis</sup>, 322<sup>ter</sup>, 322<sup>quinquies</sup> or 322<sup>septies</sup> paragraph 1 or is an offence under Article 4a paragraph 1 letter a of the Federal Act of 19 Dec. 1986 on Unfair Competition, the undertaking shall be penalised irrespective of the criminal liability of any natural persons, provided the undertaking is responsible for failing to take all the reasonable organisational measures that were required in order to prevent such an offence.

#### **Orders to dismiss**

A summary punishment order was issued against ALSTOM Network Schweiz AG on 22 November 2011 in connection with projects in Latvia, Tunisia and Malaysia for breaches of Art. 102(2) in combination with Art. 322<sup>septies</sup> SCC. To the extent that the information provided during the interview of the company's representative on 10 March 2010 is not covered by the summary punishment order, the following shall be ordered in respect of the abovementioned additional information:

**1.1. Dismissal of proceedings against ALSTOM Network Schweiz AG and ALSTOM SA due to a lack of criminal conduct (Art. 319(1)(a) Code of Criminal Procedure) and due to a lack of criminal liability of the companies prior to October 2003 (Art. 319(1)(b) Code of Criminal Procedure)**

Under Art. 319(1)(a) Code of Criminal Procedure, the OAG may also order that proceedings be dismissed if no offence can be established that would justify a prosecution being brought. For this reason, the present proceedings against the defendant companies shall also be dismissed, since investigations have failed to substantiate the suspected offences.

Under Art. 319(1)(b) Code of Criminal Procedure, the OAG may order that the proceedings be dismissed if no offence has been committed. The issue of the company's criminal liability in Switzerland does not arise until after 1 October 2003, therefore any events that have occurred before that date cannot constitute an offence *ex post facto*. The proceedings shall therefore be dismissed under Art. 319(1)(a) respectively Art. 319(1)(b) in respect of the following factual situations under investigation:

- **Spain:** for the period 2003-2006
- **Sudan:** for the period 2001-2006
- **Poland:** for the period 1998-2006
- **Brazil:** for the period 2000-2007
- **Boresta AG:** for the period 1995-2002
- **Venezuela:** for the period until 2000
- **India:** for the period until 2000
- **Italy:** for the period 2000-2003
- **Mexico:** for the period 2000-2003
- **Turkey:** for the period 2000-2003
- **Zambia:** for the period 1999-2003
- **Nigeria:** from the period between 2000 and unknown

**1.2. Dismissal of proceedings against ALSTOM SA due to reparation having been paid (Art. 53 SCC in combination with Art. 319(1)(e) in combination with Art. 8 Code of Criminal Procedure)**

1.2.1 In the three cases dealt with in the summary punishment order, it is stated that illegal acts in the abovementioned sense did take place and that ALSTOM failed to take all necessary and reasonable organizational measures to prevent bribes and illegal kickbacks. ALSTOM SA was, as the senior company in the Group, responsible and liable for developing the organizational side, implementation, controlling and the HR component of the compliance department. The corporate liability incurred by ALSTOM Network Schweiz AG in connection with the bribes uncovered and that led to its conviction can also be imposed on ALSTOM SA in these three cases.

1.2.2 The question now is whether, owing to a predominant public interest, a prosecution of ALSTOM SA is also unavoidable or whether the criminal proceedings against ALSTOM SA might be dismissed owing to reparation having been paid (Art. 319(1)(e))

and Art. 8(1) Code of Criminal Procedure in combination with Art. 53 SCC). A requirement for this is that all loss or damage must have been covered or all reasonable efforts must have been made to rectify the wrong committed. Furthermore, the public interest and the interest of the injured party in bringing a prosecution must be low.

1.2.3 The corporate liability of ALSTOM SA, which manifested – in so far as is relevant to the present case – in the insufficient organization and the failure in the abovementioned three cases to monitor and implement the existing regulations at ALSTOM Network Schweiz AG and which resulted in it being impossible to prevent the bribes referred to in the summary punishment order of 22 November 2011 being paid, should be considered in light of the following results from the investigation:

- the ALSTOM Group showed considerable efforts to observe the applicable rules and to create and continually extend according structures to prevent illegal payments, and corruption in particular; the ALSTOM Group also communicated this goal throughout the entire Group, although initially with insufficient emphasis; the detected failures in implementation and control, however, must be put into perspective considering that implementing such structures required a certain period of time in order for the Group to adapt, given the worldwide nature of the Group's business, the regulations introduced progressively in individual countries, the size of the Group itself and the various different national cultures involved.
- ALSTOM Network Schweiz AG was founded in order to centralize the payments made to consultants and to make it easier to ensure that those payments were made in accordance with compliance requirements. It is clear there is no evidence of a systematic way with regard to criminal acts or of systematically accumulated 'slush funds'.
- Ethics & Compliance today reports to the General Counsel of the Group, which allows to strengthen the controls.
- Although it was nonetheless impossible to prevent illegal payments being made in three cases, it must be concluded that in those three cases, there is evidence suggesting that employees of the ALSTOM Group might have unlawfully enriched themselves – as far as one can ascertain without knowledge of ALSTOM - personally at ALSTOM's expense, and those three cases were dealt with by the summary punishment order against ALSTOM Network Schweiz AG. ALSTOM in this regard has declared to evaluate appropriate criminal and/or civil action against these employees if allegations can be substantiated
- The ALSTOM Group has admitted to certain failings in the way compliance was organized between 2003 and 2007; the ALSTOM Group has paid CHF 1 m as reparation to the International Committee of the Red Cross (ICRC) for use in projects in Tunisia, Latvia and Malaysia respectively.

In view of all these circumstances taken together, the corporate liability of ALSTOM SA for deficiencies in organization must be described as insufficiently serious for a separate prosecution to be brought against ALSTOM SA, in addition to the prosecution of ALSTOM Network Schweiz AG, as the memorandum by Professors Handschin and Pieth of 23 April 2009, which ALSTOM willingly submitted for the file – despite

the occasionally critical conclusions it contained – further demonstrates that efforts had already been made for years to improve the organization of the compliance department. The latter fact also becomes manifest in the fact that ETHIC Intelligence Agency in 2007 issued a certificate grading ALSTOM's Integrity Programme as good. In 2011 „ALSTOM's Integrity Programme“ was certified by ETHIC Intelligence Agency as the first of the CAC40 companies in 2011.

- 1.2.4 The third and final requirement under Art. 53(b) SCC is that the public interest and the interest of the injured party in bringing a prosecution be small.
- 1.2.5 There is no direct private interest in bringing a prosecution; no injured parties have joined the proceedings, despite the global press coverage of the proceedings being brought in Switzerland. The discussion will thus concentrate solely on the public interest. This is, as a matter of principle, geared towards punitive purposes (BSK Criminal Law I - RIKLIN, 2nd Ed., Art. 53, no. 16, p. 1006).
- 1.2.6 The public interest in prosecuting the foreign parent company for the offence under Art. 102(2) SCC must also be classified as low, owing to the fact that ALSTOM Network Schweiz AG has already been issued with a summary punishment order and sentenced to a fine of CHF 2.5 m. The press has already written at some length on the house searches carried out on the premises of ALSTOM Network Schweiz AG and the incriminating circumstances at the time behind them, always referring to ALSTOM as a Group and the Group has suffered adverse consequences. In this regard, the summary punishment order is also publicly understood as being against ALSTOM as a Group and not merely against ALSTOM Network Schweiz AG. Therefore, the public interest has been satisfied by the conviction of ALSTOM Network Schweiz AG as being responsible for the compliance tasks.
- 1.2.7 In addition, the public will be informed of this order to dismiss proceedings in the appropriate form. The criminal investigation, carried out at great length, has shown that the ALSTOM Group cannot be reproached with proceeding in a systematic manner in order to funnel money out the Group and pay that money to foreign public officials as bribes.

ALSTOM SA has made efforts during these proceedings to rectify the inconsistencies it has detected in the context of the fight against corruption. Based on external reports since commissioned by ALSTOM AG and the associated improvements introduced or planned, it can be assumed that the organizational faults previously uncovered have since been rectified and the company is committed to keeping its E&C procedures under constant review to ensure that they comply with domestic and international norms and legal requirements.

- 1.2.8 There is no expectation that any new facts will emerge if a prosecution is brought against ALSTOM SA. The special and general preventive aspects are satisfied by the summary punishment order against ALSTOM Network Schweiz AG.
- 1.2.9 Thus, in each of the three cases in which the defendant ALSTOM SA might be accused of failing to prevent bribes being paid owing to deficiencies in its organization,

the requirements for dismissing the investigation under Art. 53 SCC are met. The investigation against ALSTOM SA shall therefore be discontinued.

#### IV. Costs

1. Under Art. 320 section 4 Code of Criminal Procedure a dismissal order is the equivalent of an acquittal. According to federal jurisprudence, requiring a defendant to pay costs on acquittal or on the proceedings being dismissed does not breach the principle of the presumption of innocence (Art. 32(1) Federal Constitution, Art. 6(2) ECHR) unless the defendant is accused directly or indirectly as part of the grounds for imposing costs of having committed an offence or of having triggered its criminal liability. On the other hand, it is compatible with the provisions of the Federal Constitution and the European Convention on Human Rights to compel an unconvicted defendant to pay costs if that defendant could be accused under civil law, i.e. under an analogous application of the principles flowing from Art. 41 Code of Obligations, of having clearly breached a written or unwritten behavioural standard dictated by the entire corpus of Swiss jurisprudence and thereby caused the opening of a criminal investigation or impeded such investigation (judgment of the Swiss Federal Court of 12/11/2007, 6B\_315/2007, E. 3.2, with references to previous Federal Court judgments; judgment of the Federal Criminal Court of 19/11/2007, BB.2007.43, E. 4.1). "Procedural fault" is not a liability for criminal fault but a liability based on civil legal principles for faulty behaviour by a person as a result of which proceedings were brought or impeded (BGE 116 Ia 162, E. 2 c). This cost provision is aimed at protecting State finances from being burdened by procedural costs generated by the impugnable behaviour of the defendant (BGE 116 Ia 162, E. 2d bb; BB.2007.43, E. 4.1).
2. When there is exemption from punishment under Art. 53 SCC and criminal proceedings that have already been brought are dismissed, the defendant is typically ordered to pay costs (cf. re this and the following points, BSK-Riklin, Art. 53 no. 31 in combination with prior to Art. 52 et seq., no. 35).
3. In the present case there is no apparent reason for departing from the principles set out in Sections 1 and 2, even for practical considerations, and it must be observed that part of the procedural costs have already been separated out and imposed on ALSTOM Network Schweiz AG in the summary punishment order against that company. The remaining procedural costs (fee of CHF 40,000.00 plus expenses of CHF 50,00.00) shall be imposed jointly and severally on ALSTOM Network Schweiz AG and ALSTOM SA.
4. Based on the same arguments, the parties shall not be entitled to compensation.

#### V. Order

1. The criminal proceedings against **ALSTOM SA** based on the accusation of having failed to take all necessary and reasonable organizational precautions to prevent the bribery of foreign public officials (Art. 102(2) SCC in combination with Art. 322<sup>septies</sup>

SCC) are **dismissed** (Art. 319(1)(a), (b) and (e) in combination with Art. 8(1) Code of Criminal Procedure and Art. 53 SCC).

2. The criminal proceedings against **ALSTOM Network Schweiz AG** based on the accusation of having failed to take all necessary and reasonable organizational precautions to prevent the bribery of foreign public officials (Art. 102(2) SCC in combination with Art. 322<sup>septies</sup> SCC) are **dismissed**, to the extent that they have not already been covered by the summary punishment order of 22 November 2011 (Art. 319(1)(a), (b) and (e) in combination with Art. 8(1) Code of Criminal Procedure and Art. 53 SCC).
3. It is noted that ALSTOM SA has paid reparation as defined under Art. 53 SCC in the amount of CHF 1,000,000 (one million CHF) to the International Committee of the Red Cross (ICRC) for use in projects in Latvia, Tunisia and Malaysia respectively.
4. The original documents seized from ALSTOM Network Schweiz AG shall be returned to ALSTOM Network Schweiz AG, care of the ALSTOM Group.
5. The remaining procedural costs are set out as follows and shall be payable jointly and severally by ALSTOM Network Schweiz AG and ALSTOM SA:

CHF	40,000.00	Fee (Art. 6(4)(a) Federal Regulations on Procedural Costs)
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CHF	50,000.00	Expenses
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<b>CHF</b>	<b>90,000.00</b>	<b>Total</b>
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6. No compensation shall be payable.
7. To be sent to (Art. 321 Code of Criminal Procedure):
  - Messrs Wernli, Esq. and Harari, Esq., care of ALSTOM Network Schweiz AG and ALSTOM SAand to be notified to:
  - Attorney General
  - Criminal Investigation Department/CCWF
  - Federal Criminal Investigation Office

Office of the Swiss Attorney General

Office of the Swiss Attorney General

Stefan Lenz  
Federal Attorney

Walter Mäder  
Chief Federal Attorney

#### Appeal procedure

This order may be appealed against, in writing and giving grounds, under Art. 322(2) Code of Criminal Procedure within 10 days of its issue or publication, by submitting a complaint to the First Chamber of the Federal Criminal Court, P.O. Box 2720, 6501 Bellinzona, Switzerland.