

Study on the Model of Conditional Non-Prosecution In Corporate Crime Cases

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ABSTRACT: Corporate compliance non-prosecution is a positive exploration of the conditional non-prosecution system in Chinese criminal justice. However, the procedure has not been properly integrated into the Chinese non-prosecution system, with a lack of judicial review in the application of the procedure and a lack of financial penalties and cooperation requirements in the additional conditions. Based on the degree of involvement of judges, three models of conditional non-prosecution of corporate crimes can be broadly distinguished: without review, formal review, and substantive review. In general, the conditional non-prosecution of corporate crimes has three characteristics in practice: suitable for large enterprises, imposition of large fines, longer periods of non-prosecution. The corporate compliance non-prosecution reform, China can learn from extraterritorial experience in three ways. First, it can absorb the experience of judges' review and determine the role of judicial review. It should protect the rights of enterprises in litigation and respect the discretion of prosecutors. Second, it should be combined with the actual situation in China to establish a "double non-prosecution". The special procedure of "conditional non-prosecution of corporate crimes" should be applied to enterprises, and the procedure of "plead guilty and accept punishment without prosecution" should be applied to individuals. Finally, it should clarify the role of the conditionality attached to non-prosecution. The inclusion of financial penalties and corporate cooperation as conditions attached to non-prosecution, along with compliance programs, achieves the dual goals of punishment and prevention.

Key Word: Corporate Crime Non-Prosecution; Conditional Non-Prosecution; Judicial Review

I. INTRODUCTION

Creating and improving the law-oriented environment for the development of enterprises is an important proposition for the legalization of China at this stage. In January 2020, at the National Conference of Procurators General, Procurator General Zhang Jun of the Supreme People's Procuratorate said, "We should 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 sentence, made a probation recommendation". Since then, the pilot reform of "corporate compliance" led by the Supreme People's Procuratorate has been officially launched.¹ After twice expanding the scope of the pilot region, the "enterprise compliance non-prosecution" pilot reform has been carried out nationwide. Corporate compliance is an additional requirement for enterprises involved in the case to obtain non-prosecution which is an enrichment of the Chinese non-prosecution system and an innovation in the judicial practice of conditional non-prosecution.

In some foreign countries, the application of conditional non-prosecution of criminal enterprises has long been not an uncommon thing. There are different forms of conditional non-prosecution procedures for corporate crimes in national judicial practice, but fundamentally, these procedures have the same goal: the enterprises involved in the case complete the conditions to pursue the result of not being prosecuted by the prosecutor. The United States was the first country to experiment with the conditional non-prosecution of corporate crimes and has had a judicial practice of non-prosecution or deferred prosecution of criminal enterprises since the 1990s. The United Kingdom established a deferred prosecution agreement system for corporate crimes in 2012, and France established the Judicial Public Interest Agreement system in 2016, and both have been applied to specific cases and achieved good practical results.

Based on this, this paper refers to this type of procedure collectively as "conditional non-prosecution of corporate crimes". Specifically, in a corporate crime case, the prosecutor enters into an agreement with a company that voluntarily cooperates, admits to the crime, and accepts the penalty, and if the company completes the conditions of the agreement on time, the prosecutor will not prosecute the company, and if the company fails to complete the conditions on time, the prosecutor will prosecute the company.

In China, the system of non-prosecution consists of statutory non-prosecution, insufficient evidence

¹In March 2020, the Supreme People's Procuratorate launched a pilot project of corporate compliance supervision 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 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. 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.

non-prosecution, discretionary non-prosecution, significant meritorious non-prosecution, and conditional non-prosecution of minors. In terms of applicable objects, applicable conditions, and procedural settings, corporate compliance non-prosecution as an emerging system is not identical to existing non-prosecution procedures. It does not fit properly into the existing non-prosecution system in China. In the framework of China's non-prosecution system, finding a system position for corporate compliance non-prosecution and establishing a conditional non-prosecution system for corporate crimes suitable for China's judicial situation has become one of the urgent issues to be solved.

Globally, there are many different models of conditional non-prosecution of criminal enterprises. Depending on the level of judge involvement, they can be distinguished into three main models: without judge involvement, judge formal review, and judge substantive review. This paper takes a comparative approach to the study of conditional non-prosecution of corporate crimes in the UK, US and France. This paper consists of three parts. The first part deconstructs the internal structure of the three non-prosecution models and compares their procedural features; secondly, it summarizes the practical status and features of conditional non-prosecution for corporate crimes by analyzing judicial cases and data; and finally, it summarizes the relevant insights of conditional non-prosecution for corporate crimes on the reform of corporate compliance non-prosecution in China.

II. THREE MODELS OF CONDITIONAL NON-PROSECUTION IN CORPORATE CRIME CASES

(i) Without review by judges

Conditional non-prosecution of corporate crimes without judge review means that only the prosecutor and the enterprises are involved in the negotiation, implementation and evaluation of the non-prosecution proceeding. If the enterprises complete the conditions, the prosecutor will not prosecute it, and if the enterprises fails to complete the conditions, the prosecutor will prosecute it.² A typical example of conditional non-prosecution of corporate crimes without judge review is the Non-Prosecution Agreements (NPA) adopted by the United States Department of Justice. In the non-prosecution agreement process, prosecutors and enterprises resolve liability issues in corporate criminal cases by entering into and enforcing NPA. Conditional non-prosecution of corporate crimes without judge review means that only the prosecutor and the enterprise are involved in the negotiation, implementation and evaluation of the non-prosecution agreement. If the enterprise completes the conditions attached to the agreement, the prosecutor will not prosecute it, and if the enterprise fails

²Miller, Mary. "More than Just a Potted Plant: A Court's Authority to Review Deferred Prosecution Agreements under the Speedy Trial Act and under Its Inherent Supervisory Power." *Michigan Law Review*, vol. 115, no. 1, October 2016, p. 137.

to complete the conditions, the prosecutor will prosecute it.

In the United States, depending on the type of criminal case, economic, environmental and natural resource, and tax crimes committed by enterprises are handled by the Criminal Division, the Environmental and Natural Resources Division, and the Tax Division of the Department of Justice, respectively. Prosecutors are responsible for investigating, charging, negotiating and deciding whether to prosecute criminal enterprises based on the Principles for Federal Prosecution of Enterprise Organizations issued by the Department of Justice. In deciding whether to prosecute an enterprise, prosecutors should consider three factors according to the Judicial Manual. First are the same factors as prosecuting an individual, including the sufficiency of the evidence, the likelihood of a successful trial, and the potential deterrence and other consequences of a conviction.³ Second, prosecutors need to consider factors related to the public interest, including the nature and seriousness of the crime, the adequacy of applying non-criminal methods, possible collateral consequences, the particular policies of different sectors, and the interests of any victims. Finally, given the "legal person" nature of the enterprise, prosecutors should also consider the prevalence of wrongdoing within the enterprise, the history of wrongdoing, willingness and actions to cooperate, compliance programs, and remedial measures.⁴

In specific cases, after assessing the above-mentioned influencing factors in a comprehensive manner, prosecutors may enter into NPA with companies or individuals who meet the applicable conditions. The agreement is similar to a "voluntary contract"⁵ between the parties, which only records the facts of the case and does not require the company or individual to plead guilty.⁶ The agreement is kept by both parties and serves as a legal document proving the validity of the procedure. In the non-prosecution process, the prosecutor does not present the charges against the enterprise to the judge, so there is no indictment. The prosecutor places more emphasis on voluntary disclosure by the enterprise and emphasizes truthful and full cooperation by the enterprise. In a non-prosecution agreement, the prosecutor reserves the right to prosecute (but does not use it) to ensure that the offending enterprise or individual demonstrates good behavior through a series of activities over the two- or three-year term of the agreement. Conditions attached to the NPA typically require the criminal enterprise or individual to waive the statute of limitations, admit the crime, cooperate with the prosecutor on an ongoing basis, pay a fine, and comply with and enforce remedial commitments. If the enterprise or individual involved in the case complies and completes the additional conditions within the term of the agreement, it will avoid prosecution by

³Department of Justice, Justice Manual,9-27.2200.

⁴Department of Justice, Justice Manual,9-28.300.

⁵Ye Liangfang, "The Evolution of the Pretrial Diversion Agreement System for Legal Persons in the United States and Its Implications," *Criminal Law Review*, vol. 31, p. 91.

⁶Cindy R. Alexander; Mark A. Cohen, "The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements," *American Criminal Law Review* 52, no. 3 (2015), p.544-545.

the prosecutor. However, prosecutors will file more serious criminal charges against a enterprise if it reoffends, or is found to have provided false, incomplete or misleading information, or violated any of the terms of the agreement, while the non-prosecution agreement is in effect.

(ii) Formal review by judges

Conditional non-prosecution of corporate crimes with formal review by a judge means that the non-prosecution process not only involves the prosecutor and the criminal enterprise, but also requires review and approval by a judge. A typical example of a judge's formal review of a conditional non-prosecution is the Deferred Prosecution Agreements (DPA) adopted by the U.S. Department of Justice. A DPA is a pretrial agreement between the prosecutor and the criminal enterprise based on voluntary principles. It serves to resolve matters that may be subject to prosecution. The agreement allows the prosecutor to suspend prosecution for a certain period of time, provided that the enterprise completes the conditions attached within the agreement and that the agreement is approved or monitored by a judge for entry into force and implementation.⁷ The deferred prosecution agreement process evolves around the application of the agreement, the negotiation and enforcement of the terms of the agreement, and the withdrawal of criminal charges.

In general, the subject matter, target audience, scope of cases, and conditions for application of the deferred prosecution agreement procedure and the non-prosecution agreement procedure adopted by the U.S. Department of Justice are basically the same. In *U.S. Vs. Fokker Services B.V.*, the judge noted that "the main difference between an NPA and a DPA is whether the prosecutor files criminal charges, there are no formal charges in an NPA proceeding, and the agreement is maintained by both parties and is not submitted to the court".⁸ Specifically, in a deferred prosecution agreement proceeding, the prosecutor and the enterprise negotiate a deferred prosecution agreement. The prosecutor then has to submit the DPA along with the indictment to the judge for review and apply to the judge for a stay of prosecution proceedings. If the judge approves the prosecutor's application after reviewing the DPA, the criminal proceedings are suspended and the case proceeds to the execution phase of the DPA. If the enterprise completes the additional conditions on time during the execution of the agreement and after the prosecutor's assessment is satisfactory, the prosecutor will apply to the judge to withdraw the criminal charges and the proceedings involving the enterprise are terminated.

The U.S. Speedy Trial Act requires that a defendant's trial must begin within 70 days of the prosecutor's charge or the defendant's appearance before a judicial officer, and violation of these time limits may result in dismissal of the case.⁹ However, in calculating the period of prosecution, there shall be excluded "a period during

⁷Lewis, Morgan. "Deferred Prosecution Agreements: Key Differences between the US and UK." (2019).

⁸*U.S. v. Fokker Services B.V.*

⁹18 U.S.C. § 3161.

which the prosecutor and the defendant agree in writing to defer prosecution with the approval of the court for the purpose of allowing the defendant to prove good behavior during that period. "In deferred prosecution agreement proceedings, the parties to the agreement usually agree to a two- to three-year term of the agreement. During the agreement period the enterprise fulfills its agreed obligations, the prosecutor suspends the prosecution of the enterprise and the criminal proceedings are suspended. This means that the defendant has not been tried during the 2-3 year deferred prosecution period. At this point, a conflict arises between the period agreed in the deferred prosecution agreement and the requirement of the Speedy Trial Act for the commencement of trial. To avoid this contradiction, the deferred prosecution agreement usually requires the defendant to make a waiver of his or her right to a speedy trial. In order to avoid infringement of the defendant's right to litigate and to avoid companies being forced to make a waiver due to outside pressure, the judge needs to review the voluntariness and legitimacy of the defendant's waiver of Speedy Trial Act rights protection and make a decision on whether to grant it after review. Thus, in a deferred prosecution agreement proceeding, the judge does not review the facts of the case and the specific terms of the agreement on the merits, but only the formality of the waiver of procedural rights by the enterprise.

(iii) Substantive review by judges

Judges are involved earlier and more involved in conditional non-prosecution proceedings under the judge's substantive review model than under the judge's formal model. Typical examples of substantive review by judges are the DPAs adopted by the UK CPS and SFO, and the Judicial Public Interest Agreements adopted by the French PNF and AFA.

A. The characteristics of judicial review in UK

The UK established a deferred prosecution agreement process with judicial review features in the Criminal Procedure Act in 2012. Under the guidance of a series of legal documents,¹⁰ CPS and SFO can enter into DPAs with enterprises but not individuals.¹¹ DPA were originally introduced in the UK to effectively address corporate bribery offences. However, as economic crimes have become more frequent and diverse, DPA are increasingly being used by prosecutors to deal with a wide range of criminal offences committed by enterprises. Such crimes include conspiracy to defraud, money laundering, and failure to prevent the facilitation of foreign tax evasion crimes. In the UK, the substantive review by judges in deferred prosecution agreement proceedings is twofold.

During the substantive negotiation phase, the judge can conduct a substantive review regarding the

¹⁰Schedule 17 to the Criminal Procedure Act, The Code of Crown Prosecutors, Code of Practice on Deferred Prosecution Agreements, Guidance for Prosecuting Enterprisees, Bribery Act 2010: A Guide to Joint Prosecution.

¹¹Crime and Courts Act 2013, schedule 17, Part 1, s.4.

applicability of the DPA process and the content of the agreement. The substantive negotiation phase revolves around two agreements, two applications and two hearings. During this phase, the goal of the prosecution and defense is for the DPA to be approved by the judge and become official. First, the prosecutor reaches a proposed agreement with the enterprise, submits the agreement and application to the judge. A Preliminary Application for DPA negotiations is filed with the judge. Upon receipt of the application, the judge is required to convene a Preliminary Hearing to review whether the initial application is in the interest of justice. If the judge finds that the DPA process is in the interest of justice and that the terms of the proposed agreement are fair, reasonable, and proportionate, then the judge is required to issue a statement affirming and approving the continuation of the DPA process and detailing the reasons therefor. If the judge issues a statement approving the prosecutor's initial application, then the prosecutor and the enterprise should enter into formal negotiations and reach a formal agreement. After the parties sign the agreement, the prosecutor should again file a Final Application with the judge in the form of a petition. Upon receipt of the Final Application, the judge shall convene a Final Hearing to confirm and declare whether the formal agreement is in the interest of justice and whether the terms of the agreement are fair, reasonable, and proportionate. After the Judge approves the Formal Agreement, the case shall be deemed suspended by order of the Judge.¹²

During the enforcement phase of the agreement, the judge can substantially review the changes to the DPA as well as the remediation agreement. If the judge finds that the enterprise has violated the agreement but in a minor way, it may invite the parties to the agreement to discuss an appropriate remedy. If the parties to the agreement are able to reach a remedial agreement and submit a petition for modification, the judge reviews the remedial agreement on the merits. The remedial agreement will only become effective if the judge finds that the terms of the remedial agreement are fair, reasonable and proportionate and approves them.¹³ If the judge finds that there is a material or substantial breach by the enterprise, or that the parties are unable to reach an appropriate remedial agreement, or that the terms of the remedial agreement do not meet the fair, reasonable, and proportionate requirements, the judge may issue an order terminating the DPA.¹⁴ At that point, the DPA expires and the prosecutor may apply to the judge to lift the stay of the indictment involved in the DPA and resume the criminal proceedings.

In summary, the judge in the U.S. deferred prosecution agreement process reviews only the voluntariness of the enterprise's waiver of procedural rights, while in the U.K., the judge's review is more comprehensive, examining both the appropriateness of the application of the process and the fairness, reasonableness and

¹²Criminal Procedure Rules 2015, s.11.4(4).

¹³Deferred Prosecution Agreements Code of Practice , paragraph 12.4.

¹⁴Deferred Prosecution Agreements Code of Practice , paragraph 12.5.

proportionality of the agreement's content.

B. The characteristics of judicial review in France

The Judicial Public Interest Agreement (CJIP) procedure was established in France in 2016 through the Sapin II Bill. The French National Financial prosecutor can suspend the prosecution of criminal enterprises if the applicable conditions are met. In France, the CJIP only applies to legal persons, public institutions and private companies, not to individuals.¹⁵ The State Financial Prosecutor may offer the CJIP to the aforementioned institutions as an alternative to criminal prosecution when they are suspected or investigated for corruption, trading in power and money, tax evasion, money laundering or related economic crimes.¹⁶ In addition, when a legal person is involved in an environmental crime, the prosecutor may also consider offering the CJIP to the criminal legal person, as long as no public prosecution has been filed.¹⁷

If the English judge substantively reviewed the procedural reasonableness and fairness of the terms of the deferred prosecution agreement through an initial hearing and a final hearing, respectively, the French judge combined the two hearings into one, and the judge reviewed both the procedures and the terms of the agreement when confirming the proposed agreement. Specifically, the prosecutor shall submit to the judge for review the CJIP confirmation application, the proposed agreement, the supporting documentation of the consent of the enterprise, and the documents containing the investigation and questioning procedures.¹⁸ The judge will hold a hearing and focus on verifying the following matters to determine whether to affirm the proposed CJIP application. These include the reasonableness and regularity of the application of the CJIP procedure, whether the amount of the fine in the proposed agreement complies with the legal limits, and whether the obligations imposed by the proposed agreement are proportionate to the benefits derived from the criminal conduct. After a hearing, if the judge issues a confirmation order, the company has 10 days to exercise its right to rescind. If the enterprise does not exercise its right to rescind, the judge's order becomes effective, and the enterprise shall perform the obligations set forth in the agreement. If the judge denies the prosecutor's proposed CJIP application, the prosecutor will reopen the case against the company. After the judge signs the confirmation order, the CJIP enters the enforcement phase. If the company does not fulfill its obligations under the CJIP, the prosecutor may report the matter to the judge, who will decide whether to resume the proceedings. It can be seen that the judge still has a certain review role to play at that stage.

In summary, in the French CJIP procedure, the judge's normative review of the procedure and the review of the legality of the terms of the agreement are concentrated together in a public hearing at the confirmation stage.

¹⁵ Code pénale, Article 121-2.

¹⁶ Code de procédure pénale, Article 41-1-2.

¹⁷ Code de procédure pénale, Article 41-1-3.

¹⁸ Code de procédure pénale, Article R15-33-60-3.

Although the judge only has the right to approve or reject the proposed agreement and cannot modify the terms of the agreement, the judge still plays a substantive role of judicial review to protect the legal rights of the companies involved in the case, due to the normative limits set by the CJIP on the amount of public interest fines and the object and duration of the application of the compliance program.

III. Practical features of conditional non-prosecution in corporate criminal cases

Globally, more and more countries are paying attention to the conditional non-prosecution system for corporate crimes and have been conducting theoretical studies and legislative consultations.¹⁹ However, in terms of practical effects, the judicial practices of the US, UK and France regarding conditional non-prosecution of corporate crimes are more representative. The NPA and DPA procedures in the US have been applied for the longest time and have the most abundant practical cases. According to statistics, from 2000 to 2021, U.S. federal prosecutors have signed 608 NPAs and DPAs in corporate crime cases. In the UK, the SFO signed the first DP A with Standard Bank in 2015, and as of 2022, the SFO has signed 14 DPAs of which 4 have been completed. The French PNF has now also signed 12 CJIPs since the first one with HSBC Bank (HSBS) in 2017. According to the case studies, the practice of conditional non-prosecution for corporate crimes shows the following salient features.

(i) Suitable for large enterprises

From the viewpoint of enterprise scale, the vast majority of enterprises that are not prosecuted by the prosecutor with conditions are large enterprises; from the viewpoint of enterprise scope, many of them are multinational enterprises; from the viewpoint of economic strength, many companies are strong listed companies. In the United States, according to statistics from 2001 to 2012, 58% of the companies that entered into NPAs or DPAs were publicly listed on the U.S. stock exchange (148 out of 255). Of the companies with DPAs, 22% are U.S. companies ranked in the Fortune 500; 20% are foreign companies ranked in the Global Fortune 500.²⁰ For example, General Electric and Boeing are large, globally recognized companies. In the UK and France, the companies involved in the cases resolved by conditional non-prosecution are also mega multinational or public companies, and are mostly concentrated in the securities, finance, and insurance industries. For example, Rolls-Royce PLC, a global company listed on the London Stock Exchange, is the world's second largest manufacturer of aircraft engines. Société Générale, one of the three giants of the French banking industry, is one of the world's largest investment banks, and its shares are listed on the New York and Paris stock markets, respectively.

¹⁹Canada and Singapore have legislation in place to allow the application of deferred prosecution agreement procedures in corporate crime cases, but no such agreement has been reached in judicial practice. The introduction of a deferred prosecution agreement procedure for corporate crimes is under discussion in Australia, Ireland, Poland and Switzerland.

²⁰Brandon, L. G. "Too Big to Jail: How Prosecutors Compromise with Corporations." The Belknap Press of Harvard University Press, Cambridge, Massachusetts, 2014, p.61, p.82.

(ii) Imposition of large fines

In extraterritorial practice, fines are one of the most important conditions attached to an agreement, whether it is a non-prosecution agreement process, a deferred prosecution agreement process, or a public interest justice agreement process. Overall, although the application of conditional non-prosecution to a company can prevent the company from being convicted and punished by a judge, it still needs to bear a huge fine to pay for its illegal and criminal behavior. On a case-by-case basis, in 2005 Bristol-Myers Squibb entered into a DPA with the U.S. Department of Justice for alleged securities fraud, agreeing to a total fine of \$50 million. In 2006, Statoil (ASA) entered into a DPA with the DOJ for violations of the Foreign Corrupt Practices Act, with a total fine of \$7.5 million.

A notable new trend in recent years, as a result of corporate criminal conduct involving multiple countries, is that companies may enter into conditional NPA with multiple countries at the same time, and in each agreement undertake to cover large fines. For example, for commercial offences in seven countries (Indonesia, Thailand, India, Russia, Nigeria, China and Malaysia) and three commercial sectors (civil aerospace, defense aerospace, energy enterprise), in 2017 Rolls-Royce PLC entered into conditional NPA with the UK SFO, the US DOJ, the Brazilian Federal Ministry of Public Affairs, respectively, entered into a conditional non-prosecution agreement to avoid prosecution by prosecutors. To obtain this result, the enterprise had to pay a fine of more than £671 million. In addition, Airbus SE entered into separate conditional NPA with prosecutors in the U.K., U.S. and France in 2020 for alleged bribery offenses committed in several countries around the world. Under the agreements, the company is required to pay fines totaling approximately €3.6 billion, including fines, illegal profits and compliance costs totaling £991 million to the UK SFO. This is the largest conditional non-prosecution agreement for corporate crime in the world to date.

(iii) Longer periods of non-prosecution

Based on the conditional NPA that have been signed in the U.S., UK and France, the agreements mostly agree on a long-term agreement period. The U.S. Department of Justice does not explicitly limit the duration of NPAs or DPAs. In practice, the duration of the agreement ranges from 12 to 60 months, but in general most agreements are for 36 months. According to data from the last five years, 14 of the 22 agreements signed in 2017 were for 36 months; 13 of the 24 agreements signed in 2018 were for 36 months; 23 of the 32 agreements signed in 2019 were for 36 months; and 30 of the 38 agreements signed in 2020 were for 36 months; 17 of the 28 agreements signed in 2020 were for 36 months.

The UK SFO also does not place strict limits on the duration of DPAs. Depending on the difficulty of implementing the terms of the agreement, any agreement term from 1-5 years is considered within a reasonable range. Of the 14 DPAs that have been signed, all but two have a term of five years and one has a term of one year,

while the remaining nine have a term of three years. The DPA signed by Rolls-Royce PLC has a term of 5 years for two reasons. On the one hand, due to the huge amount of money involved in the case, the company needs to pay nearly 500 million pounds of fines to the SFO, in order to achieve the punishment and ensure the normal operation of the company, the prosecutor agreed with the company to pay the installment method, the company needs to pay more than 100 million pounds of fines each year. On the other hand, because the bribery was particularly serious and had been going on for nearly three decades, involving seven jurisdictions and three commercial sectors, the SFO required the company to undertake a comprehensive and rigorous compliance program to rectify the situation. Although the DPA entered into by Güralp Systems Ltd with the prosecutor also agreed on a five-year period, it was not for the same reason as in the Rolls-Royce case. The reason given by the judge was that although the £2.06 million fine was relatively small compared to other DPAs, given the financial situation of the enterprise, ordering it to pay the fine in full within three years could be fatal to the survival of the enterprise. In the interests of justice, the agreement was extended to five years to ensure that the enterprise has sufficient time to complete its fine obligations. In the case of Airline Services Limited (ASL), the enterprise entered into a 1-year DPA with the SFO for three counts of allegedly failing to prevent bribery. This is the shortest DPA agreed to date in the UK. According to the Crown Prosecution Service's Corporate Prosecution Guidelines, "the company is in the process of liquidation" is an important consideration in not prosecuting a company. In this case, ASL continued to exist in order to conclude and perform the DPA, and once the agreement was completed ASL would be liquidated. In this case, completing the agreement in a relatively short period of time would have resulted in significant cost savings. The agreement was declared completed in October 2021 after ASL paid £990,000 in ill-gotten gains, £1.23 million in fines, and £750,000 in costs.

Unlike the UK and the U.S., France specifies the duration of the execution of public interest judicial agreements. Under Article 41-1-3 of the Code of Criminal Procedure, the prosecutor may specify in the agreement how and when the fine is to be paid, which normally cannot exceed one year. If the agreement requires the company to implement a compliance program, the maximum period is usually not to exceed three years. From the 12 agreements that have been signed, the compliance period is usually 2 years. For example, the agreements for Société Générale and Bolloré include a commitment to be audited and monitored by the French Anti-Corruption Agency (AFA) for a period of 2 years.

IV. Implications of Conditional Non-Prosecution in Corporate Crime Cases for China's Non-Prosecution Reform

China's ongoing reform of corporate compliance non-prosecution is an innovative attempt by prosecutors to apply conditional non-prosecution in corporate crime cases. Prosecutors propose compliance reforms to enterprises suspected of committing crimes, and enterprises that agree to carry out reforms submit compliance

reform commitments to prosecutors, with both parties agreeing to specific compliance reform tasks and deadlines and suspending the continuation of criminal proceedings. If the company involved in the case completes the compliance commitment on time and is evaluated by a third-party supervisory body as an incentive for litigation, the prosecutor will no longer prosecute the company.

By the end of 2021, the non-prosecution rate for unit crimes involving enterprises was 38%, an increase of 5.9 percentage points year-on-year. In the second phase of the compliance non-prosecution reform, prosecutors in the ten pilot provinces handled more than 600 compliance cases involving enterprises, of which 164 enterprises and 302 individuals were not prosecuted.²¹ In judicial practice, although the Supreme People's Procuratorate encouraged the pilot units to widely try corporate compliance non-prosecution, due to the short pilot period and insufficient theoretical research, many problems still exist in the exploration of China's corporate crime conditional non-prosecution system. Through the examination of the typical procedures of conditional non-prosecution of foreign corporate crimes, it is found that there are some experiences that can be learned from the three aspects of judicial review, applicable objects, agreement terms and duration in the UK, U.S. and France. These experiences have some positive significance for the design of the conditional non-prosecution system for corporate crimes in China.

(i) Clarify the role of judicial review

It can be found that, with regard to the conditional non-prosecution of corporate crimes, the UK, the U.S and France have set up different degrees of judicial review procedures, so should judicial review be introduced in the development of a conditional non-prosecution system for corporate crimes in China? How should the status and role of judicial review be determined? Scholars hold different views. For example, Professor Ouyang believes that China's corporate crime non-prosecution can neither learn from the UK model by the judge to review the application, nor the complete lack of review as in the U.S. model but can take the provincial procuratorate to approve the application of the approach.²² Professor Cui believes that China should actively introduce the U.S. deferred prosecution agreement system and plea-bargaining system and learn from the UK deferred prosecution agreement system localized experience, and introduce a court review and approval mechanism.²³

Unlike extraterritorial countries where judicial supervision is conducted by judges, according to China's Criminal Procedure Law, the People's Procuratorate is the supervisory organ of criminal proceedings in China and is responsible for supervising criminal proceedings activities. According to the logical reasoning, the decision of

²¹ Report on the Work of the Supreme People's Procuratorate, Xinhua News Agency, March 15, 2022.

²² Ouyang Benqi, Discussion on the Establishment of a Conditional Non-Prosecution System for Corporate Crimes in China, Chinese Journal of Criminal Law, Vol. 3, No. 3, 2020, p. 74.

²³ Cui Wenyu, A New Mechanism of Corporate Governance: A Compliance System in the Cross-View of Enterprise and Criminality, Law and Enterprise Studies, No. 6, 2020, p. 115-126.

conditional non-prosecution for corporate crimes should also be reviewed and supervised by the People's Procuratorate. However, since the main function of the People's Procuratorate is to review and prosecute, the decision not to prosecute a criminal enterprise is made by the prosecutor, and if the prosecutor is then responsible for reviewing the decision, the paradoxical phenomenon of "the athlete is also the judge" will arise. In order to solve this problem, there are two possible solutions. One is to set up an administrative review procedure within the procuratorial authorities for the decision of conditional non-prosecution for corporate crimes, to have the higher procuratorial authority that made the non-prosecution decision review the non-prosecution decision. The other is to draw on the experience of the U.S. deferred prosecution agreement procedure and set up a judge review procedure, to submit the non-prosecution decision to a judge for formal review. The first administrative review concept, in line with the nature of China's people's procuratorate supervision organs, to facilitate the implementation of the practice, but the lack of participation of judges, failing to avoid the risk of excessive prosecutorial discretion. The second judge formal review concept, the absorption of extraterritorial experience, can effectively guarantee the reasonableness of the application of non-prosecution procedures, to protect the procedural powers of the enterprises involved, but does not meet the functional positioning of China's courts trial organs.

Although there are advantages and disadvantages to both scenarios, in comparison, the author is more in favor of judges conducting formal reviews for two reasons. First, a corporate criminal case with a conditional non-prosecution itself qualifies for prosecution, and it should be referred to a judge for adjudication under ordinary criminal procedure. And it is possible that such a case may still be prosecuted by the prosecutor for failure to execute a non-prosecution agreement. In this case, the case will still be referred to a judge. If the prosecutor submits the indictment and non-prosecution agreement to the judge for review when deciding to apply the conditional non-prosecution procedure, the judge can review the voluntariness of the enterprise while not undermining the prosecutor's prosecutorial discretion. Second, the conditional non-prosecution procedure for corporate crimes usually contains financial penalties, which are in essence the same in nature as the fines imposed on criminal enterprises after trial by a judge. Review of the conditional non-prosecution agreement by the judge can avoid the financial penalties in the non-prosecution agreement and the verdict in a similar case, the financial penalties differ greatly, thus protecting the stability of the law.

(ii) Determine the dual object of non-prosecution

The UK, the U.S. and France have different options regarding who can be subject to conditional non-prosecution for corporate crimes. In the U.S., NPA and DPA can apply to both enterprises and individuals, while in the U.K. and France, deferred prosecution agreements and public interest justice agreements can only apply to enterprises and not to individuals. From the perspective of judicial practice, the conditional

non-prosecution of corporate crimes is usually applied to large, multinational enterprises. On the contrary, in the process of piloting corporate compliance non-prosecution in China, there is also the practice of non-prosecution of enterprises and non-prosecution of individuals, named "double non-prosecution". Theoretical research on the object of non-prosecution has also emerged in the debate between large enterprises and small and micro enterprises, enterprises and individuals. So, in the process of constructing a conditional non-prosecution system for enterprise crimes, how should we determine the applicable objects?

This article believes that China should be based on the plea system of leniency, in the enterprise crime conditional non-prosecution system to establish two types of applicable objects. Both enterprises and individuals can apply conditional non-prosecution, but the basis and specific procedures are different. The "conditional non-prosecution of corporate crimes" as a special procedure only applies to criminal enterprises. If an individual in a corporate crime case voluntarily admits to the crime and accepts the punishment, the prosecutor may apply the "plead guilty and accept punishment without prosecution" to that individual. Depending on the criteria for classification, enterprises in China can be divided into various types, such as large state-owned enterprises, small and micro private enterprises, etc. The degree of modernization differs from one enterprise to another, so there is a difference in whether there is a clear separation of criminal responsibility between the enterprise and the individual. Different strategies should be used in the application of conditional non-prosecution procedures.

First of all, large state-owned enterprises have been established and developed for a long time and have a high degree of modernization. The internal board of directors, supervisory board, council and other departments of the enterprise are complete, and the enterprise has a sound governance structure and perfect supervision mechanism. The criminal acts of such enterprises are usually committed for collective interests and approved by individuals or institutions with decision-making power, such as department heads or boards of directors, and there is a clear division of responsibilities between enterprises and individuals. Therefore, in cases of crimes committed by large state-owned enterprises, prosecutors may apply conditional non-prosecution procedures to the enterprise when it meets the applicable conditions and is willing to complete the additional conditions. By adopting this procedure, on the one hand, punishment and correction of the enterprise can be achieved by requiring the enterprise to pay fines, surrender illegal proceeds, compensate victims for damages, improve its compliance program, and restore the damaged environment. On the other hand, by not prosecuting the enterprise, it can avoid the negative consequences such as the enterprise being convicted and sentenced, the enterprise closing down, the employees losing their jobs, and the stock price plummeting.

Second, the distinctive feature of small and micro private enterprises in China is that the enterprise and the entrepreneur are "Combined into one". The entrepreneur (e.g., chairman, general manager) is not only the founder, operator, actual manager, and legal representative of the enterprise, but also the decision maker and

person in charge of the enterprise's behavior. It is difficult to distinguish between the responsibilities of the enterprise and those of the entrepreneur. In this type of enterprise crime cases, this paper believes that the practice of "double non-prosecution" should be adopted, in which neither the enterprise nor the entrepreneur is prosecuted. When the entrepreneur is not prosecuted, he or she should be subject to the "plea of guilty with conditions of non-prosecution" procedure. There are two reasons for this. The first is to "plead guilty and accept punishment" as a procedural incentive to apply to entrepreneurs who commit crimes, in line with the original intention of the plea system and the concept of mitigating punishment. It also reflects the implementation of the principle of leniency in the review and prosecution stage. Second, in the case of micro and small enterprises, the entrepreneur is the key to ensure the realization of the purpose of the penalty. The entrepreneur, as the core of the enterprise, will lead all personnel to conscientiously implement the non-prosecution agreement in order to obtain a non-prosecution outcome, enhance legal awareness, actively pay fines, and complete the compliance program on time in order to guarantee a passing assessment. Therefore, the application of "plea of guilty with conditions of non-prosecution" to entrepreneurs is more conducive to achieving the goal of "conditional non-prosecution of corporate crimes".

(iii) Clarify the additional conditions for non-prosecution

Although there are differences in the procedural settings of the three countries, there are many commonalities in terms of the conditions attached to the agreement. In terms of the content of the agreement, the three core conditions of the non-prosecution agreement are corporate cooperation, fines, and compliance programs. In terms of the duration of the agreement, most agreements are for a period of about three years, depending on the difficulty of implementing the fine and compliance program.

Based on the experience of our compliance non-prosecution reform pilot, it can be found that there are several problems regarding the additional content and duration of conditional non-prosecution. In terms of cooperation requirements, China's compliance non-prosecution only emphasizes in the applicable conditions that "enterprises and individuals must plead guilty and admit punishment," and does not require enterprises to continue to provide all-round, full-process cooperation during the implementation of the additional conditions. As far as financial penalties are concerned, since prosecutors in China do not enjoy the right to impose financial penalties, if a prosecutor considers it necessary to impose a fine on an enterprise or confiscate its illegal income, the relevant request can only be transferred to the administrative authorities for implementation in the form of a prosecutorial opinion. This makes the additional condition of financial penalty not play any role. The result of the enterprise obtaining a non-prosecution is not directly related to the full and timely payment of fines and the surrender of illegal profits. In terms of compliance programs, China's corporate compliance non-prosecution procedures emphasize the commitment of companies to establish or improve compliance programs and the voluntary application of third-party monitoring and assessment mechanisms. The compliance assessment report is an

important reference for the prosecutor to prosecute or not prosecute the enterprise involved in the case. In this way, the "establishment or improvement of a corporate compliance program" becomes the only additional condition that needs to be completed in order for a company to obtain a non-prosecution result. The compliance period is usually very short, only six months. In summary, the compliance non-prosecution process in China does not impose penalties for violations already committed by the enterprise, but rather focuses on the importance of corporate compliance in order to prevent the recurrence of violations.

This article argues that in the process of improving the construction of the conditional non-prosecution system, the comprehensiveness and reasonableness of the additional conditions should be strengthened from three aspects. First, to determine the "punishment and prevention" dual objectives. In determining the additional conditions of non-prosecution, attention should be paid to the prevention of future crimes, while also focusing on the appropriate punishment for crimes that have occurred. Therefore, it is necessary to specify the financial penalty in the additional conditions. Because even if the application of conditional non-prosecution of the enterprise, its behavior has violated administrative regulations or criminal law, has caused certain damage, it should assume a certain degree of liability to compensate for the damage. Second, determine the full process of cooperation requirements. Since it takes a period of time to implement the conditionality and many new situations can arise during that period, as a reflection of the compliance program, the enterprise should actively cooperate with the prosecutor or a third-party monitoring agency to ensure the effectiveness of the conditionality. Finally, establish an inspection period of one to three years. Due to the complexity of corporate structures, it takes a certain period of time to establish or refine a workable compliance program. The inspection period for compliance non-prosecution should be extended to ensure the effectiveness of the compliance program and the appropriateness of non-prosecution.

V. CONCLUSION

With the development of the market economy, the number and forms of enterprise crime are increasing, and the economic damage is getting greater and greater. However, if prosecutors insist on convicting and punishing some criminal enterprises, it will only lead to the collapse of enterprises and the fact that criminal responsibility is not borne. The significance of criminal prosecution has been lost. With a philosophy of leniency, prosecutors offer companies that are willing to take responsibility, take remedial action, and commit to compliance reform the opportunity to not be prosecuted. It should be noted that cases of crimes committed by enterprises with conditional non-prosecution inherently already qualify for prosecution, and prosecutors do not prosecute them in order to help them correct their misconduct and achieve the goal of operating in compliance with the law. However, with respect to the crimes they have committed, it is appropriate and reasonable to require

the enterprise to plead guilty and pay fines and illegal profits, and to compensate the victims, as a reasonable remedy for the damage they have caused. Therefore, it should be recognized that the setting of conditional non-prosecution procedures for corporate crimes should pay attention to both the realization of penal prevention and the pursuit of punishment.

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