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Regulatory Dilemmas and Legal Responses to 'Big Data-enabled Price Discrimination' in the Digital Economy Era

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Abstract. In today's digital economy, the widespread application of algorithms, while bringing convenience, has also given rise to the challenge of 'big data price discrimination,' posing significant threats to consumer rights, market order, and even the social credit system. Faced with big data price discrimination, consumers not only lose their autonomy to choose pricing and decide whether to disclose information, but also find it difficult to utilise existing laws to protect their rights. Even if consumers ultimately prevail in court, the illegal costs incurred by platforms engaging in price discrimination are negligible compared to the high costs consumers bear in defending their rights. These practical predicaments stem from three core issues: the unequal standing between consumers and operators in big data price discrimination schemes; substantial gaps in legal regulation; and the disproportionate burden of proof on consumers coupled with insufficient penalties for operators. Accordingly, this paper proposes safeguarding consumers' right to refuse at the front end by clarifying operators' disclosure obligations, while at the back end, reducing the burden of proof and increasing penalties. Amendments to three existing laws are recommended to curb 'big data price discrimination' and ensure the stable, healthy development of China's digital economy.

Keywords: Big Data Price Discrimination, Platform Economy, Digital Economy, Algorithms, Consumer Rights

1. Introduction

In recent years, with the rapid advancement of algorithmic technology and its widespread application in commercial spheres, algorithms and big data have become dominant factors in the business models of major online platforms, gradually forming a three-dimensional structure comprising platforms, data, and algorithms [1]. On the one hand, this has generated positive impacts such as promoting competition, enhancing consumer welfare, and achieving optimal resource allocation. However, it has simultaneously given rise to the phenomenon of 'big data price discrimination'.

'Big data price discrimination' refers to operators utilising consumer personal information collected through big data to construct consumer user profiles. They then employ algorithmic personalised pricing, setting prices at the threshold consumers are willing to pay, thereby maximising profits. This phenomenon is prevalent across sectors including hotel bookings, food delivery, travel ticketing, and e-commerce shopping, manifesting as price discrimination where

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individualised pricing or higher charges for returning customers than new ones occur. This not only infringes upon consumers' rights to information and personal privacy but also severely undermines market order and the social credit system.

Since 2018, the practice of 'big data price discrimination' has drawn widespread attention across society. A report released in 2022 revealed that over 60% of consumers reported experiencing such discrimination, with more than 80% believing this phenomenon infringes upon their legitimate rights, personal privacy, and severely undermines commercial credibility. Nearly half of consumers found themselves unable to defend their rights after encountering price discrimination, resigning themselves to their misfortune. A case search on the China Judgments Online database using keywords 'big data price discrimination' and 'price discrimination' yielded 483 relevant judicial documents, with a marked upward trend in case numbers in recent years. This underscores that 'big data price discrimination' has become a critical issue requiring urgent attention within China's theoretical and academic circles. Against this backdrop, this paper aims to analyse the challenges and causes of inadequate consumer rights protection in 'big data price discrimination', thereby constructing an optimisation pathway for this phenomenon and providing theoretical support for relevant judicial practice and regulatory enforcement.

2. Analysis of the practical dilemmas and causes of consumer rights in big data price discrimination

In judicial practice, the challenges in regulating 'big data price discrimination' manifest primarily in three aspects: during transactions, consumers lack the actual power to choose pricing or determine whether information is disclosed, making it difficult to avoid such discrimination; After falling victim to such practices, consumers struggle to utilise existing legal avenues for redress; even where recourse exists, the imbalance between the cost of pursuing claims and the low cost of non-compliance for businesses makes punishing big data price discrimination difficult, allowing it to flourish unchecked. Fundamentally, the persistent prevalence of big data price discrimination stems from the unequal footing between consumers and businesses, gaps in existing legislation, the burden of proof faced by consumers, and the absence of meaningful penalties for offenders.

2.1. Consumers and traders are not on an equal footing

In the context of 'big data price discrimination,' while consumers ostensibly retain the ability to compare and select goods and services at varying prices on e-commerce platforms, this choice is merely nominal. Once consumers opt to purchase via the platform, they effectively relinquish control over pricing transparency and personal data disclosure. Consequently, the vast majority either remain unaware of discriminatory pricing practices or, upon detection, are compelled to pay inflated prices for identical offerings—unable to abandon purchases altogether.

The formalisation of consumer choice stems from the asymmetry in the positions of consumers and operators. On the one hand, e-commerce platforms often exert control over consumers through pre-drafted click contracts. Such contracts typically fall under the category of adhesion contracts or standard form contracts [2], where consumers can only choose to accept or reject them, and must click 'agree' to proceed to the next step. Superficially, these click contracts appear as user service agreements between equal parties, where consumers supposedly have the freedom to accept or reject the platform's terms. In reality, however, consumers must agree to the entire contract as drafted by the platform to use it normally. They cannot amend the contract's content or raise objections. While nominally equal, this arrangement is effectively coercive. Furthermore, some click contracts on e-

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commerce platforms contain ambiguously worded clauses, preventing consumers from making informed decisions. Within Taobao's User Service Agreement, phrases such as 'You must authorise us to collect necessary information; refusal to provide this will prevent use of our products or services' appear. Yet it remains unclear whether 'necessary information' encompasses solely delivery-related details like telephone numbers and addresses, or whether it also includes consumers' gender and personal preferences. In practice, such ambiguous phrasing is prevalent, severely undermining consumers' freedom to authorise their privacy data. Moreover, e-commerce platforms frequently utilise collected personal information to create consumer profiles and implement differential pricing strategies. Consent for essential data collection cannot be equated with consent for information sharing; such practices constitute deep data mining and exploitation without consumer consent, infringing upon personal privacy and the right to fair transactions. Some consumers may also be unable to clearly understand their rights and obligations due to overly obscure contract terms, forcing them to tick the 'agree' option unknowingly and thereby relinquishing their right to choose.

Contrary to the compulsory acquisition and excessive mining of consumers' personal information, businesses' disclosure of information is not only insufficient in quantity but also markedly deficient in quality. Whilst e-commerce platforms ostensibly display transparent pricing for every consumer, these prices are often generated through big data algorithms analysing individual consumer behaviour to produce differentiated pricing. This fails to adequately support consumers in making freely informed decisions. Moreover, platforms disclose only the prices themselves, leaving the processes by which they analyse and utilise user data entirely opaque – an unfair practice towards consumers. Moreover, the online environment exacerbates the construction of information barriers by operators. In online transactions, effective segmentation exists between individual consumers, preventing them from comparing their pricing against that of other customers. This inevitably facilitates the occurrence of price discrimination against loyal customers.

2.2. Significant gaps exist in the current legal framework

At the legislative level, China's regulatory framework for 'big data price discrimination' primarily comprises the Anti-Monopoly Law, the Pricing Law, and the Consumer Rights Protection Law. However, owing to the immaturity of legal regulation concerning big data technology in China, these three statutes all exhibit shortcomings in areas such as the identification of responsible parties and the establishment of regulatory rules, rendering them ineffective in curbing 'big data price discrimination'.

Regarding the Anti-Monopoly Law, the primary reason for its regulatory ineffectiveness lies in the mismatch of its regulatory subjects. The Anti-Monopoly Law was enacted to regulate market competition, targeting unfair competitive practices between operators. However, 'big data price discrimination' targets consumers. While it undeniably infringes upon consumer rights, it lacks a direct causal link to the detriment of other operators' interests and thus falls outside the scope of regulation under the Anti-Monopoly Law. Furthermore, Article 7 of the Anti-Monopoly Law and relevant judicial practice indicate that its regulatory scope encompasses 'business operators with market dominance,' typically high-influence platforms commanding substantial market share [3]. 'Big data price discrimination,' however, relies on internal management rights derived from platforms' provision of public services, rather than their market influence. The provisions on 'market dominance' within the Anti-Monopoly Law not only lack clear criteria for determination but also exclude small and medium-sized operators from its regulatory scope, creating significant challenges for regulating 'big data price discrimination'. Furthermore, the ambiguity of legitimate defence

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grounds and their abuse in practice constitute major obstacles to effectively regulating this phenomenon. Although the Provisions on Prohibiting the Abuse of Market Dominance refine the 'justifiable grounds' defence standard stipulated in the Anti-Monopoly Law, the practical definitions of 'fair, reasonable, and non-discriminatory platform rules' and 'based on the actual needs of transaction counterparts' remain unclear. This ambiguity grants excessive judicial discretion to judges in court proceedings. Moreover, owing to the ambiguity of the 'justifiable grounds' defence standard, e-commerce platforms facing allegations of 'big data price discrimination' often defend themselves by citing new user incentives or system malfunctions. Ordinary consumers, lacking understanding of algorithmic mechanisms, are frequently left with no choice but to passively accept the platforms' attempts to obscure their discriminatory practices [4].

With regard to the Pricing Law, goods and services offered on e-commerce platforms are not subject to government price regulation, rendering them difficult to govern under the Pricing Law. The very purpose of enacting this law was to safeguard enterprises' autonomy in setting prices for their own products. Over the past three decades of judicial practice, it has also been applied to industries vital to the nation's lifeline, situations severely disrupting market competition, and the realm of taxation [5]. Platform retail operations clearly fall outside these three categories and should not be subject to public authority intervention. Furthermore, Article 3 of the Price Law stipulates that pricing for most goods must conform to market adjustment principles, with government-guided pricing applied only to a very limited number of commodities. Even when platforms employ big data technology to implement differential pricing for different consumers, they are still exercising autonomous pricing rights grounded in market supply and demand dynamics. Consequently, consumers find it difficult to invoke the Price Law to safeguard their legitimate rights and interests.

Regarding the Consumer Rights Protection Law, its enactment aims to safeguard consumers' rights to information and fair transactions. Regarding the right to information, consumers naturally have the right to know the true circumstances of goods and services [6]. However, the extent of information disclosure by operators is not exhaustive; it only includes key information affecting consumers' decision to transact, such as the price and quality of goods. Yet, once a platform has clearly priced goods for an individual consumer, it has no obligation to disclose other consumers' transaction information—namely, the prices they paid for equivalent products. This prevents consumers from comparing others' transaction details to avoid being overcharged due to their loyalty ('killing the familiar'). Concerning the right to fair transactions, Article 2(2) of the Consumer Rights Protection Law stipulates consumers' entitlement to reasonably priced transaction conditions. Yet, the absence of explicit legal definitions for 'reasonable pricing' and the term's inherently subjective nature create difficulties. When platforms set prices for each consumer at levels approaching their maximum willingness to pay, determining the legitimacy of such differential pricing becomes challenging [7], thereby hindering the effective application of the Consumer Rights Protection Law.

2.3. The burden of proof dilemma and inadequate penalties

The disparity between the difficulty consumers face in asserting their rights through judicial practice and the low cost of non-compliance for businesses has led many consumers to settle matters quietly after encountering price discrimination. This, coupled with operators' lack of apprehension regarding potential liability for infringement should such practices be uncovered, has encouraged the proliferation of 'big data price discrimination'.

Regarding the burden of proof for consumers, judicial practice predominantly applies the general principle of fault liability. Consumers must present conclusive evidence demonstrating the operator's intent or negligence in engaging in 'big data price discrimination' to stand any chance of prevailing.

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However, evidence in such cases is predominantly electronic data, which e-commerce platform operators can readily delete or alter, significantly increasing the difficulty for consumers to prove fault [8]. Furthermore, proving the detrimental consequences requires consumers to ascertain the prices paid by other consumers for equivalent products – an inherently challenging task. Moreover, in judicial practice, losses cannot be simplistically equated to the difference between the consumer's purchase price and that paid by others, rendering the burden of proof for 'big data price discrimination' exceptionally arduous. Moreover, given that such cases typically involve relatively small sums, even if consumers manage to provide evidence, the litigation costs far exceed any potential compensation, compelling them to choose the lesser of two evils.

In contrast to the preceding discussion, the cost of non-compliance for operators remains extremely low compared to the profits gained through price discrimination. 'Big data price discrimination' is inherently covert and difficult for consumers to detect. Moreover, it typically occurs within everyday consumption sectors involving modest sums, resulting in a low incidence of consumer complaints. Successful complaints are exceptionally rare. In the rare instance of a consumer victory, such as the Hu Hongfang v. Shanghai Ctrip Business Co., Ltd. infringement case, the platform was ordered to refund the purchase price and pay triple compensation. However, the compensation amount, less than five thousand yuan, had minimal impact on the platform [9]. Overall, platforms stand to gain substantially from implementing price discrimination, making them reluctant to cease such differential pricing practices.

3. Regulatory approaches to big data price discrimination

Addressing the threefold challenges in regulating 'big data price discrimination', attention must be paid simultaneously to establishing consumer rights at the front end, clarifying business operators' obligations, and ensuring consumer redress mechanisms at the back end. By revising and refining the existing three pieces of legislation, clear and effective guidance should be provided for the management and punishment of 'big data price discrimination'.

3.1. Safeguarding consumers' right to refuse and clarifying operators' disclosure obligations

Firstly, regarding platforms exploiting click contracts to infringe upon consumers' right to fair transactions, the current practice where consumers must accept contract terms in their entirety and grant e-commerce platforms a single blanket authorisation should be reformed. Consumers' right to opt out must be safeguarded, enabling them to selectively reject clauses pertaining to their personal privacy—such as automatic information push notifications, access to browsing history, or promotional text messages—while continuing to use the platform. This would mitigate excessive data collection stemming from the coercive nature of click contracts. Consumers should retain the right to refuse data collection unrelated to the direct facilitation of transactions. Furthermore, ambiguous language within click contracts warrants comprehensive rectification. E-commerce platforms must employ plain, concise language to ensure consumers genuinely comprehend contractual terms and make informed choices. They should proactively address consumer queries by providing hyperlinks to explanatory materials or integrating customer service features on websites/apps dedicated to contract interpretation. Regarding disclaimer clauses in click-through agreements, online service platforms should be required to enlarge, bold, or otherwise highlight relevant text to sufficiently draw consumer attention. Furthermore, the China Electronic Commerce Association (CECA) could be encouraged to proactively review disclaimer content, contacting platforms promptly for rectification if ambiguous wording is identified. In the realm of personal

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privacy—the right most frequently infringed by platforms—privacy clauses must explicitly affirm consumers' right to control their personal information. Provisions for compensated information sharing should be introduced: should a platform wish to share user-identifiable information with other e-commerce platforms or third parties for specific purposes, it must not only obtain consumer authorisation but also require the data recipient to provide appropriate compensation to the consumer. This safeguards consumers' comprehensive control over their information [10]. Where platforms abuse consumers' personal privacy, e-commerce platforms should be required, beyond merely granting deletion rights, to notify other platforms or third parties to remove relevant links, copies, duplicates, etc., thereby preventing further expansion of infringements upon consumers' privacy rights.

Secondly, regarding the inadequacies in platforms' information disclosure, the various types of 'private information' held by platforms should be made public. This would ensure that fundamental transaction-related information is not solely controlled by platforms, thereby narrowing the information gap between platforms and consumers. In this era of digital transactions, the standard of 'clear pricing' for operators should extend beyond merely disclosing price tags and price lists for goods. It should also enable consumers to understand the platform's pricing criteria in online transactions and the transaction prices paid by other consumers, thereby mitigating the information barrier created by the online environment for consumers. Concurrently, consumer associations or e-commerce platform industry associations could incentivise consumers to report genuine transaction information to them, allowing the pricing standards provided by platforms to be verified and substantiated with evidence.

3.2. Refine existing legislation

Given the current legislative challenges surrounding 'big data price discrimination' – including unclear identification of responsible parties and ambiguous regulatory frameworks – it is imperative to amend the Anti-Monopoly Law, the Pricing Law, and the Consumer Rights Protection Law to address these regulatory shortcomings.

Regarding the Anti-Monopoly Law, the foremost legislative task is to broaden the scope of entities subject to its regulation, extending coverage from large enterprises with market dominance to small and medium-sized operators. Within emerging digital markets, where market dynamics are highly fluid and platform relationships are more intricate and intertwined than in traditional markets, numerous non-dominant platforms may leverage their advantages in data control and processing to coerce or infringe upon other operators or consumers. This enables them to exclude or restrict competition from other operators and engage in price discrimination against consumers. Consequently, the Anti-Monopoly Law should comprehensively consider factors such as the data capabilities, network effects, and economies of scale of e-commerce platforms, thereby encompassing these operators who, while lacking market dominance, can exploit their data advantages to engage in monopolistic conduct. Moreover, although platforms like Meituan and Didi may not hold overall market dominance, within the unique ecosystem of online platforms, consumers exhibit heightened loyalty due to personalised consumption habits and reduced willingness to switch between platforms. Consequently, platforms occupy a relatively dominant position vis-à-vis consumers and may engage in 'big data price discrimination' [11]. Consequently, the Anti-Monopoly Law may incorporate the abuse of relative dominance by platforms into its regulatory scope, thereby achieving comprehensive governance of 'big data price discrimination'. Finally, regarding the phenomenon where platforms evade sanctions under the Anti-Monopoly Law by invoking so-called 'legitimate grounds', such defences should be refined through a 'specified list

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plus catch-all clause' approach. assessing whether such practices enhance production efficiency, maintain equitable interests between buyers and sellers, are undertaken in good faith, and yield overall consumer benefits. This would enable courts and enforcement authorities to apply relatively clear standards in specific cases, thereby reducing the abuse of legitimate grounds.

Regarding the Price Law, the scope of protected parties should first be extended from other business operators to include consumers. Expanding the protective reach of the Price Law is justified both from a legal theory perspective and in terms of institutional design. From a legal theory standpoint, although the legislative intent of Article 14 of the Price Law is to curb vicious competition among operators and maintain market competition order, its ultimate effect is to safeguard the rights and interests of individual consumers. Moreover, against the backdrop of the rapid development of the digital economy, economic law is progressively shifting from traditional indirect protection to direct safeguarding of consumer rights. Incorporating consumer interests into the scope of protection under the Price Law is entirely appropriate [12]. From an institutional perspective, the provisions of Article 14(1) and (4) of the Price Law can be directly interpreted as concerning the protection of consumers' lawful rights and interests through textual analysis. Furthermore, the subjects of the acts outlined in paragraphs (3), (6), and (7) explicitly include consumers. Consequently, incorporating consumers into the scope of subjects covered by the price discrimination provisions inherently possesses institutional 'foundation' within the Price Law. Furthermore, regarding the ambiguity in the criteria for determining price fraud, the Price Law could adopt an 'exhaustive list plus catch-all clause' approach to clarify matters. By incorporating the specific characteristics of price fraud—namely its deceptive and misleading nature—scenario-based and substantive criteria could be established to distinguish price fraud from mere autonomous pricing by platforms.

Regarding the Consumer Rights Protection Law, provisions should be added after Article 20 to impose a duty of disclosure on operators when leveraging information asymmetry to guide consumer choices. This would ensure consumers are aware when platforms apply personalised pricing. Platforms must disclose: the existence of differential pricing for consumers; their analysis and mining of consumer personal information to achieve business objectives; and, should consumers opt out of algorithmic personalised pricing, the platform must explicitly provide a standardised price list [13]. Secondly, the criteria for determining 'reasonable pricing' under Article 10 of the Consumer Rights Protection Law should be refined. Platform pricing should be assessed against the standard of a reasonable person to determine whether it exceeds the level of acceptance among the general public. Concurrently, platform pricing should undergo comparative analysis against industry average pricing or established industry pricing standards to ascertain its reasonableness and whether it infringes upon consumers' right to fair transactions, necessitating legal intervention where warranted.

3.3. Adjust the burden of proof and increase the severity of penalties

Addressing the predicament where consumers face excessive difficulties in proving 'big data price discrimination' while penalties for operators remain considerably limited, it is imperative not only to resolve consumers' challenges in providing evidence and asserting their rights, but also to significantly raise the cost of non-compliance for platforms. Only then can a fairer balance of interests between consumers and operators be achieved, thereby effectively regulating the issue of 'big data price discrimination'.

Firstly, given that consumers' evidence against 'big data price discrimination' requires considerable specialised knowledge, and that online platform data is inherently unstable and

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susceptible to tampering, applying the traditional tort law principle of 'he who asserts must prove' would significantly reduce consumers' chances of success. It is recommended that judicial practice adopt a principle of preferential protection, reversing the burden of proof. This would require e-commerce platforms to produce data and algorithms demonstrating the absence of price discrimination. Should they fail to provide sufficient evidence, operators would bear the risk of losing the case. This approach safeguards the rights of consumers as the weaker party and promotes substantive equality between consumers and operators. Secondly, where individual consumers lack sufficient leverage for effective redress in the digital environment, an antitrust public interest litigation mechanism should be established. This would pool numerous consumers suffering relatively minor individual losses, creating a more balanced adversarial position against e-commerce platforms. Furthermore, consumer associations at the prefecture-level city or above should be granted the right to initiate public interest litigation. This would enable timely redress for consumer rights and deter platforms from engaging in 'big data price discrimination'.

Finally, the cost of non-compliance must be elevated. Legislators, judiciary, and administrative bodies should reach a consensus on imposing severe penalties for 'big data price discrimination,' strengthening administrative sanctions and civil compensation for such practices, and pursuing criminal liability where warranted. In the civil sphere, a robust punitive damages mechanism should be established to impose severe economic sanctions on platforms engaging in price discrimination. Such damages would compensate consumers for the time and financial costs incurred in asserting their rights, while simultaneously encouraging litigation against big data price discrimination.

4. Conclusion

In the era of the digital economy, while innovations in algorithmic technology have revitalised platform business models, issues such as consumer rights violations and market disorder stemming from 'big data price discrimination' have become critical bottlenecks constraining the healthy development of digital trade. At its core, this phenomenon stems from a severe imbalance in information rights and pricing power between platforms and consumers. It not only exposes the inadequacy of traditional legal frameworks in addressing new digital business models but also highlights a structural contradiction between consumer rights protection mechanisms and the cost of non-compliance for platforms. Resolving this impasse urgently requires institutional restructuring and rule optimisation.

This paper examines the absence of consumer rights protection in 'big data price discrimination', identifying three root causes of the predicament: firstly, platforms reinforce their dominant position through standardised contracts and information barriers, thereby restricting consumers' substantive choice; secondly, gaps exist in the Anti-Monopoly Law, Price Law, and Consumer Rights Protection Law regarding the identification of responsible parties and the application of rules, making it difficult to address the specificities of algorithmic pricing; Thirdly, the imbalance between consumers' evidentiary burdens and the leniency of penalties for operators diminishes the deterrent effect of legal regulation. In response, this paper proposes a comprehensive regulatory pathway encompassing 'front-end rights confirmation, mid-end legislative refinement, and back-end remedy safeguards.' Through measures such as clarifying consumers' right to refuse information sharing and platforms' disclosure obligations, expanding the scope of legal regulation, and establishing mechanisms for shifting the burden of proof and public interest litigation, it provides a theoretical framework for resolving the 'big data price discrimination' challenge. Only by reshaping the power dynamics between platforms and consumers within a rule-of-law framework can the proliferation of

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'big data price discrimination' be curbed, thereby propelling the digital marketplace towards sustainable development along fair, transparent, and trustworthy trajectories.

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