

Legal issues of Third-Party Payment in Taiwan

Although third-party payment is already one of the most popular ways to do the payment online in many countries, for example, Alipay of China and Paypal of USA, third-party payment in Taiwan is just about to start. For these days, the legislation of third-party payment has become a highly debated issue. However, due to many reasons, the legislation of third-party payment eventually has not been realized. And in fact, the third-party payment in Taiwan is not mature yet. A third-party payment system in Taiwan is unable to deposit stored value in advance. This is one of the basic functions of third-party payment system abroad, such as Alipay in China and Paypal in USA. Mainly, what third-party payment provides in Taiwan is money transmission based on real trade.

1. Latest progress of third-party payment in Taiwan.

(1)Credit card payment for third-party payment system.

Recently, third-party payment has a breakthrough development. According to the resolution of the meeting “Obstacles of using credit card in third party payment” held by Executive Yuan in September this year, Financial Supervisory Commission has made the commitment that the third party payment is allowed to be a “contracted merchant” under “Regulations Governing Institutions Engaging in Credit Card Business”, and personal entity or small business which is not provided with the qualification of “contracted merchant” are allowed to accept credit card payment though third party payment system. This is a very important progress in third-party payment in Taiwan. It means credit card payment is available for C2C transaction now. This will improve the safety of C2C transaction and reduce the quantity of fraud transaction. In other way, boost the prosperity of E-commerce.

(2)Evaluation Requirements for Data Processing Services Industry Performing Trans-border Internet Transaction.

In response to the Central Bank’s request, MOEA (Ministry of Economic Affairs) approved and announced the “Evaluation Requirements for Data Processing Services Industry Performing Trans-border Internet Transaction” on October 3rd, 2012. Any Data Processing Services Industry Performing Trans-border Internet Transaction would like to obtain the qualification as a mandatory under Article 8 of “Regulations Governing the Declaration of Foreign Exchange Receipts and Disbursements or Transactions”, should pass the evaluation according to the “Evaluation Requirements for Data Processing Services Industry Performing Trans-border Internet Transaction”, and get the compliance certification.

The “Evaluation Requirements for Data Processing Services Industry Performing Trans-border Internet Transaction” has set up several requirements for a business which would like to run the payment service for trans-border internet transaction. Mainly, basic requirements are as the followings.

1-2-1 The applying data processing service enterprise should be a limited company or a company limited by shares.

1-2-2 The applying data processing service enterprise should open a special purpose deposit account to deposit the entire transmitting amount received from consumers. And the transaction of this account should be only based on the consumers’ directions of money transmitting.

1-2-3 Users of the third-party payment service provided by the data processing service enterprise should register for the first time usage. And the user’s name, birth and ID number are required for registration. The applying data processing service enterprise has the liability to check the reality of the information provided.

1-2-4 The contract between the data processing service enterprise and the user should be in writing. If the contract is performed in electronic way, it should follow the requirement of “in writing” according to Article 4 of “Electronic Signatures Act”. In addition, the contract should contain the mandatory articles about foreign exchange declaration listed in the “Evaluation Requirements for Data Processing Services Industry Performing Trans-border Internet Transaction”.

1-2-5 The data processing service enterprise should be equipped with sound information security system and operating regulations, comply with “Personal Information Protection Act” and the related directives, join ECTSA (E-commerce Trust Security Alliance), and get the ISO27001 certificate or PCI-DSS validation.

1-2-6 The data processing service enterprise should keep detailed transaction information for at least 5 years.

1-2-7 The data processing service enterprise should set up money laundering prevention operating regulations, and provide money laundering prevention employee training annually.

Once MOEA receives the application, MOEA will set up a special team, which assembles legal professionals, information engineering experts and financial experts, to conduct the evaluation. The compliance certification of the evaluation will be valid for 5 years. During these 5 years, the data processing enterprise has the duty to accept the annual examination and non-timed examination by MOEA.

2.Three-Party Legal Relationship under Third-Party Payment

The nature of a third-party payment service is “service of payment collection and forwarding”. Generally, payment collection and forwarding refers to the transfer of a transaction payment performed by a third party in its role of assisting the buyer and the seller. The current practice in Taiwan of making payment to and collecting product from a convenient store pursuant to online transaction or of paying for product upon delivery by shipping company is a type of “payment collection and forwarding” business.

In a relationship of payment collection and forwarding service, the legal relationship between the buyer and the payment collector/forwarder is a “contract of mandate” under Article 528 of the Civil Code. Refer to Article 8 of the Regulations Government the Use of Uniform Invoices:

“When a business entity is engaged to handle collection and payment on behalf of another party, if there is no difference between the amount collected and the amount paid, and the purchaser specified on the payment receipt voucher is the engaging party, then the business entity may deliver the voucher to the engaging party and is exempt both from issuing a uniform invoice and from including the payment as a sales

amount.”. Article 18-2 of the Profit Seeking Enterprise Income Tax Audit Standard also has similar stipulations.

As to whether or not a contract of mandate is formed between the seller and the payment collector/forwarder, depends on the agreement between the parties. If it is agreed that the buyer has completed payment when the payment collector/forwarder receives the fund, then the payment collector/forwarder receives the fund on behalf of the seller and a contract of mandate is formed. Under the contract of mandate, the seller grants the payment collector/forwarder the right of agency and the right of processing. Generally speaking, it is deemed that when the buyer pays the fund to the payment collector/forwarder, the buyer has completed the obligation of payment. Therefore, both the buyer and the seller form a contract of mandate with the payment collector/forwarder and grant the right of agency under such contract of mandate.

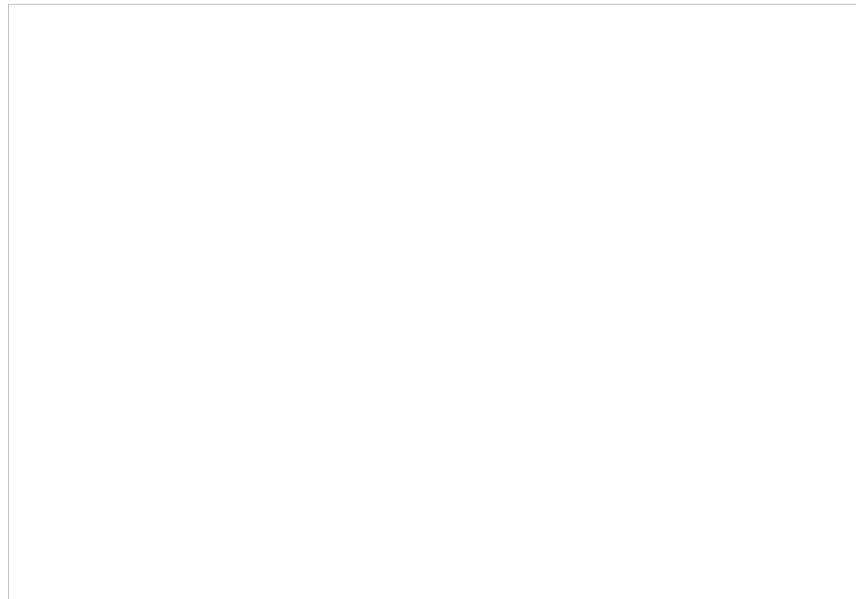


Diagram 1 Three-party relationship diagram under collection/forwarding of transaction payment

Source: Prepared by author

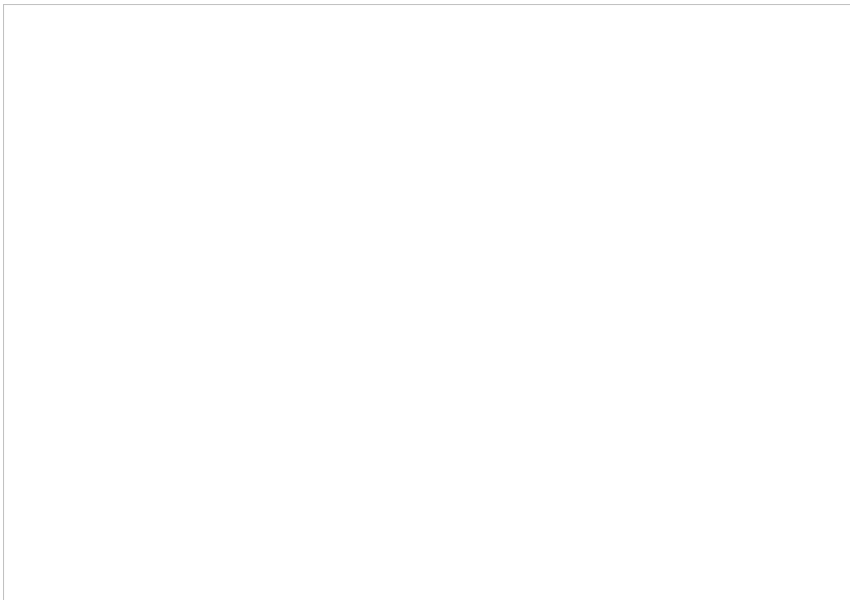
The payment collector/forwarder under online transaction acts as the agent of the buyer and the seller at the same time with regard to the act of payment and collection. This constitutes the legal issue of “acting as agent for both parties” under Article 106 of the Civil Code. However, the payment collector/forwarder performs the contract of sale and purchase for the buyer and the seller. Therefore the exception provided under Article 106 of the Civil Code is applicable.

3.Payment Custody Mechanism under Third-Party Payment

(1)Overview

The important value of a third-party payment mechanism is that it provides a credit guarantee between the buyer and seller. Through a third-party payment organization, the buyer receives the merchandize and then sends an instruction to the third party payer for the price previously provided to the third party payer to be forwarded to the seller. Although the buyer and the seller cannot verify each other’s creditworthiness and the quality of the merchandize face-to-face, through third party payment, the buyer can be assured that the merchandize will be received after the price is paid. The buyer can even be assured that he/she will receive the merchandize that he/she is satisfied with. For example, in “Alipay”, the after shopping, the consumer pays the transaction price to Alipay. Only when the consumer replies with “production received” will Alipay forward the money to the seller.

So “third-party payment service” helps activate E-commerce and is especially helpful in C2C transactions. This is one of the important features that differentiate “third-party payment service” from “Internet banking”. Therefore, although the Central Bank of Mainland China introduced the function of “Super Internet Bank” in 2009, consolidating the consultation and account transfer systems of many banks, it is generally considered that this did not have a strong impact on the third-party payment service industry which is already flourishing in Mainland China, because it does not provide value-added services, such as a guarantee and delayed payment provided by third-party payment service. Although third-party payment service provides account transfer service, absorbing part of the functions of Internet banking, it also created new business opportunities for the banks. In reference to the experience of Mainland China, the tasks are divided between third-party payers and banks as follows:



Source: Xi-Song Zhang, Choice of Development Model for Third-Party Payment in China – From the Perspective of Full Intervention by Commercial Banks, Review by Xi'An University of Finance and Economics, Volume 22, Book 2, Page 46 (March 2009).

So the service provided by third-party payment and the service provided by Internet banking overlap to a certain degree. Both perform the function of fund transmission. However, instead of thinking that the two as competitors, it is better to think of them as a cooperative.

(2) Relevant Legal System in Taiwan

The feature of the above-described third-party payment is that the third party holds the property for the benefit for others until the satisfaction of certain conditions. A similar legal system in Taiwan is "trust". In accordance with Article 1 of the Trust Act: "For the purposes of this Law, the term "trust" refers to the legal relationship in which the settler transfers or disposes of a right of property and causes the trustee to administer or dispose of the trust property according to the stated purposes of the trust for the benefit of a beneficiary or for a specified purpose."

However, in accordance with Article 2 of the Trust Act, a trust must be done through a contract of trust. What is different from the contract of mandate formed under the payment collection/forwarding described above is that, in a contract of trust, the parties must specify the purpose of the trust in the contract. Otherwise, the contract of a trust is not formed. An exception is trust by declaration for the purpose of public interest under Article 71 of the Trust Act. Below we discuss the structure and feasibility of providing third-party payment service through trust.

3-2-1 Third-Party Payer Acts as Trustee

When a third-party payer acts as the trustee of under the contract of trust and the buyer that pays the price under an Internet transaction designates it as the principal and the beneficiary, a trust for self benefit is formed. It is a trust with a purpose. The purpose of the trust is to transfer the price of sale and purchase. The seller is also the beneficiary. According to the "principle of identified beneficiary" under the laws of Taiwan as long as the beneficiary is identifiable, even though many transactions may be formed with many sellers after the buyer registers to use third-party payment service, a contract of trust can still be formed. However, in accordance with Article 2 of the Trust Act, unless the principal has reservations in the contract of trust, the termination of a trust for the benefit of others is subject to the consent of the beneficiary. So it is simpler to process under a trust for one's own benefit.

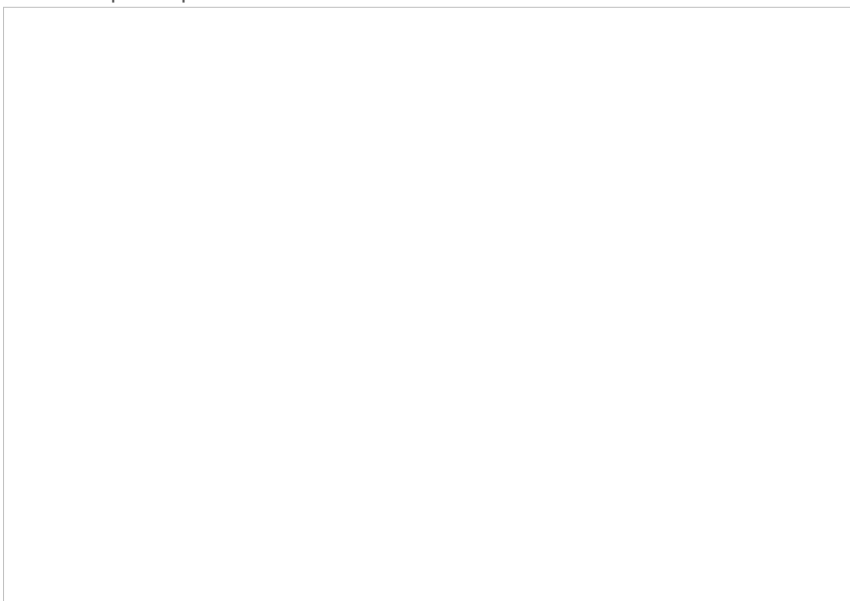


Diagram 2 Diagram of trust relationship under third-party payment (where the third-party payer is the trustee)

Source: Prepared by author

To form a contract of trust, in accordance with Articles 9 to 12 of the Trust Act, the fund entrusted by the service user to the third party to be forwarded becomes trust property and can be effectively segregated from bankruptcy. If the trustee is bankrupt, the trust property will not be

included in the bankruptcy property, and the creditors of the trustee cannot enforce upon the trust property, providing more protection for the user of third-party payment service. Also, in accordance with Article 24, the principal shall manage the trust property and the principal's own property separately. A monetary trust can be managed by keeping separate accounts. So if a contract of trust is formed under a contract of third-party payment service, it can ensure proper accounting of trust property by the service provider. Also, in accordance with Paragraph 2, Article 9, property right acquired by the trustee through the management, disposal, loss, destruction or other event of the trust property remains part of the trust property. Therefore, proceeds received from the deposit by third-party payer with the bank of any fund before it is forwarded become part of trust property and belong to the buyer, i.e., the principal and beneficiary.

Certain doubts as to whether the Trust Enterprise Act is applicable to third-party payment service provider. In accordance with Article 2 of the Trust Enterprise Act, "trust enterprise" referred to in this Act means an organization approved by the competent authority in accordance with this Act to operate trust activities. There are 4 targets regulated by the Trust Enterprise Act: Trust companies that operate trust activities with approval by the competent authority, banks they also operate trust activities, securities investment trusts, investment consulting businesses and securities dealers that also operate trust activities and trust investment companies. A third-party payer is not a trust enterprise approved by the Banking Bureau of the Financial Supervisory Commission. Therefore, the contract of trust formed under third-party payment service is a general trust under civil law and is subject to supervision by the court in accordance with Article 60 of the Trust Act. The court may select an inspector and impose other necessary disposition by order pursuant to the petition for inspection on trust activities filed by an interested party or a prosecutor.

However, the court has a role of passive supervision and does not have the general authority of supervision and management by the Bureau of Banking. Third-party payment is a service provided to unidentified members of the society. Including third-party payers into the system of financial supervision for trust will provide better protection for interest of the general public. Also, in accordance with Article 34 of the Trust Act, trust enterprises have the obligation of provisioning compensation reserves. No such obligation is imposed under general civil-law trust. So if third-party payers are included as trust enterprises, better protection will be available to the consumers.

Also in accordance with Article 19 of the Trust Enterprise Act, a trust contract must be done in writing. In case of an electronic document, requirements under Article 4 of the Electronic Signature Act must be met: "the content of the information can be presented in its integrity and remains accessible for subsequent reference, with the consent of the other party". Under third-party payment service, the third-party payer must make payment in accordance with the user's instructions. So the trust that is formed is "a trust where the trustee does not have discretion over utilization of trust property", as referred to under Paragraph 2, Article 7 of the Enforcement Rules for Trust Enterprise Act. It is also "a monetary trust under specific centralized management and utilization" under Article 8 of the Enforcement Rules for Trust Enterprise Act.

However, in accordance with Article 9 of the Trust Enterprise Act: "A trust enterprise's name shall indicate the word, 'trust.' This rule does not apply to an entity which conducts a trust business concurrently with the approval of the Competent Authority." If the third party payer adds the word "trust" in the company name, it will create a difference from the scope of business of third-party payment service. So an approval from the competent authority, the Bureau of Banking of the Financial Supervisory Commission, allowing third party payers to also operate the trust activity, seems to be a better solution.

3-2-2 Bank Acts as Trustee

As mentioned above, in a payment collection/forwarding relationship, the underlying legal relationship between the third-party payer and buyer is a "mandate". Under a separate relationship of mandate, the buyer can grant the third-party payer the right of agency to sign a contract of trust with the bank on behalf of the buyer. The bank will act as the trustee and the buyer will act as the principal and beneficiary. The third-party payer will be the agent of the principal. Same as above, the beneficiary can also be the seller here.

Under the current structure of the Trust Act of Taiwan, almost all rights that can be exercised by a principal can also be exercised by a beneficiary, including the rights under Articles 23, 24, 32, 35 and 65. Therefore, it is more convenient for a bank, with the qualification of trust enterprise, to serve as the trustee. However, trust related fees may be payable to the bank, raising the cost of third-party payment service. The relevant cost will most likely be transferred to the user of third-party payment service. The third-party payment service fee is generally paid by the seller, i.e., the payee. Under the structure where the third-party payer acts as the trustee, the relationship between the third-party payer and the bank is solely one between a depositor and a depository account. Therefore the third-party service provider does not need to pay any fee to the bank. It may even receive interest from the deposit, constituting proceeds from trust property which belong to the principal. So if the bank acts as the trustee, the cost of transaction flow is higher. On the other hand, it may obstruct the development of the industry. However, it is more consistent with the model of trust management.

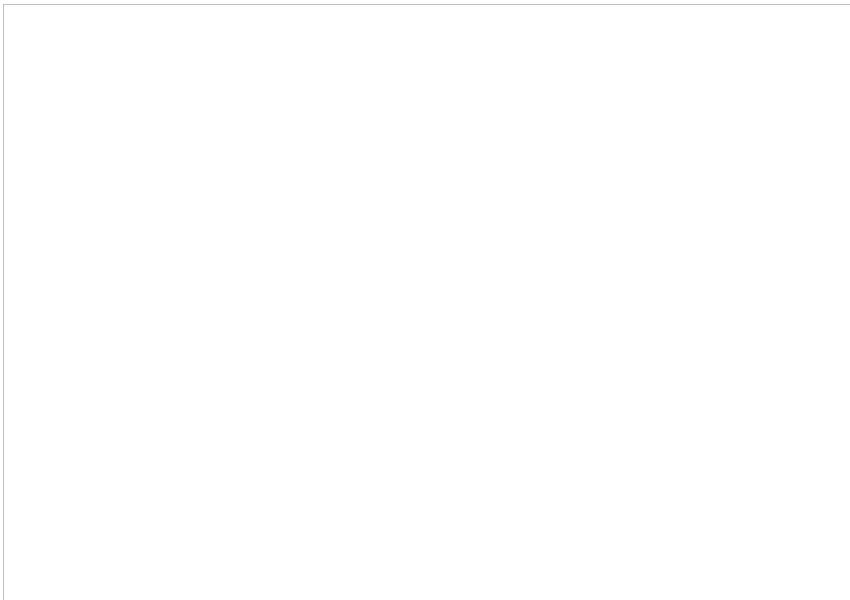


Diagram 3 Diagram of trust relationship under third-party payment (bank being the trustee)

Source: Prepared by author

4. Conclusion

There is currently no legal restriction against simple payment collection and forwarding. The contract of mandate under the Civil Code can process the tri-party legal relationship (buyer, seller and payment collector/forwarder). The transaction guarantee for third-party payment and the mechanism of custody and delayed payment of price can be processed with the structure of trust. As mentioned above, under the structure of a trust, the third-party payer can act as the trustee and the bank can act as the principal (at which time the third-party payer represents the principal and signs a contract of trust with the bank on behalf of the buyer). The formation of trust ensures account management, avoiding improper utilization of the transaction price under custody. When the third-party payer is the trustee, a general civil-code trust is formed, which is only subject to inspection by court pursuant to petition by interested party or the judge. The supervision and management are more relaxed. However, third-party payment serves an unidentified public of society and has an extensive impact. It is suggested that the competent authority, the Financial Supervisory Commission, allows third-party payers to also operate the business of trust and include third-party payers into the scope of financial supervision. When the bank acts as the trustee, the transaction cost is higher. However, the supervision and management of its business activities under the current legal system is more complete. Currently, a more feasible way is when the bank serves as the trustee and the third-party payer serves as the agent of the principal. In the long term, it can be studied to open up for third-party payers to also operate Internet transaction trust business, acting as the trustee.

Third-party payment replaces bank's fund settlement function to a certain extent. Contrary to the traditional industry of payment collection and forwarding, third-party payment provides the convenience of fund collection/payment function and can fall prey to money laundering criminal activities. For the purpose of protecting the consumers and prevention of money laundering crimes, it is indeed necessary to include third-party payment into legislative management. The priority focus of such control is to require that the operator possesses a sound corporate structure and financial status. The requirement regarding capital is different depending on the country. The flexible requirement of capital amount in the EU can be used as a reference. For smaller operators with lower transaction volumes, a lower capital amount should be required under flexibility. In 2011, the Internet shopping market in China was 773.5 billion CNY. The amount of Internet payment was approximately 70 billion CNY. In 2011, the Internet shopping market in Taiwan was only 562.7 billion NT Dollars. If the minimum capital amount required of third-party payment operators in China is applied to third-party payment operators in Taiwan, it would not be reasonable. We can refer to the US method and ask operators to take out insurance to lower the risk and avoid market monopoly or oligopoly due to high capital amount barrier, blocking full competition. With the capital amount requirement, it is highly possible that the operators will increase the amount of transaction processed in accordance with the development of E-commerce, creating the necessity to increase the capital. It is best to choose the form of limited stock companies in order to answer to capital placement requirement swiftly.

Regarding the issue of money laundering prevention, third-party payment institutions are currently not the "financial institutions" under Article 5 of the Money Laundering Prevention Act of Taiwan. However, it should be a "payment tool" under Article 9, with only an obligation to freeze the payment account and cooperate with investigation as required by prosecutors. At the same time of developing third-party payment services, the Bureau of Investigation of the Ministry of Justice should also develop a money laundering prevention reporting system for third-party payment services. In reference to the US legal system, third-party payers should be included into the network of money laundering crime prevention of Taiwan for management. In addition, third-party payment services should be performed on real-name basis. The general public should be required to register and use third-party payment services with their true identities. As for verification of identity, the so-called KYC process, the banks' KYC can be relied upon to a certain degree, such as comparison of account name information of the credit card holder or the deposit account. In reference to the legal system of different countries and the current financial legal system of Taiwan, third-party payment operators should have the obligation to maintain payment transaction information in order to facilitate criminal investigation.

To protect consumers, the rights and obligations between the consumers and the third-party payers should be specified in a written contract. If it is displayed in electronic form, the written requirement should be consistent with Article 4 of the Electronic Signature Act of Taiwan. In addition, the consumers' funds should only be used in accordance with the consumers' payment instructions. To avoid other uses by the

operators, there should be a requirement to deposit into special bank accounts to provide clear trace of transaction history. In reference to Article 24 of the Trust Act, separate account management is required under trust. So if a trust is formed, then the requirement for special deposit account can be waived. Furthermore, to avoid insolvency by the operators, operators can be required to take out insurance and acquire full performance guarantee.

Prevention is better than a cure. We should take precautions about possible issues that may arise from third-party payment. In addition, clear rules of the game will encourage industry development.

On the other hand, with the new type of money flow payment activities in the Internet era, traditional financial industries should see it as a new opportunity of business development, and not a threat. What third-party payment system processes is information flow, the actual flow of funds is still dependent on the banking system. Internet payment operators are still dependent upon the finance industry to provide financial planning and new types of financial products (such as trust and insurance) in order to promote their business. Building a sound Internet payment system indeed requires contributions from the information industry, the finance industry and the legal industry.

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