

# Corporate Compliance Non-prosecution Reform in China: Who Should be the Target of Application?

Yahong Wang

Ph. D, College for Criminal Law Science, Beijing Normal University  
Beijing, China

Email: wuzmd [AT] gmail.com

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**ABSTRACT**--- Along with the widespread use of deferred prosecution agreements in criminal justice in several countries around the world, there is a new trend of deferring prosecution in corporate criminal cases for subjects who meet the conditions. In order to improve the modernization of enterprises and strengthen their ability to deal with criminal legal risks, China introduced a corporate compliance management system in 2007. In 2020, under the leadership of the Supreme People's Procuratorate, China began to explore the reform of "corporate compliance non-prosecution". In the reform of corporate compliance non-prosecution, "double non-prosecution" should be established in the context of China's corporate structure and judicial background. Since the responsibilities of the enterprise and the individual can be separated, compliance non-prosecution can be adopted for enterprises in large corporate criminal cases. Since the responsibilities of the enterprise and the entrepreneur are "combined into one," prosecutors can apply a non-prosecution after plea of guilty to the entrepreneur in micro and small enterprise criminal cases.

**Keywords**--- Corporate Compliance, Non-prosecution Reform, Deferred Prosecution Agreements

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## 1. INTRODUCTION

Enterprise is a very important subject in the market economy. The production and operation of enterprises have some outstanding features, such as the involvement of many people and a wide range of influence. Compared with crimes committed by individuals, the damage and negative impact caused by the criminal acts of enterprises are often significant and far-reaching. Especially, in the case that the criminal enterprise is a listed enterprise or a multinational enterprise, its criminal behavior may have a traumatic impact on the national and even global economy and social stability.

The Andersen case in the United States led prosecutors to realize that prosecuting a company can not only serve a punitive purpose but can also lead to the bankruptcy or collapse of the business. In some cases, persistent prosecution of a company can have a range of negative consequences for the public interest. In corporate crime cases, the prevention of recidivism should be a more important goal than the punishment of criminal enterprises. To avoid the negative effects of prosecuting an enterprise, prosecutors in some foreign countries have tried to sign non-prosecution agreements or deferred prosecution agreements with enterprises, so that they will not prosecute the enterprise after it has completed the contents of the agreement. In China, the Supreme People's Procuratorate led a corporate compliance reform in 2020 to improve the business environment, modernize enterprises and regulate their production and operation activities. After three years of pilot reform, a preliminary institutional framework for compliant non-prosecution has been formed in the field of criminal justice.

This paper provides a comprehensive review of the basics of corporate compliance non-prosecution reform in China through a historical and empirical research approach. This paper consists of four parts. The first part focuses on the background of the corporate compliance non-prosecution reform in China. The second part outlines the process of corporate compliance non-prosecution reform in China and the characteristics of the pilot phase. The third part analyzes the main controversial issue in the current stage of compliance non-prosecution reform: who should be the target of non-prosecution, based on typical cases in judicial practice and controversies among scholars. The last part puts forward reform proposals for the targets of corporate compliance non-prosecution.

## 2. BACKGROUND OF CORPORATE COMPLIANCE NON-PROSECUTION REFORM

On the one hand, deferred prosecution agreements have been established and widely used in several extraterritorial countries. This has led prosecutors to recognize that deferred prosecution of criminal enterprises may have some positive consequences. On the other hand, there is the domestic background. First, the corporate compliance management system was introduced to the financial industry in 2007. Second, the CPC Central Committee put forward new requirements in 2016 regarding the building a law-oriented business environment and the protection of private entrepreneurs and emphasized the implementation of the Criminal Policy of Combining Leniency with Rigidity in corporate-related cases.

### (i) International Background

The initial attempts at deferred prosecution agreements occurred in the United States in the 1990s. Drawing on the experience of litigation incentives in individual crime cases, prosecutors have explored a system of deferred prosecution agreements focused on cooperation, fines, and compliance. As a tool, deferred prosecution agreements provided

prosecutors with new ideas for handling corporate crime cases. Prosecutors enter into deferred prosecution agreements with criminal enterprises and make separate commitments. The corporate commits to complete the requirements of the agreement during the period of deferred prosecution. The prosecutor commits to not prosecute the corporate after it completes the requirements of the agreement. Through the deferred prosecution agreement, the prosecutor achieves the goal of punishing and preventing the business from reoffending, and the corporate achieves the goal of not being prosecuted, not being convicted, and not having a criminal record. Along with the globalization of economic activity, U.S. prosecutors have achieved the goal of punishing and educating corporations about crime through deferred prosecution agreements. This experience is gradually gaining traction and being replicated in several countries.

In 2013, the amendment of the UK Crime and Courts Act marked the establishment of the deferred prosecution agreement system in the UK. The UK prosecutors have adapted the deferred prosecution agreement system by considering their own legislative model and judicial practice and drawing on the experience of the US deferred prosecution agreement system. In the UK, deferred prosecution agreements only apply to specific types of crimes committed by legal entities and are subject to review and approval by a judge. To date, the Serious Fraud Office has entered into deferred prosecution agreements with 12 criminal enterprises and this tool has been effectively applied.

France has been in a passive position in the fight against corporate crime. On the one hand, several large French companies were charged by the U.S. Department of Justice for alleged overseas commercial bribery, and although both sides eventually avoided litigation through a deferred prosecution agreement, the companies were invariably fined large sums of money.<sup>1</sup> On the other hand, in 2014, the OECD Bribery Working Group expressed serious concerns about France's limited efforts to comply with the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and strongly urged France to undertake the necessary reforms.<sup>2</sup> In order to reverse its passivity in the fight against corporate corruption offences and to respond to the concerns of the OECD, France established the Judicial Public Interest Agreement in 2016 through the *Projet de loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*.<sup>3</sup> Judicial Public Interest Agreements are similar to deferred prosecution agreements and can be applied to legal persons, public institutions, and private enterprises.<sup>4</sup> The State Financial Prosecutor can provide the CJIP to these aforementioned institutions when they are suspected or investigated for corruption, trading in power and money, tax evasion, money laundering or related economic crimes, thus replacing criminal proceedings.<sup>5</sup>

Canada and Singapore also passed legislation establishing a deferred prosecution agreement system in 2018 but have yet to engage in judicial practice. In addition, countries such as Australia, Switzerland, and Ireland have also explored the feasibility of establishing a system of deferred prosecution agreements applicable in their countries by way of legal proposals. Deferred prosecution agreements between prosecutors and criminal enterprises are gradually becoming a popular tool for handling cases.

## (ii) Domestic Background

Since the reform and opening of China, the number of Chinese companies has exploded. With China playing an increasingly important role in the World Trade Organization, APEC and the "Belt and Road" cooperation, Chinese companies have become fully integrated into the global marketplace. Along with this comprehensive and in-depth exchange of business activities, the frequency of sanctions against Chinese companies by Western countries is becoming faster and faster. Some famous Chinese companies, such as ZTE, Huawei, Gree, Bank of China, etc., have been criminally charged by prosecutors for violating the laws of other countries in their business activities in extraterritorial countries. The subject of how to improve the awareness of Chinese enterprises to comply with the law and enhance their ability to resist legal risks in operating in extra-territorial countries has gradually attracted the attention of the government and efforts have been made in various aspects.

## A. Introduction of a corporate compliance management system

In recent years, governments are committed to establishing and maintaining an open, transparent, and fair social order. Requiring companies to build compliance meets the requirements of building social order, while providing the cornerstone for sustainable development. Compliance means that the operation and management behavior of enterprises and their employees comply with laws and regulations, regulatory requirements, industry guidelines and corporate charters, rules, and regulations, as well as international treaties and rules. Compliance management is considered a core element of

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<sup>1</sup> According to the CORPORATE PROSECUTION REGISTRY database, from 1992 to 2016, the U.S.

Department of Justice entered into deferred prosecution agreements or non-prosecution agreements with 21 French companies, nine of which were penalized for violations of the Foreign Corrupt Practices Act.

<sup>2</sup> See Statement of the OECD Working Group on Bribery on France's implementation of the Anti-Bribery Convention, October 23, 2014.

<sup>3</sup> French National Financial Prosecutor's Office & French Anti-Corruption Agency, Guidelines on the Implementation of the Convention Judiciaire d'Interet Public, June 26, 2019.

<sup>4</sup> Code pénale, Article 121-2.

<sup>5</sup> Code de procédure pénale, Article 41-1-2.

enterprise risk management and a fundamental task in implementing effective internal control. The government believes that the construction of compliance management system in enterprises can enhance the modernization and law-abiding awareness of enterprises. Insurance and securities companies are the first to be required to build corporate compliance.

In China, compliance management systems are imported. Around 2007 corporate compliance management systems began to gain the attention of the government and were the first to introduce it in the field of financial regulation. Supervisory bodies issued a series of compliance management guidelines to pursue a set of objectives: to standardize corporate governance structures, strengthen corporate risk management and achieve effective internal controls.

China Insurance Regulatory Commission issued the Guidelines for the Compliance Management of Insurance Companies in September 2007. The Committee requires insurance companies to establish compliance management systems, improve compliance management structures, clarify compliance management responsibilities, build compliance management systems, effectively identify and proactively prevent and resolve compliance risks, and ensure sound operation of the company in accordance with the requirements of the guidelines. In 2016, the Commission issued Measures for the Compliance Management of Insurance Companies to replace the aforementioned document. China Securities Regulatory Commission issued Provisions for the Trial Implementation of the Compliance Management of Securities Companies in July 2008, and issued Measures for the Compliance Management of Securities Companies and Securities Investment Fund Management Companies in June 2017. The insurance or securities industry has achieved positive results in carrying out the construction of compliance management system. In this context, the Chinese National Standardization Administration Committee issued the Compliance Management Systems—Guideline ) (GB/T 35770-2017/ISO 19600:2014), with the aim of carrying out the construction of compliance management systems in enterprises across the industry and nationwide.

After the release of the Compliance Management Systems—Guideline, managers gradually recognize the positive value of compliance management system and realize that compliance management capability is an important influencing factor for enterprises to enhance their international competitiveness. In order to promote the improvement of their compliance management level, the National Development and Reform Commission of China, together with the Ministry of Foreign Affairs, the Ministry of Commerce, the People's Bank of China, the State-Owned Assets Supervision and Administration Commission, the State Administration of Foreign Exchange, and the All-China Federation of Industry and Commerce jointly formulated the Guidelines for the Compliance Management of Enterprises' Overseas Operation in 2018.

## **B. Propose policy requirements for improving the law-oriented business environment**

In March 2016, the National People's Congress released the Outline of the 13th Five-Year Plan for the National Economic and Social Development of the People's Republic of China, 2016-2020), which proposes to "improve the law-oriented, internationalization and facilitation of the business environment".<sup>6</sup> The CPC Central Committee emphasizes the need to give full play to the procurator function, to create a good law-oriented business environment for the development of various types of enterprises, and to provide sound judicial protection. In this context, the Supreme People's Procuratorate has taken a series of measures and issued relevant guidance documents to serve and promote the healthy development of enterprises.

First of all, the Supreme People's Procuratorate emphasizes the implementation of the Criminal Policy of Combining Leniency with Rigidity in corporate cases. In February 2016, the Supreme Prosecutor issued the "Opinions on giving full play to the procuratorial function to protect and promote the healthy development of the non-public economy in accordance with the law". The document proposes to "strictly implement the criminal policy of leniency and severity, fully consider the characteristics of the non-public economy, give priority to the survival and development of enterprises, avoid not distinguishing between the boundaries of crime and non-crime, legal policy boundaries, ways and means, avoid selective justice, and avoid arbitrary infringement of the legitimate rights and interests of non-public enterprises". It also pointed out that a strict line should be drawn between economic disputes and economic crimes, and between individual crimes and corporate violations. The document requires prosecutors to improve the way they handle cases, and in the process try to avoid negatively impacting the normal production and business activities of non-public enterprises. The implementation of the Criminal Policy of Combining Leniency with Rigidity in corporate crime cases reflects a further expansion of the concept of Mitigation of punishment in criminal law.

Secondly, the goal of protecting the legitimate rights and interests of entrepreneurs was proposed. In December 2017, the Supreme People's Procuratorate issued a notice, *Maximizing Functions and Roles to Create Rule-of-Law Environment for the Protection of the Lawful Rights and Interests of Entrepreneurs and Support the Innovation and Entrepreneurship of Entrepreneurs*, clearly proposing to "protecting the lawful rights and interests and normal economic activities of entrepreneurs in accordance with the law, and heightening entrepreneurs' confidence and sense of wealth security", "regulating their own judicial actions, improving the means and methods of handling cases, and minimizing and avoiding

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<sup>6</sup> The connotation of creating an excellent business environment can be summarized as four aspects: a fair and competitive market environment, an efficient and clean government environment, a fair and transparent legal policy environment and an open and inclusive human environment.

the negative impact that case-handling may have on the lawful rights and interests and normal economic activities of entrepreneurs”, “for cases that have entered the litigation process, prosecutors should pay attention to the disposal of the property involved in accordance with the law, the prudent use of coercive measures. In addition, Prosecutors should also pay attention to improve the efficiency of the case, according to the law, and speedy processing, and effectively prevent the long detention without decision, long delay. Adhere to equal protection, differentiated treatment, leniency and severity, and explore the establishment of criminal cases involving enterprises in line with the characteristics of the plea of guilty and leniency work norms and mechanisms”. It can be seen that, under the requirements of improving the business environment, prosecutors need to strictly grasp the prosecution conditions when handling cases involving enterprises, taking into account a combination of factors, the criminal enterprises to use coercive measures and prosecution decisions carefully.

### **3. THE PROCESS OF CORPORATE COMPLIANCE NON-PROSECUTION REFORM**

Reform does not happen overnight. With the deepening of China's reform and opening up and the development of the market economy, the number of enterprises has increased while the number of illegal crimes committed by enterprises has also gradually increased. In criminal proceedings, how to implement the Criminal Policy of Combining Leniency with Rigidity for criminal enterprises has been a practical topic for prosecutors to explore. At the beginning of this century, some local prosecutors tried to make non-prosecution decisions for enterprises with minor crimes in judicial practice in order to avoid the negative consequences of enterprise closures. However, because there was no legal basis for such non-prosecution decisions, such attempts were soon banned by the Supreme Prosecutor.

The subject received renewed attention until the release of the Outline of the 13th Five-Year Plan for the National Economic and Social Development in 2016, when the CPC Central Committee explicitly proposed to ensure the development of the private economy, protect enterprises and entrepreneurs, and not prosecute enterprises in appropriate cases. In order to have a basis in law, the Supreme People's Procuratorate has also issued guidance documents to clarify the four circumstances in which non-prosecution can be applied in private enterprise cases. Under the requirement of deepening the construction of law-oriented business environment, the Supreme Procuratorate played an active leading role in 2020 and began exploring new corporate compliance non-prosecution models in enterprise-related cases.

#### **(i) Pre-Preparation Phase**

#### **A. Historical attempts by local people's procuratorates**

At the beginning of the 21st century, in some regions with more developed economies and a larger number of enterprises, based on the need to promote economic development and prosperous market dynamics, prosecutors have tried to shift the punishment strategy in some enterprise cases. In cases where the crime was minor and not harmful, where the enterprise actively compensated and paid fines, and where the entrepreneur had a positive attitude toward pleading guilty, prosecutors adopted the practice of non-prosecution, conditional non-prosecution, and reduced charges against the enterprise or entrepreneur in order to avoid the negative consequences of closing down the enterprise.

In October 2002, Nanjing, Jiangsu Province, issued the "*Trial Measures for Deferred Prosecution by the Procuratorate*", which stipulates that prosecutors will no longer prosecute a suspected criminal unit if it meets the following conditions: the suspected criminal unit has no prior criminal record; the crime is minor and does not cause further harm to society; it confesses truthfully to the crime and actively refunds or assists in recovering damages; it is able to present a guarantor or post a bond in full and can make significant contributions to the state and society during the period of investigation. Wuxi City, Jiangsu Province, issued a "*Deferred Prosecution Approach (Trial)*" which provides that the application of deferred prosecution can be suspected of duty crimes, economic crimes and other ordinary criminal offences, minor circumstances, social harm is not the suspect unit. However, since there is no legal basis for applying the procedure of deferred prosecution at this stage, in 2004 the Supreme People's Procuratorate issued the *Notice on Strictly Performing Legal Supervision Duties to Promote Procuratorial Reform*, stating that "since there is no legal basis for deferred prosecution, it is not appropriate to expand it at present. At this point, the procuratorate's exploration of non-prosecution of corporate crime cases was called off. Although this attempt was not further extended nationwide, it should be acknowledged that the seeds of non-prosecution or deferred prosecution of criminal enterprises have germinated in judicial practice, which has laid the foundation for compliance with non-prosecution reform.

#### **B. Not to prosecute private enterprises in four situations determined by the Supreme People's Procuratorate**

During the 13th Five-Year Plan period, in order to better serve and promote the healthy development of the private economy, the Supreme People's Procuratorate has issued a series of documents that provide principled guidance to prosecutors in handling private enterprise cases.<sup>7</sup>

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<sup>7</sup> These documents include the Opinions on Giving Full Play to the Procuratorial Function to Safeguard and Promote the Healthy Development of the Non-public Economy in accordance with the Law (February 2016), Fully Fulfilling Procuratorial

First, the Supreme Prosecutor stressed that prosecutors should recognize the importance of protecting the property rights of enterprises. The indictment conditions shall be strictly satisfied in accordance with the law, social harmfulness shall be accurately determined from the aspects of economic security, public interest and market order, among others, the factors other than the will of market participants, such as policy adjustment, ill management and market risks shall be comprehensively considered, and where the indictment conditions are not met, no indictment shall be applied in accordance with the law.<sup>8</sup>

Secondly, the Supreme People's Procuratorate has clarified four situations in which private enterprises will not be prosecuted. In 2018, the Supreme Prosecutor issued a case-handling guide based on the provisions of the Criminal Procedure Law, which allows prosecutors not to prosecute criminal enterprises in the following four situations.

Statutory non-prosecution refers to the review of the case does not constitute a crime, including private business operators do not have the facts of the crime, or have one of the circumstances specified in Article 16 of the Criminal Procedure Law, or have other legal provisions of the circumstances exempt from criminal responsibility, should be made a decision not to prosecute. Minor non-prosecution refers to the review found that the case constitutes a crime, but the crime is minor, in accordance with the provisions of the criminal law does not require the imposition of penalties or exemption from punishment, the prosecutor can make a decision not to prosecute, to prevent the occurrence of "crime must be prosecuted" or "prosecution is the end". Insufficient evidence non-prosecution, refers to the review found that the facts of the case is unclear, insufficient evidence, after two additional investigation evidence is still insufficient, does not meet the conditions for prosecution; or after the return of additional investigation, the evidence is still insufficient, does not meet the conditions for prosecution and do not need to return for additional investigation, the prosecutor should make a decision not to prosecute, and firmly prevent the "sick prosecution". Significant meritorious non-prosecution refers to the review that the case meets the provisions of Article 182 of the Criminal Procedure Law, the private business operators involved in the case voluntarily and truthfully confessed the facts of the suspected crime, there is significant meritorious performance or the case involves the vital interests of the state, with the approval of the Supreme People's Procuratorate, the procuratorate may make a decision not to prosecute.

The document provides a legal basis for prosecutors not to prosecute private enterprises, but it also has certain limitations. The document only provides for "private enterprises" as the applicable object, narrowing the scope of application of non-prosecution. In China, there are many types of enterprises other than private enterprises, such as state-owned enterprises, partnerships, township enterprises, foreign-funded enterprises, etc. These different types of enterprises enjoy the same rights in criminal proceedings. The document only stipulates the scope of application for private enterprises, which is not in line with the requirement of the principle of "equality before the law". Even so, the document sends a signal that the trend of mitigating punishment in cases of corporate crime will continue to develop.

## **(ii) Pilot phase**

### **A. Pilot process**

With the accumulation of experience and standard case-handling guidance, the Supreme People's Procuratorate began a step-by-step exploration of non-prosecution procedures for enterprise-related cases. In January 2020, at the National Conference of Procurators General, Zhang Jun, Procurator General of the Supreme People's Procuratorate, said, "On the one hand, to protect the legitimate rights and interests of private enterprises and entrepreneurs with greater vigor, If it is possible not to arrest, do not arrest; if it is possible not to prosecute, do not prosecute; If it is possible not to be sentenced, make a recommendation for probation. On the other hand, we must strongly promote private enterprises to build the bottom line of law-abiding and compliant operation". So far, the Supreme People's Procuratorate as the leading "Corporate Compliance" pilot reform was officially launched. The enterprise compliance reform has gone through three stages, one is the initial trial stage, the second is the gradual expansion stage, the third is the national application stage.

In the first phase of the pilot reform, the Supreme People's Procuratorate was more cautious, identifying only six local procuratorates as pilot reform units and making initial attempts. The six local procuratorates are located in Pudong and Jinshan in Shanghai, Zhangjiagang City in Jiangsu Province, Tancheng City in Shandong Province, and Nanshan and Baoan in Shenzhen City, Guangdong Province. In March 2020, the Supreme People's Procuratorate launched a pilot project of corporate compliance supervision in the above six procuratorates involving illegal crimes without arrest, prosecution or sentence in accordance with the law. The pilot procuratorate in the region carried out the "reform of the application of the relative non-prosecution mechanism for corporate crimes". For criminal cases involving enterprises, prosecutors make decisions not to approve arrests, not to prosecute, or to propose a lighter sentence according to the plea system, while urging the enterprises involved to make compliance commitments and actively rectify the situation, in order to promote

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Duties and Strengthening Judicial Protection of Property Rights (December 2017), and Notice on Maximizing Functions and Roles to Create Rule-of-Law Environment for the Protection of the Lawful Rights and Interests of Entrepreneurs and Support the Innovation and Entrepreneurship of Entrepreneurs (December 2017) .

<sup>8</sup> See Opinions of the Supreme People's Procuratorate on Fully Fulfilling Procuratorial Duties and Strengthening Judicial Protection of Property Rights, Supreme People's Procuratorate, 01-06-2017.

compliance and law-abiding operation, and prevent and reduce corporate crime.

After a year, the procuratorates in the pilot regions have achieved good practical results. On this basis, the Supreme People's Procuratorate decided to further expand the scope of the reform in order to promote the deep development of the pilot compliance reform for enterprises involved in the case. In March 2021, the Supreme People's Procuratorate issued the "Work Plan on the Implementation of the Enterprise Compliance Reform Pilot. With this, the second phase of the compliance reform pilot for case-involved enterprises was officially opened. The Supreme People's Procuratorate extended the scope of the pilot to 10 provincial procuratorates, including Beijing and Zhejiang. The Work Program requires procuratorates to combine corporate compliance reform with a leniency system for plea and punishment, procuratorial advice, and the application of non-prosecution in accordance with the law. The pilot regional procuratorates have begun to explore the model of non-prosecution for cases of corporate offenses, taking into account the practice in their regions. In the first phase, the Supreme People's Procuratorate selected grassroots procuratorates as pilots. Unlike the first-phase option, in the second phase, the reform is hosted, decided, and supervised by the provincial procuratorates. Provincial procuratorates are responsible for coordinating the reform program and pilot cases within their provinces, and municipal and grassroots procuratorates are responsible for implementation.

On June 3, 2021, the Supreme People's Procuratorate, together with nine departments, jointly issued the "Guiding Opinions on the Establishment of a Third-Party Supervision and Evaluation Mechanism for Enterprise-Related Compliance (Trial)", which provides principles on how to apply compliance supervision to enterprise-related crime cases. The document clearly specifies two types of cases as the object of reform: One category is the company or enterprise suspected of unit crime cases, and the other category is the company or enterprise within the actual controller, management personnel, key technical personnel, etc. to implement the crime cases closely related to production and business activities. In August 2021, the Supreme People's Procuratorate made it clear that procuratorates in non-pilot areas could also explore corporate compliance reform within the legal framework. At this point, the scope of corporate compliance non-prosecution reform has also been expanded once again.

At the National Procurator General (Expanded) Conference held in January 2022, the Supreme People's Procuratorate summarized the experience of the preliminary pilot reform and decided to roll it out across the country's procuratorates. Thus, a new round of corporate crime non-prosecution reform focusing on corporate compliance is in full swing in China. In order to implement the "Guiding Opinions (Trial)", to provide guidance to prosecutors in handling cases, the Supreme People's Procuratorate, in conjunction with several departments, issued the "Measures for the Compliance Construction, Evaluation and Examination of Enterprises Involved in Criminal Cases (Trial)". The document makes two major breakthroughs: first, it establishes the basic criteria for an effective compliance system; second, it establishes the acceptance and evaluation mechanism for compliance rectification.

## B. Pilot characteristics

Although the corporate compliance reform has been underway for only three short years, the actual results have been very fruitful. According to statistics, in the first two years, 61 municipal procuratorates and 381 grassroots procuratorates handled a total of 525 cases involving corporate compliance. As of March 2022, 10 pilot provincial and municipal procuratorates handled a total of 766 corporate compliance cases, and non-pilot provincial and municipal procuratorates also took the initiative to handle 223 corporate compliance cases. According to the work report statistics released by the Supreme People's Procuratorate on March 15, 2022, the non-prosecution rate for crimes involving corporate entities was 38% in 2021, an increase of 5.9% year-on-year. At this stage, prosecutors apply compliance non-prosecution mainly in the following types of cases involving enterprises, false VAT invoicing, pollution of the environment, infringement of intellectual property rights, illegal operation, safety accidents, smuggling, etc.

In summary, this phase of corporate compliance non-prosecution reform has the following characteristics. First, these non-prosecutions only apply to minor criminal cases. Second, those responsible usually plead guilty and cooperate actively, and the companies involved usually take remedial measures and implement compliance recommendations, offering the possibility of obtaining a decision not to prosecute. In addition, compared to the simple approach in statutory non-prosecution, non-prosecution for insufficient evidence and minor non-prosecution, the application of non-prosecution to enterprises and the requirement to comply with rectification is essentially a "conditional non-prosecution". The additional condition of non-prosecution is that the enterprise carry out or improve compliance building. Finally, corporate compliance non-prosecution unites multiple entities such as the procuratorate, taxation authorities, and industrial and commercial administration authorities to perform procuratorial supervision functions and administrative punishment functions, respectively. The application of compliance non-prosecution has achieved the goal of education, correction and prevention of the enterprises involved in the case from multiple perspectives and has innovated the way of supervision of enterprises.

### 4. CONTROVERSY OVER THE TARGET OF CORPORATE COMPLIANCE NON-PROSECUTION

While affirming the achievements of reform, problems should also be summarized so that the direction of deepening reform can be found. Corporate compliance non-prosecution is a procedural decision made by the prosecutor based on discretionary authority, and its application will enable the subject of prosecution to obtain the effect of procedural exoneration. In order to limit the abuse of discretion by prosecutors and to achieve the goal of pursuing non-prosecution,

a clear target of compliant non-prosecution is a guarantee of the effective operation of the procedure. At this stage in China, there is no consensus on the object of non-compliance with prosecution, either in judicial practice or in theoretical research. The focus of controversy is who should be the target of non-prosecution in corporate crime cases, legal persons or individuals?

**(i) Mixed application in judicial practice**

Article 31 of the Criminal Law of the People's Republic of China establishes a "double subject punishment system". In other words, in the case of crimes committed by a unit, the enterprise is sentenced to a fine, and its directly responsible supervisors and other directly responsible persons are sentenced to penalties. According to the criminal law, in criminal proceedings, the enterprise, the person directly in charge or the person directly responsible may be the subject of prosecution. It then becomes an important issue that needs to be clarified whether the target of non-prosecution is a business or a natural person when the applicable conditions are met. During the compliance non-prosecution pilot reform, different approaches existed among prosecutors regarding the target of non-prosecution.

Some pilot procuratorates adhere to the understanding that "try to spare the enterprise, but severely punish those responsible", the criminal enterprise as the key application of non-prosecution target. The purpose is to separate the responsibility of units and individuals, not only to protect market players, to facilitate the normal operation of the economy, but also to create more jobs and protect people's livelihood.

Some pilot procuratorates, based on local practice, believe that in some family-owned enterprises, it is not very meaningful to adopt "differential treatment" for corporate and individuals. For example, in Wuxi, Jiangsu Province, the private economy accounts for 65% of the total local economy, and the number of private enterprises reaches 90%. The large number of small and medium-sized enterprises and family businesses is the main feature of the local market economy. In cases involving such enterprises, prosecuting the person responsible for the enterprise crime (usually the entrepreneur) is likely to result in the collapse of the enterprise. In such cases involving "people-centered" businesses, prosecutors who take the approach of "prosecuting entrepreneurs instead of businesses" will not achieve the goal of corporate compliance reform and may have a number of negative consequences. Therefore, the prosecutors in the pilot region, based on the goal of education and correction, believe that non-prosecution should be applied to the person in charge of the business - the entrepreneur - who is decisive for the survival of the business.

Other pilot district procuratorates have made a more refined distinction between "sparing the enterprise or sparing the person responsible" depending on the potential targets of non-prosecution. For example, the prosecutor's office in Nanjing's Jianye District adopted a differentiated policy based on the different characteristics of large enterprises and small and medium-sized enterprises. For large enterprises, the procuratorate insists on the practice of "letting the enterprise go, but severely punishing those responsible"; for small and medium-sized enterprises, it adopts the practice of "letting both the enterprise and the responsible person go".

The different choices of prosecutors not to prosecute have caused confusion in the causal relationship between compliance rectification and non-prosecution in practice. From the typical cases released by the Supreme Prosecutor, the condition of "qualified corporate compliance rectification" may eventually lead to three different results. From the typical cases released by the Supreme People's Procuratorate, in the pilot reform of corporate compliance non-prosecution, the condition of "passing corporate compliance rectification" may lead to three different results.

First, after the enterprise compliance assessment, prosecutors do not prosecute individuals. For example, in the Case: People v. Suizhou Z company and Kang A (case of Serious Liability Accidents), the responsible person in charge of safety production is the prosecution of the procuratorial authorities, while the enterprise is not the object of prosecution. However, because the enterprise voluntarily cooperated with the procuratorate to actively carry out compliance construction, coupled with the active surrender of the responsible persons involved in the case, pleaded guilty and punished, and actively compensated, the procuratorate finally made a decision not to prosecute the three persons involved in the case. It can be seen that the compliance building situation of the enterprises played a positive impact on the prosecutor's decision not to prosecute the individuals.

Second, the prosecutor does not prosecute the enterprise after the enterprise has passed the compliance and rectification. For example, in the case: People v. Jiangsu F Company, Yan A, Wang B (case of provided false documents), although the enterprise and the two responsible persons are the subject of prosecution, but the prosecutor's attitude is not the same. As the two responsible persons seriously violated professional ethics, the prosecutor strictly held them accountable according to the law, and the enterprise's compliance construction did not have too much influence on the conviction and punishment of the two responsible persons. The prosecutor made a decision not to prosecute the company involved in the case because of the necessity and feasibility of

compliance building, and after it passed the compliance building. This practice reflects the prosecutor's procedural pursuit of "sparing enterprises and severely punishing individuals".

Third, the prosecutor will not prosecute either the enterprise or the natural person after the enterprise's compliance and rectification has passed. This is a common practice during the pilot reform of corporate compliance without prosecution. From the typical cases of corporate compliance issued by the Supreme People's Procuratorate, most cases in which the public security authorities referred for prosecution included both corporate legal persons and individuals. In these cases, both the legal person and the natural person were the subject of prosecution by the procuratorial authorities, but after the enterprises involved in the case completed their compliance tasks, both were granted a decision not to prosecute by the prosecutor, i.e., a "double non-prosecution" result was achieved.

#### **(ii) Scholars hold different opinions**

Scholars have also offered some different opinions on the uncertainty of the subject of compliance non-prosecution. Broadly speaking, scholars' views can be divided into two schools of thought based on this criterion: whether to identify individuals as the subject of compliance non-prosecution.

First, some scholars hold the view of "single application". The target of compliance non-prosecution can only be corporate entities. Specifically, it can be divided into two views. One view is that the scope of application should be strictly limited. Scholars believe that, in the process of learning from the extraterritorial deferred prosecution agreement system, China should strictly limit the application of compliance non-prosecution to large enterprises, excluding other types of organizations and individuals to save judicial resources.<sup>9</sup> Another viewpoint advocates that compliance non-prosecution should be applied to large enterprises as far as possible and be applied to small and medium-sized enterprises with caution.<sup>10</sup> Compared with the former view, the latter view is more lenient.

Secondly, other scholars hold the view of "mixed application". Some scholars believe that, according to the characteristics and practice of Chinese enterprises, compliance non-prosecution should be applied only to corporate legal persons,<sup>11</sup> but in cases involving small and micro enterprises and family enterprises, the practice of "double non-prosecution" can also be adopted.<sup>12</sup> Some scholars have made specific suggestions in response to this view. In micro and small business cases, the entrepreneur and the business are "Combined into one", so the entrepreneur can be the subject of non-prosecution. Prosecutors may adopt "entrepreneurial compliance non-prosecution," where the crime committed by the enterprise is treated as a crime committed by the entrepreneur, and then decide whether to prosecute based on the cooperation of the entrepreneur and the compliance status of the enterprise. In the case of large and medium-sized enterprises with many employees or multinational enterprises, the enterprise has a modern management structure and the legal person and the responsible person can be clearly distinguished. Therefore, the prosecutor should only adopt the "corporate compliance non-prosecution" for the enterprise, and make a decision not to prosecute the enterprise after it meets the requirements for compliance and rectification.<sup>13</sup>

#### **(iii) Extraterritorial experience for reference**

Summarizing the extraterritorial practice, it can be found that there are two approaches regarding the target of deferred prosecution in the context of corporate crime. One is the "double subject" model. Both the enterprise and the natural person in a corporate crime case can be the subject of deferred prosecution, and both can sign a non-prosecution or deferred prosecution agreement with the prosecutor. This model is represented by the United States. Another model is the "single subject" model. Only certain types of company can be the subject of deferred prosecution in corporate crime cases and can enter into deferred prosecution agreements with prosecutors. Prosecutors cannot enter into deferred prosecution agreements with individuals.<sup>14</sup> This model is represented by the United Kingdom.

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<sup>9</sup> Cui Wenyu, "A New Type of Mechanism for Corporate Governance: A Compliance System in the Crossroads of Commercial and Criminal Perspectives," *Legal and Business Studies*, No. 6, 2020, p. 125.

<sup>10</sup> Chen, R. H., "Eight Controversial Issues in Corporate Compliance Non-Prosecution Reform," *China Law Review*, Vol. 4, No. 2021, p. 16.

<sup>11</sup> Li Yuhua, "The Applicable Objects of the Corporate Compliance Non-Prosecution System," *Legal Forum*, Vol. 6, No. 2021, p. 30.

<sup>12</sup> Li Yuhua, "Double Non-Prosecution" in Corporate Compliance Localization," *Law and Social Development*, Vol. 1, No. 1, 2022, p. 30.

<sup>13</sup> Li, Hong, "Corporate Compliance Non-Prosecution: Misconceptions and Corrections," *China Law Review*, Vol. 3, No. 2021, pp. 185-186.

<sup>14</sup> Crime and Courts Act 2013, schedule 17, Part 1, S.4(1).

Whether non-prosecution or deferred prosecution should apply to individuals in corporate crime cases is the biggest difference between the U.S. and other countries' deferred prosecution systems. The reason for this is that in the United States, deferred prosecution has evolved in the order of application to juvenile offenders, white-collar offenders, and corporate offenders. The U.S. Judicial Manual sets out different principles of prosecution for individuals and business organizations respectively. Thus, in the United States, prosecutors can enter into non-prosecution agreements or deferred prosecution agreements with both businesses and individuals in corporate crime cases.<sup>15</sup> In other countries, such as the UK and France, deferred prosecution agreements were originally introduced to effectively combat corporate crime.

The different choices of foreign countries in the target of non-prosecution for corporate crimes provide reference experience for China's compliance non-prosecution reform. As an out-of-crime procedure, the subject of a non-prosecution or deferred prosecution is given the opportunity not to be pursued by the prosecutor and not to be convicted and sentenced by the judge. As a result, this procedure is seen as "let off the hook" by Chinese judicial officials. The deeper meaning is that once a suspect or unit receives a decision from the prosecutor not to prosecute, it means that they are spared by the prosecutor and will not be pursued further. Therefore, the first issue that needs to be clarified in order to construct this system is to define the targets of corporate compliance non-prosecution.

## **5. REFORM PROPOSALS FOR THE TARGET OF CORPORATE COMPLIANCE NON-PROSECUTION**

### **(i) Non-prosecution of enterprises after compliance**

China implements an economic system in which the public ownership system is the mainstay, and a variety of ownership systems develop together. According to the different criteria of division, enterprises in China can be divided into various types. And in the research on enterprise compliance without prosecution, scholars mostly adopt two types of division. One is to distinguish large enterprises and small and micro enterprises according to the scale of the enterprise; the other is to distinguish state-owned enterprises and private enterprises according to the nature of the operating entity. If we combine these two criteria, we can distinguish between "large state-owned enterprises" and "small and micro private enterprises". Although this classification is not strict, but also represents the general phenomenon in practice.

Large state-owned enterprises have been established and developed for a long time and have a high degree of modernization. The enterprise has a complete board of directors, supervisory board, council and other departments. The governance structure of the enterprise is sound, and the supervision mechanism is perfect. The enterprise's criminal acts are all committed in the interest of the enterprise and are approved by individuals or institutions with decision-making power, such as department heads or the board of directors, and the enterprise's responsibility is expressed as collective responsibility. Therefore, in large state-owned enterprises, it is feasible to have a clear division of responsibility between the enterprise and those responsible.

As mentioned above, in the process of applying deferred prosecution in corporate criminal cases in the United Kingdom and the United States, prosecutors also enter into deferred prosecution agreements mostly with large enterprises with strong capital and monopoly status, such as industry giants and multinational enterprises. Prosecutors usually consider that deferred prosecution should be applied to these enterprises for three reasons. One is that these companies have a huge impact and prosecuting them could have a series of irreparable negative effects. For example, the enterprise will close down, employees will lose their jobs, and stock prices will plummet. Therefore, prosecutors should treat criminal cases against large corporations with caution due to the need to protect the public interest. Second, for prosecutors large corporate criminal cases have long investigation times, difficult evidence collection, and high standards of proof. And the defense team of the enterprise is large and high level, even if the prosecutor prosecutes the enterprise, there is uncertainty whether the final conviction and sentence can be obtained from the judge. Third, if a deferred prosecution agreement is signed, the requirements in the terms of the agreement can achieve almost the same results as those requested in the indictment for the judge to impose on the enterprise in the judgment. Examples include payment of fines, surrender of illegal proceeds, compensation for damages to victims, improvement of compliance plans, restoration of the damaged environment, etc. And in a deferred prosecution agreement, these obligations can be completed much earlier, taking into account efficiency. The above reasons have the same rationality when prosecutors do not prosecute large state-owned enterprises for compliance.

### **(ii) Non-prosecution of individuals after plea of guilty**

One of the characteristics of China's market economy is the large number of private enterprises, small and micro enterprises, and family businesses, which are both an important part of the market and an important driving force in enhancing market dynamics. Small and micro private enterprises are usually small in scale, have little capital, have a weak concept of legal system, lack a complete management system, and have a low

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<sup>15</sup> Department of Justice, Justice Manual,9-28.1100.

level of modernization. The person in charge of the enterprise, especially the entrepreneur (e.g., chairman and general manager), is crucial to the enterprise. They are usually multi-tasking, being the founder, operator, actual manager, and legal representative of the enterprise, as well as the decision maker and person in charge of the enterprise's behavior. In other words, entrepreneurs and enterprises have an inseparable link. In the criminal cases involving small and micro private enterprises, the responsibility of the person in charge (entrepreneur) is the same as the responsibility of the enterprise. There is little difference in the distinction between the two in terms of responsibility.

Based on the above, both judicial practice and scholarly opinion agree that enterprises and entrepreneurs should be conflated. In small and micro private enterprises in criminal cases should be established "double non-prosecution", neither the prosecution of enterprises nor entrepreneurs. In principle, I agree with this view. In the micro and private enterprises in criminal cases, entrepreneurs should also become the object of deferred prosecution. However, the deferred prosecution of entrepreneurs should no longer be based on "corporate compliance not to prosecute" but should be based on the plea system of leniency, to determine the "plea not to prosecute". In other words, Professor Li Hong proposed a conversion procedure in small and micro private enterprise crime cases, the enterprise crime will be reduced to entrepreneurial crime, and then in the case of meeting the conditions, try to apply a special plea system of leniency. <sup>16</sup>Based on this, I put forward the idea of "plea of not prosecuting" for two reasons.

On the one hand, the application of non-prosecution as a procedural incentive to entrepreneurs at the review and prosecution stage is consistent with the institutional design and penal philosophy of plea-bargaining leniency. <sup>17</sup>The plea leniency system, which was established in China in 2018 when the Criminal Procedure Law was amended, is a system of mitigating penalties applicable to individuals. As a basic principle of the Criminal Procedure Law, "leniency in plea of guilty and punishment" should be applied throughout the criminal procedure. It should be reflected in the leniency of sentencing on the substantive law punishment, and also in the leniency of the application of procedures in the litigation process. In the plea leniency system, prosecutors propose lenient punishment based on the suspect's performance in pleading guilty and accepting punishment. Although at this stage of China's judicial practice, "leniency" is mostly reflected in the conviction and sentencing, the judge's acceptance of a lighter or reduced sentence proposal. But in theory, the concept of "procedure is punishment" should also be given attention. If the suspect or unit involved in the prosecution can apply the lighter, faster proceedings, in essence, a procedural "leniency". As a kind of intermediate state between prosecution and non-prosecution, compliance with non-prosecution gives the suspect a chance not to be prosecuted through efforts to quickly end the proceedings and not to be convicted and sentenced. Therefore, the non-prosecution process has a certain "lenient" nature. For this reason, a lenient plea system should also be implemented at the prosecution stage. If the entrepreneur pleads guilty and meets the applicable requirements, the prosecutor can apply the non-prosecution procedure to him/her so that he/she can receive a period of correction, repair the damage, and obtain the procedural incentive to avoid being convicted and sentenced.

Second, the plea leniency system has been widely applied in judicial practice since it was written into the Criminal Procedure Law in 2018 and has achieved rich experience and better results. As a right of criminal suspects and defendants, plea leniency should be applied equally to all subjects, including criminal suspects and criminal suspect enterprises. Therefore, in enterprise crime cases, if the responsible person pleads guilty and punishes, he or she should be punished leniently. In small and medium-sized private enterprises, the entrepreneur and the enterprise have the characteristic of "Combined into one", and the entrepreneur plays a vital role in the enterprise. If the prosecutor does not prosecute the enterprise, but insists on severely punishing the entrepreneur, then, once the entrepreneur is taken compulsory measures can not continue to operate and manage the enterprise, the enterprise involved in the criminal proceedings may face the risk of bankruptcy, collapse. On the contrary, if the prosecutor applies a plea not to prosecute procedure to the entrepreneur, in order to obtain the result that the enterprise and itself will not be prosecuted, convicted and sentenced, and not be included in the list of defaulters. The entrepreneur will lead all the personnel of the enterprise to carry out compliance reform more seriously during the period of compliance and rectification. Entrepreneurs will actively pay fines, conscientiously implement compliance recommendations, and improve the rule of law in their businesses in order to guarantee that they will not be prosecuted after passing the compliance assessment.

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<sup>16</sup> Li, Hong, "Corporate Compliance Non-Prosecution: Misconceptions and Corrections," *China Law Review*, Vol. 3, No. 2021, pp. 185-187.

<sup>17</sup> Sun Qian, "Some Issues in the Implementation of the Revised Criminal Procedure Law by the Procuratorate," *Journal of the State Prosecutor's Academy*, Vol. 6, No. 6, 2018, p. 6.

Compared with enterprises, entrepreneurs are the real subjects who can bear criminal responsibility, which is the real guarantee of achieving the goal of penalties. Therefore, in the criminal cases involving small and micro private enterprises, not prosecuting entrepreneurs who voluntarily plead guilty and pay fines is the only way to ensure that the goal of corporate compliance not to prosecute is achieved.

## **6. CONCLUSION**

China has different characteristics of market players from those in the United Kingdom and the United States. Among them, the more prominent is in the small and micro enterprises, entrepreneurs and enterprises have the characteristics of "Combined into one". In the process of compliance with the non-prosecution reform, reformers should not only learn from foreign experience, but also develop a reasonable non-prosecution system based on national practice to achieve the procedural goals of non-prosecution. As far as the target of non-prosecution is concerned, both enterprises and individuals should be the target of non-prosecution. When the responsibility of the two can be clearly distinguished, enterprises can obtain procedural incentives through "Corporate Compliance Non-prosecution"; and when the responsibility of the two cannot be clearly distinguished may be mixed, in the case of meeting the conditions, the prosecutor can apply to the entrepreneur " Non-prosecution after plea of guilty ".

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