



Reformulation and Realization of Unit Crime Liability Theory from the Viewpoint of Corporate Compliance

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Abstract

Lanzhou Nestle Company is exempted from the criminal responsibility on the grounds of fulfilling the compliance management obligations, but this is not the result of the corporate compliance effect on the identification of unit crime, and should return to the basic theory of unit crime liability theory, in order to clarify the specific path of corporate compliance to prevent the identification of unit crime. Unit crime lies in the essence of compliance responsibility, the objective central liability model in organizational responsibility theory is based on the objective aspect to infer the subjective aspect of the overall organization, and makes a comprehensive evaluation which both conforms to the subjective and objective unifies basic principles of criminal law, also provides concrete and clear solutions for practice. The will of corporate should be divided into direct intention and indirect intention. Corporate compliance has the effect of presuming that the unit does not have the will to indulge criminal behavior, that is, corporate compliance obstructs indirect intention. Based on this, the separation of unit responsibility and natural person responsibility is achieved. According to the basic principles of organizational responsibility and natural person responsibility, corresponding situations should be classified and defined separately. Post compliance can achieve the prosecution of natural persons without prosecuting the unit, and natural persons' criminal responsibility should be reduced.

Keywords: Corporate Compliance; Unit Crime; Organizational Responsibility Theory; Exemption From Liability

Introduction

The case of illegally obtaining citizen information by Lanzhou Nestle Company is known as the first criminal compliance case of corporates in China. In this case, in order to seize the market share, Zheng and Yang, the senior market managers of Lanzhou Nestle Company, tried to promote Nestle milk powder, and instructed their employees to illegally obtain citizens' personal information from the medical staff in many hospitals for many times by paying bribes [1]. The defendant argued that their behavior was a corporate act. The court of first instance denied the existence

of the will of the unit. The reason is Nestle had formulated regulations prohibiting employees from illegally collecting personal information from consumers. The court of second instance denied the imputability of the unit on the grounds that the employee's violation of company regulations to infringe on citizens' personal information was an individual act. Based on the above reasons, it is worth reflecting on whether the real reason why Nestle did not constitute a unit crime in this case was due to its compliance management obligations? From the perspective of the distribution of the burden of proof, the establishment of the will of the unit should be proved by the public prosecution organ. In the

situation where the public prosecution authority failed to prove the elements of the crime, it is a misreading of the burden of proof in criminal proceedings to blame Nestle for denying the existence of the will of the unit by counter-evidence. Moreover, even if it is affirmed that the corporate compliance can have an impact on the criminal responsibility of the unit, the effectiveness of the compliance and the legal basis of preventing the crime should be investigated. In the unit with complex organizational structure, if the bottom employee carries out criminal behavior according to the instructions of the superior, whether it constitutes the error of illegal understanding, how to identify the will of the unit at this time, whether the unit has criminal accountability?

The Change of Unit Crime Liability Theory

Article 30 and Article 31 of the Criminal Law of China clearly stipulate the concept and punishment principle of unit crime. Compared with the crime of natural person, the scope of the crime is obviously limited, that is, if and only if "the law stipulates as a unit crime", the unit shall bear criminal responsibility.

As for the identification of the unit crime, in addition to meeting the constitutive elements of the crime stipulated in the specific provisions of the criminal law, it also needs to meet the special elements of the establishment of the unit crime. Theoretically, there is a dispute between the "three elements theory" and the "two elements theory". "Three elements theory" claims unit crime must meet "in the name of the unit, for the interest of the unit and unit will", "two elements theory" argues "unit will" standard is too fuzzy, thus it should be abandoned. Criminal responsibility can be attributed to the unit only if the two conditions of "in the name of the unit and for the benefit of the unit" are met. However, if the element of "unit will" is abandoned, as "for the benefit of the unit" does not negate the consideration of personal interests, any criminal act committed by a unit employee in the name of the unit that benefits both the employee and the unit can be considered a unit crime. This kind of identification rule belongs to the mode of alternative responsibility in American law, which makes the responsibility of unit crime become a kind of transfer responsibility. It does not conform to the basic legal theory of "unity of subjective and objective". Even if it is regarded as a strict liability, however, whether there is a real strict liability in our criminal law is controversial. Therefore, Completely abandoning the unit crime is not in line with the traditional criminal law theory. It also may cause the rapid expansion of the number of unit crimes, and then lead to the instability of the law.

Different from the moral responsibility or normative responsibility of natural person crime, the core of unit crime is the organization responsibility, and its essence lies

in the compliance responsibility. The so-called compliance responsibility refers to the responsibility that a unit should bear for the occurrence of criminal behavior due to its failure to establish a compliance system and create a compliance culture. The rationale is that enterprises in modern society are not a collection of people or things in the traditional sense, but an organization with its own internal operating mechanism [2]. This organization is sufficient to allow natural persons, as its constituent elements, to lose their individuality and simply become part of the enterprise's operation process. Therefore, the interactive relationship between enterprises and individuals, especially the influence of enterprises on individuals, indicates the independent status and function of organizations [3]. The theory of organizational responsibility has two understandings: the unified mode of subjective and objective and the objective central liability mode. The former holds that the subjective will and objective behavior of enterprises can be imitated through natural persons. The latter holds that the judgment of the subjective will of the unit lacks psychological basis, and claims that the unit crime only needs to attribute the harmful consequences to the unit. The core element of the judgment is whether the unit has violated the specific criminal obligations, and whether its internal decision-making procedure and governance structure will lead to the occurrence of harmful consequences. In essence, the center of the objective liability mode also does not completely give up the subjective aspect of the unit will. It only distinguishes the subjective aspects of natural person crimes from those of unit crimes, and believes that the subjective will of the unit can be inferred from objective aspects such as the governance structure and decision-making process of the unit, with the decisive foundation being the objective aspects. The objective central liability mode has substantial rationality.

First of all, if the subjective and objective unity mode is adopted, for the identification of unit will, due to the lack of clear judgment object and identification standard, it will eventually slide to the old way of natural person crime identification mode, so as to move towards agnostic. Secondly, overemphasizing the objective and subjective aspects of the unit separately will separate the actual operating conditions of the unit from the degree of connection between the occurrence of criminal behavior and the unit itself, making the identification of the subjective aspects of the unit lacking an objective foundation. Thirdly, the objective central liability model treats the unit as an organizational body, and uses objective aspects as the foundation to infer the subjective aspects of the entire organizational body, and then makes a comprehensive evaluation. This not only complies with the basic principle of criminal law that subjective and objective aspects should be unified, but also provides a specific and clear plan for practical identification, which is both theoretically self-consistent and practically feasible.

Therefore, the key to test the establishment of the unit crime by the objective central liability mode is to examine whether the objective operation of the organization meets the compliance requirements, and then investigate the responsibility of the unit separately in the dual dimensions of objective and subjective.

As far as the punishment of unit crime is concerned, there are double punishment system and single punishment system, the same punishment and mitigated punishment. In China, the principle of double punishment is applied to unit crimes, with single punishment as an exception. The reason for only holding the directly responsible executives and other directly responsible personnel accountable is to prevent the unlimited expansion of the scope of responsibility, which violates the principle of individual responsibility. For example, in the crime of dividing state-owned assets privately, it is not appropriate to convict state organs, state-owned companies, enterprises, institutions, which would damage the national interests represented by them. Although the same punishment theory indicates that there is no difference in the criminal responsibility of natural persons in crimes committed by natural persons and units, it is commonplace in judicial practice to use unit crimes as a reason for the reduction or exemption of penalties for natural persons. In the case of Nestle Lanzhou, the defender argued that the case was a unit crime, and the purpose was to reduce the defendant's criminal responsibility on this basis. The legal basis is that for acts that aim to benefit the unit and are subject to the unit's instructions, the defendant's preventive necessity and the possibility of expecting to implement legal behavior are relatively small. It is true that if the criminal law expressly stipulates unit crimes as a reason for sentencing reduction, it has a typological sentencing representation function. For example, there are obvious differences in sentencing ranges for natural persons and unit bribery crimes, but this is also reasonable and clearly confirmed by the criminal law.

The Theoretical Basis and Limitation of Corporate Compliance Blocking the Responsibility of the Unit

In order to serve and ensure high-quality economic and social development, promote the legitimate operation of private enterprises, and better protect the legitimate rights and interests of private enterprises, the Supreme People's Procuratorate launched the reform of the non-prosecution system for corporate compliance in 2020 [4]. The reform was first carried out in a pilot manner, starting with six grassroots people's procuratorates. In 2021, the reform of non-prosecution for corporate compliance was extended to 10 provinces, involving 27 municipal people's procuratorates and 165 grassroots people's procuratorates [5]. On April 2,

2022, the Supreme People's Procuratorate, together with the All-China Federation of Industry and Commerce, officially announced the comprehensive launch of the pilot reform of non-prosecution for corporate compliance, marking the extensive application and in-depth development of the reform of non-prosecution for corporate compliance across the country. The reform of the non-prosecution system for corporate compliance aims to strengthen judicial protection for enterprises, give play to procuratorial functions, implement active justice, promote traceability governance, and better play the role of procuratorial organs in protecting private enterprises and promoting social governance [6]. It is an important institutional arrangement to promote the modernization of the national governance system and governance capacity.

Specifically, corporate compliance refers to the procuratorial organs' supervision of the handling of criminal cases involving enterprises, and while making decisions not to approve arrest or not to prosecute according to the law, or proposing lenient sentencing recommendations based on the plea leniency system [7], they also urge the involved enterprises to make compliance commitments and actively rectify and implement them, so as to obtain non-prosecution or lenient treatment [8]. It can be divided into pre-compliance and post-compliance. At present, the non-prosecution of corporate compliance implemented by the procuratorial organs is post-compliance. After the compliance rectification and the third party evaluation and acceptance, the necessity of special prevention can be reduced, and finally the procuratorial organ can make a decision not to prosecute the enterprise and the natural person. Blocking the criminal responsibility of the unit through compliance construction is a certain breakthrough in the integration of punishment, highlighting the prominent position of preventive punishment in the function of criminal law [9]. Its exemption basis is that it does not need punishment, that is, it does not have the necessity of prevention in the sense of criminal policy, which belongs to the category of functional responsibility theory [10]. The purpose of prior compliance is to cut the criminal responsibility of units and natural persons through effective compliance, and to negate the establishment of unit crimes. It can be considered that companies use compliance construction to prevent them from bearing criminal responsibility, which has the incentive for companies to establish a criminal compliance nature. However, if the enterprise establishes the compliance mechanism to block the criminal responsibility, it lacks theoretical basis, and will also bring the unfair application of criminal law to the enterprises without sufficient ability to carry out the criminal compliance construction. Scholars who study procedural law argue that non-prosecution for compliance reflects the characteristics of negotiated justice and has the nature of "procedural punishment" to

demonstrate its legitimacy. Scholars who study substantive law turn to the examination of doctrinal foundations, arguing that the establishment and implementation of compliance rectification plans by enterprises can play a role in regulating and preventing criminal punishment [11]. However, the above arguments fail to demonstrate the path of compliance non-prosecution to prevent unit crime from the theoretical level of crime composition.

As mentioned before, the essence of the unit responsibility lies in the compliance responsibility, and the objective central responsibility mode should be adopted to identify the unit crime. The establishment of the enterprise criminal compliance system and the formation of the compliance culture can prevent the subjective intention of the unit from pursuing or allowing the crime result, thus preventing the establishment of the unit crime. However, the paradox is that since the enterprise has established a criminal compliance mechanism, why still failed to avoid criminal behavior? To some extent, it shows that the effectiveness of its compliance construction should be questioned. This involves the evaluation of the effectiveness of compliance. Neither the effectiveness of corporate compliance can be completely denied on the grounds of internal crimes, nor can it be believed that the enterprise can be completely exempted from criminal responsibility as long as the establishment of the compliance system. The former involves the incentive effect of corporate compliance, while the latter involves the fairness problem of enterprise liability exemption. Therefore, an effective balance mechanism should be established between exemption from responsibility and burdening responsibility. It can be considered that the effective compliance of enterprises shows that the crime prevention mechanism is practical and operable, and can be effectively implemented. If individual personnel of the unit violate the rules and regulations of the unit to commit criminal acts, the effectiveness of the criminal compliance of the unit should also be affirmed, so as to give the effect of blocking the criminal responsibility of the unit. However, if the corporate compliance system cannot be effectively implemented, so that the decision-making level of the unit directly or laissez the occurrence of criminal acts, this kind of invalid compliance is difficult to prevent the establishment of the unit criminal will.

To examine the relationship between corporate compliance and unit criminal intent, it is necessary to distinguish between direct and indirect intent. Corporate compliance has the effect of presuming that the unit does not have the intent to allow criminal behavior; that is, corporate compliance precludes indirect intent. However, if the public prosecution organ proves that the decision-making level of the unit actively pursues the occurrence of criminal acts with the collective will, the unit cannot be exempted from

the criminal responsibility with compliance. At this time, it not only meets the three elements of unit crime, but also is enough to explain the failure of the compliance system established by the enterprise, which can directly assume that the criminal compliance established by the enterprise is invalid compliance.

It is worth noting that the theoretical identification of unit crime in China is strict, but in practice, the will of the unit is often inferred by the behavior of the person in charge of the enterprise or the supervisor, so it is the loosening of the identification of unit crime, which just has a substantial agreement with the compliance responsibility advocated in this paper. Corporate compliance can prevent indirect intent, but not direct intent. At this point, the public prosecution authority should strictly prove the existence of direct intent in order to exclude the deterrent effect of corporate criminal compliance on crime, thereby achieving a balance between the incentive effect of corporate criminal compliance and the dual value of pursuing crime and achieving justice. Of course, the identification of whether a corporate crime is directly or indirectly intentional should be the focus of the investigation of the corporate compliance non-prosecution system. Based on the aforementioned theory of organizational responsibility, the judgment standard of direct intention should comprehensively investigate the overall decision-making will and compliance culture of the enterprise. For example, if the enterprise decision-making layer decides, instructs or even directly implements criminal acts according to the enterprise operation mode, whether it is a collective decision or an individual decision, as long as the perpetrator can be granted corresponding authority according to the management of the company's internal operation, it can be considered as the implementation of the unit. If the compliance system established by the unit expressly prohibits the implementation of this type of criminal acts, but the decision-maker persists in his own way, can the establishment of the unit crime be prevented by the corporate compliance at this time? Even if the compliance construction of an enterprise is evaluated according to the standards of enterprise compliance and the effectiveness of enterprise compliance can be confirmed, the compliance culture has obviously failed to influence the decision-making level of the enterprise, and the subjective malignant nature of the enterprise executives in committing crimes is large. Whether from the external perspective of victim protection or the internal blame of the decision-making level for the implementation of illegal behaviors, the responsibility should be attributed to the whole unit. Therefore, even if it is effective compliance, it cannot prevent the establishment of the intention of the unit. Of course, if the compliance of the company is invalid and the system is difficult or even impossible to mitigate or avoid the illegal behaviors of the executives and directly responsible personnel, there is no

doubt that it is impossible to defend the unit crime with the excuse of corporate compliance. The reason why the value of indirect intention in the field of corporate compliance is confirmed is that indirect intention itself is a low degree of intention. At this time, the decision-making level of the unit does not directly pursue the occurrence of criminal acts, but at most, it is a *laissez-faire* to specific illegal acts, neither supporting nor opposing the occurrence of the results. For a unit, if an effective compliance culture is established, although the compliance culture is not perfect and does not directly constrain the supervisors and other responsible personnel, at least the behavior of the perpetrator to seek interests for the unit is not recognized by the unit. In other words, the unit opposes the occurrence of criminal acts. At this time, even if the indirect intention of the natural person is regarded as the failure of the unit to fulfill the effective prevention obligation to prevent the establishment of the crime, an effective compliance culture determines that the behavior of the natural person is not the scope of the will of the unit. Therefore, the indirect intention of the unit is false indirect intention and should not be attributed to the liability.

To sum up, corporate compliance has its reasonable limits on unit crime, and the establishment of unit crime cannot be denied on the grounds of establishing compliance system definitively. When the perpetrator commits direct intent, the unit should bear the corresponding criminal responsibility. At the same time, corporate compliance can prevent the indirect intentional establishment of the unit, because the compliance culture itself is the subjective intentional obstruction of *laissez-faire*.

The Separation of Unit Responsibility and Natural Person Responsibility and the Judgment of the Degree of Criminal Responsibility

The traditional meaning of unit crime implements the mode of binding unit and individual responsibility, and the introduction of organization responsibility theory provides a theoretical basis for the separation of unit crime responsibility and natural person responsibility. Although the unit cannot personally carry out the crime with its own strength, it should be admitted that it has the will and has the criminal liability.

The criminal law function of punishment and prevention is also applicable to natural persons and units, but there are still differences between them in the specific process of culvert photography. The size of the punishment of the unit responsibility not only depends on the nature and the social harm of the directly responsible person in charge and other directly responsible personnel, but also examines the implementation of the unit system and the cultural construction, so as to determine the accountability degree

of the subjective aspects of the unit. Similarly, even if a unit implements compliance construction and fulfills reasonable duty of care in preventing crimes, it cannot be inferred that the criminal responsibility of natural persons will be reduced. At this time, the criminal responsibility of natural persons depends on the nature, subjective viciousness, and social harmfulness of their criminal behavior.

The investigation of the subjective viciousness of natural persons cannot be equated with the will of the unit. On the contrary, in the context of corporate compliance, natural persons who commit crimes in violation of laws and corporate regulations have a greater subjective viciousness than those who do not establish effective compliance, and should at least be treated equally. Therefore, under the guidance of the functions and purposes of criminal law, the responsibility of units and natural persons should be investigated separately, so as to accurately achieve the individualization of punishment and achieve the goal of corporate compliance non-prosecution reform.

In general, the relationship between unit responsibility and natural person responsibility can be discussed in three situations, with a view to achieving the typification of responsibility separation and responsibility identification. Firstly, the corporate establishes an effective compliance mechanism in advance, and the staff of the unit carries out criminal behavior in disregard of the rules and regulations. At this time, the corporate compliance prevents the establishment of the unit crime, and the unit does not constitute a crime due to the lack of will of the unit [12]. As for the unit staff, their objective behavior and subjective aspects should be comprehensively considered, and the basic principles of sentencing should be applied to determine their conviction and sentencing. This type is not a typical case of separating the responsibility of the unit from that of the natural person, so the unit does not constitute a crime and can be directly handled according to the criminal law provisions for natural person crimes. Secondly, the corporate establishes a compliance mechanism in advance, but in fact it is invalid compliance. The unit decides the crime with its overall will. At this time, the compliance in advance cannot prevent the establishment of the will of the unit. The unit should still be identified as a crime, but the degree of the will of the unit can be accurately determined according to its compliance situation, thus affecting its responsibility punishment. As for a natural person, his subjective and objective behavior should still be investigated. If it is indeed a criminal act for the interests of the unit (It is not required to completely disregard personal interests), it shows that its liability is low and can be given a lighter punishment within the range of sentencing stipulated in the criminal law. At this time, the unit can adopt a strategy of obtaining preferential treatment without prosecution through post-compliance.

Based on the elimination of the necessity of prevention for the unit, a decision can be made not to prosecute the unit. However, for natural persons, the need for special prevention cannot be completely excluded, so only natural persons can be prosecuted, thus separating the responsibilities of the two. Thirdly, the corporate has not established a compliance system, and after being involved in the case, it intends to achieve the exclusion of criminal responsibility through post-compliance. As mentioned before, for units, regardless of their degree of responsibility, as long as they establish effective compliance, the necessity of special prevention can be denied with a high degree of certainty, and they can be subject to adverse legal consequences through administrative penalties. Therefore, the regulatory role of preventive punishment on responsibility punishment is significant. However, in order to prevent the criminal liability of a natural person after the event, it should follow the provisions of Article 177 of the Criminal Procedure Law, and meet the situation that “for the minor circumstances of the crime, no punishment or exemption from punishment according to the provisions of the criminal law”, which can be decided not to prosecute.

However, for natural persons, corporate post-compliance can also effectively prevent them from continuing to commit socially harmful acts within their own units, thus having a certain special preventive effect. Although it is difficult to completely exclude the possibility of their continuing to commit crimes, it cannot effectively prevent them from bearing criminal responsibility. However, it should be recognized that it has the effect of reducing the criminal responsibility of natural persons. That is to say, for responsible persons who do not meet the conditions for discretionary non-prosecution, after the procuratorial organ has made a decision not to prosecute the enterprise, it can propose more lenient sentencing recommendations and apply to the court for more lenient criminal punishment [13].

Conclusion

The case of Nestle in Lanzhou is not a case in which corporate compliance obviates the establishment of unit crimes. We should distinguish the differences between unit crimes outside the territory and the standards for the establishment of unit crimes in China. At the same time, we should adhere to the status of “unit will” as the core element for the establishment of unit crimes. The evolution of the theory of imputation of unit responsibility, especially the theory of organizational responsibility, can provide an epistemological foundation for the establishment and imputation of unit crimes. Through different paths of ex ante compliance and ex post compliance, the former can exclude the establishment of unit criminal intent and negate the crime, but can only exclude indirect intent and cannot prevent the

establishment of direct intent through collective decision-making of the unit. At this time, corporate compliance can be deemed as invalid compliance. The latter is based on the loss of the necessity of special prevention for the unit, and the exemption of criminal responsibility is achieved through the adjustment of responsibility punishment by preventive punishment. The criminal responsibility of unit crimes and natural person crimes should not be tied together, but should be classified according to the basic principles of organizational responsibility and natural person criminal responsibility, and investigated separately in corresponding circumstances. Ex post compliance can achieve the non-prosecution of the unit and the prosecution of the natural person, and its criminal responsibility should be mitigated. Against the backdrop of the vigorous promotion of corporate compliance non-prosecution, a deep grasp of the imputation theory of unit crimes is of great and far-reaching significance for clarifying misunderstandings, guiding judicial practice, steadily promoting reforms, ensuring the implementation of the principle of proportionality among crime, responsibility and punishment.

Admittedly, the exploration of the path of corporate compliance to prevent the identification of unit crimes in this article is only theoretical. The grasp of the practical standards for unit crimes involves many typical cases in the reform pilot. How to test the consistency between theory and practice remains to be further investigated. In addition, the division of corporate compliance into ex ante compliance and ex post compliance, and the allocation of different levels of paths to prevent unit crimes for each, still involves deeper issues such as the substantive legal basis for corporate compliance to mitigate or exempt criminal responsibility, as well as the impact of procedural law on the realization of criminal responsibility. The deeper issues mentioned above deserve further research from the academic and practical circles, so as to provide a legitimate foundation and clearer practical path for corporate compliance to affect criminal liability.

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