

Article 102 of the Criminal Code: the criminal liability of the undertaking

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Since 2003 Swiss law has allowed a company to be convicted for offences committed within it when it failed to take all reasonable and necessary organisational measures to prevent them. Long rarely applied, the provision has in recent years reached three of the largest trading houses established in Geneva and Zug. This article explains how Article 102 of the Swiss Criminal Code works and what the Gunvor, Glencore and Trafigura cases show about its application.

1 Two forms of liability

Corporate criminal liability was introduced as Article 100quater of the Swiss Criminal Code (SCC) on 1 October 2003 and became Article 102 SCC with the revised general part of the code. It takes two forms. Subsidiary liability under paragraph 1 covers any felony or misdemeanour committed within a company in the exercise of its commercial activities. It applies where deficient organisation makes it impossible to attribute the offence to any specific natural person. Primary liability under paragraph 2 applies irrespective of the liability of individuals, for a limited catalogue of offences. These include participation in a criminal organisation, terrorist financing, money laundering and bribery of Swiss and foreign public officials. The company is liable when it can be reproached for failing to take all reasonable and necessary organisational measures to prevent the offence.

The penalty is a fine of up to five million francs. Under paragraph 3, the court sets the fine according to the seriousness of the offence, the degree of organisational failure, the damage caused and the company's economic capacity. The cap is modest compared with the turnover of the large trading houses. It is supplemented by the compensatory claim under Article 71 SCC, a form of confiscation that allows the State to claim an amount

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equivalent to the proceeds of the offence when the assets themselves are no longer available. The compensatory claim has given the three trading cases their financial weight. The Office of the Attorney General of Switzerland (OAG) prosecutes bribery of foreign public officials.

Liability under paragraph 2 rests on an organisational reproach. The company is punished because it did not put in place the measures that would have prevented the offence, such as a code of conduct, a compliance programme, procedures for vetting intermediaries, payment controls, training and internal audit. Compliance thereby becomes a legal obligation backed by criminal sanctions. Writing in *plaidoyer* on 3 February 2020, Katia Villard described the Gunvor conviction as a typical case of Article 102: compliance deficiencies allowed bribes to be paid to foreign public officials through the Swiss financial centre.

2 Gunvor

Gunvor, whose main office is in Geneva, was the first large trading house convicted in Switzerland under Article 102. By a penal order of 14 October 2019, announced on 17 October, the OAG convicted two group entities of bribery of foreign public officials under Articles 322septies and 102 SCC. The offences concerned the Republic of the Congo and Côte d'Ivoire between 2008 and 2011. RTS reported on 17 October 2019 that the sanction amounted to 94 million francs, comprising a fine of 4 million and a compensatory claim of 90 million, the latter corresponding to all the profits Gunvor made on the business concerned. According to RTS, the OAG found that Gunvor had no code of conduct giving employees a clear signal, no compliance programme, no internal audit and no one tasked with identifying or reducing corruption risk. Gunvor acknowledged that its compliance programme had been inadequate during the period under investigation.

A second case followed. In 2024 the OAG convicted the company again, this time for active bribery of foreign public officials in the Ecuadorian oil market between February 2013 and February 2017. Public Eye reports that the sanction came to close to 86.7 million francs, including a fine of 4.3 million. Under an agreement with the US Department of Justice, Gunvor also pleaded guilty in the United States, where it was to pay more than 661 million dollars. The Department of Justice announced on 1 March 2024 a criminal penalty of 374,560,071 dollars and forfeiture of 287,138,444 dollars.

3 Glencore and Trafigura

Glencore, whose group is managed from Baar in the canton of Zug, was convicted by penal order of the OAG on 5 August 2024 after a four-year investigation. According to the OAG's press release of that date, the company had failed to take all reasonable and necessary organisational measures to prevent the bribery of foreign public officials by a business partner. The case concerned the partner's acquisition in 2011 of minority stakes in two mining companies in the Democratic Republic of the Congo from the state mining company. Glencore was ordered to pay a fine of 2 million francs and a compensatory claim of 150 million dollars. It did not appeal, as *Le Matin* reported on 5 August 2024. RTS reported on the same day that the OAG had closed the proceedings on other aspects of Glencore's activity in the country between 2007 and 2017. The company's cooperation since the opening of the investigation earned it a reduced penalty.

Trafigura was the first company tried in Switzerland in a public trial for bribery of foreign public officials. The trial took place over ten days in December 2024 before the Criminal Chamber of the Federal Criminal Court in Bellinzona. According to RTS, the verdict of 31 January 2025 found all defendants guilty. Trafigura Beheer BV had been charged with failing to take the internal measures needed to prevent illicit payments between 2009 and 2011 to the head of a subsidiary of the Angolan state oil company. It was fined 3 million francs, against the 5 million sought by the OAG. It was also ordered to pay a compensatory claim of 145 million dollars. The court sentenced Trafigura's former chief operating officer to thirty-two months' imprisonment, twelve of them to be served. *Bilan* and *Le Temps* reported that three of the four convicted defendants appealed and that an appeal trial was in preparation at the end of 2025.

4 What the cases show

In all three cases the bribes passed through agents, shell companies or business partners, whose commissions or gains concealed the final destination of the funds. Payments ran through Swiss bank accounts, which founded Swiss jurisdiction and linked the corruption cases to anti-money laundering duties. The Glencore order extends the organisational reproach to the conduct of business partners in transactions from which a company benefits. Cooperation also weighed on the outcome: Glencore received a reduced penalty, whereas Gunvor was convicted a second time for conduct that partly postdated the first investigation.

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The scope of the provision remains under discussion. On 11 November 2022 the Legal Affairs Committee of the National Council recommended, by 16 votes to 9, not to follow up parliamentary initiative 21.509, which proposed extending Article 102(2) SCC to all felonies and misdemeanours.

5 What to take from it

Organisation is the offence. Under Article 102(2) SCC, a company is punished for lacking reasonable and necessary preventive measures, whether or not an individual is convicted.

The compensatory claim carries the weight. Fines of 2 to 4.3 million francs in these cases sit beside compensatory claims of 90 million francs, 150 million dollars and 145 million dollars.

Individuals are exposed too. The Trafigura judgment of 31 January 2025 included a partly unsuspended prison term for a former senior executive, a judgment under appeal at the end of 2025.

6 Sources

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