Обзор и перспективы реформы уголовно-правового комплаенса на китайских предприятиях

Review and Prospects of Criminal Compliance Reform in Chinese Enterprises

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Аннотация. *В Китае проведена реформа уголовного законодательства, направленная на совершенствование корпоративного управления и решение проблем, связанных с ростом внутренней корпоративной преступности и повышенным риском внешних санкций. Анализ показал, что работа по указанному реформированию уголовного законодательства привела к созданию диверсифицированной модели стимулирования соблюдения уголовного законодательства, механизма увязки исполнения и наказания с совместным надзором, а также различных стандартов надзора и инспекций. Однако реформа также выявила проблемы в регулируемой сфере. Например, модель стимулирования соблюдения уголовного законодательства не имеет должной научной основы и является недостаточно обязательной, механизм увязки исполнения и наказания недостаточно отлажен и прозрачен, а стандарты надзора и инспекции слишком неоднозначны.*

Проводя реформу корпоративного уголовно-правового комплаенса, мы должны следовать логике предотвращения корпоративных нарушений, в полной мере реализуя концепцию совместного управления и сосредоточиваясь на реформировании корпоративной бизнес-модели и внутренней структуры. В будущем следует локализовать механизм стимулирования соблюдения уголовного законодательства в сфере корпоративного комплаенса, усилить взаимное признание результатов рассмотрения дел в рамках комплаенса и установить двойной стандарт для разработки планов комплаенса и приемочных проверок.

Ключевые слова: *уголовно-правовой комплаенс, совместное управление, стимулы в уголовном законодательстве, программы комплаенса, взаимодействие исполнения и наказания.*

Abstract. *To promote good corporate governance and to cope with the complex situation of rising internal corporate crime and increased risk of external sanctions, China has carried out corporate criminal compliance reform. Through a general review, it can be found that the criminal compliance reform work of enterprises has established a diversified criminal incentive model, a mechanism for linking execution and punishment with joint supervision, and different supervision and inspection standards. However, it has also encountered controversial problems. For example, the criminal incentive model lacks a reasonable basis and is insufficiently binding, the mechanism for linking the execution and punishment is insufficiently smooth and transparent, and the supervision and inspection standards are too ambiguous. In carrying out the reform of corporate criminal compliance, we should follow the logic of preventing corporate violations, giving full play to the concept of collaborative governance, and focusing on the compliance reform of the corporate business model and internal structure. In the future, we should localize the criminal incentive mechanism for corporate compliance, strengthen the mutual recognition of the results of case processing in compliance, and set up a dual standard for the formulation of compliance plans and acceptance inspections.*
Keywords: *criminal compliance; collaborative governance; criminal incentives; compliance programs; execution-penalty interface*

In recent years, foreign compliance concepts and related systems have received extensive attention in China's theoretical and practical circles due to their unique corporate governance functions. The introduction of the concept of criminal compliance has made the criminal liability of enterprises associated with the issue of compliant operation, and the compliance mechanism driven by criminal incentives has become an important means for enterprises to prevent the occurrence of illegal behavior and reduce legal risks.

On the whole, the reform of corporate criminal compliance in China, although relatively late compared to that in Western countries, has developed rapidly. In the pilot work, each procuratorate flexibly explored options according to the different conditions of the cases and accumulated much experience, and the reform work achieved excellent results. Of course, constrained by lack of experience, norms and other factors, some controversial issues also appeared in the process of the pilot reform. At present, the reform of corporate criminal compliance has entered a critical period of comprehensive advancement in China, so it is necessary to review the institutional achievements and problems in the reform process as a whole and to look forward to the path of deepening the reform of corporate criminal compliance in China in the future on the basis of the clear logic of the reform.

I. A Holistic Review of Corporate Criminal Compliance Reform Efforts

At a time when it is emphasized that the rule of law should be adhered to in all respects and that the construction of China under the rule of law should be promoted, the pilot work of criminal compliance reform for enterprises is of great significance. The exploration of criminal compliance reform is not only based on the domestic implementation of the «Six Stabilizers and Six Guarantees» policy and the requirement to curb corporate crime in order to improve the modern enterprise system with Chinese characteristics but also an objective need for enterprises to build up a compliance mechanism to counteract the risk of external sanctions. At present, China's criminal compliance reform has achieved a series of institutional results.

(i) Core mechanisms: diversified criminal incentive models

According to the annual work report of the Supreme People's Procuratorate, since the launch of the pilot enterprise compliance reform in 2020, the procuratorial organs have handled 5,150 enterprise compliance cases, and 1,498 enterprises and 3,051 responsible persons have avoided criminal sanctions and regained a new life due to criminal compliance.[1] In the course of the pilot reform, some classic cases with both legal and social effects have emerged. To date, the Supreme Prosecutor has released four batches of 20 typical cases of enterprise compliance reform pilots, and various localities have interpreted and publicized cases of typical significance in their prosecutorial work. Examining compliance cases in practice from a macroscopic perspective, it can be found that the mode of granting criminal incentives in China presents a state of diversified coexistence, specifically including the following three kinds.

1. «Discretionary non-prosecution + prosecutorial recommendation» model

The first batch of reform pilot typical cases includes the «Xintai City J company and other construction

[1] See: *Report on the Work of the Supreme People's Procuratorate (First Session of the 14th National People's Congress, Zhang Jun March 7, 2023), on the official website of the Supreme People's Procuratorate // URL: https://www.*spp.gov.cn/spp/gzbg/202303/t20230317_608767.shtml, June 27, 2023 (accessed: on June 27, 2023).

enterprises collusive bidding series of cases». In these cases, the procuratorial organs conducted their own supplementary investigation and on-site visit investigation of J company and six other companies and made a decision not to prosecute. Moreover, it is recommended that the administrative department punish enterprises and required the enterprises involved in the case to carry out compliance building.

This case is a typical example of this model, and its basic operation logic is as follows: the procuratorial authorities first identify the real situation of the case and combine it with the actual situation of the enterprise's development prospect, make a discretionary non-prosecution decision within the framework of the existing provisions of the Criminal Procedure Law, and then request the enterprises involved to carry out compliance construction and the competent departments to impose corresponding administrative penalties by the procuratorial recommendations.

Under this model, the procuratorial authorities are more concerned with whether the enterprise's management system and internal structure meet the compliance requirements for crime prevention rather than simply pursuing the outcome of the case. If problems are found in the enterprise's governance system, the enterprise is urged to take compliance measures by means of prosecutorial recommendations, which are made at the same time as the decision not to prosecute.

This is essentially a situation in which «the enterprise implements a compliance program in exchange for the relative non-prosecution of the situation, which makes non-prosecution a major incentive for the enterprise to establish a compliance system.»[2] The shortcoming of this model is that even though the prosecutorial recommendation can form a certain binding force on enterprises by informing administrative authorities, self-regulatory organizations, and reporting to the National People's Congress, the Discipline Inspection Commission, and other subjects, reflecting the value of collaborative governance, its coercive power is still slightly insufficient compared to other incentives for criminal compliance.

Enterprises may, after receiving a decision not to prosecute, engage in formal «pseudocompliance» or even «noncompliance», continuing to retain space for the growth of illegal and criminal behavior.

2. «Deferred prosecution + compliance rectification» (conditional non-prosecution) model

The conditional non-prosecution model of China's corporate criminal compliance reform has achieved some of the important results. This model is attributed to the pilot work of the mainstream form of criminal incentives given to enterprises and represents the next stage of the work of the procuratorial organ's focus. In the first batch of typical cases,' Zhangjiagang L Company, Zhang Moujia and other environmental pollution cases ', and in the second batch of typical cases, ' Yinan County, Shandong Y Company, Yao Maoming City and other collusion bidding cases ' and other typical cases show the model of conditional non-prosecution.

The logic of this model lies in the following: first, the procuratorial authorities carry out a comprehensive review and assessment based on factors such as whether the enterprise pleads guilty and admits punishment, its ability and willingness to carry out compliance rectification, and the facts of the crime to decide whether or not to give the enterprise the opportunity to carry out compliance construction.

Second, on the basis of the decision to carry out compliance supervision procedures, the enterprise involved in the case signs a supervision agreement with the procuratorial authorities. The fulfillment of the regulatory agreement by the enterprise is the key to the subsequent decision by the procuratorial authorities to prosecute or not. Again, the procuratorial authorities, within the framework of the existing review and prosecution period, set a certain compliance supervision period.

During the supervision period, the relevant compliance supervisor makes regular reports to the procuratorial authorities on the enterprises' rectification situation. Finally, before the expiration of the examination period, the procuratorial authorities review the fulfillment of the compliance agreement and ultimately make a decision not to prosecute if it passes the acceptance assessment, or vice versa. In fact, the United States of America's pretrial transfer agreement, the United Kingdom's deferred prosecution system and China's conditional non-prosecution model have the same flavor, belonging to the Western experience in our country's «classic reproduction».

This mode of conditional non-prosecution, through deferring prosecution and allowing the entity's results to determine the final non-prosecution, acts as a double incentive for the enterprise to carry out compliance measures. This can effectively dismantle the undesirable mechanism of induced crime and prevent the «ripple effect» caused by other social problems.

However, this model cannot always be applied. First, the scope of application of cases in the current system of conditional non-prosecution does not include enterprise compliance cases, so the current application of this model lacks normative legitimacy. Second, the compliance rectification of enterprises in this model is actually a kind of ex post facto compliance. Some scholars have pointed out that ex post facto compliance can affect liability but cannot

[2] See: *Chen Ruihua.* Compliance Incentive Models in Criminal Proceedings // China Law Journal Vol. 6. No. 6. 2020. P. 225—244.

block the illegality of the behavior itself. In criminal law that does not take compliance rectification as the sentencing circumstance or illegal deterrent reason, the procuratorate's «conditional non-prosecution» of felonies is suspected of overstepping the principle of the law of crime and punishment.[3]

3. «Prosecution + Sentencing Recommendation» model

When an enterprise fails to pass the acceptance assessment of compliance rectification, the procuratorial authorities file a public prosecution with the court but generally make a sentencing recommendation based on a guilty plea. In practice, there have also been cases where the procuratorial authorities, after recognizing the enterprise's development prospects, social contributions and conditions for compliance rectification, still filed a public prosecution with the court due to the more serious circumstances of the enterprise's criminal conduct and, at the same time, made a sentencing recommendation. This model was adopted in the first batch of typical cases of the Supreme Prosecutor's Office in the case of «Shanghai Company A, Company B and Guan Moumou's Case of Unauthorized VAT Special Invoice». From the viewpoint of the pilot reform, the procuratorial authorities in this model are also not «handling cases for the sake of handling cases».

Even if the enterprises involved in the case are prosecuted or have carried out compliance rectification before prosecution, the procuratorial authorities still carry out continuous supervision and attention to the compliance construction work of the enterprises involved in the case through procuratorial recommendations and other tools. The prosecuting authorities likewise continue to supervise the compliance building work of the enterprises involved through tools such as prosecutorial recommendations. From this point of view, this model is conducive to ensuring that enterprises complete their «decriminalization reform» as much as possible.

(ii) Multidimensional dispute resolution: a mechanism for the convergence of enforcement and criminal justice in the context of joint supervision and control

At present, most types of corporate crimes in China are administrative crimes. Based on the premise that the establishment of a criminal offence for administrative offenders requires the constitution of an administrative offence as a basic prerequisite, the reform of corporate criminal compliance inevitably involves cooperation between the administrative authorities and the judiciary. Officials from the Supreme Prosecutor's Office have pointed out that the study of corporate compliance incentives should include both criminal and administrative incentives and that the two incentives must be combined.[4]

In the situation in the pilot enterprise criminal compliance reform, the current construction of the mechanism for the convergence of execution and punishment is mainly reflected in the following three stages.

1. Compliance initiation phase

From the viewpoint of the working practice of enterprise criminal compliance reform, the basis for the procuratorial authorities to decide whether to carry out compliance work depends largely on field visits, investigations and related reviews, in which the procuratorial authorities usually listen to the opinions of the administrative authorities on the business situation and development prospects of the enterprise and decide whether to give the enterprise the opportunity to carry out compliance and rectification in conjunction with the other facts of the case, and the mechanism of convergence between the execution of punishment and execution has been presented in this context. The mechanism of convergence between execution and punishment is also presented here. However, some scholars have pointed out that pressure from the local party and government departments is likely to lead to the dilemma of «selective law enforcement» in this phase of the convergence mechanism. In this situation, some enterprises that do not have the conditions for compliance are given the opportunity to rectify the situation, while those that do have the conditions for compliance are excluded, which ultimately affects the credibility of the pilot reform work.[5]

2. Assessment and acceptance phase

In the process of compliance rectification by enterprises, the judicial authorities cannot do without the help of administrative authorities. According to the provisions of the Guidelines on Third-Party Supervision and Assessment, the management committee of the third-party mechanism for coordinating the formulation of acceptance criteria for compliance inspection and assessment is actually formed by the

[3] See: *Liu Yanhong, The Criminal Law Doctrinal Roots of Corporate Compliance Non-Prosecution Reform // Chinese Journal of Criminal Law*. Vol. 1. No. 1. 2022. P. 107—123.

[4] See: *Compliance Building and Crime Governance Summit Held in Beijing, in Rule of Law // URL: http://epaper*.legaldaily.com.cn/fzrb/content/20210623/Articel09002GN.htm (accessed: June 27, 2023).

[5] See: *Li Yuhua and Li Huachen.* The Starting Conditions of the Compliance Nonprosecution Examination Procedure — Taking the Supreme Prosecutor's Typical Case of Corporate Compliance as a Sample // Journal of the University of Science and Technology of Beijing : Social Science Edition. 2022. No. 5. P. 563—570.

Supreme Prosecutor in conjunction with other administrative organs, such as the State-owned Assets Supervision and Administration Commission (SASAC), the Ministry of Finance and the State Administration of Taxation.

Moreover, the third-party mechanism's management committee and the mechanism of joint meetings in the pilot areas are set up by the local People's Procuratorates, the finance departments, the Federation of Industry and Commerce and other administrative organs. In addition, in accordance with the requirements of the Administrative Measures for the Selection of Professionals for the Third-Party Supervision and Evaluation Mechanism for Compliance of Enterprises Involved in Cases (for Trial Implementation), persons with specialized knowledge in governmental departments may be selected and identified as professionals of the third-party mechanism or may participate in the third-party organization and its work on the basis of invitations and assignments.

3. Follow-up penalty phase

It should be made clear that the fact that an enterprise has passed a compliance assessment and acceptance means that it is no longer criminally liable, but it does not mean that it is also exempt from administrative liability. Regardless of the compliance model adopted by the judiciary, it usually issues a procuratorial recommendation to the administrative authorities after granting criminal incentives to the enterprise, requesting that the enterprise in question be subjected to administrative penalties and thus realizing the connection between the criminal and administrative mechanisms.

Under special circumstances, the procuratorial authorities also issue procuratorial recommendations on industry governance issues, with a view to achieving the effect of «dealing with one case and governing one area» through typical cases. For example, in the second batch of typical cases, in the case of the smuggling of ordinary goods by Shenzhen X Company, the procuratorial authorities made recommendations to the Customs Department on regulatory loopholes, underreporting of prices and other general problems in the industry, which were eventually adopted.

(iii) The dimension of effectiveness: very different standards of regulatory scrutiny

To prevent the occurrence of «paper compliance» and «false compliance» by enterprises involved in cases, the procuratorial authorities have paid particular attention to the supervision and inspection criteria for compliance programs in the pilot reform work. Of course, although the central authorities and various localities have explored the formulation of compliance plans, the assessment and acceptance of the effectiveness of corrective actions, and the duration of inspections, the elements of the specific standards are still vague, and no uniform practice has been developed.

1. Compliance program development and acceptance issues

As early as 2018, China successively issued normative documents such as the Guidelines for Compliance Management of Central Enterprises (for Trial Implementation), the Guidelines for Compliance Management of Enterprises' Overseas Operations, and the Guidelines for Compliance Management Systems, which were initially designed to provide normative guidance for enterprises to formulate compliance programs and establish compliance mechanisms to prevent the risk of transnational sanction. In terms of their characteristics, some scholars have pointed out that the documents at this time only reflect the color of industry advocacy and do not have a mandatory effect, nor do they promote the construction of corporate compliance programs through criminal incentives.[6]

By the middle stage of the reform pilot, the People's Procuratorates of the pilot localities had clarified the important role of the compliance program through a series of judicial cases, so that the fulfillment of the compliance program by the enterprises involved in the case had become an important reference for criminal incentives, such as non-prosecution of compliance and sentencing recommendations.

Article 29 of the Implementing Rules of the Guidelines for Third Party Supervision and Evaluation states that when reviewing compliance plans, third party organizations should focus on the feasibility of completing the plan, its operability and its effectiveness in preventing already suspected or similar illegal and criminal acts, covering the weaknesses and obvious loopholes of the enterprise in the area of compliance, and addressing other underlying matters that need attention for review.

The Central Nine Article 5 of the Measures for Compliance Construction, Evaluation and Review of Enterprises Involved in Cases (for Trial Implementation) (hereinafter referred to as the Measures (for Trial Implementation)) issued by the Central Government and the ministries and commissions points out that «a special compliance program should be able to effectively prevent the recurrence of the same or similar illegal and criminal acts». However, in general, the provisions of the document on the compliance program are still general. The question of what specific elements should be included in a compliance program requires further study by the academic community.

[6] See: *Zhang Zhong and Li Yino.* Exploration of Criminal Compliance Programs for Enterprises in China // Jiangxi Social Science. No. 1. 2023. P. 74—82.

The issue of acceptance criteria is in fact closely related to the compliance program, and the two are «two sides of the same coin», with the compliance program focusing on «access» and acceptance and rectification focusing on «exit». In the pilot reform work, according to the provisions of Article 14 of the Measures (for Trial Implementation), the third-party organization usually pays attention to the following issues when carrying out acceptance: the disposition of illegal and criminal acts; the reasonableness of the configuration of the compliance management body and organizational personnel; the construction of the compliance mechanism and the status of guarantee; the operation of the monitoring, reporting, investigation, processing and compliance performance evaluation mechanisms; the formation of a culture of compliance and the mechanism of continuous rectification.

Article 15 also puts forward the requirements of «special compliance» and «differentiated compliance» based on the characteristics of the industry and different types of enterprises. According to the situation in practice, the effectiveness standard of compliance and rectification, which has gained more consensus, can be expressed as «achieving the substantive effect of preventing enterprises from committing crimes again».[7]

2. The question of the duration of the mission

According to the explicit requirements in the Guidelines on Third-Party Supervisory Assessment, the third-party organization must determine the duration of the compliance visit, and the enterprises involved in the case have to carry out compliance rectification and undergo inspection and assessment within the inspection period. Therefore, the issue of the inspection period is directly related to the fulfillment of the enterprise's compliance program and the extent of the enterprise's rehabilitation by decriminalization and ultimately affects the outcome of the entity's treatment. In the current pilot reform, the compliance inspection period is usually set at the stage of examination and prosecution.

However, according to the current law, the procuratorial authorities should make a decision on whether to prosecute or not within one month, which can be extended for fifteen days in major and complex cases, so compliance inspection encounters obstacles at the normative level. In practice, the procuratorial authorities in the pilot areas are seeking «the longest possible inspection period in the gaps of the criminal procedure» to create time conditions for effective compliance supervision within the framework of the legal provisions.[8]

Examining the typical cases issued by the Supreme Prosecutor's Office, the period for compliance rectification was set at three months in most cases and one year in some cases. From the perspective of normative documents, the pilot locations also set unique inspection periods according to their own work practices.

For example, Liaoning Province has set an inspection period of 3—5 months in accordance with the Opinions of the Liaoning Provincial People's Procuratorate and Ten Other Organs on the Establishment of a Compliance Inspection System for Crime-Related Enterprises, while Ningbo City, Zhejiang Province, has set an inspection period of 6-12 months through the Opinions on the Establishment of a Compliance Inspection System for Crime-Related Enterprises, etc. It should be noted that although the procuratorial authorities have already extended the period of compliance inspection as much as possible by returning the case for remedial investigation and recommending the suspension of the trial, etc., the period of compliance inspection set up in the pilot reform in our country is still relatively short from the point of view of comparative law. At present, China's compliance rectification affects the large enterprises as well as small and micro private enterprises, but with the deepening of the reform, there will be more and more large enterprises with complex governance structures and complex causes of crime will be included in the applicable objects of compliance rectification. At present, the compliance inspection period of 3 months to 1 year can not guarantee the complete rectification of the enterprise, and there is no basis for setting a long period of inspection. In this regard, the practical and theoretical communities should carry out further research and propose countermeasures to ensure the legality of the compliance inspection period.

II. Contingent logic for the development of corporate criminal compliance reforms

In the practice of reforming corporate criminal compliance, on the one hand, individual procuratorial organs have been afraid to liberalize their criminal compliance work. On the other hand, the handling of individual cases is «contrary to the original intent of corporate criminal compliance and has not realized its due social value.»[9] Therefore, it is necessary to rationalize the logic of corporate criminal compliance reform pilots.

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[7] See: *Li Lanying.* Entry and Acceptance Criteria for Criminal Compliance Review of Enterprises Involved in Cases // Politics and Law Series. No. 2. 2023. P. 100—112.

[8] See: *Chen Ruihua.* Research on Corporate Compliance Non-Prosecution System // Chinese Journal of Criminal Law. Vol. 1. No. 1. 2021. P. 78—96.

[9] See: *Fu Chuanjun.* Three Fundamental Issues of Criminal Compliance of Enterprises in China // Journal of Fujian Police College. No. 2. 2023. P. 74—83.

(i) Preventing corporate offenses as a core orientation

One of the basic requirements for the normal functioning of the modern enterprise system is that enterprises be able to consciously comply with the law. However, according to the logic of the market economy, it is unrealistic to expect enterprises to consciously abide by the law without the aid of any external system. The reason is that the market economy objectively leads market subjects to be profit-seeking and competitive. Given these characteristics and the diversified interests and values of the subjects, it is not possible for different enterprises to evaluate their interests in the same way, and it is entirely possible for enterprises to violate the law in order to pursue their interests.

Therefore, preventing enterprises from violating the law is the core orientation that must be adhered to in the pilot work of criminal compliance reform. On the one hand, criminal compliance has a stronger preventive nature than the traditional compliance model. Traditional corporate compliance favors bearing civil and administrative liability to promote the construction of a corporate compliance system, but its effectiveness in preventing illegal and criminal behavior is not satisfactory, failing to effectively meet the expectations of the public.[10]

Therefore, the future pilot work of corporate criminal compliance reform should explore more diversified criminal incentives to promote corporate compliance and prevent illegal and criminal behavior. On the other hand, it is also necessary to promote the updating of criminal law concepts as soon as possible with criminal compliance reform. At present, China's criminal law lacks a preventive mechanism for corporate crimes, and its deterrent effect is insufficient. Specifically, the provisions of articles 30 and 31 of the current Criminal Law are still based on the traditional deterrent and retribution functions of punishment, without focusing on the guidance and incentive functions for enterprises.

In fact, from the experience of long-term judicial practice, the lack of enterprise management system and internal organizational structure may be the incentive to commit crimes. The legislative method that only pays attention to punishment and ignores transformation has been unable to meet the actual needs of corporate governance : if the business model that induces corporate crime is not reorganized, even if the enterprise is sentenced to a severe penalty, it is difficult to guarantee its future compliance with the law ; without fundamental changes in the organizational structure within the enterprise, it is difficult to prevent the recurrence of illegal and criminal acts even if new managers are replaced.

It can be seen that the future criminal compliance reform must guide the concept of corporate crime governance from «punishment» to «prevention,» and strive to help enterprises identify and effectively avoid illegal and criminal acts in a timely manner, so as to enhance the effectiveness of corporate crime governance from the perspective of prevention. Without fundamental changes to the internal organizational structure of the enterprise, it is difficult to prevent the recurrence of illegal and criminal acts even if managers are replaced.[11]

It can be seen that future criminal compliance reforms must guide the concept of corporate crime management from a «punitive» to a «preventive» transformation, strive to help enterprises identify and effectively prevent criminal behavior in a timely manner and enhance the effectiveness of corporate crime management from a preventive perspective.

(ii) Full utilization of the concept of collaborative governance

The governance of modern society has entered a new stage of development. With the advent of the risk society, various social problems have ceased to be characterized by the point-like distribution of the past but are spread over a large area in various fields, affecting all parties, and no one can remain removed from the situation. Moreover, the causes of social problems are the result of a variety of superimposed and interacting factors.[12]

This also means that the practice of relying only on a single subject to resolve conflicts can no longer achieve effective governance and alleviate social conflicts. The causes of corporate crime are not limited to a single factor. In fact, the development characteristics of the market economy, the overall management system and internal organizational structure of the enterprise, the defects of the governance method, operators' weak awareness of the rule of law, and other factors are important reasons for the occurrence of corporate crime. In the face of corporate crime, if the enterprise as a party is excluded from the scope of the main body of governance, it will not only pay high governance costs but also present insufficiently effective governance.

Therefore, criminal compliance reform work must give full play to the concept of coordinated governance, absorb the participation of more subjects and

[10] See: *Kailin Chen.* Exploring the Operation Logic of Criminal Compliance and Localization Progress // Liaoning Public Security and Judicial Management Cadre College Journal. No. 2. 2023. P. 15—21.

[11] See: *Chen Ruihua.* Effective Governance of Unit Crimes — Theoretical Analysis of Major Unit Crime Cases Handled in Separate Cases // Journal of East China University of Political Science and Law. No. 6. 2022. P. 6—22.

[12] See: *Jiang Bixin and Wang Hongxia.* On the Modern Social Governance Pattern — The Implications, Foundations and Keys of Co-Construction and Sharing // Journal of Laws. Vol. 2. 2019. P. 52—60+140.

achieve effective articulation. In the short term, the focus should be on improving the criminal compliance mechanism for the convergence of execution and punishment. At present, the reform pilot's new two-system model of «procuratorial recommendation» and «conditional non-prosecution» represents the concept of coordinated governance in the field of crime governance.

As an example of the procuratorial recommendation model, if the enterprise in question refuses to rectify the situation without justifiable reasons or if the rectification is not in place, according to the provisions of Article 25 of the «Provisions on the Work of Procuratorial Recommendations of the People's Procuratorate», the procuratorial organ can report the case to the higher-level people's procuratorate, notify the self-regulatory organization of the industry to which the enterprise in question belongs or the administrative department in charge of the case, and even report to the Party committee at same level, the government, the National People's Congress, and disciplinary inspection and supervisory organs, if necessary.

This multibody participation can produce intangible coercive force on the enterprises involved in the case, effectively curbing «noncompliance» and «false compliance». For the mode of conditional non-prosecution, the focus of the procuratorial authorities is not on the pursuit of «punishment» and «retribution» but on the primary goal of crime prevention and the criminal incentive to promote the establishment of an effective compliance system. Through consultation with the enterprises involved in the case and the «intermediate tool» of conditional non-prosecution, the procuratorial authorities have realized the extension of their functions, and in the stage of reviewing and prosecuting, they have fulfilled the function of crime prevention that should be realized only in the stage of execution of penalties, which highlights the concept of «building and sharing» of collaborative governance. This highlights the concept of coordinated governance.

(iii) Focusing on the compliance reform of the business model and internal structure of enterprises

At present, administrative offenders are the hardest hit by the criminal risk of enterprises. This is because, compared with traditional natural offenders, the social hazards of administrative offenders are not very intuitive, and a large number of enterprises frequently «step on mines» due to their profit-seeking nature and ignorance of legal provisions. In the complex business field, many business activities engaged in by enterprises are actually risky activities that constantly travel between illegal and legal. The risk of violating criminal law can drag enterprises into the abyss of crime at any time.

Once a company commits a crime, it will be subject to the criminal sanction of «stigmatization» of the brand, and its future development will probably come to an end. Based on the «ripple effect», criminal sanctions on enterprises have consequences for employees, customers, partners and other subjects, intensifying social conflicts and affecting the stability of economic development.[13]

In short, the risk of criminal law brings the expansion of administrative crime and the consequences of the ripple effect, so that the traditional sense of ignoring prevention and the general emphasis on conscientious compliance with the law of the integrated business model is difficult to maintain. In this context, China's future enterprise criminal compliance reform must pay more attention to promoting the enterprise to realize the business model of compliance transformation so that it can carry out self-inspection, self-investigation and even active notification of the work with the help of the compliance management system to reduce the probability of violating criminal law or striving for leniency of the judicial organs.

Another focus of attention for future corporate criminal compliance reform should be on the governance structure of enterprises. The «director-supervisor» type of corporate governance structure currently prevailing in China is not satisfactory in terms of crime prevention. Some scholars have pointed out that due to the backwardness of the pattern, discourse and thinking caused by historical conditions, the power of China's companies is held not by the directors and executives but by the controlling shareholders or actual controllers, the degree of power separation is insufficient, and the level of organization is relatively low.[14]

This has led to the functional alienation of the corporate governance structure and the lack of checks and balances and supervision of the exercise of power by the controlling shareholders and actual controllers, which has provided the soil for the creation of corporate crimes. For example, the crime regarding the controlling shareholders and related parties in the case of Cody Dairy was due to a certain extent to the lack of constraints on the exercise of power and nontransparency in its internal decision-making procedures, which led to violations of guarantees, the

[13] See: *Chen Ruihua.* Eight Controversial Issues in Corporate Compliance Non-Prosecution Reform // China Law Review 2021. No. 4. P. 1—29.

[14] See: *Deng Feng.* The Origin of Corporate Compliance and the Institutional Limitations in China // Comparative Law Studies. Vol. 1. No. 1. 2020. P. 34—45.

[15] See: *SEC Notifies 20 Typical Illegal Cases in 2021, Financial Falsification Becomes 'Hardest Hit', on People's Daily Online // URL: http://finance*.people.com.cn/n1/2022/0402/c1004-32390776.html (accessed: June 26, 2023).

misappropriation of funds and other illegal acts.[15] Current criminal compliance reforms have made it an important acceptance indicator whether an enterprise has implemented the «top-level commitment principle» and adjusted its internal governance structure to achieve «decriminalization», and changes in the governance structure have become an important aspect of the enterprise system for correcting mistakes.[16]

As the reform continues, it is even possible to consider adding the role of chief compliance officer to the traditional power structure of «directors, supervisors and senior management» of an enterprise to incorporate the concept of compliance into the day-to-day operation of the enterprise by changing the internal structure.

III. The Future Outlook for Corporate Criminal Compliance Reform Efforts

On the basis of an overall examination of the institutional achievements and controversial issues in China's current corporate criminal compliance reform efforts and a clear understanding of the contingent logic that should be followed in future corporate criminal compliance reform efforts, we can look forward to promoting the establishment of a corporate criminal compliance system that meets the actual national conditions and has Chinese characteristics.

(i) Localization of criminal incentives for compliance

As mentioned above, the corporate criminal compliance system has been imported into China. Therefore, it must be localized and adjusted according to the actual situation in China; otherwise, the reform of corporate criminal compliance will lose the vitality of sustainable development. Western countries have long adhered to the «spare the enterprise, severely punish the responsible person» compliance system,[17] but this concept is not in line with the actual situation of China's corporate crime.

The main body of China's enterprise crime is small and micro private enterprises; their internal governance structure is not sound, and the family culture makes the phenomenon of personal and corporate personality very serious. In this case, entrepreneurs and the fate of the enterprise are actually tied to an individual, which is a general copy of the «severe punishment of the responsible person» concept. The ultimate result is that the entrepreneur's jailing is the same as the announcement of the «death penalty» for the enterprise's development prospects, and criminal compliance and the original intention and value logic of criminal compliance reform are undermined.

Therefore, most of the procuratorial organs in the pilot enterprise compliance reform have been implementing the double non-prosecution practice of «sparing not only the enterprise but also the responsible person» in accordance with the reality of our country. In the four batches of 20 typical cases, there were 13 cases in which dual non-prosecution was applied. However, there are views that the concept of «double release» adopted in China has deviated from the desired track, and the compliance system has become a tool for responsible persons to evade criminal sanctions.[18]

Through the examination of individual cases, we can find that this question is not unreasonable. The third batch of typical cases regarding «Wang Moumou leakage of insider information, Jin Moumou insider trading case» presented the situation of allowing «personal illness and letting the enterprise take medicine». In this case, the enterprise did not commit a crime, and Wang Moumou was involved in enterprise production and management activities that were not closely related to personal criminal behavior. This case was a simple natural person's crime, but the result of the case was that the enterprise carried out criminal compliance work, and Wang obtained the sentencing proposal of lenient punishment with the help of compliance results, and the legitimacy of the compliance system was questioned.

Based on the above reasons, it is necessary for China to adopt a process-oriented way of thinking to localize criminal incentives for compliance. Specifically:

(1) the responsibility of natural persons and enterprises should be separated, and the separation of the responsibility of natural persons and enterprises is a prerequisite for the construction of a binary mechanism. Theory and practice have adopted a «unit of one subject relationship theory» approach, which holds that the premise of pursuing individual responsibility is that the unit constitutes a crime. However, this concept neither makes a reasonable explanation of the basis for natural persons to bear the responsibility of unit crimes from the perspective of self-responsibility for crimes, nor can it explain the judicial interpretation provision of natural persons ' criminal responsibility when the unit involved is revoked.[19]

[16] See: *Chen Ruihua*. The Role of Compliance Advisors in Effective Compliance Rectification // Journal of Zhejiang Gongshang University. Vol. 6. No. 6. 2022. P. 35—50.

[17] See: *Li Yong*. The Dualized Model of Unit and Responsible Person in Compliance of Case-Related Enterprises // China Prosecutor. No. 12. 2022. P. 31—35.

[18] See: *Feng Weiguo and Fang Tao*. The Realistic Dilemma of the Localization of Corporate Criminal Compliance and the Path to Resolving It // Henan Social Science. No. 6. 2022. P. 52—62.

[19] See: *Xie Zhidong*. Criminal Liability Basis, Morphological Structure and Legislative Amendments of Unit Crimes in the Context of Corporate Compliance // Guizhou University Journal (Social Science Edition). No. 3. 2023. P. 34—43.

In fact, although the basis of criminal liability of enterprises is an old doctrinal question, from the utilitarian point of view of curbing corporate crime and preventing the ripple effect, the basis of criminal liability of enterprises and natural persons can be completely different. The basis of criminal liability of enterprises lies in the existence of its internal management system and organizational structure that may induce crime, with defects, while the natural person is guilty of a psychological bent to commit harmful acts.

(2) Moreover, the incentive for leniency in compliance should be limited to enterprises and natural persons whose criminal behavior is closely related to defects in the structure and system of the enterprise. In other words, there is no natural justification for natural persons to receive compliance incentives. The fundamental idea of compliance is to remodel the problematic systems and structures of the enterprise so that only natural persons who have committed criminal offenses due to deficiencies in the institutional structure of the enterprise can receive compliance incentives. For example, for an enterprise with a bribery culture and a lack of regulatory sanctioning mechanisms, compliance incentives can be applied to employees who pay bribes to key personnel to facilitate corporate cooperation.

(3) A mechanism should be established to separate cases between enterprises and natural persons. After a case occurs, it is first necessary to examine whether the unit has committed a criminal act. If the answer is negative, it is sufficient to deal only with the case of crimes committed by natural persons; if the applicable scope of the compliance case is satisfied, the case is divided between the enterprise and the natural person. For units suspected of committing a crime and in a position to rectify the situation, the compliance procedure can be initiated in accordance with the law, while for natural persons, the link between the commission of a crime and the lack of corporate compliance mechanisms can be used to determine whether natural persons are allowed to borrow the fruits of the incentives for corporate criminal compliance. For natural persons who cannot be given incentives for criminal compliance, attempts can be made to use the system of leniency in pleading guilty and accepting punishment to encourage a decision not to prosecute or to treat them leniently. In this way, a balance can be achieved to a certain extent between «preventing natural persons from using criminal compliance to evade sanctions and saving the enterprise as much as possible».

(ii) Enhancing mutual recognition of case outcomes in compliance development

Compliance governance cannot be limited to criminal incentives alone but should also include administrative incentives, which is an inevitable requirement for implementing the concept of collaborative governance. «Administrative regulators often use administrative settlements and other methods in the process of urging enterprises to construct compliance programs.»[20]

In China, a typical example of an administrative settlement system appears in the securities industry. In 2021, the State Council published the Measures for the Implementation of the Party Commitment System for Administrative Law Enforcement in Securities and Futures, which made relevant provisions on matters relating to the securities industry's work on administrative settlements. According to the provisions of the document, the parties may sign an administrative settlement agreement with the administrative authorities in exchange for leniency from the administrative authorities, and the measures that the parties undertake include correcting the suspected violations, compensating for the losses, eliminating the damages or adverse impacts, and paying the commitment money, among others.

Unfortunately, the document does not provide for matters related to the reorganization of the system structure, and our administrative settlement system has not been raised to the height of compliance. With the deepening of the reform, China can try to create a new type of administrative incentive mechanism through the administrative settlement system and promote mutual recognition with the judiciary. On the occasion of administrative offenses, the Notice on the Opinions on Strengthening the Convergence of Administrative Law Enforcement and Criminal Justice made the following provision: «Administrative law enforcement agencies have already made a decision on administrative penalties when transferring a case; the decision on administrative penalties should be copied to the public security organs and the People's Procuratorate together.»

Therefore, it is likely that the administrative organ will be able to impose an administrative penalty for the current violation of the law before it is referred for prosecution. In this regard, the administrative authorities can try to reach a settlement agreement with the enterprise involved in the case that can reduce or waive the administrative penalty, and the signing and fulfillment of the administrative settlement agreement can become the basis for the procuratorial authorities to subsequently decide whether or not to carry out the compliance procedure. Thanks to the encouragement of administrative incentives, the enterprise will also have a high level of motivation to carry out the criminal compliance measures.

In addition, it is necessary to recognize the results of criminal compliance efforts stipulated by the administrative authorities. In practice, the following situation often occurs: the enterprise makes great

[20] See: *Cui Yongdong*. Corporate Compliance from the Perspective of Legal Incentives // Rule of Law Research. Vol. 1. No. 1. 2023. P. 123—132.

efforts to engage in compliance and finally receives the decision of non-prosecution. To preserve the enterprise's hope of survival, the procuratorial organs choose to practice the «strict control and generous love» concept. After the prosecutorial recommendations are given, the administrative authorities then stipulate harsh administrative penalties that «punish the enterprise to death», regardless of the enterprise's original intention of compliance.

Some scholars said in an interview that «an enterprise cannot easily achieve corporate compliance rectification measures but was exempted from prosecution. Then, the administrative organs approached the door and said that the fine would be no less than 4 million. The boss thought it would be better to sit in jail for a year and pay the fine of 300,000, so he found the prosecutor and said that he would not rectify the situation and asked to accept the criminal punishment. The prosecutor was also very frustrated.»[21]

The defects of the results of the execution and criminal treatment have not been reasonably articulated. Therefore, the procuratorial organs can, in the procuratorial recommendations to the administrative organs, explain to the administrative organs how to carry out the original intention and philosophy of criminal compliance and suggest that the administrative organs take measures to mitigate punishment. Of course, based on the «soft law» nature of the administrative recommendations, there may also be individual administrative organs in practice that establish a rigid mechanism for their effective constraints. In-depth research must be continued in conjunction with the actual reform and development.

(iii) Establishment of binary criteria for compliance program development and acceptance visits

At present, most of the pilot reforms in China are based on ex post facto compliance. On the one hand, the main purpose of ex post facto compliance is to completely eliminate the factors that may induce crimes within the enterprise, so the setting of effective evaluation standards for such ex post facto compliance should emphasize the functional value of discipline and correction. On the other hand, with the development of the times, compliance has outgrown the «classical definition», and the most important aspect of modern enterprise compliance is the construction of enterprise culture.[22]

Therefore, when carrying out the formulation and acceptance inspection of compliance programs, it is necessary to pay attention to the above two factors at the same time and set up a binary standard. This is very beneficial to the transformation of the enterprise business model and internal structure and coincides more with the criminal compliance reform of the logic of contingency.

According to this logic, when evaluating the compliance program and the actual rectification situation of the enterprise, the focus should be on whether the implementation of the compliance program can play a disciplinary and corrective role for the enterprise, as well as whether it can support the development of a culture of compliance for the enterprise. In detail, when reviewing the formulation of the compliance program and carrying out the rectification and acceptance work in the future, the reviewing authority must focus on the following questions.

First, can the legal interests infringed upon by the criminal acts of the enterprise be restored through the implementation of the compliance program? What is the final effect of remedial restoration?

Second, can the management system and organizational structure of the enterprise involved in the case, which may have induced the crime, be reorganized through the compliance plan? Has the compliance work rectified the management system and organizational structure of the enterprise and eliminated the breeding ground for crimes?

Third, is the compliance program committed to building a good corporate culture? How effective has it been? Is there a mechanism in place to ensure the long-term sustainability of the corporate culture? How effective is this mechanism?

IV. Concluding remarks

In recent years, the pilot work of corporate criminal compliance reform has been steadily advancing and gaining momentum. Scholars in both theoretical and practical circles have studied and summarized a large number of institutional results using classic cases of compliance as a blueprint. Admittedly, China's criminal compliance reform started later than that of Western countries, but with the full implementation of the reform work and the increasing implementation efforts, we can foresee that a criminal compliance system, which is in line with the actual national conditions and has Chinese characteristics but is scientifically complete, will be established in the near future, and the modernization of the national governance system and governance capacity will be further promoted.

[21] See: *Jiang Anjie*. How to Deepen the Path of Corporate Compliance Reform Experts and Scholars Suggest as Such // Rule of Law Daily. August 10. 2022. P. 9.

[22] See: *Li Yong*. The Direction and Path of Legalization of Corporate Compliance in China // Journal of Guizhou University (Social Science Edition). No. 3. 2023. P 60—71.

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