

Research on the Impact of the Deferred Prosecution Agreement System on the Establishment of Corporate Compliance Program

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Abstract: *The deferred prosecution agreement system, which originated in the United States, is gradually accepted by Britain, France, Canada, Australia and other countries, and is regarded as an important way to deal with corporate crime cases. Taking the development of deferred prosecution agreement system as a lesson, it is of great significance to improve the system of unit criminal responsibility in China, which will change the judicial practice that China pays attention to individual crimes and ignores unit crimes, promote the popularization and maturity of corporate compliance program, and effectively prevent and punish unit crimes. Under the influence of COVID-19 epidemic, the urgent need to restore economic development and strengthen special protection for private enterprises and entrepreneurs has become a criminal justice concept generally accepted by judicial organs in China. This paper discusses the influence of deferred prosecution agreement system on the construction of corporate compliance program and puts forward the construction ideas for the specific content of deferred prosecution system in China, including the applicable object, applicable conditions, compliance inspection and the specific setting of deferred prosecution procedures. Although the focus of this paper is to study the impact of the deferred prosecution agreement system embedded in China's criminal proceedings on the construction of corporate compliance program in China, however Nowadays corporate compliance involves and has already extends beyond criminal law to include administrative law, civil law, industry rules and business ethics. Therefore, this paper also calls for attention from other perspectives from the perspective, i.e., from the perspective of administrative law, there is also great value in establishing a reduction, exemption and deferred punishment system for enterprises who violate laws. We must propose solutions with Chinese characteristics according to China's national conditions and status and help Chinese enterprises to build corporate compliance plans and programs.*

Keywords: *Deferred prosecution agreement; Corporate compliance program; Corporate crime*

1. Introduction

Enterprises are the most active and extensive subjects in the market economy. While creating social wealth, they also need to deal with many social risks, among which criminal risks are the most severe impact on enterprises. The collateral harm of criminal prosecution of enterprise crime cases is very serious, such as threatening the normal operation and survival of enterprises, damaging the rights and interests of innocent third parties such as employees, shareholders and suppliers, and even undermining market stability [1]. Corporate compliance, as an exotic product of western corporate governance, has three meanings, involving three aspects: external compliance, internal compliance and industry ethics, that is, enterprises should follow laws, internal rules and regulations, business behavior norms and industry standards in the process of operation and management [2]. Corporate compliance rules in criminal proceedings are widely regarded as the leniency of the judicial organs as long as the enterprises involved have adopted compliance construction, fulfilled effective compliance plans or are willing to adopt effective compliance plans, and can reach an agreement with the procuratorial organs to suspend prosecution or not to prosecute, so as to avoid conviction [3]. The dilemma of corporate crime prosecution not only puzzles China's criminal law enforcement agencies, but also affects foreign law enforcement agencies, including the United States. In order to avoid being convicted and sentenced, enterprises need an effective compliance system to regulate governance structure, operation management and employee behavior [4]. From a realistic point of view, few enterprises have the willingness to actively establish a costly compliance system. Only under the dual incentive mechanism of criminal justice and administrative supervision can the compliance management system be

effectively guaranteed [5]. The introduction of deferred prosecution agreement in the field of corporate crime enables prosecutors to maximize the use of corporate resources, enhance the predictability of criminal prosecution, achieve effective sanctions against those responsible for crimes, transform corporate criminals from management structure and corporate culture, prevent the recurrence of crimes from the root causes, and reduce the adverse effects of criminal charges on innocent third parties and even the whole industry [6]. In criminal justice, the exchange of leniency through compliance is a prerequisite for encouraging enterprises involved to implement compliance plans. The deferred prosecution system is the most influential way among many criminal compliance incentives [7]. Taking the development of deferred prosecution system as a lesson, it is of great significance to improve the system of unit criminal responsibility in China for changing the judicial practice that China pays attention to individual crimes and ignores unit crimes, promoting the popularization and maturity of corporate compliance program, and effectively preventing and sanctioning unit crimes [8].

2. General situation of corporate crime governance in China

2.1. Governance of enterprise crime and its way

Crime governance is a collection, which is the response of many forces to crime problems in various ways. From the process, it includes the prevention, control and treatment of crime. From the perspective of participants, there are both formal national forces and informal social forces. Deferred prosecution from the perspective of criminal compliance is mainly aimed at deferred prosecution of corporate crimes. Generally, the contents mainly include that the procuratorial organ requires the enterprises involved to complete certain compliance rectification within the specified test period, accept the supervision of the procuratorial organ, fully cooperate with the investigation of the procuratorial organ, take active remedial measures for the losses caused, and timely feedback the implementation of the compliance plan and program to the procuratorial organ. In modern society, the organizational structure of enterprises is becoming more and more complex, and the economic strength is growing, so corporate crime control cannot rely solely on government power. Postponement of prosecution is a manifestation of the right of public prosecution, but almost all countries in the world today give the right of public prosecution to the procuratorial organ, which is exclusive to it, and no other unit or individual has the right to exercise it. Therefore, whether to suspend the prosecution of a criminal suspect can only be made by the procuratorial organ, and no other unit or individual has the right to make a decision to suspend the prosecution. Taking formal and informal as the distinguishing standard, the governance of corporate crime can be divided into national criminal law regulation and criminal system and corporate criminal compliance.

The state's penalty regulation of corporate crime is to establish charges and allocate penalties, which belongs to the most traditional and main way of governance. Different countries have different criminal systems related to corporate crime governance, and many countries have unique ways to deal with corporate crime. If the enterprise involved in the case actually fulfills and completes the compliance plan and program within the test or monitorship period, the procuratorial organ may withdraw the prosecution, so that the enterprise can avoid being convicted and sentenced. In the vast majority of cases where settlement agreements are reached, the U.S. Department of Justice has incorporated criminal compliance into the deferred prosecution agreement without exception. Later, other countries incorporated the mechanism of criminal compliance while establishing the system of deferred prosecution, and regarded the establishment and implementation of compliance plan and program by enterprises as the key content of the application of deferred prosecution system by procuratorial organs and the basic condition for making a final decision not to prosecute. Non-prosecution is a decision made by the people's procuratorate not to submit the case to the people's court for trial according to law after reviewing the cases transferred for prosecution by the public security organs and the cases terminated by their own investigations. Postponement of prosecution and non-prosecution are the embodiment of criminal policies such as prosecution cheapness, litigation economy concept, public interest concept and decriminalization. Corporate criminal compliance is not only an internal management system, but also an effective means of crime prevention and control. In China, there is no other special criminal justice system for corporate crimes except the conviction and sentencing of enterprises involved in crimes according to criminal laws and regulations, and corporate criminal compliance is also in a relatively initial stage.

2.2. Current situation and predicament of corporate crime management

Whether in the United States, the birthplace of the system, or in other countries that introduced the system later, the corporate criminal compliance plan of enterprises is an important part of the agreement between procuratorial organs and enterprises to suspend prosecution, and the final implementation of the compliance plan is the decisive factor for procuratorial organs to decide whether to prosecute or not. In addition to the continuous increase in quantity, with the development of social economy, corporate crime presents some new characteristics, which greatly increases the difficulty of governance. On the one hand, corporate criminal means are increasingly hidden, and it is difficult to investigate and collect evidence. With the development of Internet technology and platform, some enterprises derive new criminal methods with the help of network technology, and there are a large number of black and gray industries. Generally speaking, compared with companies that have never established a compliance system program, it is much more likely for procuratorial organs to apply deferred prosecution to companies that already have a certain compliance program. The situation of corporate crime in the current environment is getting worse and worse, which is the phased result of social and economic development, and it is also inseparable from the defects in the traditional corporate crime governance. When the procuratorial organ makes a decision to suspend prosecution, it must have legal reasons: it is more conducive to case justice, or it is in line with social public interests, and it is in line with the substantive and procedural elements of the law.

The crux of the problem lies in the punishment of unit crime in China Criminal Law and the way in which administrative organs and judicial organs deal with corporate crimes in practice. Prosecution is divided into two forms: public prosecution and private prosecution, and deferred prosecution only exists in cases where the procuratorial organs examine and prosecute and decide whether to prosecute or not. Deferred prosecution only exists in public prosecution cases, and it does not exist in private prosecution cases. From the specific system implementation procedures, the deferred prosecution system needs to go through a certain negotiation process from the start of the procedure to the final decision. In the process of applying the deferred prosecution system, the compliance plans and program required by procuratorial organs in various countries are not exactly the same, and even the terms of compliance plans and program will be different in specific cases. Because the compliance plan and program will be determined according to the suspected illegal behavior and potential risks of the enterprise. As a conditional non-prosecution, the decision to suspend prosecution only has the effect of temporarily suspending litigation, which is a phased conclusion. After the decision to suspend prosecution is made, the final outcome of the case is uncertain.

From the point of view of litigation right, the procuratorial organ's right to suspend prosecution belongs to a right to be sued, which is a reservation to the right to public prosecution. Therefore, postponing prosecution is essentially a kind of prosecutorial discretion enjoyed by procuratorial organs to temporarily suspend their prosecutorial power. In China, the punishment for unit crimes is focused on individuals, and the unit itself may be fined, and the amount of fines is often determined according to illegal gains. Moreover, the scope of application of fines is limited, and not all unit crimes can be fined. The main legislative purpose of the prosecution system is to make a request to the court, investigate the criminal responsibility of the defendant and realize the fairness and justice of the law; The result of postponing prosecution is mostly not to prosecute, and the legislative purpose of postponing prosecution system is to realize the diversion of criminal pretrial procedures, save judicial resources and avoid the negative impact brought by short-term free punishment. Incidental accountability of enterprises can be regarded as a kind of protection, which is related to the importance that local governments attach to economic development. Instead of pushing an enterprise into criminal proceedings, local administrative organs are more willing to give administrative punishment as a warning, so that enterprises can continue to contribute to the local economy.

3. Connotation of deferred prosecution system

3.1. The concept of deferred prosecution system

The deferred prosecution system originated in the United States, and was gradually accepted by more and more countries. As an important way to deal with corporate crimes, it has had a far-reaching impact on the criminal procedure systems of various countries. Deferred prosecution system usually refers to a legal system in which, under the premise of legal authorization, the procuratorial organ gives comprehensive consideration to certain matters, temporarily refuses to prosecute criminals who should

have been prosecuted, and decides whether to prosecute by setting a certain test period or meeting certain conditions. Deferred prosecution refers to the system that procuratorial organs and prosecutors temporarily refuse to prosecute criminal suspects who violate criminal law according to their criminal nature, age, situation, degree of criminal harm and criminal responsibility [9]. Although the system is faced with many disputes, such as conniving at crimes, reducing the deterrent power of punishment, and giving excessive discretion to procuratorial organs, the deferred prosecution system can meet the value consideration of balancing the interests of all parties, has both punishment and prevention functions, and has practical value in optimizing the allocation of procuratorial power and promoting the reform of procuratorial system.

To fully understand the deferred prosecution system, it is not enough to only understand the concept and characteristics of deferred prosecution. In the criminal procedure system, there are some systems related to deferred prosecution. It is indispensable to clarify the relationship between deferred prosecution system and these systems for the study of deferred prosecution system. Probation system was first put forward by British judge Hill, and has been widely adopted by criminal legislation in various countries. When other countries want to establish similar systems, it should be clear whether the purpose of system transplantation is to solve the general problem of corporate crime or just to establish a flexible form of handling for large enterprises. If it is for the former purpose, it is necessary to adjust the setting of fines and other expenses to adapt to the affordability of enterprises with different sizes. Suspension of prosecution and exemption from prosecution are both cases that have not been transferred to the court for trial, which are the embodiment of procuratorial organs' discretion in the field of review and prosecution, and have certain similarities. However, there are more essential differences between the two: for criminal suspects, postponing prosecution does not involve substantive identification of the nature of the act and does not constitute an infringement of the court's jurisdiction. Exemption from prosecution means that the people's procuratorate declares the criminal suspect guilty and exempts him from criminal responsibility. It is a substantive processing mode, which deviates from the litigation structure concept of separating prosecution from trial.

The law enforcement of enterprise crime is faced with difficulties such as the shortage of information and resources, the difficulty in identifying individual responsibility, and the external chain effect that may be triggered by the conviction of enterprises. Although countries have different names for the deferred prosecution system, their legislative spirit is the same; Although scholars have different definitions of the concept of deferred prosecution, its essence is the same. Deferred prosecution from the perspective of criminal compliance is mainly aimed at deferred prosecution of corporate crimes. Generally, the contents include that the procuratorial organ requires the enterprises involved to complete certain compliance rectification within the specified test period, accept the supervision of the procuratorial organ, fully cooperate with the investigation of the procuratorial organ, take active remedial measures for the losses caused, and timely feedback the implementation of the compliance plan and program to the procuratorial organ.

3.2. Characteristics of deferred prosecution system

The essence of postponing prosecution is conditional non-prosecution, which is a prosecution discretion system enjoyed by procuratorial organs to temporarily suspend their prosecution rights. During the trial period determined by the agreement on deferring prosecution and the agreement on non-prosecution, law enforcement agencies or regulatory agencies usually appoint an independent compliance inspector or compliance supervisor to supervise and review the compliance of the enterprises involved, change their business methods and formulate or improve the compliance mechanism at any time, and make regular reports to the law enforcement agencies or regulatory agencies [10]. There are two consequences of postponing prosecution: first, if the criminal suspect fulfills the additional conditions within the prescribed time limit, the procuratorial organ will no longer prosecute him. Second, if the criminal suspect fails to fulfill the additional conditions within the prescribed time limit, the procuratorate will still file criminal proceedings against him. Once the regulatory authorities release unfavorable information, it will lead to a sharp drop in the stock price and a sharp fall in corporate image of the enterprises involved, which will bring great losses and damages. If a settlement agreement is not reached with the regulatory authorities, then the enterprises involved may be subject to malicious supervision, and the probability of being sued again will be greatly improved. If the enterprise involved in the case actually fulfills and completes the compliance plan and program commitment within the test period, the procuratorial organ may withdraw the prosecution, so that the enterprise can avoid being convicted and sentenced.

4. The dilemma of enterprise criminal Prosecution and the Influence of deferred prosecution Agreement

The era of globalization has witnessed the rapid expansion of the scale and scope of activities of multinational corporations. In some underdeveloped countries with weak government organization ability, companies have even surpassed the government to become the main providers of services such as security, infrastructure, basic energy and crisis response. Once a regulatory agency brings a certain accusation, especially a criminal accusation brought by the Ministry of Justice, the enterprises involved will usually hold closed-door consultations with them in exchange for these regulatory agencies to give up bringing a lawsuit to the court, and the case will end with a suspension of prosecution or no prosecution [11]. In the process of examination and prosecution, enterprises are required to establish a compliance program and set a corresponding assessment period. After passing the criminal compliance supervision and assessment of enterprises, they will make a decision not to prosecute. The government faces many difficulties in the process of investigating and prosecuting corporate crimes. First of all, under the background of the gradual specialization of market division, the increasingly complex organizational structure of companies, and the increasingly high-tech and cross-regional corporate crimes, regulatory agencies often lack sufficient resources and capabilities to monitor and regulate corporate behavior.

Theoretically speaking, if the enterprise involved fails to abide by the agreement of suspending prosecution or not prosecuting reached with the prosecutor during the trial period, the prosecutor still reserves the right to bring a public prosecution to the court. In practice, however, this rarely happens. Almost all cases that have reached a settlement of prosecution will eventually end with the prosecutor giving up the prosecution after the trial period, and the enterprises involved have also escaped the fate of being convicted and sentenced. In view of the devastating impact that criminal prosecution and conviction may have on the company's reputation, business development and personal freedom of executives, companies often adopt tougher coping and defense strategies when facing the risks of criminal proceedings, which leads to the asymmetry of information and resources between public power subjects and company subjects, which is more prominent in the field of criminal justice.

Outside the territory, independent supervisors are mainly used to monitor the compliance plan and program of enterprises. The introduction of independent supervisor system greatly enhances the independence and professionalism of supervision, which can be conducive to the implementation and promotion of corporate compliance plan and program. As a compromise between giving up the prosecution of corporate crimes and seeking to convict the company, the deferred prosecution agreement conforms to this new regulatory trend, and encourages the company to establish effective compliance program to prevent and monitor crimes by greatly reducing the company's fines, bypassing the lengthy accusation-trial procedure, and helping the company get rid of the conviction judgment and the subsequent negative effects. For the natural person suspected of committing a crime, the deferred prosecution agreement is nothing more than a conditional non-prosecution agreement signed by the prosecutor according to the defendant's will to turn over a new leaf, and has nothing to do with corporate compliance.

With the constant change of society, various conflicts of interest appear in new forms. Because of the lag of law, it is impossible to make a reasonable response to all social problems, so multiple handling mechanisms are needed to solve conflicts of interest. In China, probation means that a criminal sentenced to criminal detention or fixed-term imprisonment of not more than three years, according to the circumstances of the crime and the performance of repentance, will be given a certain trial period to suspend the execution of the penalty if it does not harm the society. In short, probation is conditional non-execution of the sentence. If we want to form an incentive for enterprises and drive them to carry out compliance establishment, the most effective measure is administrative punishment. China's administrative punishment is usually made by administrative organs, and one of the key points of the deferred prosecution agreement system is to punish enterprises with high fines, which drives procuratorial organs to sign deferred prosecution agreements with enterprises involved. There are some similarities in the forms of probation and deferred prosecution, both of which are characterized by setting a certain trial period and attaching certain obligations, and this is investigated. Postponement of prosecution and probation are consistent in concept and purpose, both of which are to urge the criminal suspect to turn over a new leaf as soon as possible. The connection between procuratorial power and administrative power is the key to the introduction of deferred prosecution agreement system in China. Only by closely linking procuratorial power and administrative power and realizing the deferred prosecution system applicable to corporate crimes with the coercive deterrent of administrative power can we promote the development of corporate compliance non-prosecution system.

5. The conception of China's suspension of prosecution system

The deferred prosecution system has great advantages in dealing with corporate crimes. China has a legal basis and practical needs for applying the deferred prosecution system to corporate crimes. The next problem to be solved is how to build the deferred prosecution system in China, so that it can be effectively integrated with the existing legal system in China. Similar to the traditional criminal law, the traditional criminal procedure law focuses on the punishment after the crime, but the embodiment of crime prevention is slightly insufficient, especially under the influence of the heavy punishment doctrine of criminal law, the punishment for corporate crime is extremely strong. During the pilot process, it was basically reached that the procuratorial organs need to hire a third-party organization to help them perform their compliance supervision functions due to their own legal supervision responsibilities and professional, experience and resource limitations.

In the current environment, how to deal with the enterprises involved has become a work that needs to take into account the interests of many parties. The suspension of production and business of the enterprises involved will seriously affect the normal livelihood of employees and their families, and the upstream and downstream enterprises involved in the business scope will also be affected accordingly. Therefore, an alternative model that can effectively solve the above problems is urgently needed. Corporate crime needs to pay the corresponding cost in exchange for leniency, so the expenses of compliance supervisors should be paid by enterprises. However, in order to ensure fairness, prevent conflicts of interest, prevent the enterprises involved from paying the supervision fees directly, and affect the objectivity and neutrality of the compliance supervisor's inspection and evaluation, we can try to set up a third-party organization to manage and pay the fees in the future system design.

The deferred prosecution agreement also emphasizes the investigation of the company's criminal responsibility, requires the company to admit the facts of the crime, and requires the company to improve the internal control, management and compliance mechanism within the period of deferred prosecution according to specific circumstances, and use the coercive force of punishment to realize the punishment and prevention of crimes. Judging from the pilot situation, there are two main ways to apply compliance non-prosecution: one is to urge the enterprises involved to establish an effective compliance program by putting forward procuratorial suggestions while making a relative non-prosecution decision during the review and prosecution process. The deferred prosecution agreement greatly expands the prosecutor's discretion, and its global spread makes it possible for law enforcement agencies or procuratorial organs in various countries to cooperate informally frequently, which enhances the finality of transnational corporate crime cases handled by pre-trial diversion agreement. If an enterprise can implement an effective compliance plan and program, then it must be law-abiding and its compliance behavior is worth encouraging. The criminal cases it encounters deserve to be forgiven, and the enterprises involved can be given incentives in criminal law or criminal procedure law, that is, the enterprises that operate in compliance are given the right to be lenient or to defend, which is manifested in lenient sentencing or exemption from punishment in criminal law.

6. Conclusions

No system can operate in a vacuum, and careful organizational structure, mature supporting mechanism and appropriate power allocation of participants constitute the necessary conditions for the effective implementation of the deferred prosecution system. Throughout the countries' deferred prosecution system, the corporate criminal compliance system is included as a prerequisite and an important content for the application of deferred prosecution system. The traditional emphasis on corporate crime is severe punishment afterwards, but it ignores the prevention, guidance and education afterwards. Although the non-prosecution system has certain educational and guiding effects, it is difficult to achieve results in the end because there are many inconveniences and no corresponding legal basis for the application of the non-prosecution system to enterprises involved. The development, expansion and questioning of the deferred prosecution system in the United States and other countries provide a useful reference for the improvement and development direction of the unit criminal responsibility system in China. As an effective incentive for corporate governance at the national level, the corporate compliance non-prosecution system plays an important role in corporate crime prevention. Defining the status of corporate compliance non-prosecution system in criminal proceedings in China is of great significance to comprehensively improve the governance level and modernization of governance capacity in China. Although the deferred prosecution system is facing some controversy, on the one hand, it supports the healthy development of enterprises, on the other hand, it gives

enterprises involved in crimes the opportunity to relax punishment and correct themselves, which can create a better business environment for the development of enterprises and promote the long-term economic development.

Although the focus of this paper is to study the impact of the deferred prosecution agreement system embedded in China's criminal proceedings on the construction of corporate compliance program in China, however from the perspective of administrative law, there is also great value in establishing a reduction, exemption and deferred punishment system for enterprises who violate laws. For enterprises, corporate crimes are minority after all, and administrative punishments are more common in China. If administrative punishment is a "minor illness", then a criminal offense is a "serious illness" or even a "terminal illness", so we must pay more attention to the treatment of "minor diseases". This requires administrative authorities to take action to promote the implementation of corporate compliance plan and program, and administrative authorities must also give compliance incentives at the law enforcement level. When an enterprise establishes a compliance plan and is effective after the examination and evaluation, the administrative penalty should be given incentives with appropriate relief. Nowadays corporate compliance involves and has already extends beyond criminal law to include administrative law, civil law, industry rules and business ethics. Therefore, simply transplanting deferred prosecution agreement system and directly applying international standards in China cannot solve the problem once and for all, we must propose solutions with Chinese characteristics according to China's national conditions and help Chinese enterprises to build corporate compliance plans and programs, which must not only be in line with international standards, but also reflect China's special principles. We need to solve China's problems with "the world's vision".

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