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"大数据杀熟"现象的法律分析与规制建议

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摘要:"大数据杀熟"生来就有对个人信息、消费习惯信息等"大数据"的不当利用以及依靠"差异化定价"进行"杀熟"两层内容。"大数据杀熟"具有隐蔽性、技术性、普遍性、危害性的特征,现已有其固定类型。就其法律性质而言,价格歧视说不足以完全评价"大数据杀熟";适用价格欺诈说对其进行规制有优势,但在当前法律架构下并不合适;应当认定"大数据杀熟"构成沉默欺诈,适用消法惩罚性赔偿制度。建议以优化《电子商务法》破除法律竞合乱象,明确市场监督管理部门的管理职能,由各级法院应为遏制"大数据杀熟"提供最终保障。

关键词: 大数据杀熟 理论界定 法律性质 规制建议

Legal Analysis and Regulatory Proposal on the Phenomenon of Big Data Price Discrimination

Abstract: "Big data price discrimination" is born with the improper use of "big data" including personal information, consumption habit information, etc., and obtaining a windfall based on differentiated pricing to consumers. "Big data price discrimination" has the characteristics of concealment, technicality, universality and harmfulness, and now has its fixed type. For its legal nature, the theory of price discrimination is not enough to fully evaluate "big data price discrimination"; applying the theory of price fraud to regulate it has its advantages, but it is not suitable under the current legal framework; it should be determined that "big data price discrimination" constitutes a reticent fraud and the punitive compensation system should be applied. It is suggested that we should reform E-commerce Law to break the confusion of competition among laws, and clarify the management functions of market supervision and management departments, let the courts provide the final guarantee to curb the " big data price discrimination".

Key words: Big data price discrimination; theoretical definition; legal nature; regulation proposal