Normative Interpretation of Criminal Compliance System——With the Criminal Law Amendment (XI) As the Background

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Abstract: *The amendment to economic crime in the Criminal Law Amendment (XI) provides a normative analysis sample for the theoretical research of criminal compliance. Organizational responsibility is the basis for the separation of unit and natural person, and the direction of Criminal Law amendment also reflects the realistic possibility of separation. Therefore, we can reconstruct the way of responsibility fixation and the application of penalty according to the revision of Criminal Law. The applicable premise of organizational responsibility is that the unit has an effective and stable criminal compliance system, so it should be clear that the unit's criminal compliance obligations include construction and operation. Criminal compliance is not the proper basis for preferential punishment units, and the application of punishment should also maintain a balance with the punishment of natural persons.*
Keywords: *Criminal Law Amendment (XI); Criminal compliance; Economic crime; Organizational responsibility*

Introduction

Under the official background that the state has strengthened the protection of enterprise property rights, "criminal compliance" has gradually become a hot research topic in the academic community. [1] It is generally believed that criminal compliance is to promote enterprises to consciously carry out compliance management by means of criminal law. [2] Although scholars had made some comments on the system design of criminal compliance. As a criminal law system applied to practice, it is not enough to discuss the construction and operation of the system only from the theoretical level. It is difficult to reach a consensus on the specific design, nor it is enough to explain the feasibility of criminal compliance. It needs to find reasons to take root in the normative level.

Enterprises are the stage products of economic development, and the core purpose is to make profits and survive. Therefore, unit crime is usually manifested as “economic crime”. The Criminal Law Amendment (XI) (hereinafter referred to as the Amendment XI) had made a large scale amendment to economic crime. This paper intends to analyze the latest trend of unit crime legislation by reviewing the amendment to economic crime in the Amendment XI, so as to examine the existing theory of criminal compliance, and on this basis build a criminal compliance system that conforms to the legislative basis and development direction.

Interpretation of the legislative trend of economic crime

Amendment XI involved up to 20 adjustments to economic crime. Chapter III of the specific provisions of the criminal law had not been adjusted except for the two sections of the smuggle crime and the tax crime, and the crimes of the other six sections had been adjusted. As statutory criminals, the adjustments of the smuggle crime and the tax crime were more based on the management needs of the country. Therefore, from the perspective of protecting economic legal interests, the amendment to economic crime in Amendment XI could be seen as a whole, and it could be considered that the legislative trend of economic crime had been fully contained in the amendment.

The expansion of the subject of crime: the transformation of pure unit crime

Amendment XI amended the entities of crime in No.160 article and 161 article of the Criminal Law. To be specific, two articles had been added while adjusting the crime of issuing securities fraudulently in No.160 article of the criminal law. One was“Controlling shareholders or actual controllers who organize or instigate the acts mentioned in the preceding paragraph shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention and shall also, or shall only, be fined not less than 20 percent but not more than one time the amount of funds illegally raised; If the amount is especially huge, the consequences are especially serious, or there are other especially serious circumstances, they shall be sentenced to fixed-term imprisonment of not less than five years and shall also be fined not less than 20 percent but not more than one time the amount of funds illegally raised." And other was “Where a unit commits the crimes mentioned in the preceding two paragraphs, it shall be fined not less than 20 percent but not more than one time the amount of funds illegally raised, and the persons who are directly in charge and the other persons who are directly responsible for the crime shall be punished in accordance with the provisions of the first paragraph.”

In No.161 article of the criminal law, it also had added two articles. One was “Where a controlling shareholder or actual controller of a company or enterprise specified in the preceding paragraph commits, organizes or instigates the acts specified in the preceding paragraph, or conceals relevant matters, resulting in the occurrence of the circumstances specified in the preceding paragraph, he shall be punished in accordance with the provisions of the preceding paragraph.”And other was “If the controlling shareholder or actual controller who commits the crime mentioned in the preceding paragraph is a unit, the unit shall be fined, and the persons who are directly in charge and other persons who are directly responsible for the crime shall be punished in accordance with the provisions of the first paragraph.”

It could be seen from the comparison that the substance of the two articles added to each of the two crimes is the same — both of them were to investigate the criminal responsibility of natural persons who play a dominant role in the criminal process. The reason for adding these entities is that the company, its shareholders, controlling shareholders and actual controllers are the owners of the enterprise, and in the process of issuing securities or disclosing important information. It can often influence and even manipulate the decisions of enterprises, forcing enterprises to go beyond the rules and regulations for illegal operations. The provisions before the amendment only stipulated that unit crime. However, in actual criminal activities, the controlling shareholders and actual controllers were actually in the dominant position of the crime and they were the

“Mastermind” behind the crime. That is, the controlling shareholders and actual controllers of an enterprise were similar to indirect principal offenders, and the enterprise was similar to those who are used. In this case, it was necessary to "pierce the company's veil".

Then, when natural persons such as shareholders and actual controllers become the subject of this crime, does the enterprise still need to bear criminal responsibility? With the help of the “theory of Indirect Principal Offender”, when an enterprise does not have a subjective crime or is in a state of coercion, it is equivalent to the object of domination. That is, there are illegal or liability impediments, and it does not need to bear the corresponding criminal responsibility. However, the premise of this defense’s establishment is that the enterprise has independent will, which is precisely why the basic concept of criminal compliance and the promotion of organizational responsibility are advocated. Therefore, the introduction of individual crimes into unit crime in Amendment XI was not only to pursue the responsibility of "behind the scenes", but also to provide development space for criminal compliance.

The Improvement of the range of punishment: the establishment of multi-grade statutory punishment

The most important part of the amendment to economic crime was the statutory punishment. The first was the increase of the penalty grade, which adjusted some crimes to multiple statutory punishments. The second was the change of the types of punishment, which not only increased the range of free punishment for some crimes, but also basically canceled the upper and lower limits of fine punishment. It was worth noting that, except for the crime of accepting bribes by state functionaries, other crimes were applicable to both natural persons and units. Combined with the adjustment of statutory punishment, we can find a major feature of economic crime legislation: criminal responsibility can be fully undertaken by a natural person or a unit.

Take the No.176 article of the criminal law, which is named“the crime of illegally absorbing public deposits”as an example. Before the Amendment XI, the statutory punishment of the crime was divided into two categories:" fixed-term imprisonment of not more than three years or criminal detention, and a fine of not less than 20000 but not more than 200000 shall also be imposed, or shall only be imposed" and "fixed-term imprisonment of not less than three years but not more than 10 years and a fine of not less than 50000 yuan but not more than 500000 yuan." If a natural person committed the crime, two statutory punishments should be applied to him; If unit committed the crime, it would be fined, and the relevant responsible person should be punished according to two levels of statutory punishment.

It is not difficult to find that the penalty amount borne by the unit was heavier than the penalty amount of the natural person. This was because there is an upper limit for the imprisonment penalty and fine penalty set for the natural person, while there is no upper limit for the fine penalty set for the unit. Amendment XI had reversed this situation. First, the upper and lower limits of fine punishment had been abolished, and second, a higher level of statutory punishment had been added, that was, "if the amount is especially huge or there are other especially serious circumstances, they will be sentenced to more than 10 years of fixed-term imprisonment and a fine."

For the No.176 article of the criminal law before Amendment XI, the criminal liability of natural persons increased with the increasing of the illegality of the act, but the increment was limited by the upper limit of the penalty. That is, the latter was out of balance with the former due to the upper limit of the penalty. At the same time, because there was no upper penalty limit for the unit, the above situation would not occur. Compared with crimes committed by natural person, the unit could better bear the penalty equivalent to its illegality.

Amendment XI had improved the range of the principal punishment and supplementary punishment of the crime, which had solved the above problems. The No.176 article of the criminal law after the legislative adjustment has brought the criminal responsibility bearing capacity of natural person crimes and unit crimes to the same level. Therefore, when a unit commits this crime and then applies criminal compliance to plead not guilty or plead guilty to a less responsibility, it can transfer to a natural person to bear the corresponding consequences of infringement of legal interests. The same degree of punishment can be applied to it, and the infringed legal interests can still be fully protected. This legislative amendment has formed a good connection between the illegality of economic crimes and the criminal responsibility, which is conducive to the realization of the adaptation of crime, responsibility and punishment.

In addition, The No.176 article of the criminal law also added a new paragraph of reasons for mitigating liability, "if there are acts mentioned in the first two paragraphs, the offender should actively return the stolen goods before initiating public prosecution to reduce the damage, he or she may be given a lighter or mitigated punishment." From the perspective of practical application, the entity of application of this article is more likely to be a unit than a natural person. Because after the natural person illegally absorbs public deposits, although he strives to manage and use the funds prudently, there is a large risk due to the lack of sufficient capital and operating information. Once the capital chain is broken due to poor operation, it is often difficult to make up for losses. However, as a for-profit organization, the unit itself has a stable operating environment and sufficient human and material resources, which can effectively reduce the risk of withdrawal in the process of managing public funds, and its ability to return stolen goods and compensation is undoubtedly higher than that of natural persons. Therefore, from the perspective of the application tendency of the clauses, the introduction of criminal compliance is more promising.

Reflection of existing criminal compliance theory

The legislative trend of economic crime shows that China's Criminal Law has a normative basis for access to criminal compliance. However, the premise of introducing criminal compliance is that it can adapt to criminal norms. Scholars had explored how to introduce criminal compliance, which provides a theoretical basis for the implementation of criminal compliance in China's judicial practice. But, whether the existing theories can make criminal compliance fit with criminal norms and help them take root in practice still needs to be further examined.

The basis of unit accountability under the cooperation model

Before modern society, natural person was the entity of various social activities, and criminal acts were the

specific manifestation of natural person's hostility to the law through their own activities. The functions of the state determined that they were responsible for preventing and punishing crimes.[3] Therefore, the traditional society followed the "state – natural person" confrontation model in dealing with crimes. [4] After entering the modern society, the activities of industrial and commercial enterprises had spread to every corner of the society, and the relationship between legal person(enterprises) and people's life, health and welfare had become increasingly close. The large-scale development of enterprises makes unit crime gradually surpassed natural person crime and became the main criminal form.[5] Compared with crimes committed by natural person, crimes committed by legal person are not only diversified in structure and covert in behavior, but also cause far greater social harm than crimes committed by natural person. Moreover, the legal person itself is a relatively independent and closed internal circulation system, and its ability to cover up crimes and evade sanctions is much higher than the former. As a result, all countries are facing with the same problem: how to minimize the instability of enterprises when the national resources for preventing and controlling illegal crimes are limited.

Criminal compliance is the theoretical answer to this question — because it is difficult for the state to control enterprises like natural person, it is more necessary for enterprises to maintain self-discipline. It is undoubtedly the best choice to promote enterprises to establish criminal compliance by criminal means such as sentencing incentives. Therefore, enterprises need to change from national adversaries to allies.

But the question facing this idea is, why can enterprises change from adversaries to allies? The answer of the academia is that the reason why enterprises were regarded as potential criminals before is that they adopted alternative liability. With the development of economy, they should fully recognize the independent personality of enterprises and replace alternative liability with organizational responsibility. The reason is that the enterprise is a legal person organization established in accordance with the laws and regulations and the company's rules and regulations, and the scope of its rights and obligations are determined by law. From the perspective of fictitious personality, there is no illegal basis, that is, the enterprise should be an organization with a propensity to conform to the law, rather than a potential criminal, so it has a basis for cooperation with the state.

Therefore, Amendment XI adjusted some pure unit crime to double subject crimes, which was ostensibly an expansion of the subject of responsibility, but actually could be understood as a change in the basis of liability fixation. Because the unit is responsible for compliance, after the unit performs its compliance obligations, the criminal responsibility will no longer be borne by the unit, but by the individual who committed the crime. [6] The unit is no longer the natural subject of the crime, and the relationship between the unit and its members is no longer inseparable from the whole and part, but the relationship between individuals. If the unit has fulfilled its compliance obligations, the criminal act will be regarded as the deviant act spontaneously committed by the unit members, rather than the agency act under the unit's instigation and connivance, and the criminal responsibility of the natural person should be investigated.

Query on the sentencing incentive of organizational responsibility

Criminal compliance not only attempts to change the basis of unit liability fixation, but also intends to con-

struct the applicable rules of punishment matching with it. This is because, as a policy tool, criminal compliance needs sufficient reasons to be promoted in enterprises. Sentencing incentives can just become this reason. Scholars discussed the necessity of sentencing incentive measures from the aspects of penalty purpose, social benefits, etc. In summary, incentive sentencing is mainly reflected through the effective criminal compliance of enterprise construction banks. The introduction of criminal compliance by enterprises shows that they have a law-abiding attitude of obeying legal norms and maintaining legal order. Combined with the effect of reducing the risk of violations and preventing crimes achieved by the compliance system, it can be considered that enterprises that have established compliance systems have less need for crime prevention, and lenient punishment can be considered when sentencing. Even if an enterprise has not established a compliance system before committing a crime, if it promises to establish an effective compliance system after the crime and earnestly performs it within a certain period of time, it can still be considered that it has achieved the purpose of special prevention and general prevention, and it will be given a lenient punishment. [7]

It can be seen that criminal compliance is necessary as an incentive measure for sentencing. However, from the perspective of the adjustment of punishment in the Amendment XI, whether the above-mentioned practices are legitimate is still questionable.

On the one hand, policy relief will lead to inequality in the application of laws. One of the major characteristics of the penalty adjustment in Amendment XI is to realize that the responsibility of a natural person's crime is equal to that of a unit crime. When the unit successfully defends, the illegality of a natural person can be fully evaluated. This creates a problem: if the sentencing incentive policy can be applied to open the door to unit crime, then it will be unfair to natural persons under the same circumstances — natural persons also abide by the law and discipline, and also conduct social activities under the guidance of the concept of compliance, but there is no policy reward for natural persons; In addition, although the unit actively promotes the construction of the compliance system, the occurrence of criminal acts means that the compliance system lacks effectiveness, so the application of policy incentives is not reasonable. Therefore, it is unfair to only provide sentencing incentives for units.

On the other hand, the reasons for the remission of criminal responsibility are insufficient. Although criminal compliance is a self-management rule driven by modern and contemporary legislation, in fact, enterprises had made efforts to build their own operating rules from the time of establishment. It is also the construction of business system in accordance with laws and industry regulations. In essence, although there is no name of compliance, it is the practice of compliance. If the target of sentencing preference is determined only from the perspective of whether the unit has formulated a compliance plan, then the unit that has followed the rules from beginning to end will lose to the unit that does not obey the rules but will take advantage of opportunities.

To sum up, although the existing criminal compliance system actively promotes the transformation from alternative responsibility to organizational responsibility, and encourages enterprises to actively participate in the construction of the compliance system on the grounds of punishment reduction. But this practice of sacrificing criminal justice for the convenience of governance seems to be too utilitarian, and perhaps we should more carefully design the development path of criminal compliance.

Redesign of criminal compliance system

As the vane of criminal law legislation, Amendment XI not only contains the general rules of unit crime, but also reveals the latest governance goals of criminal policy. If we want to introduce the criminal compliance system, we must design the specific system according to the legislative situation. Only in this way can we achieve a targeted goal.

Clarify criminal compliance obligations

As we all know, the criminal compliance system originates from the enterprise compliance system. And the corporate compliance system exists in three dimensions: the compliance system of corporate governance, the compliance system of criminal incentive mechanism, and the compliance system of lawyer business. [8] Therefore, the enterprise compliance system is not only a risk behavior supervision system, but also a shared system of multiple legal departments.[9] For enterprises, the obligations concerned by criminal compliance are only a small part of the obligations set by the overall law. How to understand criminal compliance obligations, how they differ from ordinary compliance obligations, and how to design specific compliance obligations are all questions that the criminal compliance system should answer.

The criminal compliance obligation provides a distinguishing standard for the identification paradigm of unit crime. From the perspective of the development of theory and legislation, there are two paradigms for the identification of unit crime, one is dependent form, the other is independent form. The traditional legislation usually adapted the dependent form to identify the unit crime. That is, the unit crime was regarded as the crime of the natural person group, and the leader and executor were regarded as the "head and hand" of the unit, so the criminal behavior of the relevant personnel was naturally regarded as the unit crime. In the dependent form, the unit was not an independent individual and did not have a complete capacity for criminal responsibility and criminal punishment.

Independent form is a new identification paradigm advocated by modern theories, which is intended to change the situation of the unit's dependence on individuals, to recognize the independence of the unit in a limited way, and to separate the responsibility of the unit from the responsibility of individuals in order to achieve more accurate accountability. How to choose the two paradigms depends on whether the unit has independent personality recognized by criminal law.

As mentioned earlier, the key to resolving the dilemma of unit crime governance is to transform the "confrontation relationship" between the state and the unit into a "cooperative relationship". [4] The foundation of this transformation is that the enterprise has independent personality, and an effective criminal compliance system is an important guarantee for the independence of the fictional personality. Therefore, it is necessary to clarify the criminal compliance obligations of the enterprise. When an enterprise actively performs its compliance obligations, it can be recognized as an independent organization, and should be required to assume organizational responsibility in accordance with the independent identification paradigm; On the contrary, if an enterprise is negligent in fulfilling its compliance obligations, it is still a collection of individuals in essence, and its personality independence should be denied, and it is required to assume replacement responsibility ac-

cording to the dependency identification paradigm. Therefore, compared with other compliance obligations, criminal compliance obligations have two functions: one is to determine the mode of liability fixation for unit crimes, and the other is to determine the degree of responsibility for unit crimes.

In this sense, criminal compliance obligations should include compliance construction obligations and compliance operation obligations. The former refers to the obligations of enterprises to build criminal compliance systems in accordance with criminal law norms, while the latter refers to the obligations of enterprises to maintain their own effective operation of criminal compliance systems.

From the attribute of criminal obligation, the obligation of compliance construction is not an imperative norm, but the basis and source of the imperative norm. Fulfilling the obligation of compliance construction is the premise for a legal person to be independent from a natural person. Only with a sound compliance system can the internal personnel of the unit be organized and disciplined to engage in corresponding activities, and can the individual will be excluded from the job activities. Therefore, whether the unit actively performs the obligation of compliance construction is the standard to determine whether the unit has an independent personality, which determines whether the basis for the liability of the unit crime is replacement responsibility or organizational responsibility.

Different from the obligation of compliance construction, the obligation of compliance operation includes both the basis and source of mandatory norms and mandatory norms. Specifically, the compliance operation obligation consists of maintenance obligation and supervision obligation. The maintenance obligation requires the enterprise to maintain and improve the criminal compliance system that has been established. If the enterprise is negligent in performing this obligation and pursues or allows the compliance system to become invalid in whole or in part, it should be considered that they connive and acquiesce in the illegal and criminal activities of employees, and should regard employee behavior as unit behavior. At this point, enterprises no longer have independent personality, and should return to the dependent form.

The supervision obligation is a specific act obligation, which should be introduced into the criminal law together with the criminal compliance system. Specifically, the supervision obligation is to supervise the affairs of the unit, not the members of the unit. Because the criminal compliance system of the unit is designed around the operation activities of the unit, and only the affairs involving compliance are worthy of supervision. In addition, the supervision scope and capacity of the unit are limited, which makes it difficult to achieve all-round supervision of the unit members. Therefore, when the enterprise actively performs the obligation of "supervision over matters", even if the corresponding crime occurs, it should not bear the responsibility of the organization, but the individual should bear the corresponding responsibility. On the contrary, if the enterprise is negligent in performing its regulatory obligations on the basis of intent or negligence, it should be considered as dereliction of duty or other crimes according to the specific circumstances.[9]

Building up compliant sentencing rules

The clarification of criminal compliance obligations provides the basis for the way of imputation of unit crimes, and also points out the path for dealing with the relationship between crime and punishment. As men-

tioned above, the sentencing incentive advocated by the academia is too utilitarian. Criminal compliance is generated to safeguard the interests of enterprises and achieve social governance. Reasonable and effective compliance sentencing rules are enough to encourage enterprises to participate in the construction of the criminal compliance system independently, so there is no need for too many incentive means to force this process.

This paper believes that the compliance sentencing rules should focus on two aspects: one is that the compliance sentencing rules can give consideration to both units and natural persons, and the other is that the compliance sentencing rules can give consideration to both compliant units and non - compliant units. If we ignore the subject type and directly discuss the sentencing rules, it will actively cause differences in sentencing and make criminal compliance resisted.

Although the natural person is not the applicable entity of criminal compliance, it is the entity of interest relationship, so the construction of compliance sentencing rules should first deal with the relationship between the unit and the natural person.

The basis for sentencing is the fact of the crime, the nature of the crime, the circumstances and the degree of harm to the society. That is, the severity of the punishment is based on the degree of infringement of legal interests. It can be said that China's criminal law is a behavioral criminal law, and the object of attention in sentencing is the behavior rather than the actor. Only in the specific application of the penalty will increase the attention to the actor. But criminal compliance is more concerned about the perpetrator. The performance of criminal compliance obligations is often related to the necessity of prevention, and the units that build the compliance system can get preferential treatment in terms of preventive punishment. Therefore, the introduction of criminal compliance is actually an adjustment of the object of punishment, shifting the focus of punishment from behavior to actor, and from objective harm to personal danger. However, if this change is only applicable to unit but not to natural person , it will inevitably lead to confusion in sentencing standards, resulting in the separation of "criminal law of unit crime corresponding to actor and criminal law of natural person crime corresponding to behavior". So while introducing the criminal compliance system, we should establish compliance sentencing rules that can also be applied to natural persons.

The compliance sentencing rules should include the compliance sentencing rules of the unit and the compliance sentencing rules of natural persons established by reference to the compliance rules of the unit. As far as the former are concerned, the object of responsibility punishment is behavior, and the object of prevention punishment is actor. Therefore, responsibility punishment should be determined according to the extent of infringement of legal interests of specific acts, and should not be treated differently because of the establishment of compliance system. The measurement of preventive punishment should be judged according to the fulfillment of compliance construction obligations and compliance operation obligations.

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