

Original Paper

Field Research on Corruption in Private Enterprise
-- Taking the "Criminal Law Amendment (12)" as an
Opportunity

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Abstract

For a long time, the governance strategy of corruption crimes in private enterprises has been mainly based on norms and ignoring facts, which may lead to poor governance of related crimes. In terms of the governance of corruption crimes within private enterprises, the characteristics of enterprise management mode, organizational structure, and form of power distribution are ignored, which may limit the protective function of the criminal law, and even cause problems such as excessive involvement of the criminal law and abuse of rights. In terms of bribery prevention, failure to fully consider the complex forms of bribery may lead to those enterprises and their households that are still worth saving may be mired in litigation, which will further lead to negative social effects. Based on the complex reality of China's private enterprises, a localized and comprehensive corruption crime governance strategy should be put forward from the perspective of enterprises and their households.

Keywords

Empirical research, Bribery, Crime prevention

1. The Question is Raised

With the development of China's private enterprises, the volume of private enterprises has gradually increased, and the annual income of some large private enterprises has reached hundreds of billions of yuan. In recent years, the issue of the protection of private enterprises has always occupied a certain degree of heat, and the academic and practical circles have called for strengthening the protection of private enterprises, and scholars in the field of law have focused on achieving equal protection of private enterprises and state-owned enterprises from the perspective of legislation, and the Criminal Law Amendment (12) has responded to such demands. Corresponding to protection, there must be a

"zero tolerance" attitude towards bribery by enterprises and their staff, and it is urgent to prevent and control corruption and crime in private enterprises.

Regarding this amendment, Chinese scholars focus on the legislative principles of the Criminal Law Amendment (12) (Sun Daocui, 2024), the interpretation of the elements of the constitutive elements of the crime of breach of trust and bribery (Bai Langtao et al., 2024), and the understanding and application of related crimes (He Huiling, 2024). It has important academic value and guidance for the theoretical and practical circles to learn the new law. However, these studies rarely provide feasible anti-corruption measures from the perspective of enterprises, and the effectiveness of governance may be greatly reduced. The 12th Amendment to the Criminal Law adjusts the subject of the crime of corruption by internal personnel of enterprises, but does not distinguish between the types and scale of private enterprises, even if relevant factors have been taken into account that will affect the occurrence of corruption (Zhang Yijian, 2024). The deterrent function of criminal law is limited. When revising and improving the crime of bribery, attention was paid to the poor governance effect of bribery after the amendment of the Criminal Law Amendment (11), and the complexity and diversity of bribery by private enterprises and their households in real life were not distinguished, which may cause those enterprises that operate legally, pay taxes in accordance with the law, and provide jobs to be forced to pay bribes and be subject to criminal sanctions simply because they submit to the "unspoken rules".

The current state of corruption in private enterprises cannot be answered simply from news media reports and the voices of researchers. The existence of China's private enterprises is complex and diverse, including large enterprises and small and medium-sized enterprises; Listed and unlisted companies; family enterprises, individual enterprises... Private enterprises of different types and scales are likely to present different situations of internal corruption crimes, and specific and special analysis is required in order to deal with and prevent related crimes differently, rather than ignoring the actual situation of the enterprise and generally carrying out corruption crime governance in the form of criminal law legislation. In view of this, this study aims to explore the pain points and difficulties of the governance of this type of corporate corruption crime by taking a specific large private enterprise as the survey object, presenting the complexity and diversity of bribery crimes in private enterprise, and proposing practical and feasible governance countermeasures from the perspective of enterprises.

2. Research Design

2.1 Research Perspective

At present, almost all the research on the governance of corruption crimes in private enterprises adopts the perspective of state/regulators or legal researchers. The neglect of the corporate perspective as a victim or perpetrator can lead to obstacles to the functioning of relevant legislation and crime prevention measures at the corporate level. In view of this, this paper returns the perspective to private enterprises and examines the views of private enterprises and their staff on internal corruption and external bribery.

2.2 Research Object

In this paper, X Energy Group, a large private enterprise, is selected as the research object. X Group is located in Z City, S Province, a major coal province in northern China, and is one of the top 100 enterprises in the province, with tens of thousands of employees, providing a large number of employment opportunities for the local area, with an annual turnover of billions and an annual tax payment of hundreds of millions of yuan (Guo Tong Zi, 2017). The chairman of the group undertook the enterprise in the 90s of the 20th century when the state-owned enterprise was restructured, and after more than 30 years of operation, the state-owned enterprise on the verge of bankruptcy was reborn, and he was the soul of the enterprise, with considerable right to speak (form of power distribution). The group has a relatively complete enterprise organizational structure and management level, and the parent company of the group has several branches and subsidiaries, and jointly funded with state-owned enterprises to establish a number of mixed-ownership enterprises (organizational structure). With a wide range of main business and strong product strength, it is a local benchmark enterprise and has close contact with the local government in its daily operations. These conditions facilitate the study of the prevention and control of corruption and bribery in private enterprises, and indirectly examine the differences between private enterprises and state-owned enterprises from the perspective of private enterprises.

2.3 Research Methods

In addition to the basic logical deduction method and literature analysis method, the unstructured interview method and the participatory observation method are also used.

Unstructured interviews are not based on pre-designed questionnaires and fixed outlines, but only on the topic or scope of the interview, and the interviewee and the interviewee have a more free conversation around this theme or scope (Feng Xiaotian, 2018). For example, ask the interviewee to talk about the difficulties of the company or department, and the risks that are difficult to solve. Through in-depth and detailed interviews, rich and vivid qualitative data can be obtained from the respondents, which are often based on the vivid stories told by the interviewees, which may be the story of the enterprise itself, the story of the interaction between the enterprise and the government, or the story of a key person in the enterprise. Then, through the researcher's subjective and insightful analysis, a certain conclusion is summarized and generalized. Informal, casual chit-chat, in a certain situation, can lead to key information, especially on certain sensitive topics.

Participatory observation is a research method in which researchers are exposed to or involved in the daily work or routine activities of the research subject, systematically observing and recording people's behaviors, actions and interactions, which is particularly suitable for exploratory research and critical examination of existing theories. This method focuses on participatory observation from within the firm, complementing the regulator's perspective to uncover hidden facts close to the subject of the investigation. (Danny L. Jorgensen, 2009)

3. Investigation Findings

3.1 *It is Difficult to Control Internal Corruption Crimes that Harm the Interests of Enterprises*

In recent years, the number of corruption crimes within private enterprises has been on the rise, growing faster than that of state-owned enterprises, and the related crimes are mainly bribery crimes and financial embezzlement crimes (Zhao Jun, 2024). In Group X, embezzlement of corporate assets is the main manifestation of internal corruption, and the use of power to accept bribes is controlled with the improvement of management technology.

Generally speaking, the ownership and management rights of modern enterprises are separated, and the shareholders, as the owners of the company, do not directly participate in the management, but hire professional managers to help with the operation. However, for a private enterprise with an entrepreneur as the core, its management model is not an ideal modern enterprise management model, and the entrepreneur is usually both a shareholder and a senior manager, and there is a mixture of company ownership and management rights. X group is exactly this situation, after the restructuring of state-owned enterprises in the 90s of the last century, dozens of shareholders, including the chairman, invested in the establishment of the enterprise, so far, the initial shareholders began to differentiate, some small shareholders occupy a certain proportion of shares, do not participate in business decisions, only enjoy dividends. Other individual shareholders participate in the company's operational decision-making and become the company's senior management, and the group has been running so far, the management and shareholders overlap, and even the middle-level leaders, such as the heads of various departments, also hold the company's shares due to the group's equity incentive plan.

Logically speaking, since the property of a private enterprise belongs to the shareholders, and some of the shareholders are senior managers of the company, and the employees infringe on the interests of the company, they are infringing on the interests of the executives, so the owners and managers of the company have a stronger willingness to prevent internal corruption. The same conclusion can be drawn from the analysis of the nature of public and private property (Zhuang Jin, 2007). In the process of communicating with senior managers, some executives mentioned cases of employee embezzlement and misappropriation of company property, and these cases basically have the following characteristics: First, the perpetrators are ordinary employees and do not hold positions; Second, the conduct almost meets the criminal composition of the relevant crime, such as the amount meets the standard of criminal prosecution; Thirdly, the vast majority of cases were not referred to the judicial authorities, and only one case was due to the perpetrator's bad attitude of admitting mistakes and spreading negative corporate remarks on the Internet. This is in discrepancy with the results of relevant surveys, which show that the vast majority of those who commit corruption crimes are managers with certain positions (Zhang Yuanhuang et al., 2023). There are the following reasons for this deviation: First, the cases included in the statistics are all legal documents published by the court, and there is no problem of criminal black numbers; Second, the interviewed executives in Group X were reluctant to expose similar behaviors of other executives, and only talked about some "trivial things" carried out by

ordinary employees, and the interviewed ordinary employees were not aware of such behaviors carried out by managers, and the relationship between employees and leaders was obvious, and there was not much overlap between the two except for normal business behaviors. Obviously, unlike the use of public documents for statistics, field research can uncover the facts and analyze the causes in more detail. But the question is, is there an error in the results of the survey?

In this regard, the head of the audit committee introduced a typical case:

“There was a guy in the finance department who gambled online with his mobile phone, and later misappropriated tens of thousands of yuan from the company when he ran out of money. Other people who embezzled the company's property were fired and no police were reported. Many people want to take advantage of loopholes, and the general leaders (managers with a half-job position) make many mistakes, such as taking care of relatives and so on. The boss (chairman) is too merciful and often lets go of people who have problems.”

Other executives only said a few words about the violators who infringed on the company, but the person in charge of the audit committee gave a more comprehensive introduction, in addition to the illegal situation of ordinary employees, and also mentioned the problem of corruption of leaders above the middle level. This does reflect the seriousness of the problem of financial misappropriation within private enterprises, but more importantly, it is difficult for enterprises to effectively control similar behaviors. The crux of this passage is that the identity of the interlocutor is the person in charge of the Audit Committee. Group X has committees under which are the departments. The Audit Committee consists of three members who are responsible for the Group's audit work, and external auditors are also hired. The supervision of financial activities by audit facts plays an important role in preventing financial anomalies in the company, and according to the ISO 37301 compliance standard (Note 1), audit work is also a key manifestation of the effective operation of the compliance management system. For the past financial misappropriation violations, the person in charge of the audit did not put forward further effective measures, the group's audit internal control measures could not effectively control the financial misappropriation, and there was no detailed reward and punishment system to punish the violating employees, and the handling method was based on the factor outside the system - "the chairman's decision". From this point of view, it has been suggested that it is reasonable to stipulate that the crime of harming the interests of private enterprises is a crime that can only be dealt with after accusation (Chen Jinlin, 2022). However, it should be noted that in the case that the ownership and management rights are not completely consistent, whether the management can make a decision not to pursue the ownership needs to be further explored theoretically (Note 2).

Although in most cases, the employees were not held criminally responsible, but their actions caused economic losses to the enterprise, and X Group set up a disciplinary inspection committee and an employee reward and punishment system, and most of the corresponding mechanisms were mere formalities in actual operation. On the one hand, the way executives handle the case affects whether the case enters the criminal process, on the other hand, for the corruption that occurs within the enterprise,

the first time is not to actively seek the help of law enforcement and judicial organs, because for a long time, the public security organs are reluctant to intervene in the criminal behavior within private enterprises, and executives are not willing to spend their energy on dealing with the problem of internal ghosts, for private enterprises, time is money.

The Amendment (12) to the Criminal Law extends the application of three crimes to private enterprises, responding to the research results of the majority of legal scholars. The amendment once again puts the protection of private enterprises in an important position, which will play a positive role in cultivating the social concept of equal protection of private enterprises and improving the governance dilemma of corruption within private enterprises. However, after the Amendment (11) to the Criminal Law significantly increased the statutory penalties for the crimes of embezzlement, misappropriation of funds, and bribery of non-state functionaries, the governance of these three most typical types of internal corruption crimes in private enterprises has not changed substantially, and the difficulties encountered by private enterprises in filing cases and protecting their rights in this field have not been fundamentally resolved.

3.2 It is Difficult to Avoid "Dotting" under Specific Circumstances (Note 3)

Almost any employee of a company has an awareness of the illegality of bribery, and in general, it is not practical to obtain direct information about bribery by themselves/others. At this time, he gave full play to the advantages of "entering the circle of investigation" (Zhao Jun, 2007), and found that enterprises inevitably had to "dot" appropriately in the actual business process, which reflected the problem of political and business relations, which has gone beyond the scope of enterprise self-control. Regarding this problem, a business leader complained:

"When it comes to the New Year's holidays, I have to "dot" the environmental protection department and the safety supervision department, and I have to discuss the unified price code with other business leaders. We definitely don't want to give, so what should we do?"

In order to verify the above content, the author confirmed with other employees, and received almost all of them. Later, a civil servant who had just joined the safety supervision department said:

"I followed to check, there was no problem with this company, I forced me to stuff red envelopes, I just joined the company and didn't dare to ask for it, and I was embarrassed not to accept it when I saw that everyone else had accepted it."

In real life, bribery is diverse, and not all bribery is a "hunting" type of bribery. On the premise of ensuring safe production and legal operation, in order to cope with the interference of the regulatory authorities on normal production activities, enterprises have to convey benefits, and even "collude" to negotiate the amount. In such a situation, it seems difficult to expect the perpetrator not to carry out the act of "dotting". Just imagine, if you and I, as business leaders, do not pay bribes, we will face frequent inspections, fixed administrative penalties, the company still has business goals to complete, and employees still need wages to make ends meet... Of course, this is at least to ensure that the enterprise itself does not have the premise of violating the law, otherwise it may be possible to give property "for

improper benefits" and establish the crime of accepting bribes, which is an additional premise for the determination of bribery compared with the internationally accepted standard. Unlike power-dependent private enterprises that obtain benefits through bribery of power, the goods and services provided by normal private enterprises can meet market demand, and while they legally obtain profits, they also contribute tax revenue to the state and create employment opportunities for society. The financial work of X Group attaches great importance to tax issues, and it can be said that it is a practical enterprise that pays billions of taxes for the country every year. The business behavior of such enterprises is generally legal and beneficial to society, but in order to prevent some corrupt officials who hold power from "making trouble", they have to passively follow certain "unspoken rules" and transfer benefits to corrupt officials, so as to ensure the normal operation of enterprises. Once the case is discovered, the relevant acts will also constitute the crime of bribery in law, and the relevant enterprises will also face criminal prosecution. Especially for entrepreneurs in the state of "integration of people and enterprises", pursuing the responsibility of relevant entities is likely to have a negative ripple effect, leading to the bankruptcy of enterprises and causing more social problems. It is precisely with this situation in mind that legal scholars explore ways to decriminalize such enterprises from the perspectives of "non-prosecution" and "exculpation" (Li Yuhua, 2023).

From the interviews, we indirectly examine the local business environment:

"The provincial leaders all said that they would make it difficult at the county level, and finally threatened to call the province. Dealing with Beijing leaders is really simple, many times money is not important, people don't want it, and those who ask for money can't do it with scammers. Spending money is for your subordinates to handle. Leaders at the city and county level are the most difficult to deal with, and they can only give money. Relying on daily maintenance of relationships to invite guests to dinner does not work."

In addition, statistics show that the number of cases of people in private enterprises who hold a certain amount of power accepting bribes and selling the interests of enterprises is on the rise (Zhao Jun, 2024). In the past, commercial bribery in Group X was concentrated in sales and procurement. In the sales process, the Group has established a unified online sales platform, and all transactions are carried out online. The trading model of clearly marked price and the highest price greatly reduces the space for receiving rebates. In the procurement process, it is technically difficult to establish an online platform, and the Group has set up the Ministry of Commerce to supervise and regularly check prices, so that the relevant risks can be controlled.

4. The Choice of Governance Strategy

An important background of the revision of the Criminal Law Amendment (12) is to respond to the current development of large-scale modern private enterprises. With the development of private enterprises, the internal governance structure of enterprises has changed, and the power of operation and management has gradually been dispersed, such as Internet enterprises. Based on the

characteristics of high-speed information processing, Internet enterprises often adopt an internal power distribution model of flat management and short-link decision-making, fully delegate power to employees, shorten the decision-making process, and employees grasp key powers such as the right to review the platform's entry, the right to adjudicate platform rules, and the right to allocate traffic resources, which can widely and directly affect the third-party operators within the platform, which is easy to breed corruption (Zhang Yijian, 2024). The field investigation of X Group projects another characteristic of large private enterprises, although there are many levels of enterprises, the boss has a considerable right to speak, and "the integration of people and enterprises" also exists. The best governance effect may not be achieved through criminal law means, and practical suggestions should be given from both internal and external dimensions.

4.1 The Effective Operation of the Internal Control Mechanism

With the gradual promotion of the Group's sales and procurement business to the online platform, the systemic risk of commercial bribery has been effectively controlled. Coal and coke sales and office supplies procurement have made it difficult to operate commercial bribery. From the perspective of preventing commercial bribery, this is the right direction for reform. At present, there are two main areas where there may be risks of commercial bribery: first, an online procurement platform has not yet been formed, and special equipment needs to be purchased through point-to-point investigation and negotiation; Second, in the buyer's market, enterprises need to promote products offline. This kind of bribery-type crime involving "ghosts in the enterprise" individuals (non-state functionaries) will not directly bring criminal risks to the enterprise except for harming the commercial interests of the enterprise, and can be appropriately controlled through mutual restraint and supervision between departments and bidding procedures.

1. Build internal whistleblowing system

A good internal whistleblowing mechanism can comprehensively and real-time supervision of illegal acts by internal staff, and its effective prerequisite is to establish a sound compliance system within the enterprise, so as to create a clean corporate culture (Wang Xiumei and Wang Suyi, 2024). The reason for many internal corruption cases is that they are reported by colleagues, but if the protection, investigation and feedback measures for reporting are ineffective, the willingness of whistleblowers to report will decline, which is not conducive to exposing internal ghost behavior. Through the evaluation of X Group, it was found that the relevant whistleblowing system can be implemented. Traditionally, whistleblowing seems to be despised by others, and most people adhere to the mentality of "more is better than less" and let those suspected of violating the law go unchecked. However, with the development of the Internet, real-name reporting has become the object of network relay, and the role of reporting is becoming prominent. Returning to the whistleblowing system in compliance management, the reason why it is considered feasible to establish a whistleblowing system in an enterprise is due to its business scope and organizational structure (or employee composition). As long as the problems occur in terms of safety, they need to be dealt with in a timely and rapid manner, and

those problems involving interpersonal relationships should give way to safety. In large enterprises, there is not a close relationship between employees and leaders, which makes it possible for the effectiveness of reports to be between superiors and subordinates.

2. Sort out key risk areas

Risk identification and assessment is a prerequisite for developing a prevention strategy. The main compliance risks faced by resource-dependent and power-dependent enterprises in the field of business environment occur in the process of dealing with regulatory power relations. In the "power-led" business environment, the risk of government-business relationship goes hand in hand with the business activities of enterprises and the exercise of regulatory power, and has become a "systemic risk" and "normalized risk" in the operation of enterprises. This is true even for companies that contribute significantly to the local economy and have considerable influence. For energy companies, the most typical public authorities are the competent departments for production safety, environmental protection, natural resources, and project approval.

The risk level varies greatly depending on the scenario. Relatively speaking, when handling matters such as administrative licensing, administrative approval, or litigation and arbitration involving major interests and key, the amount of expenses formed at a time is relatively large, and there is a greater criminal risk; The amount of expenses incurred in responding to routine inspections, routine law enforcement, and receiving inspections, observations, and guidance activities by personnel of power organs is relatively small, and the corresponding criminal risks are relatively controllable; The costs incurred to maintain a good relationship with the person exercising the relevant authority vary widely, and the risk is lower if the amount is not large, and the risk is higher if the amount is particularly large. For areas that are not familiar with the business, according to the specific situation, select intermediary and consulting companies that have the ability to operate legally and compliantly, and outsource the handling of matters that the company is not good at, so as to reduce costs and reduce compliance risks.

3. Pay attention to the "key minority" of enterprises

The people involved in the corruption crimes of private enterprises are mainly senior executives and persons in charge of key positions, and it is very important to control the corruption of such personnel. Classify the important positions of the enterprise, formulate targeted compliance plans around the "key minority" at key levels and key positions, and establish relevant reward and punishment mechanisms in combination with performance appraisal rules, so as to guide the "key minority" to carry out various business activities in compliance.

4. Implement a strict financial management system

Regulate matters such as duty consumption, business entertainment, and souvenirs, strictly enforce the financial reimbursement system for consumption, reduce the space for corruption, reduce the risk of bribery, and guide and encourage employees to establish and maintain healthy political and business relationships in a legal, compliant, and low-risk manner.

4.2 Institutional Support at the National Level

The field investigation found that the corruption of private enterprises is not only related to their own management, but also affected by external factors, and the state should be present in time to protect the legitimate rights of enterprises and create a good and orderly market environment.

1. Timely intervention of state public power

The legislative asymmetry and inequality of crimes, sentencing and other factors are the main reasons why mainstream legal scholars believe that the problem of corruption within enterprises is prominent. (Jia Yu, 2021) The senior management of X Group will not pursue the criminal responsibility of the personnel involved because of the adjustment of legislation, they only focus on whether the employees can return the money, and even if the company suffers losses in the end, the senior management is not willing to let the former employees go to prison. It can be said that this criminal law amendment campaign launched for the equal protection of the private economy has received a mediocre response among private entrepreneurs. But the problem is that private enterprises do not have the ability to recover property, which relies on the help of public power. Their most usual, urgent and strong demand is that the police can investigate and deal with common "ghost" behaviors such as embezzlement and misappropriation in accordance with the law - whether or not to impose a heavy sentence is secondary, and the key is to start the criminal procedure in a timely manner to help enterprises protect their rights and recover their losses, that is, to make the current laws and norms effectively implemented.

In the face of internal corruption crimes that harm the interests of enterprises, it is not enough to amend the legal provisions in order to substantively change the structural inequality between private enterprises and state-owned enterprises. The follow-up effect of the amendment to the Criminal Law Amendment (12) to the crimes of illegally operating similar businesses, illegally making profits for relatives and friends, favoritism and fraud, and selling state-owned assets is certainly worth looking forward to, but more importantly, when such crimes occur and enterprises need to obtain criminal protection, the national criminal force can be present in time to help recover losses.

2. Treat different types of bribery crimes differently

"Joint investigation of bribery and bribery" conforms to the law of detection of bribery crimes, but the joint investigation does not mean that they will be dealt with equally. The current revision of the Criminal Law adjusts the sentencing for the crime of offering bribes so that the punishment for the crime of accepting bribes is symmetrical, and the reason for leniency still extends to the bribe-giver. The crime of "hunting for power" bribery, which relies on alliances with corrupt officials to gain resource advantages and obtain illegal benefits, should be severely cracked down on in accordance with the law; For those private enterprises and their households that generate income and pay taxes and provide employment opportunities through normal production and operation, and are forced to commit the crime of "obeying the power type" of bribery only because they are forced by some "unspoken rules", On the premise that the relevant entities actively cooperate with the case-handling authorities and establish an effective anti-bribery compliance system, more lenient criminal policies, including

non-prosecution, leniency, mitigation or exemption from punishment, may be adopted in accordance with law.

In this way, we can not only accurately and severely crack down on those power-dependent criminal enterprises that collect and corrupt officials, poison political and business relations, deteriorate the business environment, and have no positive value for economic and social development, but also try to save those private enterprises that can continue to serve the society and contribute to economic development, but are involved in bribery crimes only because they submit to the "unspoken rules" (Zhao Jun, 2024).

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Notes

- Note 1. The Compliance Management System – Requirements and Guidelines for Use (ISO 37301) published by the International Organization for Standardization.

Note 2. One way to solve this problem is to rely on the resolution of the board of directors or shareholders' meeting to clarify the company's intentions.

Note 3. To avoid the labeling effect, the word "dotting" is used instead of "bribery".