

Article 102 in practice: what the company must prove

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Article 102 of the Criminal Code, in its paragraph 2, punishes the company that has failed to take all reasonable and necessary organisational measures to prevent certain offences, including the bribery of foreign public officials. The central question in every proceeding is which measures were reasonable and necessary, a question to which the three Geneva cases have progressively given a more precise answer.¹ A code of conduct is not enough: there must be a risk analysis by country and by type of counterparty, procedures for selecting and monitoring intermediaries that are proportionate to those risks, payment verification, training, a whistleblowing channel, independent controls and a documented response to warning signs. The cases showed that the convicted houses had written rules which practice ignored, and that the Office of the Attorney General judged that practice.

For Geneva traders, this evolving case law has a practical significance: it defines the minimum content of an anti-corruption compliance programme, which the following section sets out in detail, and it fixes the burden of proof. The prosecuted company must demonstrate, with supporting documents, that its measures existed, functioned and were applied at the time of the facts, failing which it is convicted even if no executive was complicit. Documentation has thus become, beyond compliance itself, the company's legal protection.

1 Notes

1. Office of the Attorney General of Switzerland, press release of 5 August 2024: summary penalty order convicting Glencore International AG to a fine of CHF 2 million and a compensatory claim of USD 150 million for having failed to take “all reasonable and necessary organisational measures to prevent the bribery of foreign public officials” by a business partner in the acquisition of minority shareholdings in two mining companies in the DRC in 2011, after four years of investigation, with an order discontinuing proceedings on the other aspects (2007-2017); Public Eye, press release of 17 October 2019: summary penalty order against Gunvor (Art. 102 SCC, fine of CHF 4 million, compensatory claim of CHF 90 million, “serious deficiencies in its internal organisation”); Wikipedia (en), art. “Trafigura”: conviction in 2025 by the Swiss courts of the company and of its former chief operating officer Mike Wainwright for bribes of EUR 4.3 million in Angola (2009-2011). ↩

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