

Research on the Legal Path of Criminalization and Convergence of Compliance in Chinese Enterprises

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Abstract: Corporate compliance reform is both a reform of the criminal trial system and an innovation of the social governance model. This paper argues that at the current stage in China, the construction of corporate compliance in China cannot rely solely on the procuratorial and other judicial organs, but also requires the participation of more social forces. The corporate compliance mechanism must highlight the leading role of the procuratorial authorities; on the other hand, it also needs to integrate the forces of all parties to provide assistance in the reform and exploration of the corporate compliance system effectively. Since this is a multi-party collaborative systematic project, problems of convergence and collaboration among various parties will inevitably arise; only by establishing smooth convergence and a good collaborative mechanism can the experimental goals of the reform be realized.

Keywords: Corporate Compliance; Program Articulation; Compliance Rectification

1. Formulation of the Problem

Since 2020, China's Supreme People's Procuratorate deployed to start the reform of the enterprise rules system, opened a new chapter of the enterprise compliance system in China, and the Procuratorate-led enterprise criminal compliance as the focus of the joint collaboration of multiple organizations is the biggest highlight of China's enterprise compliance system, but according to the existing judicial practice cases, enterprise compliance in China, there are a lot of practical problems. Among them, the most urgent problems plaguing the judicial practice is the composition of the corporate compliance mechanism, when the enterprise involved in the case, what procedures should be used to

penalize the enterprise? Judicial organs and administrative organs how to cooperate with each other to maximize efficiency and rationalization? This issue is related to the efficiency and fairness of the procuratorial organs, but also the enterprise compliance system really blossomed to realize the theoretical norms from the practical operation of the problem must be resolved. In view of this, this paper attempts to explore a little, in order to throw a brick to attract jade, help in the enterprise compliance system to enrich and improve, for the benign development of enterprises and the market escort!

2. Examination of the Current Situation of the Dilemma of the Criminalization of Compliance by the Enterprises Involved in the Case

2.1 Theoretical Level: Prosecutorial-centrism and Administrative-centrism Debate

Since March 2020, corporate compliance has become a hot topic of discussion and research in the legal profession. In the past three years of research, different views have emerged on the issue of the responsible department that should take the lead in corporate compliance, and two schools of thought have been formed in general, namely, the "procuratorate-led school" and the "administrative agency-led school".

Scholars who support the leading role of the procuratorate start from a criminological perspective, believing that corporate compliance is about combating economic crime, and that since the main purpose is to solve the problem of corporate crime, the procuratorate should take the lead. Because the procuratorate can exercise discretion to decide whether to prosecute the enterprise, grasping the enterprise "crime" and "crime" between the key. Who holds the most fundamental power

has the highest right to speak, also more can make the enterprise convinced [1]. Therefore, it is more conducive to the realization of the purpose of corporate compliance to be led by the procuratorate. On the contrary, scholars in favor of the administrative authorities taking the lead believe that it is difficult to rely only on the public security authorities and procuratorial authorities to accurately invoke from a large number and variety of administrative regulations in China. Once improperly invoked, it will inevitably lead to inaccurate characterization of the case and thus wrongful conviction, which may lead to a large number of criminal punishment instead of punishment, thus leading to judicial injustice [2]. Substantive level: the legal boundary between administrative and criminal offenses is not clear.

2.2 Substantive Level: Unclear Criteria for the Legal Boundaries between Administrative and Criminal Offenses

The root cause of the problem of convergence of criminal acts lies in the fact that administrative criminal acts have a dual unlawful nature and their dualistic administrative criminal law liability structure [3]. As we all know, enterprise-related crimes are mostly administrative offenses, and administrative offenses have secondary illegality, i.e., administrative offenses are not a kind of complete general administrative offenses, nor are they complete criminal offenses, so they have the dual offenses of administrative and criminal nature at the same time. It also leads to the duality of legal responsibility, that is to say, not only to pursue their administrative legal responsibility, but also to pursue their criminal legal responsibility. Administrative penalties in the legal attributes, in the implementation of the authorities, in the application of the basis, in the application of the object, in the way of punishment, in the punishment process, there are obvious differences. This difference determines the existence of an inevitable link between administrative law enforcement and criminal justice. It also involves the boundaries and distinctions of administrative violations, "for administrative offenders, there is an overlap and crossover of the types of administrative violations, and the boundaries between them are blurred, resulting in a

problem of poor convergence between administrative law enforcement and criminal justice in reality [4]".

The phenomenon of unclear substantive law demarcation standards between administrative law violations and criminal law violations is widespread, and this general academic judgment has also been confirmed in specific fields, and scholars who have systematically sorted out the criminal-executive interface problems in the field of securities have come to the conclusion that the unclear demarcation standards between administrative law violations and criminal law violations are an important reason for the poor criminal-executive interface of securities crimes [5]. Scholars who have conducted systematic research on the criminal-executive interface in the field of production safety have concluded that the poor criminal-executive interface stems to a large extent from the unclear standards of substantive law. Production safety administrative legislation treats "seriousness of circumstances" as a criterion for aggravating administrative penalties, while the criminal law treats it as a criterion for distinguishing between general offenses and criminal offenses; secondly, both the norms of the administrative law on production safety and the current judicial interpretations lack clear and detailed definitions of "seriousness of circumstances" and "seriousness of circumstances". Secondly, both the norms of the administrative law on work safety and the existing judicial interpretations lack clear and detailed criteria for "seriousness of circumstances".

In addition, there is a lack of a clear definition of the concepts of "primary responsibility", "important responsibility", "leadership responsibility", "main management responsibility", etc., which have a greater impact on the allocation of criminal responsibility. There is also a lack of a clear and precise definition of how to distinguish between concepts that have a greater impact on the allocation of criminal responsibility [6].

3. Practical Dilemmas in the Criminalization of Compliance by Enterprises Involved in the Case

3.1 Unclear Delineation of Responsibilities between the Prosecution and Administrative Authorities at the compliance Initiation

Stage

The normative documents promulgated by China's Supreme Prosecutor's Office for reforming compliance of enterprises involved in cases provide specific directions and guidelines for the acceptance of the criminal-execution interface of enterprise compliance, and specify the specific implementation rules for the selection and assessment of candidates by third-party supervision and assessment organizations, but there is little mention of how the responsibilities of inspection and administrative authorities are divided during the start-up phase of enterprise compliance.

There is no provision for effective linkages in terms of access to the targets of compliance visits. According to the practical experience of pilot regions in China, such as Beijing and Shanghai, the vast majority of enterprises involved in the case will be granted mitigation, mitigation of sentence, non-prosecution, or recommendation to the administrative authorities to reduce or even waive the punishment after a compliance inspection period ranging from one year to half a year. Then there will be questions: what kind of enterprises can be included in the scope of this compliance examination? How to set up differentiated thresholds for enterprises of different sizes, business scopes, natures and functions to be transferred to the compliance examination?

Supervisory authorities, because of their own inherent professional knowledge is limited, in the formulation of the enterprise involved in the case of compliance with the applicable procedures, usually need to go to listen to the relevant professional administrative departments, and according to their professional judgment, combined with the supervisory authorities of the severity of administrative violations of the enterprise and the degree of social harm to make comprehensive judgment and decision-making. But in what way or mechanism does the procuratorate consult the relevant administrative departments? How to determine the threshold of confidential information available to the consulted administrative organs? And when should the consulted administrative organs give professional responses to the procuratorate? These issues of interface and coordination between the two important roles of the procuratorate and the

administrative authorities are yet to be detailed in the laws and regulations.

This is despite the fact that the procuratorial authorities are the leaders of the compliance reforms of the enterprises involved. However, the administrative authorities are not subordinate to the procuratorial authorities in terms of authority, and therefore have no obligation to cooperate with them in the handling of corporate crime cases; therefore, the procuratorial authorities can usually only issue a procuratorial opinion to the administrative authorities in accordance with the law on the administrative penalty portion of the decision not to prosecute, which greatly diminishes the function of criminal compliance as a pre-alert and preventive measure against corporate crime.

3.2 Lack of Articulated and Scientifically Sound Standards of Review and Judgment at the Compliance Application Stage

An important prerequisite for promoting genuine rectification and compliance by enterprises involved in cases is to ensure that third-party supervisory and evaluation agencies and personnel can realize "true supervision" and "true evaluation" in the compliance application phase. Since the pilot reform of the compliance of enterprises involved in the case, China's local procuratorial organs have issued a number of standardized documents, but few of them are based on the actual situation of China's small and medium-sized micro-enterprises account for a large proportion of the actual situation of the formation of truly differentiated norms and inspection standards can be implemented. Some of the local documents only refer to and imitate foreign compliance standards for enterprises above a certain scale, requiring the enterprises involved to submit a series of external compliance performance, including compliance organization structure, compliance management charter, compliance review system, compliance risk warning and response, reporting of violation traces, and cultivation of a compliance culture, etc., and most of these systematic arrangements are centered on the criminal offenses of the enterprises involved in the case. "De-criminalization" reform, but many enterprises have already committed more illegal acts before the commission of the crime, it is these "minor" (administrative violations)

can not be stopped in time, so as to become "big mistakes "(criminal offenses). In addition, when setting standards for compliance examination, some procuratorial authorities failed to distinguish and emphasize the differences between different enterprises. On the contrary, some of the compliance examination standards only focus on the external examination items, but fail to truly integrate the compliance examination with the company's management.

4. The Construction of a Mechanism for the Criminalization of Compliance by Enterprises Involved in Cases is Envisaged

4.1 Smooth Information-sharing Mechanisms and Build Information-sharing Platforms

By analyzing the problems that have arisen in the whole process of enterprise compliance construction, it is not difficult to find that the causes of enterprise-related crimes, especially economic administrative crimes, are complex and involve many comprehensive social systemic issues, and it is difficult to achieve good results in social governance by relying solely on the "lone battle" of criminal law. At the same time, because the procuratorate lacks the necessary expertise and strength, the involvement of government administrative authorities in the criminal compliance process of the enterprises involved is also indispensable.

The premise of the effective participation of the administrative departments is the enterprise information sharing, break the information barriers and reduce the information gap, realize the interconnection of administrative law enforcement information and criminal justice information. Thus accelerating the procedural flow of the case, it is recommended to build an information sharing platform for the convergence of criminal behavior [7].

The Outline for the Implementation of the Rule of Law Government Construction (2021-2025) issued by the State Council in August 2021 explicitly states, "Improve the mechanism for the convergence of administrative law enforcement and criminal justice, strengthen the construction of an information platform for the 'convergence of the two laws', and facilitate the case information sharing mechanism, standardization of transfer criteria, and

standardization of case handling procedures." Corresponding to the field of compliance supervision, it is necessary to establish an information sharing mechanism in the field of compliance supervision according to the corresponding legal norms to improve the efficiency of using judicial and administrative resources and provide information support for compliance work in the context of the current comprehensive digital reform. As a concrete example, in the initiation stage of criminal compliance, the procuratorial authorities should give full play to the role of leader-driven. The administrative authorities are invited to intervene in advance through the information sharing big data platform. Under the premise of clarifying the boundaries of the responsibilities of both parties, the administrative authorities are targeted to invite the participation of relevant professional administrative authorities to determine whether the need for compliance rectification of the enterprise involved in the case; at the same time, a multi-party hearing meeting is organized to listen to the administrative authorities of the enterprise's own business situation, whether there are any administrative violations, the degree of social contribution and other circumstances, the preliminary formation of the compliance rectification assessment standards, which will in turn provide a basis for the third-party supervision and evaluation organization to conduct scientific compliance investigations. At the same time, it organized a multi-party hearing meeting to listen to the explanations of administrative authorities on the enterprises' own operation situation and the degree of social contribution.

4.2 Development of a Differentiated Dual Standard of Review for Large Enterprises and SMEs

Small and medium-sized enterprises (SMEs) are an important part of the promotion of China's active market economy, and enterprise-related crimes in judicial practice are also predominantly committed by SMEs, so it is necessary to formulate a differentiated compliance review standard for SMEs that is distinct from that for large-scale enterprises, with differentiation in the interface between the criminal justice system and the law enforcement system [8]. The group standard

"Evaluation of Compliance Management System Effectiveness for SMEs" was released in May 2022 by the China Association of Small and Medium Enterprises (CASME). This standard plays a considerable guiding role in the construction and evaluation of compliance management systems for SMEs. It can be used as an opportunity to set up differentiated compliance review standards for the compliance requirements of different enterprises according to the scale of operation, professional scope of business, customary characteristics of the industry, and risk level of compliance, so as to truly match the compliance supervision and inspection system with the current internal management system of the enterprise and avoid compliance construction becoming a burden for enterprise development.

This process cannot be separated from the mutual cooperation of enterprise management and administrative departments, especially in the stage of compliance application, as the construction and implementation of compliance management system is a dynamic cycle process, in which the procuratorate should not be too deeply involved, and should focus on acting as an organizing facilitator and supervisor, and is mainly responsible for reviewing the enterprise's application for compliance and finally making a decision on whether or not to make a judgment on the acceptance report based on the review and acceptance report of the third-party supervisory and assessment organization. The judgment of whether or not a crime has been committed. As for how to consider the scientific and rationality of the whole system from the perspective of management science. How to break down the compliance management system into operational points that are easily understood by employees and can be implemented by enterprises, how to train and publicize the compliance culture, and how to appropriately deal with the social impacts caused by enterprises' violations of the law, etc., and then implement them with reference to the group standard of "Evaluation of the Effectiveness of Compliance Management System of Small and Medium-sized Enterprises". Adhering to the principle of handling the criminal line, under the organization of the procuratorate, the procuratorate actively invites the

administrative authorities, law firms, accounting firms and other tripartite professional institutions to jointly introduce the detailed provisions for the implementation of the assessment by the management of the company, and ultimately to promote the construction by the assessment to promote the construction of the compliance system of the small and medium-sized enterprises.

4.3 Establishment of a Third-party Monitoring Mechanism for the Convergence of the Criminal and the Criminal Justice Systems

For compliance supervision in the criminal-execution interface, a third-party supervisory mechanism can be constructed to form a separate and independent supervisory model from that of the procuratorial authorities. The members of the third-party supervision mechanism are randomly selected by the management committee of the third-party supervision mechanism from a directory of professionals in accordance with the specific circumstances of compliance and the type of case. The Third Party Supervision Mechanism is mainly responsible for supervising compliance rectification, inspection and acceptance of enterprises, as well as matters related to the connection between criminalization and execution. At the same time, for violations of laws and regulations in compliance rectification and criminal-execution interface, it can submit supervisory opinions to the higher authorities of the procuratorate, which shall promptly accept the opinions and deal with them [9].

4.4 Continuously Optimizing the Construction of a Two-way Criminal-execution Interface System in Corporate Compliance

Following the introduction of the Several Provisions on Promoting the Convergence of Administrative Law Enforcement and Criminal Justice, the law enforcement and judicial concept of the two-way convergence of criminal and administrative activities has gradually replaced the previous concept of the procuratorate-led approach, which required administrative law enforcement agencies to transfer information on enterprises involved in cases, and clarified the need for the

procuratorate to coordinate with the supervisory authorities, public security authorities, judicial and administrative administrative authorities and administrative law enforcement agencies.

In the author's view, the provisions of the system should focus on corporate criminal behavior, and better serve the compliance reform of Chinese enterprises involved in the case by taking into account the special characteristics of corporate administrative offenders. Corporate crime cases have the natural characteristics of criminal-administrative convergence, but there are also some problems in certain procedural aspects of convergence. From the perspective of criminal-execution interface of administrative authorities' transfer of information on enterprises involved in cases and the initiation of compliance building procedures, on the one hand, the evidence collection and preliminary investigation of enterprise crime cases are highly specialized and relatively complex, and public security authorities need the technical support of administrative authorities to efficiently deal with the relevant issues; on the other hand, enterprise crime cases tend to have a greater impact on the public interest of the society, and procuratorate authorities have a greater influence on the public interest in deciding whether or not to include the enterprise in question in the scope of compliance and rectification inspections, the procuratorial authorities should fully cooperate with the administrative authorities in fully investigating factors such as the enterprise's business situation, its record of violation of the law, and the areas of influence.

Therefore, in accordance with the requirements of the principle of two-way criminal-execution convergence, the timely intervention of the legal supervision function of the procuratorial organs can be given full play through the establishment of a joint case-handling team, and the public security organs can be jointly investigated before a decision on penalties is made; at the same time, through the joint hearing meeting on compliance, the analysis of the problems of the enterprises involved in the case and the treatment of the views of the administrative organs can be fully listened to, and a certain amount of feedback is given in the final procuratorial recommendations made.

From the point of view of the final processing results, which is the interface between criminal and administrative affairs, the system of mutual recognition of enterprise compliance results can be considered to be established. The procuratorial authorities determine in advance with the administrative authorities the measures and intensity of the subsequent administrative penalties based on the rectification situation, remedial measures and social impact of the enterprises involved in the case, so as to increase the reasonableness and rigidity of the procuratorial recommendations. So that actively rectify the enterprise can obtain a relatively reliable and stable psychological expectations. In addition, in order to play the case of social publicity and guidance role, really do a good job in the "second half" compliance case. Procuratorial organs should also jointly with the local administrative departments to regularly summarize and publish the region's typical cases of corporate crime, typical cases of key areas of business risk points for in-depth analysis, "case education + legal guidance" to help enterprises quickly identify new risk points that may arise in the course of its development. In terms of strengthening the construction of corporate compliance culture and the cultivation of employees' compliance awareness, procuratorial organs can take the initiative to join hands with administrative departments, industry associations and third-party professional organizations to strengthen targeted training on the construction of corporate criminal compliance, and to improve the enterprises' understanding of the importance of criminal compliance and their awareness of criminal compliance by means of lectures given by experts, interpretation of the law in the light of cases, and the implementation of preventive and warning education.

5. Conclusion

Criminal justice and administrative law enforcement play an important role in China's social governance, and both are intrinsically linked and have consistent goals. To promote the prevention and control of criminal legal risks of enterprises and to guarantee the healthy and benign operation of enterprises, it is indispensable to reform the compliance of enterprises involved in cases and the

collaboration and cooperation between administrative organs and judicial organs. In the construction of the compliance criminalization mechanism of the enterprises involved in the case, it is necessary to make full preparations. From the entity level to clear the obstacles; at the procedural level to carry out innovative institutional design, and then through the information sharing platform and supervision mechanism to promote the deepening of the criminal-executive interface. There are still many immature places in this paper, and we look forward to a more in-depth study on the issue of compliance bank convergence for enterprises involved in cases in the future.

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