



# Corporate criminal liability: commodity trader pays Sfr94 million for lack of organisational corruption prevention



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White Collar Crime, Switzerland

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## Introduction

Under Swiss criminal law, criminal offences committed within a corporation during the course of its commercial activities may result in the corporation's direct criminal liability if the offence cannot be allocated to a specific individual within the corporation due to the corporation's deficient organisation (so-called 'secondary liability'; Article 102(1) of the Criminal Code). Moreover, a corporation may also be held liable irrespective of any individual's criminal liability if its deficient organisation caused or failed to prevent the commission of certain specific offences, including corruption in the public and private sector, money laundering and terrorism financing (so-called 'primary liability'; Article 102(2) of the Criminal Code).**(1)**

If found guilty, a corporation may face a penalty of up to Sfr5 million (Articles 102(1) and 102(3) of the Criminal Code). However, this penalty is not the largest financial risk linked to a conviction under Article 102 of the Criminal Code – the corporation may also be subject to the confiscation of the benefits derived from the criminal conduct (Article 70 of the Criminal Code). If direct proceeds from the criminal conduct cannot be identified for confiscation purposes, the corporation may be ordered to pay compensation in the same amount (Article 71 of the Criminal Code).**(2)**

On 14 October 2019 primary corporate criminal liability was the subject of a (non-published) summary penalty order rendered by the Office of the Attorney General.**(3)** The Office of the Attorney General convicted a Swiss commodity trader under Article 102(2) of the Criminal Code of failing to take all due organisational measures to prevent corruption by its employees and agents.**(4)**

The case exemplifies the risks for corporations linked with a conviction under Article 102(2) of the Criminal Code. Moreover, it gives guidance as to the organisational measures which are deemed reasonable and necessary by the Office of the Attorney General to prevent acts of corruption by employees and agents of the corporation in light of Article 102(2) of the Criminal Code.

## **Office of the Attorney General's summary penalty order**

The Office of the Attorney General established the initial condition triggering corporate criminal liability under Article 102(2) of the Criminal Code as follows (ie, the commission of a listed criminal offence in the course of the commodity trader's business activity).

On 28 August 2018 the Swiss Federal Criminal Court found a former employee of the company guilty of bribing officials in the Republic of Congo and the Côte d'Ivoire between 2008 and 2011 in separate criminal proceedings.<sup>(5)</sup> According to this final and binding decision, the former employee had acted together with employees and the trading company's agents to gain access to the petroleum market in these countries.

Further, the Office of the Attorney General assessed whether such acts were fostered or enabled by the company's organisational deficiencies. In this respect, the Office of the Attorney General established that the company had taken no organisational measures to prevent corruption during the period under scrutiny, despite the high risk linked to its business activity (ie, oil shipments in two countries with a high risk of corruption). It had neither implemented a code of conduct giving guidance to employees for carrying out their activities, a compliance programme nor an internal audit procedure. Moreover, the company had omitted to designate staff members in charge of identifying, analysing and reducing the risk of corruption.

Moreover, the Office of the Attorney General ruled that the company had also failed to manage the increased risk of corruption in connection with the use of intermediary agents for obtaining petroleum shipments, to whom millions of US dollars had been paid as commissions between 2009 and 2012. In particular, the Office of the Attorney General held that the company had neither employed due care in recruiting the agents nor monitored their activities.

The Office of the Attorney General further established that the company had ignored warning signs and committed several other irregularities, mostly in connection with payments to agents (eg, payments to offshore companies used by the agents, partly without any written agreement and partly derogating from the agreements in place, and backdating of supporting payment documents).

The Office of the Attorney General concluded that by breaching its duty to take all organisational measures to prevent corruption, the commodity trader had become criminally liable pursuant to Article 102(2) of the Criminal Code.

Accordingly, the Office of the Attorney General imposed a fine of Sfr4 million and a compensatory claim to skim off illicit profits of approximately Sfr90 million (accrued interests included).

## **Precautions for corporations**

Considering the high financial risk linked to corporate criminal liability under Swiss law, corporations must take particular care to comply with the organisational requirements for preventing the offences listed in Article 102(2) of the Criminal Code (eg, corruption).

The law does not specify which organisational measures must be taken to meet the standard set by Article 102 (2) of the Criminal Code.

According to the Office of the Attorney General and doctrine, the measures must be suitable and proportionate to the typical and concrete risks associated with a corporation's business activity as well as to its size and complexity.

With respect to anti-corruption, the Office of the Attorney General has considered that accepted standards<sup>(6)</sup>

would require corporations to:

- analyse the corruption risk according to the activities carried out, their context (country-related risk) and the corporation's size;
- establish a suitable compliance programme;
- establish policy, code of conduct, internal guidelines and processes as well as employee training concerning the fight against corruption;
- enforce internal control of compliance with anti-corruption directives, processes and corresponding disciplinary proceedings;
- establish a process for the evaluation and continuous improvement of the anti-corruption system; and
- establish an internal alerting process (ie, whistleblowing).

If a corporation carries out its business through agents, it must be aware of the increased risks relating to the agents' activities, as highlighted by the anti-corruption standards, and take additional measures such as:

- carrying out properly documented due diligence on each agent;
- regulating the selection process for agents;
- defining the warning signals for detecting potential illegal activities; and
- carrying out regular control and background checks, namely when paying agents' invoices.

### **Comment**

Corporations must consider that any investigation initiated against their employees and agents for corruption or other offences listed in Article 102(2) of the Criminal Code may trigger their liability and have severe financial consequences.

Such risks may be enhanced if the investigated individuals chose to collaborate with the prosecution authorities to obtain a more favourable judgment within accelerated proceedings (Article 358 *et seqq* of the Criminal Procedural Code), as was the case for the Swiss commodity trader. In accelerated proceedings, the accused admits to the facts essential for the legal appraisal of the case (Article 358(1) of the Criminal Procedural Code). In a subsequent criminal proceeding against a corporation under Article 102(2) of the Criminal Code, the prosecution authorities will usually rely on these facts to establish the existence of a listed criminal offence triggering the company's criminal liability.

Therefore, corporations should plan their defence strategy from the beginning as soon as criminal investigations have been initiated against one of their employees or agents.

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### **Endnotes**

(1) Article 102 of the Criminal Code (available [here](#)) states as follows:

*1 If a felony or misdemeanor 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 organization of the undertaking, then the felony or misdemeanor is attributed to the undertaking. In such cases, the undertaking is liable to a fine not exceeding 5 million francs.*

*2 If the offence committed falls under Articles 260ter, 260quinquies, 305bis, 322ter, 322quinquies, 322septies paragraph 1 or 322octies, the undertaking is penalized irrespective of the criminal liability of any natural persons, provided the undertaking has failed to take all the reasonable organizational measures that are required in order to prevent such an offence.*

*3 The court assesses the fine in particular in accordance with the seriousness of the offence, the seriousness of the organizational inadequacies and of the loss or damage caused, and based on the economic ability of the undertaking to pay the fine.*

*4 Undertakings within the meaning of this title are:*

- a. any legal entity under private law;*
- b. any legal entity under public law with exception of local authorities;*
- c. companies;*
- d. sole proprietorships.*

*Any person who by law, an official order, a legal transaction or authorization granted to him, has been entrusted with the management of the property of another or the supervision of such management, and in the course of and in breach of his duties causes or permits that other person to sustain financial loss is liable to a custodial sentence not exceeding three years or to a monetary penalty.*

(2) Articles 70 and 71 of the Criminal Code are available here (in English).

(3) A redacted version of the summary penalty order of 14 October 2019 (in French) can be inspected on request by contacting the Office of the Attorney General legal services section at the following email address: [rechtsdienst@ba.admin.ch](mailto:rechtsdienst@ba.admin.ch).

(4) The Office of the Attorney General's public announcement on the summary penalty order is available here.

(5) Decision SK.2018.38 of the Federal Criminal Court, 28 August 2018, available here.

(6) The international and Swiss anti-corruption standards are set out in the following documents:

- the Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997, available here;
  - the OECD Recommendation for Further Combating Bribery Documents of Foreign Public Officials in International Business Transactions, available here;
  - the International Chamber of Commerce Rules on Combating Corruption, 2011, available here;
- and

- the brochure *Preventing Corruption – Information for Swiss businesses operating abroad*, 3rd edition, 3 November 2017, published by the State Secretariat for Economic Affairs in cooperation with other Swiss government agencies, available [here](#).

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