

Research on the Identification of Incentive Targets for Corporate Compliance

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Abstract: The reform of corporate compliance is rapidly unfolding in pilot regions, as it holds significant importance not only for the governance and prevention of corporate crimes but also for incentivizing companies to initiate compliance measures. To effectively harness the incentives of corporate compliance, the key lies in the identification of appropriate incentive targets. However, in the current judicial practice in China, there are challenges related to the identification of incentive targets, such as a lack of clarity in the scope of identification, ambiguity in the criteria for identification, and deficiencies in the identification process. Therefore, it is necessary to clarify the scope of identifying incentive targets for corporate compliance, define the criteria for their identification, and improve the process of identifying such targets. By maximizing the incentive effects of corporate compliance, we can promote the steady development of compliance reform in our country.

Keywords: Corporate Compliance; Incentive Targets; Scope of Identification.

1. Introduction

Corporate compliance aims to regulate the lawful and legitimate operation of businesses, eliminate the risks of corporate crime, guide compliant operations, and protect market vitality. Since March 2020, the Supreme People's Procuratorate has launched the first round of pilot reforms for corporate criminal compliance, with the basic policy of "avoiding arrests, prosecutions, and imprisonment sentences for business-related crimes, recommending probation when applicable" [1]. Currently, provinces, autonomous regions, and municipalities have been exploring various forms of corporate compliance based on local conditions.

The incentive system for corporate compliance refers to the legal framework that makes non-prosecution decisions in terms of criminal punishment for implicated enterprises based on established compliance systems. Countries that have established incentive systems for corporate compliance have incorporated the effectiveness of a company's compliance management system as one of the criteria for determining whether the prosecution should proceed, whether the court should convict, and whether the punishment can be mitigated [2]. The incentive mechanism for corporate compliance not only contributes to the prevention of criminal risks but also helps reduce the crime rate of enterprises and enhance their vitality. Currently, the reform of corporate compliance is vigorously underway in various regions of China, and the most crucial aspect of corporate compliance is its incentive mechanism in criminal law. The determination of incentive targets for corporate compliance has become an urgent issue to be addressed. Within academia, there are diverse viewpoints and discussions regarding the incentive targets for corporate compliance. In the current state of corporate compliance reform, the identification of incentive targets for corporate compliance has faced challenges such as a lack of clarity in the scope of identification, ambiguity in the criteria for identification, and deficiencies in the identification process. Therefore, this paper proposes improvement suggestions for the identification of incentive targets for corporate compliance, focusing on clarifying the scope of

identification, defining the criteria for identification, and improving the identification process. It is hoped that these suggestions will contribute to the continuous and in-depth development of corporate compliance reform in China, and better leverage its incentivizing role.

2. Examination of the Practice of Identifying Incentive Targets for Corporate Compliance

To legally supervise implicated enterprises in establishing compliance systems and effectively implementing compliance rectification, the Supreme People's Procuratorate has successively released three batches of typical cases for corporate compliance. From these cases, we can observe the current state of applying corporate compliance in China and identify the characteristics of corporate compliance.

2.1. Wide Applicability

From the three batches of typical cases, it is evident that the scope of corporate compliance in China is extensive, covering almost every aspect of enterprise production and management. Apart from one major incident related to crimes endangering public safety under Chapter 2 of the Criminal Law, the remaining fourteen cases are distributed across various sections of Chapters 3 and 6 of the Criminal Law, involving multiple offenses related to crimes that disrupt the socialist market economy order. Moreover, these fifteen typical cases encompass not only the implicated enterprises but also their responsible personnel and managers. In some cases, even the managerial staff of the enterprises are implicated in criminal offenses, leading to compliance rectification for the entire company.

2.2. Leniency in Handling

Based on the outcomes, the fifteen typical cases can be categorized into four types: the first type includes nine cases where both the implicated enterprises and individuals are not prosecuted; the second type comprises four cases where both the implicated enterprises and individuals are prosecuted but

receive lenient treatment; the third type involves one case where the procuratorate intervenes and urges the public security organs to withdraw the case against the implicated enterprise; the fourth type consists of cases where the implicated enterprises are not prosecuted, but the individuals are prosecuted in court. From these categories, it is apparent that the procuratorate currently exhibits a relatively lenient approach towards both implicated enterprises and individuals. As long as the rectification tasks are completed within a specified period and pass the acceptance inspection, both the implicated enterprises and individuals can receive lenient punishment. The majority of cases fall into the category of not being prosecuted, accounting for more than 60% of the cases.

2.3. Diverse Models of Compliance Rectification

From the perspective of the criminal incentive mechanism, the introduction of corporate compliance systems in China aims to grant lenient punishment to implicated enterprises through the implementation of compliance plans. The fifteen published typical cases demonstrate the diverse models of compliance rectification in China. Most of the cases involve a specified period for compliance rectification, and after the rectification is deemed qualified during this period, a non-prosecution decision is made according to the law. There are also cases, such as the smuggling of ordinary goods by Company X in Shenzhen, where due to the complexity of the enterprise's risk points and compliance management system construction, the procuratorate accepts the results of the enterprise's compliance rectification and urges continuous compliance improvement to ensure the effectiveness of the rectification process.

3. The Existing Dilemmas in Determining the Recipients of Corporate Compliance Incentives

3.1. Ambiguity in the Scope of Identification

From the original intention of corporate compliance, the incentivized entity for corporate compliance should be the enterprise itself, as the target of compliance efforts is also the enterprise. However, as corporate compliance reform is still in its early stages in China, different regions have adopted different approaches, with some considering the corporate leaders as the incentivized entity for compliance, while others believe that only the enterprise itself should be the incentivized entity. This indicates a lack of clarity in the scope of identification for corporate compliance incentives. Currently, there are differing views among scholars regarding the scope of identification for corporate compliance incentives.

Some scholars, such as Sun Guoxiang, argue that the incentivized entity for corporate compliance should not only include the enterprise but also appropriately incorporate the corporate leaders. They believe that, first and foremost, for small and micro enterprises, the corporate leaders are not only the owners but also the operators and decision-makers of the enterprises. Their cooperation is necessary for the development of corporate compliance. Merely conducting compliance rectification and inspections on the enterprises without the cooperation of corporate leaders renders everything ineffective [3]. Secondly, the incentivizing effect on both the enterprise and its leaders should be limited, as

excessive incentives could potentially provide the corporate leaders with a "shield" against criminal liability for the enterprise. If an enterprise has committed a crime, and the individuals involved, including the corporate leaders, are sentenced to less than three years of imprisonment, it is possible to change the mandatory measures imposed on the corporate leaders while conducting compliance rectification for the enterprise. In order to encourage the enterprise's production, operation, and compliance efforts, after a certain period of time, combining assessments, it is possible to decide not to prosecute the individuals involved in the enterprise based on the severity of their involvement or to suggest probation after prosecution.

Other scholars, represented by Professor Li Hong, argue that the incentivized entity for corporate compliance should solely be the enterprise itself, and the corporate leaders should not be mixed into this. They hold the view that, firstly, if non-prosecution for corporate compliance is granted, it seems like a "get-out-of-jail-free card" for the enterprise, as long as it follows the unified compliance requirements, and it would significantly reduce the criminal risks faced by entrepreneurs, naturally leading to a diminished sense of responsibility and caution in their business activities. Therefore, corporate compliance could not only prevent corporate crimes but also provide a "protective umbrella" for them [4]. Secondly, the original intention of corporate compliance is to protect the enterprise, not the entrepreneurs. If the corporate leaders are included as incentivized entities for corporate compliance, it not only violates the principle of matching criminal liability with punishment but also contradicts the principle of equality in the application of criminal law, resulting in a significant imbalance in the punishment of corporate crimes and individual crimes.

The incentivized entity for corporate compliance should have the same identity as the target of corporate compliance. The divergence between the two perspectives mainly lies in the issue of the basis for attributing criminal responsibility to the corporate entity. Currently, the basis for attributing criminal responsibility to corporate entities in China is similar to that for individuals, which often leads to confusion. The basis for attributing criminal responsibility to corporate entities has always been a relatively controversial issue, but China has not yet provided clear legislation or practice in this regard, which contributes to the ambiguity in the identification scope of incentivized entities for corporate compliance.

3.2. Lack of Clear Criteria for Identification

The controversy mentioned earlier mainly revolves around whether the corporate leaders should be considered as incentivized entities for corporate compliance. Although the incentivizing effect of corporate compliance on the enterprise itself is beyond doubt, the question arises: which enterprises involved in criminal activities should be included in the scope of compliance examination? In other words, what criteria and conditions should be used to select which enterprises should undergo compliance rectification and be designated as incentivized entities for corporate compliance? Prior to initiating compliance examinations, specific and clear criteria should be established to determine which enterprises should be included in the compliance examination scope and become incentivized entities.

Considering the pilot initiatives in various regions in China, most corporate compliance incentives are implemented in the

form of "non-prosecution for compliance," meaning that only after meeting the requirements of the compliance plan can the decision not to prosecute the implicated enterprises and individuals be made. The primary motivation for most enterprises to establish a compliance plan is the expectation of the rewards provided by criminal law. If corporate compliance cannot bring value returns in terms of sentencing, it cannot serve as an incentive for enterprises. The value of resources lies in their scarcity. Corporate compliance, as a system that allows implicated enterprises to reduce or exempt themselves from punishment, is undoubtedly valuable. However, if every implicated enterprise can obtain the incentivizing value embedded in corporate compliance, the incentivizing value of corporate compliance will be diminished. Therefore, corporate compliance should only benefit implicated enterprises that meet certain conditions. Only in this way can corporate compliance as an incentive measure become a valuable resource.

The prerequisite for designating an enterprise as an incentivized entity for corporate compliance is its initiation of compliance rectification as an implicated enterprise. Currently, the "Guiding Opinions" issued by the Supreme People's Procuratorate in conjunction with nine departments provide three conditions for initiating compliance examinations for enterprises involved in criminal cases. However, these conditions are too general and allow excessive discretion in practice, lacking substantial evaluation criteria. This directly results in the lack of clear criteria for identifying incentivized entities.

3.3. Incomplete Identification Procedures

Currently, in practice, only the initiation procedures for corporate compliance have been appropriately regulated. The initiation procedures for corporate compliance primarily involve two situations: first, the proactive initiation of procedures by the procuratorial authorities, and second, the proactive submission of compliance rectification intentions by the implicated enterprises to the procuratorial authorities. This means that the procuratorial authorities have the power to proactively initiate corporate compliance efforts for implicated enterprises. Simultaneously, if the investigative authorities believe that an enterprise has committed a crime, they should transfer the case materials to the procuratorial authorities, who should rigorously review the social harm caused by the implicated enterprise. For those who voluntarily confess, accept administrative compensation penalties, and meet the conditions for compliance development, compliance rectification recommendations should be proposed to the enterprise, and the decision to initiate non-prosecution for corporate compliance should be made based on the overall case circumstances. The second situation involves the implicated enterprise proactively submitting its willingness to undergo compliance rectification to the procuratorial authorities. In such cases, the procuratorial authorities should comprehensively consider the overall case circumstances, paying special attention to whether the case meets the criteria of evidence and social public interest. However, the law has not yet provided regulations on how to identify incentivized entities.

4. Suggestions for Improving the Determination of Corporate Compliance Incentive Recipients

4.1. Clarifying the Scope of Recognition for Corporate Compliance Incentive Recipients

In practice, the initiation process of corporate compliance has been defined. The initiation process can be categorized into two situations: proactive initiation by the procuratorial organ and voluntary initiation proposed by the implicated enterprise. As one of the core components of corporate compliance, the incentive role is of great importance. Therefore, it is crucial to clearly define the scope of recognition for incentive recipients. There are different opinions regarding whether corporate executives should be included as incentive recipients. However, it is argued that corporate executives should be included for the following reasons:

Firstly, including corporate executives aligns with the purpose of establishing corporate compliance systems. The core objective of corporate compliance systems is to prevent, control, and reduce corporate crimes and to hold corporations criminally liable more scientifically [5]. As a legal system, corporations are expected to establish and implement compliance plans. Failure to do so may result in criminal liability and even enhanced criminal penalties. Simultaneously, effective implementation of compliance plans can serve as a "special leniency" or positive defense in mitigating criminal liability. Although corporate executives are not within the scope of corporate criminal liability, they still significantly influence corporate decisions. In fact, many instances of corporate crimes occur due to the actions of corporate executives. Therefore, including corporate executives as incentive recipients aligns with the original intent of corporate compliance systems [6]. Furthermore, incentivizing corporate executives can more effectively achieve the objectives of corporate compliance systems. As the key decision-makers of corporations, their compliance awareness and behavior have a significant impact on the overall compliance culture. Thus, including corporate executives as incentive recipients can promote the progress of corporate compliance, reduce corporate crimes, and uphold social stability and justice.

Secondly, including corporate executives as recipients aligns with China's judicial practice. Although the targets of corporate compliance investigations are generally implicated enterprises, China's current practice of corporate compliance has seen some procuratorial organs applying compliance assessment to both criminal enterprises and their executives. Furthermore, there is an increasing emphasis on providing compliance incentives (non-prosecution) to implicated enterprise executives. This phenomenon of sparing both the corporation and the executives has been observed. Typical cases released by the Supreme People's Court, as well as the "Guiding Opinions on Establishing Third-party Supervision and Evaluation Mechanisms for Corporate Compliance" jointly published by nine departments, indicate that the current scope of incentive recipients for corporate compliance includes both the corporation itself and the executives. In the first two batches of typical cases released by the Supreme People's Procuratorate, out of ten cases, eight involved compliance inspections of both the implicated corporations

and their members. Therefore, including corporate executives as incentive recipients also aligns with China's judicial practice.

Thirdly, including corporate executives as recipients aligns with the reality of China's market economy. In contrast to foreign legal systems, most of China's corporate crime cases subject to procuratorial examination and prosecution originate from small and micro private enterprises. Small and micro enterprises are important components of market entities and serve as a major pillar of stable economy and employment. Therefore, maintaining market entities and stimulating the vitality of small and micro enterprises can greatly alleviate the downward pressure on the domestic economy. Small and micro enterprises often suffer from the confusion of corporate personality and lack systematic prevention of criminal legal risks, making them prone to criminal activities. The will of corporate executives often represents the will of the corporation itself, and they are intertwined with the corporation. Therefore, excluding corporate executives as recipients of corporate compliance incentives would often fail to achieve the true purpose of preventing corporate crimes.

4.2. Clarifying the Criteria for Determining Corporate Compliance Incentive Recipients

The previous section discussed the need to clarify the criteria for determining corporate compliance incentive recipients. In order to address this issue, the following two criteria can be considered:

First, effectiveness. Given the current legislation in China, there is a lack of clear evaluation criteria for determining corporate compliance incentive recipients. One of the key factors in determining the recipients should be the effectiveness of their compliance efforts. The introduction of corporate compliance systems in China aims to stimulate market vitality and provide a chance for convicted enterprises to reform. From a utilitarian perspective, the introduction of corporate compliance systems aligns with the maximization of benefits. The impact of a conviction on society varies depending on the size of the enterprise. Larger enterprises create greater social benefits and value, providing more employment opportunities and generating tax revenue for the country. Therefore, when determining the recipients of corporate compliance incentives, the effectiveness of the enterprise or its responsible individuals should be taken into account. Factors such as the size of the enterprise and its management effectiveness should be included in the criteria for determining the incentive recipients.

Second, prospectiveness. In addition to effectiveness, the recipients of corporate compliance incentives should also demonstrate prospectiveness. Whether it is the responsible individuals or the enterprise itself, if the incentive recipients do not show prospects for reform, the value of the compliance incentives cannot be realized, and the incentives would serve no purpose in establishing corporate compliance. The full potential of corporate compliance incentives can only be realized when the recipients show prospects for reform. The prospectiveness of the recipients can be analyzed and determined based on factors such as the nature of the criminal charges, whether there is a criminal record, the attitude of the responsible individuals or the enterprise towards confession and repentance, the level of cooperation during the investigation, and the existence of a proactive rectification plan.

By considering the effectiveness and prospectiveness of the recipients, the criteria for determining corporate compliance incentive recipients can be clarified. This will help ensure that the incentives are targeted towards those who have made significant efforts to comply with the law and have a genuine intention to reform, ultimately promoting the effectiveness of corporate compliance systems in China.

4.3. Improving the Identification Process for Corporate Compliance Incentive Recipients

Currently, China has established a corporate compliance procedure, which includes initiation, implementation, inspection and supervision, and conclusion. The initiation process can occur in two ways: either initiated by the procuratorial organ or voluntarily proposed by the implicated enterprise. The implementation process is assessed by the procuratorate, requiring the voluntarily reforming enterprise to develop and provide a compliance plan or agreement within a specified period [7]. The inspection and supervision process adopts a compliance supervision mechanism involving "procuratorial suggestions, procuratorial opinions, and third-party evaluations." The conclusion process involves the procuratorial organ considering the necessity of prosecution based on the assessment results of the compliance construction of the implicated enterprise and the performance of relevant responsible individuals. Throughout the entire procedure, it is crucial to clearly and confirm the incentive recipients at the initiation stage. To improve the identification of incentive recipients, two aspects should be addressed:

First, for cases where the procuratorial organ initiates the procedure, it should propose and identify the incentive recipients in the procuratorial suggestions. Second, for cases where the implicated enterprise voluntarily proposes the initiation of the procedure, the enterprise should specify the incentive recipients when making the proposal, and the procuratorial organ should confirm them.

5. Conclusion

In the context of deepening economic globalization, promoting better development of enterprises is an important aspect of continuously optimizing China's business environment policies. Corporate compliance is not only an effective measure to enhance the modernization of corporate governance capabilities but also a crucial measure to promote the internationalization of Chinese enterprises and improve their competitiveness. The most important aspect of corporate compliance lies in its incentive mechanism under criminal law. Therefore, it is crucial to accurately identify the incentive recipients, as it is the key to promoting the effectiveness of corporate compliance. Currently, in judicial practice in China, there are challenges in terms of the unclear scope, undefined criteria, and imperfect procedures for identifying incentive recipients of corporate compliance. To address these challenges, it is necessary to clarify the scope of identification, define the criteria for identification, and improve the identification process for corporate compliance incentive recipients.

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