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CONSUMER PROTECTION IN BRITAIN IN NEED OF REFORM

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I. INTRODUCTION

IN the last three decades many acts and regulations[1] have been introduced in Britain to serve the interests of consumers and as a consequence a new branch of law has evolved: consumer protection.[2] These acts concern many aspects of public and private law. Within private law they mainly deal with contract law and the law of restitution.[3] For example, the Consumer Protection (Distance Selling) Regulations 2000[4] (henceforth CPR 2000), the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987[5] (henceforth CPR 1987), and the Consumer Credit Act 1974 (henceforth CCA 1974) confer a right on the consumer to cancel a contract.[6] This right of cancellation arises in the context of consumer protection. Yet from the perspective of private law it is part of the law of contract.[7] A cancelled contract is treated as if it had not been made[8] and as a consequence each party has to give back what he received under the contract. The contract is unwound. Again, any questions on how to unwind a contract belong only in a contextual sense to the law of consumer protection. On our map of private law they are part of the law of restitution.

If one turns to traditional textbooks on contract and restitution one is rather surprised that they, however, tend to ignore acts on

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[1] For reasons of simplicity henceforth I will use the term act to include the term regulation as well.

[2] On the history of consumer law see, *e.g.*, W.C.H. Ervine, "Consumer Law", in: *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol. 6 (Edinburgh 1988), ss. 2 ff.

[3] In Scotland one speaks of the law of unjustified enrichment. In England Birks favoured the term unjust enrichment: Peter Birks, *Unjust Enrichment* (Oxford 2003). For reasons of simplicity henceforth I will omit these terms and only speak of restitution.

[4] S.I. 2000/2334.

[5] S.I. 1987/2117.

[6] CPR 2000, reg. 10(1); CPR 1987, reg. 4(5); CCA 1974, s. 67.

[7] On questions of the classification of private law see, *e.g.*, Peter Birks, "Definition and Division: A Meditation on *Institutes* 3.13", in Birks (ed.), *The Classification of Obligations* (Oxford 1997), pp. 1 ff.

[8] CPR 2000, reg. 10(2); CPR 1987, reg. 4(6); CCA 1974, s. 69(4).

the protection of consumers.[9] Instead one finds a number of textbooks on consumer protection which discuss the different acts. However, these textbooks do not put these acts into their contractual and restitutionary context. Furthermore, these acts are often not compared with each other although they regularly deal with comparable matters. Instead, they are presented isolated from each other.

This treatment of consumer protection in the literature is unsatisfactory: most of these acts for the protection of consumers are based on, or have been modified as a consequence of, European directives.[10] One of the aims of the European Communities is to harmonise consumer protection.[11] However, it has been observed that this harmonisation on a European level has caused fragmentation on a national level in some member states.[12] This fragmentation has two main reasons. (1) The European legislator is said often to disregard legal principles which are basically common to all member states. As a consequence, when a national legislator implements European directives, problems may be solved by these new acts differently than in the original national law. Thus, European legislation may cause friction between the national laws and the newly implemented directives. (2) Furthermore, in some member states, such as Britain, the different directives have been introduced as isolated acts. These different acts for the protection of consumers may solve similar problems in a variety of ways. As a consequence, the implementation of directives may not only cause friction between the original national law and these implemented directives, but there may also be friction between the different acts. Thus, to the same legal question, the original national law and any

[9] Aspects of consumer protection are discussed briefly in all standard textbooks. They do not, however, discuss the problems which are addressed in this paper, *e.g.*, the textbooks on restitution do not discuss the restitutionary consequences of cancellation. *Chitty on Contracts*, 2 vol., 29th ed. (London 2004), ss. 38–001 ff., 43–114 ff., seems to be exceptional in its discussion of consumer protection; it offers a lengthy treatment of the CCA 1974 and a brief discussion of the CPR 1987 and it also compares, though not very thoroughly, the different acts on consumer protection.

[10] *E.g.*, the CPR 2000 are based on the directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts, O.J. L. 144, 04/06/1997, P. 0019–0027 and the CPR 1987 on the directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, O.J. L. 372, 31/12/1985, P. 0031–0033. The CCA 1974 is not based on, but functioned as a model for, the directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, O.J. L. 42, 12/02/1987, P. 0048–0053. The Commission has presented a proposal for a new directive on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers, 11/09/2002, COM (2002) 443 final.

[11] Directive 85/577/ECC, recital 3; directive 97/7/EC, recital 3; Peter Rott, *Die Umsetzung der Haustürwiderrufsrichtlinie in den Mitgliedstaaten* (Baden-Baden 2000), p. 4.

[12] Reinhard Zimmermann, "Civil Code and Civil Law. The 'Europeanisation' of Private Law Within the European Community and the Re-emergence of a European Legal Science", (1994/95) 1 Columbia Journal of European Law 77.

two acts for the protection of consumers might give three different answers.

With the treatment of consumer protection in today's literature it stays unnoticed whether this kind of fragmentation exists in Britain, too. This article will try to take a first step to put consumer protection into its contractual and restitutionary context and to compare the different acts on consumer protection with each other.[13] For reasons of space it will, however, be restricted to the CPR 2000, the CPR 1987, and the CCA 1974 and only the right of cancellation will be discussed. Before it is, however, possible to identify examples of fragmentation a closer look needs to be taken at the right of cancellation as a means of consumer protection.

II. The Right of Cancellation as a Means of Consumer Protection

The CPR 2000 apply to distance contracts.[14] According to reg. 3(1) a distance contract is, simply speaking, a contract concluded by exclusive use of means of distance communication. Means of distance communication are defined in the same regulation and schedule 1 presents an indicative list of such communication. This list gives an idea of what kind of situations the regulator had in mind: catalogue ordering, teleshopping, advertising by letter or electronic mail, *etc*. In distance contracts the consumer has a right of cancellation because the circumstances of the formation of contract involve a number of risks to the him.[15] He is ordering goods or services "blind". He has no chance to view the goods before he buys them in order to judge whether they meet his expectations and needs. The right of cancellation under reg. 10 of the CPR 2000 is a means to protect the consumer against this risk.[16]

[13] For a comparison of the directive 97/7/EC and the directive 85/577/EEC see Hans-W. Micklitz, Bettina Monazzahian, Christina Rößler, *Door to Door Selling—Pyramid Selling—Multilevel Marketing. A Study commissioned by the European Commission*, 2 vol. (Berlin 1999), vol. 1, pp. 1 ff. The study of Micklitz/Monazzahian/Rößler can be found at http://europa.eu.int/comm/consumers/cons_int/safe_shop/door_sell/sur10_en.htm.

[14] CPR 2000, reg. 4. Regulation 5 excepts certain contracts from the applicability of these regulations and reg. 6 exempts some more contracts from the application of a number of regulations. Critical towards these exceptions, which are also to be found in directive 97/7/EC, art. 3, Hans-W. Micklitz, "Perspektiven eines Europäischen Privatrechts. Ius commune praeter legem?" [1999] Zeitschrift für Europäisches Privatrecht 878.

[15] Directive 97/7/EC, recital 14; Geraint G. Howells, Stephen Weatherill, *Consumer Protection Law* (Aldershot 1995), s. 8.1.

[16] Critical on giving the consumer a right of cancellation in these kind of cases: Herbert Roth, "EG-Richtlinien und Bürgerliches Recht", [1999] Juristen Zeitung 529, 533f. Roth argues that as the right of cancellation stands in the directive it is purely plaintiff-sided; consumer protection is, according to Roth, however not in itself a reason to grant the consumer a right of cancellation; the right of cancellation is only justified if the supplier makes use of his advantageous bargaining position as *e.g*., in situations covered by the directive 85/577/EEC; Roth is thus in favour of a defendant-sided right of cancellation.

The supplier has to inform him of the details of his right to cancel the contract.[17]

The CPR 1987 most prominently apply to contracts concluded with door-to-door salesmen.[18] The reason why the consumer deserves special protection in this kind of situation is that unsolicited visits by door-to-door salesmen involve a psychological disadvantage to the consumer.[19] He was not able to prepare himself for negotiating with somebody. The door-to-door salesman might be trained to take advantage of the fact that he took the consumer by surprise. Thus, the consumer may have been rushed into a contract which, on reflection, he would not otherwise have concluded. Again, the consumer has a right of cancellation as a means of protection against such risk. This gives him a second chance to form a free and uninfluenced will.[20] The trader has to inform the consumer about his right of cancellation.[21]

The CCA 1974 applies to consumer credit agreements.[22] However, the debtor does not have a right to cancel any such agreement.[23] Further requirements have to be met:[24]

[17] CPR 2000, reg. 8(2)(b).

[18] CPR 1987, reg. 3 contains detailed rules when the regulations apply. According to this regulation the CPR 1987 apply to a number of other situations, too. This approach of enumerating different situations in detailed rules to define the scope of application is also to be found in directive 85/577/ECC, art. 1. Micklitz/Monazzahian/Rößler, *Door to Door Selling*, vol. 1, p. 16, suggest that a revised directive should apply to all contracts concluded away from business premises. They criticise that the present detailed rules have caused uncertainty and unnecessary litigation, vol. 1, p. 9. CPR 1987, reg. 3(2) excepts a number of contracts from the applicability of the regulations. For the details see Rott, *Die Umsetzung der Haustürwiderrufsrichtlinie*, pp. 65 ff., who doubts that all of these exceptions of the CPR 1987 are conform with the directive 85/577/EEC.

[19] Directive 85/577/EEC, recital 5; Howells/Weatherill, *Consumer Protection Law*, s. 8.1; Rott, *Die Umsetzung der Haustürwiderrufsrichtlinie*, p. 1.

[20] Rott, *Die Umsetzung der Haustürwiderrufsrichtlinie*, pp. 8 f.

[21] CPR 1987, reg. 4(1). For the details see Rott, *Die Umsetzung der Haustürwiderrufsrichtlinie*, pp. 67 f.

[22] On the term consumer credit agreement see CCA 1974, s. 8 f. See also *Chitty on Contracts*, ss. 38–013 ff. CCA 1974, s. 16 exempts a number of consumer credit agreements from the application of the Act. For the details see, *e.g.*, R.M. Goode, "The Consumer Credit Act 1974" [1975] C.L.J. 88f. Observe that a number of Consumer Credit (Exempt Agreements) (Amendment) Orders equally exempt some further consumer credit agreements from the application of the CCA 1974.

[23] Britain was not required by any European directive to introduce such a right of cancellation. However, there is such a right of cancellation in art. 11 of the proposal of the Commission for a new directive on consumer credit, see the reference in n. 10 above.

[24] CCA 1974, section 67. For the following see *e.g.*, *Chitty on Contracts*, s. 38–091. Article 11 of the proposal of the Commission for a new directive on consumer credit (see n. 10 above) does not contain these further requirements to the right of cancellation. On the debate in Britain see A.G. Guest, Michael G. Lloyd, *Encyclopedia of Consumer Credit Law*, 56th update (London 2003), General Note to s. 67. For a discussion which approach is preferable see Walther Hadding, *Welche Maßnahmen empfehlen sich zum Schutz des Verbrauchers auf dem Gebiet des Konsumentenkredits? Gutachten zum 53. Deutschen Juristentag Berlin 1980* (Munich 1980), pp. 190 ff.; Wolfgang Freiherr Marschall von Bieberstein, *Gutachten zur Reform des finanzierten Abzahlungskaufs* (Cologne 1978), pp. 170 ff.; Roth, "EG-Richtlinien und Bürgerliches Recht" [1999] Juristen Zeitung 533f.; see also n. 16 above.

> A regulated agreement [that is a consumer credit agreement to which the CCA 1974 applies] may be cancelled by the debtor [...] if the antecedent negotiations included oral representations made when in the presence of the debtor [...] by an individual acting as, or on behalf of, the negotiator, unless—(a) [...], or (b) the unexecuted agreement is signed by the debtor [...] at premises at which any of the following is carrying on any business [...]—(i) the creditor or owner; (ii) any party to a linked transaction (other than the debtor [...]).

Many antecedent negotiations[25] are made in the presence of the consumer and the creditor or his negotiator[26] and it is also most likely that oral representations are made during these negotiations. Therefore, the first half of section 67 seems to grant a right of cancellation in very many cases.[27] However, the second half of section 67 narrows down the scope of application of the right of cancellation. The exceptions in para. (a) are omitted because they do not relate to the problems discussed in this article. Para. (b) exempts those cases from the right of cancellation where the agreement is signed at the premise of the creditor, his negotiator *etc*. What is left are cases which are very similar to those cases covered by the CPR 1987.[28] The policy considerations underlying both the right of cancellation in the CCA 1974 and in the CPR 1987 are thus comparable.[29] In both cases the right of cancellation is granted to the consumer because he is in a similarly disadvantageous bargaining position.[30]

Thus, the CPR 2000, the CPR 1987, and the CCA 1974 know of a right of cancellation. *Prima facie*, one would assume that the rules governing the right of cancellation and the rules governing the consequences of cancellation are always identical. After all, the right of cancellation was introduced for an identical policy reason, that is to protect consumers. Furthermore, the CPR 1987 and the CCA 1974 not only share the underlying policy considerations for introducing a right of cancellation, but even apply to equivalent situations.

In addition, one would assume that any deviations from the general law of contract and the general law of restitution would be policy based. The right of cancellation is of course something new, that has not been known to the traditional law of contract and the traditional law of restitution. However, English and Scots law have

[25] Cf. CCA 1974, s. 56(1).
[26] Cf. CCA 1974, s. 56(1).
[27] See, *e.g.*, Paul Dobson, *Sale of Goods and Consumer Credit*, 6th ed. (London 2000), ss. 24–50.
[28] See Guest/Lloyd, *Encyclopedia of Consumer Credit Law*, General Note to s. 67.
[29] Dobson, *Sale of Goods and Consumer Credit*, ss. 24–48; Howells/Weatherill, *Consumer Protection Law*, s. 7.8.
[30] See, *e.g.*, R.M. Goode, *Consumer Credit Law* (London 1989), s. 15.1.

developed rules, *e.g.*, on a notice of revocation of an offer and on a notice of rescission. These rules could be applied to the notice of cancellation unless, of course, there is a policy reason demanding otherwise. The law of restitution has developed rules for unwinding contracts that are void, have been rescinded, terminated, or that are frustrated. Again, the law of restitution could be applied to the question of how to unwind a cancelled contract unless there is a policy based reason not to do so.

III. The Cancellation Period

With the CPR 2000, the CPR 1987, and the CCA 1974 the consumer has to make use of his right of cancellation within a cancellation period. These periods are rather short and all three acts introduce exact periods. Such exact periods are unknown to the general law of contract, where, for example, the right to rescind a contract may be barred by lapse of a reasonable time.[31] This difference between the acts for the protection of consumers and the general law of contract does not result in discrepancies because the introduction of such exact cancellation periods is policy based. The right of cancellation is introduced for the protection of the consumer. It is his choice whether to put the contract to an end. He will, usually, be informed of his right of cancellation. Business certainty, however, demands that the other party should know when exactly the contract is uncancellable. The introduction of exact cancellation periods, thus, balances the interests of the consumer against the interests of the other party.

With the CPR 2000, the period during which the consumer may cancel the contract "begins with the day on which the contract is concluded".[32] The length of the period is calculated differently in the case of contracts for the supply of goods on the one hand and in the case of contracts for the supply of services on the other hand. With contracts for the supply of goods the cancellation period is determined as follows: if the supplier has informed the consumer about the details of his right of cancellation, the cancellation period ends "on the expiry of the period of seven working days beginning with the day after the day on which the consumer receives the goods".[33] If the supplier does not inform the consumer about the details of his right of cancellation at the latest at the delivery of the goods, but if he does so "within the period of three months beginning with the day after the day on which the

[31] William W. McBryde, *The Law of Contract in Scotland*, 2nd ed. (Edinburgh 2001), ss. 20–121; Guenter Treitel, *The Law of Contract*, 11th ed. (London 2003), p. 385.
[32] CPR 2000, reg. 11(1) and 12(1).
[33] CPR 2000, reg. 11(2).

consumer receives the goods, the cancellation period ends on the expiry of the period of seven working days beginning with the day after the day on which the consumer receives the information".[34] Finally, if the supplier does not inform the consumer about the details of his right of cancellation within these three months after delivery, then "the cancellation period ends on the expiry of the period of three months and seven working days beginning with the day after the day on which the consumer receives the goods".[35] In the case of contracts for the supply of goods the crucial day for the calculation of the cancellation period is, thus, the day after the day of the receipt of the goods/information. In the case of contracts for the supply of services the crucial day is "the day after the day on which the contract is concluded".[36]

With the CPR 1987, the cancellation period is seven "days following the making of the contract".[37]

Finally, with the CCA 1974, the cooling-off period starts with the debtor signing the agreement and usually ends at "the end of the fifth day following the day on which he received a copy under section 63(2) or a notice under section 64(1)(b)".[38] Sections 63(2) and 64(1) are rather complex and the details are of no interest for the present purpose. In effect the five day period only starts to run if the debtor has been informed of his right of cancellation at the time of execution or before.

The various statutory provisions, thus, differ in the length of the cancellation period. The cancellation period of the CCA 1974 is regularly five days, that of the CPR 1987 seven days and that of the CPR 2000 seven working days. The cancellation periods are not only of different length. They also start to run at different points and the different acts contain rather complex and different rules on the calculation of the cancellation period. This *lex lata* is problematic for a number of reasons:

(1) there is no policy based reason for most of these differences.[39]

[34] CPR 2000, reg. 11(3).
[35] CPR 2000, reg. 11(4).
[36] CPR 2000, reg. 12(2) and (4).
[37] CPR 1987, reg. 4(5).
[38] CCA 1974, s. 68(a).
[39] Apparently the discussion of harmonising the cancellation period in the CCA 1974 and the CPR 1987 has already started; see the references in Brian W. Harvey, Deborah L. Parry, *The Law of Consumer Protection and Fair Trading*, 6th ed. (London 2000), p. 320 n. 12. A critical account of the reasons given by the industry in favour of the different length of the cancellation period in the European directives is given by Micklitz/Monazzahian/Rößler, *Door to Door Selling*, vol. 2, pp. 91 ff. The only difference that seems to be policy based is that with the CPR 2000 the crucial day for calculating the cancellation period is the receipt of the goods whereas with the CPR 1987 it is the making of the contract.

(2) Furthermore, will a consumer not be confused by these differences? Take the following hypothetical case: a consumer has entered into a contract to which the CPR 1987 apply. He has been informed about his right to cancel the contract by the supplier. He has carefully read the information. He cancels the contract. Later on he enters into a consumer credit agreement and he has a right of cancellation under section 67 of the CCA 1974. He receives written notice of his right to cancel. This time, however, the consumer thinks that he does not need to read the information as careful again. He assumes that he knows his rights as a consumer. He sends off the notice of cancellation six days after the execution of the agreement and he is surprised to learn that this is too late. The consumer is right to be surprised. The policy considerations underlying the right of cancellation of the CCA 1974 and of the CPR 1987 are identical and there is no policy reason for having cancellation periods of different lengths.

(3) Finally, there is a further problem resulting from the fact that the different acts know cancellation periods of different length. The requirements of the right of cancellation are with the CPR 1987 and the CCA 1974 very similar. *Prima facie*, a contract might thus be cancellable both under the CPR 1987 and the CCA 1974. However, the regulator intended the CPR 1987 not to apply to agreements which are cancellable under the CCA 1974.[40] In the explanatory note to the CPR 1987 one can read:[41] "The Regulations apply to cash transactions and to credit transactions not already cancellable under the Consumer Credit Act 1974. Where that Act applies cancellation of contracts and the consequences of cancellation are governed by the provisions of the Act [...]." The intention of the regulator obviously was to avoid the situation that two conflicting sets of rules apply to the same case. However, if this view is correct there is an immediate problem:[42] a regulated agreement under the CCA 1974 is not excluded from the scope of application of the directive 85/577/EEC. Thus, according to art. 5(1) of this directive the cancellation period has to be

[40] See, however, VII below.

[41] See Howells/Weatherill, *Consumer Protection Law*, s. 7.8; Rott, *Die Umsetzung der Haustürwiderrufsrichtlinie*, p. 66; Dobson, *Sale of Goods and Consumer Credit*, s. 2–22; W.C.H. Ervine, *Consumer Law in Scotland*, 2nd ed. (Edinburgh 2000), s. 11–70. See also *Chitty on Contracts*, s. 38–093; Goode, *Consumer Credit Law*, s. 19.32; Guest/Lloyd, *Encyclopedia of Consumer Credit Law*, s. 2–068.

[42] Rott, *Die Umsetzung der Haustürwiderrufsrichtlinie*, p. 6; Howells/Weatherill, *Consumer Protection Law*, s. 8.2.

not less than seven days. However, the cancellation period of the CCA 1974 is only five days. The CPR 1987, therefore, seem not to be conform with the directive 85/577/EC.

The only way to remedy these problems is to introduce cancellation periods of exactly the same length in each and every act. However, there seems to be a hurdle. The European directives themselves contain cancellation periods of different lengths.[43] The key to introducing a unified cancellation period is to understand that the directives do not require the implementation of an exact cancellation period. They only set forth a minimum length of cancellation period.[44] Thus, the longest cancellation period can be adopted in all acts on consumer protection. That is the cancellation period as contained in the CPR 2000.

IV. The Notice of Cancellation

A. Consumer Credit Act 1974 and Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987

The CCA 1974 and the CPR 1987 each contain two distinct rules on the notice of cancellation. The first is to be found in section 69(7) of the CCA 1974 and in reg. 4(7) of the CPR 1987. Section 69(7) of the CCA 1974 reads: "Whether or not it is actually received by him, a notice of cancellation sent by post to a person shall be deemed to be served on him at the time of posting." Regulation 4(7) of the CPR 1987 is worded very similar. The consumer only has to post the notice of cancellation within the cancellation period. It does not matter whether it arrives late or does not arrive at all. The receipt of the notice is not necessary for the notice to become effective. Instead, the notice becomes effective, when and if it is posted. The risk of loss and the risk of delay are always on the recipient of the notice. At first sight, this seems to be a very sensible rule. The protection of the consumer is maximised. He does not run the risk that the notice is lost or delayed due to any fact which is outside his control, *e.g.*, due to the fault of the Post Office. Furthermore, he does not run into evidentiary problems; he does not have to prove the delivery of the notice.

However, both, section 69(7) of the CCA 1974 and reg. 4(7) of the CPR 1987 deviate from the English and Scottish law of

[43] This may change: see the Statement by the Council and the Parliament re Article 6(1) of the directive 97/7/EC. See also Micklitz/Monazzahian/Rößler, *Door to Door Selling*, vol. 1, pp. 21 ff., vol. 2, pp. 90 ff.

[44] Rott, *Die Umsetzung der Haustürwiderrufsrichtlinie*, p. 8.

contract. Generally speaking, a notice of revocation of an offer, for example, only becomes effective if and when it is received.[45] The risk of loss and the risk of delay are on the sender, and not the recipient.

Is this difference between the CCA 1974 and the CPR 1987 on the one hand and the English and Scottish law of contract on the other hand policy-based? There is probably very good reason to shift the risk of delay on to the recipient. Firstly, the right of cancellation is introduced to protect the consumer. The consumer should have a chance to rethink the advisability of having entered into the contract. For reasons of business certainty the cancellation periods are very short. The right of cancellation will only then be an effective means of consumer protection if it is ensured that the consumer has the full cancellation period to reconsider of having concluded the contract. Secondly, the rule maximises certainty for the consumer. He knows exactly until when he has to send of the notice. He does not have to take into consideration that a letter from, *e.g.*, Cambridge to the Orkneys might take longer than a letter from Cambridge to Oxford.

However, for a number of reasons it seems that both acts have gone a step too far by also shifting the risk of loss on to the recipient. This becomes clear if we compare reg. 4(7) of the CPR 1987 with art. 5(1) of the directive 85/577/EEC. The CPR 1987 are based on this directive. The problem dealt with in reg. 4(7) of the CPR 1987 is, in the directive, addressed in art. 5(1). However, reg. 4(7) is rather taken from section 69(7) of the CCA 1974 than from art. 5(1) of the directive. Article 5(1) states:[46] "The consumer shall have the right to renounce the effect of his undertaking by sending notice within a period of not less than seven days from receipt by the consumer of the notice referred to in Article 4, in accordance with the procedure laid down by national law. *It shall be sufficient if the notice is dispatched before the end of such period*." There is a subtle, yet important difference between reg. 4(7) of the CPR 1987 and art. 5(1) of the directive. According to the predominant view,[47] art. 5(1) only says that, if the notice is received late, all that counts is that it has been dispatched in time. It does not dispense with the requirement of receipt of the notice of cancellation. Section 69(7) and reg. 4(7) on the other hand dispense with the requirement of

[45] See, *e.g.*, Treitel, *Contract*, p. 41; *Chitty on Contracts*, s. 2–087; Black, "Contract", in *The Laws of Scotland. Stair Memorial Encyclopaedia*, vol. 15 (1996), ss. 643 ff.; McBryde, *Law of Contract in Scotland*, s. 6–57.

[46] Emphasis added.

[47] Compare, *e.g.*, Hans-W. Micklitz, "Haustürwiderrufsrichtlinie", in Eberhard Grabitz, Meinhard Hilf (eds.), *Das Recht der Europäischen Union*, vol. 3, 22nd update (Munich 2003), art. 4–7 para. 78.

receipt of the notice. The difference will become obvious with the following example: The consumer C has posted the notice of cancellation to the trader. Due to the fault of the post, the notice is not delivered to the trader but returned to the consumer. According to reg. 4(7) the notice has become effective. He has successfully cancelled the contract and he does not need to take any further steps. According to art. 5(1), however, the notice has not become effective. The consumer has to post it again. It will not be treated as arriving late, because the consumer has dispatched the first notice before the end of the period of cancellation. That is sufficient.[48]

To shift the risk of loss on to the recipient may in some cases even be unfair to him. If he has taken goods from the consumer in part-exchange, he is under a duty to return these goods. If he does not do so within ten days he is obliged to pay to the consumer a sum equal to the part-exchange allowance.[49] Even if the notice of cancellation is delayed by a couple of days it usually will arrive before the period of ten days has run out. However, if also the risk of loss is on the receiver and if the notice is lost the period of ten days runs out before the supplier had a chance to know that he had to return the part-exchange goods.

Finally, it does not seem that evidentiary problems are able to justify section 69(7) of the CCA 1974 and reg. 4(7) of the CPR 1987. A consumer is able to avoid any evidentiary problems by sending the notice of cancellation by registered mail and a reasonable consumer will probably always do so.[50] But even if he does not use registered mail, he would not have run into evidentiary problems if the British regulator had adopted only a rule as contained in art. 5(1) of the directive 85/577/EEC. If the recipient denies to have received the notice, the consumer only needs to prove that he has posted the notice within the cancellation period, which will be much easier to him, and he may then post it a second time.

The second rule on the notice of cancellation is to be found in section 176(1)-(3) of the CCA 1974 and reg. 11(2) of the CPR 1987. Section 176(1)-(3) of the CCA 1974 reads:

(1) A document to be served under this Act by one person (''the server'') to another person (''the subject'') is to be

[48] This is how German lawyers understand art. 5(1) of the directive: see, *e.g.*, Peter Ulmer, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. 2a, 4th ed. (Munich 2003), s. 355 para. 39.

[49] CPR 2000, reg. 18(2); CPR, reg. 8(2); CCA 1974, s. 73(2).

[50] In France the consumer even has to use registered mail: see Micklitz, ''Haustürwiderrufsrichtlinie'', art. 4–7 para. 29.

treated as properly served on the subject if dealt with as mentioned in the following subsections.

(2) The document may be delivered or sent by post to the subject, or addressed to him by name and left at his proper address.

(3) For the purpose of this Act, a document sent by post to, or left at, the address last known to the server as the address of a person shall be treated as sent by post to, or left at, his proper address.

Regulation 11(2) of the CPR 1987 has been inspired by section 176(3) of the CCA 1974. There is no equivalent in the directive. It states: "For the purpose of these Regulations, a document sent by post to, or left at, the address last known to the server of the document as the address of a person shall be treated as sent by post to, or left at, his proper address."

Both, section 176(3) of the CCA 1974 and reg. 11(2) of the CPR 1987 are not restricted to the notice of cancellation. They do not say anything about the risk of loss and risk of delay in general. They apply, for example, to the case that the trader changes his address without informing the consumer about his change of address. In such a case, it is sufficient that the consumer posts the notice of cancellation to the last address known to him. This is a very sensible rule. However, I doubt whether section 176(3) of the CCA 1974 and reg. 11(2) of the CPR 1987 say, with regard to the notice of cancellation, anything that is not already part of Scots and English law. It is the trader's duty to provide the consumer with the address to which the notice of cancellation is to be sent. If the trader then changes his address it seems to be a clear case of estoppel,[51] or in Scotland of personal bar,[52] that the supplier cannot rely on the fact that the notice of cancellation is lost or delayed due to this change of address. Section 176(3) of the CCA 1974 and reg. 11(2) of the CPR 1987 seem to me to be, with regard to the notice of cancellation, superfluous.

B. Consumer Protection (Distance Selling) Regulations 2000

How are these questions dealt with in the CPR 2000? Regulation 10(4) states:

> A notice of cancellation given under this regulation by a consumer to a supplier or other person is to be treated as having been properly given if the consumer—(a) leaves it at the address last known to the consumer and addressed to the

[51] On estoppel see *e.g.*, Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford 2000).

[52] On personal bar see *e.g.*, A.M. Bell, "Personal Bar", in *The Laws of Scotland. Stair Memorial Encyclopaedia*, vol. 16 (Edinburgh 1995), ss. 1601 ff.

> supplier or other person by name (in which case it is to be taken to have been given on the day on which it was left); (b) sends it by post to the address last known to the consumer and addressed to the supplier or other person by name (in which case, it is to be taken to have been given on the day on which it was posted); (c) sends it by facsimile to the business facsimile number last known to the consumer (in which case it is to be taken to have been given on the day on which it is sent); or (d) sends it by electronic mail, to the business electronic mail address last known to the consumer (in which case it is to be taken to have been given on the day on which it is sent).

The directive 97/7/EC does not contain a comparable clause. Regulation 10(4) of the CPR 2000 rather seems to be an amalgam of section 69(7) of the CCA 1974 and reg. 4(7) of the CPR 1987 on the one hand and section 176(3) of the CCA 1974 and reg. 11(2) of the CPR 1987 on the other hand. However, it seems to be more than doubtful whether it was sensible to collapse these two rules into one: firstly, it is obvious that reg. 10(4) of the CPR 2000 is anything but elegant, easy to read or easy to understand. Secondly, section 69(7) of the CCA 1974 and reg. 4(7) of the CPR 1987 on the one hand and section 176(3) of the CCA 1974 and reg. 11(2) of the CPR 1987 on the other hand deal with two distinct problems. Section 69(7) of the CCA 1974 and reg. 4(7) of the CPR 1987 allocate the risks of loss and of delay of the notice in general. Section 176(3) of the CCA 1974 and reg. 11(2) of the CPR 1987 only deal with the very specific problem of what happens if the consumer sends of the notice to the wrong address. By combining these two rules one could get the impression that reg. 10(4) of the CPR 2000 only deals with the case where the notice of cancellation is lost or delayed because the consumer sends it of to the wrong address. With such a reading reg. 10(4) would not cover all those cases to which section 69(7) of the CCA 1974 and reg. 4(7) of the CPR 1987 apply.[53]

C. Comparison and Proposal for Reform

The differences between the CPR 2000, the CPR 1987, and the CCA 1974 are not policy based. In distance contracts, in contracts concluded away from business premises and in consumer credit agreements the consumer deserves special protection. The means of protection is always the same: the consumer has a right to cancel

[53] However, on a literal reading, reg. 10(4) of the CPR 2000 is also open to a wider understanding. With such an interpretation reg. 10(4) would also cover the case that the notice is lost due to any fact which is outside his control, *e.g.*, due to the fault of the Post Office: all that reg. 10(4) requires for the presumption of receipt is that the consumer sends the notice to the last address known to him, which may still be the correct address.

the contract. Thus, the rules on the notice of cancellation should also be identical.

The British regulator was not bound to introduce the rules which we find in the CPR 2000, the CPR 1987, and the CCA 1974. Directive 97/7/EC does not contain a clause which is comparable to reg. 10(4) of the CPR 2000 and directive 85/577/EEC contains in art. 5 only the rule that it is sufficient if the notice is dispatched before the end of the cancellation period. It does not say anything about the risk of loss of the notice of cancellation. It only deals with the risk of delay. Thus, the British regulator was required to introduce a rule according to which this risk of delay is on the receiver of that notice into the CPR 1987. In order to avoid discrepancies between the single acts, a similar rule should be introduced into the CCA 1974 and the CPR 2000.

V. The Consequences of Cancellation

As a consequence of the cancellation the contract is to be unwound. The CPR 2000, the CPR 1987, and the CCA 1974 contain detailed rules on the recovery of any benefits received as a contractual performance. Did the legislator need to deal with these matters? Article 6(2) of directive 97/7/EC and art. 7 of the directive 85/577/EEC only demand that the contract is to be unwound. They do not deal with any details.[54] Since the directive 87/102/EEC does not contain a right of cancellation it does not say anything about how to unwind a cancelled contract, too. If the CPR 2000, the CPR 1987, and the CCA 1974 were silent on the problem of how the contract is to be unwound the law of restitution would come into place. Thus, to answer the question of whether the acts need to include rules on how to unwind the contract one has to examine the Scottish and English laws of restitution.

How the contract would be unwound under Scots law is clear: the effect of a notice of cancellation is that the contract shall be treated as if it had not been made.[55] Each party's cause of action to recover his performance would, thus, be a *condictio indebiti*.[56] Hence, Scots law could satisfactorily deal with the problem of unwinding cancelled contracts. Any rules on this matter in the CPR 2000, the CPR 1987, and the CCA 1974 would be superfluous, unless the legislator wanted to deviate from the general law for reasons of consumer protection.

[54] See, however, directive 97/7/EC, art. 6(3) implemented by CPR 2000, reg. 13(1).
[55] See the references in n. 8 above.
[56] William Murray Gloag, Candlish Henderson, *The Law of Scotland*, 11th ed. (Edinburgh 2001), s. 28.03.

The English position is, however, slightly less clear. There are two possibilities how the matter of unwinding the contract could be dealt with: (1) In order to recover any sum of money, goods, or the value of services or goods, the parties would, according to the view that is still predominant, need to rely on an unjust factor.[57] However, there is no such unjust factor called "cancelled contract" or "consumer protection". The only unjust factor that would be applicable is total failure of consideration.[58] As the law stands today each party can claim back any performance only if he himself has not received anything under the contract.[59] The prevailing view in the literature suggests, however, that it should be sufficient that the plaintiff makes counter-restitution.[60] Both positions would not be in line with the requirements of art. 6(2) of the directive 97/7/EC and art. 7 of the directive 85/577/EEC. Article 6(2) of the directive 97/7/EC states that where "the right of withdrawal has been exercised by the consumer pursuant to this article, the supplier shall be obliged to reimburse the sums paid by the consumer". The directive does not permit qualification of the consumer's right to reimbursement by the requirement that he should not have received any part of the counter-performance or that he needs first to make counter-restitution. According to this solution the British acts needed provisions regarding the unwinding of the contract.

(2) Birks was of the view that it was sufficient for a claim in unjust enrichment that there was no basis for the enrichment.[61] Although the case of a cancelled contract is not mentioned[62] it is clear that, according to his view, both parties would be able to claim back their respective performances because the contract was treated as if it had not been made. With this view, the problem of unwinding cancelled contracts could satisfactorily be dealt with. Again, any rules on this matter in the CPR 2000, CPR 1987, and the CCA 1974 would be superfluous, unless the legislator wanted to deviate from the general law for reasons of consumer protection. However, it is not clear whether the courts will follow Birks' new theory.

[57] On the English unjust factor approach see, *e.g.*, Andrew Burrows, *The Law of Restitution*, 2nd ed. (London 2002), pp. 41 ff.
[58] On the unjust factor total failure of consideration see, *e.g.*, Graham Virgo, *The Principles of the Law of Restitution* (Oxford 1999), pp. 323 ff.
[59] See, *e.g.*, Treitel, *Contract*, p. 1049.
[60] See, *e.g.*, Graham Virgo, "Failure of consideration: myth and meaning in the English law of restitution", in: David Johnston, Reinhard Zimmermann (eds.), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge 2002), pp. 115 ff.
[61] Birks, *Unjust Enrichment*, pp. 87 ff.
[62] Birks, *Unjust Enrichment*, pp. 110 ff.

Thus, the British acts needed to say something about the unwinding of the contract to meet these problems of English law.

A. Consumer Protection (Distance Selling) Regulations 2000

The CPR 2000 contain detailed rules on these matters in reg. 13, 14 and 17 f. According to reg. 14 the supplier has to pay back any sum of money which he has received from the consumer.

Regulation 13(1) makes exceptions to the right to cancel, *e.g.*, in respect of contracts for the supply of services if performance of the contract has begun with the consumer's agreement before the end of the cancellation period and if the supplier has informed the consumer under reg. 8(3) that he will loose his right of cancellation in such a case.

If the consumer has already received goods, he has the duty to restore them to the supplier and, until he does so, he has "to retain possession of the goods and take reasonable care of them".[63] Regulation 17(4)-(7) deals with the details of the duty to deliver the goods.

According to reg. 17(2) the "consumer shall be treated as having been under a duty throughout the period prior to cancellation—(a) to retain possession of the goods, and (b) to take reasonable care of them" and reg. 17(10) states that a breach "of a duty imposed by this regulation on a consumer is actionable as a breach of statutory duty". Thus, if the consumer is in breach of this duty he is liable in damages.[64] At first sight, this appears to be a sensible rule: the right of cancellation is plaintiff-sided. It is introduced only in the interest of the consumer. Thus, there is nothing wrong with burdening him with duties to retain possession of the goods and to take reasonable care of them. Furthermore, the effect of cancellation is that the contract is to be treated as if it had never been made. Hence, the consumer had *ex tunc* no right to the received goods. Finally, the consumer usually knows of his right of cancellation and therefore knows that he might have to give back what he received. However, none of these arguments are compelling: the liability in damages cannot be explained by the fact that the right of cancellation is plaintiff-sided; the law of restitution knows a number of plaintiff-sided unjust factors and nevertheless the plaintiff will never be liable in damages if he is unable to give back what he received; his right *e.g.*, to rescind the contract might be excluded; he might be liable to make good the value of what he received; but he will not be liable in damages. The liability in

[63] CPR 2000, reg. 17(3).

[64] Joe Thomson, *Delictual Liability*, 2nd ed. (Edinburgh 1999), pp. 193 ff.; *Clerk and Lindsell on Torts*, 18th ed. (London 2000), ss. 11–01 ff.

damages also cannot be explained by reference to the effect of the cancellation; rescission also avoids the contract *ex tunc* and yet the person rescinding will not be liable in damages. In addition, the liability in damages cannot be explained by the fact that the consumer knew that he might have to give back what he received; reg. 17(2) also applies if the consumer has not been informed about his right of cancellation. Furthermore, if one accepts that reg. 14 and 17 f. contain special rules on restitutionary rights, then a liability in damages appears to be alien.

Finally, reg. 18 deals with the case in which the supplier has agreed to take goods in part-exchange and has received these goods. Primarily, he is under a duty to return these goods to the consumer. If he does not do so within ten days or if he does not return them in substantially as good a condition as they were in when he received them, then the consumer will have a right to recover from the supplier a sum of money. This sum of money is "the sum agreed as such in the cancelled contract, or if no such sum was agreed, such sum as it would have been reasonable to allow in respect of the part-exchange goods".[65] Thus, in the usual case in which the consumer and the supplier agreed on a part-exchange allowance, it will be this agreed price which the supplier will have to pay. For four reasons, this is a rather surprising rule. Firstly, the effect of a notice of cancellation is that the contract shall be treated as if it had not been made. Why does the agreement on the part-exchange allowance then survive the cancellation? The second reason is a policy-based reason. It becomes more evident if we look at the CPR 1987 which contains in reg. 8 a similar rule. In the typical case, in which the CPR 1987 apply, the consumer has a relatively disadvantageous negotiating position. This disadvantage might result in a bad bargain.[66] The right of cancellation is a means of escaping such a bad bargain. The contract might be a bad bargain because the consumer pays too much for what he received. However, it might also be a bad bargain because the allowance agreed for goods given in part-exchange is too small. In reg. 8 of the CPR 1987 and in reg. 18 of the CPR 2000 the consumer is bound to his bad bargain. The supplier will keep the part-exchange goods and pay the agreed part-exchange allowance when the consumer made such a bad bargain. This result does not seem to be in line with the general aim of the CPR 1987 and the CPR 2000 to protect the consumer. The third reason becomes apparent through a comparison with the law of restitution. As a rule, in the law of restitution each party has to

[65] CPR 2000, reg. 18(3).
[66] See Rott, *Die Umsetzung der Haustürwiderrufsrichtlinie*, p. 2.

pay the value of what he received if he cannot return it *in natura*. It is the objective value at the time of receipt that counts.[67] It is never the contract price itself, though it is argued by some that the contract price might function as a ceiling.[68] There is no policy based reason to depart from these rules in the CPR 2000. The final reason becomes apparent if we compare the liabilities of the supplier with that of the consumer: the consumer will be liable in damages if he is not able to return goods which he received because he was in breach of his duty to retain possession of the goods and to take reasonable care of them. If the supplier does not retain possession of the goods and does not take reasonable care of them he will not be liable in damages, but he will have to pay the agreed part-exchange allowance. The part-exchange allowance might be less than damages if the supplier agreed to give less than the actual value. Hence, in such a situation the supplier would be in a better position than the consumer. Again, this does not seem to be in line with the general aim of the CPR 2000 to protect consumers.

Apart from these problems with reg. 13, 14 and 17 f. there is yet another problem: the regulations are, though very detailed, incomplete. There are at least two problems which are not solved.

First, what happens in respect of contracts for the supply of services if the supplier has not complied with reg. 8(3) or if he has began the performance of the contract without the consumer's agreement? Regulation 13(1)(a) does not apply, so that the consumer's right to cancel the contract is not excluded. Thus, he may cancel the contract. However, the CPR 2000 are lacking a cause of action for the recovery of the value of received services. Does this mean that the consumer does not have to pay anything for these services? This might result in an unjustified enrichment of the consumer. Or should one solve this problem by falling back on the English and Scottish common law? However, such an approach seems to be equally problematic: the regulations on unwinding the contract are so detailed that it is likely that the regulator intended that only they be applied in this context and not the common law.

Secondly the CPR 2000 are silent on what has to be done if the consumer is not able to restore goods which he has received prior to cancellation because *e.g.*, they have been destroyed although the consumer has taken reasonable care. In this situation the consumer is not liable in damages for breach of statutory duty.[69] Since the regulations are silent on this situation the *prima facie* solution is

[67] Virgo, *Principles of the Law of Restitution*, pp. 60 ff., 95 ff.
[68] On this discussion see *e.g.*, Andrew Skelton, *Restitution and Contract* (Oxford 1998), pp. 33 ff., 55 ff.; Virgo, *Principles of the Law of Restitution*, pp. 100 ff.
[69] See the text at n. 63 and n. 64 above.

that the consumer is not liable. Again, the regulations are so detailed that the intention of the regulator must have been that they only apply. As a consequence the consumer can claim back the price which he has paid to the supplier but he does not have to give anything. Such a solution is, however, not in accordance with the English and Scottish law of restitution. In both it is thought that a plaintiff has to make counter-restitution either *in natura* or, if that is—for whatever reason—impossible, in money.[70]

B. Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987

The details of how the contract is unwound under the CPR 1987 are dealt with in reg. 5 ff. However, reg. 5 ff. are incomplete. Only four situations are covered:

(1) According to reg. 5(1) any sum paid by the consumer is repayable.[71]

(2) If the consumer has already received goods, he has the duty to restore them to the trader.[72] The details of the duty to deliver these goods are dealt with in reg. 7(3)-(7).[73] Until the consumer returns what he received, he has to retain possession of the goods and take reasonable care of them.[74] If he is in breach of any of these duties he will commit a breach of statutory duty.[75]

(3) Regulation 7(2) provides a number of exceptions to the rule that the consumer is bound to return anything that he has received from the trader.[76] If the consumer has received perishable goods, "goods which by their nature are consumed by use and which, before the cancellation, were so consumed", and "goods which, before the cancellation, had become incorporated in any land or thing not comprised in the cancelled contract" he does not have to restore the goods, but according to reg. 7(2)(i), (ii), and (iv) he has to pay the contract price. It makes sense that the consumer is not obliged to restore what he received in these cases, since that is impossible. However, for a number of reasons it does not make sense that the consumer has to pay the contract price: the first reason becomes obvious if we compare the cancellation with rescission. Both the right of cancellation and of rescission are unilateral powers by the one party; both cancellation and rescission

[70] See the references in n. 59 above. See also Gloag/Henderson, *Law of Scotland*, s. 28.08; Virgo, *Principles of the Law of Restitution*, p. 32.
[71] For the details see Rott, *Die Umsetzung der Haustürwiderrufsrichtlinie*, p. 69.
[72] CPR 1987, reg. 7(1). For the details see Rott, *Die Umsetzung der Haustürwiderrufsrichtlinie*, p. 69.
[73] For the details see Rott, *Die Umsetzung der Haustürwiderrufsrichtlinie*, p. 69.
[74] CPR 1987, reg. 7(1).
[75] CPR 1987, reg. 7(8).
[76] For the details see Rott, *Die Umsetzung der Haustürwiderrufsrichtlinie*, p. 69.

have retrospective effect.[77] However, in the law of rescission the impossibility of making *restitutio in integrum* is a bar to rescission. It is however argued by academics that the impossibility should not be a bar to rescission but that the person rescinding should only be liable to make good the value of what he received.[78] He has to pay the value, not the contract price. I cannot think of any policy based reason to solve these kind of problems in the law of cancellation differently. Actually, it is against the policy considerations underlying the regulations to make the consumer pay in accordance with the contract. The right to cancel was introduced to protect the consumer. He needs the protection even more if he made a bad bargain. The right of cancellation in the cases covered by reg. 7(2) however does not allow the consumer to escape the bad bargain. Secondly, if the consumer does not cancel he has to pay the contract price. In return he has a right to any goods or services. But he also has additional rights. *E.g.*, if in a contract of sale goods do not conform to the contract at the time of delivery, the consumer has a right to have the goods repaired or replaced by the seller under section 48B of the Sale of Goods Act 1979 or he might have a right to have the purchase price reduced or he might rescind the contract under section 48C of the Sale of Goods Act 1979.[79] When calculating the price the purchaser will always have in mind that these rights of the consumer might cause additional costs to him. Thus, the consumer pays for these rights and these rights are reflected in the contract price. If the consumer cancels the contract he will not have any of these rights under the Sale of Goods Act 1979. But he still is required to pay the full contract price under reg. 7(2). In effect it would be most stupid of a consumer to cancel the contract in cases covered by reg. 7(2) and this *lex lata* is also not in line with the general aim of the regulations to protect the consumer. The cancellation would be a trap to the consumer. Thirdly, reg. 7(2) is not conform with the European directive.[80] Article 7 of the directive 85/577/EEC reads: "If the consumer exercises his right of renunciation, the legal effects of such renunciation shall be governed by national laws, particularly regarding the reimbursement of payments for goods or services provided and the return of goods received." Article 7 has clearly in mind, that the cancelled contract is unwound. Article 5(2) of the directive 85/577/EEC reads: "The giving of the notice shall have the effect of releasing the consumer from any obligations

[77] CPR 1987, reg. 4(5), (6).
[78] See the text at n. 70 above.
[79] Sale of Goods Act 1979, s. 48A ff. have been inserted by the Sale and Supply of Goods to Consumers Regulations 2002, S.I. 2002/3045, reg. 5.
[80] Rott, *Die Umsetzung der Haustürwiderrufsrichtlinie*, p. 130.

under the cancelled contract." In the British regulation the consumer is however stuck with his side of the bargain. Finally, one could point to the fact that the cancellation avoids the contract *ab initio*.[81] But if the contract is set aside *ex tunc*, how then does the agreement as to the price survive the cancellation? However, this last argument is not the strongest since reg. 4(6) allows exceptions from the rule that cancellation has retrospective effect and one could argue that reg. 7(2) is one of these exceptions.

(4) Finally, reg. 8 regulates how the contract is to be unwound if goods have been given in part-exchange. Regulation 8 is similar to reg. 18 of the CPR 2000 and the criticism put forward above does apply to the CPR 1987, too.[82]

The CPR 1987 are silent on three points. First, what happens if the consumer has received something, apart from the goods enumerated in reg. 7(2), and he cannot restore what he received *in natura*? He might have received services before cancelling the contract. Is he now allowed to recover the money he paid to the trader under reg. 5 without paying anything for the service he received? *Prima facie* one would tend to answer this question in the affirmative: the regulator has regulated the respective rights of the consumer and of the trader in detail and one would think that the regulator meant these rules to apply exclusively. However, this view might result in an unjustified enrichment of the consumer. Should the consumer then have to pay according to the principles of the law of restitution? Then the trader would be able to recover the value of the services from the consumer. But there is an immediate discrepancy with reg. 7(2): if the consumer received goods which by their nature are consumed by use and which, before the cancellation, were so consumed he has to pay the contract price. Why should the consumer then pay in the case of services the value of the services? Are not both cases comparable? In both cases the consumer is not able to restore what he received *in natura*. One would think that both cases should be treated alike. Should the consumer also in the case of services then pay the contract price? The problem with such a view would firstly be that there is no basis for such a liability, neither in the CPR 1987 nor in the English or Scottish law of restitution. One would need to draw an analogy to reg. 7(2). Secondly, as a consequence of such an analogy one would run into similar problems as one does with reg. 7(2).

Secondly, what happens if the consumer received any goods other than those mentioned in reg. 7(2) and if he is not able to restore what he received because he *e.g.*, destroyed it intentionally

[81] CPR 1987, reg. 4(6).
[82] See A above.

before cancelling the contract? The CPR 1987 lack a provision such as reg. 17(2) of the CPR 2000. According to reg. 7(1) of the CPR 1987 the consumer only has the duty to retain possession of the goods and to take reasonable care of them after he cancelled the contract. However, he is not treated as having been under this duty throughout the period prior to cancellation:[83] "Subject to paragraph (2) below, a consumer who has before cancelling a contract under regulation 4 above acquired possession of any goods by virtue of the contract shall be under a duty [...] on the cancellation to restore the goods to the trader in accordance with this regulation, and *meanwhile* to retain possession of the goods and take reasonable care of them." Thus, he is not liable in damages. Should the trader be able to recover the value of the goods? The problems one would meet are similar to those in the case of services.

(3) Regulations 5 ff. only apply if the contract is cancelled. This may result in problems which are not apparent right away: the consumer has to cancel the contract within seven days.[84] The trader has to inform the consumer of his right to cancel.[85] But what happens if the trader does not comply with this duty to inform the consumer? In reg. 11(3) and 12(3) of the CPR 2000 the cancellation period is in these cases three months longer than usual. The CPR 1987 lack a comparable rule. Instead, reg. 4(1) states that in such a case the contract is unenforceable against the consumer. But what happens if the contract is fully performed and only later, let us say after eight days, the consumer finds out about his right to cancel the contract. *Prima facie*, one would think that the consumer should be able to claim back the contract price and that he is in turn liable to restore what he received. After all, the reason why he did not cancel the contract in time was because the trader did not comply with his duty to inform the consumer about his right. However, we immediately run into problems. Under reg. 5 the consumer can only recover the money if he has cancelled the contract which in our case he did not do and which he can no longer do. Will he be able to recover according to the general principles of the English or Scottish law of restitution? The first problem we run into with this is that it is again not clear that one can fall back on the general law in those cases in which the regulations are silent. They seem to have been meant to apply exclusively. However, there is also a second problem: the only unjust factor in English law that would lie is total failure of

[83] Emphasis added.
[84] CPR 1987, reg. 4(5).
[85] CPR 1987, reg. 4(1).

consideration.[86] In our example there would be no restitution, since both parties have received what they bargained for.[87] For the same reason the Scottish *condictio causa data causa non secuta* would not be applicable. The other possible cause of action in Scots law would be a *condictio indebiti*. However, the requirements of a *condictio indebiti* are not met if one performs an unenforceable contract.[88] The same is true for Birks' absence-of-basis approach.[89] Thus, there will be no recovery. This is not in accordance with the European directive. Article 4 of the directive 85/577/EEC states that the trader has to inform the consumer of his rights to cancel the contract. The last sentence of art. 4 reads: "Member States shall ensure that their national legislation lays down appropriate consumer protection measures in cases where the information referred to in this Article is not supplied". Unenforceability is no such "appropriate consumer protection measure" in Britain because in many cases no recovery will follow and the consumer will be bound to the bargain if it is fully performed.[90] Furthermore, art. 5 of the directive states: "The consumer shall have the right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from receipt by the consumer of the notice referred to in Article 4 [...]". According to art. 5 the cancellation is not allowed to run out "within the period of 7 days following the making of the contract" if the consumer has not been informed of his right of cancellation. Thus, reg. 4(5) of the CPR 1987 is not conform with directive 85/577/EEC.[91]

C. Consumer Credit Act 1974

The effects and consequences of the cancellation are with consumer credit agreements regularly more complicated than with those cases which are covered by the CPR 2000 and the CPR 1987. Cases

[86] Virgo, *Principles of the Law of Restitution*, pp. 366 ff.

[87] After *Kleinwort Benson Ltd.* v. *Lincoln City Council* [1999] 2 A.C. 349 there is an alternative unjust factor which might apply, mistake of law. However, this might not help in our example since according to the prevailing view in the literature there is no recovery when a contract is fully executed on both sides so that both parties got what they bargained for; see, *e.g.*, Peter Birks, "No Consideration: Restitution After Void Contracts", (1993) 23 U.W.A.L.R. 195 ff. Consumer lawyers however think that at least the consumer can recover but not the trader, see Rott, *Die Umsetzung der Haustürwiderrufsrichtlinie*, p. 68. I cannot see the basis for the consumer's claim.

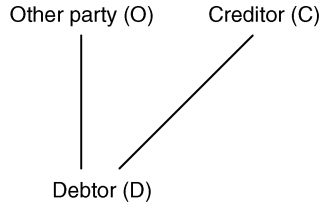
[88] Scottish Law Commission, *Recovery of Benefits Conferred under Error of Law*, Discussion Paper No. 95 (Edinburgh 1993), vol. 2, s. 2.18.

[89] Birks, *Unjust Enrichment*, p. 112.

[90] See also Geraint Howells, Thomas Wilhelmsson, *EC Consumer Law* (Aldershot 1997), p. 172, who are critical towards unenforceability as an appropriate consumer protection measure, too; however, their reasoning is differently from the one taken here. On the different approaches adopted in the member states see Micklitz/Monazzahian/Rößler, *Door to Door Selling*, vol. 2, pp. 14 f.

[91] *Georg Heininger et Helga Heininger* v. *Bayerische Hypo- und Vereinsbank AG* (2001) E.C.R. I-09945.

covered by the CCA 1974 may involve three parties. That is often the case when a second contract—a so-called linked transaction—comes into play. A linked transaction is defined in section 19(1). The following example may be used to make the situations envisaged by this section clear:



The debtor D wants to buy a car from the other party O who is a car dealer. D is short of cash. O suggests to D to take a credit from the creditor C. O negotiates with D also the terms of the credit agreement and acts as a representative for C. There are two contracts to which D is a party: the credit agreement between D and C, and the sale between D and O.[92]

It would only be half of what is necessary in the circumstances if only the credit agreement were to be unwound. In the above example, D was only able to buy the car because he entered into a credit agreement with C. If the credit is cancelled, D is no longer in the position to buy the car. The cancellation therefore not only affects the credit agreement between D and C, but also the linked transaction between D and O.[93] The linked transaction is also treated as if it had never been entered into.[94] If the debtor has already received goods under a linked transaction, he is liable to restore what he has received to the person from whom he received the goods.[95] In the example from above D would be liable to return the car to O. The details of the duty to restore the goods are dealt with in section 72(5)-(8).

Until the debtor returns what he received, he is under the duty "to retain possession of the goods and take reasonable care of them".[96] Furthermore, he will be treated as having been under this duty throughout the pre-cancellation period.[97] Any breach of these duties is a breach of statutory duty and the debtor will be liable in

[92] On triangular transactions see A.P. Dobson, "Anomalies in the Triangular Transaction", [1983] J.B.L. 312 ff.
[93] CCA 1974, s. 69(1).
[94] CCA 1974, s. 69(4). For the details see Guest/Lloyd, *Encyclopedia of Consumer Credit Law*, General Note to s. 69.
[95] CCA 1974, s. 72. For the details see Guest/Lloyd, *Encyclopedia of Consumer Credit Law*, General Note to s. 72.
[96] CCA 1974, s. 72(4).
[97] CCA 1974, s. 72(3).

damages.[98] For the reasons given above this liability in damages is problematic.[99]

Section 72(9) exempts the debtor of his duty to restore the goods which he received, to retain them and to take reasonable care of them. Section 72(9)(a),(b) and (d) for example applies if the debtor received perishable goods, "goods which by their nature are consumed by use and which, before the cancellation, were so consumed", or "goods which, before the cancellation, had become incorporated in any land or thing not comprised in the cancelled agreement or a linked transaction". Thus, the right of cancellation is not excluded in these cases as it is under reg. 13 of the CPR 2000 in very similar cases. However, the CCA 1974 does also not state, as reg. 7(2) of the CPR 1987 does, that the debtor has an obligation to pay for these goods in accordance with the cancelled contract.[100] One might argue that this is in line with the purpose of the Act to protect debtors. However, with this line of argument we immediately run into problems: minors are protected by the law, too. Yet as the law stands, a minor can only rescind a contract if *restitutio in integrum* is possible or, according to the predominant view among academics, the minor is able to rescind the contract but he must make counter-restitution in money. He has to make good the value of what he received if he is unable to return it *in natura*.[101] Should then a debtor under the CCA 1974 be able to claim back any payments without paying anything for the goods he received and which he is now unable to restore? Is the need to protect a debtor in consumer credit agreements higher than to protect minors? I find that hard to believe. Furthermore, if we leave the case with section 72(9) this might result in an unjustified enrichment of the debtor. He has received goods which he cannot restore and for which he has not to pay under the CCA 1974. Should then the debtor at least make good the value of what he received? There seems to be no basis for such a liability. There is none in the CCA 1974 and it seems again problematic merely to apply the general law of restitution to this kind of situation. The provisions in the CCA 1974 on unwinding contracts are so detailed that they seem to be intended to apply exclusively.

[98] CCA 1974, s. 72(11).

[99] See A above. For further criticism of this rule with regards to the CCA 1974 see A.P. Dobson, "Cancellation Provisions—A Rogue's Charter?" (1978) 128 N.L.J. 57.

[100] See Goode, *Consumer Credit Law*, s. 15.67; Howells/Weatherill, *Consumer Protection Law*, s. 7.8.3.

[101] See Burrows, *Law of Restitution*, pp. 323 ff.; Scottish Law Commission, *Report on the Legal Capacity of Minors and Pupils*, Report No. 110 (Edinburgh 1987), ss. 3.34ff.

In the case of goods given in part-exchange, the debtor is according to section 73 liable to pay the agreed part-exchange allowance. This rule has already been criticised above.[102]

The CCA 1974 is silent on what happens if the debtor is unable to restore goods which he has received because *e.g.*, the goods are destroyed although the debtor has taken reasonable care of the goods. He will not be liable in damages under section 72(11). The conclusion one may draw from this is again that the debtor has not to pay anything.[103] Again, it seems problematic to justify this conclusion by reference to the purpose of the CCA 1974 to protect debtors if we keep in mind that with this result debtors are in a better situation than minors.

Finally, the CCA 1974 only provides rules on the recovery of money and on the recovery of goods. However, a linked transaction may also be a contract of services. May one legitimately draw the conclusion from the silence of the Act that the debtor has not to pay anything for services which he received but that he is entitled to claim back any money that he has paid?[104] This would result in an unjustified enrichment of the debtor and would not be in line with the principle of counter-restitution.

D. Proposal for Reform

The problem of how to unwind the contract should be dealt with in the same way in the CPR 2000, the CPR 1987, and the CCA 1974. This is the only way to avoid discrepancies. The different European directives are not a hurdle to such an unified approach. They hardly contain any rules on how the contract is to be unwound.[105] To work out a proposal for reform one has to start with the problems of the English law of restitution that need to be remedied. The only applicable unjust factor is total failure of consideration. However, as the law stands today, total failure of consideration will not apply if both sides have received anything under the contract.[106] All that needs to be said to remedy this problem is that the consumer has a right to recover the contract price and any goods given in part-exchange or, if that is impossible, their value. Then the other party will be able to recover his performance on the basis of total failure of consideration. Further, it needs to be said that after cancellation the other party has a right to return the contract price and any goods he received in part-exchange. This, again, puts the other party into a position to

[102] See A above.
[103] Dobson, *Sale of Goods and Consumer Credit*, s. 24–57.
[104] This conclusion is drawn by Dobson, *Sale of Goods and Consumer Credit*, s. 24–57.
[105] See directive 85/577/EEC, art. 7 and directive 97/7/EC, art. 6(2).
[106] See A above.

claim back anything from the consumer on the basis of total failure of consideration.

VI. Terminological Differences

Up to this point this article only discussed differences between the single acts for the protection of consumers which are differences in substance. However, there are also a number of terminological differences. One obvious, but by far not the only, example is to be found in the CPR 2000 and the CPR 1987: in the CPR 2000 the parties to a cancellable contract are called consumer and supplier, in the CPR 1987 consumer and trader. A supplier is defined in reg. 3(1) of the CPR 2000 as any person who "is acting in his commercial or professional capacity". According to reg. 2(1) of the CPR 1987 trader means a person who "is acting for the purpose of his business, and anyone acting in the name or on behalf of such a person". Trader and supplier seem to mean exactly the same. It seems to be a mere terminological difference that the CPR 2000 speak of a supplier whereas the CPR 1987 speak of a trader. However, there is always the risk that a terminological difference develops into a difference of substance. To lower this risk and to avoid confusion the regulations should be changed to use the same term. It is no hurdle to the use of a uniform terminology that the directive 97/7/EC[107] and the directive 85/577/EEC[108] themselves speak of supplier and trader. Also in the European directive it is a mere terminological difference.[109] The national legislator does not have to implement a directive word by word.[110]

VII. Overlap Between the CPR 1987 and the CCA 1974

Discrepancies exist if like cases are not treated alike. Examples of such discrepancies have become apparent in the preceding sections of this paper. However, further problems are met if the same case is regulated by conflicting set of rules. This might happen with the CPR 1987 and the CCA 1974. Above it has been pointed out that the CPR 1987 and the CCA 1974 apply to the same situations.[111] It has also been observed that the regulator intended the CPR 1987

[107] Directive 97/7/EC, art. 2(3).
[108] Directive 85/577/EEC, art. 2.
[109] Micklitz/Monazzahian/Rößler, *Door to Door Selling*, vol. 1, pp. 15 f., suggest that the directive 85/577/EEC should be changed to use the term supplier.
[110] On the terminology used in the different member states implementing directive 85/577/EEC see Micklitz/Monazzahian/Rößler, *Door to Door Selling*, vol. 2, p. 3. A survey on how the directive 85/577/EEC has been implemented in the single member states is also done by Rott, *Die Umsetzung der Haustürwiderrufsrichtlinie*.
[111] See II above.

not to apply if a contract is cancellable under the CCA 1974.[112] However, this is not what the CPR 1987 on a literal reading actually say. Regulation 4(2) of the CPR 1987 states: "Paragraph (1) above does not apply to a cancellable agreement within the meaning of the Consumer Credit Act 1974 [...]." Only reg. 4(1) does not apply to those contracts which are already cancellable under the CCA 1974. Regulation 4(1) only states that a contract is unenforceable against the consumer if the trader has not informed the consumer about his right of cancellation. The right of cancellation itself is, however, dealt with in reg. 4(5) and the consequences of the cancellation in reg. 5 ff. Regulation 4(2) does not say anything about the non-applicability of these regulations.[113] Hence, on a literal reading a consumer might have the right to cancel the agreement both under the CPR 1987 and the CCA 1974.[114] However, with this literal understanding of reg. 4(2) we run immediately into problems.[115] The duty to inform the consumer about his right of cancellation is dealt with in reg. 4(1). According to the literal understanding of reg. 4(2), the consumer has the right to cancel the contract both under the CPR 1987 and the CCA 1974 but he only has to be informed about his right of cancellation under the CCA 1974. The period of cancellation under the CCA 1974 is shorter than that under the CPR 1987. Thus, it might happen that, although the right of cancellation under the CCA 1974 has already run out, the contract is still cancellable under the CPR 1987, but that the consumer does not know of his right to cancel the contract under the CPR 1987. Furthermore, the CCA 1974 and the CPR 1987 contain conflicting rules on the consequences of cancellation. This raises doubts concerning the care with which these provisions were drafted.

VIII. Conclusion

Consumer protection law in Britain is in need of reform. The CPR 2000, the CPR 1987, and the CCA 1974 are each deficient: (1) although these acts present very detailed rules, they are still incomplete. How these gaps are to be filled, is unclear. (2) There are differences between the CPR 2000, the CPR 1987, and the CCA 1974 on the one hand and the common law on the other hand. There are also differences between the CPR 2000, the CPR 1987,

[112] See the text at n. 41 above.

[113] Furthermore, not all regulated agreements within the meaning of the CCA 1974 are excluded from the scope of application of the CPR 1987 under reg. 3(2). See *e.g.*, Goode, *Consumer Credit Law*, s. 15.32.

[114] A.P. Dobson, "Consumer Sales and Credit Transactions", [1988] J.B.L. 167; David Oughton, John Lowry, *Consumer Law*, 2nd ed. (London 2000), s. 11.3.2.

[115] See also the criticism put forward by Dobson, [1988] J.B.L. 167.

and the CCA 1974. Some of these differences seem to be purely terminological differences. The problem with these is that there is always the danger that terminological differences evolve into differences in substance. Other differences are such differences in substance. The problem with these is that many of them do not seem to be policy based. They thus result in discrepancies. To remedy these problems, the legislator has to pay attention to the contractual and restitutionary context of consumer protection. (3) Finally, some details of the British acts do not seem to be conform with the European directives.

The scope of this article was rather narrow. For reasons of space only the CPR 2000, the CPR 1987, and the CCA 1974 have been considered, and only certain aspects of them have been discussed. Many other problems need to be identified, reflected on, and solved: According to reg. 13(1)(e) of the CPR 2000, for example, the consumer is not able to cancel a contract for the delivery of newspapers and periodicals. The British regulator had no choice but to make this exception: art. 6(3) of the directive 97/7/EC. None the less, it seems to be rather problematic. One could argue that it makes sense that a consumer has no right to cancel the contract for the delivery of newspapers once the newspaper is delivered or has even been dispatched to the consumer: the newspaper will be worthless to the supplier if it is returned to him. However, English and Scottish laws of contract and restitution are moving towards the solution that rescission should not be excluded, but that the rescinding party should have to restore the value of what he received if he is unable to return it *in natura*.[116] There is no policy reason why with cancellation there should be any differences. Moreover, the cancellation period already starts with the conclusion of the contract and it would make sense to allow the cancellation at least from that moment on until the dispatch of the newspaper. Finally, what a consumer will usually enter into is a subscription for a newspaper that runs for a long period of time. Even if the first newspaper has been delivered and it is accepted that any performances which has already been rendered should not be unwound, there would be no problem in accepting that in these cases the cancellation only works prospectively.

Furthermore, the CPR 2000 and the CPR 1987 contain special rules for certain objects. According to reg. 13 of the CPR 2000, the right to cancel the contract is excluded if it is a contract for the supply of goods which are liable to deteriorate or expire rapidly. Regulation 7 of the CPR 1987 and section 72(9) of the CCA 1974

[116] See the text at and in n. 60, n. 70, and n. 78 above.

deal with the situation of perishable goods. Why do the CPR 2000 speak of goods which are liable to deteriorate or expire rapidly and the CPR 1987 and the CCA 1974 of perishable goods? Is this a difference in substance? If the legislator felt compelled to introduce special rules for certain objects should we not find in each and every act rules on the same kind of objects?

There are also a number of further directives on consumer protection: *e.g.*, the directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchaser of the right to use immovable properties on a timeshare bases,[117] the directive 90/619/EEC on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services,[118] the directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products,[119] and the directive 90/314/EEC on package travel, package holidays and package tours.[120] Also the statutory instruments implementing these directives have to be compared with each other and they have to be discussed in their national legal context. Only then, it is possible to evaluate whether there is further need of reform. In the EU, and in some Member States, these discussions have already commenced.[121]

Finally, the *lex lata* concerning consumer protection is very complex. This is in itself a problem which calls for reform.[122] The legislator when drafting acts for the protection of consumers should at least try to formulate the provisions in such a way, that the consumer himself has the chance to understand his rights. The legislator cannot simply point to the fact that the European directives are equally complex because the addressees of the

[117] Of 26 October 1994, O.J. L. 280, 29/10/1994, P. 0083–0087.
[118] Of 8 November 1990, O.J. L. 330, 29/11/1990, P. 0050–0061.
[119] Of 25 July 1985, O.J. L. 210, 07/08/1995, P. 0029–0033.
[120] Of 13 June 1990, O.J. L. 23/06/1990, P. 0059–0064.
[121] See *e.g.*, Micklitz/Monazzahian/Rößler, *Door to Door Selling*, vol. 1 and 2; Janko Büßer, *Das Widerrufsrecht des Verbrauchers. Das verbraucherschützende Vertragslösungsrecht im europäischen Vertragsrecht* (Frankfurt am Main 2001); Ewoud Hondius, "Consumer Law and Private Law: the Case for Integration", in Wolfgang Heusel (ed.), *Neues europäisches Vertragsrecht und Verbraucherschutz. Regelungskonzepte der Europäischen Union und ihre Auswirkungen auf die nationalen Zivilrechtsordnungen* (Cologne 1999), pp. 19 ff.; Susanne Kalss, Brigitta Lurger, "Zu einer Systematik der Rücktrittsrechte insbesondere im Verbraucherrecht" [1998] Juristische Blätter 89 ff., 153 ff., 219 ff.; and the Statement by the Council and the Parliament re Article 6(1) of the directive 97/7/EC.
[122] See K.E. Lindgren, "The Consumer Credit Act 1974: Its Scope", (1977) 40 M.L.R. 173; Stephen Weatherill, "The Implementation and Repercussions of Consumer Protection Directives in Domestic Law. Country Report: United Kingdom", in Heusel, *Neues europäisches Vertragsrecht und Verbraucherschutz*, p. 118. See also Konrad Schiemann, "New European Contract Law and Consumer Protection. An Evaluation from the Point of View of the Courts", in Heusel, *Neues europäisches Vertragsrecht und Verbraucherschutz*, p. 134.

European directives are the individual national legislators whereas the addressees of the British acts are the individual consumers. Thus, a national legislator should not simply implement a European directive word by word.[123] He should paraphrase it in plain and simple language. He should do what, according to reg. 7(1) of the Unfair Terms in Consumer Contracts Regulations 1999,[124] he requires a seller and supplier to do: "A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language." The legislator seeks to ensure that a consumer understands any contract that he enters into and he should equally ensure that the consumer understands any act which is made for his protection.

[123] Jack Beatson, "European Law and Unfair Terms in Consumer Contracts" [1995] C.L.J. 235, speaks vividly of "copy-law" technique.
[124] S.I. 1999/2083.