

The criminal liability of the company: Article 102

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

Swiss criminal law was for a long time based on the principle that only natural persons can commit crimes. The introduction of corporate criminal liability in 2003 created an exception, which is now contained in Article 102 of the Criminal Code. The provision establishes two forms of liability. Under its first paragraph, a company is liable for a felony or misdemeanour committed in the exercise of its commercial activities where the offence cannot be attributed to any specific natural person because of the deficient organisation of the company. This liability is subsidiary. Under its second paragraph, for a list of specific offences, including money laundering, the financing of terrorism and the bribery of Swiss and foreign public officials, the company is liable independently of the liability of the natural persons, if it failed to take all the reasonable and necessary organisational measures required to prevent such an offence.¹ The maximum fine is five million francs. In addition, the proceeds of the offence can be confiscated or, where they are no longer available, replaced by a compensation claim, which in the commodity cases has far exceeded the fine.

The second paragraph of Article 102 is the relevant provision for the commodity trade. It makes the company liable where the bribery of a foreign official by one of its employees or agents was made possible by the absence of adequate organisational measures. The measures required are those that a reasonable company in the same situation would have taken: a clear policy against bribery, the due diligence and monitoring of intermediaries, controls over payments, training of staff, a reporting system for suspicions and the consistent reaction to red flags. The Federal Supreme Court and the Federal Criminal Court have developed the requirements of the provision in a series of decisions, most of them concerning banks.²

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1 Notes

1. Source as cited in the printed edition. ↩
2. Source as cited in the printed edition. ↩

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