



Exploring the Localization Path of Compliance System in the Perspective of Whole Processes

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Abstract. In order to implement the criminal policy of leniency and severity, lightness, and prudence in punishment, China has introduced an extraterritorial corporate criminal compliance system and made localized improvements to it. However, in the process of implementing the system, due to the lack of supporting legal systems, it has been difficult to curb the tendency to operate the system with the Procuratorate as the center of the system for a long time. In the face of the need to efficiently establish a complete compliance system, rather than insisting on the absolute subject position of the Procuratorate, we might as well turn our attention to strengthening the subject position of the investigating, judging and executing authorities, and try to smooth the process of collaboration between the public prosecuting, legal and law-enforcement authorities, so as to help each case finally reach an effective compliance and rectification.

Keywords: whole process of law compliance; compliance non-prosecution system; cooperation in litigation and investigation; cooperation between legal prosecutors

1 Introduction

Throughout world history, corporate compliance systems have had a fairly long history of development. As early as the mid-20th century, the compliance system emerged in the United States as a voluntary regulatory method. After entering the 21st century, the globalization of the compliance system has gradually accelerated, and some countries have made innovations and breakthroughs. In comparison, the construction of China's compliance system started late, and the relevant legislation and practice are still in the initial stage. Before 2018, the development of the compliance system was mainly concentrated in the fields of insurance, banking, and securities, and had not yet been linked to criminal incentive policies. [1] Since 2018, compliance research has gradually become a hot spot in the field of jurisprudence. In order to comply with the trend, China has successively issued many important documents, such as the "Central Enterprise Compliance Management Guidelines (Trial)", and achieved a stage-by-stage victory in compliance legislation. In 2021, the Supreme People's Procuratorate issued "the Pilot Work Program on Carrying Out Corporate Compliance Reform", followed by the publication of several batches of typical cases of corporate compliance, which provided

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directional guidance at the stage of examination and prosecution. After the vigorous promotion by public authorities, scholars in various fields have also engaged in the exploration and discussion of the compliance system one after another.

While the theoretical and practical circles are enthusiastically involved in compliance reform, some scholars have questioned the effectiveness of the implementation of criminal incentives for compliance. [2] They believe that, due to the lack of uniform compliance standards and supervision rules, the implementers are difficult to avoid "the practice of formalities for formalities' sake", and the semi-mandatory compliance construction needs will greatly add to the burden of small and medium-sized enterprises to survive. In the previous practice, our country has paid too much attention to procuratorial organization, not only ignoring the construction of the corresponding external supervision mechanism but also blocking the development of the compliance system process. The author believes that, in the face of the urgent need to curb corporate crime, the only way to achieve the national goal is to clarify the main position of the state organs and build a localized path of "full-process compliance" at an early date.

2 Dilemmas in the Application of a Full-Process Compliance System

2.1 Cooperation in Litigation and Investigation

The judicial practice of criminal compliance was initially led by the Supreme People's Procuratorate, and in local pilot projects, by the local people's procuratorate. With the increasing call for the court to participate in the compliance process of enterprises involved in the case, the system from the "prosecutor-led" mode to the "cooperation between legal prosecutors" mode, further squeezing the living space of investigation organs. [3]

By exploring the institutional design in overseas countries, the author has learned that various Western countries usually adopt a "prosecutor-led" compliance procedure, leaving the power of opening and termination of the compliance system to the procuratorial organs, with only a relatively small number of countries recognizing that the investigation organs can directly initiate the compliance procedures. However, in those "prosecutor-led" countries, a perfect compliance system still requires investigators to utilize their experience, knowledge and skills in fact discovery. According to recent cases, there are two main modes to carry out compliance work in such a stage. The first is led by the investigation authorities. After a preliminary examination of the enterprise's application or independent judgment, the public security organs can invite the procuratorial organs to intervene in advance if the conditions are met; the second is led by the procuratorial organs. In the process of clearing the "pending cases", if the procuratorial organs have found sufficient clues, they can take the initiative to intervene in the investigative work through the exercise of the filling supervision right. In the case of the former, the division of labor between the investigation and procuratorial organs is not clear, and the "prior review" of the investigation organs in an individual case is likely to transform the originally neutral procuratorial organ into a "joint organ",

weakening the meaning of the subsequent review and prosecution process. For the latter, the intervention of the procuratorial organs is mostly premised on the "pending case", which is extremely limited in terms of practical application space, and also tends to give rise to a tendency for the procuratorial organs to operate compliance procedures for the purpose of the pending case clearance.

2.2 Cooperation Between Legal Prosecutors

Based on realistic needs, the People's Court's participation in the criminal compliance reform of enterprises has become a heated topic in academic circles. As the initiator of compliance procedures, the supervisor of the procuratorate's decision, and the administrator of lenient sentences, the courts' "multiple identities" have also given rise to a number of practical concerns, which have centered mainly on the courts' pre-trial involvement.

Some scholars are of the view that China should follow the example of the relevant provisions of other countries and adopt legislation recognizing the necessity of pre-trial court participation. For example, the legislation of the United Kingdom provides that, after the procuratorial organs have initiated the compliance procedure, it must first apply to the court, and the court will conduct a substantive review of the draft agreement. [3]Some scholars have also argued that the court in pre-trial participation actually assumes part of the function of procuratorial organs. Because of the strong attribute of public power, the court is naturally more inclined to assist the procuratorial organs compared to protect people's legal rights. This not only worsens the inequality between prosecution and defense but also leads to an undue influence on the subsequent trial stage. [5] Obviously, both sides of the view are convincing to some extent. However, taking into account the present practice with a serious generalization trend of applying the non-prosecution process, and the third party supervision mechanism is not mature, in order to ensure the orderly implementation of the compliance program, to prevent "compliance corruption", "paper compliance" and other issues, the introduction of the court as the subject of supervision is inevitable. For the aforesaid problems, our lawmakers should innovate the pre-trial participation mechanism, through the appropriate system design to maintain the neutrality of the judiciary, rather than completely isolated from the court in the pre-trial compliance stage.

2.3 Execute Phase

For a long time, China's legislators have tended to pay more attention to the construction of pre-litigation and litigation procedures, ignoring the system design for the implementation stage, resulting in practice, facing the risk of the effective judgment can not be implemented. As the "last kilometer" to realize fairness and justice, a large number of "incomplete implementations" greatly undermine the legal authority and judicial credibility, and affect the people's confidence in the compliance reform.

Under the current legal provisions, enterprises can only be held criminally liable by paying fines, but Article 53 of the Criminal Law only provides for the payment of fines, and does not specify how installment payments are to be made, nor does it set out the

ancillary measures to ensure the execution of fines. In the actual process, the court is not willing to directly apply installment payment as well. [6] Due to the complexity of cases involving enterprises, the same enterprise may face administrative, criminal, and civil liability recovery at the same time. As a result, once the enterprise enters the execution stage, it not only has to pay a certain amount of fines within a very short period, but also has to bear the "siege" of negative impacts such as employee turnover, access qualification restriction, and reputation degradation, which may easily make the survival environment of the enterprise continue to deteriorate. The person being prosecuted may also become fearful and resistant before the execution, and hide the relevant property elsewhere before the judgment is passed, further increasing the court's enforcement difficulties.

3 Systematic Construction of Localized Full-Process Compliance System

3.1 Smoothing the Process of Collaboration Between Investigation and Procuratorial Organs

In order to avoid subsequent disputes, the legislator, when establishing the law, should include in the law the specific compliance work that can be carried out during the investigation stage, to lay the foundation for the normal operation of the "full-process compliance" system. At the same time, the division of labor between the investigation and procuratorial organs should be clarified, so as to prevent excessive overlap. Since the procuratorial organs have accumulated more experience in the previous pilot, they have more precise control over the conditions for the commencement of corporate compliance and the manner of investigation, so it is necessary to give them the exclusive right to initiate compliance at the investigation stage. Prior to the intervention of the procuratorial organs, the investigation organs can still take the lead. After the intervention, the investigation organs need to follow the instructions and carry out targeted inspection work. If the investigation organs believe that the conditions have been met, they may jointly issue a "Notice of Rights and Obligations for Enterprise Compliance", and let the enterprise itself choose whether or not to sign a compliance undertaking.

Besides, in the choice of modes of intervention by the procuratorial organs, we need to accept the "invitation by the investigation organs" as the main one, and supplemented by the "initiative of the procuratorial organs". By way of comparison, the current proactive intervention by the procuratorial organs is closely linked to the "pending case" clean-up activities, and can only be used as a special means of legal supervision. So, although it is difficult to avoid the suspicion of "joint case handling", if the two organs in advance in the form of countersigning documents to regulate the scope of the case, it will be able to let the prosecutorial forces focused on the application of major, difficult, complex cases, and minimize the undue influence. After the investigation organ decides to invite the procuratorial organs to intervene, it shall issue a "Letter of Early Intervention" and send it to them. If the procuratorial organ decides to intervene, it can synthesize the countersigning documents and the intervention letter to carry out in-

depth compliance work, help the investigation organ to make good preparations for compliance at an earlier and better time and guide the enterprise to make better compliance plans.

3.2 Improvement of the Joint Mechanism of the Legal Prosecutors

In order to avoid an imbalance in the procuratorial organ's power to prosecute, its decision should be included in the scope of judicial review. In the case of enterprise-related cases, judicial review includes not only a written review but also field visits, hearings and other forms of participation. In accordance with article 15 of the "Guiding Opinions on the Establishment of a Third-Party Compliance Mechanism for Monitoring and Evaluating the Compliance of Enterprises Involved in Cases (trial) ", the Procuratorate may, at the pre-trial stage, organize and hold hearings, and invite third-party organizations to attend and express their views, which naturally include staff members of the judiciary who participate as "compliance experts". However, the attendees should pay attention to their status as "expert consultants", and not intervene in the substantive review, but only to gain a certain understanding of the enterprise's compliance implementation. If the prosecutor's office on this basis makes a decision not to prosecute, the court may only on the non-prosecution material to do a formal review. It should be noted that, in cases where the court has not participated in prior review procedures, and the procuratorate has made a decision not to prosecute, the court must rigorously carry out a substantive review, taking the review report submitted by the prosecutor, the letter of commitment to compliance, the expert report, and other documents as a clue, focusing on verifying the authenticity and validity of the compliance.

3.3 Compliance Rectification During the Implementation Period

Under the current legal system, the imposition of suspended sentences on natural persons alone will not alleviate the pressure on enterprises to pay fines, nor will it realize the proportionality of guilt and responsibility between enterprises and natural persons in individual cases. If we want the probation system to be effective in enterprise-related cases, the scope of application of probation must be extended to companies. Once established, the unit probation system can be applied to multiple scenarios, such as enterprises failing to complete a compliance program during the inspection period, or even failing to open a compliance program at the pre-trial stage, the court can make a unit probation sentence based on the actual needs of the enterprise involved and the specific circumstances of the crime, and set a test period of less than five years. After entering the probation period, the enterprise should continue to carry out rectification in accordance with the compliance program and regularly report to the court. Upon passing, the enterprise will be granted relief from the execution phase and the original sentence of fine will no longer be enforced. However, probation generally applies to misdemeanors. If the court determines at the trial stage that the original fine sentence is necessary for actual enforcement, but only because of the large amount, the accused is unable to pay the full amount in one go due to financial difficulties, then it is not necessary to apply the probation system, instead applying the collection of fines in installments. In order

to alleviate the psychological pressure on judges, the legislator should clarify the conditions for the application of installment payment, the provisions of the period of deferred execution and the number of periods. In the specific application, the court may listen to the views of the pursuers and their counsels, refer to the repayment plan of the civil case, and set out in the judgment the share of the fine to be paid for the first time, the share of the installment and the date of payment.

4 Conclusions

After three years of unremitting exploration, China's compliance system for enterprises involved in cases has gradually transformed from a limited "prosecution-led" model into a full-process compliance system. However, due to the large gaps in compliance legislation, the implementation of compliance at all stages of the pilot reform is still a serious problem, and the frequent absence of investigation and implementation organs has seriously affected the compliance reform process nationwide. As the saying goes, "One strand does not make a thread, one tree does not make a forest", the construction of a compliance system cannot rely solely on the enthusiasm of a single organ for reform; Rather, it should form a complete system in which multiple organs supervise and assist each other. In order to ensure that compliance reforms are carried out in an orderly manner, it is necessary for legislators to further standardize the specific powers and functions of the state organs at each stage, so as to resolve the compliance dilemma of "no law to rely on" at the source, and to add bricks and mortar to the construction of a compliance system with Chinese characteristics.

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