

The Study on China's Criminal Compliance Review of Multinational Corporations

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Abstract. The current criminal compliance system in China is constantly forming and developing in theory and practice. At the same time, in the context of economic globalization, the influence of multinational companies on the national and even world economy is expanding. It is important and urgent to conduct criminal compliance review on them. In this paper, the author will use legal normative analysis to study the issue of criminal compliance review of multinational corporations in China. Although the overall development of the criminal compliance system is good, there are still more problems compared with the operation characteristics of multinational companies and the criminal compliance system in foreign countries. These problems are mainly manifested in the lack of internal motivation for corporate criminal compliance, the perfection of supporting legal system, and the poor articulation when the system is introduced. The reasons behind this are the inherent profit-seeking nature within the enterprises themselves and the influence of the non-uniform international standards on compliance effectiveness. Based on this, China should gradually build up a criminal compliance system with Chinese characteristics by promoting joint participation of the state and enterprises, establishing an effective criminal incentive mechanism, and drawing on the application of the non-prosecution system for compliance.

Keywords: criminal compliance; corporate compliance; multinational corporation.

1. Introduction

A criminal compliance system is a self-optimizing, self-monitoring and supervisory mechanism for companies to prevent crimes committed by themselves and their employees and to respond effectively afterwards [1]. With the development of economic globalization, the worldwide economic and trade exchanges are increasing. There are more and more multinational companies entering China, and there are also many Chinese companies listed or operating outside China. In recent years, with the emergence of ZTE and Huawei facing long-arm jurisdiction and overseas criminal investigations and charges, the corporate criminal compliance system in China has attracted more and more attention from the legal theory and practice community. Better compliance with the laws of the countries and regions in which they operate and avoiding the criminal risks that multinational companies may encounter in their operations have become issues that every multinational company must consider [2]. At present, some scholars believe that the current corporate compliance system in China is mainly an administrative compliance system, and further exploration is needed in the criminal compliance system [3]. There is a breakthrough of the current law in the judicial practice of criminal compliance. Some scholars also point out that the current academic research on the theory of criminal compliance is not practical enough and cannot be well applied to the practice of judicial reform [4]. Based on the actual situation in China, the general direction of China's criminal compliance review of multinational corporations is to learn from the advanced experience of criminal compliance in foreign countries and to reconstruct it locally [5].

This paper will first give a general description of the current situation of the development of China's criminal compliance system and point out the problems currently faced by China's criminal compliance system. After that, it will further analyze the internal and external reasons for the inadequacy of the criminal compliance system of multinational corporations and the necessity of criminal compliance review for multinational corporations. Finally, the paper will propose a feasible

way to build a criminal compliance system with Chinese characteristics from three aspects including enterprises themselves, legislative regulation and judicial practice.

2. The Current Situation and the Need for a Criminal Compliance System in China

2.1 The Current Development of Criminal Compliance in China

At present, with the promulgation of guidelines and relevant documents to the piloting of judicial practice, the construction and development of China's criminal compliance system is in a stage of continuous exploration. President Xi Jinping pointed out the need to strengthen the construction of a compliance system for enterprises' overseas business practices, and to gradually form a regulatory system mechanism with clear authority and responsibility, a combination of devolution and management, regulation and order, and strong risk control. This clearly defines the importance of corporate compliance. The State has successively issued several regulatory documents such as *the Compliance Management System Guidelines*, *the Guidelines on Compliance Management of Enterprises' Overseas Operations (Draft for Comments)*, and *the Guidelines on Compliance Management of Central Enterprises (for Trial Implementation)*. The National Enterprise Compliance Committee was also established under the promotion of the China Council for the Promotion of International Trade [6]. In terms of judicial practice, in March 2020, the State selected six people's procuratorates, including the Bao'an District People's Procuratorate in Shenzhen, the Nanshan District People's Procuratorate, the Jinshan District People's Procuratorate in Shanghai and the Pudong New Area Procuratorate, to carry out pilot work on corporate compliance non-prosecution reform. The procuratorate may order the enterprises involved in the case, which have the will to establish a compliance system, to propose a special compliance plan for the facts of the offence and urge them to promote the construction of a corporate compliance management system. If the enterprise passes the assessment of the effectiveness of the compliance plan after the test period established, the procuratorial authorities can decide of relative non-prosecution [7]. *The Guidance on the Establishment of a Third-Party Supervision and Assessment Mechanism for Compliance of Enterprises Involved in Criminal Cases (for Trial Implementation)* introduces a third-party supervision and management model to criminal compliance. The third-party organisation will assess the completion of the compliance plan of the company involved in the case at the end of the compliance inspection period and issue a written report on the compliance inspection. Based on the report, the procuratorate shall decide whether to approve the arrest, whether to prosecute and whether to change the coercive measures and make sentencing recommendations or procuratorial suggestions or procuratorial opinions. The pilot was extended to more than 100 people's procuratorates nationwide in March 2021 and the State issued several typical cases of corporate compliance without prosecution as guidelines for judicial practice.

2.2 Shortcomings of the Current Chinese Criminal Compliance System

China's corporate criminal compliance system started late and has insufficient endogenous dynamics. Previously, corporate compliance was mainly focused on the civil and administrative fields, and the types of liability involved were mainly civil and administrative liability. The awareness of criminal liability of enterprises was still mainly in the area of ex-post punishment after a corporate crime. There is a large gap between this and foreign criminal compliance systems that focus on the prevention of corporate criminal offences beforehand. A large part of the formation and development of China's corporate criminal compliance system has been borrowed and introduced from abroad or developed passively as a result of the long-arm jurisdiction of Chinese enterprises. As a result, China's corporate criminal compliance system has not evolved from a local, step-by-step approach. This can lead to a lack of understanding and heartfelt recognition of the criminal compliance system and a lack of integration of criminal compliance into the corporate culture. The awareness of criminal

compliance among core management and employees at all levels is weak, and the initiative to undertake criminal compliance is weak. Most companies only have a corporate criminal compliance programme because of mandatory state pressure, which is not well implemented and is superficial. The lack of an in-house criminal compliance culture and system, as in the US, UK and France, makes the endogenous dynamics of China's criminal compliance system significantly insufficient.

Insufficient support from external legal norms for China's criminal compliance system. When China undertook the development of its corporate criminal compliance system, it did not first regulate it from a legislative perspective but started with judicial practice to carry out pilot work. Therefore, there are no sound applicable legal norms in criminal law and criminal procedure law to accompany judicial practice. This can lead to the lack of a theoretical basis for an effective compliance scheme as a defence of innocence for businesses and the non-indictment of felonies affecting the application of discretionary sentencing circumstances in criminal compliance. It would also create a contradiction between the principle of statutory penalties and the validity of a compliance plan as a mitigating circumstance. Procuratorial authorities can only base their pilot work on the introduction of guidance and the issuance of typical cases, or the appropriate application of the original law as it existed, such as conditional non-prosecution and discretionary sentencing circumstances for corporate compliance non-prosecution. This lag in legislation and the lack of a normative level of law can also lead to a lack of legal basis and a lack of uniformity in the handling of cases by the prosecution authorities. This tends to result in different approaches to the same type of case at different levels. It also affects the fairness and impartiality of the judiciary and the long-term effectiveness of the corporate criminal compliance system.

The formation and development of China's criminal compliance system has not been fully integrated with China's actual national conditions, the mode of operation of enterprises and the business environment. The criminal compliance system is an imported product, and China can draw on the criminal compliance system for foreign companies, but it is important to note whether it is suitable for local application in China. For example, China's traditional unit criminal liability uses the principle of vicarious liability. Unit crime is a crime committed intentionally or negligently by a company, enterprise, institution, agency or group for the benefit of the unit or in the name of the unit, by the decision of the collective study of the unit or by the decision of the person in charge [8]. A further theory of organisational body responsibility has emerged in the development of corporate compliance in the extra-territorial context. This theory considers the unit to be a living organism with its own independent will. The liability of the unit does not depend on the acts and subjective faults of a natural person, and therefore also has an independent criminal intent and fault. The unit can be held criminally liable even if no natural person has committed the crime. There are also many similar problems with the application of extraterritorial theories in Chinese practice. Some Chinese scholars have advocated the direct introduction of the more mature criminal compliance system into China on a large scale, in order to build up a Chinese criminal compliance system as soon as possible. This kind of criminal compliance system, which is not locally adapted to the national context, is contrary to the law of institutional development. It is likely to result in a situation where the introduction is not well connected and cannot be reasonably applied in China.

3. Analysis of the Causes of and Need for Inadequate Criminal Compliance Systems in Multinational Companies

3.1 Cause Analysis

Enterprises themselves are profit-seeking. The enterprise itself is the subject of the corporate crime regulated by the criminal compliance of multinational corporations, and the fundamental purpose of business is to obtain profits. To improve the internal criminal compliance system of enterprises, it is necessary to establish a compliance department within the enterprise independent of other departments, and to have a chief compliance officer and employ professional compliance personnel. It must also be subject to regular monitoring and oversight by external third-party bodies. This

inevitably involves a significant investment of capital and manpower, creating certain compliance costs. Moreover, multinational companies often have offices or companies in multiple countries and regions, and the cost of their corporate criminal compliance systems can be even higher. In such circumstances, if the penalties for breaking the law are lower than the cost of setting up and implementing a corporate criminal compliance system, it cannot be ruled out that some companies will take a chance and take the risk of not establishing or implementing a corporate criminal compliance programme.

Standards for the effectiveness of corporate compliance programmes are not uniform across countries. As an enterprise engaged in international production and operations, multinational companies are involved in the day-to-day operations of multiple countries. These countries apply different criteria for assessing the effectiveness of corporate compliance programmes for the purpose of entering into deferred prosecution agreements, non-prosecution agreements or reviewing compliance programmes. Each country will have different criteria for assessing the effectiveness of its compliance programme depending on its own circumstances and legal system. For example, the US Federal Sentencing Guidelines mentioned above set out seven criteria for an effective compliance programme, the French Sabine II Act sets out seven criteria for an effective compliance programme and the UK Bribery Act Guidelines set out six principles of "due process" as criteria for an effective compliance programme [1]. It is not only different countries that set different standards, but several international organisations have also set their own requirements for corporate compliance. The International Organisation for Standardisation (ISO) has also established basic standards for effective compliance with the international legal document "Guidelines for Compliance Management Systems". The World Bank, the Basel Committee on Banking and others have also issued corresponding corporate compliance standards. These different standards for the effectiveness of compliance programmes did not cause too much disruption in the past, when countries did not trade frequently or when the subject of compliance was a company operating only in one country. However, in an increasingly globalised economy and with multinational companies as the subject of compliance, such different standards for the effectiveness of compliance programmes can result in companies being unable to ensure that their compliance programmes are deemed to be effective in different countries and internationally. The costly development and implementation of compliance programmes can lead to a loss of effectiveness and risk avoidance, leading to a growing shortage of criminal compliance for multinational companies.

3.2 The Need for Criminal Compliance for Multinational Companies

Multinational corporations and their operations are naturally international in nature, subject to regulation and jurisdiction at the host and home country or even international level, and the business risks they face are also global in nature. The nature of a multinational company's operations requires it to establish a criminal compliance programme that can adapt to the regulatory and jurisdictional standards of different countries in order to avoid the various risks encountered in its operations and business. In the context of globalization, the scope of application of the criminal compliance regime is no longer limited to a particular country and region but is a regime that involves a wide range of countries and enterprises, such as *The Anti-Foreign Corrupt Practices Act*, Section 404 of the Sarbanes-Oxley Act, enacted in the United States, which has extraterritorial effects and forms a long-arm jurisdiction regime. In 2018, ZTE Corporation became a key target of extraterritorial countries and was sanctioned in the United States, causing huge losses. Therefore, China should further improve the criminal compliance review of multinational companies and gradually develop a criminal compliance system with localised characteristics and in line with the world. This is conducive to improving the internal control mechanisms of Chinese enterprises and responding to extraterritorial jurisdiction. From another perspective, if there is no criminal compliance system, enterprises that cause bad social impact will usually only bear civil or administrative liability, which will lead to low cost of violation for many enterprises and is not conducive to regulating their behavior.

If a company is criminally prosecuted, its reputation will be severely damaged, its business activities will be basically at a standstill, and it may be frozen and have its property and equity seized, which will often be a devastating blow to the company [9]. Criminal compliance for multinational companies facilitates the prevention of corporate crime from the source in advance. The risk of corporate crime can be identified at an early stage, reported and dealt with in a timely manner to avoid corporate criminal liability. An effective compliance programme for multinational companies can also serve as a basis for non-prosecution or as a condition for mitigating penalties. This is conducive to enabling multinational companies to operate in a more regulated manner in the context of globalisation, as well as creating a good business environment worldwide.

The current economic globalization continues to develop and the risks arising from it are also global. If a criminal offence occurs in a multinational company, the judicial authorities will need to conduct investigations and collect information on a global scale and will encounter many legal obstacles [10]. If a multinational enterprise has established a comprehensive criminal compliance system, the compliance department will be the first to grasp the evidence and defences that can be used when the enterprise commits a crime. This will help to save judicial resources and improve judicial efficiency by providing accurate evidence when a multinational company is involved in a criminal investigation.

4. The Path to Building a Criminal Compliance System with Chinese Characteristics

Understanding and learning from extraterritorial criminal compliance systems is a must for China's criminal compliance exploration. As a representative country in the development of corporate compliance, China should focus on studying the United States. However, when learning from the advanced aspects of their policies and measures, attention should also be paid to the reasonable transplantation and conversion according to the actual situation in China.

4.1 State and Business Cooperation in Governance

The U.S. Federal Sentencing Guidelines define a "corporate compliance program" as "an internal control mechanism for preventing, detecting, and deterring corporate criminal violations" [5], reflecting the fact that corporations themselves are the main actors in the corporate crimes regulated by criminal compliance. If the root cause of crime reduction is to be achieved, the focus should be on the companies themselves. The state should stimulate the endogenous motivation of enterprises to take the initiative to improve the criminal compliance system within the enterprise. A model of cooperation between the state and enterprises should be established, in which prevention is strengthened beforehand and punishment is improved afterwards, internal control by enterprises is combined with external legal regulation by the state, and the responsibility of the state is shared with that of enterprises [11].

Firstly, China should provide guidance for corporate criminal compliance at the normative level, indicating the direction or building certain standards for different types of enterprises in different industries to carry out corporate criminal compliance, so that there is a basis and reference for corporate criminal compliance. For example, under France's Sabine II Act, companies that meet the conditions of employing more than 500 people and having a turnover of more than €100 million should establish a compliance system [12]. China should also have differentiated regulations depending on the size of the company, the business orientation of the different departments and the level of criminal risk involved. The authorities should be careful not to turn corporate compliance programmes into a burden on business operations. Corporate information disclosed as a result of a compliance review should be prevented from being used to attack a business, and the normal operation of a business should not be affected by the verification of the effectiveness of corporate compliance and the acceptance of third-party oversight [1]. For example, Arthur Andersen & Co. was required to disclose non-compliant information in accordance with its compliance plan during the review, which resulted in many client

losses, business interruptions and eventual closure. The aim of corporate criminal compliance should be to promote the healthy development of the business.

Secondly, China can gradually implement the legalization of the compliance responsibilities of corporate executives and their obligations. The Sarbanes-Oxley Act of the United States of America legalised the obligation of corporate executives to structure and enforce oversight of corporate compliance [13]. This makes it a criminal obligation for companies to develop and implement a compliance program. Holding corporate executives accountable will help to promote a positive approach to compliance programs and truly urge companies to actively promote and implement compliance programs. China could add to the Criminal Law of the People's Republic of China the statutory obligation of enterprises and corporate executives to construct and implement a corporate compliance program. Internally, preventive mechanisms should also be established. Companies should develop their own standards of conduct, which should be reflected in their articles of association, and different conduct guidelines should be developed for each possible situation and updated regularly in accordance with changes in the actual situation and the requirements of domestic legal regulations and policies. Attention should also be paid to building a corporate criminal compliance culture and developing awareness of criminal compliance risks. Companies should conduct criminal compliance risk awareness and training for all employees to form a law-abiding awareness among their members [14]. This will stimulate the initiative of criminal compliance from within the company. In addition, enterprises should establish open channels for monitoring and reporting internal violations of the law. In addition, enterprises should establish a smooth channel to monitor and report internal violations of the law. The board of directors, the compliance management committee and the internal audit department of the enterprise can set up a reporting platform within the enterprise and open a "reporting telephone number" to provide the possibility for employees to report corporate criminal offences through the above measures. Attention should also be paid to protecting the privacy of whistleblowers and preventing the disclosure of their identities, which could affect their career development.

4.2 Establishing Effective Criminal Incentives

China can give meaning to corporate criminal compliance sentencing in the context of fine sentences for unitary crimes by making a sound corporate compliance program a factor to be examined in sentencing, creating an effective criminal incentive mechanism. Specifically, after convicting an enterprise suspected of committing a crime, the court could consider the establishment of an effective compliance program by the enterprise as an important sentencing circumstance and use it as a basis for a more substantial reduction in the penalty for the enterprise. A legislative interpretation could be issued by the Standing Committee of the National People's Congress or a judicial interpretation by the Supreme People's Court. Add the fine sentence imposed on the unit to the discretionary sentencing circumstances and include the corporate compliance program as one of the discretionary sentencing circumstances [6].

This approach combines the advanced experience of extraterritoriality in the construction of criminal compliance systems. The United States is a typical country for this type of sentencing incentive mechanism. The US Sentencing Guidelines for Federal Organisations legislated the definition of corporate compliance for the first time, introducing the corporate compliance regime into the realm of legal practice. And it makes corporate compliance a statutory element for the reduction of fines for corporate offences and the application of probation. The seven criteria for an "effective" corporate compliance scheme are also regulated, which provide a legal basis for judges to assess the effectiveness of corporate compliance in the context of conviction and sentencing. When courts in the United States calculate the criminal law range for businesses that have committed a crime, penalties are largely reduced if the business has an effective compliance program. However, the relevant legal norms of Chinese criminal law and criminal procedure law are still being explored. Fines imposed on units of the PRC Criminal Law have not yet been included as a discretionary sentencing circumstance. Consideration could be given to introducing a transitional period first, whereby the development and implementation of a corporate compliance program and its effectiveness would be incorporated into

the plea and penalty leniency regime. The penalties for criminal enterprises that meet the requirements would be lenient. Setting a reasonable reduction in fines for enterprises at the time of compliance is conducive to stimulating a strong incentive from within the enterprise to build a compliance program and motivate the enterprise to promote the criminal compliance process. At the same time, this is also in line with the original intention of Chinese corporate criminal compliance to encourage the development of private enterprises, enterprises to go global and promote business and economic development.

4.3 Promoting the Compliance Non-prosecution System

The system of non-compliance with prosecution has developed into a more mature system abroad. China can draw on this to a certain extent. For example, the United States promulgated the Principles for Federal Prosecution of Business Organisations, the Thompson Memorandum and the Phillip Memorandum, which gradually clarified the application of deferred prosecution agreements and non-prosecution agreements. When deferred prosecution agreements and non-prosecution agreements are applied to businesses suspected of committing crimes, US prosecutors will decide whether to enter into a settlement agreement based on the effectiveness of their corporate compliance programme, or further decide whether to reduce criminal penalties after completion of the conviction process. The UK also enacted the Crime and Courts Act in 2014, establishing a deferred prosecution system in a legal sense. However, China should not adopt this system as a "fetish" but should explore the local legal soil to find a compliant non-prosecution system that suits the national context [2].

The first step should be to improve the legal norms of substantive and procedural law, and to unify the criteria for assessing the validity of criminal compliance through specific legal norms, to further determine whether the enterprises involved in the case can be subject to non-compliance with prosecution. The specific procedures for compliance with non-prosecution should be based on judicial practice in recent years, and practical judicial procedures should be developed in the criminal procedure law for enterprises of different sizes in different industries. Provide legal support for the system of deferred prosecution in criminal proceedings. For example, regarding the establishment of a compliance period, US legal documents generally provide for a compliance period of one to three years, which is often long enough for companies to establish and implement effective compliance programmes. China should learn from this and extend the current six-month to one-year inspection period established by the procuratorial authorities, which is conducive to truly promoting the improvement of corporate criminal compliance. However, given that China's compliance non-prosecution system is still in the exploratory stage, and in order to avoid the waste of resources and reduced efficiency associated with excessively long compliance supervision, it could be extended to 12 months to 2 years for an initial trial before being rolled out nationwide [15].

In addition, in establishing a third-party compliance monitoring and assessment mechanism for companies involved in the case, the prosecuting authority should issue relevant judicial interpretations or legal norms that set out requirements for their professionalism, independence and impartiality. It is also important to establish a pool of talent for third-party compliance monitoring and assessment. The procuratorial authorities can regularly select senior lawyers, auditors, experts and scholars for third-party assessment bodies and complete the filing of personnel with the procuratorial authorities [10]. The assessment reports formed by third parties are important for the procuratorial authorities in deciding whether to take compulsory measures, whether to prosecute and whether to make lenient sentencing recommendations. This requires that the construction of third-party organisations should be regulated even more, and that the inspectorate should conduct regular inspections of the qualifications of personnel. Third party personnel who are not sufficiently qualified or who have a history of unobjective assessments should be discontinued from participating in the assessment of corporate compliance programmes.

5. Conclusion

The paper focuses on the issues related to China's criminal compliance review of multinational corporations. In general, China's current criminal compliance system is still in the exploration stage, and there is much room for development and improvement of criminal compliance for multinational corporations. In the light of the current development of criminal compliance in China and the advanced experience of foreign criminal compliance, this paper argues that we should strengthen the construction of a criminal compliance system that is conducive to regulating the development of enterprises and in line with China's actual national conditions. From the perspective of enterprises themselves, China should issue relevant documents or gradually implement the legalization of enterprises' compliance obligations to stimulate the endogenous motivation of enterprises' criminal compliance. This will help to form a joint effort between the state and enterprises in criminal compliance review. In terms of legislative regulation, China can give meaning to the sentencing of corporate criminal compliance to form an effective criminal incentive mechanism. At the same time, a comprehensive legal system will also provide legal guidance and guarantee for the development of corporate criminal compliance. At the level of judicial practice, China can learn from foreign criminal compliance and introduce a criminal compliance non-prosecution system. However, when introducing it, special attention should be paid to adapt to China's legal environment and the current stage of criminal compliance development. The completion of a perfect criminal compliance system with Chinese characteristics will be conducive to regulating the business behavior of multinational corporations and will also avoid the global risks they encounter in their operations, such as long-arm jurisdiction. At the same time, the improvement of China's criminal compliance review for multinational companies is conducive to creating a favorable business environment. It will be more helpful for China to go out and foreign companies to come in, break down trade barriers, and have long-term significance for promoting China and global economic trade. Criminal compliance is a proposition that is large in scope and will continue to be updated and developed. The author believes that in the future, the criminal compliance review of multinational companies should be more detailed and in-depth and can be regulated in a targeted manner according to different industry categories and enterprise sizes.

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