ISSN: 2771-7763

Research Article

Journal of Economic Research & Reviews

Compliance Reform of Enterprises Involved in The Case Analysis from The Governance of Economic Crime

Qi Yaping

China University of Political Science and Law, Beijing, China

*Corresponding author:
Qi Yaping, China University of Political Science and Law, Beijing, China

Submitted: 07 Sep 2022; **Accepted:** 14 Sep 2022; **Published:** 26 Sep 2022

Citation: *Qi Yaping (20200). Compliance Reform of Enterprises Involved in The Case Analysis from The Governance of Economic Crime, J Eco Res & Rev, 2(3), 434-438.*

Abstract

The recently emerging compliance reform procedures for enterprises involved in cases are actually a link in the governance of economic crimes, in China. The premise of the criminal compliance of the enterprises involved in the case is still the important difference between crime and non-crime and between one crime and another. The relationship between judicial fairness and social management responsibilities should be well handled. The conditional non-prosecution of the procuratorate should follow the basic law of criminal justice and social effect.

Keywords: Corporate compliance; corporate crime; social governance

Introduction

Since March 2020, under the policy background of strengthening the judicial protection of private enterprises, China's procuratorial organs have launched two batches of compliance reform pilot projects for enterprises involved in the case. Through lenient treatment such as non-prosecution for enterprises involved in the crime or responsible natural persons, two basic case handling modes, namely, the compliance inspection mode and the procuratorial suggestion mode, have been formed. The incentives for the enterprises involved in the case include: no arrest for compliance, no prosecution for compliance, suggestions on leniency and sentencing for compliance, and the connection of the compliance penalty line with the procuratorial opinions. The guiding opinions on the establishment of a third-party supervision and evaluation mechanism for the compliance of the enterprises involved (for Trial Implementation) (hereinafter referred to as the guiding opinions on compliance) jointly issued by the Supreme People's Procuratorate and other nine departments and the measures for the compliance construction, evaluation and review of the enterprises involved (for Trial Implementation) (hereinafter referred to as the measures for construction, evaluation and review) jointly formulated by the Supreme People's Procuratorate are the main normative basis for the compliance reform of the enterprises involved at the current stage.

In the theoretical research, there are still many disputes about the discussion of the compliance reform of the enterprises involved. First of all, the use of criminal law and criminal procedure has not been unified. In the criminal law, the criminal law calls it "unit crime", and the criminal procedure law calls it "enterprise crime" or "corporate crime" . This means that the criminal law circle and the criminal procedure law circle have not reached a consensus on some basic concepts of the compliance reform of the enterprises involved. Secondly, for economic crime, although the concept of "economic criminal law" has been put forward, the understanding of economic crime governance is still limited. For enterprise economic crime, the whole criminal law lacks sufficient clear understanding and substantive law and procedural law response.

Economic crime has harmed the prudent and fair management of the economy and the legal framework of the country . The handling of economic crime cases should be carried out in strict accordance with the law. Corporate crime or corporate crime is a very important part of the criminal system. Therefore, corporate crime governance is an unavoidable problem in the criminal law system. Thirdly, the existing legal system still has insufficient understanding of the systems related to corporate crime in terms of the connection between systems and the systematization of the compliance system of the enterprises involved. For example, the existing penalty system and the types of legal person penalties are too single, there is a lack of effective connection between administrative law enforcement and criminal law enforcement for economic crimes, there is a lack of legal basis for the non-prosecution of the compliance of the enterprises involved, and the evaluation system of the compliance of the enterprises involved is not fully constructed. Finally, the compliance system of the enterprises involved has been hovering between "punishment" and "punishment", "pardon" and "severity", but it has not paid enough attention to the evidence collection of economic, social and corporate crimes. The compliance of the enterprises involved in the case must be guaranteed by the actual investigation ability of the corresponding case. It will be difficult to produce effective constraints if the system design is divorced from the existing investigation ability.

From the perspective of legal norms, there are certain contradictions and tears between the "systematicness" of crime governance faced by enterprises and compliance and the "accuracy" of enterprise compliance law enforcement. In other words, in terms of the "accuracy" and fairness of law enforcement, the procuratorate has to face the contradiction between the existing legal norms and the constantly renovated and changing crimes - the unified system of the traditional criminal law lacks consideration of the flexibility of law enforcement - the discovery of new crimes and the interpretation of the original laws are all problems that the current reform must face. The resolution of this contradiction of non-prosecution of compliance will not only help the smooth progress of non-prosecution of compliance, but also help to further rationalize the existing system.

National Social and Economic Governance Capacity

Economic crime is not a new form of crime. Like other crimes, it needs the explicit provisions of the criminal law to be included in the crime. However, the emergence of this crime probably requires a more developed commodity trading relationship. As early as 1905, there was a general definition of "economic crime", which at that time mainly referred to the crime of traders and entrepreneurs . Later, Sutherland further summarized the subject of crime and called it "white-collar crime". This concept definition from the subject of crime obviously ignores the harmfulness of economic crime to economic order. Therefore, economic crime should more accurately refer to crimes in the economic field. In fact, the meaning and scope of economic crime have been changing for many years. Today's economic crime subjects may actually include all those who participate in economic activities and the production and circulation of economic factors, and are no longer limited to the "white collar" class; Further speaking, the illegal economic activities of enterprises should attract more attention in economic crimes, because in modern society, enterprises actually bear a more important social role, involving national economic security, social stability and other matters. Enterprise economic crimes will be a long-term concern of the state.

Enterprises and their main members commit crimes related to professional technology, such as theft, fraud, bribery and tax fraud, which are obviously different from the economic crimes committed by general social members. The main obstacle in handling this kind of crime is that the offender has a legal organizational identity, has a certain economic foundation and professional and technical level, and it is difficult to collect evidence. All countries have weak response to the discovery, verification, prosecution and other criminal measures of economic crimes, especially after the "Pan economic" phenomenon in the information society. In view of the complexity of economic case investigation, it is generally believed that the state needs to set up purposeful institutions in the investigation link, and then supplement property punishment, qualification punishment and compliance incentive methods in the prosecution and trial links. Therefore, the compliance reform of the enterprises involved belongs to a link in the above-mentioned economic crime governance system. The objective reasons for the emergence of the compliance system of the enterprises involved in the case are such realistic conditions as the lack of the state's ability to investigate specific crimes and the limited legal basis. The specific prosecution incentive measures implemented by the state to improve the ability of economic crime governance have become a unique strategy in economic crime governance. To a certain extent, it can be said that enterprise compliance is a concession of the national criminal justice system to enterprise management power, which reflects a governance concept of multi-agent collaborative governance. In the world, this judicial practice has promoted the emergence of systems such as plea bargaining, prosecution discretion, and "disappearing trial", as well as the reform of relevant systems such as the reduction of free punishment and the expansion of the application of fine punishment.

Criminal Prosecution Power of the Procuratorate

Article 20 (3) of the organic law of procurators stipulates that "the people's Procuratorate has the right to review criminal cases and decide whether to initiate public prosecution". According to this power provision of the organic law of the public prosecutor, the public prosecution power of the procuratorate is naturally within the discretion of the prosecution power, and it can decide not to prosecute certain criminal cases. However, in judicial practice, the above views are difficult to put into practice, and it is not directly recognized that China's criminal procedure law has provided for the principle of cheap prosecution. In fact, China may be facing the transition from the principle of legal prosecution to the principle of cheap prosecution. On the one hand, the criminal procedure law sets more conditions for the procuratorate to decide not to prosecute, and the power of the procuratorate to decide not to prosecute is far less than the scope specified in the organic law of prosecutors. Paragraph 2 of article 177 of the criminal procedure law stipulates that "if the circumstances of a crime are minor and it is not necessary to impose a penalty or exempt the penalty according to the criminal law, the procuratorate may make a decision not to prosecute". It is obvious that "the circumstances of a crime are minor" means that the case has constituted a crime, but meets the conditions of "the circumstances of a crime are minor", and the substantive law conditions such as "no punishment is required" or "punishment can be exempted" are stipulated in the criminal law. The procuratorate can decide not to prosecute at its discretion. On the other hand, some recent judicial reforms are indeed expanding the scope of discretionary non-prosecution by prosecutors. For example, the leniency system of guilty plea and punishment and the compliance reform of the enterprises involved in the case actually depend on the prosecutor's initiative and lawful performance of the prosecution discretion. The existing laws are also gradually expanding the supporting system of discretionary non-prosecution. For example, Article 37 of the criminal law also provides for "non-criminal measures", which can be used as the basis for the no- criminal measures taken by the defendant after he has decided not to prosecute.

There are several reasons for applying the principle of prosecution cheapness to economic crimes: first, the social harmfulness of economic crimes may have a certain range of changes. The social harmfulness of some economic crimes is relative. For example, the crimes of illegal operation, insider trading, dis-

closure of insider information, and bribery of units stipulated in the criminal law do not constitute crimes once the acts are committed. Among them, the crime of insider trading and the crime of disclosing insider information involve the speculative stock market, which may constitute civil liability, administrative liability and criminal liability alone or together. The undertaking and investigation of these responsibilities should be limited to the restoration of market order, and the law enforcement agencies should avoid excessive investigation. Second, economic crime cases generally need administrative law norms as the precondition, and the actor violates the corresponding administrative regulations before it constitutes a criminal crime. If the administrative regulations lag behind or are over interpreted, the identification of criminal responsibility is also prone to errors. A typical example is the crime of illegally absorbing public deposits, which is premised on violating the provisions of the State Council on financial order. The interpretation of the provisions may lead to changes in the crime and non-crime.

However, the administrative law rules are more flexible in reflecting the control measures of the financial market. Sometimes, there may be repeated, and those not originally identified as illegal acts may be identified as illegal acts later, or vice versa. This phenomenon that administrative regulations are placed first makes economic crimes have obvious characteristics of "administrative crimes". Third, the social harmfulness of economic crime is often difficult to accurately grasp in individual cases. The public security organs basically lack understanding of the characteristics of economic crimes, and the filing and investigation of economic cases often need the reports of relevant units or the instructions of leaders before they can start; The procuratorial organs lack the ability to grasp the integrity of tax, securities and other highly professional cases. It is difficult to evaluate the evidence proof of the case, and it is often difficult to accurately evaluate the social harm of the case.

Reform of Compliance Non-prosecution of Enterprises Involved

The compliance reform of the enterprises involved, especially the issue of compliance non-prosecution, is directly related to the public prosecution authority of the procuratorial organs. According to the current understanding, enterprises suspected of criminal offences can obtain amnesty for non-prosecution through the "procuratorial suggestion mode" and the "conditional non-prosecution mode": "procuratorial suggestion mode" refers to that the procuratorial organs send procuratorial suggestions to them at the same time of making a discretionary non-prosecution, requiring the establishment of a special compliance system; "Conditional non- prosecution mode" refers to the decision made by the procuratorial organ to suspend prosecution, compliance inspection or conditional non-prosecution, set a trial period and order to hire a compliance supervisor. After the trial period, the procuratorial organ makes a decision on whether to initiate a public prosecution according to the progress of enterprise compliance.

It can be seen that the main content of non-prosecution for compliance is that the procuratorial organs force enterprises to abide by laws and regulations in their own system construction and prevent the recurrence of illegal acts of enterprises through the possible application of penalties. However, the real realization of the above objectives needs to be based on the clear facts of the case and the accurate application of the law. First, the crime involved in the enterprise is clear, the evidence is indeed sufficient, and there is no dispute on the facts of the crime; Second, the crime involved in the enterprise is clear, the guilty result after the trial procedure is inevitable, and the legal aspects of the crime are clear and the conclusion is unique; Third, the criminal liability between legal person and natural person is clear, and there is no possibility of mutual prevarication or substitution; Fourth, the compliance plan can improve the business behavior of the target enterprise, and the actual effect of legal operation can be achieved after compliance is not prosecuted. The realization of the above-mentioned goal of compliance non-prosecution depends on the timely discovery, full confirmation and effective compliance rectification of the economic crime of the enterprise by the case handling organ. How to specify the actual operation of the non-prosecution power of the procuratorate, especially the accurate operation of the non-prosecution power of the procuratorial organ, is the core meaning.

There are several reasons for applying the doctrine of prosecution cheapness to economic crimes: First, the social harmfulness of economic crimes may have a certain range of changes. The social harmfulness of some economic crimes is relative. For example, the crimes of illegal business operation, insider trading, divulging inside information, unit bribery and other crimes stipulated in the criminal law do not constitute crimes as soon as they are implemented. Among them, the crime of insider trading and the crime of divulging inside information involve speculative stock market, which may constitute civil liability, administrative liability and criminal liability alone or together. The undertaking and investigation of these responsibilities should be limited to restoring market order, and law enforcement agencies should avoid excessive investigation. Second, economic crime cases generally require administrative law norms as preconditions, and the perpetrator violates the corresponding administrative regulations before it constitutes a criminal offence. If the administrative regulations are lagging behind or over-interpreted, it is easy to make mistakes in the determination of criminal responsibility. A typical example is the crime of illegally absorbing public deposits, which is premised on violating the provisions of the financial order of the State Council. The interpretation of this provision may lead to the change of crime and non-crime. Administrative regulations are more flexible measures to control the financial market, and sometimes they may be repeated. What was not recognized as illegal behavior may be recognized as illegal behavior later, or vice versa. This phenomenon that administrative regulations take precedence makes economic crimes have obvious characteristics of "administrative crimes". Third, the social harmfulness of economic crimes is often difficult to accurately grasp in individual cases. Public security organs basically lack understanding of the characteristics of economic crimes, and the investigation of economic cases often requires the relevant units to report or the leadership's instructions to start; Procuratorial organs lack the ability to grasp the

integrity of tax, securities and other professional cases, which makes it difficult to evaluate the evidence of the cases and the social harmfulness of the cases.

For economic crimes, the doctrine of prosecuting cheapness actually puts forward a crime-control cooperation mode between the state and enterprises. That is, the enterprise strengthens its own internal standard construction and self-restraint of economic activities in accordance with the law, and the state gives the enterprise involved in the crime a certain degree of forgiveness. The cooperation between the two sides in criminal cases is roughly equivalent to the "lenient system of confession and punishment" between natural persons and public security organs. The legal person admits his crime and makes serious rectification in exchange for the prosecution forgiveness of the procuratorial organ. It can also be said that at the present stage, we can understand that the compliance reform of the enterprises involved is a legal person version of the leniency system of confession and punishment.

Economic Crime and "Disappearing Trial"

With the increase of new criminal forms such as economy and juvenile delinquency, the traditional litigation forms have to be reformed constantly, and the phenomenon of "disappearing trial" has become a common choice in various countries. Although it is difficult to find the direct evidence between the economic crime and the "disappearing trial", if we analyze the causes of the "disappearing trial", the economic crime can indeed meet these conditions to a certain extent. Generally speaking, the appearance of "disappearing trial" is based on the following reasons: the consideration of procedural efficiency, the improvement of conviction rate, the interests of victims and other factors, or the consideration of reducing the working pressure of judges, prosecutors and lawyers involved in litigation, as well as the pressure of the judge's original judgment being revoked due to the appeal of the parties. In the handling of economic crimes, the above factors undoubtedly exist. When there are a large number of victims, or the case involves economic cases with relatively unpopular professional knowledge, it is undoubtedly an urgent choice for the case-handling authorities to take the initiative to plead guilty and reduce the risk of case handling.

In economic crimes, the litigants' willingness to support the prosecution by the procuratorate is not obvious. For enterprises as legal persons, it is a common phenomenon for a long time that they borrow from the private sector or from unspecified people because the source of funds is restricted by bank lending conditions. Too strict financial control has set up unnecessary obstacles for most enterprises to obtain funds, and it is naturally difficult to avoid the defendant's recognition of criminal punishment after criminal responsibility investigation. Victims of economic crimes are obviously less interested in pursuing crimes than in recovering property losses and obtaining economic compensation. The "disappearing trial" has obvious advantages in obtaining compensation more efficiently, settling the source of litigation more securely and ending the case. "The main reason why the state strictly controls the financing process is that financing involves the public interest; However, excessive control and excessive penalty measures will only make the financing channel more and more blocked ... It is unscientific for the criminal law to excessively intervene in the dispute cases of illegally absorbing public deposits ". To sum up, the governance of economic crimes is closely related to pre-trial procedures such as "the trial of disappearance", and it is helpful to better solve the problem of economic crimes by realizing more flexible penalty execution.

According to the current experience of judicial reform, compliance non-prosecution includes two modes: discretionary non-prosecution and conditional non-prosecution. However, Article 282 of the Criminal Procedure Law amended in 2018 stipulates that conditional non-prosecution is only limited to the special procedure for minors, and provides more stringent conditions. Although some scholars advocate expanding rapid legislation, establishing and expanding the applicable object of conditional non-prosecution, and then providing sufficient legal basis for enterprise compliance reform. However, the author agrees that this legal basis can be established through proper explanation. Judging from the procuratorial organ's crime control responsibility and the reasonable range and scope of the expanded interpretation of Article 282 of the Criminal Procedure Law, the current legal provisions do not completely deny the application of conditional non-prosecution.

First, Articles 3 and 169 of the Criminal Procedure Law and Article 20 (3) of the Public Prosecutor Organization Law stipulate that the procuratorate monopolizes the exercise of the right of public prosecution, and all cases that need to be prosecuted shall be examined and decided by the people's procuratorate. According to the understanding of the subsequent articles of the Criminal Procedure Law, the conclusion of case review and prosecution is only "prosecution" and "no prosecution", and there is no possibility of other classifications. Discretionary non-prosecution, statutory non-prosecution, conditional non-prosecution can only be understood as one of the decisions of non-prosecution, and the procedure of non-prosecution and right relief are applicable. The so-called "conditional non-prosecution" should also be regarded as a kind of "discretionary non-prosecution" by the procuratorate, but it has additional test period and conditions than the "discretionary non-prosecution" that directly makes the decision of non-prosecution. Therefore, "discretionary non-prosecution" should include discretionary non-prosecution and discretionary conditional non-prosecution. The former directly determines the consequences of non-prosecution, while the latter needs to finally decide not to prosecute through the trial period and the conditions of the trial period, which is a kind of non-prosecution decision to be tested. In the legal setting, the leniency should be weaker than the direct decision of non-prosecution, but better than the direct prosecution.

"Demand is one of the important factors of institutional change." In judicial practice, the procuratorate has introduced Article 37 of the Criminal Law as the basis for non-prosecution, and the discretionary non-prosecution system has actually changed from "semi-discretionary and semi-statutory" to "discretionary-oriented", which has achieved implicit expansion. Therefore, when the procuratorate performs its duties according to law, it can

include "conditional non-prosecution" when it does not prosecute cases that meet certain conditions, and this discretionary non-prosecution can be regarded as "hesitation" in the procuratorate's decision not to prosecute, while the person who is not prosecuted can be regarded as having to go through the test in order to obtain the decision not to prosecute.

Secondly, the principle of lenient punishment for guilty plea stipulated in Article 15 of the Criminal Procedure Law does not limit the scope of applicable subjects, charges and possible penalties. The legal person applies the guilty plea procedure, and the applicable conditions generally follow the requirements of the guilty plea procedure, but there should also be some particularity. The most important thing is that a natural person's confession and punishment requires "truthful confession", "admission of criminal facts" and "willingness to accept punishment"; The leniency obtained is "leniency can be dealt with according to law". As for the legal person, as a virtual personality, it is difficult to have the problem of "confession", but there will also be the problem of confession and cognition of corporate crime; Without "admitting the facts of a crime", there will also be the attitude of recognizing the facts of a crime and accepting punishment, as well as the problem of actively settling claims for victims and gaining their understanding. The expansion of confession and punishment from lenient procedure to corporate crime means that on the basis of following the principle of confession and punishment procedure, the procedure of corporate crime should be appropriately adjusted according to its particularity. This adjustment can be divided into two aspects: First, the punishment method of corporate crime. At present, the legal person penalty stipulated in the criminal law is mainly a fine penalty.

So, can the so-called "forgiveness of penalty" only be manifested as forgiveness of fine penalty, or can it be manifested as other contents with more positive significance? The fine penalty stipulated in the existing criminal law itself has the defect that the fine amount is small. Under such conditions, "forgiveness" is difficult to have actual influence on enterprises. Second, the "discretionary scope of non-prosecution" of corporate crime. There is no fixed-term imprisonment for a legal person. Naturally, there is no limitation on the scope of discretionary non-prosecution of "imprisonment of not more than three years and punishment of not more than three years". Theoretically, all corporate crime cases can be included in the scope of "discretionary non-prosecution". However, the procuratorate directly decides not to prosecute, which makes it difficult for enterprises to meet the corresponding constraints and achieve the effect of supervising and reforming their own criminal acts. Therefore, for corporate crimes, it is more in line with the legislative intent to appropriately expand the understanding of the scope of "discretionary non-prosecution" and include "conditional non-prosecution" into "discretionary non-prosecution".

Thirdly, the three conditions stipulated in Article 282 of the Criminal Procedure Law are only limited to conditional non-prosecution of minors, but there is no provision on whether the same conditions should be followed when other cases are subject to conditional non-prosecution. Article 76 "Shall be investigated for criminal responsibility" and Article 177, paragraph 2 "If the crime is minor and it is not necessary to be sentenced or exempted from punishment according to the provisions of the Criminal Law", the procuratorate may make a decision not to prosecute. Discretionary non-prosecution does not absolutely exclude "conditional non-prosecution", but only emphasizes the difference between statutory non-prosecution and non-prosecution due to insufficient evidence, which still belongs to one kind of non-prosecution. If this paragraph is interpreted as including direct decision of non-prosecution and conditional non-prosecution, it can basically solve the problem of forgiveness conditions for corporate crimes.

Conclusion

Based on the above analysis, the author believes that in the compliance reform of the enterprises involved, the procuratorates should pay attention to the fairness of the exercise of power. The fairness of the compliance reform of the enterprises involved in the case is specifically manifested in the following aspects: first, the issue of the crime and non crime of the enterprises involved, and the issue of this crime and the other crime, is the basic premise for the initiation and promotion of the criminal compliance procedure. The accuracy of non prosecution of enterprise compliance largely depends on the accuracy of investigation. In order to ensure the timely detection of crime, it is necessary to establish an economic crime investigation institution. Second, we should pay attention to the fairness between the enterprises involved and the law-abiding enterprises. The need to grant amnesty to the enterprises involved in the case should not lead to contempt for legal norms in the industry as a whole. To persuade enterprises to operate according to the rules, they should pay attention to understanding the overall situation of each enterprise in the industry. If necessary, they can supervise and urge the industry director to make rectification through procuratorial suggestions. Third, after the completion of the rectification, the enterprise involved in the case can properly establish a case return visit system, allowing the case handling organ to conduct a later "return visit" to the actual effect of the case handling.

Reference

1. Chen Xuequan, Tao langxiao (2021) The response of China's criminal justice under the background of the mitigation of enterprise crime [J]. Political and legal treatise, (2): 117-128
2. Ma Chunxiao (2020) Legal interests of China's economic criminal law: cognition, reflection and construction [J]. Politics and law, (03): 38-51; Li bencan Compliance and criminal law [M]. China University of political science and Law Press: 201809.437.
3. Patti B. Saris, "The 2015 Economic Crime Guideline Amendments," New York University Journal of Law and Business,1: 1-34
4. Osman Jasarevic (2015) "Strategic Planning and Directing the Fight against Economic Crime, "Journal of Eastern-European Criminal Law, 2: 138-141.