ISSN: 2414-1895 DOI: 10.6919/ICJE.202206_8(6).0070

The Critical Review Towards the Article of Professor Ryder on the Financial Crime Legislation

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Abstract

The financial crime is, in the process of financial activities, the violation of financial regulations, such as the fraud and money laundering happened in daily life. Due to the lack of unified criminal codes, the United States and the United Kingdom adopt loads of financial legal provisions for the regulation of financial markets, which considerably helps Chinese scholars and officials to reform the existing financial law system, in order to promote readjustments in Chinese financial law.

Keywords

Financial Crime; Legal Regulation; Common Law.

1. Introduction

With the development of the market economy and economic globalization, the diversification and liberalization of financial business not only provide many development opportunities for financial institutions but also provide convenience for financial crimes, which indicates that the internationalization of financial crimes will become a historical trend. From the world's first special anti-corruption law (Public Bodies Corrupt Practices Act 1889) enacted more than 100 years ago to the establishment and improvement of the most severe anti-corruption law (Bribery Act 2010) in today's human society, the concept of honesty and positive prevention that the British uphold is in a continuous line.

The author Ryder in his article 'Too scared to prosecute and too scared to jail?' A critical and comparative analysis of the enforcement of financial crime legislation against corporations in the USA and the UK" illustrates the main point that by taking the essence and discarding the dross from the experience of the USA in dealing with financial crimes, the UK, which has obtained remarkable achievements, could make further development in the field of financial crime.

The reviewer believes that although there might be a few research blind spots in this article, it still has indispensable value in the field of financial crime, aiming to analyse the role and limitations of both the USA and the UK legal regulations system and attempts to put forward some essential legal regulation methods for further developments of the financial crime research of the UK.

2. Summary

This article presents purely theoretical arguments in its research area of legal regulations towards financial crime, with two main aims. On the one hand, the author Ryder attempts to critically analyse the countermeasures of the USA to cope with corporate financial crimes. On the other hand, this article is also utilized to demonstrate the efforts of the UK to deal with corporate financial crime, and then compares that with the USA for long-term signs of progress in the UK. This study attempts to provide a unique perspective by comparing the treatment methods of corporate financial crimes in the USA and the UK. That is to say, through the comparison of two different ways to deal with

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corporate financial crime, the author hopes to discover and master the most suitable methods to handle the problems of financial crimes.

It is clear that the author Ryder divides the whole article into five parts. The first part concentrates on judicial countermeasures against corporate financial crimes of the USA, involving the critical thinking of the process of specific legal enforcement of the USA, and introducing the analysis and research of the DPA. The second part focuses on the principles of company criminal responsibility, briefly evaluating the differences between the British and American judicial authorities in dealing with specific corporate financial crimes. In the third part, Bribery Act 2010 and the Deferred Prosecution Agreement have received enough attentions from the Serious Fraud Office, and the author Ryder argues that the wider application of the DPA must be taken into account of the UK to match the existing achievements of the USA. In the fourth part, the author Ryder identifies and comments on several alternative enforcement measures which might be used as substitutes for the limitations of the corporate criminal responsibility in theories. In the last part, the author Ryder puts forward some suggestions on the current situation for further reformations, expanding the potential range of this academic research.

The reviewer argues that the content of the core research of this article might be divided into two key points concisely. However, for Ryder, the important degree of the second half of the article seems week than the first half which may make the structure of the whole article a little unbalanced.

On the one hand, the author Ryder focuses on the legal experience of the USA in the field of financial crime. Ponzi scheme is a typical case to show the stern attitude of the USA in dealing with financial crimes. New York Central & Hudson River Railroad Company v US illustrates the doctrine of corporate criminal liability in the USA. The prosecution of corporations transformed from the focus on individuals to concentrate on legal persons gradually, after the 1980s saving and loans crisis. The U.S. Department of justice could use serval legal measures against the financial crimes of companies. It could implement punishments in accordance with the Sentencing Reform Act, or bring civil lawsuits based on the Financial Institutions Reform, Recovery and Enforcement Act 1989. Moreover, the combination of criminal prosecution and the DPA is proved to be effective.

On the other hand, the author Ryder discusses some legal measures chosen in the field of financial crime in the UK, concerning some references to the USA. Tesco Supermarkets v Nattrass is a typical legal case about the identification doctrine in the principle of company criminal responsibility. Furthermore, Bribery Act 2010 introduces a new form of corporate criminal responsibility that if a person associated with an organization bribes another one with the intention of obtaining commercial benefits for the organization, the legal person may be convicted.

3. Evaluation

(1) The reviewer believes that the author Ryder should not pay one-sided attention just to the comparison of differences between the USA and the UK in the field of financial crime. On the contrary, he should consider both similarities and differences between them more comprehensively and seek common ground while reserving differences, which might make the whole article more comprehensive and persuasive.

In principle, Both the USA and the UK are very tough on financial crime issues. The efforts of the UK to combat financial crime are continuously concentrating on individuals rather than companies which seems a similar pattern to that of the US. This leads to both two countries have failed, to a large extent, to effectively formulate relevant legal provisions to prevent the bribery of the unit.

Bribery Act 2010 is the most severe anti-corruption law in the world, which requires almost all individuals or companies associated with the UK to be subject to its restrictions and supervision. Compared with the Foreign Corrupt Practices Act of the USA, Bribery Act 2010 covers a wider range and is applicable to handle the bribery crimes committed by private or private sectors. Furthermore, the ability of the UK to impose financial penalties on enterprises is slightly inferior to that of the USA. The author Ryder argues that legislators of the UK ought to introduce related legislation based on the

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provisions of financial institution reformation to provide another mechanism for some specific financial crimes in order to impose sanctions on companies that violate specific legislation on financial crimes. Obviously, the judicial department of the United States has adopted flexible and innovative Legislative Research on the principle of corporate criminal responsibility, while the relevant authorities of the United Kingdom have always been conservative in this regard.

(2) The reviewer believes that the author Ryder demonstrates the value of American law almost comprehensively.

The USA has established a complete financial legal system and regulates financial behaviours with reasonable civil, administrative and criminal penalties. Hence, the UK needs to draw on the experience of American financial crime governance. The comprehensive restriction of American Law on financial crime is reflected in almost all fields including Bribery, Corruption, Money Laundry, Terrorist Financing, Fraud, Market Abuse and Insider Dealing. In addition, the cooperation between financial professionals and legal personnel could be effective for the identification and the sanction of financial crimes. The departments involved in the governance of financial crimes in the USA include both judicial departments such as FBI and DOJ, and financial regulators such as SEC and CFTC. The FINRA and some other non-governmental and self-regulatory organizations are involved as well.

In particular, Foreign Corrupt Practices Act is regarded as the most important law to regulate the foreign bribery of American enterprises with its comprehensive and precise sanction mode which makes it have crucial value in the field of financial crime. Apart from civil and criminal penalties, enterprises and individuals violating FCPA might be suspended or prohibited from signing contracts with the federal government, and may have to confront the cross-debarment of the Multilateral Development Banks.

(3) The reviewer believes that the author Ryder should summarize the highlights of the Bribery Act 2010 and Criminal Finances Act 2017 obviously in a further step.

Although Bribery Act 2010 is composed of merely 20 legal provisions, it creates a comprehensive governance model of bribery in the legislature on the stylistic rules and layout. Section 7 of the Bribery Act 2010 stipulates the Bribery of foreign public officials which is the initiative of legislative reform in the field of bribery crime. The establishment of this legal regulation measure has clearly made the anti-bribery duties that commercial organizations should perform in business activities, and increased the crackdown on bribery crimes. Bribery Act 2010 adopts the mode of compound liability, which combines direct liability with strict liability. This is a significant adjustment of the traditional responsibility model of bribery crime in the UK, reflecting its rational attitude in the governance of bribery crime. That is to say, not only punish the briber but also require the commercial institutions associated with the briber to bear the main responsibility for failing to prevent bribery effectively.

The Criminal Finances Act 2017 has established a novel charge, the failure to prevent tax evasion offence, stipulating those enterprises engaged in business activities with the UK will bear criminal responsibility for their actions of assisting in tax evasion. This legal provision mainly targets legal persons and intermediary organizations with the ability to aid tax evasion, and require relevant commercial organizations to improve internal supervision systems in order to curb tax evasion.

(4) The reviewer believes that the author Ryder seems to exaggerate the role of DPA rather than take a cautious and objective attitude.

In essence, DPA tends to require the company to cooperate with the procuratorate, rather than to protect the accused employees, which is an unreasonable requirement to put the employer and the employee in an opposite position. Due to the inequality of status between the government and the company, prosecutors could use DPA to create economic coercion, so that the company might dismiss or punish some employees. To make matters worse, there is no effective judicial review to determine whether the applicable conditions of DPA are the result of economic coercion.

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4. Conclusion

Overall, the author Ryder in his article "'Too scared to prosecute and too scared to jail?' A critical and comparative analysis of the enforcement of financial crime legislation against corporations in the USA and the UK" makes a comprehensive analysis about the similarities and differences of theories and means in dealing with financial crimes between the UK and the USA. Although the UK has made remarkable achievements in the field of legal regulation of financial crimes, it is still of great significance for the UK to draw American modern legal experience for its future development. Furthermore, regardless of the content, the procedure of DPA is also too complicated. The author Ryder ought to continue to expand the research in this area.

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