

## **Digital content and the definition dilemma under the Sale of Goods Act 1979: Will the Consumer Rights Bill 2013 remedy the malady?**

**Althaf Marsoof**

PhD candidate

The Dickson Poon School of Law

King's College London

althaf.marsoof@kcl.ac.uk

**Abstract.** The Sale of Goods Act 1979 (“SGA”) that is in force in the United Kingdom (UK) is ill suited for the Twenty First Century. Since the term “goods” defined in the SGA does not extend to the sale of digital content, buyers of digital content are robbed of the protection guaranteed by the implied terms found therein. This analysis considers the recent Consumer Rights Bill 2013 that was presented in Parliament by the UK’s Government and evaluates its suitability in overcoming the deficiencies in the SGA in relation to the sale of digital content.

### **Introduction**

The Sale of Goods Act 1979 (“SGA”) became law almost a third of a century ago at a time when computers and the Internet were still in their incubatory stages. With the effluxion of time, the commercial world has evolved tremendously leading to novel ways in which sale of goods transactions are made. Not only did the law have to keep pace with these changes, but also provisions that aimed at protecting consumers were specifically incorporated into the SGA shifting the regime from one of *caveat emptor* to one of *caveat venditor*. Yet, notwithstanding these amendments, the SGA is still a thing of the past ill suited to deal with certain transactions taking place in the Twenty First Century.

This brief analysis aims to critically assess the applicability of the SGA to the sale of digital content over the Internet, and then goes on to consider whether the Consumer Rights Bill 2013 effectively overcomes the problematic outcomes the SGA has given rise to.

### **The sale of “digital content”—are digital content “goods” under the SGA?**

Today, the Internet has become a prominent marketplace where goods that previously comprised physical characteristics are now sold as digital content. A typical example is eBooks, or electronic books, that are downloadable into the buyer’s electronic device upon a purchase. But for the lack of tangibility, the nature of transactions relating to the sale of digital content is in every sense identical to transactions concerning physical goods. In the circumstances buyers of digital goods ought to be given the same legal protection as those who purchase goods bearing physical characteristics. It is in this context that one must pose the question whether digital content are “goods” for the purposes of the SGA. Why this question becomes important is because the operation of the SGA is limited to transactions pertaining to “goods”. This becomes patently clear when s 1(1) of the Act provides:

‘This Act applies to contracts of sale of goods made on or after (but not to those made before) 1 January 1894.’

And a contract of sale of goods “...is a contract by which the seller transfers or agrees to transfer the *property in goods* to the buyer for a money consideration, called the price” (s 2(1)). What is

noteworthy here is that the SGA applies specifically where the subject matter of a contract of sale is a good, as opposed to other types of property such as immovable or intangible property.<sup>1</sup> The Act provides a definition for the term “goods” in s 61 to include:

‘...all personal chattels other than things in action and money... and in particular “goods” includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale...’

It cannot be doubted that one of the key features of the SGA is its implied terms. Whether a sale of goods transaction is a business-to-business transaction or a consumer transaction, the SGA provides certain assurances through its implied terms provisions. Thus, where a contract is made for the sale, or future sale, of goods there is an implied term that the seller shall have title to the goods at the point of sale (s 12). Where a sale of goods takes place by description there is an implied term that the goods shall correspond with the description upon which the goods were sold (s 13). Where the sale is by sample there is an implied term that the goods shall correspond with the sample (s 15). Most importantly, buyers are safeguarded by an implied term as to quality and fitness (s 14). While it is these implied terms that have played a crucial role in transforming the sale of goods regime to one of *caveat venditor*, unless a sale transaction could be regarded as a sale of “goods” these implied terms under the Act would be inapplicable to such transactions.

The difficulty in applying the SGA and its provisions to digital content has been eloquently highlighted in a research report prepared for the UK Department of Business, Innovation and Skills.<sup>2</sup> The report pointed out:

‘In 2009 the then UK government... committed itself to a high level of consumer protection in relation to digital products, undertaking to ensure that “the core principles of consumer protection” apply to sales of digital products. Those core principles seem reasonably to be identified as the implied terms contained in sections 12 to 15 of the SGA 1979 and the corresponding provisions of other statutes governing the supply of goods.’<sup>3</sup>

To date, the discussion as to the applicability of the SGA to sales of digital content has been significantly dominated by discourses on computer software transactions, although “[i]n modern times an important point, not yet wholly resolved, is whether computer software may constitute ‘goods’ within the meaning of the Act.”<sup>4</sup> In other words, “[i]t has never been authoritatively decided whether goods include [...] computer software.”<sup>5</sup> The very definition of “software” postulates its intangible character. An oft cited definition of software, or computer program, was provided by the Australian Federal Court in *Apple Computers Inc. and another v. Computer Edge Pty Ltd and Suss* as a “...concise set of instructions that directs the computer to do the tasks required of it step by step and to produce the desired result.”<sup>6</sup> Thus, the value in software appertains to a set of instructions and it cannot be disputed that instructions are *per se* intangible although they can be incorporated in physical objects for future reference. Although computer software is complex and unique (as depending on whether it is off-the-shelf or tailor-made, the legal implications could be different), it shares fundamental characteristics with most other digital content, and therefore a consideration of how courts have treated software in the light of sale of goods disputes is a useful exercise in determining the status of digital content in relation to the SGA. For example, in the case of a novel or a music video what is important is the subject matter of the novel or music video and not the media upon which it is distributed. The value of a novel or a music video is in its copyright, just as for computer programs.

The question whether software is a “good” for the purposes of the SGA has been considered in several cases. In the seminal case of *St Albans City and District Council v. International Computers*

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<sup>1</sup> John N. Adams and Hector MacQueen, *Atiyah’s Sale of Goods* (12 ed, Longman, Harlow 2010), 74.

<sup>2</sup> Robert Bradgate, ‘Consumer Rights in Digital Products’ (September 2010) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31837/10-1125-consumer-rights-in-digital-products.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31837/10-1125-consumer-rights-in-digital-products.pdf)> accessed 17 November 2013.

<sup>3</sup> *Ibid*, [10].

<sup>4</sup> Adams and MacQueen (n1), 74.

<sup>5</sup> Ewan McKendrick (ed), *Goode on Commercial Law* (4<sup>th</sup> ed, Penguin, London 2010), 213.

<sup>6</sup> [1984] FSR 481.

*Ltd*<sup>7</sup> the English Court of Appeal (CoA) was confronted with this question in relation to a software transaction. This case involved computer software that was transferred on a computer disk. It is to be noted that while the software itself is intangible and therefore cannot be regarded as a “good”, the computer disk is undoubtedly a good for the purposes of the SGA. The CoA, framed the question in the following terms:

‘If a disc carrying a program is transferred, by way of sale or hire, and the program is in some way defective, so that it will not instruct or enable the computer to achieve the intended purpose, is this a defect in the disc? Put more precisely, would the seller or hirer of the disc be in breach of the terms as to quality and fitness for purpose implied by section 14 of the SGA...?’<sup>8</sup>

Glidewell L J answered this question by using the analogy of an instruction manual:

‘Suppose I buy an instruction manual on the maintenance and repair of a particular make of car. The instructions are wrong in an important respect. Anybody who follows them is likely to cause serious damage to the engine of his car. In my view the instructions are an integral part of the manual. The manual including the instructions, whether in a book or a video cassette, would in my opinion be “goods” within the meaning of the SGA, and the defective instructions would result in a breach of the implied terms in section 14.’<sup>9</sup>

Accordingly, the Court had brought a transaction pertaining to the sale of software—in reality software comprising a set of computer instructions that are strictly intangible—in to the realm of the SGA provided the software was sold in a computer disk. Thus, it was the physical characteristics of the “disk” that enabled the Court to apply the SGA to such a transaction.<sup>10</sup>

The CoA’s approach in *St Albans* has been criticised for over-reliance on the media upon which the software was transferred. The Court’s over-emphasis on the physical media becomes apparent when it observed “... if the disc is sold or hired by the computer manufacturer, but the program is defective, [...] there would *prima facie* be a breach of the terms as to quality and fitness for purpose implied by the SGA...”<sup>11</sup> One commentator has suggested:

‘...in *St Albans* the ‘fitness for purpose’ test was wrongly applied to software transactions. The question is; ‘what is sold?’ Is it the carrier-media, or software? If the answer is ‘software’ it is illogical to apply the ‘fitness for purpose’ test to the carrier-medium and subject the contract to the implied terms of the Sale of Goods Act... Drawing an analogy, it is illogical to state that a container is not fit for its purpose, if the car is defective, as the contract was for the sale of a car and not the container.’<sup>12</sup>

In fact, Lord Penrose in *Beta Computers (Europe) Ltd v. Adobe Systems (Europe) Ltd*<sup>13</sup> doubted whether treating software as a “good” merely for the purpose of affording a consumer the protection under the SGA was a logical approach.<sup>14</sup>

The CoA’s decision in *St. Albans* begs a further, and more serious, question. What if software was simply downloaded without being transferred on any physical media? If Glidewell L J’s logic were applied, such a transaction would not come within the ambit of the SGA as nothing that formed the

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<sup>7</sup> [1997] FSR 251.

<sup>8</sup> *Ibid*, 265.

<sup>9</sup> *Ibid*.

<sup>10</sup> This approach was accepted, albeit *obiter*, in the subsequent case of *The Mayor and Burgesses of the London Borough of Southwark v IBM UK Limited* [2011] EWHC 549 (TCC), [95]-[97].

<sup>11</sup> *Ibid*, 226.

<sup>12</sup> Althaf Marsoof, ‘A case for sui generis treatment of Software under the WTO regime’ (2012) 20(4) *International Journal of Law and Information Technology*, 291, 305.

<sup>13</sup> [1996] FSR 367.

<sup>14</sup> *Ibid*, 376 – “It the somewhat odd result that the dominant characteristic of the complex product, in terms of value or of the significant interests of parties, would be subordinated to the medium by which it was transmitted to the user in analysing the true nature and effect of the contract.”

subject matter of the contract had a physical characteristic—defying the definition of “goods”. In fact, Glidewell L J went on to distinguish between software *per se* and software on physical media.<sup>15</sup> This is precisely the problem that the current SGA poses to software transactions, and arguably to any transaction that relates to the sale of digital content. While courts have managed to bring digital content sold in physical carrier media within the purview of the SGA, digital content that are transmitted electronically escape the provisions of the SGA. In other words, the SGA, owing to its definition of the term “goods” is ill suited to deal with digital content—and is therefore not technologically neutral, in that it is applied by courts in a discriminatory fashion favouring digital content transferred over physical carrier media over those that may be simply downloaded without the aid of any physical carrier media.

### Could a single Consumer Rights Bill remedy the malady?

It is in these circumstances that the UK’s Government has called for reforms in the area of consumer protection laws. Thus, the Government published a report titled “Better Choices: Better Deals – Consumers Powering Growth” in 2011 aiming to create a simple and modern framework for consumer protection law in the UK.<sup>16</sup> Accordingly, the Consumer Rights Bill 2013 (“the Bill”) was presented to give effect to these aims.<sup>17</sup> While the Bill “...sets out a framework that consolidates in one place key consumer rights covering contracts for goods, services, digital content and the law relating to unfair terms in consumer contracts,” given the difficulty in bringing the sale of digital content to the coverage of the SGA (as discussed hitherto), the Bill no doubt will play a crucial role in providing better protection to consumers of digital content.

The Bill would arguably apply to a wide range of digital content, from computer software, films, music, games to e-books and apps. The Standard Note on the Bill succinctly points out the problem concerning digital content:

‘The problem is that the existing consumer law pre-dates the digital content era. As a result, the SGA 1979 treats digital content as ‘goods’ if they are provided in a physical format such as a CD or DVD. However, where such products are delivered via ‘intangible media’ (e.g. a digital file for software, games, music files, or films) they fall outside the conventional definition of ‘goods’. In short, there is a significant gap in consumer protection.’<sup>18</sup>

The Bill defines “goods” as “... any *tangible* moveable items, but that includes water, gas and electricity if and only if they are put up for supply in a limited volume or set quantity” (emphasis added).<sup>19</sup> It is noteworthy that the Bill does not seek to add digital content to the definition of “goods”.<sup>20</sup> Instead, the Bill deals with digital content separately under Chapter 3 and defines “digital content” as “... data which are produced and supplied in digital form.”<sup>21</sup> Thus, in terms of clause 35 in Chapter 3, the Bill applies to contracts between a trader and a consumer where *inter alia*<sup>22</sup> a trader

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<sup>15</sup> Sarah Green and Djakhongir Saidov, ‘Software as goods’ (2007, March) *Journal of Business Law* 161, 164. See also, Ken Moon, ‘The nature of computer programs: Tangible? Goods? Personal Property? Intellectual Property?’ (2009) 8 *European Intellectual Property Review* 396.

<sup>16</sup> Lorraine Conway, *Draft Consumer Rights Bill – Commons Library Standard Note*, Standard note SN06588 (14 November 2013) <<http://www.parliament.uk/briefing-papers/SN06588>> accessed 20 November 2013.

<sup>17</sup> Consumer Rights Bill 2013 (June 2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/20656/bis-13-926-draft-consumer-rights-bill-explanatory-notes.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/20656/bis-13-926-draft-consumer-rights-bill-explanatory-notes.pdf)> accessed 20 November 2013 (hereinafter “the Bill”).

<sup>18</sup> *Ibid.*, 8.

<sup>19</sup> The Bill (n17), s 2.

<sup>20</sup> Consumer Rights Bill Explanatory Notes (12 June 2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/20656/bis-13-926-draft-consumer-rights-bill-explanatory-notes.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/20656/bis-13-926-draft-consumer-rights-bill-explanatory-notes.pdf)> accessed 20 November 2013 (hereinafter “Explanatory Notes”), paragraph 39.

<sup>21</sup> The Bill (n17), s 2.

<sup>22</sup> Other instances include contracts between a trader and a consumer where a trader provides or agrees to provide digital content that are associated with any paid for goods, digital content or services (e.g. free software given away with a paid-for magazine), and/or paid for with a facility, such as a token, virtual currency, or gift voucher, that was originally purchased with money (e.g. a magic sword bought within a computer game that was paid for within the game using “jewels” but those jewels were originally purchased with money).

provides or agrees to provide digital content that has been paid for with money. Accordingly, clause 36 to 38 guarantees that all digital content purchased must be of satisfactory quality, be fit for a particular purpose and correspond to the description upon which they were sold.

Clause 43 of the Bill provides that every contract to supply digital content will be subject to an implied term that the seller or trader must have a *right* to provide the digital content to the consumer. Where this term is breached, the consumer will be entitled to a full refund of the purchase price.<sup>23</sup> This is a useful remedy that could protect consumers from the sale of counterfeit digital content – as those who sell counterfeit goods do so without having any “rights” over the subject matter of the transaction. In relation to the sale of counterfeit digital content, only owners of intellectual property rights have a right of action against those who sell such counterfeit digital content, whereas pursuant to clause 43 of the Bill consumers could also seek a full refund where they are sold counterfeit digital products.<sup>24</sup>

The approach under the Bill in relation to digital content seems apt, but for the following criticism. It is important to note that although clause 12 of the Bill incorporates an implied term that guarantees the seller’s right to provide the digital content at the time of entering into a contract, the additional protection that the consumer shall enjoy the quite possession of the goods that are transferred pursuant to a sale of goods contract does not apply to digital content.<sup>25</sup> The non-applicability of this guarantee to digital content is surprising as at least in the context of software this implied term had been invoked in the past where the seller had installed a “time lock” device in a software system that was supplied rendering it completely useless after the device was activated – the court concluding that this was sufficient to trigger a breach of the implied term as to quite possession under s 12(2)(b) of the SGA.<sup>26</sup>

Secondly, the sale by sample guarantee available under the SGA, as well as under the Bill in clause 12 for goods, does not exist for digital content.<sup>27</sup> While it might be thought that digital content are usually not sold by sample, the non-existence of such an implied term may raise some concern as digital content might be sold by sample just as in the case of tangible goods. For example, sometimes purchasing a limited license to a particular software may provide the user with access to a trial version that would expire within a given period of time. It might be argued that the trial version is akin to a sample, the complete and full product being accessible to the user upon the payment of the full purchase price. Thus, in the event the purchaser of software under a limited license decides to purchase the full version at the end of the trial period, and the final product does not correspond with the product that was supplied for his use during the trial period, arguably this could be treated as a breach of the sale by sample guarantee. A second example relates to the software development process. Software development often takes place utilising prototypes and these prototypes could serve as a sample. Of course, it might be contended (in the second example) that where software is developed in this fashion for the specific needs of a consumer the transaction is not a sale of software, but rather a supply of software development services. Yet, it might have been useful to have this implied term in respect of digital content, as given the constantly evolving nature of the Internet and related technologies it might be reasonable to envisage digital content to be sold with reference to samples, if not now in the not so distant future.

Thirdly, the inclusion of computer software under digital content may raise some concerns. Unlike other forms of digital content, software could be twofold– off-the-shelf or tailor-made.<sup>28</sup> While off-the-shelf software might be regarded as digital content giving rise to similar transactional characteristics to the sale of tangible goods, the supply of tailor-made software is a service, the outcome of the supply of such service being the delivery of software either electronically or on a physical carrier medium. Thus,

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<sup>23</sup> The Bill (n17), s 44(4).

<sup>24</sup> It must be noted that a similar implied term as to “title” and “quite possession” exists under the SGA (s 12) that arguably could be used by innocent buyers against those who sell counterfeit tangible goods.

<sup>25</sup> See, Clause 16(2)(c) of the Bill and s 12(2)(b) of the SGA.

<sup>26</sup> *Rubicon Computer Systems Limited v. United Paints Limited* (2000) 2 T.C.L.R. 453.

<sup>27</sup> It is equally noteworthy that the sale by model guarantee applicable to goods (under clause 13 of the Bill) has not been provided for digital content.

<sup>28</sup> Marsoof (n11), 302 – “Software, that is developed for mass marketing without tailoring it for an individual customer is one kind. These are called off-the-shelf software. This may be compared to the sale of a car in a showroom. The other is customized software that is tailored for the use of a particular customer, known as tailor-made software. Tailor-made software is regarded as a supply of service analogous to the supply of carpentry or architectural services rather than a sale of goods” (citations omitted).

categorising software as digital content may not be accurate. Despite this inaccuracy that arises owing to the complex and unique nature of software, the Bill overcomes this problem by providing for “mixed contracts”—that is, contracts where both goods and service elements exist in a single contract.<sup>29</sup> The aspects of a contract that relate to the digital content on the one hand and the service on the other would therefore attract rights under different parts of the Bill. Where a service was not supplied with reasonable care and skill, a consumer would have recourse under the Bill just as under s 13 of the Supply of Goods and Services Act 1982 (as amended). However, the “mixed contract” approach under the Bill may create some uncertainty. For example, in the context of tailor-made software, which is clearly a supply of a service with an end product (the software) being delivered at the end, would a consumer be entitled to sue the supplier under the implied terms provisions relating to digital content, or in the alternative under the “reasonable care and skill” provision relating to the provision of services, or both?

Lastly, and perhaps most importantly, the key consumer protection provisions in the Bill apply only to individual consumers excluding small businesses and other legally incorporated bodies.<sup>30</sup> This narrow approach to the definition of the term “consumer” could be traced to the Consumer Rights Directive (“CRD”)<sup>31</sup> which defines “consumer” narrowly as:

‘...any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession.’<sup>32</sup>

Interpreting the term “consumer” in Art. 2 of Directive 93/13/EEC (which was amended by the CRD) the Court of Justice of the European Union observed in the *Idealservice* case:

‘It is thus clear from the wording of Article 2 of the Directive that a person other than a natural person who concludes a contract with a seller or supplier cannot be regarded as a consumer within the meaning of that provision.’<sup>33</sup>

Social scientists when providing insights into consumers, consumer behaviour and consumption on the one hand and their relationship with the law on the other, they do so *without* any explicit reference to “natural persons”. Yet, such an “...expanded consumer definition is not recognised at the European level,”<sup>34</sup> and this narrow approach has seeped into the Consumer Rights Bill 2013. While making consumer specific legislation is useful in the context of providing a more comprehensive system of consumer protection, it must be remembered that the implied terms under the SGA applies to sale of goods contracts between any seller and buyer whether the buyer is an individual consumer or a legal entity. In other words, the SGA does not discriminate between buyers that are natural persons and those that are legal entities. As a consequence, the definition dilemma emanating from the definition of “goods” in the SGA would continue in relation to the sale of digital content when the buyer is not an individual consumer – as the Bill once it becomes law would not apply to legal entities. Limiting the application of the Bill only to “natural persons” questions the pragmatism of the Bill and no doubt leads to a discriminatory outcome.

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<sup>29</sup> Explanatory Notes (n17), paragraph 34.

<sup>30</sup> *Ibid*, paragraph 37.

<sup>31</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

<sup>32</sup> *Ibid*, Art. 2(1). See also, Margus Kingisepp and Age Värvi, ‘The Notion of Consumer in EU Consumer *Acquis* and the Consumer Rights Directive—a Significant Change of Paradigm?’ (2011) XVIII *Juridica International* 44 and Martin Ebers, ‘The notion of “consumer” in *EC Consumer Law Compendium – A comparative Analysis* (February 2008) <[http://ec.europa.eu/consumers/rights/docs/consumer\\_law\\_compendium\\_comparative\\_analysis\\_en\\_final.pdf](http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf)> accessed 20 November 2013, 713.

<sup>33</sup> Joined cases of *Cape Snc v. Idealservice Srl* (C-541/99) and *Idealservice MN RE Sas v. OMAI Srl* (C-542/99), [16].

<sup>34</sup> James Devenney and Mel Kenny (eds), *European Consumer Protection: Theory and Practice* (CUP, Cambridge, 2012), 130.

This view becomes more explicit upon a consideration of the provisions of the UK's Unfair Contract Terms Act 1977 (as amended) ("UCTA") a piece of legislation that aims to protect consumers from harsh exemption clauses in *inter alia* sale of goods contracts. The meaning afforded to a "consumer contract" under the UCTA is not limited to consumers that are "natural persons". Section 25(1) of the UCTA defines a "consumer contract" to mean:

'...subject to subsections (1A) and (1B) below, a contract. . . in which —

- (a) one party to the contract deals, and the other party to the contract ("the consumer") does not deal or hold himself out as dealing, in the course of a business, and
- (b) in the case of a contract such as is mentioned in section 15(2)(a)<sup>35</sup> of this Act, the goods are of a type ordinarily supplied for private use or consumption;

and for the purposes of this Part of this Act the onus of proving that a contract is not to be regarded as a consumer contract shall lie on the party so contending.'

It is important to note that the application of s 25(1) is qualified by subsections (1A) and (1B) of that section, and the qualification in subsection (1A) exemplifies the proposition that both natural and legal entities are to be regarded as "consumers" although the former is given greater protection than the latter. Thus, when a consumer is an "individual", s 25(1)(b) must be disregarded, by which one could draw the inference that the nature of the goods is irrelevant when the consumer is an individual.

Whereas, when the consumer is not an individual—meaning where the consumer is a "legal entity"—the goods must be of such a nature that they are ordinarily supplied for private use or consumption. This means that so long as a legal entity "does not deal, or hold [itself] as dealing, in the course of a business" and the goods purchased "are of a type ordinarily supplied for private use or consumption", such a legal entity would be regarded a "consumer" to which the UCTA applies. Although the meaning of "in the course of a business" may seem to limit the application of the UCTA, this is not necessarily the case.<sup>36</sup> As Adams and MacQueen point out:

'Where a transaction was only incidental to a business activity a degree of regularity was required before a transaction could be said to be an integral part of the business, and so entered into in the course of a business. Clearly, however, a sale is not a consumer sale where the buyer buys for resale or where the goods are raw materials to be used by the buyer in his own manufacturing process.'<sup>37</sup>

This means that certain categories of transactions where the buyer is a legal entity could be regarded as a "consumer transaction" – an example being where a company purchases a coffee machine for its employees. Here the product is clearly being consumed by the legal entity and sufficiently irregular not to be regarded as "incidental to its business". Thus, it does not make sense to make the definition of the term "consumer" depend on the legal status of the purchaser under a contract of sale— what matters is the nature of the transaction. So long as goods are "consumed" and are not for resale or for the purpose of manufacturing goods or supplying services, the nature of the entity that acquires the goods should not matter.

Just as the Consumer Rights Bill 2013 proposes to do, the Australian Consumer Law ("ACL")<sup>38</sup> was an enactment that consolidated all consumer protection laws in Australia into one piece of legislation. The ACL defines "consumer" as follows:

'A person is taken to have acquired particular goods as a *consumer* if, and only if:

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<sup>35</sup> Section 15(2)(a) refers to contracts that "... relates to the transfer of the ownership or possession of goods from one person to another (with or without work having been done on them)."

<sup>36</sup> Adams and MacQueen (n1), 229 citing *R & B Customs Brokers Co Ltd v. United Dominions Trust* [1988] 1 All E.R. 847 – "... the buyer only makes a contract I 'in the course of business' within the meaning of this section, either if the contract is one of a regular kind of contract made by the buyer, or if the purchase was an 'integral part of the business', that is (presumably) if the goods are bought for a distinctive business use."

<sup>37</sup> *Ibid*, 229.

<sup>38</sup> Competition and Consumer Commission Act 2010 (Cth), Volume 3, Schedule 2 ("Australian Consumer Law")

- (a) the amount paid or payable for the goods, as worked out under subsections (4) to (9), did not exceed:
  - (i) \$40,000; or
  - (ii) if a greater amount is prescribed for the purposes of this paragraph—that greater amount; or
- (b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or
- (c) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.<sup>39</sup>

Accordingly, it is not the nature of the recipient of the goods that matters, but the nature of the goods and price paid for the goods that determines if a sale is a consumer sale or not. This approach is more suitable than the approach under the Consumer Rights Bill 2013 that simply excludes legal entities from the definition of “consumer”. A legal entity could be a consumer just as much as a natural person.

Despite the need to extend the Bill to legal entities in limited circumstances, whether such an extension through a broader definition of the term “consumer” could be incorporated into the Bill is an important question that must be posed. This is so given the “maximum harmonisation” expectations under the CRD.<sup>40</sup> For instance, Art. 4 of the CRD provides:

‘Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, *including more or less stringent provisions to ensure a different level of consumer protection*, unless otherwise provided for in this Directive’ (emphasis added).

Recital 13 of the CRD, however, is an instance where the CRD provides for a deviation from maximum harmonisation rule and is important in relation to the harmonisation of the definition of “consumer”. The relevant parts of recital (13) are reproduced herein:

*‘...Member States may therefore maintain or introduce national legislation corresponding to the provisions of this Directive, or certain of its provisions, in relation to contracts that fall outside the scope of this Directive. For instance, Member States may decide to extend the application of the rules of this Directive to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises...’* (emphasis added).

Accordingly, the Government of the UK has no bar in adopting a broader definition for the term “consumer” to include legal entities, if it so wishes.

## Conclusion

There is no doubt that the Consumer Rights Bill 2013 is a timely introduction in order to simplify and strengthen consumer protection laws in the UK. This is so, especially where the application of the all important implied terms provisions in the SGA to certain modern day transactions concerning digital content is problematic. Although it is useful to consolidate all consumer protection provisions into a single law, a good example of such an exercise being the Australian Consumer Law, it is inapt to restrict the definition of “consumer” to only natural persons, as even legal entities could very well be regarded as consumers in appropriate circumstances. Moreover, as digital content ought to be treated just as tangible goods, all implied terms that protect buyers under the SGA in the context of sale of goods must be extended to digital content. Otherwise, digital content will still be subject to discriminatory treatment *vis à vis* their tangible counterparts despite the consistent view that digital content should be afforded equal treatment.<sup>41</sup>

<sup>39</sup> ACL, s 3(1).

<sup>40</sup> Consultation on the implementation of the Consumer Rights Directive 2011/83/EU (August 2012) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32690/12-999-consultation-implementation-of-consumer-rights-directive.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32690/12-999-consultation-implementation-of-consumer-rights-directive.pdf)> accessed 20 November 2013, 7.

<sup>41</sup> Bradgate (n2), paragraph 181.

### **About the author**

The author is currently pursuing his PhD research in Law at the Dickson Poon School of Law, King's College London. His research is funded by the Dickson Poon PhD Scholarship scheme. Prior to taking up Doctoral research, he completed his LL.M. at the University of Cambridge and is at present awaiting his M.Phil. qualification from the University of Queensland, Australia. He was admitted as an Attorney-at-Law in Sri Lanka in 2007 and is currently attached to the Sri Lankan Attorney General's Department as a State Counsel.

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