

Discussion on the construction path of the compliance non-prosecution system

Lifang Du

School of Law, Fuzhou University, Fuzhou 350000, China.

dulifang1013@163.com

Abstract. Chinese compliance non-prosecution system conforms to the criminal policy of "combining leniency with strictness" and social public interests, and helps people's procuratorates to fully participate in social governance and prevent enterprises from committing crimes again. The current pilot units in China mainly adopt the mode of relative non-prosecution and conditional non-prosecution. The former is inconsistent with the value pursued by the compliance non-prosecution system, and the latter should be reformed in a targeted manner. The applicable object of the compliance non-prosecution system shall be the large and medium-sized enterprises, and shall not be subject to the influence of the degree of criminal penalties. Moreover, the people's procuratorates shall apply the system to the large and medium-sized enterprise that conforms to the social and public interests, pleads guilty and accepts punishment, and is possible to transform successfully, and shall decide to prosecute or not prosecute the enterprises involved in criminal cases according the effectiveness of the special compliance rectification plan and the relevant compliance management system of an enterprise.

Keywords: Non-prosecution system for compliance; the Deferred Prosecution Agreement System; Legal business environment.

1. Introduction

On April 2, 2022, the Chinese Supreme people's procuratorates announced that the pilot of compliance reform of enterprises involved in the criminal case would be extended to the whole country. Since the first round of the pilot program was carried out in March 2020, the non-prosecution system for the compliance has been widely concerned by the society, showing strong advantages. For one thing, the system conforms to the criminal policy of "combining leniency with strictness", which not only leaves a chance for enterprises, but also imposes appropriate punishments on enterprises through administrative penalties and deprivation of criminal interests. Therefore, it is conducive to prevent enterprises from committing crimes again. For another the system is in line with the public interest. Because it avoids the undesired consequences of layoffs of employees and market damage caused by the prosecution and helps build a century-old enterprise for long-term development by improving and reshaping the business structure of the enterprises.

However, the practice of the system in China has exposed the problem of insufficient incentives for companies. According to the main case-handling data of procuratorial organs across the country in 2021 released by the Chinese Supreme people's procuratorates, the people's procuratorates decided not to prosecute 348,000 people in the whole country in 2021, while only 25,000 of them are from non-state-owned companies, enterprises and institutions. The lack of compliance cases reflects that the reform has not fully stimulated the enthusiasm of enterprises, and the compliance non-prosecution system needs to be further explored. In view of this, this paper intends to explore the mode selection, applicable objects, applicable conditions and evaluation procedures of the compliance non-prosecution system on the basis of observing the pilot mode of the system, in order to help construct and optimize the system, what's more, to enhance its application rate and improve the business environment.

2. Pilot Modes of the compliance non-prosecution system

During the pilot period, the people's procuratorates mainly adopted the mode of relative non-prosecution or conditional non-prosecution. The non-prosecution system of the enterprises involved in the criminal case is still in the process of reform and exploration, and the law has not given the procurator a special type of non-prosecution system to meet this challenge. Therefore, the best way for the people's procuratorates to be in line with law is to make a relative non-prosecution decision and put forward procuratorial suggestions. However, due to the successful experience of the foreign deferred prosecution agreement system and the local conditional non-prosecution system, there are also pilot units boldly innovating and trying to adopt the mode of conditional non-prosecution system, which is beyond the limitation of current law to some extent.

2.1 the relative non-prosecution mode

According to the criminal procedure law, the conditions for applying relative non-prosecution is that the criminal suspect commits a crime while the circumstances of the crime are minor and no criminal punishment is necessary or the criminal suspect is exempted from criminal punishment according to law. Therefore, In the pilot practice, most of time people's procuratorates determine that the enterprises meets the condition for non-prosecution because the crime of the enterprise is minor the little social harms was caused or the company repaired the damaged legal interests by pleading guilt and accepting punishment, actively compensating victims, and actively constructing and improving compliance plans. In practice, this mode has the following characteristics:

First, the people's procuratorates takes the degree to which the company needed to be condemned as as the standard for whether to take a non-prosecution decision. Judging from the legislative provisions, Article 177 of Criminal Procedure Law of the People's Republic of China expressly stipulates that the applicable conditions for relative non-prosecution are "the circumstances of the crime are minor" and "no penalty is necessary or suspect is exempted from penalty", which leads to the only possibly applicable subjects for the system is the company suspected of misdemeanor crimes. From the perspective of judicial practice, when prosecutors make a decision on relative non-prosecution, they just consider whether the enterprise has a minor crime circumstance or a lenient circumstance. For example, there was once a case where the people's procuratorates applied compliance. In that case, the company falsely issued a special VAT invoice of 370,000 yuan, whose crime only need to be sentenced to imprisonment of not more than three years or limited incarceration. Additionally, the enterprise and suspect involved has such circumstance of lenient punishment as voluntary surrender and pleading the guilt and accepting the punishment, which is greatly reduced their condemnability. Similarly, scholars discuss the applicable conditions of corporate compliance from the perspective of whether the company meets the statutory leniency conditions. For instance, one scholar believes that corporate compliance reform is an act of confession, so they can be dealt with leniently in accordance with the leniency system for admitting guilt and accepting punishment.

Second, the relative non-prosecution mode has the problem of insufficient coercive power in urging companies to implement compliance programs. In practice, the people's procuratorates' decision on non-prosecution precedes the procuratorial suggestion about how to perform the compliance construction. In the case of falsely issuing special VAT invoices as mentioned above, the prosecutor issued a Procuratorial Proposal to urge the enterprise to improve the criminal compliance system after deciding not to prosecute the company. However, this mode of the non-prosecution decision first and the compliance evaluation later lacks a strong post-event supervision mechanism. Since Chinese procuratorial organs are short of the administrative power to punish enterprises, the only thing they can restrict the enterprises involved is the right to file a public prosecution. As is known to all, once the non-prosecution decision is made, it cannot be withdrawn, so if the people's procuratorates makes a non-prosecution decision in advance they will lose the possibility of criminally sanctioning the company involved in the criminal case before evaluation. What's worse, the deterrent force of the procuratorial recommendation issued by it is greatly reduced.

2.2 the conditional non-prosecution mode

Another mode in China is the conditional non-prosecution. At present, the conditional non-prosecution system is only applicable to juvenile cases in China's legislative practice. However, the conditional non-prosecution system gives people's procuratorates the chances to supervise enterprises to formulate and implement compliance rectification plans, which meets the practical needs of the non-prosecution system for the compliance. Therefore, some pilot units attempt to practice corporate compliance reform in this mode. Under this mode, the people's procuratorates provide the enterprise a certain compliance evaluation and inspection period, and decide to prosecute or not to prosecute based on the comprehensive performance of the enterprise during the period. In practice, this mode has the following characteristics:

First, set a compliance inspection period to supervise and evaluate the effectiveness of the corporate compliance. Under the conditional non-prosecution mode, prosecutors require companies to submit compliance rectification plans, and evaluate it through the modes of self-regulation by prosecutors, entrusting administrative agencies to supervise, or entrusting third-party organizations to supervise, and will make a decision on non-prosecution based on the written materials submitted by the supervisor after the expiration of the compliance inspection period. For example, in an environmental pollution case in Zhangjiagang City, the people's procuratorates reviewed the written commitment submitted by the enterprise, entrusted the relevant administrative organ to evaluate the compliance rectification plan, formed an evaluation team composed of professionals from the Ministry of Ecology and Environment and other administrative departments to conduct compliance inspections, and finally held a hearing to decide whether or not to prosecute based on the company's compliance performance. Under this mode, the only way an enterprise can get rid of the fate of being prosecuted is to achieve the expected goal of compliance transformation during the compliance inspection period. This program design not only uses non-prosecution decision as a bait to incentivize corporate compliance to reform, but also relies on the deterrent force of criminal sanctions to force companies to strictly formulate, improve, and comply with compliance plans within the statutory period.

Second, the inspection period is generally short. Since the enterprise compliance non-prosecution system is currently in the stage of judicial reform and lacks the authorization of the authority, the pilot units should try their best to stay within the scope of the law when exploring the reform. Even if the people's procuratorates choose the conditional non-prosecution mode, they can only put the process into the existing case-handling procedures. According to Chinese law, the maximum period for handling a case by the people's procuratorates is not more than six and a half months, and the time limit set by the procuratorate in practice is mostly about three months. For example, in Case 1 and Case 4 of the first batch of typical cases released by the Chinese Supreme people's procuratorate, the time it took the people's procuratorate 4 months and 3 months respectively from examination for prosecution to making a decision whether to prosecute. However, the above inspection periods are aimed at small and micro enterprises. If they encounter large private enterprises or enterprises with complicated circumstance, it will be difficult for them to make a compliance rectification plan which penetrate into the fundamentals of the enterprise, and it will make the compliance inspection become a mere formality.

To sum up, in practice, pilot units mostly adopt the above two modes of non-prosecution, each of which has its own characteristics and shortcomings. It is also worth noting that both of them are combined with the leniency system of admitting guilt and accepting punishment in practice. For example, in the special value-added tax invoice case of a police equipment company in Wuxi, the company involved in the case pleaded guilty and accepted punishment and signed the "Agreement of Guilty and Punishment". Whether it is necessary to combine the leniency system of plead guilty and accept punishment with the compliance non-prosecution system is also worth further discussion.

3. Mode selection of the compliance non-prosecution system

In response to the problems arising from the compliance non-prosecution system in practice, scholars have proposed various institutional solutions. Some scholars have pointed out that the rules of relative non-prosecution and conditional non-prosecution can be modified within the framework of the leniency system of admitting guilt and accepting punishment. Some scholars believe that the conditional non-prosecution system can be improved on the basis of the leniency system. Some scholars suggest to directly expand the applicable object of conditional non-prosecution in Chinese legislative practice to enterprises. The way to understand whether these different system designs can perfectly fit the practice of Chinese compliance non-prosecution system is to consider whether the leniency system for admitting guilt and accepting punishment can be combined with the compliance non-prosecution system, and whether the relative non-prosecution and conditional non-prosecution mode can satisfy practice needs.

The leniency system for guilty plea and punishment is not suitable to be combined with the compliance non-prosecution system. Because it is different from the compliance non-prosecution system in terms of purposes of the system, applicable objects, so it cannot be perfectly integrated with the latter. For example, the leniency system was created to solve the problem of the shortage of judicial resources, emphasizing the value of efficiency; the non-prosecution system for compliance requires the people's procuratorates to equally protect the legitimate rights and interests of private enterprises in accordance with the law, and requires the people's procuratorates to consume considerable resources to examine the effectiveness of corporate compliance reform. For another example, the leniency system is not only applicable to units, but also to natural persons; however, criminal compliance aims at the transformation of enterprises, so it is only applicable to enterprises. In the case of them pursuing different value orientations, if the two are forced to run on the same track, it will confuse the people's procuratorates when they face the tough choices between efficiency and enterprises protection. In addition, the reason why companies spend a great deal of money and resources on compliance reform is that they desire to obtain a clean criminal record and restore their damaged reputation. Under the application of the leniency system for admitting guilt and accepting punishment, the enterprise signs the "Recrimination of Guilty and Punishment", and the affidavit becomes a disguised proof of the enterprise's crime, which will lead to the company's slack in choosing the compliance non-prosecution system.

There are also contradictions between relative non-prosecution system and the compliance non-prosecution system. For the purpose of application, the relative non-prosecution system emphasizes judicial efficiency, while the aim of the corporate compliance non-prosecution system is to prevent the re-offending. In terms of applicable conditions, the compliance non-prosecution system doesn't take criminal penalties into account but consider the possibility of successful enterprise transformation and crime prevention. However, The relative non-prosecution system is limited by the requirements of minor crime, which will greatly reduce the scope of the compliance non-prosecution system. To make things worse, if the applicable object is limited to the enterprises involved in the case with minor circumstances, the enterprise will lack the incentive to adopt a relatively time-consuming and labor-intensive compliance plan, due to admitting guilt, accepting punishment and reaching a settlement with the victim also achieving the effect of the non-prosecution. In addition, in practice, the procuratorate also is afraid of making a relative non-prosecution decision because once the decision of relative non-prosecution is made, it cannot be remedied. According to the data of a district procuratorate in Baoji City, the relative non-prosecution rate of the court in 2020 is only 14.06%. Under the circumstance that the widespread implementation of the non-prosecution system is relatively difficult, adding the conditions for corporate compliance to the system will make the promotion of the non-prosecution system more difficult.

The conditional non-prosecution system is similar in concept to the criminal compliance system and has successful experience, so it is more suitable to be constructed as a model of the compliance non-prosecution system. In terms of concept, both conditional non-prosecution and corporate compliance non-prosecution systems emphasize special prevention, and both aim to help the target

object return to society smoothly. Some scholars have stated that the conditional non-prosecution for minors is due to the particularity of juveniles, whose ability to recognize and control crimes is insufficient, and they can be educated and improved by being supervised and inspected. Similarly, the non-prosecution system for the compliance is also out of special protection for enterprises. Because the criminal will of the enterprise is expressed through the internal organizational structure of the enterprise, it is accessible to change the criminal tendency and prevent the second crime of the enterprise through in-depth investigation and correction of the internal organizational structure of the enterprise. At the same time, the conditional non-prosecution system has been implemented rapidly in practice. The relative non prosecution system appeared 16 years earlier than the conditional non prosecution system in China, but among the non-prosecution modes, relative non-prosecution accounts for 59% while the conditional non-prosecution also accounts for 36% according to the "White Paper on Juvenile Prosecution Work (2020)" issued by the Supreme people's procuratorate. In 2020 the people's procuratorates will take various measures against juvenile criminal suspects. Moreover, the rate of conditional non-prosecution of juvenile crimes by prosecutors has increased year by year, from 8% in 2016 to 20.87% in 2020.

Due to the two systems pursuing the same value goal, adopting the conditional non-prosecution mode can maximize the advantages of the corporate compliance non-prosecution system. However, at present, Chinese conditional non-prosecution system is only applicable to juvenile cases. There is no legislative basis for enterprises to apply conditional non-prosecution. Apart from that, there are differences between minors and enterprises, so it is not appropriate to apply the systems designed for minors to enterprises without change. Therefore, even if the framework of the conditional non-prosecution system should be applied, the specific systems such as the applicable objects, applicable conditions, and compliance assessment and inspection procedures of it must be modified and re-designed accordingly.

4. Applicable objects of the compliance non-prosecution system

4.1 For enterprise

For many reasons, the compliance non-prosecution system is only applicable to enterprises. First, entrepreneurs do not enjoy the legitimacy of being convicted. One of the goals of the compliance non-prosecution system is to protect the survival and development of enterprises and stabilize the economy. However, special protection for entrepreneurs, especially for entrepreneurs of large enterprises, cannot achieve the above goals. In the event that the United States sanctioned ZTE, ZTE was required to reorganize its board of directors, and up to 14 directors left, but the company can still operate normally under this circumstance. Therefore, the top management of the company has little influence on the survival of large enterprises, that is, it has little influence on economic development. In addition, businesses can be rectified for compliance, but entrepreneurs cannot. Enterprises can prevent re-offending by establishing a compliance mechanism capable of identifying and controlling risks, but an objective prevention mechanism cannot be set on natural persons. Persons can only rely on the subjective control. Moreover, the view that enterprises can change the criminal will by changing the organizational structure is gradually recognized. At present, Chinese scholars are discussing the theory about using the organizational characteristics of the enterprise itself to determine the subjective aspect of the crime of the enterprise,. And there are also examples for the theory. In the case of Nestlé employees illegally obtaining citizens' personal information, the judge stated that if the company's policies, codes of conduct and other materials are sufficient to prove that the company prohibits a certain criminal act, the suspects' subjective will be separate with the subjective will of the enterprise.

After determining that the applicable object of the compliance non-prosecution system is the enterprise, it is necessary to further consider that large enterprises are more suitable as the applicable object. First, the social and public interests maintained by large and medium-sized enterprises are far greater than those maintained by small and micro enterprises. Large enterprises have far-reaching

influence on their industries, both in terms of employment creation and technological R&D and innovation capabilities. Second, only large and medium-sized enterprises can truly accomplish the goal of compliance rectification. The enterprise classification standards in China are based on the characteristics of the industry and are determined by employees and total assets. Small and micro enterprises generally have few employees and low operating income. In this case, for one thing, small and micro enterprises do not have enough scale to establish institutions that restrict each other, so as to get rid of the control of entrepreneurs. For another small and micro enterprises have no motivation to build a compliance mechanism. In addition to external pressures, large and medium-sized enterprises also have their own needs to establish compliance to improve their own structures. However, for small and micro enterprises, survival is their primary goal, so such enterprises lack the motivation and ability to build and adhere to compliance plans. However, considering that the raging epidemic has caused a huge impact on the economy, the role of small and micro enterprises in people's livelihood, employment and social stability cannot be ignored and it should be properly protected. However, the special protection for small and micro enterprises is based on the special needs of the current special environment, so this protection can be used as a policy, and it is not suitable to be incorporated into legislation as a long-term measure. In addition, due to the simple structure and limited capabilities of small and micro enterprises, the formal requirements for compliance of small and micro enterprises should be relaxed.

4.2 For all kinds of crime

Different scholars have different answers to whether companies involved in serious crimes can be compliant and not be prosecuted. Some scholars believe that the entity's conditional non-prosecution is essentially "conditional relative non-prosecution", so the penalty conditions should be the fixed-term imprisonment of less than three years in accordance with the requirements of relative non-prosecution in Chinese law. Some scholars believe that compliance non-prosecution system is called compliance non-prosecution system, so it is different from ordinary non-prosecution. Since there is a difference, it needn't be limited to the application of misdemeanors. There are also scholars who believe that whether to apply a felony case depending on whether the enterprise's crime is a systematic or non-systematic unit crime. For the former, a felony case cannot be applied to compliance with non-prosecution. In early practice, people's procuratorates mostly limited cases to minor cases. For example, the Ningbo Municipal Procuratorate stipulates that the scope of application of the case is corporate crime cases in which the directly responsible personnel of the enterprise should be sentenced to fixed-term imprisonment of less than 3 years according to law. But with the continuous deepening of the pilot practice, the scope of application began to explore felonies.

As long as the criminal act really comes from the will of the unit, then no matter what form of crime the enterprise commits, and to what extent the crime is committed, it should be allowed to apply the compliance non-prosecution system. The criminal responsibility capacity of an enterprise is special. Its cognitive capacity and willpower are manifested through pre-system design and subsequent mechanical operation, and its social harm can also be weakened or even eliminated through post-event system reform. As long as an enterprise voluntarily undergoes compliance transformation and has the practical foundation and capability for compliance transformation, it can basically successfully return to society. Therefore, the modifiability of a business has little to do with the severity of the crime committed by the business. Limiting the compliance non-prosecution system to misdemeanors is not conducive to maximizing the effect of the corporate compliance non-prosecution system.

In addition, from the perspective of incentivizing enterprises, if the application is limited to petty crimes, it is difficult to stimulating enterprises to build or improve compliance programs. After all, when the circumstances of the case are minor, the enterprise can adopt the leniency system of admitting guilt and accepting punishment, and the criminal reconciliation system to achieve the purpose of reducing or even exempting the penalty, without having to spend a lot of money and

energy to cooperate with the compliance inspection. Compliance inspections are expensive and time-consuming, and are not the preferred choice for enterprises who face the threat of criminal sanctions. If enterprises are lazy in choosing the compliance non-prosecution system, it will be difficult to implement the system smoothly. Expanding the applicable object of the system to serious crime cases, compliance becomes the only solution for enterprises to get rid of criminal risks, which will greatly improve the application rate of the compliance system in practice.

5. Applicable conditions of the compliance non-prosecution system

In order to maximize the compliance advantages, the companies involved should be screened. Enterprises applying the compliance non-prosecution system shall meet the following requirements. The first is public welfare. The reason for the criminal compliance system is to protect private enterprises and safeguard social public interests, which requires enterprises to be worthy of protection. The second is the coordination requirements. The voluntary cooperation of enterprises with the compliance inspection of the people's procuratorates is the basis for the successful implementation of the compliance system. The third is the requirement of modifiability. If the enterprise only has subjective enthusiasm, but does not have the objective possibility of completing the compliance plan and achieving the compliance goal, it should not be included in the scope of compliance inspection.

5.1 conforming to the social public interest

The non-prosecution system is the practice of prosecutors to participate in social governance, requiring prosecutors to safeguard social and public interests. Therefore, the procuratorate should consider that the activation of the system is indeed for the public interest when initiating compliance. The public interest itself has different connotations. Some scholars have pointed out that "in general cases, the 'public interest' considerations include at least: the seriousness of the crime, the circumstances of the crime, the victim and related damage, the impact of the case on the society, the appropriateness of prosecution, the source of the case information and the relevant damages. "However, the crime, the circumstances of the crime, the victim and the related damage here are the social harm of the criminal subject, and can be considered as a factor in whether to mitigate or exempt from punishment, that is, as a factor in deciding whether to prosecute. But it should not be considered as a requirements for entry. After all, the label of corporate compliance and non-prosecution is "saving the life of the company", so it is more appropriate to adopt the method of lenient entry and strict exit to give enterprises as many opportunities as possible. However, in practice, there are pilot units that incorporate criminal circumstances into the applicable conditions. For example, in one of the first batch of typical cases of the Supreme people's procuratorates, the procuratorial authority used the fact that the amount of sewage discharged by the enterprise was small and had not caused substantial harm as the reason for not prosecuting.

In addition, the positive benefits that the surviving and development of the companies involved can bring to the entire society are also considered within the scope of social welfare. For example, the company can provide huge tax revenue for the country, provide strong support for people's livelihood and employment, have a positive impact on industrial technological innovation, or can supply operating materials under epidemic conditions. Obviously, companies that can create greater social value are more necessary to be exempted, and they can play a better role in safeguarding social interests. Prosecutors should consider how much value the enterprise can maintain by not prosecuting before deciding to enable non-prosecution.

Considering the social harm of corporate crime is to focus on the past mistakes of the company, but the reason for the emergence of the compliance non-prosecution system is that the society has begun to consider the future benefits of non-prosecution against companies , preventing crimes and not harming the market . Therefore, when considering which cases should be included in the scope of the compliance non-prosecution system, more consideration should be given to the expected

benefits in the future, that is, whether the enterprise can bring higher social and public interests to the society and the country after future rectification.

5.2 pleading guilty and accepting punishment

The premise of realizing the due effect of enterprise compliance is that the initiation of compliance is subject to the prior consent of the enterprise. The corporate compliance plan is made after deeply digging out the internal structure of the company that is prone to illegal and criminal activities. If the company covering up, it will be difficult to penetrate the root cause of the company and fundamentally rectify it. At the same time, the enterprise is the main body of the implementation of the compliance plan. If the enterprise delays or even fails to implement the compliance plan, the compliance plan will only be abandoned and cannot be integrated into the bones and blood of the enterprise, no matter how perfect it is. Therefore, in order to effectively carry out corporate compliance plan, it must be initiated on the basis of the company's commitment to building, improving and implementing compliance plans in accordance with regulations. The cooperation condition is a necessary element for the initiation of the compliance non-prosecution system, the basis for digging out the root of the enterprise's problems, and the guarantee for the enterprise to consciously implement the compliance plan in the future.

From practical experience, a commitment to establish or improve a compliance plan is a generally an entry condition for corporate compliance. The Guiding Opinions for the system in China clearly point out that the application of the Guiding Opinions requires enterprises to undertake to establish or improve their compliance systems. In practice, pilot units often use this as a reason to start compliance inspections. Judging from extraterritorial experience, other countries also require the consent of the enterprise before conducting enterprise compliance. In the Anglo-American Deferred Prosecution Agreement system, companies express their willingness to actively cooperate by reaching agreements with prosecutors.

So, does China also use the method of agreement to express consensus? Some scholars have pointed out that due to the different nature of prosecutorial power in the United States and China, China should not adopt extraterritorial deferred prosecution agreements. The procuratorial power in China is a legal supervision power. Due to supervision is a single activity, the people's procuratorates cannot compromise and reach an agreement with the enterprise. Based on this, China should adopt other ways to express the willingness of enterprises to actively cooperate with compliance transformation. The leniency system for admitting guilt and accepting punishment is a negotiation system between prosecutors and criminal suspects and defendants in my country, which can replace the process of signing compliance agreements between prosecutors and enterprises. The enterprises involved can plead guilty and accept punishment and submit a compliance commitment letter, declaring that they voluntarily accept compliance inspections, undertake to build or improve a compliance plan, and consciously implement the compliance plan, indicating that they have the subjective voluntary nature of compliance transformation.

5.3 being possible to transform successfully

The non-prosecution system for compliance requires the actual effect of preventing crimes and safeguarding higher social interests. Therefore, if an enterprise only has the subjective will but is objectively unable to complete the compliance plan, it is still improperly included in the compliance inspection. To examine whether an enterprise has objective modifiability, we can start from two aspects: one part is whether the enterprise has the ability to formulate and improve the compliance plan; the other is the possibility of the enterprise implementing the compliance plan for a long time.

Only when an enterprise has a basic compliance plan or has preliminary actions to formulate a compliance plan can it show that it can formulate or improve a compliance plan and has the possibility of compliance transformation. An effective compliance program is not built overnight but requires targeted design by experts in specialized fields. An effective compliance plan is the one which could prevent illegal and criminal acts successfully. In order to achieve this goal, it not only requires the

designer to have sufficient knowledge of enterprise operation and management, but also be involved in professional fields such as environment, finance, finance and taxation. Even if the designer is competent in the formulation of the compliance program, the enterprise may not have sufficient financial resources to attract the designer to accept the work. Therefore, companies with pre-existing basic compliance plans only need to make targeted repairs, and their chances of successful compliance transformation are much higher than those of companies that have never set foot in the field of compliance. If the enterprise has not yet formulated a compliance plan, it should formulate a rough compliance plan first, listing its preparations for the formulation of the compliance plan, and proving that it's possible to formulate an effective compliance plan.

Even with a perfect compliance program, a compliance transformation cannot be successful if a business does not implement it rigorously. Assessing a company's ability to implement a compliance program over time requires examining its consistent behavior. Of course, from the perspective of protecting the enterprise, the compliance non-prosecution system should expand the applicable conditions for enterprise compliance as much as possible, and should not deprive the enterprise of its qualifications for rehabilitating because of its bad behavior history. But a company's poor historical behavior undermines the credibility of its compliance commitments, potentially increasing judicial costs. Judging from extraterritorial experience, the British "Deferred Prosecution Agreements Code of Practise" also stipulates that when the procuratorate considers whether to initiate a public prosecution, it should consider whether the company has a criminal, civil or administrative supervision record, or whether it has been warned or sanctioned. The historical behavior of failing to take appropriate action to prevent the behavior from recurring after a criminal indictment. When the enterprise has the above bad historical behavior, the prosecutor should make a decision after weighing the social public interest behind the enterprise and the possibility of the enterprise's successful transformation with discretion.

6. Compliance evaluation procedure of enterprises involved in the criminal case

The evaluation and inspection of the compliance non-prosecution system means the main body of the evaluation and inspection evaluates and inspects the entire process of enterprise rectification and formulates the procedures of submitting a compliance inspection report to the prosecutor for review. In order to maximize the effect of the compliance non-prosecution system, effective evaluation and inspection procedures should be formulated, and the subject of evaluation and inspection, the content and method of evaluation and inspection, and the time of evaluation and inspection should be established.

6.1 the subject that responsible for the compliance evaluation

At present, there are three modes of reform pilots: the self-regulation mode of the procuratorate, the mode of entrusting the supervision of administrative organs, and the mode of entrusting independent supervisors to assist in China. Among them, there are unavoidable defects in the self-regulation mode of prosecutors and the mode of entrusting administrative agencies to supervise. Prosecutors lack professional knowledge in corporate management, and have insufficient understanding of accounting, taxation and other specialized fields; administrative organs have insufficient knowledge in criminal matters, which weakens the effect of corporate compliance in "criminal". Professionals such as lawyers, accountants, and tax accountants can not only penetrate into the internal business structure of the enterprise, but also detect criminal problems in a timely manner. So they are most suitable for forming a third-party supervision organization.

Despite the existence of third-party organizations, prosecutors also have legal oversight responsibilities. At present, the people's procuratorates are not required to directly participate in the evaluation and inspection. In the "Measures for Compliance Construction, Evaluation and Review of Enterprises Involved (Trial)", prosecutors only need to review the evaluation process and conclusions of third-party organizations after the compliance inspection report is submitted. However, it is

necessary for the people's procuratorates to directly participate in the evaluation and inspection, which can find out the problems of lack of breadth and depth of compliance in criminal matters, and can also reduce the risk of collusion between third-party organizations and enterprises. Although the pilot units mostly adopt the mode of written review in practice, there are also cases where prosecutors take the initiative to perform their supervisory duties. For example, in a case in Yinan County, Shandong Province, the prosecutor went deep into the enterprise, spot-checked the bidding projects, and directly monitored the compliance and rectification of the enterprise. Only by fully performing the functions of legal supervision can prosecutors maximize the advantages of the compliance non-prosecution system.

6.2 the content and method of the compliance evaluation

There are three keys to the successful transformation of an enterprise: firstly, the enterprise has formulated and improved an effective compliance plan; secondly, the enterprise has implemented the compliance plan conscientiously, and the compliance plan has been effectively implemented; thirdly, the successful results of compliance transformation has emerged, such as the risk of the crime has been prevented, a culture of compliance has become commonplace. The above is the focus of the evaluation and inspection by independent supervisors and people's procuratorates in the compliance non-prosecution system.

First of all, it is necessary to ensure that the compliance plan formulated and improved by the enterprise is reasonable and effective. The basic components of a compliance plan include incorporating compliance clauses into the company's articles of association, establishing a special compliance plan for criminal issues, establishing an independent, authoritative compliance organization with sufficient resources, and establishing a compliance review and inspection reporting system. In short, the plan at least meets the requirements of special rectification and basic ability to identify and deal with risks.

In addition, the compliance plan needs to be actually implemented in the business management process of the enterprise. It can be verified whether the company has invested enough resources in practice by reviewing the written materials such as the list of personnel and financial budget of the compliance management agency submitted by the company, by visiting the workplace of relevant organizations, and asking the staff of such agencies about the work content. Establish and maintain the necessary organizational systems.

Finally, the assessment and inspection body should examine the actual effect of the compliance program. In this regard, the appropriate method can be selected according to the case. For example, in cases of accepting bribes, interviews can be conducted to investigate employees' attitudes toward bribery. For smuggling, bidding and other cases, random inspections can be conducted. If necessary, it is even possible to observe the company's response by attending the board of directors and simulating the recurrence of the risks involved in the case.

6.3 duration of the compliance evaluation

The period of rectification and inspection also affects the final effect of non-prosecution. If the inspection period is too short, the effect of the system will be weakened, and if the inspection period is too long, judicial resources will be strained, so it should be limited within a reasonable range. According to the size of the company and the complexity of the case, it is advisable to flexibly choose the inspection period of 1 to 3 years. In practice, the inspection period used is relatively short. The first reason is that most of the current compliance cases in China is about small and micro enterprises with simple structures, so sometimes the people's procuratorates even shorten the already-determined inspection period in practice. Second, it is subject to the time limit for handling the case, which is difficult to exceed six and a half months for the evaluation and investigation. When the company involved in a criminal procedure is a large private enterprise, the compliance risk points involved and the construction of the compliance management system are complex, compliance rectification cannot be completed only by the time limit for handling the case. In practice, some large companies are given

a one-year period for compliance and rectification and a one-year return visit period, which takes two years in total. Because small and micro enterprises are not the target of compliance and non-prosecution, and large and medium-sized enterprises should be the key force to demonstrate the advantages of the system, it is more appropriate to stipulate 1 to 3 years for the inspection period to meet the needs of large and medium-sized enterprises. And according to the size of the enterprise and the complexity of the case, the people's procuratorates can flexibly set the time.

7. Conclusion

Most of the pilot units adopt the relative non-prosecution mode or the conditional non-prosecution mode within the existing legal framework, but the existing legal system cannot perfectly fit the compliance non-prosecution system. In order to make full use of the corporate compliance system to optimize the business environment and protect private enterprises, we should ensure the extensiveness and effectiveness of the compliance. Therefore, the system should not only maximize the scope of application of the system on the basis of ensuring that the enterprise has the necessity of being transformed and the possibility of success, but a set of effective evaluation procedures should be set up. Of course, the compliance non-prosecution reform was born in practice, and the effectiveness of its system also needs to be tested by practice in China.

References

- [1] Sun Guoxiang. Criminal policy transformation of unit crime and enterprise compliance reform [J]. Journal of Shanghai University of political science and Law (on the rule of law) , 2021, 36(06): 21-38.
- [2] Li Yong. Legislative suggestions on conditional non prosecution of enterprises [J]. Chinese Journal of criminal law, 2021 (02): 127-143.
- [3] Zhao Heng. Research on the leniency system of guilty confession and punishment of enterprises involved in crime [J]. Law, 2020 (04): 122-134.
- [4] Li Yong. Legislative suggestions on conditional non prosecution of enterprises [J]. Chinese Journal of criminal law, 2021 (02): 127-143.
- [5] Liu Shaojun. The possibility and limit of the localization of the enterprise compliance non prosecution system [J]. Journal of law, 2021, 42 (01): 51-65.
- [6] Shi Yanan. Discussion on the theory of conditional non prosecution of unit criminal cases and corporate governance [J]. Chinese Journal of criminal law, 2020 (03): 51-62.
- [7] Li Yuhua. Applicable objects of the non prosecution system for enterprise compliance [J]. Law forum, 2021, 36 (06): 21-30.
- [8] Li Yong. Legislative suggestions on conditional non prosecution of enterprises [J]. Chinese Journal of criminal law, 2021 (02): 127-143.
- [9] Li Yuhua. Applicable objects of the non prosecution system for enterprise compliance [J]. Law forum, 2021, 36 (06): 21-30.
- [10] Chen Ruihua. Eight controversial issues of enterprise compliance non prosecution reform [J]. China law review, 2021 (04): 1-29.
- [11] Li Fenfei. On the applicable conditions of enterprise compliance inspection [J]. Law forum, 2021, 36 (06): 31-43.
- [12] Shi Yanan. Discussion on the theory of conditional non prosecution of unit criminal cases and corporate governance [J]. Chinese Journal of criminal law, 2020 (03): 51-62.
- [13] Ma Mingliang. On enterprise compliance supervision system: from the perspective of independent supervisors [J]. China Criminal Journal, 2021 (01): 131-144.
- [14] Chen Ruihua. Deferred prosecution agreement system from the perspective of enterprise compliance [J]. Comparative research, 2020 (01): 1-18.