

Дискуссионная панель 10

СОВРЕМЕННЫЕ ПРОБЛЕМЫ ПУБЛИЧНОГО И ЧАСТНОГО ПРАВА: ТЕОРИЯ И ПРАКТИКА

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RESEARCH ON THE DETERMINATION OF DOMINANT POSITION IN THE THIRD-PARTY PAYMENT INDUSTRY

As an emerging industry, the third-party payment industry needs fair and free competition in the market to ensure its development. However, at present, there are many problems with competition in the third-party payment industry, and there are few cases of anti-monopoly regulation. The theoretical research on anti-monopoly law in this field is insufficient. The abuse of dominant position is the most prominent anti-competitive conduct in the third-party payment industry. The precondition for the analysis of whether an enterprise has abusive conduct is confirming that it has dominant position. At present, oligopoly has emerged in the third-party payment market, and the top payment companies by market share have gained de facto market dominance. In the determination of the dominant position of an enterprise, the comprehensive criteria should be adjusted internally. Besides traditional structural criteria, attention should also be paid to non-structural criteria and other relevant factors.

To some extent, the process of market competition is in fact the process of the pursuit of dominant positions by enterprises. Once an enterprise has established dominant position in the competition, it can influence market competition by taking advantage of its dominance [1, p. 12–14]. An enterprise's gaining dominant position is not necessarily subject to anti-monopoly regulation, which is targeted at corporate conducts that abuse the dominant position [2, p. 146]. Regulating the abuse of dominant position by third-party payment enterprises is a priority of anti-monopoly law enforcement. The third-party payment industry, a market of competitive monopoly, is characterized by oligopoly, with a few enterprises getting most of the market share. To find out whether the conducts of price or non-price competition breach the prohibition of the abuse of dominant position by anti-monopoly law, the determination about dominant position should be made first. The approach of anti-monopoly regulation of the abuse of dominant position has evolved from the structural one to the behavioral one. The structural approach focuses on the regulation of market structure while the behavioral approach focuses on the regulation of the behaviors of enterprises. Most of the modern anti-monopoly laws have adopted the behavioral approach. The regulation of the abuse of dominant market position in the anti-monopoly laws of China and the European Union (EU) aims at prohibiting the abuse rather than the possession of dominant position [3, p. 123]. The precondition for the analysis of whether an enterprise has abusive conduct is confirming that it has dominant position. Generally, an enterprise is considered to have substantial market power when the following two situations occur: the enterprise can increase the price

above the cost, and obtain super-normal profits from preventing competitors' entry into or expansion in the market. These are the preconditions for the possession of market power of an enterprise in a certain period [4]. Dominant position is the economic power of an enterprise to prevent effective competition. Specifically, a series of related factors should be examined [5, p. 9]. The factors in determining dominant position mainly include the definition of the relevant market, market share, market competition constraints, barriers to market entry and exit, and the possibility for consumers to switch to another service [6, p. 195–221]. The following part mainly analyzes the determination of the dominant position of a third-party payment enterprise.

Different countries have different criteria for determining dominant position, including market outcome, market performance, and market structure [7, p. 11]. In the practice of anti-monopoly enforcement, neither market outcome nor market behavior is adopted as the single criterion for determining dominant position [8, p. 204–205], while market share can more specifically indicate whether an enterprise has dominant position [9, p. 118]. However, market share is not the only criterion for determining dominant position. Other factors should also be considered at the same time, such as barrier to market entry for new competitors. But market share is still the decisive factor in determining dominant position [10, p. 238]. In terms of anti-monopoly laws of various countries, such laws of EU, Germany, Japan and the US adopt the market structural approach, while such laws of China adopt the “comprehensive criteria”, which includes market share, market entry barrier and other factors in determining the dominant position of an operator. Among those factors, it is important to determine the market share of an operator in the relevant market, and presume that the operator has dominant position based on the market share. However, some new economic phenomena in the internet industry have posed challenges to this criterion. Some scholars have also called this criterion into question. Lv Mingyu (2011) thinks that in determining dominant position in the internet industry, the significance of market share is decreasing while the significance of market entry barrier is increasing [11, p. 61]. Sophie van Loon (2012) thinks that the dynamic competition in the new economy market leads to the situation of winner-takes-all — the most successful operator will dominate the whole market. However, such dominance is fragile because if another competitor makes a successful innovation, it may control the whole market. Ye Ming thinks that in the internet industry, due to the network effects and customer lock-in effect, the market is prone to the emergence of oligopoly and the influence of market share on competition is weakened, making it difficult to adopt the structural approach in the internet industry [11, p. 33]. Yang Wenming (2015) thinks that due to the very dynamic nature of market structure in the internet industry, there is a lack of stable conditions required to give play to the role of market share, reducing the applicability of market share [11, p. 164]. Those views share the idea that dynamic competition influences the stability of markets here, and it is difficult to determine the dominant position of an enterprise in a market of competitive monopoly based on market share. The main opinions of the academic circle are that the original criteria cannot be simply applied in a market of competitive monopoly and the structural approach cannot correctly reflect the market power of enterprises in such market. The third-party payment industry has the structure of a competitive monopoly market, which influences the determination of dominant position in the third-party payment market. The next section will analyze what criteria are applicable in determining dominant position of a third-party payment enterprise and whether the structural approach should be adopted as the main criterion.

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О ДАВНОСТИ НАЧИСЛЕНИЯ НАЛОГОВЫХ ПЛАТЕЖЕЙ

Базовой характеристикой налогового обязательства является его бессрочный характер, т.е. существование правовой связи по уплате налога не ограничено как таковое конкретным промежутком времени. Вместе с тем принцип правовой определенности требует, чтобы при регулировании общественных отношений нормами права временная составляющая учитывалась. И хотя прекращение налогового обязательства не связано с самим фактом истечения определенного срока, временной контекст является одним из решающих моментов, который лежит в основе системы правового регулирования осуществления субъективных налоговых прав. В действующем налоговом законодательстве РБ закреплено значительное число сроков, которые участники налоговых отношений, в том числе налогового обязательства, должны учитывать в процессе налогообложения. Проведенный анализ норм налогового законодательства свидетельствует, что многие из таких сроков ограничивают возможность взимания налогового платежа, к примеру правила о пятилетнем сроке для осуществления возврата (зачета) налогов (п. 3 ст. 66, п. 1 ст. 67 НК РБ); о трехлетнем сроке для определения сумм имущественных налогов для физических лиц; о пятилетнем сроке для принудительного взыскания сумм налоговых платежей (п. 2 ст. 61 НК РБ) и др. Научные мнения относительно правовой природы таких сроков различны, но существует понимание факта, что такие сроки могут рассматриваться как сопоставимые со сроками давностного характера (природы), но только в сфере публично-го права (налогового права). Данный аспект следует из ряда признаков, свойственных срокам давности, и, в частности, правовых последствий применения института давности: легализации фактически существующего состояния, отклоняющегося от установленной правовой модели поведения; существования определенной неизменности (неподвижности) общественных отношений; императивности правил о длительности и течения сроков