

Research on the Comparative Law of Enterprise Criminal Compliance Incentive System

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Keywords: Criminal Compliance, Incentive System, Comparative Law, Enterprise

Abstract: In recent years, in order to deal with the legal risks that enterprises the Enterprise Compliance Management System has been paid more and more attention. Such practice in many countries abroad has accumulated a certain amount of experience. During in the process of establishing Compliance Management System, many countries grope out a set of incentive mechanism. In the perspective of criminal comparison law, enterprise compliance incentive is mainly manifested as the basis of reducing sentence and the basis of non-prosecution. Compared with foreign countries, China's current enterprise criminal compliance incentive mechanism is in start-up stage. Along with the process of reform of the rule of law and the construction of the rule of law government, all judicial organizations are also in accordance with the different scope of authority to conduct a variety of attempts and practice, in the process of establishing criminal compliance incentive mechanism, we can reference to the experience of other countries, choose the appropriate way to learn from and transplant, In order to establish and improve our enterprise criminal compliance incentive mechanism.

1. Introduction

As the saying goes, "no interest, no power", which is why Western enterprises started early to establish the enterprise criminal compliance system source power. The establishment of an effective compliance plan can make it possible for enterprises to get more shelter when facing criminal behavior, to reduce penalties, and even to win the result of deferred prosecution or non-prosecution, to seek more opportunities for the development of enterprises, but also greatly reduce the risk of enterprise death. The larger the enterprise, the more it will benefit from the compliance construction. In recent years, more and more multinational enterprises have taken compliance management as an important part of corporate culture. In order to adapt to the international economic situation, international organizations have also begun to formulate targeted "soft law" standards of corporate compliance, and guide member states to comply with and promote them. In China, financial regulatory authorities and the State-owned Assets Supervision and Administration Commission have also begun to issue compliance guidelines and guidelines of "soft law" nature according to China's national conditions to guide enterprises in compliance construction. Foreign enterprises' attention to criminal compliance business and the experience and lessons they have gained have also provided a wide space for China to carry out research on criminal compliance.

2. Enterprise criminal compliance as the basis for deferred prosecution/non- prosecution

In essence, deferred prosecution is a contract between the procuratorate organ and the enterprise. Specifically, the procuratorate gives the enterprise involved a certain amount of time and space, requires the enterprise to pay a certain count of fines, build a compliance management system, and report regularly. After the expiration of the period, the procuratorate decides whether to file a prosecution based on the completion of the enterprise. Criminal compliance deferred prosecution agreements first appeared in the American Amur Corporation case in 1993.[1] In this case, the prosecutor entered into a deferred prosecution agreement with company, included the content of the compliance management system in the agreement, which was somewhat creative. This was followed by a series of memos issued by the Justice Department. It is also from this that the effective and compliant deferred prosecution mode began to emerge gradually. It was then widely applied into judicial practice.[2] The deferred prosecution agreement system based on the compliance management system originated in the United States, and later many civil law system and common law system countries also through different ways to give recognition and establishment.[3]

The Supreme People's Procuratorate defined the non-prosecution of enterprise compliance in the pilot work of enterprise compliance reform which means that if the enterprise involved is willing to establish a compliance management system, the procuratorate can order it to correct its criminal behavior, comprehensively improve the compliance management system, and establish a sound risk identification and response mechanism, violation investigation and accountability mechanism. Then, according to the construction of the enterprise's compliance management system, the decision on whether to prosecute or not to prosecute will be made. The pilot work of the Supreme People's Procuratorate has also been reflected in concrete practice. In the "Environmental pollution case of a company and Mr. Zhang", the procuratorates took the initiative to investigate the operating conditions of the companies, screened whether they met the applicable conditions of enterprise compliance, and actively asked the enterprises involved about their willingness to carry out compliance rectification, laying a good foundation for the resume of the enterprise compliance management system. Although non-prosecution of compliance has been used in practice, it still lacks support of legal application in our country. The most direct manifestation is that it has not been adjusted in the form of Criminal Procedure Law. According to the kinds of non-prosecution in our country, the procuratorates have adopted "conditional non-prosecution mode". In fact, non-prosecution with condition can only be applied to juvenile crimes, so legal application of non-prosecution with condition needs to be improved by the way of legislation.[4] The establishment of this point is particularly important in the countries of civil law system.

3. Enterprise criminal compliance as the basis for conviction and sentence

If the enterprise has had an effective compliance management system before the case, then the enterprise can prove that it has fulfilled its management obligations and plead not guilty based on this. Such a provision already exists in the British Anti- Bribery Act. When an enterprise is suspected of bribery crimes, it can prove that it has set up anti-bribery mechanism and has fulfilled corresponding obligations, which can be used as the basis for the crime.[5] In this way, it can prove that the compliance management system of the enterprise has been effectively run, and take this as the reason for the enterprise to plead not guilty.[6] In fact, such a practice separates the company's behavior from the employee's behavior. Since the company has an independent will, as the company has done its reasonable obligation to prevent the criminal behavior of the employee, it can be considered that the company has fulfilled its duty of care, that is, at the corporate level, the company itself has no criminal intention. Under the premise, if the company is required to

unconditionally pay for the employee's behavior, it will inevitably appear unfair to the company, resulting in the imbalance of rights and obligations at the company level. Even if the company is finally determined to be suspected of carrying out criminal acts, the judicial authorities can still reduce the liability of the company by saying that the company has fulfilled certain obligations.[7] This is one way to incentivize companies. Although enterprises cannot be completely exonerated, the mitigation of criminal law may also be the key factor of death and inventory for enterprises, which also shows that the compliance system plays a role in the incentive system in the mitigation of criminal law.

In the United States Federal Sentencing Guidelines clear that an enterprise has established an effective compliance system which can be used as a circumstance for mitigating punishment. Such groundbreaking regulations have increased the incentive for enterprises to establish a compliance management system to prevent criminal behavior. As an effective system has been established in advance and the system is functioning properly, the punishment can be reduced according to the degree.[8]

In 2020, Lanzhou Intermediate People's Court heard the first enterprise criminal compliance defense case "Nestle Employee Infringement of Personal Information Case", the court held that the unit crime should be for the collective interests of the unit, and the decision-making level of the unit should carry out or decide to carry out the criminal behavior. Nestle has expressly prohibited employees from infringing on citizens' personal information, and the perpetrator intentionally violated the company's regulations and committed a criminal act for his own work performance, which is obviously his personal behavior and should not be attributed to the company. In this case, Nestle proved through its compliance obligations that there was no fault of the supervisor on the part of the company and that the company did not need to take responsibility for the individual behaviors of employees beyond the company's control. The court finally found that the company did not have the fault of the supervisor and ruled that it did not constitute a unit crime. Before this case, the court usually combined the subjective will of the doer to determine the subjective will of the unit act.[9] In this case, the court broke through the separation of the will of the doer and the will of the company, excluding the subjective intention of the unit, which has positive significance.

Thus, in practice, compliance has been considered as sentencing circumstances by the judicial authorities, but due to the lag of the law, it has not been explicitly stipulated, so enterprise compliance can only be regarded as discretionary sentencing circumstances at most, rather than statutory sentencing circumstances, which leads to the limited impact of enterprise compliance on the reduction of penalty.

4. Conclusion

Although corporate compliance is a way of corporate governance guided by new situation and new value, few enterprises will pay attention to it, let alone require them to spend money and time to implement it, if they cannot make profits after the implementation of criminal compliance. The experience of the United States shows that the implementation of compliance programs in the Foreign Corrupt Practices Act is synchronized with the incentive mechanism of criminal law. Other countries have also learned from the experience of the United States, and even carried out direct legal transplants. The reason that the incentive mechanism of criminal law should be established is not an innovative system, but only based on the utilitarian philosophical consideration of enterprises. Only by separating the behaviors of enterprises from the behaviors of employees in a timely manner can the balance be found between punishing the violations of enterprises and ensuring the inventory of enterprises. The existence of what inscrutable philosophical basis, but mainly based on a utilitarian philosophical consideration, that is, only "let off the illegal enterprises, severely punish

the illegal executives and employees", in order to punish the illegal behavior of enterprises and avoid causing significant losses between the balance. In practice, most countries in Europe and the United States have adopted the method of giving severe punishment to employees. And the reason why enterprises have implemented an effective compliance system to lenient treatment, is to try to avoid the consequences of the conviction of the enterprise is difficult to survive, to ensure the interests of the shareholders, investors of the enterprise, but also to protect social employment and transaction security and stability. Such a practice, in addition to reasonable, scientific, but also to the maximum extent to avoid the local economic shocks, prevent the negative impact on economic development.

In terms of substantive law, we can learn from the legislative and judicial practice of the UK. When judging whether an enterprise constitutes a unit crime, we adopt the "independent will theory of the enterprise", which will be reflected through documents such as the company's articles of association, internal rules and measures such as risk control and crime prevention taken by the company. In addition to considering whether individual actions are done in the name of the company and for the collective good, the company should also consider whether it has fulfilled its reasonable management obligations. Applying the conditional non-prosecution expansion to corporate crime is a good way to do it. Provisions on content with general characteristics, such as compliance with laws and regulations, industry norms and business ethics. Establishing investigation and accountability mechanisms for violations. Regularly report the construction of enterprise compliance management system.

Based on the experience of foreign countries and the present situation of Chinese legal system, we should not be completely passive and pragmatic in order to make enterprise compliance system a benign system in our judicial system. As an important aspect of enterprise compliance, incentive system should be based on China's legal system and legal practice to study the localization and localization of enterprise compliance. The scientific attitude towards enterprise compliance should be to transplant it into China's legal system on the basis of a comprehensive understanding of its basic principles and operation mode, so that it can be seeded and germinated in China's institutional soil, and gradually become a "living organism" that can effectively play the function of the system.

References

- [1] Lin Jin, *Modes of Criminal Compliance and the Proof of Compliance Program*, *Jurists Review*, 2021(3): 47-61.
- [2] Li Bencan, *Deferred Prosecution for the Corporation in the Perspective of Comparative Law*, *Criminal Science*, 2020(3): 89-108.
- [3] Chen Ruihua, *Three Dimensions of Corporate Compliance System: Analysis from the Perspective of Comparative Law*, *Journal of Comparative Law*, 2019(3): 61-77.
- [4] Chen Ruihua, *Research on Corporate Compliance Non-prosecution System*, *Criminal Science*, 2021(1): 78-96.
- [5] Deng Ruoxun, *Research on Reform System of Bribery Crime in Britain*, *Criminal Science*, 2021(3): 111-116.
- [6] Yin Bo, Gao Yuan, *British Firms' Full Procedure Defense Preventing the Bribery and Delinquency Offence*, *Journal of Hebei University of Economics and Business*, 2015(6): 132-136.
- [7] Li Bencan, *On Compliance Program System in Corporate Crime Prevention*, *China Legal Science*, 2015(5): 177-205.
- [8] Sun Guoxiang, *The Concept and Function of Criminal Compliance and Its Construction in China*, *Criminal Science*, 2019(2): 3-24
- [9] Tong Jianming, *Fully Implement the Procuratorial Responsibility: Strive to Build Good Environment of Rule of Law for Enter-prises' Development*, *People's Procuratorial Semimonthly*, 2019(4): 2-4.