Proceedings of ICILLP 2024 Workshop: Turkey's Current Corruption Situation: Laws, Economic Impact and Government Analysis
DOI: 10.54254/2753-7048/66/2024MU0039

Inspiration from the Deferred Prosecution Agreement: Based on Its Comparison with China's Compliance Non-prosecution System

Fengyi Su[1,a,*]

[1]*Law School, Beijing Institution of Technology, JinFeng Street, Zhuhai, China*
a. 221501102116@bitzh.edu.cn
**corresponding author*

Abstract: Since the break out of the financial crisis in 2008, the US has attached more importance to economic surveillance. In order to avoid and fight against crimes which take place in big enterprises effectively, meanwhile, release the burden that the prosecution process might bring to companies, the legislature has come up with a new system called "deferred prosecution" and promoted its application in real practice. In recent years, the legislation has been widely used in many cases to tackle with the corruption problem, especially those happen in MNEs, who is powerful enough to play an essential role in global trade and economic growth, and has proved to be a success for it creates a balance between the benefit of MNEs and that of the country, purifying the market atmosphere and optimizing the market order. Similarly, China has a relevant system named "Compliance Non-prosecution". However, there are some differences between two systems, also, application is still strictly limited in China. This essay aims at identifying the contrast of two systems and analysis the essence behind the differences, using cases from both China and the US as an example.

Keywords: Deferred prosecution agreement, Compliant non-prosecution system, Case analysis, Comparative study.

1. Introduction

It was 1st December 2018, in Vancouver, Canada, a Chinese citizen called Meng, the CFO of Huawei Group, was arrested by the Canada government "at the US's request". Soon after her probation, the US Department of Justice asked to intervene the case to "safeguard the interest of America". Under the guidance of the US government, Meng was illegally restricted to act like a normal person and strictly supervise by the Canada government. One year later, in 28th January 2019, Meng and Huawei was sued by the US Department of Justice for disrupting financial order by bank fraud and wire fraud. With the helpful effort of China, the UN human right council paid high attention to the issue and held meetings in particular to resolve the dispute. Few days after the meeting, China's effort paid back. The US Department of Justice reached to an agreement with Meng and permitted to release her unconditionally. The agreement is exactly a deferred prosecution agreement (DPA) [1].

Making a DPA with the one in charge is usually an effective way for the prosecutor to maintain a decent relationship with companies and organizations, meanwhile, impose a duty on them and

DOI: 10.54254/2753-7048/66/2024MU0039

guarantee that they are strictly regulated by laws and policies through compromise. However, compare with a normal DPA, huge differences can be found in this DPA. Firstly, it focuses on personal crime instead of corporation delinquency. Meng, as an individual, became a party of the contract, which means that it is an agreement specific for dealing with Meng's crime and for dropping the charges of Meng. Secondly, it doesn't require Meng to pay a fine and cooperate with further investigation. A normal DPA usually asks the guilty one to accept punishment to compensate for their mistake in a equivalent way. However, there were few obligations that Meng should take on. Two of the most significant duty for her are providing a personal guarantee and abandoning her right to prosecute the US government and relevant officers for body harm and economic damage during her stay in Canada [2]. On the one hand, it was the DPA that free Meng from being surveillance and finally led to her return to China. On the other hand, for the US government, the agreement released the burden caused by media and neutral international organizations, preserving their reputation and cutting their loss. Seemingly, it is a win-win situation for both Meng and the US government.

The case not only provoked a wide discuss among the public, but also motivated many scholar in China to fix their eyes on the concept and the usage of DPA. Early in 2018, China has adopted the concept of "compliance", which means for the compliant behaviour and steps that a guilty corporation promise to take after slightly breaking the criminal law, to legislation. In 2020, the Supreme Prosecutor's Office announced that pilot exercise of applying the "Compliance Non-prosecution system (CNSS)" would be taken in several primary offices. Nowadays, China is still gaining insight from the US and exploring an effective way to combine the desire and reality of the country with the promotion of the system .

2. Analysis on Deferred Prosecution Agreement System

2.1. The Basic Concept of Deferred Prosecution Agreement System

DPA system, is a kind of pretrial division agreement system that used by the prosecutors to delay the process of prosecution [3]. It bypasses the traditional plea agreement system and allow defendants to sign a contract with the enforcement organizations and take some remedy measure which meet a specific criteria during a period of time. Provided that they can finish their promise on time, the Prosecutor's Office can exempt them from being sued based on the contract.

2.2. The Timeline and Legal Sources of the Establishment of Deferred Prosecution Agreement System

The appearance of DPA system can be dated to 1960s. At that moment, the system was used to handle juvenile delinquency. For teens who act minor crime or make wrongdoings for the first time, the Prosecutor's Office offer them a choice plead guilty voluntarily without imposing punishment on them and suing them to the court. It was seen to be a helpful way to educate the adolescence, correcting their mistake and arming them with proper value. In 1974, Speedy Trail Act was formally published by the Congress, which marked the establishment of pretrial division agreement system. However, the range of its application was limited. A few decades later, in 1992, when a crime occurred in "Solomon Brothers Company", the system was applied to deal with corporation crime for the first time. In this case, the company eventually agreed to pay for a 290 million fine, altered the members responsible for management and improved the operation system [4]. It seemed to be great success for the US Department of Justice to firstly implement the system to such circumstance, however, it was not until another scandal happened in Enron that the application of DPA in dealing with corporation crime gain attention again. The system gradually upgraded after the publication of several memos which regulated for its detailed components after the 21 century. Also, with the improvement of Foreign Corrupt Practice Act (FCPA), the system no longer regulates local

DOI: 10.54254/2753-7048/66/2024MU0039

enterprises, it can be also used when MNEs violate the criminal law. In recent years, the system has been widely used in judicial practice .

2.3. The Application of Deferred Prosecution Agreement

DPA has been generally implemented in practice to tackle with crimes related to corporation as the legislation get promoted .

One typical cases was taken place in a huge Swiss automatic machine manufacturing company called ABB. This MNE has violated FCPA and reached an agreement with judicial department for three times during the past two decades. According to the records posted by the US Department of Justice, in 2010, a subsidiary in Texas paid bribe with the officers in CFE, a Mexican state-owned company through middleman in Mexico, to obtain the opportunity to enter a significant contract which could bring more than 81 million dollars to ABB. Besides, ABB group also admitted its illegal trade with the Iraq government. Based on the “Oil-for-Food”programme supported by the UN, ABB signed a contract with the car selling contract with the Iraq government. By paying extra kickback, the subsidiary acquired the chance to cooperate with several local companies and won 11 equipment provision bookings which valued more than 5.9 million. During the plea hearing, ABB Ltd and two subsidiary revealed their wrongdoings above and agreed to signed a three-year DPA with SEC. According to the DPA, ABB acknowledged the allegation on violating FCPA and accepted to paid a criminal fine, relevant interest and other penalty for more than 58 million dollars. Otherwise, ABB also consented to reverse the members in the board of directors and strengthened its duty on report and disclosure. It happens that a similar case occurred in 2022. A subsidiary paid bribes to a South Africa officer who also an high-ranking employee in the local state energy company -- Eskom, to obtain advantage in several profitable contract with the company and other trade associated with the government. The same as what they did in the past, ABB admitted the accuse on breaking FCPA and agreed to enter a DPA, which calls for paying a 315 million dollar fine and compliance rectification [5].

In this case, it benefits both the US government and ABB by signing the DPA. For the US government, it helped them better combat financial crime and regulate the market order, building a fair and open atmosphere which could attract more further investment. As for ABB, although it should bear a huge fine, the DPA still protected it from facing criminal charges, which is harmful to its global image and reputation and might further influence its expansion. Seemingly, it reached a win-win situation for both parties .

Similar to this case, a number of individual and corporations has entered a DPA to avoid being charged throughout these years, among them, some famous enterprises like 3M and JP.Morgan are in the list [5]. The application of DPA is becoming increasingly popular in practice due to its effectiveness in balance social interest and legal benefit. Even though the wide application of DPA is still controversial for it might impose a threat to companies and charge for irrational amount of fine, causing serious damage to enterprises, the advantage of the system is still non-negligible .

Firstly, it enhances the litigation efficiency. By signing a DPA, both parties can take positive actions to avoid the previous mistake from causing more severe outcome. It encourages companies to cooperate with investigation held by the government and disclose more inner information to reveal the illegal behaviour they did, help distinguishing who should bear the duty and be responsible for the wrongdoings and finally come out with an appropriate method to resolve the problem speedily. A long-term litigation will always cause exhaustion to both parties. Entering a DPA can reduce the time and money spent on litigation, making the process more simple and straightforward.

Secondly, it optimizes the allocation of judicial resources. The DPA system offers enormous discretionary power to the prosecutor to determine whether a party should be charged. It is a pre-litigation procedure used to select the cases that can enter the litigation process. By signing DPA and

DOI: 10.54254/2753-7048/66/2024MU0039

obey their duty, it is not necessary for companies or individual to enter the litigation process any more. This helps release the burden of the court and cut the waste in judicial resource.

Besides, it decreases the social impact that crimes bring. On the one hand, it reduces public attention. Making an agreement is a more moderate approach to tackle with problems comparing with litigation, both parties can remedy the trouble effectively, meanwhile, attract less attention to the case and prevent the boom of public opinion over the incident. On the other hand, it helps maintaining the social stability. Solving conflicts promptly is helpful to ease social contradiction and build a harmonious community.

Last but not least, it improves the relationship of both parties and protects their interest. Through entering the contract, companies or individual act to compensate for their wrong behaviors and the government promise not to charge for them. The consideration between two parties is adequate, which helps strengthen the communication and improve trust, bettering the cooperation. What is more, DPA also provides both parties a flexible platform to deal with contradictions. They can bargain and debate with each other equally, reach an agreement based on actual facts and situations, finally, arrive to a solution which can be accepted by both. It guarantees the legal right that both parties have and prevent their interest from detriment .

To sum up, DPA has great impact in many aspects, including saving judicial resource and protecting the interest of both governments and defendants. However, it is worth noticing that DPA might be not suitable to apply in all financial crimes happening on corporations. Still, efforts should be make to clarify the detailed components of the system thus application can be more appropriate.

2.4. The Components of Deferred Prosecution Agreement

2.4.1. Focusing on Companies and Individual Related to Financial Crime

The targets of DPA is companies and individual who break the criminal law in the aspect of finance. Mostly, DPA is for regulating the behaviour of enterprises, few is used to limit a person. The categories of financial crime includes commercial bribery, financial fraudulent, swindling, money laundering and so on [6].

2.4.2. Consent between Two Parties

The essence of DPA is a contract, which regulates the right and obligation of the relevant parties. DPA is a contract made between the guilty companies, individual and enforcement organizations like SEC. The agreement usually requires the guilty party to acknowledge the fact of violating the criminal law, accept penalty, cooperate with investigation and fix inner regulations. If a party agree to sign the contract and follow the agreement in a certain period of time, the Prosecutor’s Office will withdraw their charge afterwards. But if they breach the agreement, then the Prosecutor’s Office is no long limited by the clause of deferred prosecution can is able to sued the party at any time.

2.4.3. The Social Effect of the Crime is Minor

It is the duty of Prosecutor’s Office to distinguish the severity of defendants’ behaviour using discretion. Until now, there are no exact criteria to identify the social effect of a crime, for it is a abstract concept. However, from numerous cases it is obvious to find two characteristics. First, all the crimes are not involved in national security and public interest. Second, the initial penalty of the delinquency is not extremely strict before signing DPA. For instance, punishment like short-term imprisonment and paying fine is not serious compared with other penalty. Base on these two reference standards, prosecutors can judge the extent of social influence of a crime and determine whether they should use DPA to tackle with the legal problem.

DOI: 10.54254/2753-7048/66/2024MU0039

2.4.4. High Possibility of “Being at a Deadlock”

It is also determined by the Prosecutor’s Office and it is lack of clear judging standard as well. However, there are still some aspects the officers can look into. Firstly, the court cost. It is not economical to sued a party if the expected court cost is much too expensive. Besides, the power of both parties. From the case study, it is evident that defendants allowed to sign a DPA are huge enterprises especially MNEs who are influential and powerful in global trade market. Although their power is inappreciable in comparison of the Prosecutor’s Office and other public authorities, it will still cause great damage to the country’s interest if the defendants are charged and strict punishment is imposed on them. Thus, there is no victor in the strife, both parties suffer if the prosecution continues. What is more, the availability of evidence is also a key point requires consideration. The content above illustrates that a normal DPA usually demands the defendant to bear the duty of disclosure. From another prospective, it is a signal demonstrating that the Prosecutor’s Office has limited available evidence to convict the defendant of a crime reasonably and legally. Due to the lack of useful evidence, they compromise and utilize DPA for warning and punishing. Litigation is as a gambling game, but the core of it is solving conflict instead of fighting against each other and get triumph.

2.4.5. Agreed by the Court

For cases that enter the process of prosecution, if a DPA was determined to made, it requires the approval of the court. Normally, a formal examination should be taken by the court to ensure the legality of fairness of the agreement.

3. Analysis on Compliance Non-prosecution System

3.1. The Basic Concept of Compliance Non-prosecution System

The CNSS is a division of the guilty plea system. It allows the Prosecutor’s Office to identify the corporation who is willing to abide by some specific and is able to satisfy the fundamental conditions of “compliance” while dealing with criminal affairs occurs in companies [2]. In other words, after being examining by the Prosecutor’s Office and promising to adjust inner system that obeys certain criteria, at the same time, achieving the promise during the regulated period, enterprises gain freedom again and will not be charged for crime .

3.2. The Application of Compliance Non-prosecution System

The establishment of the system happened merely 4 years ago, it is a brand-new system for China. Even so, the Supreme Prosecutor’s Office has actively motivated its application. By conducting experiments in several primary offices and publishing typical cases, the applying standard is getting distinct and detailed.

One of the typical case took place in Shandong Province. An enterprise majors in chemical production, filled 4.8 tons of chemical waste to the soil illegally, which violated the environmental protection clause in criminal law. After being evaluated by the local professional agency permitted by the government, relevant prosecutors found that the extent of detriment is limited. The burying of chemicals only polluted certain range of place and the soil out of that range was still with good quality, which means that the ecological system was in decent condition and no steps should be taken to restore the environment. Besides, considering that the company is a giant in producing a certain chemical in China and products are mainly for export, it is not a wise choice to impose strict punishment on them, for it will cause huge loss in customers which might do harm to their operation

DOI: 10.54254/2753-7048/66/2024MU0039

and financing, resulting in large scale layoff and ultimately leading to bankrupt or instability of the company. Accordingly, in 2022, after confirming that the company had reached an agreement with the government, paying for relevant investigating fees, properly handling the fillings, with the permission of senior office, the primary office decided to apply CNSS and freed the company from being charged .

In recent years, the system has applied to certain amount of cases. Merely in four years after the birth of the system, at present, every single Prosecutor's Office over China adopt it to deal with criminal cases associated with corporation and the significance of the system gradually emerged to the public .

Firstly, it encourages the compliant construction of enterprises. Through setting several criteria for companies and offer them time to adjust their inner managing or operation system, companies can deeply realize their mistake and attach more importance to compliance construction, this helps them correct their regulations and strengthen the publicity of compliant awareness, which ultimately prevent them from crime again.

Secondly, it ensures the normal operation of companies. For companies who are willing to accept compliant rectification and have the capacity to hold such a rectification, the CNSS can reduce the negative effect that criminal procedure and penalty bring. On the one hand, penalties for corporations usually include fine, expropriation, canceling the business licence, etc, which is a huge price for the companies. However, if the system is applied, it can exempted them from tossing excessive money and resources to deal with the case or to compensate for their wrongdoings, get them out from the risk of bankrupt or poor operation. On the other hand, it can bring less bad effect to companies' reputation for it will leave no record about their misbehavior on official websites.

Last, it boosts economic growth and stabilizes the society. The system helps optimize the judicial resources distribution, leading authorities to fix their eyes on cracking down critical crimes and safeguarding people's health, wealth and dignity. With the protection of the public power, the society can be well-regulated and stable. Besides, application of the system also helps set good examples for the whole industry. Once a company readjust their inner system under the standard regulated by authorities, it will motivate others in the same industry to check their regulations and rectify them.

3.3. The Component of Compliance Non-prosecution System

3.3.1. Concentrating on Crime Happening on Corporations and People Closely Related to or Take Charge of the Management and Operation of the Company

The system is specifically for guilty corporations and people who can totally control companies. Mostly, it is applied to companies, seldom happens in individuals for it is uneasy to prove who should be responsible for the crime occurred in a company.

Different from DPA, who focuses only on crimes in financial aspect, the CNSS can be implemented in dealing with 17 kinds of crime, according to Guiding Opinions on Establishing a Third-party Compliance Supervision and Evaluation Mechanism for Related Enterprises (Trial) (Guiding Opinion in short) published by the Supreme Prosecutor's Office [7]. It means that no only financial crimes can be solved by this mean, other crimes such as illegally mining, smuggling common goods can also be settled in this way.

3.3.2. The Penalty of Crime is Minor

The application of the system is also deeply related to the severity of penalty. Basically, it is often used in minor crimes in which the guilty party will be sentenced to penalties like an imprisonment less than three years, detention, community surveillance and fine. However, in the practice of law, it remains some extra circumstances. From the typical cases posted by the Supreme Prosecutor's Office it is obvious to find that in some severe crimes, the system is still applied. For example, in a crime about inner information disclosure and insider trade, the offender seriously broke the law [7]. Considered that they are prosecuted, they must be sentenced to a imprisonment for more than five years normally, which is seemingly out of the range of a “tiny penalty”. Nevertheless after the cautious judgement of the office, the prosecutors selected to free them from being charged. Until now, there are no rules and standards of how “minor” the penalty should be. Whether a case can implement the system is more associated with the defending strategy that taken by the defender . In other words, it is up to the negotiation between the prosecutor and the defender.

3.3.3. The Willingness and Capability of Compliance

The CNSS is a branch of plea punishment system. The decision of excluding a party from being prosecuted is a lenient punishment, it is used to encourage criminals to admit their guilt and shoulder the legal duty positively. From this knowing it evident to find that whether the system can be applied is based on the willingness of compliance. The willingness can be explained in two aspects. The first one, acknowledging wrongdoings and bearing duty positively. This means only when guilty parties admit their crime and promise to make compensation for their mistake can the system possibly be applied. The second one, making a positive argument about the application of the system. This means guilty parties should persuade prosecutors to implement the system in their case [8]. However, willingness is the only factor, more crucial is that the capacity of compliance, judged by prosecutors.

3.3.4. Execpt Particular Circumstance

According to clause 5 of Guiding Opinion, five circumstances are excluded by the system, including: (1) A nature person set up the company specifically for conducting crimes. (2) The major business or service of the company is conducting crimes. (3) Personnel of a company or another enterprise fraudulently use the name of a company to commit crimes. (4) The crime endangers national security or is relevant to terrorist activities. (5) Other conditions not suit for the system [7].

4. Comparison of Two Systems

4.1. Nature and Objectives

4.1.1. Nature

DPAs in the US is a unique form of plea bargaining, it is particularly prevalent in dealing with corporate crime in financial aspects. They are tools for resolving complex, costly, or otherwise stagnant criminal cases, meanwhile, they offer defendants an opportunity to avoid formal prosecution in exchange for compliance with specified conditions.

The CNSS is a criminal policy tackling with corporate criminal cases. It is a effective method to encourage self-regulatory reforms within enterprises, thereby reducing potential criminal conduct and mitigating the harsh consequences of criminal prosecution, particularly for minor offenses.

4.1.2. Objectives

The primary goal of DPAs is to provide defendants with a way to return to society without being look down upon by other subjects like their business partners in the market, which could ultimately lead to an enormous loss in profit. By imposing penalties such as fine and monitoring, it not only simulates corporations to build up a sense of responsibility but also prevent them from conducting potential crime in the future. Moreover, DPAs also aims at alleviating the burden on the criminal judicial system by resolving cases efficiently and cost-effectively.

DOI: 10.54254/2753-7048/66/2024MU0039

The primary objective of the CNSS is to stimulate enterprises to voluntarily undertake compliance programs, thus preventing future criminal activities. By doing so, it fosters a culture of compliance within corporations, enhancing their overall corporate governance standards. What is more, the CNSS aims to avoid the destructive consequences of criminal prosecution on businesses, such as forced liquidation or bankruptcy, which could have negative effects on employees, investors, and the economy at large.

4.2. Applicable Objects and Conditions

4.2.1. Applicable Objects

DPAs are available to both natural persons and corporations. They are applied only to financial crimes including financial fraud, commercial bribery, and money laundering and so on. They are particularly prevalent in cases involving complex corporate structures.

The CNSS primarily targets enterprises with willingness and capacity to implement compliance reforms. It is designed for those companies that have engaged in criminal conduct but possess the potential for meaningful transformation through compliance revolution.

4.2.2. Conditions

To enter into a DPA, defendants must acknowledge their criminal conduct, accept a punishment, and agree to abide by a set of conditions during a period. These conditions typically include the implementation of a compliance program, reporting to the prosecution authority regularly, and readjust their inner managing system to prohibit further criminal activity.

To qualify for the CNSS, enterprises must submit a tailored compliance plan to deal with the specific violations under investigation. This plan must outline measures to prevent future crimes and enhance overall corporate governance. Enterprises must then implement the plan effectively, actively cooperate with the monitor of the prosecutor. Upon successfully completing their promise after the monitoring period, the procurator may decide not to prosecute the company.

5. Conclusion

In conclusion, the disparities observed between DPAs and CNSS stem from different national contexts and governance enology. Hence, it is hard to tell the superiority of one over another, as both are tailored to serve their respective countries' needs. For the US, as a capitalist nation prioritizing capital accumulation, DPAs help build a balance between government and corporation with huge power, thereby maximizing economic efficiency. Rather than merely a criminal justice tool, they also function as strategic mechanism for pursuing economic prosperity, fostering mutually beneficial exchanges between corporations and the government through contractual arrangements. Conversely, CNSS represents a transformation from traditional heavy-handed penal approaches, marking a procedural advancement. It emphasizes the establishment of a flexible, comprehensive, and unified regulatory framework to supervise all market entities, ensuring transparency and accountability in corporate operations. Both systems, despite distinct, embody adaptive governance strategies tailored to their respective landscapes.

References

[1] *Lawyer Dong. (2021) What is the deferred prosecution Agreement DPA? Break through the traditional applicable conditions and emphasize personal responsibility. Retrieved from https://new.qq.com/rain/a/20210926A0DAJM00.*

[2] *Yi Xun Technology. (2021) After reaching a deferred prosecution agreement with the United States, Meng Wanzhou was released and returned home. Retrieved from https://baijiahao.baidu.com/s?id=1711933835575760056*

[3] *Zhu Xinying. (2021) Brief analysis and enlightenment of the deferred prosecution agreement in the US criminal procedure. Modern Finance Guide, 12,71-74.*

[4] *Grandall Law Firm. (2021) Impact of US Deferred Prosecution Agreement (DPA) on business compliance of multinational companies. Retrieved from https://www.grandall.com.cn/ghsd/info.aspx?itemid=23558.*

[5] *Office of Public Affairs. (2022) ABB Agrees to Pay Over $315 Million to Resolve Coordinated Global Foreign Bribery Case.*

[6] *Pang Zheng, Xu Hongyan. (2019) On the application of the deferred prosecution system in punishing unit crimes : Takes the United States suspension of prosecution agreement as a reference. Chinese Prosecutor, 15,54-57.*

[7] *Li Bo, Xi Mengying. (2024) Based on typical cases issued by the Supreme Procurator's Office to discover the appl ication of enterprise compliance non-prosecution. Retrieved from https://baijiahao.baidu.com/s?id=17948268744 76339180.*

[8] *Su Yi, Zhu Quansheng, Li Yuecun. (2024) Comparative study on enterprise compliance non-prosecution system: From the perspective of lenient confession system. Journal of Harbin University, 45(06),76-79.*