

Research on the legitimacy of the entity of administrative act -- Based on Ali Group's anti-monopoly sky-high administrative penalty case

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Abstract:

The topic of this paper is the legality of the Alibaba penalty case. Research methodology of the article is using the general standards of legality of administrative behavior, the application of the principle of separation of powers, whether the violation of the basic provisions, the protection of the principle of reliance and the prohibition of abuse of power, so as to achieve the effect of reviewing the legality of the discussion of the four major perspectives. In this case, the judgment results of the fine link, does not satisfy the proportionality principle of proportionality between the means and the end and the proportionality principle of the discretionary system, it is Based on the judgment, the legality of the administrative penalty imposed by the General Administration of Market Supervision on Ali Group's monopolistic behavior is still open to question.

Keywords: legitimacy of the entity of administrative act, proportionality principle, anti-monopoly, discretion in administrative acts

1. Case introduction

In December 2020, the State Administration for Market Regulation launched an investigation into Alibaba Group's abuse of its dominant market position in China's online sales platform service market following the Anti-Monopoly Law. The SAIC set up a special task force in response to this case and took Ali Group to conduct on-site inspection, investigate, and question relevant personnel, obtaining a

large number of evidence materials. At the same time, after extensive investigation and collection of evidence on the third-party competition platform and the merchants in the platform, the final decision was made to make an administrative punishment according to law and ordered to stop the illegal acts immediately.

According to the investigation, since 2015, Ali Group began to abuse its dominant market position in order to obtain improper benefits. The specific performance is that it puts forward the harsh requirements of "two choices" for the listing of the corresponding platform, and explicitly prohibits the third-party platform merchants from setting up stores or participating in promotional activities on its platform. By relying on its inherent huge market share, platform internal mechanism, and big data algorithm, while limiting other merchants in the platform to carry out "two choices", Ali Group gradually maintains and steadily strengthens its market-leading position to seek unfair competitive advantages. On April 10, 2021, based on the provisions of Article 47 and Article 49 of

the Anti-Monopoly Law, the Municipal Administration of Supervision made an administrative punishment decision on Ali Group's illegal acts, imposing a fine of 4% of its 2019 sales in China of 455.712 billion yuan--18.228 billion RMB. [1]

The penalty decision of the case also set a record for the largest amount of fines in the history of China's administrative punishment. Once the judgment of the case was published, it immediately caused an uproar in all sectors of society. However, whether the amount of compensation liability in this case could be reasonable in line with the legality standard of general administrative acts. The following article will analyze and discuss the legality or not of Ali Group's penalty case based on the legitimacy standard theory of relevant administrative acts.

2. The analysis of the review of the administrative legality of Ali's case

According to the general provisions of the legal standards of administrative acts, the paper would discuss from the four perspectives of the application of the principle: separation of powers, whether it violates the basic provisions, the protection of the principle of trust, and the prohibition of the abuse of power, to achieve the effect of comprehensive review.

2.1 The application of the principle of separation of powers

In 1789, the "Declaration of the Rights of Man and

of the Citizen” was published in France, with a new constitutional concept proclaiming, at the same time, the principle of separation powers was first proposed. The principle of separation of powers aims to divide a country into different parts and set up different organs for the distribution of power, to form a set of mutual checks and balances among various departments. Based on the principle of separation of powers, the first criterion of legitimacy is whether there is a specific principle of authorization and whether the authorization is specific.

2.1.1 The presence or absence of specific authorization

First, according to the Institutional Reform Plan of The State Council adopted on March 13, 2018, [2]the State Council officially announced the establishment of the General Administration of Market Regulation as its direct agency, enjoying ministerial-level status. Therefore, the administrative acts undertaken by the Municipal regulatory bureau shall be authorized by The State Council according to law. The State Council shall be its authorized organ, and the Municipal Regulatory Bureau shall have the legitimacy to obtain the authorization. From another point of view, the key to authorization is to examine whether it has a specific legal basis, and whether the establishment of the reform plan provides a sufficient legal basis for it.

2.1.2 With or without authority

Secondly, according to the provisions of “the State Administration for Market Supervision and Administration on the allocation of functions, internal organs, and personnel”, the provisions of the third to fifth cases of the provisions of Article 1, at the legislative level, the Municipal Regulatory Bureau is given the right to supervise and guide the conduct of market work, enjoying the right to be responsible for anti-monopoly unified law enforcement.[3]At the same time, according to the provisions of the sixth chapter of the Anti-Monopoly Law of the People’s Republic of China, the Municipal Administration of Supervision, and its antimonopoly bureau are given the authority to investigate suspected anti-monopoly behavior and make corresponding decisions. [4] The above two provisions give the MGAC the right to investigate and punish Ali Group for suspected non-issuance, which is authorized in the meaning of organic law in nature, and the exercise of its rights is within the scope of its authority.

2.1.3 Whether it is illegal

The last point is the examination of whether the act is illegal, which includes the two criteria: whether the fact was wrongly determined and the legal consequences. In a broader sense, factfinding can be divided into pure fact-finding situations and legal fact-finding from a legal

perspective.

In this case, based on the relevant provisions of the Anti-Monopoly Law and combined with the relevant facts of this case, it should be the key to determining the anti-monopoly behavior of Ali Group. First of all, as the first step of anti-monopoly behavior is the definition of the relevant market. According to the provisions of Chapter 2 and Chapter 3 of the Market Definition Guide issued by The State Council of China in 2009, the market identification is generally divided into two main bodies the commodity market and the relevant regional market, and the three analyses perspectives of substitution analysis, demand substitution, and supply substitution are taken as the basis. Moreover, it subdivides the specific considerations, such as the shape of the commodity, price, transportation, etc. The geographical market is mainly considered from the perspective of geographical location. In this case, since Ali Group’s business focuses on the online service consumption platform, it is essentially a two-sided market. Based on the cross boundary network effect displayed by the two groups of consumers and operators in the platform in this market, the two groups have a high dependence on Alibaba’s online retail services and have a close relationship. Considering the differences in coverage area and service time, operating cost composition of service operation, ability to support operators to match potential consumers, and market demand feedback efficiency, it is difficult to confuse its monopoly on the online market with that of the offline retail industry, and they do not belong to the same related commodity market. At the same time, based on the perspective of natural geographical location, the analysis of the above three points in China is not closely related to the overseas market, and its service policies are not significantly different. Therefore, to sum up, the relevant market is defined as the online retail platform in China.

The second is to determine whether the party has a dominant position in the relevant market. According to the provisions of Articles 18 and 19 of the Anti-Monopoly Law, Ali Group has in fact possessed a dominant position in the online retail platform service market in China. Through investigation and evidence collection, combined with Alibaba Group’s platform service revenue and platform

merchandise turnover data from 2015 to 2019, it can be concluded that its market share has exceeded 50%; At the same time, combined with the HHI index and the evidence of the parties’ total net profit and annual growth rate, it can also be concluded that Ali Group meets the important facts and basis of market monopoly judgment such as the high concentration of the relevant market, the high market control rate and the strong financial resources.

It is the parties who have the above objective advantages of their own and related markets, which further leads to other operators showing a high degree of dependence on Ali Group in transactions. On the one hand, the network effect and locking effect brought by the inherent nature of online retail; on the other hand, its consumers' user stickiness is very strong. According to the data, the cross-year retention rate of Ali users is as high as 98%. It is difficult for other operators to give up such a huge consumer group and huge traffic, which also indirectly leads to an increase in the difficulty of entering related markets. If an online retail platform wants to enter the relevant market, it not only needs to pay a lot of costs to lock in fixed customers, but also requires a certain number of past transaction payment history records as a springboard for business development or transformation. From the above facts, it can conclude that the parties dominate the market.

Finally, after investigation, since 2015, the parties have excluded the development of other competitive platforms by restricting the operators in their platform to set up shop on the third-party competitive platform, prohibiting them from participating in promotional activities on other competitive platforms, and adopting various reward and punishment measures to implement the "two choices one" policy, so as to stabilize and enhance their market position. Its behavior constitutes abuse of dominant market position, violating the provisions of Article 17, paragraph 1, of the Anti-Monopoly Law, which stipulates that "the counterparty of a transaction can only transact with the counterparty without justifiable reasons".

To sum up, based on the Anti-Monopoly Law, there is no mistake in the determination of the illegal facts in the Ali case under the legal system of this department. At the same time, the administrative punishment decision is not unduly applied under the principle of separation of powers, which meets the first criterion of legality.

2.2 The violation of the basic rights clause or not

The second criterion is to examine whether the administrative act violates the basic rights clause. Under normal circumstances, this criterion can be discussed from the two perspectives of the principle of equality and the principle of proportionality.

2.2.1 Principle of equality

The principle of equality, it claims that the government or the organ in the relevant administrative act can not arbitrarily distinguish between people unless it could prove that the meaning of the distinction is to achieve a certain degree of relevance to the purpose, otherwise, the administrative act would not be supported. Since the

subject involved in this case is the specific enterprise of Ali Group, and its business scope is the online retail service platform, the act of administrative punishment against it does not violate the principle of equality is improper. As a result, the principle of equality would not be discussed here.

2.2.2 Principle of proportionality

When it comes to the principle of proportionality, one of the core principles of administrative law, can be traced back to the Magna Carta period in the United Kingdom. Its main purpose is to adopt appropriate means, take the least damage as the sacrifice of the implementation of the means, and considering the negative impact of the implementation of the means, to determine the basis for the legality of administrative acts. The above analysis level is based on the three points of the principle of proportionality: the principle of appropriateness, the principle of necessity, and the principle of balance. Hence, the following will be discussed from the three sub-principles of the proportionality principle.

First of all, the principle of proportionality emphasizes that when an administrative agency intends to carry out an administrative act, especially for the improper act of the administrative counterpart, unless it can prove that the purpose of the administrative act might achieve its expected administrative goal, the act should be negated. In this case, the decision of the Municipal Regulatory Bureau to impose administrative punishment on Ali Group according to law comes from the fact that Ali Group's conduct violates the provisions of Articles 17 and 18 of the Anti-Monopoly Law, constitutes an abuse of its dominant position in the online retail platform service market in China, and prohibits the operators of the platform from opening stores or participating in promotional activities on other competitive platforms. Excluding and restricting the relevant market competition, infringing on the legitimate rights and interests of the operators within the platform, damaging the interests of consumers, and hindering the innovation and development of the platform economy, without justifiable reasons. The act of ordering to stop and imposing a fine on its illegal acts can effectively crack down on the monopoly illegal acts of Alibaba and other giant enterprises in their relevant business markets, achieving the purpose of warning giant enterprises in other fields; While regulating the market order, it can also play an important goal of establishing a safe and convenient market trading system. Therefore, the punishment resolution is not improper.

Secondly, given the principle of necessity, it emphasizes the careful application of the "principle of least harm", that is, the measures taken are the only measures that cause the least harm to the relationship and the public.

In the final judgment issued by the municipal Regulatory Bureau, it decided to impose a fine of 18.228 billion yuan, 4% of its 2019 sales in China, of 455.712 billion yuan. In response to the confirmation of the fine data, the law enforcement agency did not analyze the confirmation process of the specific proportion of 4%, and there is a gap in the explanation of the confirmation process of the proportion. Looking at the entire “Antimonopoly Law”, only the seventh chapter of the provisions of article 46 from which the limit of “a fine of more than one percent of the retail sales of the previous year and less than ten percent” -- can be seen that the retail sales of the penalty ratio are very vague and unclear. The problem caused by the provision’s independent setting in judicial practice is first of all to question the legality of the fine decision of law enforcement agencies: if there is no objective standard for the fine amount of an enterprise, then the penalty standard given is largely subjective, which makes it difficult to quantify the standard. In the case of Ali Group, the first question is whether it is effective for law enforcement agencies to impose fines on it-- it could be questioned whether administrative fines can play a role in monopoly behaviors within online retail platforms; the second problem is that in the case of Ali Group’s total profit of over 400 billion yuan in 2019, any change in the percentage of its fine will have a huge impact on the final result of the fine. Furthermore, it is also difficult to judge whether 3% or 4% of the fine can play a sufficient warning and crackdown on its anti-monopoly violations, or even if the proportion of fines increased to more than 5 percentage points is not enough to achieve the effect of punishing Alibaba. Therefore, under the principle of necessity, there is no sufficient reason to support the legality of the judgment in this case.

At the same time, due to the lack of corresponding demonstration on the determination of the amount of fine in the judgment, it also violates the third sub-principle, the principle of equilibrium, to a certain extent. The so-called principle of equilibrium, also known as the narrow principle of proportionality, means that the behavior carried out by the administrative agency is not only appropriate and necessary for the realization of the corresponding administrative purpose, but also requires that the income obtained is greater than the cost paid, emphasizing the balance between means and ends. From the judgment of this case, it is not difficult to see that it adopts a simple three-layer structure form of “fact description + legal argument + penalty result”, and the description of the penalty result, that is, the type of penalty and the amount of fine, lacks a detailed explanation, which has generated huge resistance to the application of the judgment standard of the equilibrium principle. It

is also the result of the lack of constraint on the overall proportionality principle. This also leads to another focus issue worthy of attention -- the use of discretionary power. According to the analysis of the first criterion of the legality review above, we can conclude that the Municipal Regulatory Bureau has the qualified subject qualification to make punishment decisions for monopolistic behaviors according to the law.

However, due to the ambiguity of the provisions of the Anti-Monopoly Law itself, coupled with the inherent objective defects such as the short time of the establishment of the Municipal Regulatory Bureau, insufficient law enforcement experience and ability, it is easy to cause improper exercise of the discretionary power. Specifically speaking, for the punishment result of Ali’s case, the MGA may have carried out a comprehensive consideration, but the factors considered and the specific points of the judgment result affected by each factor, we can not know at least from the presentation of the written document of the judgment.

In fact, the principle of proportionality and discretion show a relationship pattern of complementary and reciprocal checks and balances: depending on the principle of proportionality, the law enforcer would be more cautious in the formal process of discretion; On the contrary, when law enforcers exercise their discretion to make decisions, the theoretical basis of the principle of proportionality is revealed. To sum up, since there is no detailed explanation on why the penalty type and the amount of penalty are imposed in the handling of administrative punishment in this case, the administrative decision of Ali’s case does not meet the legitimacy standard under the principle of proportionality.

2.3 The principle of reliance protection

Generally speaking, the reliance protection principle originated in the German Federal Court in the 1950s, gradually developing into a constitutional principle. In simple terms, the principle says that the executive agency should be honest and trustworthy about its actions or promises, and should not arbitrarily modify or change them. For the revision and cancellation of administrative policies, we should consider and protect the possible damage to the relevant people, and trust in the government’s actions is the starting point of this principle. Since this case does not involve the change or revocation of the relevant administrative act, it is not necessary to go into details here.

2.4 The principle of prohibiting abuse of power

The final criterion is the principle of prohibition of abuse of power, which means that state agencies must

not abuse their powers. Furthermore, it is closely related to administrative discretion. Administrative discretion means that in addition to the state's disposal power within the range and scope explicitly stipulated by laws and regulations, it also enjoys other choice rights to a certain extent, to achieve the purpose of improving administrative efficiency. Therefore, based on the provisions of the Anti-Monopoly Law, the rights of the anti-monopoly agency have been comprehensively covered from the examination and identification of the facts of anti-monopoly behavior to the judgment of anti-monopoly punishment. The relevant provisions are bound to lead to the problem of excessive abuse of discretion in practical judicial practice. In this case, whether the high price fine issued by the Municipal Regulatory Bureau to Ali Group constitutes the excessive use of discretion, the following would be discussed.

First of all, according to the provisions of China's Administrative Procedure Law, there are three criteria for courts to review the legality of administrative discretion: whether it is an abuse of power, whether it violates legal procedures and whether it is clearly improper. According to the above review standards, the judgment of this case did not appear abuse of power and violation of legal procedures. However, based on the third point, it should be paid attention to whether there is a "clearly improper" review. According to the provisions of Article 47 of Chapter VII of the Anti-Monopoly Law, operators can be "fined from one to ten percent of the sales of the previous year". Therefore, if only from the perspective of the legal provisions, the municipal regulatory Bureau in this case ordered Ali Group to stop illegal acts and imposed a fine of four percentage points is not improper. However, this kind of review standard is only a single legal review standard, it requires to meet the provisions of laws and regulations. If this standard is applied to judicial practice, there may be improper review. Hence, administrative discretion should not only satisfy its legitimacy, but also satisfy its rationality in judicial practice.

As mentioned in the "Application of the Principle of Proportionality" section above, the review of the discretion and the principle of proportionality overlap and both adopt the balance between the means and the purpose-- under the legislative purpose expressed in legal provisions or summarized based on common sense and the law as a whole, the review of administrative discretion determines whether the proportion is reached with the realization of the purpose. Looking at the decision of administrative punishment in the judgment of this case, the first is to order Ali Group to stop illegal acts, which is based on the provisions of Article 47 of the Anti-monopoly Law, playing a role in combating monopoly

and restoring the purpose of market order of online retail service platform. Furthermore, the means are consistent with the legislative and practical purposes. Hence, it is reasonable. The second penalty resolution is to impose a fine of four percentage points on Ali Group in 2019. Although this part of the resolution is also supported by Article 47 of the Anti-Monopoly Law as legislation, the determination of the specific proportion of total sales is determined by the Municipal Regulatory Bureau on its own, which is also an important embodiment of the use of administrative discretion in this case. So whether a fine of 4% of total sales can meet the consistency of means and ends is indeed debatable. As a giant industry that enjoys huge undue advantages in the field of online retail transactions, with the rapid development of Internet transaction payment services in China in recent years. For example, in 2019, the total sales of Alibaba Group reached a huge profit of 450 billion yuan. According to the survey, other data, such as market share and profit growth rate, have also reached a very considerable degree. Therefore, it is supposed to have reasonable doubts and to a certain extent opposition to whether the penalty point of less than 50% of the prescribed scope of compensation can achieve the purpose of warning or eliminating possible monopolistic behavior for Ali and other giant industries in the field. Another important problem in this judgment, which has been mentioned above, is that there is no detailed explanation on the basis of which the specific fine amount is determined, but the simple "legal provisions + punishment result" format is adopted, and there is no reason to convince the public. And this problem is not the first time to show up. For example, in the 2016 "Estazolam drug monopoly agreement case" judgment results, it also appeared the lack of anti-monopoly behavior of the fine amount related to the explanation of the problem. In this case, the National Development and Reform Commission final judgment based on the Central China Pharmaceutical, Shandong Xinyi, and Changzhou Siyao three companies monopoly estazolam of the specific type of drugs. They were fined 7%, 2.5%, and 3% of the total sales of the previous year in 2015, but likewise, there was no detailed explanation of the key issues, such as how to connect and interact between the consideration factors and the result of the judgment and how to produce the difference in judgment. The emergence of such problems has seriously affected the parties and the public's conviction of the judgment results. Furthermore, it is also impossible to judge the standards for the means and ends to reach an agreement under the principle of proportionality, to make an objective and reasonable judgment on its discretion. To sum up, the ruling in this case cannot or should not be legally determined under the criterion of discretion, which

is the principle of prohibiting abuse of rights.

3. Conclusion

Taking Alibaba's high price penalty case as the starting point, this paper comprehensively discusses and analyzes the judgment and punishment result of this case from four aspects: the application of the principle of separation of powers, whether it violates the basic terms, the protection of the principle of trust and the prohibition of power abuse. In the penalty section of the judgment result of this case, due to the lack of a detailed explanation of how Alibaba's antimonopoly behavior affects and determines the specific amount of fine, it cannot be further proved that the specific proportion of fine can exclude the possible monopoly behavior within the online detail service platform in the future. It does not meet the principle of proportionality between means and ends and the discretionary system under the principle of proportionality. Therefore, the legitimacy of the administrative punishment imposed by the State Administration of Market Regulation on the monopolistic behavior of Ali Group based on the judgment remains to be discussed.

Based on this case, the application of the principle of proportionality and discretion in administrative acts is worthy of deep thought and discussion. Due to the lack of the principle of proportionality in China's

administrative law, in the trial of some need to carry out the cost and benefit, profit and loss balance of the case, such as restricting competition, there will be a lack of reasonableness standard resulting in insufficient or excessive judgment; At the same time, the discretion of relevant law enforcement agencies would also fall into the situation of improper use or even abuse of rights because of the absence of the principle of proportionality. Therefore, strengthening the application of the principle of proportionality in administrative law, and rational and prudent use of administrative discretion, can truly reflect and implement the system value of China's administrative law.

Reference:

- [1] State Administration for Market Supervision and Administration, Decision on Administrative Penalties, State Market Supervision [2021] No. 28
- [2] State Council Institutional Reform Program, issued by the State Council on March 13, 2018
- [3] Provisions on the Functional Configuration, Internal Organization and Staffing of the State Administration for Market Supervision and Administration, "(a) Responsible for comprehensive market supervision and administration.
- [4] Responsible for unified anti-monopoly enforcement. (v) Responsible for supervision and management of market order."
- [5] Anti-Monopoly Law of the People's Republic of China, Chapter VI Investigation of Suspected Monopoly Behavior.