



The Simple Compliance for Corporate Involved

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Abstract. In judicial practice, the main body of China's companies compliance cases are mostly small and medium-sized companies, in order to adapt to the reform of China's companies compliance, enhance the efficiency of handling cases involving companies, China's procuratorial organs to create a 'simple form of compliance', and a higher frequency of reference and application in practice. However, China's current research on simple compliance is relatively small, and has not been standardised application, the companies involved in the case of simple compliance in practice, the application of random, formal phenomenon. As a matter of urgency, it should be made clear that simple compliance for companies involved in cases is an attribute of the non-standardised rectification mode of compliance rectification, and that it should be made clear to whom it applies and the conditions for the initiation of the various procedures; and that it should highlight the principle of commitment at the highest level, and at the same time, make use of digital technology to generate acceptance criteria for individual cases.

Keywords: Simplified Compliance Criminal Compliance Micro and Small Companies Social Governance.

1 Introduction

In March 2021, Shanghai Jinshan District Procuratorate, based on the starting point of handling enterprise-related cases and improving the efficiency of case handling, formulated and issued the *Approach for Trial Enterprise Compliance Work of Shanghai Jinshan District People's Procuratorate*, and the concept of 'Simple Compliance' was proposed for the first time.^[1] In June 2021, the Supreme People's Procuratorate, in conjunction with nine departments, issued the *Guiding Opinions on Establishing the Mechanism of Third-Party Supervision and Evaluation for Enterprise Compliance Involving Cases (Trial)*, formally distinguishing corporate compliance procedures into 'formal compliance' and 'simple compliance'. Simple compliance is opposed to formal compliance and belongs to the non-standardised compliance rectification mode, which refers to the simplification of compliance rectification procedures and compliance elements for cases with small scale enterprises, clear compliance issues and simple requirements for professionalism in supervision and assessment, and the application of third-party mechanisms is made optional by mandatory options, so as to complete the non-standardised compliance rectification. In China's judicial practice, the application

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of the rectification model to simplify the compliance procedures, reduce the compliance costs of the enterprises involved in the case, MSMEs compliance rectification of the enthusiasm has played an incentive role, has been favoured and adopted by a number of procuratorial organs, Shanghai involved in the case of the enterprises in the application of the simple compliance rate of more than 50%.^[2] However, China is currently not for case-related enterprises simple compliance legislation, mainly by the reform of the front-line legal practitioners to promote the application of simple compliance and innovation. With the popularity and application of simplified compliance for enterprises involved in cases, the model needs to be optimised and upgraded.

2 Analysis of the legitimacy of construction-related business simple compliance

Throughout the overseas experience, corporate compliance is to large enterprises and listed companies as the target object, with high cost of systematic compliance construction as the handle to spread, but China's corporate compliance reform pilot began at the grassroots level, the compliance without prosecution system applicable to the object of the MSMEs, which is different from the foreign compliance without prosecution system applicable to the object of the large-scale enterprises with a modern enterprise management structure. However, if the current situation of the extra-territorial system is used to prove the irrationality of the non-prosecution compliance system for small and micro-enterprises, this kind of 'backward deduction' will make us ignore the essence of the problem. In fact, the United States to expand the subject of compliance to small and medium-sized micro-enterprises as a beautiful vision, but by the existing system, cannot be realised in a short period of time.^[3] In order to justify the construction of the enterprise involved in the construction of a simple form of compliance, cannot be avoided to explore the value of MSME compliance and the rationality of non-standardised procedures.

2.1 The legitimacy of applying the compliance non-prosecution regime to MSMEs involved in cases

2.1.1 The application of the non-prosecution compliance system for MSMEs is a need to safeguard the public interest of society. First of all, according to *2022 China's small and micro-enterprise SaaS white paper*, as China's national economy 'capillary' small and micro-enterprises, accounting for 98.5% of China's total number of enterprises, contributing more than 60% of China's GDP and more than 50% of the tax revenue, solving 80% of the urban labour force, and providing more than 70% of the technological innovation results.^[4] Secondly, analysed from the perspective of the relevance of large enterprises to MSMEs, the business operated by a large enterprise is often inseparable from the supporting service support of MSMEs in upstream and downstream industries. Therefore, MSMEs have the external expectation of building a compliance system. If we leave out the MSMEs and only apply compliance to large enterprises, there will still be a large number of investors, employees and co-operative third-party

interests damaged, and may even affect the system initially want to protect the large enterprises, and cannot avoid the ‘penal water wave effect’, which is not in line with the social public interest, and the theoretical and practical value of corporate compliance will be greatly reduced.

2.1.2 The application of the compliance non-prosecution system to MSMEs involved in cases is a requirement of the principle of equal protection. MSMEs have equal legal personality with large enterprises, and should be equally eligible for the compliance non-prosecution system. In the second meeting of the Central Committee for Comprehensive Rule of Law, General Secretary Xi pointed out that ‘the rule of law is the best business environment’, and that in order to optimise the business environment, market players should be respected and supported to compete on an equal footing.^[5] ‘Provide equal judicial protection to all types of market entities, including State-owned and private enterprises, domestic and foreign capital, and large, medium-sized, small and micro-enterprises, and comprehensively push forward compliance reforms for enterprises involved in cases’ is a work commitment made at the fifth session of the thirteenth session of the National People’s Congress.^[6] Article 6 of *China’s Code of Criminal Procedure* provides that ‘All citizens are equal in the application of the law and no privileges are permitted before the law’, and article 207 of *China’s Civil Code* stipulates that ‘The property rights of the State, collectives, private individuals and other rights holders are equally protected by the law. No organisation or individual may infringe upon them’. If we follow the example of the United States and other extra-territorial practices and open the compliance and non-prosecution system to large enterprises only, it will result in large enterprises that have infringed upon the same legal rights and interests being able to obtain leniency in the form of non-prosecution through compliance and rectification, while small and micro-enterprises will only be able to face prosecution and penalties,^[7] which is clearly contrary to the principle of equal protection.

2.2 The legitimacy of non-standardised procedures

Simplified compliance procedures are required to follow the principle of proportionality. Applying a comprehensive and systematic compliance programme to all enterprises involved in a case would result in small enterprises with a single compliance issue being overburdened with compliance obligations and waste social resources.^[8] The ‘principle of proportionality’, comprises the elements of appropriateness, necessity and least detrimental effect, and the United Kingdom has adopted the principle of proportionality as the primary principle for evaluating the effectiveness of compliance construction.^[9] Simplified compliance for companies involved in cases is a compliance rectification model that is simpler than the standardised procedures in terms of procedures and inspection contents, based on the smaller scale of the companies involved in the cases, less serious crimes and fewer compliance risk points. The ‘simplicity’ here refers, on the one hand, to the constraints on the exercise of punitive public power by the procuratorial authorities, such as setting a shorter compliance inspection period (3-12

months), requiring the companies involved in the case to submit fewer written reports (<2), and non-mandatory activation of the third-party mechanism, etc.; on the other hand, to the protection of the lawful interests of the companies involved in the case, so that they can achieve effective rectification of the companies. To the extent that effective rectification of the enterprise is achieved, less resources such as manpower and material are invested, such as setting up fewer compliance officers (1-2 persons), etc.^[10] This differentiated treatment regime fully reflects the requirements of the principle of proportionality.

3 Practical dilemmas of simple compliance for companies involved in the case

3.1 Irregular application of prosecutorial recommendations

There are two modes of compliance non-prosecution: procuratorial recommendation and conditional non-prosecution. Procuratorial recommendation mode means that after the procuratorial organ decides not to prosecute the companies concerned, it orders the companies concerned to build a compliance system by issuing a procuratorial recommendation; the conditional non-prosecution mode means that the procuratorial organ does not prosecute the companies concerned for the time being, and sets an inspection period of a definite duration, with the condition that the enterprise concerned carries out compliance rectification and passes the inspection acceptance within the inspection period as a condition for deciding not to prosecute.^[11] The author believes that the procuratorial recommendation mode, the enterprise involved in the case is not through the inspection and acceptance of compliance rectification as a condition for obtaining non-prosecution, the enterprise involved in the case after receiving the procuratorial advice issued by the procuratorial authorities, whether or not in accordance with the requirements of the construction of a compliance system, does not affect the established fact that it has obtained the decision of non-prosecution, the construction of a compliance system of the enterprise involved in the case of no coercion, the enterprise involved in the case of the enterprise involved in the case also lacked the determination to establish a corporate compliance system. Corporate compliance as a new type of corporate governance, not only has the function of protection, but also punishment function, when the enterprise is included in the compliance rectification object, it must assume the corresponding compliance obligations, Compliance rectification after the issuance of prosecutorial recommendations does not fall under the category of 'Compliance Rectification Management System', but rather under the category of 'Daily Compliance Management System'. However, from the viewpoint of its content, the model should have the mandatory and external supervision, but the mixed application of 'procuratorial advice + simple compliance' in judicial practice denies the attributes that the simple compliance of the enterprise involved in the case should have.

3.2 Arbitrariness in the Exercise of Prosecutorial Discretion

3.2.1 Randomly initiating simple compliance procedures. In June 2012, the Guidance on the Establishment of a Third-Party Supervision and Assessment Mechanism for Compliance of Companies Involved in Cases (the Guiding Opinions) was issued, stipulating that simple compliance is applicable to cases in which company is small in size, the compliance issue is clear, and the requirement for professionalism in the supervision and assessment is relatively simple. However, the Guiding Opinions do not indicate the quantitative criteria for 'smaller companies', 'clear compliance issues' and 'simpler requirements for supervisory and assessment expertise'. Due to the lack of clear initiation criteria, some local procuratorial authorities will be affected and constrained by many factors when initiating simple compliance for companies involved in cases, artificially including some companies involved in cases that do not have the basis for building a compliance system into the target of applying the compliance non-prosecution system, and wrongly initiating simple compliance procedures.^[12] Or some of the enterprises involved in the case that should be subject to summary compliance to regulate the rectification, reduce the difficulty of rectification to apply summary compliance, resulting in the arbitrary exercise of prosecutors' discretion.

3.2.2 Arbitrary activation of third-party mechanisms. According to the Measures for Compliance Construction, Assessment and Review of the Enterprises Involved in the Case (for Trial Implementation) (Review Measures for Short) and the Guiding Opinions, the procuratorial authorities can supervise the enterprises involved in the case to formulate the compliance plan, review the rectification report and organise their own inspections to check and accept the results of the enterprises involved in the case's compliance and rectification without the necessity of activating the third-party mechanism. However, this optionality leads to two outcomes that differ significantly in terms of both compliance procedures and compliance costs, with enterprises not applying the third-party mechanism bearing less compliance pressure and paying less in costs. This unexplained difference reveals that the activation of the third-party mechanism in the short-form compliance of the enterprises involved in the case is arbitrary and does not satisfy legal predictability, which is due to the lack of clarity in the criteria for activation of the third-party mechanism, leading to the excessive discretion of the prosecutor.

3.3 Doubts about the effectiveness of simple compliance for the companies involved in the case

Article 17 of *the Measures for Review* stresses that the People's Procuratorate's review of compliance plans and rectification reports submitted by enterprises involved in cases should focus on the implementation of compliance commitments, the implementation of compliance plans and the effectiveness of compliance rectifications.^[13] The review of effectiveness refers to the need for the procuratorial authorities to judge whether the enterprises involved in the case have an effective compliance programme outcome after the adoption of simplified compliance. Simplified compliance is a non-standardised procedure, and the goal of compliance rectification should emphasise the relevance,

focusing on the suspected crimes of the enterprise to carry out compliance rectification, and achieve effective prevention and control of specific compliance risks. Judicial practice, most of the procuratorial authorities will be the focus of the work of compliance review on the first stage of compliance rectification-compliance plan design, ignoring the substantive review and assessment of compliance rectification, the application of simple compliance involved in the enterprise only need to build a set of good vision and a more thorough compliance rectification plan, can be through the procuratorial authorities of the Inspection and acceptance, in practice, there are very few cases of failure that do not pass the inspection and acceptance, and there is a phenomenon of inflated pass rate of simple compliance for enterprises involved in cases. A ‘plan is a result’ is tantamount to ‘quenching one’s thirst’ and cannot really achieve the goal of compliance rectification.

4 Optimising the path to simple compliance for case-involved companies

4.1 Clarify the attributes of the companies involved in simple compliance

The Guidance on the Establishment of a Third-Party Mechanism for Compliance by Case-Related Enterprises (for Trial Implementation), issued in 2021, states that Simplified Compliance and Formal compliance are part of the same procedure for rectifying corporate compliance. The author believes that the rectification attribute of simple compliance determines that the procedural model should have mandatory constraints, urgency, and results to be accepted. In the face of the chaos in practice, legislation should be accelerated to make clear that simple compliance belongs to a non-standardised mode of compliance and rectification procedures, emphasising the rigour of the legal process, which can only be chosen to be applied after the procuratorial authorities have decided not to prosecute the enterprises involved in the case with conditions. In addition, the law should be expressed in a prudent manner. If the procuratorial organ makes a decision of ‘relative non-prosecution’ for the enterprise involved in the case, the procuratorial recommendation of supervising the establishment of a compliance management system should no longer contain the recommendation of ‘carrying out simple compliance’, so as to safeguard the dignity of the law and avoid the misuse of simplified compliance by the enterprise involved in the case.

4.2 Clarification of the criteria for the initiation of proceedings

4.2.1 Clarify the criteria for triggering simple compliance for enterprises involved in cases. In order to change the current situation of abusive use of simple compliance, there should be specific thresholds for the initiation of simple compliance by enterprises involved in cases. In the typical companies-related compliance cases released, there are many references to the companies involved in the case ‘actively assuming social responsibility’. For example, in the fourth batch of typical cases released by the Supreme Court, Company A provided 180 jobs for the left-behind elderly and made positive

contributions to the promotion of rural revitalisation.^[14] In a typical case released by the Shanghai Pudong Procuratorate, the enterprise in question was a private microenterprise in a township that took the initiative to provide about 40 percent of employment opportunities for the elderly and persons with disabilities, actively assisted workers in difficulty, and revitalised the rural economy.^[15] Therefore, in the author's view, when initiating simple compliance, the procuratorial authorities should take into account the governance structure of the enterprise in question, the characteristics of the industry, the scope of the business, and the seriousness of the suspected offence. At the same time, it is also possible to add the criteria of 'actively assuming social responsibility' and 'actively taking remedial measures' to the affirmative conditions, so as to appropriately raise the threshold of application of simple compliance for the enterprises involved in the case, and at the same time, to highlight the intrinsic value of the enterprise's compliance system.

4.2.2 Clarify the criteria for the application of third-party mechanisms for simple compliance by companies involved in the case. Firstly, it should adhere to the principle of activating the simplified third-party mechanism, and not activating it as an exception to the provisions of the simplified compliance case. Corporate compliance and rectification of the law and corporate internal control, risk control and other combined cross-field business, professional barriers are high, should be handed over to professionals; second, establish specific start-up criteria. Whether to start the third-party mechanism should take into account the number of compliance risk points, the financial situation of the companies involved in the case, if there is 'only one compliance risk point' or 'cash flow is tight (inability to pay third-party mechanism costs)', the third-party mechanism will not be activated, if the compliance risk point is greater than or equal to 2 or cash flow is wide, the third-party mechanism will not be activated. If the compliance risk point is greater than or equal to 2 or the cash flow is strong (able to operate normally after paying the third-party mechanism fee), then the third-party mechanism will be activated. Third, cases in which the third-party mechanism is not activated should also be tracked and inspected, and the prosecution system may carry out a special evaluation of compliance cases, which will be included in the internal performance appraisal in order to strengthen supervision and improve the quality of simplified compliance cases of companies involved in the case.

4.3 Establishment of minimum compliance management acceptance criteria

4.3.1 Use digital technology to generate case acceptance criteria. Through digital technology to set the weight of the effectiveness assessment criteria in order to find a balance point in the contradiction of systematic and targeted, it requires that compliance plans blend with generic MSME acceptance criteria and specific case circumstances, which has three advantages: firstly, the use of data analytics can provide a quick diagnostic description of the criminal factors in the companies concerned. For instance, the concentration of decision-making power in the company can be derived from the calculation of the abnormal concentration of cash flows.^[16] Secondly, data and artificial

intelligence can inhibit the subjective factors in the assessment, generate objective and straightforward effectiveness assessment standards, thereby reasonably limiting the prosecutor's discretion and forcing the enterprises involved conscientiously implement compliance and rectification plans, thereby enhancing the quality and efficiency of the enterprises involved in the case of simple compliance; Thirdly, using 'data to run the road' instead of 'contractors to run the errands' can reduce the pressure of the case, enhance the efficiency of the case, and stimulate the initiative of the procuratorial organs to handle such cases.

4.3.2 Highlight the principle of high-level commitment. The principle of top-level commitment is regarded as a pillar principle for the establishment of a compliance system, which plays the functions of defining and communicating compliance value objectives, establishing a compliance management system and promoting governance in accordance with the law.^[17] The support of the management of an enterprise is a key factor in the effective operation of a compliance management system, and whether or not the enterprise in question can pass the effectiveness assessment of the compliance rectification and implementation stages will largely depend on the results of the assessment of the leadership of the management.^[18] MSMEs are characterised by the 'unity of man and enterprise', and the persons in charge of the MSMEs have a stronger and more direct influence on the activities of the enterprise. Therefore, the only way to achieve effective compliance is for the senior managers of the MSMEs in question to make a genuine commitment to compliance and to assume the highest responsibility for implementing compliance and rectification, so that they can truly control the strategic direction and make radical changes to the deficiencies in the governance structure of the MSMEs in question.

5 Conclusion

Judicial practice in the process of enterprises involved in the application of simple compliance arbitrariness, the phenomenon of formalisation, exposing compliance with the non-prosecution mode of application of non-standard, prosecutors discretionary exercise of arbitrariness and enterprises involved in the effectiveness of simple compliance in doubt the deep-seated problems. In this regard, we should comprehensively consider improving the path, such as clarifying the attributes of simple compliance for enterprises involved in cases as a compliance rectification model, standardising the application of the "conditional non-prosecution + simple compliance" legal procedure, clarifying the application criteria for simple compliance and the criteria for activating the third-party mechanism, and by emphasising the principle of high-level commitment and using digital technology to generate acceptance criteria for cases. By emphasising the principle of high-level commitment and using digital technology to generate acceptance criteria for individual cases, it can establish minimum compliance management and acceptance criteria for simplified compliance for enterprises involved in cases, contributing international wisdom to the development of corporate compliance.

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