

Corporate Compliance Risk Prevention from the Perspective of National Governance

Jiyang Xiao

Faculty of Law, Qingdao University, Qingdao, Shandong, 266071, China

Keywords: National governance; Corporate compliance risk; Enterprise compliance reform; Thought of rule of law

Abstract: The global epidemic situation, the changing situation in a century, and enterprise compliance are the only way for enterprises to achieve sustainable and healthy development, and also the inevitable choice to promote the modernization of the national governance system and governance capability on the track of the rule of law. In terms of national legislation, the enterprise compliance causes in the pilot reform will be presented in the criminal law and criminal procedure law and integrated into the socialist legal system with Chinese characteristics. In terms of administrative law enforcement, administrative organs should guide enterprises' compliance construction, help enterprises prevent compliance risks, and support and serve enterprises' steady "going global". In judicial practice, the procuratorial organs explored and innovated the new mode of procuratorial performance, "strictly managed and loved" the enterprises, encouraged the enterprises involved to rectify in compliance with the regulations, and realized self strengthening. In terms of supervision and management, the procuratorial organ cooperates with the third country to organize independent supervision to ensure the effectiveness of enterprise compliance rectification. We will take multiple measures at the same time to make enterprise compliance reform help the country's modern governance to a higher level.

1. Introduction

On April 8, 2021, the Supreme People's Procuratorate issued the Work Plan on Carrying out the Pilot Reform of Enterprise Compliance, launched the second phase of the pilot reform of enterprise compliance, "promoting the in-depth development of the pilot reform of enterprise compliance in an orderly manner according to law", and accumulated practical experience for the next step of introducing legislation. It can be seen that the country are trying to think about the issue of national governance and social governance from a new perspective, because this is the need of reality and basic national conditions. With the deepening of China's economic opening to the outside world and the wave of "going global" of Chinese enterprises, enterprises are faced with more legal risks, especially compliance risks, while gaining development opportunities. "Sailing" enterprises are faced with a grim situation of large compliance risks and serious risk consequences. However, under the trend of vigorous development of the market economic system and deepening economic globalization, only "going out" is the right way. In order to deal with compliance risks and their actual consequences, corporate compliance has become the standard configuration for "offshore"

enterprises. Similarly, corporate compliance has also been recognized and adopted by the state as a new way of governance and further promoted reform. On the one hand, any new thing is bound to suffer twists and turns, and enterprise compliance is bound to encounter various doubts and obstacles. On the other hand, the compliance risks faced by enterprises are already in jeopardy; Proceeding from the national conditions, learning from and innovating in practice, and constantly strengthening compliance management in exploration are the right choices to improve the level of governance, deal with the results of compliance risks, and help enterprises "go to sea".

2. Systematic Awareness of Enterprise Compliance Risk

2.1 Briefly Describe the Meaning of Enterprise Compliance

"No rules, no circles". Corporate compliance is a major cross cutting legal subject rising in the world at the beginning of the 21st century. Research in the field of compliance in China is also in the ascendant. Many experts and scholars in different fields have joined in this grand historical subject. From different perspectives, different interpretations of enterprise compliance emerged. Professor Chen Ruihua of Peking University Law School clarified the three meanings of enterprise compliance through the current differentiated concept of enterprise compliance: on the positive side, compliance requires enterprises to operate in accordance with laws and regulations; On the negative side, compliance is a way for enterprises to avoid compliance risks and mitigate losses due to violations; On the external level, the state should legally encourage and encourage enterprises to carry out compliance rectification.^[1]

As the main body of the market economy, the healthy operation of enterprises is not only related to the safety of enterprises themselves, but also to the safety of the country, society and people; The "going global" of enterprises also concerns the overall strategic situation of both domestic and foreign countries. Therefore, enterprises are not only the only way for the healthy development of Chinese enterprises, but also the inevitable choice for the country to improve its governance level; This means that the state, as an external entity of an enterprise, should strengthen the promotion and guidance of enterprise compliance rectification and deepen the enterprise compliance reform.

2.2 Realistic Situation of Compliance Risk

The corporate compliance system originated in the United States earlier, and it is a concept put forward in the United States "Guidelines for Sentencing Federal Organizations". From the case of enterprises that have been subject to the regulatory investigation of the U.S. government or the sanctions of international organizations, the investigation or sanctions on the non-compliance of enterprise operations at the national level will often cause a heavy blow to the enterprise, causing the enterprise to bear huge fines, and even the relevant enterprise executives will face the risk of assuming criminal responsibility. After the US Department of Justice released the China Action Plan at the end of 2018, it successively launched charges and sanctions against Chinese companies and their executives in 2019 by taking advantage of related events. For example, in 2019, Li Yanliang, the former president of Herbalife China, and Yang Hongwei, the former director of the External Affairs Department, offered bribes and were suspected of providing false receipts to avoid the company's audit; If the US government's charges are found, the two will be sentenced to several years in prison.

Not only the above-mentioned China Action Plan issued by the United States, but also the White Paper on Establishing a Fair Competition Environment for Foreign Subsidies issued by the European Commission in June 2020, which established a new review and supervision mechanism for companies belonging to non EU countries or organizations operating in the EU on the grounds

that trade subsidies from other countries disrupt the internal market economic order of the EU, filling the gap in foreign capital regulation in the EU market before. The content of this white paper is absolutely aimed at Chinese enterprises investing and operating in Europe, and intends to conduct a comprehensive review of Chinese enterprises operating in Europe on the ground that Chinese enterprises are subsidized by the Chinese government. ^[2] This review system may be potentially abused. Once the enterprise is identified as having "foreign government subsidies" as mentioned in the white paper, it will face serious legal consequences such as restricting operation, eliminating the market, turning in subsidies and fines.

According to the documents issued by the United States and the European Union successively, the scope of foreign sanctions is no longer limited to any single jurisdiction, and the sanctions adopted are also comprehensive and comprehensive. The compliance risks of Chinese enterprises' overseas operations are also gradually increasing. It is not only to seize opportunities, but also to cope with risks and challenges. At the same time, it is not uncommon for countries or organizations to regulate enterprise operations internationally. Promoting enterprise compliance reform in China is not only a natural choice to ensure the healthy and healthy development of "going global" enterprises, but also an inevitable choice to develop the economy, stabilize the society, and govern the country.

2.3 Value and Significance of Enterprise Compliance Reform

Reform is a powerful driving force for social development, so is it necessary to carry out corporate compliance reform? The answer is obviously yes. In today's era, enterprise compliance is the general trend. It needs to be clear that "compliance is not a burden, but an enterprise's productivity". ^[3]

From a micro perspective, a sound compliance management system is a "golden signboard" of an enterprise, an effective guarantee of corporate image and business reputation, can play a role in preventing and identifying risks, and is conducive to the long-term survival and healthy development of the enterprise. An enterprise's initiative to establish a compliance management system can also reduce employee misconduct and mitigate the impact of misconduct on the enterprise. "Whether there is a sound compliance management system" has become an important reference standard for the market to measure the level of enterprise management, for enterprises to find partners, and for employees to choose companies for employment.

From a macro perspective, as the main body of the market economy, enterprises have made outstanding contributions in promoting people's employment, creating social wealth, driving production development, etc. The compliance operation of an enterprise is conducive to its sustainable development, and is of great significance to maintaining a stable and healthy economic environment, a peaceful social environment, and resisting systematic major risks. With the development of China's market economy and the internationalization of the economy, it is an inevitable requirement to establish and improve the enterprise compliance system. The "going global" Chinese enterprises stand on the world stage through compliance management, which is a positive response to the country's higher level of openness, and also shows the world China's strong national strength.

In practice, at present, China's enterprise compliance is still in the pilot stage. From the case handling effect of the six procuratorates in the first pilot stage, the results are gratifying. The procuratorial organs at both levels in Shenzhen have been included in the pilot scope. Through active exploration in practice, the compliance "Shenzhen model" of enterprises involved in the case has gradually taken shape, and a replicable and promotable experience road of compliance construction led by procuratorial organs has been explored in Shenzhen.

At the same time, under the guidance of this thought, the construction of a rule of law country, a rule of law society and even socialism with Chinese characteristics will also be stable and far-reaching.

3. Governance Measures to Deal with Compliance Risks

3.1 National Legislation First

Good law is the premise of good governance. Enterprise compliance represents a new model of social governance, which should be fed back in national legislation. From the perspective of national governance, the legislation does not regulate the civil legal relationship between equal subjects. The issue will focus on the administrative and criminal laws.

It should be pointed out that criminal compliance is not a sub item of enterprise compliance. If only classified, different standards have many classifications, such as personal information compliance, big data compliance, anti-corruption and bribery compliance; Because of various risks faced by enterprises in violation of regulations, only criminal liability or criminal risk is the most severe, criminal compliance has its own unique status and value, which is the inevitable result of enterprises' compliance reform following the bottom line thinking.

As a "foreign product", the simple "take it" principle is absolutely undesirable. As far as criminal compliance is concerned, Professor Li Bencan pondered over whether China should introduce the criminal compliance system through procedural law or substantive law. After considering the differences in legal culture between China and western countries, he believed that the responsibility mechanism in China's criminal law could fully promote corporate compliance, and supported by the case of Nestle employees infringing on citizens' personal information, When an organization has an effective compliance plan system, of course, its criminal liability can be excluded accordingly. ^[4] It may be feasible to put compliance into the criminal liability mechanism and use it as a plea of innocence in theoretical operation, but it may ignore the complexity of practical problems. In reality, on the one hand, enterprises are not "qualitative" crime or non crime issues, but more judicial practice involves "quantitative" responsibility and behavior degree issues; On the other hand, in the reality of "more cases and fewer people", based on the consideration of saving judicial resources and improving judicial efficiency, the compliance non prosecution method adopted in the procedural law has also achieved relatively good results in the compliance pilot practice, and relevant non prosecution cases have also been released in the Supreme People's Procuratorate as typical cases of the enterprise compliance reform pilot. In addition, the procuratorate's decision not to prosecute because of the enterprise's compliance rectification is also an incentive in itself and should be established in legislation.

The introduction of corporate compliance in both substantive law and procedural law has the feasibility and effectiveness of protecting enterprises and avoiding criminal risks. Moreover, procedural law helps to better apply substantive law, and the two complement each other. In addition, the Law Society of China is not only applicable to Chinese enterprises "going global"; Foreign laws will also have a binding force on "going global" Chinese enterprises. When introducing the compliance system, China's legislation should also consider the similarities and differences between domestic laws and international commercial rules, international trading habits, and international legal provisions, benchmark international rules, strengthen enterprises' adaptability overseas, and deal with various compliance risks.

3.2 Enterprise Compliance Administrative Guidance and Government Support

Before the Supreme People's Procuratorate implemented the enterprise compliance non

prosecution reform, China's administrative authorities had already begun to introduce the enterprise compliance management mechanism in the field of administrative supervision. As early as around 2005, China's financial regulatory authorities issued compliance guidelines for financial enterprises to guide financial enterprises to establish a compliance management system. The administrative supervision department advocates enterprises to establish a compliance management system by issuing compliance guidelines, improves the risk identification, risk assessment and risk prevention and control mechanisms of enterprise compliance, and helps enterprises to establish a set of compliance management operation and guarantee mechanisms that meet domestic and foreign requirements. ^[5]

In addition, the administrative organ should make use of its unique resource advantages and position advantages to provide overseas legal support for "going global" enterprises. The laws of each country are different. A huge problem faced by "sea going" enterprises is that they are not familiar with the laws of the host country and relevant international rules, so that they are restricted to operate or fined. The state administrative organs have the status and personnel advantages of the Ministry of Foreign Affairs, the Ministry of Commerce, the Ministry of Justice, etc. They play a role in clarifying foreign-related laws and regulations, international judicial assistance, diplomatic negotiations, business consuls, etc., and provide services and support for Chinese enterprises to operate in foreign countries.

3.3 The Procuratorial Organ Urges the Enterprise to Operate in Compliance with the Law

In the development history of enterprise compliance, administrative departments and judicial authorities have incorporated enterprise compliance into the process of supervision and law enforcement, imposed mandatory compliance requirements on enterprises, and leniently dealt with those enterprises that have established compliance systems or committed to compliance rectification when they are investigated for suspected violations of laws and crimes. This is the biggest motivation for enterprises to implement compliance mechanisms. ^[6] Taking the US government as an example, the law encourages the companies involved to actively conduct self-examination and report, and explicitly includes the self-examination and reporting of enterprises in the US Sentencing Guidelines as a mitigating circumstance; If the enterprise does not actively conduct self-examination and control, the senior executives of the enterprise are suspected of conniving at crimes, and individuals will face criminal risks. ^[7]

The criminal law of our country adopts the double punishment system for unit crime, which can divide the case between the enterprise involved in the crime and the relevant responsible personnel of the enterprise involved in the crime. In practice, we should return to the original intention of corporate compliance, that is, corporate compliance is to save enterprises involved in crimes, not to give entrepreneurs "legal escape", and we should protect enterprises to the greatest extent. ^[8] In the face of enterprises suspected of violating laws and crimes, the procuratorial organs of our country "strictly control and love" Chinese enterprises, urge enterprises to rectify their compliance, and provide "rewards" to encourage enterprises to actively build a compliance system, so as to prevent "going global" enterprises from being hit by internal corruption, fraud, fraud and other acts due to poor corporate compliance management or imperfect compliance system.

3.4 Compliance Third-Country Supervision and Evaluation Mechanism of Enterprises Involved

The third country organization will review the compliance plan of the enterprise involved, put forward suggestions or suggestions for improvement of the compliance plan based on the "enterprise" conditions, and determine the compliance inspection period according to the specific

case and the commitment of the enterprise involved. The third country organization is both a regulator and a service provider. Through system design, it gathers manpower and intelligence from multiple parties, participates in the design, implementation and acceptance of the compliance plan of the enterprise involved in the case, ensures the feasibility and effectiveness of the compliance plan, and implements the rule of law concept of "strict management" and "kindness".

At the same time, it should be pointed out that in the trial stage, the guidance should be closer to the deepening pattern of China's opening to the outside world, that is, to the standards and requirements of international compliance. The supervision and evaluation mechanism requires the third-country organization to objectively and independently evaluate and accept the enterprise's compliance plan and related rectifications in addition to supervision and services, which is related to the trend of the procuratorate's criminal treatment of the enterprises involved in the case and the fair administration of justice. Based on the actual situation of Chinese enterprises and the basic framework of American evaluation standards, the evaluation standards for the effectiveness of enterprise compliance management system with Chinese characteristics are formulated. In the setting of specific evaluation indicators, it is necessary to highlight the special needs of the enterprises involved in the compliance risk prevention and control, and also take into account the international standard ISO37301:2011 Compliance Management System Requirements with Guidance for Use and relevant industry compliance standards.^[9] It is not only the internationalization of enterprises, but also the level of system design and management governance that meet the needs of reality, keep pace with the requirements of the era of big compliance, and move to a higher level.

4. Conclusion

Any system is imperfect, so is the enterprise compliance system. The system is of great significance and value, and the country is also promoting this reform for the country and the people, which is the driving force for exploring the enterprise compliance reform. Only by adjusting to the "national" and "enterprise" conditions, unblocking theoretical barriers, solving practical contradictions, and steadily promoting enterprise compliance reform can this reform move be truly beneficial.

Regardless of the size of the enterprise, its contribution to promoting employment and economic development, creating social wealth, improving people's well-being and other aspects cannot be ignored. The east wind of the "Belt and Road" has brought Chinese enterprises to the world, and the compliance risks faced by enterprises are becoming increasingly severe in the current complex and changing international environment. While helping enterprises "go global", they should also guard the domestic "headquarters" and take into account both domestic and foreign situations. The country innovates the governance mode, adopts enterprise compliance, standardizes enterprise operation, maintains the sustainable and healthy development of domestic enterprises, and provides guidance at the national level for "going global" enterprises to help them stand firm in the international market. It is not only to govern according to law and deepen reform, but also to optimize the national governance capacity and governance system, and to have a higher grasp of the laws of socialist construction. We are confident that the domestic society is stable and united, the economy is stable and making progress, Chinese enterprises are thriving in the international market, and they have repeatedly achieved good results, the country is prosperous and strong, and the people live and work in peace and contentment.

References

[1] Chen Ruihua. (2021) *On the Nature of Enterprise Compliance*. *Journal of Zhejiang Industrial and Commercial*

University, 1, 46-60.

[2] Ye Bin. (2020) *On Investment Protection in the EU White Paper on Foreign Subsidies*. *International Law Research*, 6, 70-85.

[3] Yin Yunxia, Li Xiaoxia. (2020) *The Motivation and Realization Path of Chinese Enterprise Compliance*. *China Legal Review*, 3, 159-166.

[4] Li Bencan. (2021) *Rational Treatment of Enterprise Compliance Non prosecution System*. *Democracy and Legal System*, 24, 37-39.

[5] Chen Ruihua. (2021) *On the Position of Enterprise Compliance in the Administrative Supervision Mechanism*. *Journal of Shanghai University of Political Science and Law (A Study of the Rule of Law)*, 6, 1-20.

[6] Chen Ruihua. (2021) *On the Basic Value of Enterprise Compliance*. *Law Forum*, 6, 5-20.

[7] Yin Yunxia, Zhuang Yanjun, Li Xiaoxia. (2016) *Enterprise initiative and anti-corruption "radiation law enforcement effect" - inspiration from the US FCPA cooperation mechanism*. *Jiaotong University Law*, 2, 28-41.

[8] Sun Guoxiang. (2021) *Observation and Reflection on the Practice of Enterprise Compliance Reform*. *China Journal of Criminal Law*, 5, 23-41

[9] Liu Tingting. (2021) *Corporate compliance reform opens the sun flower*. *Procuratorial Daily*, 16, 5.