

The lessons

*Dr Alexander Ressos, TEP
Attorney-at-Law (Switzerland), Solicitor (Hong Kong),
Solicitor (England & Wales)*

These three affairs share common features, from which practitioners can draw lessons.

The first concerns geography. The facts took place in the Republic of the Congo, Côte d'Ivoire, the Democratic Republic of the Congo, Angola and Ecuador, countries producing oil or minerals whose institutions are fragile and where access to resources depends on public decisions. Part I will return to the African dimension of these affairs. The risk of corruption is structurally bound up with markets in which the State controls the resources.

The second concerns intermediaries. In all three affairs the bribes passed through agents, shell companies and business partners, whose commissions or gains concealed the final destination of the funds. The control of intermediaries — their identity, their remuneration and the reality of the services rendered — is the central point of any anti-corruption compliance programme.

The third concerns the financial centre. The bribes passed through Swiss bank accounts, which founded the jurisdiction of the Swiss authorities and implicated the banks. The fight against corruption and the fight against money laundering, described in the preceding chapter, converge here, since the banks that executed these payments ought to have detected their unusual character.

The fourth concerns sanctions. The fines, capped at CHF 5 million, are symbolic in relation to the companies' profits, as *Le Temps* observed with regard to Trafigura. The compensatory claims, which absorb the profits, are more significant, yet they do not exceed what the offence yielded. The debate on raising the ceiling on fines and on introducing more dissuasive sanctions continues in Switzerland.¹

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The fifth concerns natural persons. Whereas the Gunvor affair had led only to the conviction of junior employees, the Trafigura affair reached a former executive. The personal liability of senior managers, which Part D touched upon with regard to private bankers, is once again becoming an instrument of deterrence.

The sixth, finally, concerns cooperation. Glencore benefited from a reduction in its penalty for its cooperation, whereas Gunvor was sanctioned for reoffending. The attitude of the company towards the investigation — cooperation, remediation, transparency — influences the sanction.

1 Notes

1. Art. 102 para. 1 SCC (droit-bilingue.ch): “In such a case, the enterprise shall be liable to a fine of no more than five million francs”; para. 3: “The court shall determine the fine in particular according to the seriousness of the offence, the extent of the organisational failure and the loss caused, and according to the economic capacity of the enterprise”; Legal Affairs Committee of the National Council, report of 11 November 2022 on parliamentary initiative Hurni 21.509 “Pour une punissabilité des entreprises criminelles” (For the criminal liability of criminal enterprises) (submitted on 8 December 2021, proposing to extend Art. 102 para. 2 SCC to all felonies and misdemeanours): proposal not to proceed, by 16 votes to 9, the majority considering that “the law in force already makes it possible to address what the parliamentary initiative seeks”, the minority taking the view that “the catalogue of punishable conduct under Art. 102 SCC deserves to be extended”. ↩

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