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THE FOREIGN EXPERIENCE OF NON-PROSECUTION SYSTEM OF ENTERPRISE COMPLIANCE AND THE MIRROR OF CHINA

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ABSTRACT

Corporate compliance non-prosecution governance is a form of governance that transcends corporate management activities, takes non-criminalization as an incentive and aims at national governance. Enterprises' compliance governance in our country should reflect Chinese characteristics. But the current non-prosecution research is largely based on western context. Therefore, to explore the path of Chinese governance of non-prosecution in compliance, we must first clarify the background and basic logic of the establishment of the system in western countries.

Keywords: enterprise compliance non-prosecution foreign experience localization path

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I. The practice of non-prosecution system for enterprises outside the region

The compliance non-prosecution system originated from the pretrial transfer agreement in the United States, and was later adopted and "improved" by the United Kingdom, France and other countries. In these countries, the compliance non-prosecution system has been relatively mature, but in the process of development, there are also problems such as high compliance costs and difficult rights supervision. Through the analysis of the patterns and practical experience of the United States, Britain and France, we hope to provide reference for the improvement of China's compliance non-prosecution system.

1.1 American pretrial transfer agreement

There are two types of pretrial transfer agreement in the United States, deferred prosecution agreement and non-prosecution agreement. The difference lies in the time of occurrence. The non-prosecution agreement means that the prosecution has not yet prosecuted the case, and the prosecutor has complete discretion on whether to prosecute the enterprise involved. The deferred prosecution agreement means that after the procuratorial organ indicts the enterprise involved, it can only sign the agreement with the approval of the judge handling the case. In fact, the judge usually only conducts formal review, and the prosecutor does not enjoy full discretion.

No matter what kind of agreement, the content includes the trial period, during which the enterprise involved should pay high or even huge fines, compliance plan, fulfill the compensation obligation, accept supervision and inspection, and regularly report the implementation of the compliance plan, etc. After the trial period is over, if the enterprise involved has fulfilled the agreement, Then the enterprise involved makes a decision to withdraw the prosecution or not prosecute, and the enterprise involved is therefore exempt from criminal responsibility.

The characteristics of the pretrial transfer agreement in the United States are as follows: first, there is no explicit authorization in congressional legislation, and the legitimacy of the power of the procuratorial organ comes from the discretion of the prosecutor on whether to prosecute or not. The Judicial Manual of the United States and the Sentencing Guide of Federal Organizations formulated by the United States Department of Justice stipulate the prosecution power of prosecutors and the relevant standards of pretrial referral agreements, so as to standardize the prosecutors' discretion and the specific content standards of agreements. Second, the United States does not distinguish felony misdemeanors or charges in the application of the pretrial transfer agreement, and the agreement can be applied to almost any enterprise crime. Third, the procuratorial organ plays a dominant role in the whole process, decides whether to start the procedure, and enjoys the discretionary power to determine the charges and the contents of the agreement. At the end of the deadline for the implementation of the final agreement, it decides whether to withdraw the prosecution or not to prosecute the enterprise involved.

1.2 The UK deferred prosecution Agreement

The content of the deferred prosecution agreement in the United Kingdom is not much different from that in the United States. The main feature of the deferred prosecution agreement is that during the period of

suspension, the actions of both the prosecution and the enterprises involved are supervised by the court throughout the whole process, which is in sharp contrast to the formal review by the judges in the United States. The preliminary draft of the agreement formed by the procuratorial organ and the involved enterprise through equal consultation is submitted to the court for review, and the court either modifies or accepts it. The subsequent application made by the procuratorial organ in the trial can only be approved A hearing will be held to publicize specific information. In addition, the UK's deferred enterprise agreement states that it only applies to enterprises two and does not apply It applies to the head of the business.

The British deferred prosecution agreement is characterized by the full participation of the court and the substantive review of the agreement. Finally, the relevant details are disclosed through the hearing, which not only limits the power of the prosecution, but also ensures the fairness and transparency of the deferred non-prosecution agreement process. But at the same time, it also reduces the enthusiasm of prosecutors to apply the deferred prosecution agreement to the enterprises involved in the case, and the advantages of this system are limited.

1.3 France’s deferred prosecution agreement

The content of the deferred prosecution agreement between France and the United States is not very different from that of the United States, but the form of corporate compliance in France can be said to be mandatory compliance. The Second Act of Sabine clearly stipulates that eligible enterprises must establish an effective compliance system, that is, the enterprises involved should establish a compliance system before the case, also known as prior compliance. At the same time, the Act also makes clear provisions on the charges suspected of the enterprises involved in the deferred prosecution agreement, only for these charges, the procuratorial organ can make a decision not to prosecute after review. In addition, after the prosecution reached a deferred prosecution agreement with the enterprise involved, it also needs to be submitted to the court for approval. The court only decides whether to pass the agreement, does not modify the specific content of the agreement and does not supervise the follow-up implementation. The supervision work is performed by the anti-Corruption Bureau, whose main function is to supervise the establishment and implementation of the compliance plan by the enterprise, and also evaluate its effectiveness.

The characteristic of the French deferred prosecution agreement is that France emphasizes the prior compliance of enterprises, which reduces the effectiveness of the application of the agreement, and also reduces the enthusiasm of prosecutors to apply the system to the enterprises involved (Yang 2020). In addition, this kind of agreement in France is mainly distributed in anti-corruption cases, showing strong restrictive characteristics.

2.The type analysis of non-prosecution system of foreign enterprises in compliance

2.1 Procedural non-prosecution

Compliance non-prosecution includes non-prosecution or deferred prosecution procedures non-prosecution and non-prosecution of entities that prevent the establishment of a crime. From a comparative perspective, these two types of non-prosecution have different backgrounds, applicable cases and system logic. It is generally believed that the procedural non-prosecution system originated in the United States in the 1990s, and gradually expanded to Britain, Australia, France and other countries. Its main forms are non-prosecution agreement and deferred prosecution agreement. These two types of agreements were first applied to the criminal cases of corporate fraud. For example, the first informal non-prosecution agreement in 1992 was for the crime of securities fraud, and the first formal deferred prosecution agreement in 1994 was for the crime of falsely reporting the profits of investment projects. In both cases, the decision not to prosecute or suspend prosecution took into account the company's full cooperation with the investigation, the payment of substantial damages and the development of internal controls, but did not take into account the impact of the prosecution on society. What really made the United States pay attention to both types of agreements was the reflection that the conviction of Arthur Andersen caused serious damage to the interests of innocent third parties. Through this case, the US Department of Justice realized that the state must balance the need to punish crimes with the prevention of risks faced by innocent third parties. The need to punish by not prosecuting means that companies are often involved in more serious crimes. In such cases, companies can still be punished even if they enter into deferred prosecution agreements, in part by paying hefty fines. Data show that from 2000 to 2021, companies that signed deferred prosecution agreements or non-prosecution agreements in the United States paid an average annual fine of 3.959 billion U.S. dollars, and even exceeded 9 billion U.S. dollars in 2012 and 2020. Of course, such fines do not necessarily belong to criminal fines, and their nature is similar to “settlement money”. Different from the “real-time” criminal punishment, deferred prosecution also includes the “prosecution deterrence” of “deferred prosecution”, that is, the possibility of prosecution as a deterrent to ensure the cooperation of enterprises in internal structural reform, so some commentators call it "structural reform prosecution". The reason why this kind of prosecution strategy has become common is that after the Enron fraud scandal, the number of unit crimes prosecuted by prosecutors increased, and “structural reform prosecution” is an effective measure to deal with corporate crimes.

The concept of “risk prevention” emphasizes the need for the state to guard against spillover risks arising from the criminalization of large corporations (Yang & Li 2021). For example, Arthur Andersen, an accounting firm with 85,000 employees in 390 offices around the world, would lose tens of thousands of jobs if a conviction led to the firm’s collapse. Different from the “aggregate risk” generated by the conviction of many Msmes, the risk is caused by a small number of companies, has a strong diffusion effect, and is easy to manifest in a short period of time. Therefore, in order to prevent the negative impact of conviction, the state finds a “third way” for a small number of companies with spillover risks, that is, signing a deferred prosecution agreement or a non-prosecution agreement, which not only guarantees the normal operation of the company, but also does not give up the possibility of prosecution under specific

circumstances. In view of the fact that the deferred prosecution agreement and the non-prosecution agreement are mainly aimed at a few large companies, the number of enterprises signing the agreement every year is small. For example, from 2000 to 2021, the average annual number of agreements signed by US companies was less than 30, and before 2004, it was even less than 10.

It can be seen that the non-prosecution mechanism of extraterritorial compliance procedures has its particularity. If the applicable objects are concentrated in large enterprises, the judicial organs may require compliance enterprises to pay huge fines. These practices are difficult to apply to our country. As of 2021, the number of enterprises in China will be 48.42 million, of which more than 99 percent are small and medium-sized enterprises, and the "aggregation risk" generated by the large number of small and medium-sized enterprises will cause a "water wave effect" in society. In addition, paying high fines also goes against the concept of protecting small and medium-sized enterprises, which is not realistic and practical. These institutional differences determine that to explore the path of non-prosecution compliance for enterprises with Chinese characteristics, we must return to the reality of China itself.

2.2 Entity non-prosecution

Italy, Spain, the United Kingdom and other countries have differences in the institutional background and conditions for non-prosecution of compliant entities. In 2001, Italy adopted the Italian Act on the Administrative Responsibility of legal Persons, Companies, Associations and Unincorporated Organizations in order to cope with the serious situation of corporate crimes and to fulfill its obligations under the Convention on the Protection of the Financial Interests of the European Communities (Protocol II) and the Convention on the Prohibition of Bribery of Foreign Public Officials in International Business Transactions. According to the provisions of Articles 5 and 6 of the Act, when directors, senior managers and their subordinate employees commit crimes for the benefit of the enterprise, the enterprise may not be held criminally liable if the following four circumstances are met: (1) a compliance plan suitable for the prevention of such crimes has been developed and effectively implemented; (2) an internal body with autonomy and control supervises the operation, compliance and updating of the compliance plan; (3) the offender uses fraudulent means to circumvent the compliance program; And (4) lack of supervision or insufficient supervision by supervisory bodies. These provisions indicate that such non-prosecution is not limited to specific crimes, and that a business is not criminally liable for an employee's criminal conduct as long as it has developed and implemented a compliance plan before the crime is committed and proves that there is no "organizational guilt." (Daniel 2016; Li 2022)

In order to control corporate crime, the 2010 Spanish Law on the Organization of the Judiciary also provides for the criminal liability of enterprises for the first time. However, the law does not specify whether compliance programs can be exempted from prosecution. Article 31 of the 2015 Spanish Penal Code specifies for the first time the conditions for non-prosecution by a compliant entity: (1) the board of directors has adopted and implemented a management organization and control model appropriate for the prevention of crime prior to the commission of the offence; (2) a supervisory body with independent autonomy and control supervises the operation of the prevention mechanism; (3) criminals use deception

to avoid the organization's preventive system; (4) compliance regulators perform or do not slack in performing their duties of supervision, management and control. These four conditions are similar to the relevant provisions of Italian law, emphasizing that there is no "organizational guilt" for the occurrence of criminal acts if the company has developed and effectively operated a compliance plan in advance. In terms of scope of application, this type of non-prosecution is not aimed at a specific crime, but is a common defense enjoyed by compliant companies.

Different from Italy and Spain, the non-prosecution provisions of compliant entities in the UK focus on special crimes such as bribery and financial crimes. For example, in 2010, the UK enacted the Anti-Bribery Act in response to increasing corruption crimes committed by public institutions, frequent overseas bribery scandals involving commercial organizations, and failure to meet the standards of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Based on the theory that commercial organizations are the “best responsible person” for preventing bribery, the law is the first to prevent commercial organizations from committing bribery dereliction of duty, and requires enterprises to bear strict liability. In 2017, in view of the rampant criminal activities such as tax crimes, money laundering crimes and terrorism, it is difficult to hold relevant organizations accountable under existing laws, and the UK added the crime of preventing tax evasion and the crime of preventing foreign tax evasion. These two crimes both impose strict liability on the relevant institutions in the entity, and take the establishment of reasonable procedures in advance to prevent crimes as the only excuse for exemption.

The situation of non-prosecution in the above-mentioned national laws shows that whether a compliant enterprise entity is not prosecuted is related to the principle of criminal liability attribution, the concept of liability attribution and the background of The Times. Italy and Spain added provisions on unit criminal responsibility in order to cope with the severe situation of unit crimes, and took whether an enterprise had “organizational crimes” as the basis for it to bear criminal responsibility (Zhang 20222; Zhang 2023). Therefore, the compliant entities in Italy and Spain do not prosecute or limit themselves to specific crimes. As long as an enterprise makes and implements a compliance plan and proves that there is no “organizational crime” (Li 2021; Xiao 2021), it can no longer bear criminal responsibility for the criminal behavior of its employees. The background of the new crime of prevention of bribery, prevention of tax evasion and prevention of foreign tax evasion by business organizations in the UK is that corruption, bribery and other criminal activities of public institutions and business organizations are frequent, and these organizations are difficult to be held accountable according to national laws. In view of this, it is clear that enterprises should bear strict responsibilities, and establish reasonable procedures in advance to prevent crimes as the only excuse for exemption. China is discussing how to give incentives to compliant enterprise entities in the context of policies to protect private enterprises and optimize the business environment. According to the theory of criminal responsibility for unit crimes in China, both enterprises and nature apply the principle of unity of subjectivity and objectivity, and do not bear strict liability. This means that different countries have different entity non-prosecution logic and system forms, and there is no universal non-prosecution mode. China can learn from foreign experience when building a compliance

non-prosecution system, but it cannot accept it without discriminating. The most fundamental criterion for judging whether the non-prosecution mechanism of compliant entities can grow in the soil of our country's rule of law still lies in whether it is compatible with our country's legal system, rule of law system and national governance system.

3. The reflection and enlightenment of foreign experience on the compliance non-prosecution system of Chinese enterprises

3.1Advantages of non-prosecution system for foreign enterprises in compliance

Through the analysis of the non-prosecution system of non-regional countries, it can be found that the system embodies the concept of consultative justice and achieves the purpose of managing corporate crimes through consultation. In order to avoid negative effects such as the blow to corporate reputation caused by prosecution, the enterprises involved reached an agreement with the prosecution to establish a compliance plan, financial compensation and pay fines. Deferred prosecution agreements in non-regional countries are all inspired by the United States. Specifically, they have the following advantages:

3.1.1 Compliance plan is the premise of deferred prosecution agreement

Although there are differences in the design of compliance non-prosecution systems in different countries, the enterprises involved must develop an effective compliance plan before the prosecutors can sign a deferred prosecution agreement with them (Yang 2021). The agreements all involve admitting guilt, making positive restitution, developing an effective compliance plan and paying fines. The compliance plan is of great significance to whether the compliance non-prosecution system can realize the purpose of preventing enterprises from committing such crimes again.

3.1.2 Qualified compliance does not prosecute applicable specific crimes

For example, the United Kingdom and France have made provisions on which crimes are applicable to this system, mostly economic crimes and corruption crimes. In addition, countries outside the region have made a strict distinction between the liability of natural persons and the liability of enterprises. The system applies only to enterprises, not natural persons, which can prevent natural persons from evasive criminal responsibility by using this system.

3.1.3 Pay attention to the convergence of procedures

In the implementation of the system, countries pay more attention to the procedural connection between procuratorial organs and relevant departments. For example, when French procuratorial organs reach an agreement with enterprises involved in suspected tax evasion crimes, they will contact relevant financial departments to assess the loss of national tax, and then determine the amount of compensation or fine to be paid by the enterprises involved according to the assessment.

3.2 The inadequacy of non-prosecution system for non-compliance of enterprises outside the region

3.2.1 High cost

The first is the high time cost, such as the test period set by the United States for the companies involved in the case is measured in years, usually three years. The second is striking deals to pay hefty fines. In the famous Enron incident, Andersen accounting firm did false accounts for Enron and was subsequently charged by the prosecution. Andersen wanted to reach a deferred prosecution agreement with the prosecutor, but could not reach an agreement on the compensation plan and rectification plan. Subsequently, Andersen went bankrupt, and its branches all over the world went bankrupt one after another due to reputation and other reasons, leaving a large number of employees unemployed and looking for another job. After the Andersen incident, in order to limit the discretion of the prosecution, the US Department of Justice issued the Holder Memorandum, which stipulated the standards for reference when the prosecution reached an agreement with the involved enterprises. The memorandum proposed eight factors to be considered, including the severity of the crime, the circumstances of surrender, and remedial measures. In addition, the motivation behind the so-called "settlement penalty" reached by the United States with foreign enterprises through long-arm jurisdiction is also often criticized.

3.2.2 Prosecutorial agencies have too much discretion

This is most evident in the deferred prosecution agreements in the United States, where the U.S. prosecutors are often criticized for abusing their power in the process of reaching agreements with companies involved. In the United States, the judge handling the deferred prosecution agreement only carries out formal review, and the prosecution organ plays an absolutely dominant role in the process of reaching the deferred prosecution agreement or non-prosecution agreement with the enterprise involved, while the enterprise involved is usually unable to negotiate with the prosecution organ on an equal basis, just like Andersen, which makes it difficult to reflect the nature of equal negotiation in the final agreement.

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