

The development of digital technologies has brought about a rapid growth in online shopping worldwide. Nowadays, consumers are able to purchase a variety of services and products online. Among them is digital content (examples of which include software, music, computer games and applications or "apps") which may simply be downloaded online upon purchase. Should consumer sales law in Hong Kong be reformed to address such inadequacies as may be identified to provide better protection for consumers shopping online, especially in the context of digital content purchases? If so, why and how? If not, why not?

## **1. Introduction**

Online shopping has gained traction in recent years, connecting sellers to buyers through platforms that stretch over time and space. Global retail e-commerce sales rose from 1,336 billion USD in 2014 to 5,717 billion USD in 2022<sup>1</sup>. Hong Kong embraced the emergence of e-commerce platforms, as the consumer base of local platform HKTVMall.com shot up from 94,000 in 2015 to 1,290,000 in 2021<sup>2</sup>. The pandemic escalated online purchase behaviours. The emergence of a stay-at-home economy encouraged consumers to purchases online. However, the spike in online shopping also confronts consumers with issues in the existing e-commerce market. The number of complaints relating to online shopping disputes reached 8,207 in 2021/22, a 69% increase from that in 2018/19<sup>3</sup>.

This essay outlines the current consumer laws in Hong Kong, assess its adequacy and issues facing online consumers, then evaluates four reform directions and their applicability to the context of Hong Kong.

## **2. Current Legal Framework**

Currently, there is no specific legislation regulating online retail business in Hong Kong. There are legislations offering protection to certain rights

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<sup>1</sup> Chevalier, S. (2022). Global retail e-commerce sales 2014-2026.

<https://www.statista.com/statistics/379046/worldwide-retail-e-commerce-sales/>

<sup>2</sup> International Trade Administration. (2022). eCommerce-Hong Kong & Macau.

<https://www.trade.gov/country-commercial-guides/e-commerce-hong-kong-macau>

<sup>3</sup> Consumer Council. (2022). 2021-22 Annual Report.

[https://www.consumer.org.hk/f/annual\\_report/416840/CCAR21-22\\_All%28WCAG%29.pdf](https://www.consumer.org.hk/f/annual_report/416840/CCAR21-22_All%28WCAG%29.pdf)

of general consumers, including Sale of Goods Ordinance (Cap. 26) ("SOGO") and Supply of Service (Implied Terms) Ordinance (Cap. 457) ("SSO"), Unconscionable Contracts Ordinance (Cap. 458) ("UCO") and Trade Descriptions Ordinance (Cap. 362) ("TDO").

## 2.1 Sale of Goods

Generally, the common law provides consumers with the right to reject goods and to terminate the contract when there is a breach of condition.

SOGO implies terms into contracts for sale of goods, which cannot be excluded or limited in a consumer contract<sup>4</sup>. They include the implied conditions that the seller has the right to sell the goods, the goods correspond with description in a sale by description, the goods are of merchantable quality, the goods are fit for the purpose made known to the seller, and the goods corresponds with samples in a sale by sample. The implied term of correspondence with description is likely applicable in an online sale, as consumers rely who are generally unsophisticated rely<sup>5</sup> on descriptions provided by sellers to decide whether to purchase the goods, without information that can be otherwise collected by a physical examination. The implied term of correspondence with sample is unlikely to apply to online sales where buyers usually place orders without an opportunity to examine a sample physically<sup>6</sup>.

SOGO also sets out a number of remedies for buyers in scenarios including delivering a wrong quantity of goods<sup>7</sup>, delivering goods mixed with those of different descriptions<sup>8</sup>, delivering by instalments<sup>9</sup>, giving rise to a right to reject (part of) the goods, accept them or claim for damages. In addition, buyers can claim damages for non-delivery<sup>10</sup> and breach of warranty<sup>11</sup>.

## 2.2 Supply of Services

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<sup>4</sup> Control of Exemption Clauses Ordinance (Cap. 71) s. 11(2)

<sup>5</sup> *Harlindon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 QB 564

<sup>6</sup> Chitty on Contracts - Hong Kong Specific Contracts. 6th Ed. (2019). §10-042.

<sup>7</sup> SOGO s. 32(1)&(2)

<sup>8</sup> *Ibid*, s. 32(3)

<sup>9</sup> *Ibid*, s. 33

<sup>10</sup> *Ibid*, s. 53(1)

<sup>11</sup> *Ibid*, s. 55(1)

The SSO implies terms into contracts for the supply of services<sup>12</sup> which cannot be excluded or limited. This includes the implied conditions that the supplier would carry out the service with reasonable care and skill<sup>13</sup>, the supplier would carry out the service within reasonable time if the contract is silent on time<sup>14</sup>, and that the consumer would pay a reasonable charge if the contract is silent on price<sup>15</sup>.

### 2.3 Unconscionable Contracts

UCO s. 5(1) provides relief to consumer in unconscionable contracts by empowering the court to refuse the contract or part of it, or limit the application or revise or alter any unconscionable part, if the court finds that the (part of) the consumer contract unconscionable

### 2.4 TDO

The TDO imposes civil (TDO s. 36) and criminal (TDO s. 18(1)) liability for those who applied a false trade description or carried out an unfair trade practice. Unfair trade practice include sale of counterfeit goods (TDO s. 9(2)), misleading omissions (TDO s. 13E(1)), aggressive commercial practices (TDO s. 13F(1)), bait advertising (TDO s. 13G(1)), bait and switch (s. 13H(1)) and wrongful acceptance of payment (s. 13I(2)). A trader can be liable to offences as long as they were in Hong Kong or Hong Kong is the trader's usual place of business (TDO s. 21A) In online sale, purchasing counterfeit products and resold them online is in contrary to s 9(2) and s 18(1) of TDO (*HKSAR v Ng Ka Yu* [2015] 2 HKLRD 1148).

## 3. Adequacy of Hong Kong Law

While the legal framework discussed above generally offers adequate protection to consumers purchasing in-person, it has limitations that impairs consumer welfare.

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<sup>12</sup> SSO s. 8(1)

<sup>13</sup> *Ibid*, s. 5

<sup>14</sup> *Ibid*, s. 6

<sup>15</sup> *Ibid*, s. 7

On the overall protection, the legislative framework protects general consumers in that it lays down certain standards of quality of the goods or service provided. In the case of unconscionable contracts, it allows courts to strike down parts that are unconscionable and prevents the seller from avoiding liability under SOGO or SSO. There are specific legislations such as TDO and Consumer Goods Safety Ordinance (Cap. 456) protecting consumers from unscrupulous commercial practices and unsafe goods.

However, there are four issues confronting online consumers that call for reforms of the existing legal landscape.

### 3.1 Definition of Goods or Services

Digital content does not fall under the definition of “goods” for the purpose of SOGO.

Generally, the legislative protection discussed above applies to both goods purchased in-person or online. However, in *Glidewell LJ’s dictum* in *St Albans City & District Council v International Computers Ltd*<sup>16</sup>, a pure programme which was not in physical form does not fall under the definition of “goods” in the Sale of Goods Act 1979, in contrast to a programme supplied in a computer disk. The definition of “goods” in the Sale of Goods Act is “essentially the same as” that in the SOGO s. 2(1). This reasoning was followed by the Hong Kong Court of First Instance in *Liu Peggy v Alfa Com Technology*<sup>17</sup>. Considering that digital contents nowadays can be purchased and installed online without any physical medium, it is unlikely for them to be “goods” for the purposes of SOGO. Hence, the implied terms in SOGO cannot operate to protect consumers of this type of product. As the definition for “goods” in UCO s. 2(1) follows that of SOGO, it is unlikely to apply to digital content without any physical medium.

Meanwhile, it is unlikely that the mere supplying of digital content would be a contract for service for the purposes of SSO<sup>18</sup>. Digital contents such as online applications or games can be transferred to the device of consumers, which would operate independently of the seller. The

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<sup>16</sup> [1996] 4 All ER 481

<sup>17</sup> [2007] 1 HKLRD 528

<sup>18</sup> (n 6), §10-050.

provision of digital content does not necessarily require skill and labour<sup>19</sup>. In a mass-market situation consumers place substantially more emphasis on the product rather than skill and labour used. Although a contract to write an original programme would be a contract for service<sup>20</sup>, it is not common among general consumers that purchase digital content. Hence, it is unlikely that digital content would fall under the definition of “service” to give rise to SSO implied terms.

The inapplicability of SOGO, SSO and UCO to software products implies that there would be digital content that is not protected by statutory implied terms. The purchase of digital content software such as online applications, electronic books, and streaming music<sup>21</sup> may fall out of the definitions of goods and services, hence are not subject to SOGO, SSO and UCO. The statutory implied terms require sellers and goods to meet certain requirements, proffering higher standard of protection to consumers. For example, the implied condition that goods are of merchantable quality ensures that goods supplied meet the general standard expected of goods of the kind<sup>22</sup>. Without such implied terms, consumers of digital content would be exposed to goods of unpredictable quality. Although it was suggested that the common law may still imply terms similar to those in the statutes<sup>23</sup>, there is still legal uncertainty of the extent to which such terms would be implied in each case. Hence, the protection of consumer rights in the context of digital content purchase is restricted.

### 3.2 Unbalanced Bargaining Power

A characteristic of business-to-consumer transactions is that consumers are in a weaker position to bargain contract terms against sellers<sup>24</sup>. As sellers could sell the goods to other consumers who are willing to accept their terms, consumers face a “leave it or take it” scenario between accepting the goods with unfavourable terms or not purchasing the good.

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<sup>19</sup> *Robinson v Graves* [1935] All ER Rep 935

<sup>20</sup> (n 17).

<sup>21</sup> (n 6), §10-051.

<sup>22</sup> *Jewson Ltd v Kelly* [2004] 1 Lloyd's Rep 505

<sup>23</sup> (n 16).

<sup>24</sup> Barkatulla, A. H. (2018). Does self-regulation provide legal protection and security to e-commerce consumers? *Electronic Commerce Research and Applications*, 30, 94-101.

Worse still, online sellers often include standard terms and conditions as part of their contract. These terms can be incorporated through “clickwrap” or “browsewrap”<sup>25</sup> that buyers click on without necessarily reading them. Buyers have little opportunity to bargain for a change in contractual terms. Hence, without legislative protection, online consumers can be subject to unfavourable terms.

### 3.3 Lack of Physical Contact During Purchase

Online sale does not involve physical contact with the seller or the goods. This implies that buyers have little opportunity to examine the goods, in physical aspects such as the good’s appearance, texture, weight, etc. Their source of information is those supplied by the seller, which can be insufficient for buyers to make informed decisions to purchase according to their needs. There is a risk that buyers would suffer losses from purchasing undesirable products<sup>26</sup>. The lack of opportunity to physically examine samples also means that the SOGO s. 17 implied condition of correspondence to a sample would not apply.

### 3.4 Limitations in Remedies

Generally, consumers can exercise their common law right to terminate the contract or reject the goods upon the seller’s breach of condition, claiming for damages as compensation. They may also claim for damages for breach of warranty by SOGO s. 13. Buyers can also reject goods if the seller delivered goods in a wrong quantity or by instalment under SOGO s. 32 and 33. However, there are limitations to these remedies.

Firstly, late delivery does not necessarily give rise to remedies for buyers. Buyers can only claim damages when a seller wrongfully neglects or refuses to deliver goods (SOGO s. 53(1)). Yet, in 2021-22, “Late / Non-delivery / Loss” accounted for 33% of online shopping complaints to the Consumer Council<sup>27</sup>. The Consumer Council also observed that some

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<sup>25</sup> Preston, C. B., McCann, E. (2012). Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse. *Brigham Young University Journal of Public Law*, 26(1).

<sup>26</sup> World Economic Forum. (2019). The Global Governance of Online Consumer Protection and E-commerce.

<sup>27</sup> (n 3).

online buyers need to wait during a long delivery time without receiving updates on the status<sup>28</sup>. This phenomenon creates uncertainty for consumers who need information on when their ordered goods are delivered to conduct their other daily activities.

Secondly, there is no requirement in Hong Kong for sellers to disclose information about their business or contact methods. This gap in law allows bad-faith businesses to vanish after receiving payments from consumers, leading to losses for consumers<sup>29</sup>. In 2020, there were 6678 cases of online shopping fraud, causing \$122 million of losses to consumers<sup>30</sup>. Without sufficient seller information, consumers may not be able to identify the seller as defendants if they intend to pursue legal claims.

Thirdly, there is no protection over the right to repair, replace the goods or receive refund. Although sellers have a right to cure if the contractual timeframe of delivery is not expired<sup>31</sup>, this right does not apply when the window for delivery has expired, or the seller did not elect to exercise it. Also, while consumers may claim for damages at court, the process takes up more time and cost than obtaining a refund. Yet, the success rate of refund or returning the goods is lower than 50% in a Consumer Council study<sup>32</sup>. Consumers may also be subject to shipping costs and handling charges.

The current legislative landscape is inadequate to protect online consumers in comparison with traditional ones. Considering the rising dependence on e-commerce since the pandemic<sup>33</sup>, it is necessary to consider options of reform to address the aforementioned issues.

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<sup>28</sup> Consumer Council. (2019). Online Shopping Platforms Survey. <https://www.consumer.org.hk/en/press-release/516-online-shopping-refund-and-exchange#:~:text=A%20Consumer%20Council%20survey%20with,the%20deadlines%20for%20goods%20return.>

<sup>29</sup> *Ibid.*

<sup>30</sup> Hong Kong Police Force. (2021). Legislative Council Panel on Security Initiatives for Preventing and Combatting Deception Cases.

<sup>31</sup> *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391.

<sup>32</sup> (n 28).

<sup>33</sup> (n 3).

## **4. Proposed Changes**

Four solutions are proposed to compensate for the current legislative shortfalls, considering overseas jurisdictions.

### **4.1 Separate category of digital content in existing legislations**

Consumer contracts for digital content can be introduced as a separate category subject to statutory implied terms similar to that in SOGO to address the issue that purely digital content does not fall under the definitions of “good” or “service”.

There is no principled reason to exclude digital content from the general consumer protection offered by SOGO, in comparison with tangible goods. Similar to buyers of tangible goods, digital content consumers are in a weaker bargaining position in relation to the seller. They face similar risks during their purchase, including *inter alia* that the quality of the digital content would fall below expectations below what is reasonably expected by consumers. The current gap in law for digital content is a result of the advancement of information technology creating digital contents unforeseeable to lawmakers in the past. The legislature, in introducing SOGO implied terms, would not have intended to exclude digital content from consumer protection. Buyers of digital content are therefore entitled to receive statutory protections for their purchase.

It should be noted that not all consumer protection laws for goods should apply to digital content, due to the latter’s specific contexts. For example, buyers of digital content are generally unable to examine a sample of digital content<sup>34</sup> or return it to the seller after rejecting it. Once the content is transferred to the buyer’s device, it is impractical to have the copy removed. This is recognised by the UK Consumer Rights Act 2015 (the “CRA”), in which no terms are implied regarding correspondence with a sample or matching with a model seen, unlike goods<sup>35</sup>. The CRA also did not provide a right to reject digital content. Therefore, instead of merely expanding the definition of “goods” to include digital contents, the creation

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<sup>34</sup> (n 6).

<sup>35</sup> CRA s. 13-14.



of an independent category is more apt to adjust to the unique characteristics for digital content.

In fact, some overseas jurisdictions have already introduced consumer protection laws in relation to digital content. The UK CRA provided statutory rights and remedies for consumers for digital content. It follows the European Union<sup>36</sup> definition of digital content as "data which are produced and supplied in digital form"<sup>37</sup>, which broadly covers electronic content that traditionally falls outside of the definition of "goods". The CRA implies the terms into contracts of digital content, such as that digital content should be of satisfactory quality<sup>38</sup> and fit for particular purpose<sup>39</sup>.

The European Union introduced the Directive (EU) 2019/770<sup>40</sup> (the "Directive") created three categories of digital-related consumer contracts, which are digital content, digital service, and goods with digital elements. Digital service is defined in art. 2(2) as a service that allows the consumer to create, process, store or access data in digital form or a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service. "Goods with digital elements" is defined as "any tangible movable items that incorporate, or are inter-connected with, digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions".

The categorisations of digital service and goods with digital elements enable comprehensive protection of consumer contracts. However, it is unnecessary to create such further categories in Hong Kong as the common law notion of contract for service can cover services for digital contents<sup>41</sup>. Meanwhile, tangible items with digital content are held to be

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<sup>36</sup> In Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

<sup>37</sup> (n 34), s. 2(9).

<sup>38</sup> (n 34), s. 34.

<sup>39</sup> (n 34), s. 35.

<sup>40</sup> of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services

<sup>41</sup> (n 17).

goods protected by SOGO<sup>42</sup>. Therefore, the creation of the category for digital content is sufficient in the context of Hong Kong.

## 4.2 Legislative Expansion of Online Buyer's Rights

A second proposed solution is that the legislature not only includes digital content under the consumer protection regime, but also expands rights and remedies for online purchasers. As discussed, there is currently no right to information about the goods, limited remedies in case of breach, and duty for the seller to deliver within a certain period in online purchase. Legislation is a more effective solution to guarantee such rights, as it imposes buyers' rights and remedies without requiring consumers to negotiate with sellers under a weaker bargaining position.

### *Right to information*

In the United Kingdom, the CCRs Schedule 2 lists the information that online sellers must provide for distance contracts, including, *inter alia*:-

- (a) product information such as a description of the goods or services, the price, details of any delivery costs and the arrangement for delivery;
- (b) identity of sellers and contact details; and
- (c) information about cancellation rights and goods return/refund policy.

Consumers' right to cancel a distance contract within 14 days after the contract is entered into<sup>43</sup> extends by 12 months if the trader fails to provide the required information<sup>44</sup>. Upon cancellation, the trader must reimburse payments<sup>45</sup>.

Establishing an implied right to information can prevent the reckless behaviours by online sellers and inform consumers in making purchase decisions. First, electronic purchases are made by the buyer paying online and the seller subsequently delivering. The absence of contact between the buyer and the goods and even the seller means that online buyers

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<sup>42</sup> (n 16).

<sup>43</sup> (n 34), s. 20(2).

<sup>44</sup> (n 34), s. 31(3).

<sup>45</sup> (n 34), s. 34.

cannot examine goods or samples as in traditional purchases. Yet, consumers require detailed information about the goods to know if it suits their needs and compare it with similar ones in the market. Therefore, the provision of relevant and truthful information about online goods is crucial for online buyers to make informed purchase choices<sup>46</sup>. Second, with necessary identity and contact information about the seller, buyers can better identify legitimate sellers, hence avoid entering into contracts with bad-faith sellers that deliver late or vanish after payment. In contrast, the current rhetoric from government departments asking victims of fraud should be more “vigilant”<sup>47</sup> when purchasing online does not address the core issue, which is that buyers lack information to understand who and what they are purchasing from. Thirdly, requiring online vendors to provide cancellation or refund policy provides consumers with more information as to their formal channels of redress, enhancing legal certainty to conduct their behaviours.

### *Right to repair or replace*

The right to repair or replace obviates the need to repurchase another substitute, saving costs for consumers. This can also discourage planned obsolescence<sup>48</sup> in industries including smartphones, where manufacturers engineer goods with shorter lifespans to stimulate consumers to purchase the same product more frequently. With a buyer’s right to repair or replace, the vendor would bear the costs of completing the repair or supplying a new product. Hence, this reduces the practice of planned obsolescence. However, caution should be exercised in determining the precise period under which consumers can exercise this right. It has been argued that bad-faith manufacturers would engineer goods with lifespan that coincides with the warranty period<sup>49</sup>, perpetuating the problem of planned obsolescence.

Establishing a right to repair or replace is of particular importance in Hong Kong, where citizens show a habit of over-consumption in online

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<sup>46</sup> Shofie, Y. (2013). *Consumer Protection and Legal Instruments*. Citra Aditya Bakti, Bandung

<sup>47</sup> (n 30).

<sup>48</sup> Malinauskaite, J. & Erdem, F. B. (2021). Planned Obsolescence in the Context of a Holistic Legal Sphere and the Circular Economy. *Oxford Journal of Legal Studies*. 41(3): 719-749.

<sup>49</sup> Stefan W & Larry M. (2019). Comparative Warranty Law: Case of Planned Obsolescence. *University of Pennsylvania Journal of Business Law*: 21(4): 907-977.

shopping<sup>50</sup>, causing wastage of goods and money. A default right to repair or replace goods would create a legal certainty for consumers that the vendor would provide such service. The law should serve an educational function by encouraging society to reuse goods that could still be repaired or replaced.

CRA s. 23 in the UK creates a consumer's right to repair or replacement unless it is impossible or disproportionate compared to other remedies to do so. It requires the trader to bear the costs incurred in the repair or replacement. If the goods do not conform to the contract after one repair or replacement, the consumer has a right to a price reduction or the right to reject<sup>51</sup>.

An alternative approach is taken by the United States, where the Digital Fair Repair Act<sup>52</sup> of New York State requires manufacturers to provide information necessary for repairing. The newly enacted legislation requires manufacturers to provide diagnostic and repair information about digital electronic parts to consumers to authorised repair providers and provide equipment to such repair providers. The law intends to allow consumers and third-party repair providers to complete repairs over electronic devices.

It is suggested that the approach in the UK should be adopted. A default right to repair or replacement provides greater certainty that the non-conforming goods would receive repair or replacement, compared to merely receiving information about repairing. Consumers should not bear the costs and spend time on the repair process, when the trader has contractual duty to provide goods that conform to the contract and fall short of such standard. Alternatively, a reform could further incorporate the approach in the Digital Fair Repair Act by requiring sellers to provide repair information when it is impossible or disproportionate for them to do so. This is taking into account the fact that the seller of goods is not

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<sup>50</sup> Ng, N. (2017). Hongkongers' shopping habits among unhealthiest in the world, survey reveals. <https://www.scmp.com/news/hong-kong/education-community/article/2093298/hongkongers-shopping-habits-among-unhealthiest>

<sup>51</sup> (n 34), s. 24(5).

<sup>52</sup> S4104-A/A7006-B.

necessarily the manufacturer in a supply chain<sup>53</sup> and therefore lacks the requisite technical expertise to perform the repair. An opportunity for the seller to provide manufacturer's repair information, if available, to consumers can facilitate repair if requested.

### *Right to refund*

On a similar vein, consumers should be entitled to a right to refund. If the seller's breach of contract causes it to be terminated, consumers should be compensated for the sums paid. Refunding can provide expeditious recovery of payment, in contrast with initiating a legal action by consumers.

Although major global and Hong Kong e-commerce platforms globally have published their refund policies, there is no guarantee that small e-commerce platforms would provide a right to refund. Moreover, such refund policies are often inconsistent with each other. Considering that the e-commerce industry has recognised consumers' need to receive refund, the legislature should step in to set a default right to refund with a standard timeframe for sellers to refund buyers.

For example, the UK CRA s. 20(15) requires traders to refund to the consumer within 14 days from the day on which they agreed that the consumer is entitled to one. If the consumer treats the contract as an end, the trader must reimburse all payments made under the contract without undue delay, per s. 28(9). Similarly, in Australia, under the Australian Consumer Law<sup>54</sup> s. 99(1), the supplier must refund to the consumer all amounts paid under the agreement upon termination of the contract, and pecuniary penalty may be imposed for the failure to do so.

### *Seller's duty to deliver*

Finally, it is suggested that the legislature could impose a statutory duty on sellers to deliver within a default time frame to address the issue of late delivery common in online shopping. A default delivery period can encourage speedier delivery and provide a remedy for consumers. For

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<sup>53</sup> Storey, J. et al. (2006). Supply chain management: theory, practice and future challenges. *International Journal of Operations & Production Management*, 26(7): 754-774.

<sup>54</sup> Schedule 2 to the Competition and Consumer Act 2010.

example, the UK, CRA s. 28(3) sets out a default delivery period of 30 days, during which the seller needs to deliver unless a longer period has been agreed. If the seller fails to deliver as agreed, the e-consumer affected has the right to terminate the purchase (s. 28(6)) and request a full refund.

### 4.3 Industry self-regulation

It has also been recommended that the e-commerce industry should continue to regulate itself. Under this line of argument, lawmakers should refrain from interfering with a specific industry, allowing those within it to regulate their own behaviour. Major e-commerce platforms have already set out their own refund, return and cancellation policies. In addition, industry self-regulation agreements may allow the e-commerce industry to identify and abide by certain standards. international organisations have published industry self-regulation agreements, such as the World Customs Organisation's Framework of Standards on Cross-Border E-Commerce. Specific sectors such as internet advertising in the United States have also developed enforcement programmes that hold actors accountable<sup>55</sup>.

A major argument for industry self-regulation is that the e-commerce industry is in the best position to flexibly adjust to its needs<sup>56</sup>. Individual firms can receive direct customer feedback through customer support channels or otherwise, and collect internal data to identify potential violations of rights and fraudulent activities<sup>57</sup>. They can also tailor-make technological solutions to respond to technological advances that cannot be adequately addressed by existing regulations.

However, it is difficult to justify the different treatment of online purchase compared with in-purchase purchase from the perspective of consumers. Online consumers pay and expect to receive goods conforming to contractual agreement on time, same as consumers in a physical setting.

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<sup>55</sup> Organisation for Economic Co-operation and Development. (2015). Industry self-regulation: role and use in supporting consumer interests.

<sup>56</sup> Zhao, Y., 2005. *Dispute Resolution in Electronic Commerce*. Leiden/Boston.

<sup>57</sup> (n 26).

As businesses are profit-driven, they may be slow to respond to consumer needs<sup>58</sup>.

#### 4.4 Liability on E-commerce platforms

Hong Kong legislations including SOGO and its common law often place liability on the seller to fulfil certain duties, whether civil or criminal. The e-commerce platform itself is not subject to such legislative scrutiny, as the traditional sales process does not usually involve such an intermediate party. Yet, e-commerce platforms are crucial for online sales to occur. They collect and disseminate information about goods and connect sellers to buyers. They set terms and conditions for users to abide by as a prerequisite of using its services. Hence, a potential direction of reform is imposing a duty on e-commerce operators, in addition to those on the sellers.

In 2018, China adopted the E-Commerce Law of the People's Republic of China, which places much greater responsibility on e-commerce platform operators to protect consumer interests. Under the E-Commerce Law, e-commerce operators must verify, register, and update identification and contact information of business operators on the platform (Art 27), and retain the information for no less than three years (Art 31).

Moreover, e-commerce platforms are jointly and severally liable for online sellers' non-compliance of legislative requirements for consumer rights, if they "know or should know" the goods or services supplied do not comply with relevant consumer protection requirements (Art 38). In addition, for goods relating to life or health of consumers, e-commerce platform operators can be liable for their failure to examine the qualification of business operators or fulfil the obligation to safeguard consumer safety, which causes damage to consumers (Art 38).

Hence, one way of reforming the Hong Kong legal framework is to impose a duty on platforms to verify sellers. This can ensure a more comprehensive enforcement as platforms have more resources and technical expertise than the government to enforce consumer protection

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<sup>58</sup> (n 57).

laws. If they are or ought to be aware that a seller is potentially infringing consumer protection requirements, they should be under a duty to prevent or mitigate it.

However, direct regulation of e-commerce platforms necessarily presumes that the technology revolving around it would not change, but this is rarely the case. Other services akin to traditional e-commerce continuously spurt, from peer-to-peer markets that allows consumers to resell used items to electric platforms that connect drivers to passengers, there would only be more possibilities for e-commerce development. Yet, the needs of consumers using each service are not the same, there may not be a one-size-fit-all solution to protect consumers. A blanket legislation over all e-commerce platforms would either fail to protect consumers on certain platforms or become excessively rigid that it stifles e-commerce activities for a platform.

Also, while large e-commerce platform operators such as Amazon have the resources to procure compliance from every seller, smaller operators may not<sup>59</sup>. This would lead to a higher barrier of entry into the market, causing market monopolisation by few players and reducing consumer choices which harm consumers' interests. Therefore, the legislature should be cautious with the approach of imposing a duty on platforms to enforce consumer protection regulations.

## **5. Conclusion**

The emerging popularity of e-commerce demands that online consumers requires adequate legal protection, yet little has been done to cater to their needs. Among the reform options discussed, imposing a liability on e-commerce platforms is too restrictive on platforms while industry self-regulation is too lax to secure adequate consumer protection. Meanwhile, the expansion of current consumer protection laws to a new category of digital content and broadening the rights of buyers can complement each other to protect consumers without placing too great a burden on sellers. Therefore, these two reform options are recommended.

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<sup>59</sup> Soo, Z. (2019). Here's how China's new e-commerce law will affect consumers, platform operators. <https://www.scmp.com/tech/apps-social/article/2180194/heres-how-chinas-new-e-commerce-law-will-affect-consumers-platform>