



Josje de Vogel

**The Transition from
Mobility Ownership
to Mobility Usership:
Is EU Consumer Law
Pushing the Brakes?**

A Comparative Legal Study

Boom

The growing call for ecologically responsible consumer choices, driven by greater awareness of the environmental and social consequences, is impacting consumer rights. This study explores the rights of consumers amid the mobility transition from ownership to usership within the circular economy. By means of an analysis of specific EU directives and their implementation in the Netherlands, Belgium, Germany, and France, this study analyses whether, and to what extent, the protection of consumers of mobility usership is equivalent to that of consumers in traditional sales contracts. Furthermore, it includes an empirical analysis of the level of self-regulation within the Member States, consisting of a comprehensive analysis of the general terms and conditions of providers of mobility usership.

The findings suggest that inequivalent protection exists for consumers of mobility usership due to both the *ratione personae* and *ratione materiae* scope of the directives. Although inequivalences may not necessarily pose significant problems, a *mutatis mutandis* assessment of the rules is important to consider the *ratio legis* of the legal rule, while ensuring that the rule remains proportional and practically possible. Furthermore, empirical findings show that the mobility usership sector sometimes enhances protection to levels comparable to those for traditional sales.

This study sheds light on consumer rights and the mobility transition from ownership to usership in the circular economy and its results could be valuable for academics in the field of consumer law, policymakers involved in the transition from ownership to usership, and providers and consumers of mobility usership.

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Is EU Consumer Law Pushing the Brakes?

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THE TRANSITION FROM MOBILITY OWNERSHIP TO MOBILITY USERSHIP: IS EU CONSUMER LAW PUSHING THE BRAKES?

A COMPARATIVE LEGAL STUDY

*De mobiliteitstransitie van eigendom naar gebruik: remt het EU-consumentenrecht af?
Een rechtsvergelijkende studie*

Thesis

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LIST OF ABBREVIATIONS AND TRANSLATIONS

EU Laws and regulations

Charter of Fundamental Rights of the EU	Charter of Fundamental Rights of the European Union 2012/C 326/02
Consumer Credit Directive (CCD)	Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC
Consumer Credit Directive 2023 (CCD 2023)	Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC
Consumer Rights Directive (CRD)	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
Consumer Sales Directive (CSD)	Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC
Consumer Sales Directive 1999	Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

LIST OF ABBREVIATIONS AND TRANSLATIONS

Directive on the pursuit of the business of credit institutions	Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (30 June 2006) L177/1
Distance Selling Directive	Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts
Omnibus Directive	Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules
Regulation on a multiannual consumer programme	Regulation (EU) No 254/2014 of the European Parliament and of the Council of 26 February 2014 on a multiannual consumer programme for the years 2014-20 and repealing the Decision No 1926/2006/EC
Rome I Regulation	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
SCE Regulation	Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)
Services Directive	Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market
Treaty on the Functioning of the European Union (TFEU)	Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union (26 October 2012) C 326/47

Unfair Commercial Practices Directive (UCPD)	Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council
Unfair Contract Terms Directive (UCTD)	Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts
<i>National Laws and regulations</i>	
Belgian Act of 14 July 1991 on commercial practices and consumer information and protection	Wet van 14 juli 1991 betreffende de handelspraktijken en de voorlichting en bescherming van de consument
Belgian Act of 2 August 2002 on combating late payment in commercial transactions	Wet van 2 augustus 2002 betreffende de bestrijding van de betalingsachterstand bij handelstransacties
Belgian Civil Code	Burgerlijk Wetboek
Belgian Code of Economic Law (WER)	Wetboek van Economisch Recht
Belgian Code on Companies and Associations	Wetboek van Vennootschappen en Verenigingen
Dutch Civil Code	Burgerlijk Wetboek
Dutch Consumer Protection Enforcement Act	Wet handhaving consumentenbescherming

LIST OF ABBREVIATIONS AND TRANSLATIONS

Dutch Consumer Rights Directive Implementation Act	Wet van 12 maart 2014 tot wijziging van de Boeken 6 en 7 van het Burgerlijk Wetboek, de Wet handhaving consumentenbescherming en enige andere wetten in verband met de implementatie van Richtlijn 2011/83/EU van het Europees Parlement en de Raad van 25 oktober 2011 betreffende consumentenrechten, tot wijziging van Richtlijn 93/13/EEG van de Raad en van Richtlijn 1999/44/EG van het Europees Parlement en de Raad en tot intrekking van Richtlijn 85/577/EEG en van Richtlijn 97/7/EG van het Europees Parlement en de Raad (PbEU L 304/64)
Dutch Decree on compensation for extrajudicial collection costs	Besluit vergoeding voor buitengerechtelijke incassokosten
Dutch Decree on the Supervision of Financial Enterprises under the Wft	Besluit Gedragstoezicht financiële ondernemingen Wft
Dutch Financial Supervision Act (Wft).	Wet op het financieel toezicht
Dutch Implementation Act Books 3, 5 and 6 new Civil Code	Invoeringswet Boeken 3, 5 en 6 nieuw BW
Dutch Law adapting the Directive on Unfair Commercial Practices by companies towards consumers in the internal market	Wet van 25 september 2008 tot aanpassing van de Boeken 3 en 6 van het Burgerlijk Wetboek en andere wetten aan de richtlijn betreffende oneerlijke handelspraktijken van ondernemingen jegens consumenten op de interne markt, Stb. 2008, 397 en 398
Dutch Motor Vehicle Liability Insurance Act	Wet aansprakelijkheidsverzekering motorrijtuigen
Dutch Structure Regulation Act for large cooperatives and mutual guarantee companies	Wet van 16 juni 1988 tot invoering van de structuurregeling voor grote coöperaties en voor grote onderlinge waarborgmaatschappijen
French Civil Code	Code Civil
French Code of Trade	Code du Commerce
French Consumer Code	Code de la Consommation

French Hamon Law	LOI n° 2014-344 du 17 mars 2014 relative à la consommation (Loi Hamon).
French Insurance Code	Code des assurances
French Law on the Status of Cooperation	Loi n° 47-1775 du 10 septembre 1947 portant statut de la coopération
French Law relating to the contract of association	Loi du 1er juillet 1901 relative au contrat d'association
French Law relating to the legislative part of the Consumer Code and consumer credit agreements	LOI n° 2017-203 du 21 février 2017 ratifiant les ordonnances n° 2016-301 du 14 mars 2016 relative à la partie législative du code de la consommation et n° 2016-351 du 25 mars 2016 sur les contrats de crédit aux consommateurs relatifs aux biens immobiliers à usage d'habitation et simplifiant le dispositif de mise en œuvre des obligations en matière de conformité et de sécurité des produits et services
French Regulation regarding the legislative part of the consumer law	L'Ordonnance n° 2016-301 du 14 mars 2016 relative à la partie législative du code de la consommation
French rules on incidents involving the repayment of personal loans	Arrêté du 26 octobre 2010 relatif au fichier national des incidents de remboursement des crédits aux particuliers, NOR: ECET1024001A, JORF n°0253 du 30 octobre 2010, Texte n° 22
German Banking Act (KWG)	Gesetz über das Kreditwesen
German Civil Code (BGB)	Bürgerliches Gesetzbuch
German Commercial Law Act (HGB)	Handelsgesetzbuch
German Federal Code	Bundesgesetzbuch
German Federal Data Protection Act	Bundesdatenschutzgesetz
German Introductory Act to the Civil Code (EGBGB-E)	Einführungsgesetz zum Bürgerlichen Gesetzbuche
German Law on the Federal Financial Supervisory Authority	Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht

LIST OF ABBREVIATIONS AND TRANSLATIONS

German Price Indication Regulation (PAngV)	Preisangabenverordnung
German Unfair Competition Law (UWG)	Unlauterer Wettbewerb-Gesetz

Miscellaneous abbreviations and translations

B2B	Business-to-Business
B2C	Business-to-Consumer
Belgian association with legal personality	Vereniging met rechtspersoonlijkheid
Belgian association without legal personality	Vereniging zonder rechtspersoonlijkheid
Belgian Central Office for Credit to Private Individuals (CKP)	Centrale voor Kredieten aan Particulieren
Belgian Chamber of Representatives	Chambre des Représentants de Belgique
Belgian cooperative company (CV)	Coöperatieve Vennootschap
Belgian Financial Services and Markets Authority (FSMA)	Autoriteit voor Financiële Diensten en Markten
C2B	Consumer-to-Business
C2C	Consumer-to-Consumer
CJEU	Court of Justice of the European Union
DCFR	Draft Common Frame of Reference
Dutch association	Vereniging
Dutch Central Credit Information System (CKI)	Centraal Krediet Informatiesysteem
Dutch cooperative	Coöperatie
Dutch Court	Rechtbank
Dutch Court of Appeal	Gerechtshof
Dutch Financial Markets Authority (AFM)	Autoriteit Financiële markten
Dutch Fine Policy Rule ACM 2014	Boetebeleidsregel ACM 2014
Dutch private lease quality mark	Keurmerk private lease
Dutch Supreme Court	Hoge Raad
EA	European Association
EESC	European Economic and Social Committee
EU	European Union
French association	Association

French cooperative society of collective interest	Société coopérative d'intérêt collectif
French Court	Tribunal Correctionnel
French Court of Appeal	La cour d'appel
French Court of Cassation	Cour de cassation
French de facto association	Association de fait
French File of personal loan repayment incidents (FICP)	Fichier des incidents de remboursement des crédits aux particuliers
French Prudential Control and Resolution Authority (ACPR)	L'Autorité de contrôle prudentiel et de résolution
German Cooperative Society Act (GEW)	Genossenschaftsgesetz Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften
German economic association	Wirtschaftlicher Verein
German Federal Court of Justice (BGH)	Bundesgerichtshof
German Federal Financial Supervisory Authority (BaFin)	Bundesanstalt für Finanzdienstleistungsaufsicht
German federal legal gazette	Bundesgesetzblatt
German non-economic association	Nicht wirtschaftlicher Verein
German Protection association for general credit protection (Schufa)	Schutzgemeinschaft für allgemeine Kreditsicherung
German registered cooperative (eG)	Eingetragene Genossenschaft
P2P	Peer-to-Peer
PECL	Principles of European Contract Law
PSS	Product-Service System
SCE	European Cooperative Society
SECCI	Standard European Consumer Credit Information

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1 INTRODUCTION

1.1 REDEFINING MOBILITY: FROM OWNERSHIP TO USERSHIP

In most European cities today, shared vehicles like mopeds and scooters are abundantly available to the public, facilitating transportation. The emerging trend in which the consumer pays for vehicle use as a service and foregoing legal ownership of the vehicle is the figurehead of a transformation. This transformation has taken place in our approach to consumption, ushering in a heightened awareness of the ecological, societal, and developmental consequences of consumer choices.¹ In recent decades, this awareness has sparked a resounding call for change, driving a reassessment of consumption patterns and consideration of more sustainable alternatives. Central to this paradigm shift is the transition from the conventional model of legal ownership to the innovative landscape of temporary usership within the realm of mobility. The necessity for this transition is broadly acknowledged by policymakers and their strategies to support the transition are encouraged through *inter alia* development of policy and legislative initiatives such as the European Union's sustainability agenda.² The underlying philosophy of such usership models align with the principles of a circular economy, where vehicles are designed for longevity, repairability, and recycling. By promoting repair and reuse,

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- 1 O.K. Mont (2002) 'Clarifying the concept of product-service system' *Journal of cleaner production* 10(3), pp. 237-245; European Commission, 'A New Deal for Consumers' (Brussels, 11 April 2018) COM (2018) 183 final; J. Valant (2015) 'Consumer protection in the EU – policy overview' *European Parliamentary Research Service*, DOI: 10.2861/575862; B. Keirsbilck and E. Terryn (2021) 'Duurzaamheid en consumentenrecht' *Revue de Droit Commercial Belge-Tijdschrift voor Belgisch Handelsrecht* 2021/10; B. Keirsbilck, E. Terryn, J. Eyckmans, S. Rousseau, D. Voinot, *Servitization and circular economy: economic and legal challenges* (1st Edition, Intersentia, 2023); E. van Gool, 'De nieuwe Richtlijn Consumentenkoop en duurzame consumptie' in: E. Terryn, I. Claeys, *Nieuw recht inzake koop & digitale inhoud en diensten* (Intersentia, 2020); V. Mak (2019) 'Consumentenbescherming bij servitization' *Preadviezen Vereniging voor de vergelijkende studie van het recht* 2019-1, pp. 69-98.
 - 2 European Commission 'A new Circular Economy Action Plan For a cleaner and more competitive Europe' (Brussels, 11 March 2020) COM(2020) 98 final; European Commission, 'A New Deal for Consumers' (Brussels, 11 April 2018) COM (2018) 183 final; European Commission 'Sustainable and Smart Mobility Strategy – putting European transport on track for the future' (Brussels, 9 December 2020) COM(2020) 789 final; European Institute of Innovation & Technology 'Evaluation of shared mobility to support decarbonisation' (18 January 2021) <https://eit.europa.eu/sites/default/files/200256-d04_id0022273_evaluation_of_shared_mobility_to_support_decarbonisation_report.pdf> accessed 6 September; European Institute of Innovation & Technology 'Co-creation of transition guidance tools private sector engagement report' (December 2020) <https://eit.europa.eu/sites/default/files/200256-d07_id0021303_co-creation_of_transition_guidance_tools_private_sector_engagement_report.pdf> accessed 6 September 2023; J. Valant (2015) 'Consumer protection in the EU – policy overview' *European Parliamentary Research Service*, DOI: 10.2861/575862.

mobility usership extends the lifespan of vehicles and reduces the need for constant replacements. In addition, providers of mobility usership have incentives to focus on durability, efficiency, and user-friendliness, which could also lead to innovations and higher-quality products. While the sustainability benefits of mobility usership have not been conclusively proven, policy makers agree that the transition from ownership to usership can make an important contribution to helping the European Union (EU) achieve its sustainability goals and growth in the EU if the transition is encouraged and developed in a responsible manner.³ In addition, policymakers recognise that this transition can bring benefits to consumers through access to new services, a wider variety of choices, and lower prices.⁴ The usership model also encourages more efficient use of resources, which can contribute to the EU's sustainability agenda and the transition to the circular economy.⁵ At the same time, mobility usership raises questions regarding the applicability of the existing consumer law framework, since this new business model has not been taken into account when designing the consumer protection directives in the past. This uncertainty could slow down the transition to mobility usership in Europe and prevent its benefits from being fully realised. Consumers may be reluctant to make the lifestyle or financial decisions necessary for this transition due to the ambiguity about their rights and obligations; for example, what exactly are the rights (and obligations) of a consumer who participates in a usership model in the event of a defective vehicle? Where can the consumer report such a defect and can the consumer terminate their participation because of such a defect? At the same time, this uncertainty also affects providers in a mobility usership model when the legal framework within which they

3 European Commission 'A new Circular Economy Action Plan For a cleaner and more competitive Europe' (Brussels, 11 March 2020) COM(2020) 98 final; European Commission, 'A New Deal for Consumers' (Brussels, 11 April 2018) COM (2018) 183 final; European Commission 'Sustainable and Smart Mobility Strategy – putting European transport on track for the future' (Brussels, 9 December 2020) COM(2020) 789) final; European Institute of Innovation & Technology 'Evaluation of shared mobility to support decarbonisation' (18 January 2021) <https://eit.europa.eu/sites/default/files/200256-d04_id0022273_evaluation_of_shared_mobility_to_support_decarbonisation_report.pdf> accessed 6 September; European Institute of Innovation & Technology 'Co-creation of transition guidance tools private sector engagement report' (December 2020) <https://eit.europa.eu/sites/default/files/200256-d07_id0021303_co-creation_of_transition_guidance_tools_private_sector_engagment_report.pdf> accessed 6 September 2023; O.K. Mont (2002) 'Clarifying the concept of product-service system' *Journal of cleaner production* 10(3), pp. 237-245; B. Keirsbilck and E. Terryn (2021) 'Duurzaamheid en consumentenrecht' *Revue de Droit Commercial Belge-Tijdschrift voor Belgisch Handelsrecht* 2021/10.

4 European Commission, 'A New Deal for Consumers' (Brussels, 11 April 2018) COM (2018) 183 final; European Commission 'Sustainable and Smart Mobility Strategy – putting European transport on track for the future' (Brussels, 9 December 2020) COM(2020) 789) final; European Commission 'The New EU Urban Mobility Framework' (Strasbourg, 14 December 2021) COM(2021) 811 final; B. Keirsbilck and E. Terryn (2021) 'Duurzaamheid en consumentenrecht' *Revue de Droit Commercial Belge-Tijdschrift voor Belgisch Handelsrecht* 2021/10.

5 European Commission, 'A New Deal for Consumers' (Brussels, 11 April 2018) COM (2018) 183 final; O.K. Mont (2002) 'Clarifying the concept of product-service system' *Journal of cleaner production* 10(3), pp. 237-245.

operate is unclear and providers do not have a clear idea of their obligations toward consumers.⁶ In addition, there is a risk that regulatory grey zones could be used to avoid rules designed to protect the consumer as the weaker party. Although the rationale of the weaker party in most cases also applies to a mobility usership model, the reality is that this model falls outside a large part of the EU consumer law acquis simply because there is no transfer of ownership given the limitation of their scope to sales contracts. Nonetheless, as will be argued below, many of the policy targets underlying these instruments applicable to sales contracts also apply to mobility usership contracts. Consequently, the question arises as to whether consumer protection applies and, if not, whether the protection should be extended and if this would lead to desirable results with regard to sustainable consumption.

After all, the consumer has far-reaching rights in case of a consumer sale, while the consumer of mobility usership does not have these because the business model does not fall within the scope of consumer law directives that apply to consumers of consumer sales, because it requires ownership to pass. At the same time, this means that the Unfair Commercial Practices Directive and the Unfair Contract Terms Directive do provide a level of protection to the mobility usership consumer. However, to create a level playing field between sales-based contracts and use-based contracts, mobility usership needs to be constructed in a way that safeguards consumers' rights.

1.2 OPERATIONALISATION

The important and topical concept of mobility usership is central to this study and is therefore defined and operationalised to construct a model to be used for the purpose of this research. Mobility usership is a Product-Service System (PSS) that provides consumers with a combination of (the use of) products and services, often in an integrated and holistic manner. Instead of selling a physical product, a provider implementing a PSS approach also offers complementary services that enhance the value, functionality, and overall experience of the product for the consumer. The main rationale behind PSS is to move away from the traditional focus on selling individual products and towards providing solutions that address the broader needs and desires of consumers. This approach can improve sustainability and consumer satisfaction and has the potential for ongoing income through service contracts or subscriptions. PSS offers

6 C. Lavigne, S. Rousseau 'Trust and Consumers' Attitudes towards Product-Service Systems: Comparing Flanders and the Netherlands' in: B. Keirsbilck, E. Terryn, J. Eyckmans, S. Rousseau, D. Voinot, *Servitization and circular economy: economic and legal challenges* (1st Edition, Intersentia, 2023), pp. 15-32.

consumers a more comprehensive solution that meets consumers' needs and preferences while potentially reducing waste and resource consumption. This concept has gained significance in discussions about sustainability and circular economy practices as it encourages a shift from the linear take-make-dispose consumption model to a more circular and resource efficient approach.⁷ Although various classifications of PSS are proposed, for this research a classification of three main categories is adopted, namely the (1) product-oriented services, (2) use-oriented services, and (3) result-oriented services.⁸ This classification is visualised in Figure 1. With (1) product-oriented services, the provider sells a product and additionally offers services and/or support on its most efficient use. On the other end of the spectrum, (3) a result-oriented service is a service in which the user only buys the output of the product, e.g. outsourcing or a pay-per-service model. For the purposes of this study, however, only (2) use-oriented services, visualised in the light grey box of Figure 1, will be evaluated because this approach aligns with the current existing mobility solutions that target the transition from ownership to usership.

7 B. Keirsbilck and E. Terryn (2021) 'Duurzaamheid en consumentenrecht' *Revue de Droit Commercial Belge-Tijdschrift voor Belgisch Handelsrecht* 2021/10; R. Antikainen, R. Baudry, A. Gössnitzer, T.K.M. Karppinen, M. Kishna, F. Montevecchi, F. Müller, C. Pinet and R. Uggla (2021) 'Circular business models: product-service systems on the way to a circular economy' *European Network of the Heads of Environment Protection Agencies – Interest Group on Green and Circular Economy* <https://epanet.eea.europa.eu/reports-letters/reports-and-letters/circular_business_models_interest-group-green-and-circular-economy.pdf> accessed 4 September 2023; A. Tukker (2004) 'Eight types of product-service system: eight ways to sustainability?' *Business strategy and the environment* (Special Issue: Innovating for Sustainability) 13(4), pp. 246-260; A. Tukker (2015) 'Product services for a resource-efficient and circular economy—a review' *Journal of cleaner production* 97, pp. 76-91; A. Annarelli, C. Battistella, and F. Nonino (2016) 'Product service system: A conceptual framework from a systematic review' *Journal of cleaner production* 139, pp. 1011-1032; O.K. Mont (2002) 'Clarifying the concept of product-service system' *Journal of cleaner production* 10(3), pp. 237-245; P. Roman, G. Thiry, C. Muylaert, C. Ruwet and K. Maréchal (2023) 'Defining and identifying strongly sustainable product-service systems (SSPSS)' *Journal of Cleaner Production* 391, 136295; C. Muylaert, G. Thiry, P. Roman, C. Ruwet, R. De Hoe, and K. Maréchal (2022) 'Consumer perception of product-service systems: Depicting sector-specific barriers in the mobility, clothing and tooling sectors' *Frontiers in Environmental Science* 10, DOI: 10.3389/fenvs.2022.1048554; S. Kurpiela and F. Teuteberg (2022) 'Strategic planning of product-service systems: A systematic literature review' *Journal of Cleaner Production* 338, 130528; J. Hojnik (2018) 'Ecological modernization through servitization: EU regulatory support for sustainable product-service systems' *Review of European, Comparative & International Environmental Law* 27(2), pp. 162-175.

8 For a more detailed discussion of the other categories within the classification, see: A. Tukker (2004) 'Eight types of product-service system: eight ways to sustainability?' *Business strategy and the environment* (Special Issue: Innovating for Sustainability) 13(4), pp. 246-260. For various classifications of PSS, see: S. Behrend, C. Jasch, J. Kortmap, G. Hrauda, R. Firzner, D. Velte, *Eco-Service Development. Reinventing Supply and Demand in the European Union* (Sheffield: Greenleaf Publishing Limited, 2003); J.C. Brezet, A.S. Bijma, J. Ehrenfeld, S. Silvester (2001) 'The Design of Eco-Efficient Services; Method, Tools and Review of the Case Study Based 'Designing Eco-Efficient Services' Project' Ministry of VROM – Delft University of Technology; Zaring O. (ed.) (2001) 'Creating Eco-Efficient Producer Services, report of an EU project' (Gothenburg Research Institute, Gothenburg).

Figure 1: Operationalisation PSS and use-oriented services

Product-Service System					
Value mainly in (use of) vehicle	Product content (tangible) <i>Use component</i>			Service content (intangible) <i>Service component</i>	Value mainly in service
<i>Pure vehicle</i>	(1) Product-oriented service	(2) Use-oriented service		(3) Result-oriented service	<i>Pure Service</i>
		Exclusive use (a), (b)	Shared use (c)-(h)		
		The vehicle does not shift in ownership.			
		The provider has ownership of the vehicle, and is also often responsible for maintenance, repair, and control.			
		The consumer uses the vehicle long-term.	The consumer uses the vehicle short-term.		
		The consumer pays a periodic fee for the use of the vehicle.	The consumer pays for (each) use of the vehicle.		
		The consumer has unlimited and individual access to the leased vehicle.	The consumer has limited and shared access to the vehicle. The same vehicle is sequentially used by different consumers.		

The use-oriented service exists in two models: exclusive mobility use and shared mobility use.⁹ All mobility usership consists of a use component and a service component. These models are listed from left to right in Figure 1 because the oblique line illustrates that the balance of these components shifts from a predominant use component to a predominant service component.¹⁰ Above, Figure 1 shows the exclusive use and shared use model with a concise indication of the characteristics that distinguish these models. Note that mobility

9 There is a third model, namely product pooling (also known as ride hailing or ride sharing), which resembles simultaneous product/vehicle renting or sharing. However, this model is excluded from the study because the study concerns individual mobility use and therefore not taxi services such as Uber or Lyft. For more information on product pooling model, see: A. Tukker (2004) 'Eight types of product-service system: eight ways to sustainability?' *Business strategy and the environment* (Special Issue: Innovating for Sustainability) 13(4).

10 Note: The size of the display of the categories (1), (2), and (3) is not a true proportional representation of these categories, but were adjusted for this study, to facilitate elaboration of the use-oriented service category in the figure.

usership explicitly does not include public transport or ridesharing services such as *Uber* or *Lyft* because these models are not solely and sequentially controlled by the consumer since the consumer is not the driver. This sole and sequential control is essential to this research because it contributes to the comparability of exclusive use and shared use. In addition, the simultaneous use of the vehicle in ridesharing adds a different type of legal issues due to the mutual relationship between those parties, which legal issues fall outside the scope of this research. Therefore, public transport and ridesharing services are not included in this study.

An overview of the variations of mobility usership included in this study is shown in Table 1. These variations ((a) up to and including (h)) and their corresponding letters are used throughout the whole study for the sake of consistency.

Table 1: Operationalisation notion of mobility usership

Mobility usership		
	<i>Private companies (B2C)</i>	<i>Collaborative (C2C)</i>
<i>Exclusive use</i>	Exclusive B2C usership of cars (private lease), (a).	In theory possible but due to non-existence in practise excluded from the study.
	Exclusive B2C usership of two-wheelers, (b).	
<i>Shared use</i>	Shared B2C usership of cars, (c).	Collaborative vehicle sharing, (e), (f), (g), (h), elaborated in Figure 2.
	Shared B2C usership of two-wheelers, (d).	

1.2.1 *Exclusive use*

In case of an exclusive usership contract, the use component predominates and is supplemented by a subordinate service component, such as *Direct Lease*. Furthermore, it concerns the possibility of continuous access and individual long-term use of a vehicle, whereas the subordinate service component is addressed in the event of a need for maintenance or repair, for example.¹¹ The consumer pays a periodic fee for the long-term use of the vehicle. Although theoretically exclusive vehicle use providers could be divided

11 A. Tukker (2004) 'Eight types of product-service system: eight ways to sustainability?' *Business strategy and the environment* (Special Issue: Innovating for Sustainability) 13(4), pp. 246-260; A. Tukker (2015) 'Product services for a resource-efficient and circular economy—a review' *Journal of cleaner production* 97, pp. 76-91; O.K. Mont (2002) 'Clarifying the concept of product-service system' *Journal of cleaner production* 10(3), pp. 237-245.

between private companies and collaboratives. However, exclusive use collaboratives do not exist in practise and therefore only exclusive use in the B2C relationship (i.e. with private companies) is studied for (a) cars and (b) two-wheelers. *Direct Lease*, *LeasePlan* and *Swapfiets* are private lease providers and examples of exclusive vehicle use, where a lease company might provide their own vehicles on a subscription basis and the consumer pays a monthly fee for use.

1.2.2 Shared use

A shared usership contract primarily focusses on the short term and distance means of mobility. An example of shared mobility is *Greenwheels*. The emphasis for shared mobility lies on the service component because the ease and accessibility of shared mobility is central. The shared mobility provider supplies transportation to the consumer and the consumer pays the price of the single ride. This means that the consumer pays for (each) use of the vehicle and has limited, short-term, shared access to the vehicle because the same vehicle is sequentially used by other consumers. Two types of shared mobility are examined, namely B2C shared mobility and collaborative mobility sharing.

B2C shared mobility use is examined for (c) shared cars and (d) shared two-wheelers (Table 1 for a complete overview of all mobility usership constructions and the related letter references). Regarding shared mobility of two-wheelers, the term micro-mobility is also used, referring to a mode of transport that involves small, lightweight vehicles designed for short-distance travel. With B2C shared mobility use, the provider offers its own fleet of vehicles to the consumer, in which there exist two variants, namely the station-based variant or the free-float variant. In station-based mobility, the shared vehicles are located at designated docking stations throughout the providers' service areas. Consumers are required to pick up the vehicles from these specific stations and return them to a designated station. In comparison, the free-float variant allows consumers to locate, unlock, and use shared vehicles without the need for designated docking stations. The free-float vehicles are equipped with GPS technology and can be left anywhere within a provider's service area. Both variants are included in this research.

The second type of shared mobility is collaborative mobility sharing, which includes different types of sharing constructions, as shown in Figure 2. Collaborative mobility sharing refers to consumer-to-consumer (C2C) sharing, with or without the intervention of a platform. Collaborative mobility sharing therefore differs from business-to-consumer (B2C) shared mobility usership, in which the provider owns a fleet of vehicles to facilitate and offer shared mobility use. In contrast to B2C shared mobility usership, the consumer

uses a vehicle owned by a private individual with collaborative mobility sharing. Therefore, in principle, the application of consumer protection is less evident for C2C sharing of mobility because the rationale is different. The unequal bargaining power is less present as there is already a certain level playing field. However, C2C mobility sharing is also included in this research because it is a significant form of mobility usership and it is therefore valuable to investigate the level of protection in such constructions.

Four types of collaborative mobility sharing can be distinguished. The first type is (e) collaborative platform sharing enabling C2C mobility sharing with the intervention of a platform that mediates in carsharing between private individuals, such as *SnappCar* or *Getaround*.¹² Private individuals can provide their own car to consumers via the platform's website. These private individuals (hereinafter referred to as 'providers') can often determine their own price and availability. Again, there are two variants. The provider can choose to share the car with every consumer that has an account, or only with a predetermined group of consumers. Furthermore, the provider often asks a fixed amount per day for expenses like insurance, roadside assistance, reliability assessments and mediation. To clarify, a triangular relationship exists in this example between the individual provider, the platform, and the consumer. This means that the level of protection may be influenced either by the platform or individual provider. The second type of collaborative mobility sharing is (f) formal C2C collaborative sharing, which includes private individuals who can offer their own vehicle to consumers, without the intervention of a platform but with a mutually concluded use contract. This indicates some degree of formalisation of the use. This often concerns small-scale neighbourhood communities. Sometimes mobility sharing associations – such as *Deelauto*, for example – provide exemplary contracts or contract terms that can be used by the private individual to regulate the mobility usage.¹³ The third type of collaborative mobility sharing is (g) informal C2C collaborative sharing, which resembles the second type of vehicle sharing between private individual and consumer, or in other words between neighbours. However, this third type does not formalise the use of mobility and is used on a case-by-case basis. This refers to the example of one neighbour lending their vehicle to another (in good faith, usually without legal requirements). A fourth type of collaborative mobility sharing is (h) collaborative sharing as cooperative referring to the joint purchase of a fleet of vehicles whereby the private individuals jointly own this fleet.¹⁴ This is often organised as a cooperative, again with two variants. The cooperative can choose to share

12 *SnappCar*, <<https://www.snappcar.nl>> accessed 22 June 2023; *Getaround*, <<https://be.getaround.com>> accessed 22 June 2023.

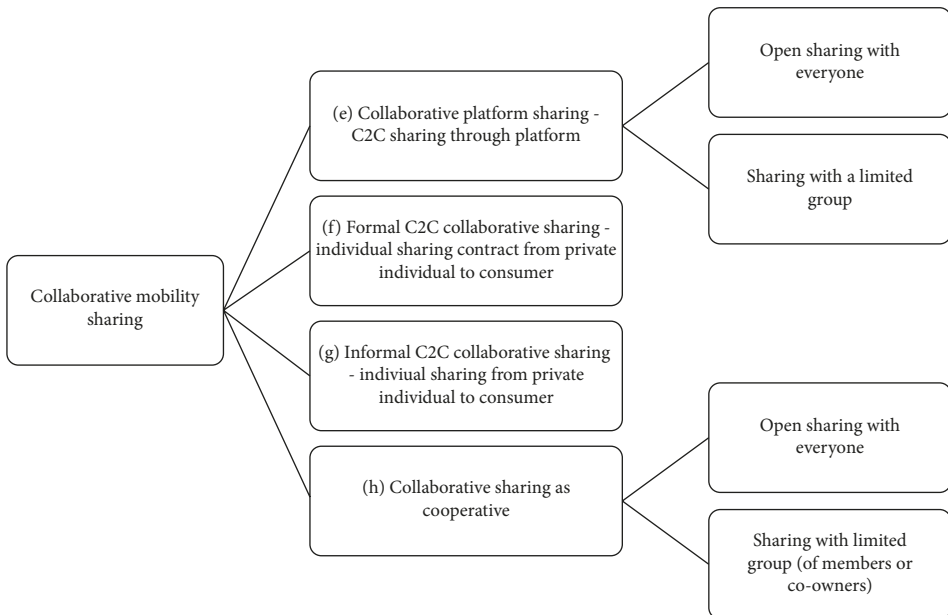
13 *Deelauto*, <<https://deelauto.nl>> accessed 22 June 2023.

14 The definition and qualification of the cooperative is further discussed in chapter 2, namely section 2.4.2, section 2.5.2 (on the qualification of the cooperative as a professional party) and 2.6.2 (on the qualification of the cooperative as a consumer).

the fleet with every consumer, or only with members or co-owners of the cooperative. Furthermore, collaborative sharing as cooperative can exist in two scales. There are small-scale cooperatives, in which individuals jointly purchase a vehicle or a fleet of vehicles to offer between co-owners or as open sharing. In addition, there are also larger-scale cooperatives with a sizeable fleet and, for example, 10.000 co-owners. These variants have a different use-to-service ratio. Where small-scale cooperatives predominantly focus on the use-component and subordinate on the service component, large scale cooperatives emphasise the availability and accessibility of use, indicating a predominant service component.

Figure 2 shows that there is a multiplicity of types of collaborative sharing. Due to this diversity, not all these different types of collaborative sharing are studied as extensively as B2C sharing in this research since the initiatives are often (very) small-scale, which makes them hard or impossible to find and assess, and they often vary. After all, small collaborative neighbourhood initiatives do not envision global (or national) market outreach but operate instead only in the specific neighbourhood or town.

Figure 2: Operationalisation collaborative mobility sharing



1.3 RESEARCH QUESTION AND DESIGN

A recent proliferation of literature regarding different sustainable business models has resulted in an abundance of available information,¹⁵ but questions related to the impact, if any, on the rights and obligations of consumers in circular economy models have not yet been addressed broadly.¹⁶ As an owner of a product, the consumer has certain rights and obligations, but these rights and obligations might differ with a transition to temporary use instead of ownership.¹⁷ After all, the rules for these business models vary mainly because the business models differ; insufficient scrutiny is made regarding the rationale for consumer protection in these cases, indicating a lacuna in regulations. As a result, this research is relevant because it addresses this lacuna that exists at the contractual level. The findings of this research can provide policy makers with information on the effects on consumers

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- 15 For example: A. Tukker (2004) 'Eight types of product-service system: eight ways to sustainability?' *Business strategy and the environment* (Special Issue: Innovating for Sustainability) 13(4), pp. 246-260; A. Tukker (2015) 'Product services for a resource-efficient and circular economy—a review' *Journal of cleaner production* 97, pp. 76-91; O.K. Mont (2002) 'Clarifying the concept of product-service system' *Journal of cleaner production* 10(3), pp. 237-245; S. Behrend, C. Jasch, J. Kortmap, G. Hrauda, R. Firzner, D. Velte, *Eco-Service Development. Reinventing Supply and Demand in the European Union* (Sheffield: Greenleaf Publishing Limited, 2003); J.C. Brezet, A.S. Bijma, J. Ehrenfeld, S. Silvester (2001) 'The Design of Eco-Efficient Services; Method, Tools and Review of the Case Study Based 'Designing Eco-Efficient Services' Project' Ministry of VROM – Delft University of Technology; O. Zaring (2001) 'Creating Eco-Efficient Producer Services, report of an EU project' (Gothenburg Research Institute, Gothenburg); R. Antikainen, R. Baudry, A. Gössnitzer, T.K.M. Karppinen, M. Kishna, F. Montevecchi, F. Müller, C. Pinet and R. Ugglä (2021) 'Circular business models: product-service systems on the way to a circular economy' *European Network of the Heads of Environment Protection Agencies – Interest Group on Green and Circular Economy* <https://epanet.eea.europa.eu/reports-letters/reports-and-letters/circular_business_models_interest-group-green-and-circular-economy.pdf> accessed 4 September 2023.
- 16 European Commission, 'A New Deal for Consumers' (Brussels, 11 April 2018) COM (2018) 183 final; B. Keirsbilck and E. Terryn (2021) 'Duurzaamheid en consumentenrecht' *Revue de Droit Commercial Belge-Tijdschrift voor Belgisch Handelsrecht* 2021/10; V. Mak (2018) 'Van ownership naar access: Is toegang de nieuwe eigendom' *Ars Aequi*, 2018(juli/augustus), pp. 664-671; V. Mak (2019) 'Consumentenbescherming bij servitization' *Preadviezen Vereniging voor de vergelijkende studie van het recht* 2019-1, pp. 69-98; J. Hojnik (2018) 'Ecological modernization through servitization: EU regulatory support for sustainable product-service systems' *Review of European, Comparative & International Environmental Law* 27(2), pp. 162-175; J. Luzak (2018) 'Digital age: time to say goodbye to traditional concepts' *Journal of European Consumer and Market Law* 4; M.B.M. Loos (2022) 'Servitization, consumentenhuur en consumentenkoop' *Weekblad voor Privaatrecht, Notariaat en Registratie* 7396, pp. 944-947.
- 17 European Commission, 'A New Deal for Consumers' (Brussels, 11 April 2018) COM (2018) 183 final; O.K. Mont (2002) 'Clarifying the concept of product-service system' *Journal of cleaner production* 10(3), pp. 237-245; B. Keirsbilck and E. Terryn (2021) 'Duurzaamheid en consumentenrecht' *Revue de Droit Commercial Belge-Tijdschrift voor Belgisch Handelsrecht* 2021/10; V. Mak (2018) 'Van ownership naar access: Is toegang de nieuwe eigendom' *Ars Aequi*, 2018(juli/augustus), pp. 664-671; V. Mak (2019) 'Consumentenbescherming bij servitization' *Preadviezen Vereniging voor de vergelijkende studie van het recht* 2019-1, pp. 69-98; M.B.M. Loos (2022) 'Servitization, consumentenhuur en consumentenkoop' *Weekblad voor Privaatrecht, Notariaat en Registratie* 7396, pp. 944-947.

(and their protection) when transitioning to circular mobility models.¹⁸ A solid private law framework can be a catalyst for circular business models, while the absence of this can have the opposite effect.¹⁹ Consumer rights protect consumers from threats and serious risks that they are unable to tackle as individuals in B2C relationships, which allows consumers to make decisions based on correct and reliable information and improve their welfare and economic interests. A solid legal framework is necessary not only for ensuring a level of protection, but also because it may give the consumer an incentive to switch to a mobility usership model. The evaluative study contributes to a transition to circular business models, not only within the mobility sector but all sectors using circular models, resulting in environmental pollution reduction.²⁰ Therefore, the aim of this research is to investigate the extent to which the existing EU consumer law framework provides consumers of mobility usership an equivalent level of protection as traditional consumer sales contracts. In previous research that I have conducted, some knowledge has already been gained about the existence of lacunae in consumer protection law for mobility usership consumers.²¹ Against the background of the foregoing, the main research question of this study is:

‘To what extent does equivalent consumer protection apply to the mobility usership consumer, and if it does not, should the EU legal framework on the protection of the sales-based consumer be amended to offer equivalent protection to the new consumer of mobility usership in a circular economy context?’

This research question involves several sub-questions.

First, it raises the question as to what extent the EU directives (and the implementations into national law) offer equivalent consumer protection to the mobility usership consumer compared to the consumer of a sale.

18 J. Hojnik (2018) ‘Ecological modernization through servitization: EU regulatory support for sustainable product-service systems’ *Review of European, Comparative & International Environmental Law* 27(2), pp. 162-175; B. Keirsbilck and E. Terryn (2021) ‘Duurzaamheid en consumentenrecht’ *Revue de Droit Commercial Belge-Tijdschrift voor Belgisch Handelsrecht* 2021/10.

19 See for example: C. Lavigne, S. Rousseau ‘Trust and Consumers’ Attitudes towards Product-Service Systems: Comparing Flanders and the Netherlands’ in: B. Keirsbilck, E. Terryn, J. Eyckmans, S. Rousseau, D. Voinot, *Servitization and circular economy: economic and legal challenges* (1st Edition, Intersentia, 2023), pp. 15-32; V. Mak (2019) ‘Consumentenbescherming bij servitization’ *Preadviezen Vereniging voor de vergelijkende studie van het recht* 2019-1, pp. 69-98; J. Hojnik ‘Servitization and circular economy: economic and legal challenges’ in: B. Keirsbilck, E. Terryn, J. Eyckmans, S. Rousseau, D. Voinot, *Servitization and circular economy: economic and legal challenges* (1st Edition, Intersentia, 2023), pp. 33-68.

20 S. Taekema (2018) ‘Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice’ *Law and Method*, DOI: 10.5553/REM/.000031.

21 J. de Vogel (2020) ‘Private Lease: Consumer Credit in Disguise?’ *Journal of European Consumer and Market Law* (9)2, pp. 51-60; W. Verheyen, J. de Vogel, B. Pavlovski-Dikker, Ü. Tanriverdi and F. Unz (2022) ‘Law as a tool towards the ecological transition: (urban) mobility’ *Annales de Droit de Louvain* 1, pp. 175-194.

Second, the question to what extent possible inequalities in protection do also lead to inequivalent protection considering the *ratio legis* of consumer law provisions and whether this inequivalence is problematic or sensible.

Subsequently, the question rises on whether, and if it does to what extent, the sector itself offers equivalent consumer protection to the mobility usership consumer through self-regulation.

In this context, it is necessary to examine whether the current legal framework should be amended to offer equivalent protection to the consumer of mobility usership, where both government and self-regulation are to be considered.

Table 2 provides an overview of where and with what research method these sub-questions are answered.

For years, the protection of the consumer in a sale is deeply rooted in current consumer law and considered to be of vital importance. Where the consumer sale protection is established, this protection is not self-evident for consumers of mobility usership. After all, policymakers have claimed that the usership model should ultimately offer a fully-fledged alternative to a consumer sale, facilitating a sustainable and promising alternative method of consumption, but the model must first be provided a level playing field.²² The equivalence of rights will be researched within the mobility usership business model to contribute to the redesign of mobility toward sustainable societal processes. Naturally, the fact that a consumer is not an owner but only a user has consequences for the legal relationship (for example, unlike the user, the owner usually bears the risk of damage). Therefore, this research aims at the *mutatis mutandis* application of the examined EU Directives. Equivalent explicitly does not mean equal, because differences in business models and the role of the consumer are considered. Equivalent protection should be understood as equivalent in view of its qualities, assets, performance, and other modalities of the mobility usership model. These conditions are taken into consideration while assessing equivalent consumer protection for mobility usership.²³ Furthermore, equivalent

22 C. Lavigne, S. Rousseau 'Trust and Consumers' Attitudes towards Product-Service Systems. Comparing Flanders and the Netherlands' in: B. Keirsbilck, E. Terryn, J. Eyckmans, S. Rousseau, D. Voinot, *Servitization and circular economy: economic and legal challenges* (1st Edition, Intersentia, 2023), pp. 15-32; J. Hojnik 'Servitization and circular economy: economic and legal challenges' in: B. Keirsbilck, E. Terryn, J. Eyckmans, S. Rousseau, D. Voinot, *Servitization and circular economy: economic and legal challenges* (1st Edition, Intersentia, 2023), pp. 33-68.

23 The equal protection of consumers is an important spearhead of the EU consumer policy, and this concerns equal protection in equal cases. In this study, the term equivalent was deliberately chosen because the research examines equivalent protection vis-à-vis consumers who purchase a product. This concerns a comparison of dissimilar cases, so the research must expressly focus on equivalent protection. After all, an ownership right entails far-reaching rights and obligations, going beyond use. On equal protection, see for example: BEUC, 'The Consumer Voice in Europe: Proposal for a Better Enforcement and Modernisation of

protection is the benchmark in this research, not so much because I argue that equivalent protection is always necessary, but because the rationale behind sales-based rules is deeply ingrained into the current consumer protection framework and this rationale provides guidance in designing a framework for mobility usership consumers. This means that identical protection is not always necessary, but protection is needed against issues that consumers and providers may encounter in the mobility usership sector, as these could be barriers to fully leveraging the benefits and opportunities of mobility usership.

1.4 RESEARCH METHODS AND LIMITATIONS

The research method for this study involves a doctrinal analysis of fundamental EU consumer protection instruments and its applicability to mobility usership models, an empirical study on the mobility usership sector regulation, and an evaluative analysis on the key improvements for equivalent protection and trade-off of government regulation versus self-regulation. The first two parts consist of a comparative analysis by incorporating the Netherlands, Belgium, Germany, and France (paragraph 1.4.1 for the justification of these legal systems). Table 2 below summarises the research design and questions, the associated methods, and a roadmap description.

Table 2: Research methodology

Methodology	Research design	Research question	Outline
Doctrinal analysis	<i>Ratione personae</i> scope	To what extent do the contracting parties involved in mobility usership fall under the <i>ratione personae</i> scope of the legal framework and its national implementations?	Chapter 2
	<i>Ratione materiae</i> scope	To what extent does the mobility usership contract fall under the <i>ratione materiae</i> scope of the legal framework and its national implementations?	Chapter 3
	Non-applicable substantive legal framework	To what extent do the substantive rights of the selected EU consumer protection directives provide equivalent protection with respect to sales-based consumers and to what extent are the rules that lead to inequivalent protection applicable to mobility usership in view of the EU policy objectives of consumer law?	Chapter 4
	Applicable substantive legal framework		Chapter 5

EU Consumer Protection Rules: BEUC response to the Commission ex-post consultation' (31 May 2018) BEUC-X-2018-041, pp. 2.

Methodology	Research design	Research question	Outline
Empirical analysis	Sector regulation exclusive mobility usership providers	To what extent does the sector provide for self-regulation, raising the legal minimum for mobility usership, and to what extent does the sector offer equivalent protection compared to the traditional sales-based consumer?	Chapter 6
	Sector regulation shared mobility usership providers		Chapter 7
Evaluative analysis	Key improvements and choice on method of regulation	What are the key improvements that contribute to equivalent protection for the mobility usership consumer and what are the main considerations on choosing a method of regulation when implementing these key improvements?	Chapter 8

1.4.1 Territorial selection

This research initially focusses on consumer protection in the EU, as the EU has been at the forefront of promoting sustainable mobility and usership models through various policies and initiatives such as the focus on the EU sustainability agenda and the transition to a circular economy.²⁴ The EU is also the epicentre of use-based mobility initiatives, especially regarding the shared mobility initiatives, and has the largest measured number of members and fleets deployed.²⁵ The choice to focus on the EU was also prompted by the fact that this research is executed in the EU. In addition, the EU tries to harmonise legislation to protect consumers and consumer rights and to ensure a high level of

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- 24 European Commission 'A new Circular Economy Action Plan For a cleaner and more competitive Europe' (Brussels, 11 March 2020) COM(2020) 98 final; European Commission, 'A New Deal for Consumers' (Brussels, 11 April 2018) COM (2018) 183 final; European Commission 'Sustainable and Smart Mobility Strategy – putting European transport on track for the future' (Brussels, 9 December 2020) COM(2020) 789 final; J. Valant (2015) 'Consumer protection in the EU – policy overview' *European Parliamentary Research Service*, DOI: 10.2861/575862; European Institute of Innovation & Technology 'Evaluation of shared mobility to support decarbonisation' (18 January 2021) <https://eit.europa.eu/sites/default/files/200256-d04_id0022273_evaluation_of_shared_mobility_to_support_decarbonisation_report.pdf> accessed 6 September; European Institute of Innovation & Technology 'Co-creation of transition guidance tools private sector engagement report' (December 2020) <https://eit.europa.eu/sites/default/files/200256-d07_id0021303_co-creation_of_transition_guidance_tools_private_sector_engagement_report.pdf> accessed 6 September 2023; O.K. Mont (2002) 'Clarifying the concept of product-service system' *Journal of cleaner production* 10(3), pp. 237-245.
- 25 S.A. Shaheen, and A.P. Cohen (2007) 'Growth in Worldwide Carsharing: An International Comparison' *Transportation Research Record* 1992(1), pp. 81-89, DOI: 10.3141/1992-10; S.A. Shaheen and A.P. Cohen (2016) 'Innovative Mobility Carsharing Outlook: Carsharing Market Overview, Analysis, and Trends' *Transportation Sustainability Research Center*, University Of California; S.A. Shaheen and A.P. Cohen (2013) 'Carsharing and Personal Vehicle Services: Worldwide Market Developments and Emerging Trends' *International Journal of Sustainable Transportation* 7(1), pp. 5-34, DOI: 10.1080/15568318.2012.660103.

protection throughout the internal market. This includes areas of rapid change, such as the transition from ownership to usership, which makes the EU an interesting research territory. Although harmonisation in EU consumer law is therefore central, comparative legal research will also be carried out in various Member States because different Member States have varying legal systems, cultural norms, and mobility challenges. In addition, EU consumer law sometimes leaves gaps for instance by using open norms or by not issuing maximum but minimum harmonisation. Also for this reason, maximum harmonisation is not always achieved. In other words, the actual implementation of consumer rights may differ from system to system.

Four EU Member States have been selected for the comparative legal research: the Netherlands, Belgium, Germany, and France. The comparative legal study of these Member States aims at an exemplary analysis in which the mutual deviations, despite the harmonisation, are examined by studying mobility usership in these EU Member States. This contributes to a deeper understanding of how usership models are regulated in different legal contexts. It is relevant to also examine the national implementations in different legal systems due to the current innovations in EU consumer law, such as the relatively new Consumer Sales Directive and Consumer Credit Directive.²⁶

The choice for these four Member States is justified for three reasons. First and foremost, the current mobility trends and the representation of these trends are most prevalent in these Member States. The Netherlands is a pioneer in vehicle sharing; the first attempt at bicycle sharing originates in Amsterdam, and later carsharing also emerged there.²⁷ Furthermore, mobility usership has been widely adopted in all four Member States and there was an increase in rides of 11 percent from 2022 to 2023.²⁸ This is significant for the

26 Consumer Sales Directive; Consumer Credit Directive; European Commission 'Proposal for a Directive of the European Parliament and of the Council on consumer credits' (Brussels, 30 June 2021) COM(2021) 347 final.

27 S. Jacobs 'Het witte-fietsenplan: opstap naar een betere toekomst of luchtfietsenrij?' (1 November 1999, Ons Amsterdam) <<https://onsamsterdam.nl/uploads/user/stories/ArchiefPDF/OA-1999-11-Het-witte-fietsenplan.pdf>> accessed 23 August 2023.

28 Fluctuo Mobility Enablement (2023) 'European Shared Mobility Index Q1 2023' (Fluctuo, 2023) <<https://www.polisnetwork.eu/wp-content/uploads/2023/06/ESMI-Q1-2023.pdf>> accessed 23 August 2023; Bundesverband CarSharing 'Aktuelle Zahlen und Daten zum CarSharing in Deutschland' (*Bundesverband CarSharing*, 1 January 2018) <<https://carsharing.de/alles-ueber-carsharing/carsharing-zahlen>> accessed 14 February 2019; F. Bordage 'La France, championne du monde de l'auto-partage peer-to-peer' (*GreenIT*, 10 May 2012) <<https://www.greenit.fr/2012/05/10/la-france-championne-du-monde-de-l-auto-partage-peer-to-peer/>> accessed 14 February 2019; Vereniging van Nederlandse Autoleasemaatschappijen 'Vehicle Leasing Market in Figures 2021' (April 2022) VNAID-2066292588-68. S. Jacobs 'Het witte-fietsenplan: opstap naar een betere toekomst of luchtfietsenrij?' (1 November 1999, In: Ons Amsterdam) <<https://onsamsterdam.nl/uploads/user/stories/ArchiefPDF/OA-1999-11-Het-witte-fietsenplan.pdf>> accessed 23 August 2023.

execution of the empirical study, as it must be possible to have enough providers to choose from for the study. Likewise, the intertwined legal traditions of these Member States also play a role in their selection. Although all legal systems are civil law systems, Dutch civil law and Belgian civil law have been influenced by the French *Code Civil*, enacted in 1804.²⁹ As recently as 1992, a new Dutch Civil Code (DCC) was introduced, which was largely inspired by the German Civil Code. An additional reason to study German law is that it is an important (trading) partner of the Netherlands and there is extensive body of literature on consumer law in Germany. Moreover, studying Belgian law is interesting because of the entry into force of the new contract law.³⁰ Finally, the choice for these four Member States is dictated by my language skills and by the fact that this research was conducted at Dutch and Belgian universities, the Erasmus University Rotterdam and University of Antwerp.

1.4.2 Selection of legal framework

Within the EU, consumer protection is regulated in many directives and several regulations, resulting in a significant consumer law *acquis*.³¹ In view of the feasibility of this research, a selection has been made of vital EU Directives in order to study the equivalence of consumer rights in mobility usership models. This research focusses primarily on the applicability of the directives, which requires an analysis of EU directives. This is supplemented with the implementation of these directives into the various national legal systems as it relates to the content of consumer protection.

Five EU consumer directives have been selected for the fundamental principles that they contain for consumer protection as it relates to private law. The scope of these directives differs and some (partially) focus on sales contracts and a sales-based level of protection is used as a benchmark in this research as equivalent protection. Furthermore, except for the Unfair Contract Terms Directive, all selected directives endeavour to create maximum harmonisation, which means that they aim to create a unified and consistent regulatory framework across EU Member States by setting a high standard of consumer protection that must be uniformly implemented in national laws.³²

29 D. Heirbaut and M.E. Storme (2006) 'The Belgian Legal Tradition: From a Long Quest for Legal Independence to a Longing for Dependence?' *European Review of Private Law* 5(6), pp. 645-683.

30 Belgian Chamber of Representatives, "Wetsvoorstel houdende Boek 5 'Verbintenissen' van het burgerlijk Wetboek" (24 februari 2021) DOC 55 1806/001.

31 J. Valant (2015) 'Consumer protection in the EU – policy overview' *European Parliamentary Research Service*, DOI: 10.2861/575862.

32 European Commission 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' *Official Journal of the European Union* (29 December 2021) C526/1; European

The relatively new Consumer Sales Directive aims to ensure the proper functioning of the internal market and to ensure a high level of consumer protection. To this end, the directive contains basic and common rules on sales contracts *inter partes*. The directive also aims to strike a balance between a high level of consumer protection and increased business competitiveness, an overarching objective of EU consumer law.³³ Member States must apply the rules from 1 January 2022.³⁴ Furthermore, the Consumer Rights Directive aims to increase consumer protection by harmonising several fundamental aspects of national legislation on B2C contracts and encourage trade between Member States, particularly for consumers buying online.³⁵ The relatively new Omnibus Directive on the better enforcement and modernisation of EU consumer protection rules amends the Consumer Rights Directive. These amendments increase consumer protection in several areas such as sales through online marketplaces, transparency of price personalisation, and ranking of online offers and consumer rights when using ‘free’ online services.³⁶ When there are relevant amendments to mobility usership, the omnibus directive is included in the study on those themes.

The Consumer Credit Directive is included in this analysis because it harmonises rules regarding credit granted to consumers who borrow to finance purchases of goods and

Commission ‘Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts’ *Official Journal of the European Union* (27 September 2019) C323/4; European Commission ‘Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights’ *Official Journal of the European Union* (29 December 2021) C525/1; M. Faure (2008) ‘Towards a maximum harmonization of consumer contract law?’ *Maastricht Journal of European and Comparative Law* 15(4), pp. 437-439; G. Howells, C. Twigg-Flesner and T. Wilhelmsson, *Rethinking EU Consumer Law* (London, New York: Routledge, 2018), pp. 4, 21, 170, 209; M. Westphal ‘The EU financial Services Policy and its Effect on Consumer Law’ in: M. Kelly-Louw, J.P. Nehf and P. Rott (eds.), *The Future of Consumer Credit Regulation: Creative Approaches to Emerging Problems* (London: Routledge, 2008), p. 80. Also see: M. Loos (2010) ‘Full Harmonisation as a Regulatory Concept and its Consequences for the National Legal Orders: The Example of the Consumer Rights Directive’ (2010) *Centre for the Study of European Contract Law Working Paper Series No. 2010/03*, pp. 6-29.

33 Less relevant to this study is that the Consumer Sales Directive is part of the Digital Single Market Strategy, which provides a comprehensive framework to promote the integration of the digital dimension in the internal market. Also see the older version Consumer Sales Directive 1999. D. Staudenmayer (2000) ‘The Directive on the Sale of Consumer Goods and Associated Guarantees – A Milestone in the European Consumer and Private Law’ *European Review of Private Law* 8(4), pp. 547-564; J.A. Luzak and V. Mak (2014) ‘De invloed van het Europese recht’ (*Onderneming&Recht* nr. 81-II) 2014/II.A.3.1-II.A.3.3.

34 The Consumer Sales Directive is relatively new, which means that the old Consumer Sales Directive 1999 or jurisprudence based on the old Directive may be examined for clarification or supplementation in the study. If this is the case, this will be explicitly stated.

35 Consumer Rights Directive. Also see: J.A. Luzak and V. Mak (2014) ‘De invloed van het Europese recht’ (*Onderneming&Recht* nr. 81-II) 2014/II.A.3.1-II.A.3.3.

36 Omnibus Directive. See for example: M. Durovic (2020) ‘Adaptation of Consumer Law to the Digital Age: EU Directive 2019/2161 on Modernisation and Better Enforcement of Consumer Law’ *Annals of the Faculty of Law in Belgrade* 68(2).

services and strives to strengthen consumer rights and to inform the consumer about a credit agreement.³⁷ Providers of credit sometimes use circumventing techniques that package loans as a service, thereby excluding their consumers from the protection of the directive. Furthermore, some long-term financial obligations that occur in mobility usership are similar to the obligation found in credit contracts, which makes the study of equivalent protection evident.³⁸ On the 30th of October 2023 the new Consumer Credit Directive 2023 was published, which repeals the former Consumer Credit Directive 2008 from 20 November 2026. In addition, the new directive needs to be transposed in national law by 20 November 2025 and these rules should apply from 20 November 2026. For this reason, the Consumer Credit Directive 2008 is used for this study as it constitutes the applicable law at the time of writing and completing the study. This is also done in the context of maintaining a consistent approach to the comparative legal aspect of the research because the Consumer Credit Directive 2023 is not yet transposed into national law.³⁹

The Unfair Contract Terms Directive is selected for this research because it aims to protect consumers from unfair terms and conditions which might be included in a standard contract for goods and services, and it is a fundamental instrument in achieving a fair EU internal market. It refers to the notion of good faith to avoid any fundamental imbalance in the contract parties' rights and obligations in B2C contracts.⁴⁰ The Unfair Commercial Practices Directive defines the unfair business-to-consumer commercial practices that are prohibited in the EU and ensures the same level of protection to all consumers irrespective of the place of contracting in the EU.⁴¹ As part of the new deal for consumers, both the Unfair Contract Terms Directive and the Unfair Commercial Practices Directive are

37 Recital 7 and 8 Consumer Credit Directive 2008. Also see: Asser/ Hartkamp 3-I 2023/240; V. Heutger (2014) 'De invloed van het Europese recht' (*Onderneming&Recht* nr. 81-II) 2014/II.A.5; I. Benöhr *EU Consumer law and human rights* (First Edition published in 2013, Oxford: Oxford University Press, 2014); J. Luzak (2019) 'In the wind of change: Ten years of the EU consumer credit framework' *Tijdschrift voor Consumentenrecht & handelspraktijken* 1, pp. 2-4.

38 J. de Vogel (2020) 'Private Lease: Consumer Credit in Disguise?' *Journal of European Consumer and Market Law* (9)2, pp. 51-60; S.E. Machiels and T.M. Penninks (2015) 'Private lease' *Tijdschrift voor Financieel Recht* (5), pp. 165-169; N. Hoefsloot, P. Risseeuw, L. Tilburgs, C. de Jager (2021) 'Marktonderzoek Private Lease' <<https://www.tweedekamer.nl/downloads/document?id=2021D28435>> accessed 19 October 2023; V. Mak (2019) 'Consumentenbescherming bij servitization' *Preadviezen Vereniging voor de vergelijkende studie van het recht* 2019-1, pp. 69-98.

39 A crucial aspect to consider is that the new directive also excludes any type of mobility usership due to the exception of hiring and leasing agreements in article 2(2)(g) CCD 2023. This means that also under the Consumer Credit Directive 2023 the results of this research remain pertinent.

40 Unfair Contract Terms Directive. Also see: European Commission 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (27 September 2019) C 323/4.

41 Unfair Commercial Practices Directive. Also see: European Commission 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair

amended by the Omnibus Directive.⁴² In case of relevant amendments to mobility usership, the Omnibus Directive is included in the study on those themes.

It is not the aim of this research to describe *de lege lata* in the field of consumer protection by analysing the entire text of the directives or every provision they include. This research focusses on the selected directives in view of their applicability to mobility usership and possible lacunae or complications that exists in the applicability of the law or inequivalences in protection. In addition, the implementation of the rules in national law is considered. However, it is not the aim of this study to give a full explanation of national law. The parts where deviations in national law exist are emphasised to prevent overlap and repetition.

1.4.3 Doctrinal analysis

This doctrinal research consists of four parts, graphically displayed on the left side of Figure 3. In the first two parts, the focus of the analysis is on whether the contract parties of a mobility usership agreement fall under the *ratione personae* scope and whether the mobility usership agreement falls under the *ratione materiae* scope, respectively. The next two parts of the research focus on the discussion of the substantive legal framework, whereby a distinction is made in the analysis between the discussion of applicable rights and non-applicable rights. In this last part, the applicability of the substantive rules is evaluated. The methodological considerations will be explained for all four parts, in the order listed in Table 2. First, research is conducted into the *ratione personae* scope, raising the question of whether the contracting parties in mobility usership contracts fall under the personal scope of the selected EU directives and their national implementations. This is examined for all mobility usership models and contractual relationships as follows from Table 1. Subsequently, research is conducted into the *ratione materiae* scope of the EU directives and their national implementations for all contract variations of mobility usership, as illustrated in Table 1. While inquiries about scope are straightforward for some contracts or contractual relationships, they are ambiguous for others. As a result, elaborate examination of these scopes is important to determine the applicability of the various EU directives on mobility usership. The next two parts of the doctrinal research focus on the discussion of the substantive legal framework. A distinction is made in the

business-to-consumer commercial practices in the internal market' *Official Journal of the European Union* (29 December 2021) C 526/1.

42 European Commission, 'A New Deal for Consumers' (Brussels, 11 April 2018) COM (2018) 183 final. See on the omnibus directive: M. Durovic (2020) 'Adaptation of Consumer Law to the Digital Age: EU Directive 2019/2161 on Modernisation and Better Enforcement of Consumer Law' *Annals of the Faculty of Law in Belgrade* 68(2).

analysis of the rights that are not applicable to mobility usership and the rights that are applicable to mobility usership due to the *ratione personae* and *ratione materiae* scope. The discussion of the non-applicable rights examines the substance of those rights, but also the possibilities of applying those rights to achieve equivalent consumer protection based on three exemplary case studies, which represent the variation of mobility usership models. In addition, the discussion of the applicable rights also studies the substance of the rights and the applicability based on the exemplary case studies, although the applicability is not disputed. Nevertheless, the examination of the applicable rights is necessary to determine possible overlap between the applicable and non-applicable rights, which may cause the lapse of inequivalent protection.

1.4.4 Empirical analysis

The empirical part of the study consists of two parts, also shown graphically in Figure 3. Both parts of the study aim to explore and understand whether self-regulation in the mobility usership sector provides consumers with equivalent protection in practice when compared to traditional sales-based consumers. Initially, it may not appear evident that mobility usership providers voluntarily opt to impose additional rules beyond requirements imposed by law. Nonetheless, these providers have the option to provide consumers with a higher level of protection beyond what is mandated by the law, which can, for instance, enhance their competitive position by retaining consumers. Therefore, it is relevant to gain understanding on whether any lack of consumer protection is offset by self-regulatory safeguards from the general terms and conditions. This study thus aims to explore and comprehend whether the mobility usership sector provides equivalent consumer protection in practice with the application of general terms and conditions of mobility usership providers compared to traditional sales-based consumers.

The first part focusses on exclusive mobility use models, whereas the second part focusses on shared mobility use, including collaborative mobility sharing (Table 1). With a view to consistency and comparability, the selection of Member States for the doctrinal study is continued for the empirical study. The central question in this part of the research is whether general terms and conditions or other agreements such as standard contracts of mobility usership providers offer equivalent consumer protection to their consumers. Therefore, an assessment is made of how this sector behaves in terms of self-regulation in regard to the different mobility usership models. Based on the scope of the directives (chapter 2 and chapter 3) and a substantive comparison of the applicable and non-applicable rights (chapter 4 and chapter 5), it is examined whether these lacunae in the equivalence of consumer rights are voluntarily filled by the business practices in this sector.

This empirical study assumes that lacunae in consumer protection law are found, and this assumption is based on previously conducted research in this field.⁴³ The methodological considerations applicable to the empirical study are discussed in detail in paragraph 6.2 and 6.3 and apply to the entire empirical study (chapter 6 and chapter 7).

1.4.5 Evaluative analysis

The last part of this study discusses the main improvements necessary to promote equivalent protection for mobility usership consumers and how this can be achieved. This is graphically displayed on the right side of Figure 3. By evaluating the preceding parts of the research, the main inequalities in the current protection of the mobility usership consumer can be enacted. In addition, the possible solutions to achieve equivalent protection can be determined, which will most likely also depend on the mobility usership model. To stimulate equivalent protection, both government regulation and self-regulation are ways to achieve this aim. To contribute to a decision in this matter, an evaluation is conducted of the factors that play a role in choosing a method of regulation.

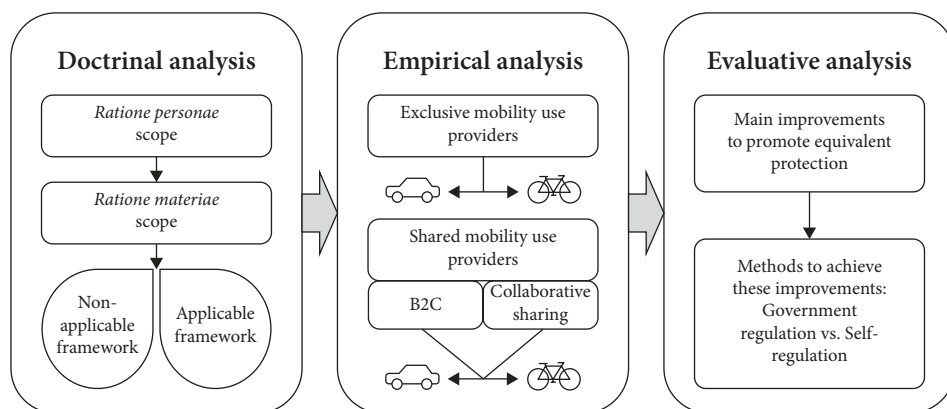
1.5 OUTLINE

Chapter 2 of this research deliberates over to what extent the contracting parties involved in mobility usership fall under the *ratione personae* scope of the legal framework, where both sides of the contractual relationship, namely provider and consumer, are considered. Subsequently, chapter 3 discusses to what extent the mobility usership contract falls under the *ratione materiae* scope of the legal framework. In chapter 4 and chapter 5 the question of to what extent the substantive rights of the legal framework apply to mobility usership is central. In addition, possible applicability problems for mobility usership are examined. For this question, chapter 4 focusses on the non-applicable substantive legal framework, whereas chapter 5 discusses the applicable substantive legal framework. Next, both chapter 6 and chapter 7 confer whether the sector offers an increased level of protection to consumers of mobility usership compared to the legal minimum and to what extent the sector offers equivalent protection compared to the traditional sales-based consumer model. Respectively, they discuss the level of sector regulation of exclusive mobility usership and the level of sector regulation for shared mobility usership. Chapter 8

43 J. de Vogel (2020) 'Private Lease: Consumer Credit in Disguise?' *Journal of European Consumer and Market Law* (9)2, pp. 51-60; W. Verheyen, J. de Vogel, B. Pavlovski-Dikker, Ü. Tanriverdi and F. Unz (2022) 'Law as a tool towards the ecological transition: (urban) mobility' *Annales de Droit de Louvain* 1, pp. 175-194.

contains the key improvements that contribute to equivalent protection for the mobility usership consumer and the main considerations on choosing a method of regulation when implementing these key improvements. Lastly, chapter 9 presents the conclusions, which follow the structure of this research. Table 2 also offers an overview of the outline of this research.

Figure 3: Research design



2 *RATIONE PERSONAE* SCOPE

2.1 INTRODUCTION

In this chapter, the current legal framework will be evaluated to determine whether it provides adequate protection to consumers of mobility usership in comparison to the protection it provides to more traditional, sales-based consumers regarding the *ratione personae* scope. More specifically, the focus of this research is to examine to what extent the contracting parties involved in mobility usership fall under the *ratione personae* scope of the selected legal framework and its national implementations. First, EU consumer policy targets in the different directives are identified. This is done to analyse how and where these consumer policy targets translate into concrete EU legislation. In addition, this analysis helps to clearly define how these policy targets may also play a role in (the equivalent protection of) mobility usership consumers. Although current consumer policy targets are adequately reflected in the current EU legislation for the sales-based consumer, the goal of this analysis is to determine whether these targets are attained or attainable for the mobility usership consumer. After all, it provides insight into how these policy targets may also play a role in (the equivalent protection of) mobility usership consumers. Hereafter, it is examined whether the contracting parties in mobility usership fall under the *ratione personae* scope for each selected directive and the national implementation where the national implementation differs from the directive. This concerns national legislation that goes beyond the directive, for example through a different scope. This *ratione personae* scope focusses on two sides; namely that of the providers and that of the consumers. This focus originates from the fact that a consumer contract is a reciprocal contract based on the principle of *do ut des* in which each of the parties assumes an obligation to maintain consideration for the other party.¹ After all, consumer protection only applies when an agreement is concluded between a professional party and the consumer.

2.2 EU CONSUMER POLICY

The EU developed policies targeted specifically at protecting consumers with the purpose of defending the specific interests of consumers. In general, consumer protection policies

1 The reciprocal agreement is most common in practice. Reciprocal agreements include for example purchase, exchange, rental, contracting of work, employment contract. R.J.Q. Klomp 'wederkerige overeenkomsten' in: R.J.Q. Klomp and H.N. Schelhaas (red.), *GS Verbintenissenrecht* (Deventer: Wolters Kluwer), 3; Asser/Sieburgh 6-III 2022/3.2.III.

ensure that the single market can function properly and efficiently, whereby mitigating the existing imbalance in the relationship between consumer and professional. The aim of consumer protection policies is to guarantee consumer rights and provide a high level of protection for vulnerable consumers on the internal EU market.² Empowering consumers and effectively protecting their safety and economic interests have become essential targets of EU policy.³ Consumer protection policy is intended to protect the health, safety, economic and legal interests of EU consumers, regardless of where consumers live, travel or shop within the EU.⁴ Although the distinction between consumer policy targets is not resolute, six cornerstones of consumer policy targets have been defined from policy, legislation and literature. The Charter of Fundamental Rights of the EU emphasises consumer protection by stating that EU consumer policies aim to (1) safeguard a high level of consumer protection.⁵ Such a high level of protection refers to safeguarding the rights and interests of consumers with the goal of ensuring that consumers are treated fairly, have access to accurate information, and are protected from unfair or deceptive practices.⁶ Furthermore, the EU aims to (2) establish an internal market. This is defined as ‘an area without internal frontiers in which the free movement of goods, persons, services

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- 2 European Commission ‘New Consumer Agenda: Strengthening consumer resilience for sustainable recovery’ (Brussels, 13 November 2020) COM(2020) 696 final, pp. 16-19; European Parliament, ‘Consumer Policy: Principles and Instruments’ <https://www.europarl.europa.eu/ftu/pdf/en/FTU_2.2.1.pdf> accessed 3 May 2020; European Parliament, ‘Study ‘Contribution to Growth of Consumer Protection’, prepared for IMCO, Policy Department A, 2019, <[https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631066/IPOL_STU\(2019\)631066_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631066/IPOL_STU(2019)631066_EN.pdf)> accessed 3 May 2020; European Parliament, ‘Study on consumer protection aspects of financial services, prepared for the Committee on the Internal Market and Consumer Protection (IMCO), Policy Department A, 2014, <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/507463/IPOL-IMCO_ET\(2014\)507463_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/507463/IPOL-IMCO_ET(2014)507463_EN.pdf)> accessed 3 May 2020; European Commission ‘Commission Staff Working Paper: Consumer Empowerment in the EU’ (Brussels, 7 April 2011) SEC(2011) 469 final. Also see: M. Durovic (2020) ‘International Consumer Law: What Is It All About?’ *Journal of Consumer Policy* 43, pp. 125-143.
 - 3 M. Maciejewski, C. Ratcliff, and K. Næss, ‘Study on consumer protection aspects of financial services’ (IMCO, 2014) <<https://www.europarl.europa.eu/factsheets/en/sheet/46/consumer-policy-principles-and-instruments>> accessed 18 April 2020; P. Muller, S. Devnani, R. Heys and J. Suter, ‘Consumer Protection Aspects of Financial Services’ (European Union, February 2014) IP/A/IMCO/ST/2013-07 <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/507463/IPOL-IMCO_ET\(2014\)507463_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/507463/IPOL-IMCO_ET(2014)507463_EN.pdf)> accessed 18 April 2020; I. Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Bloomsbury Publishing, 2012); S. Weatherill, *EU Consumer Law and Policy* (Second Edition, Edward Elgar Publishing Ltd, 2014), pp. 62-91, 188-203; European Commission ‘New Consumer Agenda: Strengthening consumer resilience for sustainable recovery’ (Brussels, 13 November 2020) COM(2020) 696 final, pp. 16.
 - 4 Article 114 and 169 TFEU; European Commission ‘New Consumer Agenda: Strengthening consumer resilience for sustainable recovery’ (Brussels, 13 November 2020) COM(2020) 696 final, pp. 16-19.
 - 5 Article 38 Charter of Fundamental Rights of the EU.
 - 6 Article 38 Charter of Fundamental Rights of the EU; European Commission, ‘A New Deal for Consumers’ (Brussels, 11 April 2018) COM (2018) 183 final, pp. 1-5; V. Mak (2015) ‘The character of European private law’ (Tilburg University: Inaugural speech), pp. 9-35; J. Valant (2015) ‘Consumer protection in the EU – policy overview’ *European Parliamentary Research Service*, DOI: 10.2861/575862, pp. 3-4; M. Durovic (2020) ‘International Consumer Law: What Is It All About?’ *Journal of Consumer Policy* 43, pp. 125-143.

and capital is ensured.⁷ The internal market could provide significant advantages for EU consumers. A well-functioning EU internal market helps to encourage competition which benefits consumers by offering them access to a wider range of products and services, better and consistent quality and lower prices for products and services. Another cornerstone of consumer policy is to (3) pursue legal certainty, which is also formulated as a ‘guard against unfairness’.⁸ This policy target requires that the law is certain in its clarity and precision and that its legal implications are foreseeable.⁹ Furthermore, (4) the enhancement of consumer confidence and (5) the enhancement of consumer knowledge or awareness through consumer education are both significant cornerstones of consumer policy.¹⁰ In particular, better information on consumer rights could improve consumer confidence. To improve consumer confidence, the EU strives to modify or implement legislation, conduct consumer information campaigns in Member States, and publish concrete guides to inform consumers of their rights.¹¹ Furthermore, the EU has organised different consumer education actions to enhance consumer knowledge or awareness in order to empower consumers.¹² By empowering this ‘vulnerable’ contract party, the EU

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- 7 M. Maciejewski, I. Ozolina, J. Ferger, C. Piaguet, J. Apap, M. Desomer, A. Gronbech Jorgensen, B. Hardt, B. Lefort, B. Matic, and S. Vanhoucke ‘EU Mapping: Overview of Internal Market and Consumer Protection related legislation’ Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy (April 2015) IP/A/IMCO/2014-08, PE 536.317, pp. 27-39; V. Mak (2015) ‘The character of European private law’ (Tilburg University: Inaugural speech), pp. 9-35; S. Weatherill, *EU Consumer Law and Policy* (Second Edition, Edward Elgar Publishing Ltd, 2014), pp. 62-91, 188-203; K. Lenaerts and P. van Nuffel ‘Hoofdstuk 3 – De interne markt’ in: *Europees recht* (7^e editie, Brussels: Intersentia, 2023), pp. 143-232; M. Durovic (2020) ‘International Consumer Law: What Is It All About?’ *Journal of Consumer Policy* 43, pp. 125-143.
- 8 Recital 5, 24, 37, 47, 71 Consumer Sales Directive; Recital 7, 41 Consumer Rights Directive; Recital 5, 12, 17 Unfair Commercial Practices Directive; European Commission ‘Commission staff working document: Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices’ (Brussels, 25 May 2016) COM(2016) 320 final, pp. 5, 11 *et seq.* Also see: V. Mak (2015) ‘The character of European private law’ (Tilburg University: Inaugural speech), pp. 9-35; S. Weatherill, *EU Consumer Law and Policy* (Second Edition, Edward Elgar Publishing Ltd, 2014), pp. 150, 230-235.
- 9 D. Chalmers, G. Davies and G. Monti, *European union law* (Cambridge university press, 2019), pp. 316-321.
- 10 Recital 4, 5, 8, 41, 52 Consumer Sales Directive; Recital 6, 7 Consumer Rights Directive; Recital 8 Consumer Credit Directive 2008; Recital 4, 13 Unfair Commercial Practices Directive; Recital 19 Consumer Credit Directive 2008; Recital page 1 Unfair Contract Terms Directive; European Commission ‘Commission Staff Working Paper: Consumer Empowerment in the EU’ (Brussels, 7 April 2011) SEC(2011) 469 final, pp. 6-8; J. Luzak (2019) ‘In the wind of change: Ten years of the EU consumer credit framework’ *Tijdschrift voor Consumentenrecht & handelspraktijken* 1, pp. 2-4; S. Weatherill, *EU Consumer Law and Policy* (Second Edition, Edward Elgar Publishing Ltd, 2014), pp. 24, 25, 62-66; J. Valant (2015) ‘Consumer protection in the EU – policy overview’ *European Parliamentary Research Service*, DOI: 10.2861/575862, pp. 19.
- 11 For example, the adoption of the Consumer Rights Directive strengthened consumer rights, introduced greater price transparency, prohibited pre-ticked boxes, and clarified the provision of information on digital content which caused a boost to the consumer confidence.
- 12 Article 3(b) and 4(b) Regulation on a multiannual consumer programme. For example: Dolceta, an online consumer education tool is launched, see: <<http://www.eucen.eu/post/dolceta->> accessed 8 May 2020. Another example is the Consumer Classroom, a multilingual European community website for teachers,

also strives to (6) balance the inequity between the contracting parties.¹³ Although the enforcement of consumer rights is a cornerstone of consumer policy, this policy target is not discussed and is deliberately excluded from this study because the research focusses on the substantive rules and not on whether those rules can be enforced *ex post*. In addition, enforcement does not apply specifically to a mobility usership model.

2.3 FROM CONSUMER POLICY TO LEGISLATION

The cornerstones of consumer policy have operated as a foundation for a developing corpus of EU consumer protection legislation. Consumer law is mainly realised in the EU through directives, which need to be implemented into national legislation for direct application. The current consumer law *acquis* is compound and sometimes inconsistent because of the dissimilarities between the numerous directives and the varying transposition of consumer protection directives into national laws.¹⁴ The national implementation can go beyond the directive in the case of minimum harmonisation.¹⁵ The selected directives in paragraph 1.4.2 contain fundamental principles for consumer policy related to private law, rights in a consumer contract, and ownership, which are specifically relevant to mobility usership.¹⁶

see: <<http://europeanconsumersunion.eu/progetti/consumer-classroom/?lang=en/>> accessed 8 May 2020; European Commission 'Commission Staff Working Paper: Consumer Empowerment in the EU' (Brussels, 7 April 2011) SEC(2011) 469 final. Also see on this policy target: S. Weatherill, *EU Consumer Law and Policy* (Second Edition, Edward Elgar Publishing Ltd, 2014), pp. 100, 310-315.

13 European Commission 'Commission Staff Working Paper: Consumer Empowerment in the EU' (Brussels, 7 April 2011) SEC(2011) 469 final, pp. 2-6; Asser/ Vonken 10-I 2018/233, 234, 280; Asser/Kramer & Verhagen 10-III 2015/934. Also see: Recital 53 Consumer Sales Directive; Recital 34 Consumer Rights Directive; Recital 32 Consumer Credit Directive 2008.

14 J. Valant (2015) 'Consumer protection in the EU – policy overview' *European Parliamentary Research Service*, DOI: 10.2861/575862; H. Schulte-Nölke, C. Twigg-Flesner, M. Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States* (Sellier, 2009), pp. 1-5; C. Twigg-Flesner, *A Cross-Border-Only Regulation for Consumer Transactions in the EU: A Fresh Approach to EU Consumer Law* (Springer-Verlag New York, 2012), pp. 3-15, DOI: 10.1007/978-1-4614-2047-7; W.H. Roth (2002) 'Transposing 'pointilist' EC guidelines into systematic national codes – problems and consequences' *European Review of Private Law* (10)6, pp. 769-776; W.H. Roth (2001) 'Europäischer Verbraucherschutz und BGB' *JuristenZeitung* 56(10), pp. 475-490.

15 A minimum harmonization directive only sets minimum rules and Member States may apply stricter rules. In the case of maximum harmonization, the Directive regulates everything, and Member States may not impose rules other than those prescribed by the Directive. See on harmonisation: Asser/Hartkamp 3-I 2023/177; H. Schulte-Nölke, C. Twigg-Flesner, M. Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States* (Sellier, 2009); L. Froňková (2010) 'The new Directive on Consumer Protection: objectives from the perspective of the EU and the Member States' in: H. Schulte-Nölke and L. Tichý (eds.), *Perspectives for European Consumer Law: Towards a Directive on Consumer Rights and Beyond* (Munich: Sellier European law publishers GmbH, 2010), pp. 91-96.

16 J. Valant (2015) 'Consumer protection in the EU – policy overview' *European Parliamentary Research Service*, DOI: 10.2861/575862; D. Staudenmayer (2000) 'The Directive on the Sale of Consumer Goods

Table 3: Policy targets in existing EU consumer instruments

Policy targets in existing EU consumer instruments						
Policy targets Directives	(1) High level of consumer protection	(2) Internal market	(3) Legal certainty	(4) Consumer confidence	(5) Consumer awareness and knowledge	(6) Balance between contracting parties
CSD 1999	Recital 1, 19, 24.	Recital 2.		Recital 5.		
CSD	Recital 2, 3, 4, 6, 10.	Recital 1, 2, 4, 10.	Recital 5, 24, 37, 47, 71.	Recital 4, 5, 8, 41, 52.		Recital 53.
CRD	Recital 3, 7.	Recital 4, 5, 6.	Recital 7, 41.	Recital 6, 7.		Recital 34.
CCD	Recital 8, 9, 18.	Recital 4, 6, 7.		Recital 8.	Recital 19.	Transparency: Recital 32.
UCTD	Recital, page 1, 2.	Recital, page 1.			Recital, page 1.	
UCPD	Recital 1, 5, 11, 24, 20.	Recital 4, 2, 3, 5, 12, 13, 23, 24.	Recital 5, 12, 17.	Recital 4, 13.		

In Table 3, an overview is provided to determine whether the selected directives – explicitly in its preambles and/or by studying the material rule – aim to achieve their intended policy targets and to examine whether the rationales of the directives also apply to mobility usership. This is discussed for each policy target. While the examined cornerstones of EU consumer policy may not all be reflected in the directives, a patchwork of the selected directives exists due to the same *ratione personae* scope, which results in an overlap of EU legislation and a representation of the EU consumer policy cornerstones.

2.3.1 High level of protection

The Consumer Sales Directive provides for a high level of consumer protection by laying down common rules on certain requirements concerning sales contracts concluded between sellers and consumers. More specifically, it contains rules on the conformity of goods with the contract, remedies in the event of a lack of conformity, the modalities for exercising those remedies, and on commercial guarantees.¹⁷ The European Parliament

and Associated Guarantees – A Milestone in the European Consumer and Private Law’ *European Review of Private Law* (8)4, pp. 547-564.

17 Article 1 Consumer Sales Directive. Respectively expressed in Article 5, 13, 14, 15, 16, 17 Consumer Sales Directive; Also see: Asser/Hartkamp 3-I 2023/262.

mentions in the recitals of the Consumer Sales Directive that fully harmonizing key rules would result in consumers experiencing enhanced levels of protection and welfare gains.¹⁸ As a result, this directive reflects the policy target of pursuing a high level of consumer protection by providing mutual rules on requirements that concern the sales contract. This full harmonisation principle also ensures the reflection of the high level of consumer protection of the Consumer Rights Directive. The full harmonisation of consumer information reflects the target of a high level of consumer protection and a better functioning of the B2C internal market.¹⁹ The right of withdrawal, which allows the consumer to change his mind about a contract he concluded without giving any reason, has similarly bolstered consumer protection and strengthened the quality of services. With regard to the examined directives, the right of withdrawal, for example, is a product of the Consumer Rights Directive and the Consumer Credit Directive. This right is remarkable when set against the traditional contract law doctrine of *pacta sunt servanda*.²⁰ For the Consumer Credit Directive, full harmonisation is also necessary to ensure that consumers enjoy a high level of protection of their interests and to create a genuine internal market.²¹ The Unfair Contract Terms Directive underlines the importance of safeguarding consumers from unfair contract terms and includes common rules about the general unfairness test and transparency requirements for contracts concluded between a

18 Recital 10 Consumer Sales Directive.

19 European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1; European Commission 'Key Facts on the new EU consumer Rights Directive' (April 2015) <https://commission.europa.eu/system/files/2017-08/crd_arc_factsheet-consumer_en.pdf> accessed 28 August 2023.

20 Article 1 and 4 Consumer Rights Directive; Article 14 Consumer Credit Directive 2008; Chapter II and III Consumer Rights Directive; European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1; V. Cap, P. Schwarzenegger, B. Luger, P. Bydlinski, and J. Stabentheiner (2012) 'Die Richtlinie über die Rechte der Verbraucher (2011/83/EU vom 25. Oktober 2011)' *Manz'sche Verlags- und Universitätsbuchhandlung GmbH*, Wien, pp. 8-15; G. Heirman 'De algemene informatieverplichting t.a.v. consumenten in het wetboek van economisch recht (art. VI.2 WER)' in: G. Straetmans and R. Steennot, *Wetboek Economisch Recht En de Bescherming van de Consument* (Antwerpen: Intersentia, 2015), pp. 63-64; L. Froňková (2010) 'The new Directive on Consumer Protection: objectives from the perspective of the EU and the Member States' in: H. Schulte-Nölke and L. Tichý (eds.), *Perspectives for European Consumer Law: Towards a Directive on Consumer Rights and Beyond* (Munich: Sellier European law publishers GmbH, 2010), pp. 91-96; G. Howells, C. Twigg-Flesner and T. Wilhelmsson, *Rethinking EU Consumer Law* (London, New York: Routledge, 2018), pp. 36, 113; Asser/Hartkamp 3-I 2023/281a; M. Durovic (2020) 'International Consumer Law: What Is It All About?' *Journal of Consumer Policy* 43, pp. 125-143.

21 Article 1 Consumer Credit Directive 2008; European Commission 'Proposal for a Directive of the European Parliament and of the Council on consumer credits' (Brussels, 30 June 2021) COM(2021) 347 Final; I. Benöhr *EU Consumer law and human rights* (First Edition published in 2013, Oxford: Oxford University Press, 2014); Asser/Hartkamp 3-I 2023/240; R.A. Stegeman, *Wet op het financieel toezicht: Tekst & Toelichting – Wet* (Deventer: Wolters Kluwer, 2015), IV.21; V. Heutger (2014) 'De invloed van het Europese recht' (*Onderneming&Recht* nr. 81-II) 2014/II.A.5.

seller or supplier and a consumer.²² The policy target of pursuing a high level of protection is reflected by the principle-based approach of the Unfair Contract Terms Directive but to a reduced extent because of the minimum harmonisation.²³ By outlawing the use of unfair contract terms, the directive contributes to the target of a high level of consumer protection.²⁴ The purpose of the Unfair Commercial Practices Directive is to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection against unfair commercial practices harming consumers' economic interests.²⁵ Again, the aim of a high level of consumer protection is reflected in the substantive rules of the directive, such as the prohibition of unfair commercial practices, for example.²⁶

2.3.2 Internal market

In the Consumer Sales Directive, encouragement of the proper functioning of the internal market goes hand in hand with the target of high consumer protection. As a result, the rules that reflect these policy targets focus on requirements for conformity, remedies

22 Recital 16 and 20 Unfair Contract Terms Directive. Also see: European Commission, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (27 September 2019) C323/4; Asser/Hartkamp 3-I 2023/249.

23 European Commission, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (27 September 2019) C323/4; P. Rott 'Unfair contract terms' in: C. Twigg-Flesner (ed.), *Research handbook on EU Consumer and Contract Law* (Glos, Edward Elgar Publishing Limited, 16), pp. 287-288.

24 European Commission, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (27 September 2019) C323/4; G. Howells, C. Twigg-Flesner and T. Wilhelmsson, *Rethinking EU Consumer Law* (London, New York: Routledge, 2018), pp. 136-141.

25 Recital 1, 5, 11, 24, 20 Unfair Commercial Practices Directive; Article 1 Unfair Commercial Practices Directive; European Commission 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' *Official Journal of the European Union* (29 December 2021) C526/1; European Commission 'Commission staff working document: Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices' (Brussels, 25 May 2016) COM(2016) 320 final; C.J.J.C. van Nispen, 'IV.1.13 Richtlijn oneerlijke handelspraktijken' in: C.J.J.M. Stolker (red.), *GS Onrechtmatige daad* (Deventer: Wolters Kluwer); Asser/Hartkamp 3-I 2023/288, 289; M. Durovic (2020) 'International Consumer Law: What Is It All About?' *Journal of Consumer Policy* 43, pp. 125-143.

26 Chapter II Unfair Commercial Practices Directive; European Commission 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' *Official Journal of the European Union* (29 December 2021) C526/1; European Commission 'Commission staff working document: Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices' (Brussels, 25 May 2016) COM(2016) 320 final; M. Durovic (2020) 'International Consumer Law: What Is It All About?' *Journal of Consumer Policy* 43, pp. 125-143; E. Büllesbach (2008) 'Auslegung der irreführenden Geschäftspraktiken des Anhangs I der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken' *Münchener Universitätschriften*, Reihe der Juristischen Fakultät, Band 222 (München: C.H. Beck), p. 12.

in case of non-conformity and the main modalities for enforcement. In addition, full harmonisation of key rules contributes to the internal market as it *inter alia* facilitates businesses to offer products in other Member States.²⁷ This is also applicable to the Consumer Rights Directive where the goal of the proper functioning of the internal market is accomplished by full harmonisation; hence, the high level of consumer protection directly correlates to the proper functioning of the internal market.²⁸ The policy target of the Consumer Credit Directive is to facilitate the emergence of a well-functioning internal market, which is reflected in specific provisions on advertising and certain items of standard information that enable consumers to compare different offers.²⁹ The policy target of the Unfair Commercial Practices Directive is broader and full harmonisation of this directive eliminates the barriers created by the fragmentation of the rules on unfair commercial practices and enables the internal market.³⁰ In the Unfair Contract Terms Directive, the policy target of the internal market is mentioned in its recitals.³¹ The aim of the directive is to contribute to the establishment of the internal market through the minimum harmonisation of the national rules. In addition, the Unfair Contract Terms Directive mentions that it is essential to remove unfair terms from contracts to establish an internal market.³²

27 Recital 1, 2, 4, 10 Consumer Sales Directive; Asser/Hartkamp 3-I 2023/262; G. Alpa 'Autonomie privée et garanties commerciales dans les ventes aux consommateurs' *Revue Européenne de Droit de la Consommation – Mélanges offerts à Marcel Fontaine* (Brussels: De Boeck & Larcier, 2003), pp. 315-318.

28 Recital 4, 5, 6, Consumer Rights Directive; European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1; Asser/Hartkamp 3-I 2023/281a; L. Grynbaum 'Pre-contractual information duties: the foreseeable failure of full harmonisation' in: H. Schulte-Nölke and L. Tichý (eds.), *Perspectives for European Consumer Law: Towards a Directive on Consumer Rights and Beyond* (Munich: Sellier European law publishers GmbH, 2010), pp. 7-11; L. Froňková (2010) 'The new Directive on Consumer Protection: objectives from the perspective of the EU and the Member States' in: H. Schulte-Nölke and L. Tichý (eds.), *Perspectives for European Consumer Law: Towards a Directive on Consumer Rights and Beyond* (Munich: Sellier European law publishers GmbH, 2010), pp. 91-96.

29 Recital 18 Consumer Credit Directive 2008; European Commission 'Proposal for a Directive of the European Parliament and of the Council on consumer credits' (Brussels, 30 June 2021) COM(2021) 347 Final; Asser/Hartkamp 3-I 2023/240.

30 Recital 12 Unfair Commercial Practices Directive. Also see: European Commission 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' *Official Journal of the European Union* (29 December 2021) C526/1; C.J.J.C. van Nispen, 'IV.1.13 Richtlijn oneerlijke handelspraktijken' in: C.J.J.M. Stolker (red.), *GS Onrechtmatige daad* (Deventer: Wolters Kluwer); Asser/Hartkamp 3-I 2023/288, 289.

31 Recital 1, 6 and 7, p. 1 Unfair Contract Terms Directive. Also see: European Commission, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (27 September 2019) C323/4.

32 Article 3, 4 and 5 Unfair Contract Terms Directive, Recital 1, 6 and 7, p. 1 Unfair Contract Terms Directive; European Commission, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (27 September 2019) C323/4; P. Nebbia, *Unfair Contract Terms in European Law: A Study in Comparative and EC Law – Modern Studies*

2.3.3 Legal certainty

The Consumer Sales Directive strives to enhance legal certainty by, *inter alia*, the full harmonisation of the available remedies to consumers in case of non-conformity, and the conditions under which such remedies can be exercised.³³ In addition, legal certainty is reflected in the Consumer Rights Directive, the Consumer Credit Directive, and Unfair Commercial Practices Directive by full harmonisation of some key regulatory aspects.³⁴ Again, consumers should be able to rely on a single regulatory framework based on clearly defined legal concepts regulating certain aspects of B2C contracts. The Unfair Contract Terms Directive does not mention legal certainty. However, in my opinion, the given time limits, limitation periods and the rules on the finality of decisions – *res judicata* – do reflect the fundamental principle of legal certainty.³⁵

2.3.4 Consumer confidence

The Consumer Sales Directive states that consumer confidence is dependent on the assumption that the purchased goods are in conformity with the contract and if they are not, that the remediation of this lack of conformity is guaranteed.³⁶ Furthermore,

in European Law (Hart Publishing, 2007), pp. 8-14; G. Howells, C. Twigg-Flesner and T. Wilhelmsson, *Rethinking EU Consumer Law* (London, New York: Routledge, 2018), pp. 136-141.

33 Article 4, 5 Consumer Sales Directive. Furthermore, enhancing legal certainty for both consumers and sellers requires a clear indication of the time when the conformity of the goods should be assessed, namely the time when the goods are delivered.

34 Article 4 Consumer Rights Directive; Article 22 Consumer Credit Directive 2008; Recital 5, 12, 17 Unfair Commercial Practices Directive. See for exceptions to harmonization Unfair Commercial Practices Directive: European Commission 'Commission staff working document: Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices' (Brussels, 25 May 2016) COM(2016) 320 final. The Consumer Rights Directive refers to the level of protection also adopted in other areas of EU consumer law which is favourable for the legal certainty. See: J. Watson, 'Withdrawal rights' in: C. Twigg-Flesner (ed.), *Research handbook on EU Consumer and Contract Law* (Glos, Edward Elgar Publishing Limited, 2016), pp. 251-252; V. Mak (2011) 'De grenzen van maximumharmonisatie in het Europese consumentenrecht' *Nederlands Tijdschrift voor Burgerlijk Recht* 2011/77; V. Cap, P. Schwarzenegger, B. Luger, P. Bydlinski, and J. Stabentheiner (2012) 'Die Richtlinie über die Rechte der Verbraucher (2011/83/EU vom 25. Oktober 2011)' *Manz'sche Verlags- und Universitätsbuchhandlung GmbH*, Wien, pp. 1-21; G. Heirman 'De algemene informatieverplichting t.a.v. consumenten in het wetboek van economisch recht (art. VI.2 WER)' in: G. Straetmans and R. Steennot, *Wetboek Economisch Recht En de Bescherming van de Consument* (Antwerpen: Intersentia, 2015), pp. 63-64; E. Büllesbach (2008) 'Auslegung der irreführenden Geschäftspraktiken des Anhangs I der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken' *Münchener Universitätschriften*, Reihe der Juristischen Fakultät, Band 222 (München: C.H. Beck), pp. 3-13.

35 Article 6 Unfair Contract Terms Directive; European Commission, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (29 September 2019) C323, p. 4.

36 Article 13 Consumer Sales Directive.

consumer confidence is encouraged by providing a period during which the consumer is entitled to remedies for any lack of conformity.³⁷ Furthermore, the Consumer Credit Directive specifically states that the free movement of credit offers should be allowed to take place under optimum conditions for both those who offer credit and those who require it in order to reach this policy target.³⁸ This target is reflected in the Consumer Credit Directive by the option given to consumers to compare different offers and the rights in the Consumer Credit Directive that balance the bargaining power of the contracting parties. Consumer confidence is gained when consumers are given information and are empowered to make decisions and take advantage of opportunities offered by the internal market; in this example, consumers are informed of the price they pay for credit and are able to compare offers from all over Europe, giving them access to cheaper cross-border borrowing.³⁹ Under the Unfair Contract Terms Directive, consumer confidence, despite not specifically being mentioned, is reflected in the rights under the directive, particularly the condition that unfair terms are not binding on the consumer and that the terms should always be drafted in plain, intelligible language and that, in case of doubt about the meaning of a term, the interpretation most favourable to the consumer prevails.⁴⁰ Under the Unfair Commercial Practices Directive, consumer confidence is reflected and supported by the general prohibition to unfair commercial practices which occur outside any contractual relationship between a trader and a consumer or following the conclusion of a contract and during its execution. This prohibition can contribute to increased consumer confidence.⁴¹

37 Article 10 Consumer Sales Directive.

38 Recital 8 Consumer Credit Directive 2008; European Commission 'Proposal for a Directive of the European Parliament and of the Council on consumer credits' (Brussels, 30 June 2021) COM(2021) 347 Final; I. Benöhr *EU Consumer law and human rights* (First Edition published in 2013, Oxford: Oxford University Press, 2014); J. Luzak (2019) 'In the wind of change: Ten years of the EU consumer credit framework' *Tijdschrift voor Consumentenrecht & handelspraktijken* 1, pp. 2-4.

39 Article 5, 6; Annex II (Standard European Consumer Credit Information) Consumer Credit Directive 2008. Also see: European Commission 'Proposal for a Directive of the European Parliament and of the Council on consumer credits' (Brussels, 30 June 2021) COM(2021) 347 Final; J. Luzak (2019) 'In the wind of change: Ten years of the EU consumer credit framework' *Tijdschrift voor Consumentenrecht & handelspraktijken* 1, pp. 2-4.

40 Article 5 Unfair Contract Terms Directive; European Commission, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (27 September 2019) C323/4.

41 Recital 4, 13, chapter II Unfair Commercial Practices Directive; European Commission 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' *Official Journal of the European Union* (29 December 2021) C526/1; European Commission 'Commission staff working document: Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices' (Brussels, 25 May 2016) COM(2016) 320 final.

2.3.5 Consumer awareness and knowledge

Consumer awareness or consumer knowledge is not explicitly mentioned as a policy target in the Consumer Sales Directive but can be understood to be an underlying principle. It follows from the Consumer Sales Directive that Member States should take appropriate measures to ensure that information on the rights of consumers, and on the means to enforce those rights, is available to consumers.⁴² Informing consumers of their rights makes consumers more aware and knowledgeable about them. This also applies to the Consumer Rights Directive. Whereas consumer awareness or consumer knowledge is not explicitly mentioned, the policy target is reflected by several rules in the directive about consumer information.⁴³ To enable consumers to make their decisions in full knowledge of the facts regarding the Consumer Credit Directive, consumers should receive adequate information prior to the conclusion of the credit agreement on the conditions and cost of the credit and on their obligations.⁴⁴ Furthermore, consumer awareness or knowledge is mentioned in the recitals of the Unfair Contract Terms Directive but it is only indirectly reflected in the directive itself.⁴⁵ The Unfair Commercial Practices Directive does not explicitly refer to consumer awareness or knowledge. However, by providing *inter alia* a limited number of key items of information enabling the consumer to make an informed decision, the argument could be made that the target is reflected in the directive.⁴⁶

42 Article 20 Consumer Sales Directive.

43 Recital 12, 34, 35, 36 Consumer Rights Directive; Article 5, 6, 7, 8 Consumer Rights Directive. Also see: European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1.

44 Recital 18, 24, 25, 27, 32 Consumer Credit Directive 2008; Article 4, 5, 6, 7, 10, 11 Consumer Credit Directive 2008.

45 Article 6(1), 7 Unfair Contract Terms Directive. European Commission, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (27 September 2019) C323/4; P. Rott 'Unfair contract terms' in: C. Twigg-Flesner (ed.), *Research handbook on EU Consumer and Contract Law* (Glos, Edward Elgar Publishing Limited, 2016), pp. 287-288.

46 Article 6 and 7 Unfair Commercial Practices Directive; European Commission 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' *Official Journal of the European Union* (29 December 2021) C526/1; European Commission 'Commission staff working document: Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices' (Brussels, 25 May 2016) COM(2016) 320 final; C.J.J.C. van Nispen, 'IV.1.13 Richtlijn oneerlijke handelspraktijken' in: C.J.J.M. Stolker (red.), *GS Onrechtmatige daad* (Deventer: Wolters Kluwer); E. Büllsbach (2008) 'Auslegung der irreführenden Geschäftspraktiken des Anhangs I der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken' *Münchener Universitätsschriften, Reihe der Juristischen Fakultät*, Band 222 (München: C.H. Beck), pp. 3-13.

2.3.6 Balance between parties

The balance between the contracting parties refers to the rationale that there should be a fair and equitable distribution of rights and obligations between professional parties and consumers and aims to counterweight power imbalances. This policy target is reflected in the Consumer Sales Directive and the Consumer Rights Directive.⁴⁷ The Consumer Sales Directive reflects this target by conforming that the consumer should enjoy the right to terminate the contract only in cases where the lack of conformity is not minor in order to maintain a balance between the contracting parties.⁴⁸ In the Consumer Rights Directive, the balance between the contracting parties rebalances the contractual power, giving the weaker party – often the consumer – more power. In this way, the dominant position of the professional party is compensated.⁴⁹ This balance between parties can be understood as underlying in the Consumer Credit Directive through *inter alia* the precontractual obligations of the professional party.⁵⁰ The Unfair Contract Terms Directive contains rights on unfair terms, regarded as unfair in any case where a significant imbalance occurs in the contracting parties' rights and obligations to the detriment of the consumer. By this way of interpreting 'unfair', the directive already expresses the policy objective to some extent. Furthermore, the transparency conditions also contribute to the reflection of the policy objective.⁵¹ The Unfair Commercial Practices Directive does not state the balance between contracting parties as a policy target. However, it is reflected because the dominant position of the professional party is counterweighted by prohibiting certain practices.⁵²

47 Article 13(1), (4), (5) and 16 Consumer Sales Directive; Chapter II, III, IV Consumer Rights Directive.

48 Recital 53 Consumer Sales Directive.

49 Chapter II, III, IV Consumer Rights Directive. See on the objective of the Consumer Rights Directive: L. Froňková (2010) 'The new Directive on Consumer Protection: objectives from the perspective of the EU and the Member States' in: H. Schulte-Nölke and L. Tichý (eds.), *Perspectives for European Consumer Law: Towards a Directive on Consumer Rights and Beyond* (Munich: Sellier European law publishers GmbH, 2010), pp. 91-96; European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1.

50 Article 5, 6 and 7 Consumer Credit Directive 2008. Also see: European Commission 'Proposal for a Directive of the European Parliament and of the Council on consumer credits' (Brussels, 30 June 2021) COM(2021) 347 final.

51 Article 3, 4(2) and 5 Unfair Contract Terms Directive, Point 1(i) Annex and Recital 16 and 20 Unfair Contract Terms Directive; European Commission, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (27 September 2019) C323/4.

52 Chapter II Unfair Commercial Practices Directive; European Commission 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' *Official Journal of the European Union* (29 December 2021) C526/1; European Commission 'Commission staff working document: Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices' (Brussels, 25 May 2016) COM(2016) 320 final. See e.g.: E. Büllesbach (2008) 'Auslegung der irreführenden

2.3.7 *Should the same policy considerations underly the usership consumer's protection?*

At the beginning of this chapter, paragraph 2.2 and 2.3 made an analysis of the most important consumer policy considerations that follow from the selected EU directives. Regardless of the scope of the selected directives, this analysis is made to assess whether the mobility usership consumer should fall under these policy considerations or whether these policy considerations should not (directly) apply to this type of consumer.

It follows from the analysis above that the cornerstones of EU policy considerations relating to consumer protection should apply and be pursued for all consumers, including mobility usership consumers. After all, the equal approach to consumer policy within the EU also stimulates these most important cornerstones of consumer policy. This applies, for example, to the principle of legal certainty (paragraph 2.3.3), which enables consumers to know the law that applies to them. The contribution that will be made to legal certainty will be especially positive if the consumer policy is the same. At the same time, this equal approach to consumers can stimulate the internal European market (paragraph 2.3.2).

The impactful pursuit of a high level of consumer protection (paragraph 2.3.1) and a correct balance between the contracting parties (paragraph 2.3.6) applies to all consumers; the fact that mobility usership is the product or service does not affect the consumer. This also applies to the encouragement of the policy cornerstones of consumer confidence (paragraph 2.3.4) and consumer awareness and knowledge (paragraph 2.3.5), which are mainly expressed in the right to information. Here too, the fact that this concerns a mobility usership consumer does not alter the fact that the consumer is still entitled to information to promote consumer confidence, awareness, and knowledge. In addition, this cornerstone of EU consumer policy might even be more important for new developments and business models, such as mobility usership, precisely because it is new (and unknown). After all, there may be more uncertainty about the implications of use of mobility, which makes encouraging consumer confidence important. Furthermore, there is a greater chance that consumers lack knowledge and awareness because the business model is new and is not yet seen as an established business model. Pursuing these policy goals is therefore important for mobility usership consumers to fill this knowledge gap.

All in all, at least the same policy considerations underlie the protection of the mobility usership consumer because there is essentially no clear reason to approach consumers

Geschäftspraktiken des Anhangs I der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken' *Münchener Universitätsschriften*, Reihe der Juristischen Fakultät, Band 222 (München: C.H. Beck), pp. 3-13.

differently. The fact that it concerns a mobility usership consumer does not alter this. In the light of the EU sustainability agenda, it could become even more important to stimulate the acceptance of mobility usership, emphasizing all these principles.⁵³ At the same time, this also raises questions about the potential need for additional duties of care in mobility usership agreements. Unlike traditional ownership models, where individuals have an interest in maintaining the longevity and quality of their owned vehicle, consumers of mobility usership may not feel the same sense of ownership or attachment to the vehicles they use. This could potentially lead to less diligent care and maintenance, which may impact the durability and sustainability of the products over time.

2.4 CONTRACT PARTIES IN MOBILITY USERSHIP

EU Consumer law commonly contrasts two actors, the providers/professional party with their responsibilities and obligations on the one hand versus the consumer with their rights on the other hand. The qualification as ‘professional party’ or ‘consumer’ is critical for the application of consumer protection. This specifically concerns the situation in which the provider offers a service or sells something, and it is the consumer who accepts this (and not the other way around).⁵⁴ In order to determine whether the current legal framework provides equivalent protection to mobility usership consumers in comparison to the traditional sales-based consumer, it is relevant to first examine whether the contract parties of mobility usership could be qualified as either a ‘professional party’ or ‘consumer’ under the definitions of selected directives. In the case where the consumer and/or provider of mobility usership do not fall under the scope of the directive, then in principle no consumer protection is offered by this directive. However, if the consumer and provider fall under the *ratione personae* scope, protection under this directive is not immediately certain because the mobility usership contract

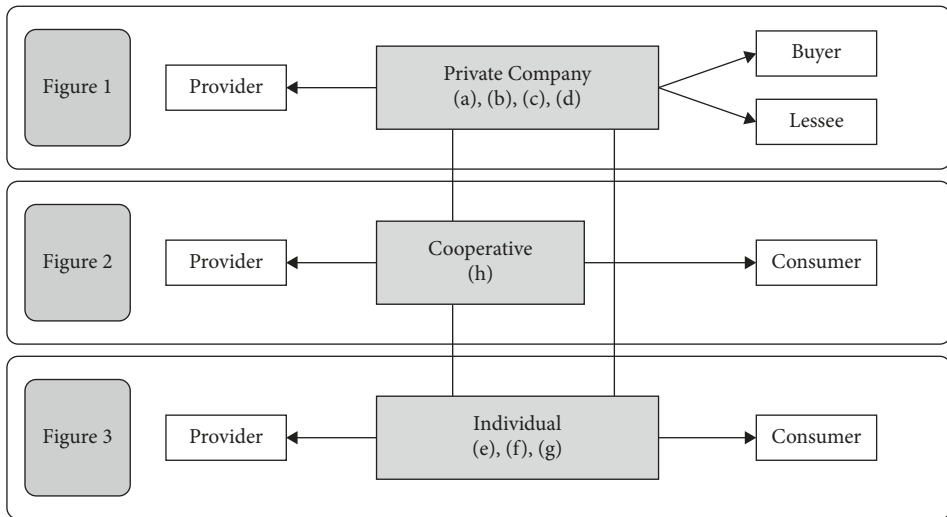
53 European Commission, ‘A New Deal for Consumers’ (Brussels, 11 April 2018) COM (2018) 183 final; European Commission ‘Sustainable and Smart Mobility Strategy – putting European transport on track for the future’ (Brussels, 9 December 2020) COM(2020) 789 final; European Commission ‘A new Circular Economy Action Plan For a cleaner and more competitive Europe’ (Brussels, 11 March 2020) COM(2020) 98 final.

54 European Commission, ‘A European agenda for the collaborative economy’ (Brussels, 2 June 2016) COM(2016) 356 final, pp. 9-10; European Commission, ‘Exploratory study of consumer issues in online peer-to-peer platform markets’ Task 1 Report (March 2017), DOI: 10.2838/7661, <C:\Users\63150jdv\AppData\Local\Temp\1\Annex1_Task1_ReportMay2017pdf.pdf> accessed 31 October 2019; Asser/Hijma 7-I 2019/103-121; E.H. Hondius (2006) ‘The Notion of Consumer: European Union versus Member States’ *Sydney Law Review* (28)89, p. 95 *et seq*; C. Meller-Hannich, E. Krausbeck, R. Wittke (2019) ‘Der Verbraucher in der Sharing Economy’ *Verbraucher und Recht*, pp. 403 *et seq*.

should cumulatively meet the *rationae materiae* scope of that directive. The latter is discussed in chapter 3.

Figure 4 shows a graphical overview of the different contract parties in mobility usership that are examined to determine whether these fall under the *rationae personae* scope of the directives. The different parties could have a dual capacity, being both a provider and a consumer.⁵⁵ This is explained for each figure below.

Figure 4: Contract parties of mobility usership



2.4.1 Figure 1: Capacity of the private company

The first example in Figure 4 represents the dual capacity of the private company, which on the one hand may act in the capacity of provider and on the other hand as user.⁵⁶ For example, a private company like *Greenwheels* offers a fleet of cars to their consumers. In this case, *Greenwheels* is the provider of mobility usership. At the same time, *Greenwheels* buys or leases their fleet from another contracting party. In this case, *Greenwheels* is the buyer or lessee.⁵⁷ Nevertheless, the latter relationship is not researched as it falls outside

⁵⁵ CJEU, Case C-110/14, 3 September 2015, ECLI:EU:C:2015:538 (*Horațiu Ovidiu Costea v SC Volksbank România SA*), p. 20; CJEU, Case C-105/17, 4 October 2018, ECLI:EU:C:2018:808 (*Kamenova*) with annotation of D.W.F. Verkade.

⁵⁶ Mobility usership variations (a), (b), (c) and (d).

⁵⁷ Greenwheels 'Een auto als het jou uitkomt' <<https://www.greenwheels.com/nl/>> accessed 9 July 2020.

the scope of the study as it concerns either a B2B relationship or a C2B relationship where an individual provider delivers to a private company and consumer protection does not apply to such contracts.⁵⁸ On the other hand, the B2C variation where a private company such as *Greenwheels* offers mobility to consumers is included in this research as the rights of consumers might be effected. For example, if *Greenwheels*' vehicle breaks down during a ride, does the consumer have rights vis-à-vis *Greenwheels*? Paragraph 2.5.1 will discuss the question of whether the private company can be qualified as a professional party and paragraph 2.6.2 discusses whether the private company can be qualified as a consumer.

2.4.2 Figure 2: Capacity of the cooperative

The second example in Figure 4 exemplifies the (dual) capacity of a (h) cooperative as a type of collaborative mobility sharing model (Figure 2). A cooperative can be characterised as a collaboration of entrepreneurs and/or private individuals who are members with whom the cooperative concludes agreements and on whose behalf the cooperative carries out activities. These members enter into agreements with the venture, driven by the cooperative to achieve a common goal.⁵⁹ This could, for example, be the joint purchase of vehicles, such as bicycles or cars, so that the members can use these vehicles to get around. There are various cooperatives, namely those of (1) entrepreneurs or producers, (2) consumers, (3) employees and finally a combination of these member groups in the form of (4) multi-stakeholder cooperatives. This research focusses on consumer cooperatives because this study concerns the question of whether bilateral B2C relationships fall under the scope of the selected directives. Therefore, only the consumer cooperative is relevant. In consumer cooperatives on mobility usership, the members (being consumers) purchase mobility from their cooperative, which can buy the vehicles for them. In this way, the members

58 The rules of consumer law pertain to the situation in which a consumer is the buyer of a professional party (B2C) and not the opposite situation where the consumer is the supplier. In C2B contracts, the consumer can, in principle, not rely on the mandatory protection of consumer law. See: M.B.M. Loos (2015) 'Consumentenbescherming bij de consumentenverkoop van auto's' *Weekblad voor Privaatrecht, Notariaat en Registratie* 2015/7062; M.Y. Schaub (2019) 'Wie is handelaar?' *Tijdschrift voor Consumentenrecht en handelspraktijken* 2019(1), pp. 5-13.

59 Asser/Rensen 2-III 2022/249; J.T.L. Nillesen & H.T.P.M. van den Hurk, *Belastingheffing van coöperaties (Fed Fiscale Brochures)* (Deventer: Wolters Kluwer 2018), nr. 1.1, 1.2.3; M. Beudeker e.a./J. Nijland & D.E.M.M. Zaman, *De coöperatie anno 2017. Verslag van het op 12 september 2017 te Leiden gehouden symposium van KNB, VOC en Universiteit Leiden (Ars Notariatus nr. 166)* (Deventer: Wolters Kluwer, 2018); W. van Opstal (2010) 'De Coöperatie, organisatievorm uit het verleden voor onze samenleving van morgen?' *Aktief* (2), pp. 8 *et seq.*; B. Snijder-Kuipers and G.J.C. Rensen, *Handboek notarieel ondernemingsrecht: Deel 2 – Vereniging, coöperatie en onderlinge waarborgmaatschappij* (Serie vanwege Van der Heijden Instituut, nr. 132-2, Wolters Kluwer, 2019).

(being consumers) aim to purchase the goods and/or services they require at a more favourable (and affordable) price.⁶⁰ An example is *Coöperatieauto*.⁶¹ The cooperative can act as a provider of mobility usership as a collection of the members (private individuals) who jointly own a fleet of vehicles. As a result, these members (private individuals) are the co-owners of the vehicles. At the same time, *Coöperatieauto* also operates as a buyer, buying or leasing a fleet of cars from another contract party.⁶² The dual capacity is relevant because a cooperative may consist of members who are both co-owners and consumers. This means that a cooperative consisting of consuming members could be subject to consumer law. Different variations are possible. The first variation is that the cooperative offers mobility directly to the consumer. Second, there exists a variation whereby the cooperative buys or leases a fleet of cars from a private company and offers the use of vehicles to the consumer. As a result, the cooperative could play both roles of provider and consumer.⁶³ Here too, variations that could affect consumer rights are included in this research. For example, if a vehicle of *Coöperatieauto* breaks down during the ride, does the consumer (who is possibly also a co-owner of these vehicles) have rights vis-à-vis *Coöperatieauto* and/or the producer or seller who sold the fleet to *Coöperatieauto*? Paragraph 2.5.2 will discuss the question of whether the cooperative can be qualified as a professional party and paragraph 2.6.2 discusses whether the cooperative can be qualified as a consumer.

2.4.3 Figure 3: Capacity of the individual

The third example in Figure 1 represents the capacity of the individual, who can act in different capacities. After all, the individual can be both a consumer and a provider, resulting in a possible C2C relationship.⁶⁴ After all, the role of the individual is no longer confined to the role of consumer; they can also step into the role of the provider in

60 Asser/Rensen 2-III 2022/249; J.T.L. Nillesen & H.T.P.M. van den Hurk, *Belastingheffing van coöperaties (Fed Fiscale Brochures)* (Deventer: Wolters Kluwer 2018), nr. 1.1, 1.2.3; M. Beudeker e.a./J. Nijland & D.F.M.M. Zaman, *De coöperatie anno 2017. Verslag van het op 12 september 2017 te Leiden gehouden symposium van KNB, VOC en Universiteit Leiden (Ars Notariatus nr. 166)* (Deventer: Wolters Kluwer, 2018); W. van Opstal (2010) 'De Coöperatie, organisatievorm uit het verleden voor onze samenleving van morgen?' *Aktief* (2), pp. 8 *et seq.*; B. Snijder-Kuipers and G.J.C. Rensen, *Handboek notarieel ondernemingsrecht: Deel 2 – Vereniging, coöperatie en onderlinge waarborgmaatschappij* (Serie vanwege Van der Heijden Instituut, nr. 132-2, Wolters Kluwer, 2019).

61 *Coöperatieauto*, <<https://www.cooperatieauto.nl>> accessed 22 June 2023.

62 Partago, 'Cooperatief ondernemen' <<https://www.partago.be/onze-cooperatie.html>> accessed 9 July 2020.

63 M. Beudeker e.a./J. Nijland & D.F.M.M. Zaman, *De coöperatie anno 2017. Verslag van het op 12 september 2017 te Leiden gehouden symposium van KNB, VOC en Universiteit Leiden (Ars Notariatus nr. 166)* (Deventer: Wolters Kluwer, 2018), p. 1.4.

64 This entails the so-called C2C or P2P relationship.

a mobility usership model.⁶⁵ An example is *Snappcar*, a (e) C2C carsharing platform, connecting car owners (individual providers) with individuals who need a car (consumers).⁶⁶ In addition, there are two other variations of C2C, namely (f) formal C2C collaborative sharing through an individual sharing contract, and (g) informal C2C collaborative sharing without a contract. These are explained in more detail in paragraph 1.2.2. The classification of the parties in this type of contractual relationships is crucial. Therefore, this research focusses on the circumstance where consumer rights are affected. For example, does the consumer have rights vis-à-vis the owner of the car? An additional question is whether the platform, like *Snappcar*, plays an operational role in this. However, this question falls outside the scope of this research because the research is focussed on the two-sided relationship between the (individual) provider and the consumer and not on the role of the platform in the triangular Provider-Platform-Consumer relationship.

Paragraph 2.5.3 will discuss the question of whether the individual (an individual provider) can be qualified as a professional party and paragraph 2.6.1 discusses whether the individual (an individual user) can be qualified as a consumer.

2.5 RATIONE PERSONAE SCOPE: WHO QUALIFIES AS A PROFESSIONAL PARTY?

Even though this research is primarily focussed on the rights of the consumer, the role of the provider and whether he could be considered a professional party is vital because it affects the applicability of consumer legislation. After all, consumer protection is only granted to a bilateral B2C contract.⁶⁷ This paragraph examines whether the provider of

65 CJEU, Case C-105/17, 4 October 2018, ECLI:EU:C:2018:808 (*Kamenova*) with annotation of D.W.F. Verkade; L.Guibault, N. Helberger, M. Loos, C. Mak, L. Pessers, B. van der Sloot, *Digital consumers and the law: Towards a cohesive European framework* (Alphen aan den Rijn: Kluwer Law International BV, 2012), pp. 41, 43; C. Meller-Hannich, E. Krausbeck, R. Wittke (2019) 'Der Verbraucher in der Sharing Economy' *Verbraucher und Recht*, pp. 403-408; V. Mak (2021), 'Contracteren in de platformeconomie: De derde-aanbieder als zwakke partij' *Maandblad voor Vermogensrecht* 2021(2), pp. 57-63.

66 Snappcar, 'Rent a car in your neighborhood' <<https://www.snappcar.nl/en>> accessed 9 June 2020. Another example is *Mywheels*: Mywheels, 'Huur en open een auto met je smartphone' <<https://mywheels.nl>> accessed 9 June 2020.

67 Definition consumer: Article 2(1) Consumer Rights Directive; Article 2(2) Consumer Sales Directive; Article 1(a) Consumer Sales Directive; Article 3(a) Consumer Credit Directive 2008; Article 2(a) Unfair Commercial Practices Directive; Article 2(b) Unfair Contract Terms Directive; Definition professional party (seller/trader/creditor/supplier): Article 2(2) Consumer Rights Directive; Article 2(3) Consumer Sales Directive; Article 1(c) Consumer Sales Directive; Article 3(b) Consumer Credit Directive 2008; Article 2(b) Unfair Commercial Practices Directive; Article 2(c) Unfair Contract Terms Directive. Also see: European Commission, 'A European agenda for the collaborative economy' (Brussels, 2 June 2016)

mobility usership in its different capacities could be considered a professional party.⁶⁸ This covers the left side of Figure 4 and will be discussed below from top to bottom. In the cases in which the parties cannot be classified as a provider under EU law, it will be examined whether this is possible under the selected national laws and under what conditions.⁶⁹ Each directive uses different terminology while all refer in principle to the notion of the professional party. All directives broadly define a professional party as any natural or legal person, irrespective of whether they are privately or publicly owned, who is acting, including through any legal agent that is acting on that person's behalf, for purposes relating to that person's trade, business, or profession.⁷⁰ Table 4 shows that despite the differing terminology in each directive, the definition of the professional party consists of two significant components:⁷¹ (1) a natural or legal person that (2) acts for purposes related to trade, business, or profession.⁷²

COM(2016) 356 final, pp. 9-10; European Commission, 'Exploratory study of consumer issues in online peer-to-peer platform markets' Task 1 Report (March 2017), DOI: 10.2838/7661, <C:\Users\63150jdv\AppData\Local\Temp\1\Annex1_Task1_ReportMay2017pdf.pdf> accessed 31 October 2019; Asser/Hijma 7-I 2019/103-121; E.H. Hondius (2006) 'The Notion of Consumer: European Union versus Member States' *Sydney Law Review* (28)89, pp. 95 *et seq*; V. Cap, P. Schwarzenegger, B. Luger, P. Bydliński, and J. Stabenheiner (2012) 'Die Richtlinie über die Rechte der Verbraucher (2011/83/EU vom 25. Oktober 2011)' *Manz'sche Verlags- und Universitätsbuchhandlung GmbH*, Wien, pp. 15-20; M. Rezek 'Contracts concluded away from business premises and contracts concluded through distance communication in the light of the Proposal for a Directive on Consumer Rights' in: H. Schulte-Nölke and L. Tichý (eds.), *Perspectives for European Consumer Law: Towards a Directive on Consumer Rights and Beyond* (Munich: Sellier European law publishers GmbH, 2010), pp. 109-116.

68 Definition professional party (seller/trader/creditor/supplier): Article 2(2) Consumer Rights Directive; Article 2(3) Consumer Sales Directive; Article 1(c) Consumer Sales Directive; Article 3(b) Consumer Credit Directive 2008; Article 2(b) Unfair Commercial Practices Directive; Article 2(c) Unfair Contract Terms Directive.

69 Viz. The Netherlands, Germany, France and Belgium.

70 In relation to contracts covered by this Directive, 'Professional party'. See: Article 2(3) Consumer Sales Directive 1999, Article 2(3) Consumer Sales Directive, Article 2(2) Consumer Rights Directive, Article 2(b) Unfair Commercial Practices Directive, Article 1 Unfair Contract Terms Directive, Article 3(a) Consumer Credit Directive 2008.

71 The similar way of defining this term is also recognized, for example: CJEU, Case C-105/17, 4 October 2018, ECLI:EU:C:2018:808 (*Kamenova*), pp. 25-27.

72 For example, the Consumer Sales Directive refers to a seller whereas the Consumer Credit Directive 2008 refers to a creditor and the Consumer Rights Directive refers to a trader. Respectively seller (Article 2(3) Consumer Sales Directive), creditor (Article 3(b) Consumer Credit Directive 2008), trader (Article 2(2) Consumer Rights Directive). J. Calais-Auloy, H. Temple and M. Depincé, *Droit de la consommation* (10th Edition, Paris: Dalloz, 2020), pp. 4-7. See for the notion of the seller: R. Canavan, 'Contracts of sale' in: C. Twigg-Flesner (ed.), *Research handbook on EU Consumer and Contract Law* (Glos, Edward Elgar Publishing Limited, 2016), pp. 266-274. See on the notion of trader under Unfair Contract Terms Directive: P. Rott 'Unfair contract terms' in: C. Twigg-Flesner (ed.), *Research handbook on EU Consumer and Contract Law* (Glos, Edward Elgar Publishing Limited, 2016), pp. 289-290; C-M. Péglion-Zika, *La Notion de Clause Abusive: Étude de Droit de la Consommation* (Issy-les-Moulineaux Cedex, LGDJ, Lextenso éditions, 2018), pp. 21-22.

Table 4: Elements of the notion of the professional party

Elements of the notion of the professional party											
EU directive	Professional party	Natural person		Acting for purposes related to:					Acting in the name or on behalf of	Publicly or privately owned	
		Natural person	Legal person	Trade	Commercial or professional activity	Business	Craft	Profession			
Article 2(3) CSD	Seller	x	x	x			x	x	x	x	x
Article 2(2) CRD	Trader	x	x	x			x	x	x	x	x
Article 3(b) CCD	Creditor	x	x	x			x		x		
Article 2(c) UCTD	Seller	x	x	x			x		x		x
	Supplier	x	x	x			x		x		x
Article 2(b) UCPD	Trader	x	x	x			x	x	x	x	

2.5.1 Private company

As follows from Table 1, private companies can offer both exclusive mobility use and shared mobility use. Therefore, both models are examined to determine whether the private company that offers mobility usership is considered a professional party. Exclusive mobility use, also known as private lease, entails the relationship between lessor (mobility usership provider) and lessee (consumer).⁷³ A private lease is defined as a form of mobility use where the consumer contracts the long-term use of a vehicle at a fixed, periodic rate. After the contract ends, the vehicle is returned to the mobility usership provider. In any case, the provider remains the legal owner of the leased vehicles.⁷⁴ Clearly, the exclusive mobility provider is considered a professional party because the provider is acting for purposes relating to that person's trade, business, or profession.⁷⁵ In addition, the assessment for the shared mobility provider is as clear as for exclusive mobility provider because the shared mobility provider offers their own fleet of vehicles to the consumer which also entails

⁷³ Private lease is also known as operational lease, as long as the ownership of the vehicle is not transferred.

⁷⁴ V. Mak (2019) 'Consumentenbescherming bij servitization' *Preadviezen Vereniging voor de vergelijkende studie van het recht* 2019-1, pp. 69-98; S.E. Machiels and T.M. Penninks (2015) 'Private lease' *Tijdschrift voor Financieel Recht* (5), pp. 165 *et seq*; J. de Vogel (2020) 'Private Lease: Consumer Credit in Disguise?' *Journal of European Consumer and Market Law* (9)2, pp. 51-60.

⁷⁵ In relation to contracts covered by this Directive, 'Professional party.' See: Article 2(3) Consumer Sales Directive 1999; Article 2(3) Consumer Sales Directive; Article 2(2) Consumer Rights Directive; Article 2(b) Unfair Commercial Practices Directive; Article 1 Unfair Contract Terms Directive; Article 3(a) Consumer Credit Directive 2008.

acting for purposes relating to that person's trade, business, or profession.⁷⁶ As a result, the mobility usership provider falls within the personal scope of the selected directives. This applies equally to exclusive use as it does to shared use.⁷⁷

2.5.2 Cooperative

Paragraph 2.4.2 already introduced the cooperative as a potential contract party in mobility usership, which refers to (h) collaborative sharing as a cooperative.⁷⁸ Furthermore, this paragraph clarified that this study only concerns consumer cooperatives. The status of a consumer cooperative does not alter the qualification of the cooperative in general. Therefore, when the term cooperative is used below, it always refers to a consumer cooperative. The main assessment of this section is to examine whether these consumer cooperatives promote the trade or professional interests of their members and are therefore acting for purposes related to trade, business, or profession.

The cooperative reaches its targets through a jointly owned and democratically controlled venture distributing benefits based on use.⁷⁹ This means that the cooperative concludes agreements with the members in the business that the cooperative carries out on behalf

76 In relation to contracts covered by this Directive, 'Professional party'. See: Article 2(3) Consumer Sales Directive 1999; Article 2(3) Consumer Sales Directive; Article 2(2) Consumer Rights Directive; Article 2(b) Unfair Commercial Practices Directive; Article 1 Unfair Contract Terms Directive; Article 3(a) Consumer Credit Directive 2008.

77 Definition professional party (seller/trader/creditor/supplier): Article 2(2) Consumer Rights Directive; Article 2(3) Consumer Sales Directive; Article 1(c) Consumer Sales Directive; Article 3(b) Consumer Credit Directive 2008; Article 2(b) Unfair Commercial Practices Directive; Article 2(c) Unfair Contract Terms Directive.

78 Also see paragraph 1.2.2. where the cooperative is first mentioned regarding the different types of collaborative sharing. To recall, type (h) collaborative sharing as a cooperative only exists for shared mobility and not for exclusive use.

79 W. Majee and A. Hoyt (2011) 'Cooperatives and Community Development: A Perspective on the Use of Cooperatives in Development' *Journal of Community Practice* (19)1, pp. 48-52, DOI: 10.1080/10705422.2011.550260; P. Somerville (2007) 'Co-operative identity' *Journal of Co-operative Studies* (40)1, pp. 5-17; B.J. Fairbairn, M. Bold L. Fulton, H. Ketilson, D. Ish (1995) 'Co-operatives and community development: Economics in social perspective' *Center for the Study of Co-operatives*, Diefenbaker Centre, University of Saskatchewan; International Co-operative Alliance, 'Guidance Notes to the Co-operative Principles' <<https://www.ica.coop/sites/default/files/publication-files/ica-guidance-notes-en-310629900.pdf>> accessed 30 march 2021; K.A. Zeuli and R. Cropp 'Cooperatives: Principles and practices in the 21st Century', pp. 1-45, <<http://learningstore.uwex.edu/assets/pdfs/A1457.PDF>> accessed 30 march 2021; European Commission, 'Cooperatives' <https://ec.europa.eu/growth/sectors/social-economy/cooperatives_en> accessed 20 May 2020; Commission of the European Communities, 'Communication from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of Regions: On the promotion of co-operative societies in Europe' (Brussels, 23 February 2004) COM(2004) 18 final, p. 6.

of its members. These members enter into agreements with the cooperative, driven by the cooperative to achieve a common goal.⁸⁰ Individuals aim to combine their resources voluntarily to capture greater or different benefits from a venture than if the venture were undertaken individually. In case of (h) collaborative sharing as a cooperative, this common target refers to the joint purchase of a fleet of vehicles whereby the private individuals jointly own this fleet. By combining resources, the individuals can purchase vehicles and capture greater benefits by using the vehicle more efficiently at lower costs compared to ownership. As a result, these cooperatives can be characterised as a collaboration of private individuals who are members of the cooperative to meet common economic, social, and cultural targets acting for purposes related to trade, business, or profession. Consequently, a cooperative can be seen as a professional party if it acts for purposes related to trade, business, or profession.⁸¹ This also raises the question whether, for example, a very small cooperative, where three individuals purchase and share one bicycle, qualify as professional party. In my opinion, this could lead to an undesirable situation as it would impose increased obligations on such a small cooperative.

A cooperative may have a profit motive and may distribute a profit to its members.⁸² A cooperative can enter into agreements with members, which means that members of a cooperative could have a double identity where members are not only the owner, but also the user of their cooperative (Figure 4). However, it is possible to hold a share of a

80 Asser/Rensen 2-III 2022/249; J.T.L. Nillesen & H.T.P.M. van den Hurk, *Belastingheffing van coöperaties (Fed Fiscale Brochures)* (Deventer: Wolters Kluwer, 2018), nr. 1.1, 1.2.3; M. Beudeker e.a./J. Nijland & D.F.M.M. Zaman, *De coöperatie anno 2017. Verslag van het op 12 september 2017 te Leiden gehouden symposium van KNB, VOC en Universiteit Leiden* (Ars Notarium nr. 166) (Deventer: Wolters Kluwer, 2018); W. van Opstal (2010) 'De Coöperatie, organisatievorm uit het verleden voor onze samenleving van morgen?' *Aktief* (2), pp. 8 *et seq*; B. Snijder-Kuipers and G.J.C. Rensen, *Handboek notarieel ondernemingsrecht: Deel 2 – Vereniging, coöperatie en onderlinge waarborgmaatschappij* (Serie vanwege Van der Heijden Instituut, nr. 132-2, Wolters Kluwer, 2019).

81 If the cooperative were organized as a Non-Governmental Organization, this would not lead to a different outcome. See: W. Majee and A. Hoyt (2011) 'Cooperatives and Community Development: A Perspective on the Use of Cooperatives in Development' *Journal of Community Practice* (19)1, pp. 48-52, DOI: 10.1080/10705422.2011.550260; P. Somerville (2007) 'Co-operative identity' *Journal of Co-operative Studies* (40)1, pp. 5-17; B.J. Fairbairn, M. Bold L. Fulton, H. Ketilson, D. Ish (1995) 'Co-operatives and community development: Economics in social perspective' *Center for the Study of Co-operatives*, Diefenbaker Centre, University of Saskatchewan; International Co-operative Alliance, 'Guidance Notes to the Co-operative Principles' <<https://www.ica.coop/sites/default/files/publication-files/ica-guidance-notes-en-310629900.pdf>> accessed 30 march 2021; K.A. Zeuli and R. Cropp 'Cooperatives: Principles and practices in the 21st Century', pp. 1-45, <<http://learningstore.uwex.edu/assets/pdfs/A1457.PDF>> accessed 30 march 2021; European Commission, 'Cooperatives' <https://ec.europa.eu/growth/sectors/social-economy/cooperatives_en> accessed 20 May 2020; Commission of the European Communities, 'Communication from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of Regions: On the promotion of co-operative societies in Europe' (Brussels, 23 February 2004) COM(2004) 18 final, p. 6.

82 Asser/Rensen 2-III 2022/226.

cooperative as a co-owner without being a user and vice versa. This means that consumer cooperatives are not solely investor-driven but also user-driven.⁸³

As mobility usership often extends beyond borders, it is also relevant to qualify the European Cooperative Society (SCE) here. The SCE is an optional legal form of a cooperative, which aims to facilitate cross-border and transnational activities of cooperatives. A condition for such an SCE is that the members cannot be based in only one Member State. Furthermore, the SCE is required to unite residents from more than one Member State.⁸⁴ The regulation on the SCE stipulates that its main objective must be to satisfy the needs of its members and/or the development of their economic and social activities, in particular by concluding contracts with them for the supply of goods or services or for the performance of activities of the type that the SCE carries out or orders.⁸⁵ This means that the SCE is, in principle, a legal entity that acts for purposes related to trade, business, or profession (Table 4), which means that the SCE also qualifies as a professional party.

The examined Member States also consider their national variations of the cooperative a professional party. Both in the Netherlands and Belgium respectively, the Dutch cooperative and the Belgian cooperative company (CV) are considered legal entities that act for purposes related to trade, business, or profession (Table 4), which means that they qualify as professional parties.⁸⁶ This also applies for the German registered cooperative

83 M. Beudeker e.a./J. Nijland & D.F.M.M. Zaman, *De coöperatie anno 2017. Verslag van het op 12 september 2017 te Leiden gehouden symposium van KNB, VOC en Universiteit Leiden* (Ars Notariatus nr. 166) (Deventer: Wolters Kluwer, 2018), p. 1.4; W. Majee and A. Hoyt (2011) 'Cooperatives and Community Development: A Perspective on the Use of Cooperatives in Development' *Journal of Community Practice* (19)1, pp. 48-52, DOI: 10.1080/10705422.2011.550260; International Co-operative Alliance, 'Guidance Notes to the Co-operative Principles' <<https://www.ica.coop/sites/default/files/publication-files/ica-guidance-notes-en-310629900.pdf>> accessed 30 march 2021; K.A. Zeuli and R. Cropp 'Cooperatives: Principles and practices in the 21st Century', pp. 1-45, <<http://learningstore.uwex.edu/assets/pdfs/A1457.PDF>> accessed 30 march 2021; W. van Opstal (2010) 'De Coöperatie, organisatievorm uit het verleden voor onze samenleving van morgen?' *Aktief* (2), pp. 8 *et seq.*; Asser/Rensen 2-III 2022/227; R.C.J. Galle, *Handboek Coöperatie* (Convoy Uitgevers Bv, 2012); B. Snijder-Kuipers and G.J.C. Rensen, *Handboek notarieel ondernemingsrecht: Deel 2 – Vereniging, coöperatie en onderlinge waarborgmaatschappij* (Serie vanwege Van der Heijden Instituut, nr. 132-2, Wolters Kluwer, 2019); Organisation for Economic Co-operation and Development, 'Protecting Consumers In Peer Platform Markets: Exploring The Issues Draft Background Paper for Panel 3.1 of the 2016 Ministerial on the Digital Economy' (28 April 2016) DSTI/CP(2015)4/REV2, p. 7, <[https://one.oecd.org/document/DSTI/CP\(2015\)4/REV2/en/pdf](https://one.oecd.org/document/DSTI/CP(2015)4/REV2/en/pdf)> accessed 28 July 2020.

84 Article 1(3), (5) SCE Regulation.

85 Article 1(3), (5) SCE Regulation. Note: An SCE may also aim to satisfy the needs of its members by promoting their participation in economic activities in one or more SCEs and/or national cooperatives. An SCE may carry out its activities through a subsidiary.

86 Article 2:3 Dutch Civil Code; Dutch Structure Regulation Act for large cooperatives and mutual guarantee companies; Article 1:5(2), 6:1, 8:4 Belgian Code on Companies and Associations; Belgian Chamber of Representatives, 'Projet de Loi introduisant le Code des sociétés et des associations et portant des dispositions

(eG), which should promote the (social or cultural) interests or ventures of its members through their joint operation.⁸⁷ Furthermore, the German registered cooperative is a legal person,⁸⁸ which qualifies as a professional party under German national law.⁸⁹ In France, the French cooperative society of collective interest is a company voluntarily formed by several individuals who are united in the effort to meet their economic or social needs by the establishment of the necessary means. Accordingly, the French cooperative society of collective interest is also qualified as a professional party because it concerns a company that acts for business purposes.⁹⁰ This means that both within the SCE and in the Member States, cooperatives qualify as professional parties because they act for purposes related to their trade, business, or profession.⁹¹

Association

Although (h) collaborative mobility sharing with co-owners is usually organised as a cooperative, collaborative sharing of mobility is sometimes organised as an association. Nevertheless, collaborative sharing as an association is not further examined in this study because there were no examples available. For the sake of completeness, it is briefly considered whether an association can be seen as a professional party.

An association is a permanent grouping of natural and/or legal persons whose members pool their knowledge or their activities. This could be either for a purpose in the general interest or to promote the trade or professional interests of its members.⁹² This means that the association qualifies as a professional party. The examined Member States also consider their national variations of the association a professional party.

diverses (PARTIE I)' (4 juin 2018) DOC 54 3119/001, pp. 30, 31, 190; Belgian Chamber of Representatives, 'Projet de Loi introduisant le Code des sociétés et des associations et portant des dispositions diverses (PARTIE II)' (4 juin 2018) DOC 54 3119/002, pp. 80, 81, 100, 118. Note: The Dutch cooperative is qualified as an association and should be established by notarial deed. It must, according to the statutes, set itself the objective of meeting certain needs of its members by virtue of agreements, concluded with them in the business that it carries on or has carried out for their benefit for this purpose, see Article 2:53 Dutch Civil Code.

87 Section 1 German Cooperative Society Act.

88 Section 17 German Cooperative Society Act; Wissenschaftlicher Service Deutscher Bundestag, 'Ausarbeitung – Zur Geschichte und aktuellen Situation von Genossenschaften' (Deutsches Bundestag, 2018) WD 1-3000-001/18, pp. 4-17, <<https://www.bundestag.de/resource/blob/551654/645df4e523cdb75608768f872637fcd8/wd-1-001-18-pdf-data.pdf>> accessed 4 September 2023. Also see: Section 2 German Commercial Law Act; Table 4: Elements of the notion of the professional party.

89 Section 2 German Commercial Law Act.

90 Article 1 French Law on the Status of Cooperation.

91 Article 1(5) Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE); Article 2:3 Dutch Civil Code; Article 1:5(2) Belgian Code on Companies and Associations; Section 17 German Cooperative Society Act; Section 2 German Commercial Law Act; Article 1 French Law on the Status of Cooperation.

92 Article 1(1) Amended proposal for a Council Regulation (EEC) on the statute for a European Association COM(93) 252 final – SYN 386.

The Dutch association is a legal entity with members aiming at a specific (social) target. An important characteristic of an association is that it has members, and that the association may make a profit and use it to achieve its goals. However, profits may not be distributed to members.⁹³ Therefore, an association can act for purposes related to their trade, business, or profession in case of mobility usership by purchasing vehicles and subsequently offering them for use to its members, which allows them to qualify as a professional party. The Belgian association without legal personality is a group of natural or legal persons who pursue a goal without any interest. The non-profit organisation is made up of at least two people. Members of a non-profit organisation cannot receive any financial benefit from it. Similarly, the French *de facto* association is where a group meets for an activity but carries out no formal set-up. It has limited powers and no legal identity. Both of these examples are neither a legal person nor a legal subject. Nevertheless, they can act for purposes related to their trade, business, or profession in case of mobility usership by purchasing vehicles and subsequently offering them for use to its members. This means that they could qualify as a professional party. Both Belgium and France also acknowledge associations with legal personality; respectively, the Belgian association with legal personality and the French association.⁹⁴ These associations promote the trade or professional interests of their members and are therefore acting for purposes related to trade, business, or profession, which also grants them the qualification as a professional party.⁹⁵ In Germany, a division exists between the German economic association and the German non-economic association.⁹⁶ The German non-economic association acquires legal capacity by being entered in the register of associations of the competent local court and does not aim at commercial business operations but is considered a legal entity that could act for purposes related to trade, business, or profession, which means it qualifies as a professional party.⁹⁷ The German economic association aims at a commercial business operation and acquires legal capacity through state award in the absence of special

93 Article 2:3; 2:26(1) Dutch Civil Code. Note: a target other than one that is described in Article 53(1) or (2) Dutch Civil Code.

94 A three-way division can be made for Belgium: the non-profit association (*vereniging zonder winstoogmerk, VZW*), the international non-profit association (*internationale vereniging zonder winstoogmerk, iVZW*), the association of co-owners (*vereniging van mede-eigenaars, VME*).

95 Article 1:2 Belgian Code on Companies and Associations; Article 1 French Law relating to the contract of association; Belgian Chamber of Representatives, 'Projet de Loi introduisant le Code des sociétés et des associations et portant des dispositions diverses (PARTIE I)' (4 juin 2018) DOC 54 3119/001, pp. 27-29; Belgian Chamber of Representatives, 'Projet de Loi introduisant le Code des sociétés et des associations et portant des dispositions diverses (PARTIE II)' (4 juin 2018) DOC 54 3119/002, pp. 30, 31, 118.

96 Respectively: Paragraph 22(1) and 21 German Federal Code.

97 Article 1(1) Amended proposal for a Council Regulation (EEC) on the statute for a European Association COM(93) 252 final – SYN 386; Article 26-52 Dutch Civil Code; Article 1:2 Belgian Code on Companies and Associations; Section 21-79 German Federal Code; Article 1 French Law relating to the contract of association; Paragraph 21 German Federal Code; L. Leuschner, *Münchener Kommentar zum BGB*, 9. Auflage 2021, BGB § 22 Wirtschaftlicher Verein, Rn. 1-4.

federal regulations.⁹⁸ The German economic association typically promotes the trade or professional interests of its members, therefore acting for purposes related to trade, business, or profession, and thus also qualifies as a professional party. This means that the mobility usership provider in the capacity of either cooperative or association generally may fall within the *ratione personae* scope of consumer directives.

2.5.3 Individual provider

It is a relatively simple assessment to determine that a private company (paragraph 2.5.1) or a cooperative (paragraph 2.5.2) is a professional party, since it boils down to the question of whether a natural or legal person offers the mobility acting for purposes related to trade, business, or profession.⁹⁹ This assessment becomes a lot more ambiguous for the individual provider in a C2C relationship (type (e), (f) and (g)), however, but it is relevant due to the development of collaborative C2C mobility sharing which blurs the line between the professional party and consumer. This *inter alia* raises questions on whether the natural person could qualify as a professional party.¹⁰⁰ What is the tipping point between being a 'weak' party, protected by consumer law or a professional party, acting with the notion of freedom of contract? The starting point of consumer law is that consumer protection applies to contracts between a professional party and a consumer, where the professional party provides a service or is a seller, which means that the protection does not exist between consumers.¹⁰¹ For example, if an individual decides to share his own car with his

98 Paragraph 22(1) German Federal Code; L. Leuschner, *Münchener Kommentar zum BGB*, 9. Auflage 2021, BGB § 22 Wirtschaftlicher Verein, Rn. 1-4.

99 For example, the Consumer Sales Directive refers to a seller whereas the Consumer Credit Directive 2008 refers to a creditor and the Consumer Rights Directive refers to a trader. Respectively seller (Article 2(3) Consumer Sales Directive), creditor (Article 3(b) Consumer Credit Directive 2008), trader (Article 2(2) Consumer Rights Directive). J. Calais-Auloy, H. Temple and M. Depincé, *Droit de la consommation* (10th Edition, Paris : Dalloz, 2020), pp. 4-7. See for the notion of the seller: R. Canavan, 'Contracts of sale' in: C. Twigg-Flesner (ed.), *Research handbook on EU Consumer and Contract Law* (Glos, Edward Elgar Publishing Limited, 2016), pp. 266-274. See on the notion of trader under Unfair Contract Terms Directive: P. Rott 'Unfair contract terms' in: C. Twigg-Flesner (ed.), *Research handbook on EU Consumer and Contract Law* (Glos, Edward Elgar Publishing Limited, 2016), pp. 289-290; C-M. Pégliion-Zika, *La Notion de Clause Abusive: Étude de Droit de la Consommation* (Issy-les-Moulineaux Cedex, LGDJ, Lextenso éditions, 2018), pp. 21-22.

100 C. Meller-Hannich, E. Krausbeck, R. Wittke (2019) 'Der Verbraucher in der Sharing Economy' *Verbraucher und Recht*, pp. 403 *et seq*; Asser/Hijma 7-I 2019/121; European Commission, 'A European agenda for the collaborative economy' (Brussels, 2 June 2016) COM(2016) 356 final.

101 European Commission, 'A European agenda for the collaborative economy' (Brussels, 2 June 2016) COM(2016) 356 final, pp. 9-10; European Commission, 'Exploratory study of consumer issues in online peer-to-peer platform markets' Task 1 Report (March 2017), DOI: 10.2838/7661, <C:\Users\63150jdv\AppData\Local\Temp\1\Annex1_Task1_ReportMay2017pdf.pdf> accessed 31 October 2019; Asser/Hijma 7-I 2019/103-121; E.H. Hondius (2006) 'The Notion of Consumer: European Union versus Member States'

neighbour in return for some compensation like in type (g), the individual provider will – most likely – not be considered a professional party. As a result, this neighbour will not be protected by consumer law, since it entails a C2C contract.¹⁰² It becomes more complicated when the individual provider decides to offer three cars in his neighbourhood in turn for compensation. The offer is eagerly accepted, and two of the three cars are shared most of the week. Would the individual provider still be considered a consumer? Or did the individual become a professional party, acting within its trade, business, or profession? While consumer legislation is built on the juxtaposition between professional parties and consumers, the rise of the individual provider has made the boundary between these roles more complicated since not everyone who carries out economic activities does so as a professional party.¹⁰³ The individual provider can offer mobility usership services and can do so in the capacity of either a self-employed individual or a prosumer. This qualification is relevant to determine whether either of the parties are a professional party or not, and consequently for the applicability of consumer rules.¹⁰⁴

The self-employed individual is a natural person who has no employees and acts and earns in the performance of his own business, trade, or profession. A comparison of this definition with the definitions of the professional party in Table 4 shows that the self-employed individual falls within the definition of the professional party.¹⁰⁵ However, this does not make him a professional for all his businesses, as a self-employed individual can offer mobility usership professionally but at the same time be a prosumer for other

Sydney Law Review (28)89, pp. 95 *et seq.*; S. Lorenz, *Münchener Kommentar zum BGB*, 8. Auflage 2019, BGB § 474 Begriff des Verbrauchsgüterkaufs; anwendbare Vorschriften, Rn. 22-24.

102 European Commission, 'A European agenda for the collaborative economy' (Brussels, 2 June 2016) COM(2016) 356 final, pp. 9; S. Lorenz, *Münchener Kommentar zum BGB*, 8. Auflage 2019, BGB § 474 Begriff des Verbrauchsgüterkaufs; anwendbare Vorschriften, Rn. 22-24; C. Meller-Hannich, E. Krausbeck, R. Wittke (2019) 'Der Verbraucher in der Sharing Economy' *Verbraucher und Recht*, pp. 403 *et seq.*

103 European Commission, 'A European agenda for the collaborative economy' (Brussels, 2 June 2016) COM(2016) 356 final, p. 2.

104 C. Meller-Hannich, E. Krausbeck, R. Wittke (2019) 'Der Verbraucher in der Sharing Economy' *Verbraucher und Recht*, pp. 403 *et seq.*; Asser/Hijma 7-I 2019/121; European Commission, 'A European agenda for the collaborative economy' (Brussels, 2 June 2016) COM(2016) 356 final.

105 A self-employed individual who has no employees. See: Asser/Tjong Tjin Tai 7-IV 2022/70a; H.N. Schelhaas (2018) 'Bescherming voor de zelfstandige zonder personeel in het contractenrecht' *Ars Aequi*, p. 681; T. Hartlief (2019) 'Zzpers tussen vrijheid en bescherming' *Nederlands Juristenblad* 2019/1000; H.N. Schelhaas, *Commerciële contractanten – consistentere differentiëren* (Den Haag: Boom juridisch, 2018), p. 9; Organisation for Economic Co-operation and Development, 'Protecting Consumers In Peer Platform Markets: Exploring The Issues Draft Background Paper for Panel 3.1 of the 2016 Ministerial on the Digital Economy' (28 April 2016) DSTI/CP(2015)4/REV2, p. 18, <[https://one.oecd.org/document/DSTI/CP\(2015\)4/REV2/en/pdf](https://one.oecd.org/document/DSTI/CP(2015)4/REV2/en/pdf)> accessed 28 July 2020; P.P. Swire (2008) 'When Should 'Consumers-as-Producers' Have to Comply With Consumer Protection Laws?' 31(4) *Journal of consumer policy*, pp. 473-487.

activities, such as sharing his privately owned tools via *Peerby*.¹⁰⁶ In that scenario and to that extent, the self-employed individual is not considered a professional party. In conclusion, for the activities that the self-employed individual carries out and are within the performance of his own business, trade, or profession, the self-employed individual is a professional party. Table 5 provides a definition of a self-employed individual for the purposes of this research.

The natural person can also be a prosumer, a category that receives attention in the legal literature because there are calls to broaden the notion of consumer understanding by using the term ‘prosumer’.¹⁰⁷ Although the position between a small, self-employed provider and a prosumer might in essence not be that different because neither will benefit from the scale and economic advantages that the large professional provider has, the prosumer nevertheless differs from the self-employed individual. Prosumers are a neologism between the term ‘consumer’, ‘producer’ and subsequently ‘professional’.¹⁰⁸ The prosumer

106 *Peerby* is a platform that facilitates neighbours to share and borrow tools from each other, promoting sustainability and community by reducing the need for buying tools only used occasionally. *Peerby*, <<https://www.peerby.com>> accessed 29 august 2023.

107 T. Hartlief (2017) ‘Het contractenrecht anno 2025’ *Nederlands Juristenblad* 2017/1392, 26, p. 1801; C. Meller-Hannich, E. Krausbeck, R. Wittke (2019) ‘Der Verbraucher in der Sharing Economy’ *Verbraucher und Recht*, pp. 403 *et seq*; L. Guibault, N. Helberger, M. Loos, C. Mak, L. Pessers, B. van der Sloot, *Digital consumers and the law: Towards a cohesive European framework* (Alphen aan den Rijn: Kluwer Law International BV, 2012), pp. 41-48; M.B. Loos, L. Guibault, N. Helberger, C. Mak, L. Pessers, K.J. Cseres, and R. Tigner (2011) ‘Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts: Final report, comparative analysis, law & economics analysis, assessment and development of recommendations for possible future rules on digital content contracts’ (Amsterdam: University of Amsterdam, Centre for the Study of European Contract Law, 2011), pp. 41-44; J. Valant (2015) ‘Consumer protection in the EU – policy overview’ *European Parliamentary Research Service*, DOI: 10.2861/575862; L. Guibault, N. Helberger, M. Loos, C. Mak, L. Pessers, B. van der Sloot, *Digital consumers and the law: Towards a cohesive European framework* (Alphen aan den Rijn: Kluwer Law International BV, 2012), pp. 41-51; T. Hartlief (2017) ‘Het contractenrecht anno 2025’ *Nederlands Juristenblad* 2017/1392, 26, p. 1801; OCU Consumers and Users Organisation (2016) ‘Collaboration or Business? Collaborative consumption: From value for users to a society with values’, pp. 9-10, <https://www.oneplanetnetwork.org/sites/default/files/from-crm/collaboration_or_business_cc_p2p_2016.pdf> accessed 4 September 2023; G. Straetmans, *Consument en markt: onderzoek naar de rechtspositie van de consument op de Europese interne markt: met de financiële sector als toetssteen* (Diss., Katholieke Universiteit Leuven 1997), pp. 91-97; V. Mak (2022), ‘A Primavera for European consumer law: re-birth of the consumer image in the light of digitalisation and sustainability’ *Journal of European Consumer and Market Law* 11(3), pp. 77-80.

108 The term was originally used by Toffler as a contraction of ‘consumer’ and ‘producer’. See: A. Toffler, *The Third Wave* (New York: Bantam Books, 1980); P.P. Swire (2008) ‘When Should ‘Consumers-as-Producers’ Have to Comply With Consumer Protection Laws?’ 31(4) *Journal of consumer policy*, pp. 473-487; L. Guibault, N. Helberger, M. Loos, C. Mak, L. Pessers, B. van der Sloot, *Digital consumers and the law: Towards a cohesive European framework* (Alphen aan den Rijn: Kluwer Law International BV, 2012), pp. 41-48; M.B. Loos, L. Guibault, N. Helberger, C. Mak, L. Pessers, K.J. Cseres, and R. Tigner (2011) ‘Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts: Final report, comparative analysis, law & economics analysis, assessment and development of recommendations for possible future rules on digital content contracts’

is defined as a natural person who consumes and also *produces* goods and services.¹⁰⁹ The prosumer's aim in mobility usership is to use vehicles more efficiently by offering underutilised resources,¹¹⁰ which clearly diverges from the aim of the self-employed individual. Furthermore, the prosumer offers the vehicle when it suits him and offering the vehicle is not originally his main business. In other words, the prosumer does not become a sophisticated and experienced professional party, contrary to the self-employed individual.¹¹¹ One of the main characteristics of C2C is that the role of individuals is no longer confined to the role of consumer, as in traditional B2C business models.¹¹² Table 5 also shows the definition of the prosumer used for this study. The qualification of the individual provider and the definition of its capacities is deduced from the analysis above.

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- (Amsterdam: University of Amsterdam, Centre for the Study of European Contract Law, 2011), pp. 41-44; J. Valant (2015) 'Consumer protection in the EU – policy overview' *European Parliamentary Research Service*, DOI: 10.2861/575862; L.Guibault, N. Helberger, M. Loos, C. Mak, L. Pessers, B. van der Sloot, *Digital consumers and the law: Towards a cohesive European framework* (Alphen aan den Rijn: Kluwer Law International BV, 2012), pp. 41-51; T. Hartlief (2017) 'Het contractenrecht anno 2025' *Nederlands Juristenblad* 2017/1392, 26, p. 1801; OCU Consumers and Users Organisation (2016) 'Collaboration or Business? Collaborative consumption: From value for users to a society with values', pp. 9-10, <https://www.oneplanetnetwork.org/sites/default/files/from-crm/collaboration_or_business_cc_p2p_2016.pdf> accessed 4 September 2023; G. Straetmans, *Consument en markt: onderzoek naar de rechtspositie van de consument op de Europese interne markt: met de financiële sector als toetssteen* (Diss., Katholieke Universiteit Leuven 1997), pp. 91-97; V. Mak (2022), 'A Primavera for European consumer law: re-birth of the consumer image in the light of digitalisation and sustainability' *Journal of European Consumer and Market Law* 11(3), pp. 77-80.
- 109 Organisation for Economic Co-operation and Development, 'Protecting Consumers In Peer Platform Markets: Exploring The Issues Draft Background Paper for Panel 3.1 of the 2016 Ministerial on the Digital Economy' (28 April 2016) DSTI/CP(2015)4/REV2, <[https://one.oecd.org/document/DSTI/CP\(2015\)4/REV2/en/pdf](https://one.oecd.org/document/DSTI/CP(2015)4/REV2/en/pdf)> accessed 28 July 2020; P.P. Swire (2008) 'When Should 'Consumers-as-Producers' Have to Comply With Consumer Protection Laws?' 31(4) *Journal of consumer policy*, pp. 473-487; T. Hartlief (2017) 'Het contractenrecht anno 2025' *Nederlands Juristenblad* 2017/1392, 26, p. 1801; H.N. Schelhaas (2018) 'Bescherming voor de zelfstandige zonder personeel in het contractenrecht' *Ars Aequi*, p. 681.
- 110 Whether or not with the intervention of an intermediary platform like *Snappcar*. Prosumers outside mobility usership also just offer (hand-made) products and sell them.
- 111 P.P. Swire (2008) 'When Should 'Consumers-as-Producers' Have to Comply With Consumer Protection Laws?' 31(4) *Journal of consumer policy*, pp. 473-487; J. Valant (2015) 'Consumer protection in the EU – policy overview' *European Parliamentary Research Service*, DOI: 10.2861/575862, p. 16; H.N. Schelhaas, *Commerciële contractanten – consistentere differentiëren* (Den Haag: Boom juridisch, 2018), p. 9; Organisation for Economic Co-operation and Development, 'Protecting Consumers In Peer Platform Markets: Exploring The Issues Draft Background Paper for Panel 3.1 of the 2016 Ministerial on the Digital Economy' (28 April 2016) DSTI/CP(2015)4/REV2, p. 18, <[https://one.oecd.org/document/DSTI/CP\(2015\)4/REV2/en/pdf](https://one.oecd.org/document/DSTI/CP(2015)4/REV2/en/pdf)> accessed 28 July 2020.
- 112 An example is *Snappcar*, a C2C carsharing marketplace, connecting car owners with individuals who need a car, see Snappcar, 'Rent a car in your neighborhood' <<https://www.snappcar.nl/en>> accessed 9 June 2020. Another example is *Mywheels*: Mywheels, 'Huur en open een auto met je smartphone' <<https://mywheels.nl>> accessed 9 June 2020. L.Guibault, N. Helberger, M. Loos, C. Mak, L. Pessers, B. van der Sloot, *Digital consumers and the law: Towards a cohesive European framework* (Alphen aan den Rijn: Kluwer Law International BV, 2012); European Commission, 'A European agenda for the collaborative economy' (Brussels, 2 June 2016) COM(2016) 356 final, p. 9.

Furthermore, the natural person also has the possibility, regardless of the capacity, to act as a consumer; this matter is elaborated on in paragraph 2.6.1.

Table 5: Definitions of self-employed individual and prosumer

Definitions of self-employed individual and prosumer	
'Self-employed individual':	Natural person (whether organised as a legal person or not) who acts and earns in the performance of his own business, trade, or profession and has no employees.
'Prosumer':	Natural person who offers (self-owned) underutilised resources to use these resources more efficiently in exchange for a compensation.

Although the self-employed individual differs from the prosumer, clarity is needed on factors that determine whether a prosumer deviates sufficiently from the self-employed individual to be classified differently. Below, distinguishing factors are elaborated.

Distinguishing between the prosumer and the self-employed: Who is a professional party?

In order to distinguish between the prosumer and the self-employed and determine whether these individual providers are a professional party, two factors should be taken into account. First of all, the interpretation of the legal act must be considered, and the legal consequences that the parties themselves wanted must be determined. Below, the qualification of a legal act must be examined, which is determined by the legislator and the legal consequences that must be attached to the legal act.¹¹³ The order of first interpreting and subsequently qualifying is followed because the correct content of the obligations must first be established in order to qualify a legal act.¹¹⁴ After all, interpretation is a factual matter, while qualification is a legal matter.

The capacity of the prosumer should not be interpreted merely based on a pure linguistic interpretation of the terms of the contract. This means that the substantive legal relationship is decisive and not solely based on which label the parties have attached to this. In the Netherlands, the starting point in determining the capacity of the prosumer is what the parties could deduce from their mutual intentions from each other's statements

113 J. Waelkens, *Interpretatie van rechtshandelingen* (Diss., Katholieke Universiteit Leuven, 2015-2016), p. 18; J. van Drooghenbroeck (2007) 'Le juge et le contrat' *Tijdschrift voor Belgisch Burgerlijk recht* 10, p. 598; J. Seghrouchni (2021) 'De kwalificatie van de arbeidsovereenkomst: de rol van de partijbedoeling na het arrest X/Amsterdam' *Bedrijfsjuridische Berichten* 2021/2.

114 J. Waelkens, *Interpretatie van rechtshandelingen* (Diss., Katholieke Universiteit Leuven, 2015-2016), p. 18; J. van Drooghenbroeck (2007) 'Le juge et le contrat' *Tijdschrift voor Belgisch Burgerlijk recht* 10, p. 598; J. Seghrouchni (2021) 'De kwalificatie van de arbeidsovereenkomst: de rol van de partijbedoeling na het arrest X/Amsterdam' *Bedrijfsjuridische Berichten* 2021/2.

or behaviour.¹¹⁵ The meaning that the contracting parties could reasonably attribute to provisions in the given circumstances, and what they could reasonably expect from each other in this regard, is leading. In the Netherlands, this standard is better known as the *Haviltex*-standard and a similar standard is being used in the examined Member States.¹¹⁶

German law aims at discovering the actual/subjective intentions of the parties.¹¹⁷ In case this cannot be determined, the objective interpretation method applies; the agreement must be assessed from the perspective of a reasonable person who is in the same position as the contracting parties.¹¹⁸ The German Federal Court invariably bases this perspective on its judgments in regards to the interpretation of contracts, considering all circumstances of the case, such as *inter alia* the linguistic meaning of words, the system of the contract, and the possible legal consequences.¹¹⁹ Furthermore, the moment of assessment for the interpretation of the legal act is in principle the moment of the conclusion of the contract. Circumstances that occurred after the conclusion of the contract, including the behaviour of the parties, are not important for the interpretation of a legal act. However, significance

115 Dutch Supreme Court, 13 March 1981, ECLI:NL:HR:1981:AG4158 (*Haviltex*); Dutch Supreme Court, 5 April 2013, ECLI:NL:HR:2013:BY8101 (*Mexx/Lundiform*). H.N. Schelhaas & W.L. Valk, *Uitleg van rechtshandelingen – In nationaal en internationaal perspectief (Monografieën Privaatrecht nr. 20)* (Deventer: Wolters Kluwer, 2022), 1.2. Also see: F.M. Cassel-van Zeeland, ‘5.4 Uitleg: Haviltex-norm’ in: Jac. Hijma (red.), *GS Vermogensrecht* (Deventer: Wolters Kluwer); M. Vriend, ‘2.7 Haviltexmaatstaf nader beschouwd: betekenis tekst overeenkomst’ in: R.J.Q. Klomp and H.N. Schelhaas (red.), *GS Verbintenissenrecht* (Deventer: Wolters Kluwer).

116 Article 5:101 PECL; Article II.-8:101 DCFR; Netherlands: Dutch Supreme Court, 13 March 1981, ECLI:NL:HR:1981:AG4158 (*Haviltex*). Germany: Section 133; 157 German Civil Code. Belgium: Artikel 5.64; 5.65; 5.66 Belgian Civil Code. France: Article 1188 French Civil Code. See: H.N. Schelhaas & W.L. Valk, *Uitleg van rechtshandelingen – In nationaal en internationaal perspectief (Monografieën Privaatrecht nr. 20)* (Deventer: Wolters Kluwer, 2022), 7.

117 Section 133 German Civil Code.

118 Section 133; 157 German Civil Code. The articles complement each other and should be read together, see: J. Busche, *Münchener Kommentar zum BGB*, 9. Auflage 2021, BGB § 157 Auslegung von Verträgen, Rn. 1, 2. Also see: M.A. Czarnecki, *Vertragsauslegung und Vertragsverhandlungen: Eine rechtsvergleichende Untersuchung (Rechtsvergleichung und Rechtsvereinheitlichung, nr 34)* (Tübingen: Mohr Siebeck, 2016), pp. 55-56; J. Busche, *Münchener Kommentar zum BGB*, 9. Auflage 2021, BGB § 133 Auslegung einer Willenserklärung, Rn. 17, 18; H.-P. Mansel, Jauernig, Bürgerliches Gesetzbuch, 19. Auflage 2023, BGB § 133 Auslegung einer Willenserklärung, Rn. 8-11; J. Busche, *Münchener Kommentar zum BGB*, 9. Auflage 2021, BGB § 157 Auslegung von Verträgen, Rn. 1-25. The importance of this article lies on the reasonableness, fairness, and common belief, and therefore does not focus primarily on the subjective intentions of the parties.

119 J. Busche, *Münchener Kommentar zum BGB*, 9. Auflage 2021, BGB § 157 Auslegung von Verträgen, Rn. 1-25; M.A. Czarnecki, *Vertragsauslegung und Vertragsverhandlungen: Eine rechtsvergleichende Untersuchung (Rechtsvergleichung und Rechtsvereinheitlichung, nr 34)* (Tübingen: Mohr Siebeck, 2016), pp. 55-56; J. Busche, *Münchener Kommentar zum BGB*, 9. Auflage 2021, BGB § 133 Auslegung einer Willenserklärung, rn 8, 9; H.N. Schelhaas & W.L. Valk, *Uitleg van rechtshandelingen – In nationaal en internationaal perspectief (Monografieën Privaatrecht nr. 20)* (Deventer: Wolters Kluwer, 2022), p.7.

can be attached to the development history of the text, including pre-contractual facts and circumstances.¹²⁰

While German and Dutch law have limited interpretation rules and only generally formulated rules, French and Belgian law include more interpretation provisions.¹²¹ Belgian law stipulates that contracts must determine what common intention the contracting parties had, rather than adhering to the literal meaning of the words. However, if the contract is laid down in a document, the contract may not be interpreted in an interpretation that is manifestly irreconcilable with the scope of that document, considering its intrinsic elements and the circumstances in which it was drawn up and performed.¹²²

Moreover, French law states that in the interpretation of contracts, the common (subjective) intention of the parties is decisive and that if this cannot be properly determined, the contract must be interpreted in accordance with what a reasonable person would have understood in the same circumstances.¹²³ This means that an attempt must first be made to determine the actual intention of the party, but if that leads to nothing, then the intention must be determined through the eyes of an objectified 'reasonable person' in a comparable situation to the contractors.¹²⁴ In addition, French law has four rules of interpretation, namely: (1) The interpretation must be taken into account for (the purpose of) the entire contract,¹²⁵ (2) a *contra proferentem* rule,¹²⁶ (3) an interpretation in which a provision has legal effect prevails over an interpretation without legal effect,¹²⁷ and (4) clear rules do not require interpretation.¹²⁸

Neither the Belgian nor the French approach seems to result in a major practical difference compared to the perspective used in the Netherlands or Germany regarding contract

120 There are exceptions to this, such as for duration agreements. M.A. Czarnecki, *Vertragsauslegung und Vertragsverhandlungen: Eine rechtsvergleichende Untersuchung (Rechtsvergleichung und Rechtsvereinheitlichung, nr 34)* (Tubingen: Mohr Siebeck, 2016), p. 85.

121 H.N. Schelhaas & W.L. Valk, *Uitleg van rechtshandelingen – In nationaal en internationaal perspectief (Monografieën Privaatrecht nr. 20)* (Deventer: Wolters Kluwer, 2022), 7.4.1.

122 Article 5.64; 5.65; 5.66 Belgian Civil Code. Also see: H.N. Schelhaas & W.L. Valk, *Uitleg van rechtshandelingen – In nationaal en internationaal perspectief (Monografieën Privaatrecht nr. 20)* (Deventer: Wolters Kluwer, 2022), 7.4.2.

123 Article 1188 French Civil Code; H.N. Schelhaas & W.L. Valk, *Uitleg van rechtshandelingen – In nationaal en internationaal perspectief (Monografieën Privaatrecht nr. 20)* (Deventer: Wolters Kluwer, 2022), 7.4.3.

124 H.N. Schelhaas & W.L. Valk, *Uitleg van rechtshandelingen – In nationaal en internationaal perspectief (Monografieën Privaatrecht nr. 20)* (Deventer: Wolters Kluwer, 2022), 7.4.3.

125 Article 1189 French Civil Code.

126 Article 1190 French Civil Code.

127 Article 1191 French Civil Code.

128 Article 1192 French Civil Code.

interpretation. The biggest difference lies in the special interpretation rules included in French and Belgian law.¹²⁹ Both French and Belgian law aim to determine the subjective will of the party. However, the French interpretation standard places more emphasis on objective explanation elements. Despite the more subjective interpretation standard in current Belgian law, objective facts and circumstances are often the guiding focus and are viewed through the eyes of a reasonable party to determine the intention of the parties.¹³⁰ Although the Dutch *Haviltex*-standard is formulated in a different way, the common party intention is also sought. Here too, objectification takes place, but the perspective is not that of a reasonable person, but of the contracting parties.

After the agreed rights and obligations have been established (interpretation phase), it can be assessed how the agreement can be qualified based on its characteristics (qualification phase). In any case, Dutch and Belgian law make a distinction in these two phases.¹³¹ Qualification consists of determining the legal category to which the agreement belongs, and then deriving the consequences attached to it by law.¹³² This means that the parties cannot decide for themselves on the qualification of the contract. When qualifying an agreement, the name that the parties give to that agreement is not decisive.

Factors to assess the capacity of the individual provider

More concrete factors play a role in determining the capacity of the individual provider. Such factors include the social circles to which the contracting parties belong and the level of legal knowledge that can be expected from such contracting parties. Here, national legal systems could place emphasis on specific factors of this standard.¹³³ The legal rule

129 J. Waelkens, *Interpretatie van rechtshandelingen* (Diss., Katholieke Universiteit Leuven, 2015-2016); H.N. Schelhaas & W.L. Valk, *Uitleg van rechtshandelingen – In nationaal en internationaal perspectief* (Monografieën Privaatrecht nr. 20) (Deventer: Wolters Kluwer, 2022), 7.4.3.

130 J. Waelkens, *Interpretatie van rechtshandelingen* (Diss., Katholieke Universiteit Leuven, 2015-2016); H.N. Schelhaas & W.L. Valk, *Uitleg van rechtshandelingen – In nationaal en internationaal perspectief* (Monografieën Privaatrecht nr. 20) (Deventer: Wolters Kluwer, 2022), 7.4.3.

131 See: Dutch Supreme Court, 6 November 2020, ECLI:NL:HR:2020:1746 (*Participatieplaatsen Amsterdam*); Asser/Houben 7-X 2019/19, 20; H.N. Schelhaas & W.L. Valk, *Uitleg van rechtshandelingen – In nationaal en internationaal perspectief* (Monografieën Privaatrecht nr. 20) (Deventer: Wolters Kluwer, 2022), 1.2.11. J. Waelkens, *Interpretatie van rechtshandelingen* (Diss., Katholieke Universiteit Leuven, 2015-2016), p. 18; J. Seghrouchni (2021) 'De kwalificatie van de arbeidsovereenkomst: de rol van de partijbedoeling na het arrest X/Amsterdam' *Bedrijfsjuridische Berichten* 2021/2.

132 W. van Eeckhoutte (2005) 'Gezag' in de cassatierechtspraak. Een kwestie van bewijs, interpretatie en kwalificatie' *Nieuw Juridisch Weekblad* 95, p. 5; J. Waelkens, *Interpretatie van rechtshandelingen* (Diss., Katholieke Universiteit Leuven, 2015-2016); J. van Drooghenbroeck (2007) 'Le juge et le contrat' *Tijdschrift voor Belgisch Burgerlijk recht* 10, p. 598; J. Seghrouchni (2021) 'De kwalificatie van de arbeidsovereenkomst: de rol van de partijbedoeling na het arrest X/Amsterdam' *Bedrijfsjuridische Berichten* 2021/2; Asser/Houben 7-X 2019/19, 20.

133 Dutch Supreme Court, 13 March 1981, ECLI:NL:HR:1981:AG4158 (*Haviltex*); Dutch Supreme Court, 5 April 2013, ECLI:NL:HR:2013:BY8101 (*Mexx/Lundiform*). Also see: H.N. Schelhaas & W.L. Valk,

is especially suitable for agreements where uncertainties exist. After all, in disputes about balanced, high-quality contracts between equal parties, careful consideration is given to the content of the contract after equal negotiations. For example, this standard can be used to supplement short, incomplete (verbal) agreements. In the conclusion of a contract between the individual provider and the consumer, there may also be uncertainty about the capacity of the individual provider, and therefore the applicability of consumer law.

As elaborated in paragraph 2.5, the starting point for this assessment includes the application of two main criteria to qualify as a professional party under consumer law, namely (1) natural and legal persons can fall within the definitions and this person must (2) act for purposes relating to his trade, business, or profession.¹³⁴ The scope of the basic notion of 'professional party' is clarified by relevant case law, which means that the capacity of the individual provider should be determined on a case-by-case basis.¹³⁵ What the contracting parties could reasonably attribute to provisions in the given circumstances and what they could reasonably expect from each other in this regard is the basis of determining the capacity of the individual provider. Complementary, other factors appear repeatedly in the literature and case law and play an important role in that assessment to

Uitleg van rechtshandelingen – In nationaal en internationaal perspectief (Monografieën Privaatrecht nr. 20) (Deventer: Wolters Kluwer, 2022); Asser/Sieburgh 6-III 2022/372; Asser/Hijma 7-I 2019/31. F.M. Cassel-van Zeeland, '5.4 Uitleg: Haviltex-norm' in: Jac. Hijma (red.), *GS Vermogensrecht* (Deventer: Wolters Kluwer); M. Vriend, '2.7 Haviltexmaatstaf nader beschouwd: betekenis tekst overeenkomst' in: R.J.Q. Klomp and H.N. Schelhaas (red.), *GS Verbintenissenrecht* (Deventer: Wolters Kluwer).

134 CJEU, Case C-59/12, 3 October 2013, ECLI:EU:C:2013:634 (*BKK Mobil Oil Körperschaft des öffentlichen Rechts/Zentrale zur Bekämpfung unlauteren Wettbewerbs eV*), p. 42. See: G. Straetmans, 'Onderneming, vrij beroep en consument' in: G. Straetmans and R. Steennot, *Wetboek Economisch Recht En de Bescherming van de Consument* (Antwerpen: Intersentia, 2015), pp. 3-6.

135 CJEU, Case C-105/17, 4 October 2018, ECLI:EU:C:2018:808 (*Kamenova*), pp. 37-39, 48-54 and in the conclusion of CJEU, Case C-59/12, 3 October 2013, ECLI:EU:C:2013:634 (*BKK Mobil Oil Körperschaft des öffentlichen Rechts/Zentrale zur Bekämpfung unlauteren Wettbewerbs eV*); European Commission, 'A European agenda for the collaborative economy' (Brussels, 2 June 2016) COM(2016) 356 final, p. 9; Asser/Hijma 7-I 2019/120-121; M.Y. Schaub (2019) 'Wie is handelaar?' *Tijdschrift voor Consumentenrecht en handelspraktijken* 2019(1), pp. 5-13; M.Y. Schaub, *Onlineplatformen* (Monografieën Privaatrecht nr. 19) (Deventer: Wolters Kluwer, 2020), 23; M.B.M. Loos, *Consumentenkoop (Monografieën BW nr. B65b)* (Deventer: Wolters Kluwer, 2019), 12; G. Straetmans, 'Onderneming, vrij beroep en consument' in: G. Straetmans and R. Steennot, *Wetboek Economisch Recht En de Bescherming van de Consument* (Antwerpen: Intersentia, 2015), pp. 3-6. Also see: European Commission, 'A European agenda for the collaborative economy' (Brussels, 2 June 2016) COM(2016) 356 final, p. 5; European Commission, 'Exploratory study of consumer issues in online peer-to-peer platform markets' Task 1 Report (March 2017), DOI: 10.2838/7661, <C:\Users\63150jdv\AppData\Local\Temp\1\Annex1_Task1_ReportMay2017.pdf> accessed 31 October 2019; Organisation for Economic Co-operation and Development, 'Protecting Consumers In Peer Platform Markets: Exploring The Issues Draft Background Paper for Panel 3.1 of the 2016 Ministerial on the Digital Economy' (28 April 2016) DSTI/CP(2015)4/REV2, p. 18, <[https://one.oecd.org/document/DSTI/CP\(2015\)4/REV2/en/pdf](https://one.oecd.org/document/DSTI/CP(2015)4/REV2/en/pdf)> accessed 28 July 2020; L.Guibault, N. Helberger, M. Loos, C. Mak, L. Pessers, B. van der Sloot, *Digital consumers and the law: Towards a cohesive European framework* (Alphen aan den Rijn: Kluwer Law International BV, 2012).

qualify the self-employed individual and the prosumer.¹³⁶ Although none of the factors are decisive, they are directional.¹³⁷

The first factor relates to the *registration* of the party. In the case where the self-employed individual is *registered*, he is a professional party insofar as it relates to his activities as a self-employed individual. However, the self-employed individual does not need to be registered to be classified as a professional.¹³⁸ The argument can be made that the prosumer is not a professional party because they are not registered, but this argument does not hold because registration as a legal person is not required to qualify as a professional party. Nevertheless, that does not mean that the existence of a national system of registration is completely irrelevant as it can generate a presumption that the party was acting within its economic or professional activity.¹³⁹ Related to this factor, the *level of organisation and planning* and the *connection with the party's commercial or professional activity* are relevant.¹⁴⁰ Regarding this latter factor, it is examined whether the sale on an online platform is carried out in an organised manner. The prosumer does not have, as mentioned earlier, a pure profit-seeking motive even though the prosumer would receive

136 CJEU, Case C-105/17, 4 October 2018, ECLI:EU:C:2018:808 (*Kamenova*) with annotation of D.W.F. Verkade; J. Rutgers (2020) 'Kroniek van het Europees privaatrecht' *Nederlands Juristenblad* 2020/960; European Commission, 'A European agenda for the collaborative economy' (Brussels, 2 June 2016) COM(2016) 356 final, p. 9.

137 CJEU, Case C-105/17, 4 October 2018, ECLI:EU:C:2018:808 (*Kamenova*) with annotation of D.W.F. Verkade; J. Rutgers (2020) 'Kroniek van het Europees privaatrecht' *Nederlands Juristenblad* 2020/960; European Commission, 'A European agenda for the collaborative economy' (Brussels, 2 June 2016) COM(2016) 356 final, p. 9.

138 CJEU, Case C-256/15, 15 December 2016, ECLI:EU:C:2016:954 (*Drago Nemec v Republika Slovenija*); CJEU, Case C-256/15, 28 July 2016, ECLI:EU:C:2016:619 (*Drago Nemec v Republika Slovenija*), pp. 89-97; CJEU, Case C-301/14, 3 December 2015, EU:C:2015:793 (*Pfotenhilfe-Ungarn*), p. 24; CJEU, Case C-508/12, 5 December 2013, EU:C:2013:790 (*Vapenik*), p. 23; D.W.F. Verkade (2019) 'Bescherming van de consument: Begrip 'handelaar' en begrip 'handelspraktijk' NJ 2019/234, p. 3803; M.B.M. Loos, *Consumentenkoop (Monografieën BW nr. B65b)* (Deventer: Wolters Kluwer, 2019), 12.

139 CJEU, Case C-256/15, 15 December 2016, ECLI:EU:C:2016:954 (*Drago Nemec v Republika Slovenija*); CJEU, Case C-256/15, 28 July 2016, ECLI:EU:C:2016:619 (*Drago Nemec v Republika Slovenija*), pp. 89-97. Note: The existence of an invoice also constitutes an element indicating that a party acted in the course of a structured and ongoing economic activity.

140 European Commission, 'A European agenda for the collaborative economy' (Brussels, 2 June 2016) COM(2016) 356 final, pp. 9-10. For (2): CJEU, Case C-105/17, 4 October 2018, ECLI:EU:C:2018:808 (*Kamenova*) with annotation of D.W.F. Verkade. For a further elaboration on 'volume' or 'frequency' see: CJEU, Case C-324/09, 12 July 2011, ECLI:EU:C:2011:474 (*l'Oreal/eBay*); C. Twigg-Flesner, 'Disruptive technology—disrupted law? How the digital revolution affects (contract) law' in: Alberto De Franceschi (red.), *European Contract law and the Digital Single Market* (Intersentia, 2016), p. 6.2. For (3) and (4): L. Guibault, N. Helberger, M. Loos, C. Mak, L. Pessers, B. van der Sloot, *Digital consumers and the law: Towards a cohesive European framework* (Alphen aan den Rijn: Kluwer Law International BV, 2012), pp. 41-51. On the profit seeking motive: A low profit or lack of profit motive does not prevent qualification as a trader. See: C. Riefa, *Consumer Protection and Online Auction Platforms* (Surrey: Ashgate Publishing Company, 2015), p. 25.

compensation from providing the service. In addition, the services of the prosumer do not have (in principle) a connection with the seller's commercial or professional activity. Furthermore, the prosumer offers services in a non-organised manner because services are provided when possible or available (for example, if the vehicles are not used by the prosumer himself). In addition to affecting the organisational level and planning of the activity, this also influences the frequency and the duration of the activity.

The *cause* or *motive* of offering services by an individual provider is a determining factor. For example, an individual provider drives his car from Rotterdam to Antwerp. This may concern the offer by a self-employed individual who, for the exercise of his profession or business, brings the consumer from Rotterdam to Antwerp (e.g. a taxi service). However, it may also concern a prosumer who shares his ride through a platform (e.g. Blablacar).¹⁴¹ The motive or cause of the ride diverges. In the first case, it concerns a professional party in the exercise of an economic activity. In the second case, it concerns a 'private activity' in which the prosumer receives monetary compensation for sharing the ride.

Another factor to consider is that of *time* or in other words, the *frequency of services*. This will mainly concern the extent to which it can still be an occasional offering and at what point an occasional offer becomes a professional offer. After all, if a service is offered by an individual provider for 30 hours a week, it is more likely to be a self-employed individual in the conduct of a business than when such a service is only offered for four hours a week. In the latter case, this is more likely to be an occasional offer by a prosumer. The more time that is invested or the frequency of the service provision, the more apparent it is that the individual provider may qualify as a trader and vice versa. After all, this could indicate that the consumer acts for purposes related to his business, craft, or trade.¹⁴²

A *profit-seeking motive* can also be an indication that an individual provider may qualify as a professional party. Providers who simply obtain cost compensation for a given transaction may not be seeking a profit and would most likely qualify as a prosumer. Conversely, providers that obtain remuneration beyond cost compensation are likely have

141 More information on the example of *Blablacar*, <<https://www.blablacar.com>>.

142 CJEU, Case C-105/17, 4 October 2018, ECLI:EU:C:2018:808 (*Kamenova*) with annotation of D.W.F. Verkade; CJEU, Case C-324/09, 12 July 2011, ECLI:EU:C:2011:474 (*l'Oreal/eBay*); C. Twigg-Flesner, 'Disruptive technology—disrupted law? How the digital revolution affects (contract) law' in: Alberto De Franceschi (red.), *European Contract law and the Digital Single Market* (Intersentia, 2016), p. 6.2; European Commission, 'A European agenda for the collaborative economy' (Brussels, 2 June 2016) COM(2016) 356 final, p. 9; OCU Consumers and Users Organisation (2016) 'Collaboration or Business? Collaborative consumption: From value for users to a society with values', p. 32, <https://www.oneplanetnetwork.org/sites/default/files/from-crm/collaboration_or_business_cc_p2p_2016.pdf> accessed 4 September 2023.

a profit-seeking motive and would qualify as self-employed.¹⁴³ A related determining factor is *the level of turnover*. In a case where the turnover generated by the individual provider is high, there is a greater indication that the provider qualifies as a professional party and vice versa. In addition, the level of turnover generated by the provider stems from the same activity or from various types of activities. Especially in this latter scenario, a higher turnover does not – per definition – imply that the provider qualifies as a professional party, since it may not have necessarily been obtained in relation to the provider's other business.¹⁴⁴

Another factor to consider is the *product/service quality*. A consumer can demand a certain quality of a service in the case where the consumer receives services from a professional party. However, this is not the case with a non-professional where the primary objective is the efficient use of resources. The consumer consumes mobility (not so much the vehicle) and uses the car available at a certain moment. This is closely related to the *price* charged for a service. The self-employed person performs an economic activity for the exercise of their profession or business. The price that is asked for the service is related to this and is therefore a commercial (and fixed) price to make profit from providing the service, whereas the goal of the prosumer is the more efficient use of resources. As a result, the price of services offered by prosumers is lower (and variable) because providing the service is not an economic activity.¹⁴⁵ Whether the party has *specific information and technical skills* is also a related factor that could be taken into account.¹⁴⁶ Clearly, a prosumer does not have specific information or technical skills as the prosumer is a consumer who offered

143 European Commission, 'A European agenda for the collaborative economy' (Brussels, 2 June 2016) COM(2016) 356 final, p. 9; OCU Consumers and Users Organisation (2016) 'Collaboration or Business? Collaborative consumption: From value for users to a society with values', p. 32, <https://www.oneplanetnetwork.org/sites/default/files/from-crm/collaboration_or_business_cc_p2p_2016.pdf> accessed 4 September 2023; L.Guibault, N. Helberger, M. Loos, C. Mak, L. Pessers, B. van der Sloot, *Digital consumers and the law: Towards a cohesive European framework* (Alphen aan den Rijn: Kluwer Law International BV, 2012), pp. 41-51. On the profit seeking motive: A low profit or lack of profit motive does not prevent qualification as a trader. See: C. Riefa, *Consumer Protection and Online Auction Platforms* (Surrey: Ashgate Publishing Company, 2015), p. 25; D.W.F. Verkade (2019) 'Bescherming van de consument: Begrip 'handelaar' en begrip 'handelspraktijk' NJ 2019/234, p. 3803.

144 European Commission, 'A European agenda for the collaborative economy' (Brussels, 2 June 2016) COM(2016) 356 final, p. 9; OCU Consumers and Users Organisation (2016) 'Collaboration or Business? Collaborative consumption: From value for users to a society with values', p. 32, <https://www.oneplanetnetwork.org/sites/default/files/from-crm/collaboration_or_business_cc_p2p_2016.pdf> accessed 4 September 2023.

145 CJEU, Case C-105/17, 4 October 2018, ECLI:EU:C:2018:808 (*Kamenova*) with annotation of D.W.F. Verkade; L.Guibault, N. Helberger, M. Loos, C. Mak, L. Pessers, B. van der Sloot, *Digital consumers and the law: Towards a cohesive European framework* (Alphen aan den Rijn: Kluwer Law International BV, 2012), pp. 41-51; D.W.F. Verkade (2019) 'Bescherming van de consument: Begrip 'handelaar' en begrip 'handelspraktijk' NJ 2019/234, p. 3803.

146 For (1): CJEU, Case C-105/17, 4 October 2018, ECLI:EU:C:2018:808 (*Kamenova*); CJEU, Case C-537/13, 15 January 2015, ECLI:EU:C:2015:14 (*Birutė Šiba*), pp. 23-24.

his underutilised resources to a consumer to use these resources more efficiently.¹⁴⁷ Of course, there will be prosumers with specific information or technical skills, but this does not differentiate them from consumers. For example, if a person is a private law lawyer by profession, he may understand legal matters and would be better equipped to protect themselves in comparison to a person without any legal knowledge. However, the law does not make that distinction, nor should such a distinction exist for the prosumer.¹⁴⁸

Another relevant factor is the *type and value of the offered products*, a factor that is correlated to the factors in the paragraph above. After all, it is relevant whether the products are all the same type or have the same value, and whether the offer is concentrated on a limited number of products. This is also related to the element that concerns the *impression to the outside world*.¹⁴⁹ For example, the prosumer offers a self-owned vehicle for use and therefore the number of products offered is very limited. Even if the prosumer offers several vehicles, they will most likely not be the exact same vehicles with the exact same value. If an individual provider offers the same vehicles, this is more likely to reflect professional activities in which the element of the impression to the outside world also plays a role. After all, offering vehicles of one type gives the presumption of professional activities.

147 Table 5: Definitions of self-employed individual and prosume.

148 CJEU, Case C-110/14, 3 September 2015, ECLI:EU:C:2015:538 (*Horățiu Ovidiu Costea v SC Volksbank România SA*), pp. 25-30; T. Pfeiffer (2015) 'Private Darlehensaufnahme durch Anwalt als Verbrauchergeschäft' *Fachdienst Zivilrecht – Lindenmaier-Möhrling Kommentierte BGH-Rechtsprechung*, 372972. That consideration cannot, however, rule out a lawyer from being categorized as a 'consumer' within the meaning of Article 2(b) of that directive where that lawyer is acting for purposes which are outside his trade, business or profession (see, by analogy, CJEU, Case C-361/89, 14 March 1991, ECLI:EU:C:1991:118 (*Di Pinto*), p. 15); CJEU, Case C-537/13, 15 January 2015, ECLI:EU:C:2015:14 (*Birutė Šiba*), p. 23. Also see: H.N. Schelhaas, *Commerciële contractanten – consistentere differentiëren* (Den Haag: Boom juridisch, 2018), p. 32; C. Meller-Hannich, E. Krausbeck, R. Wittke (2019) 'Der Verbraucher in der Sharing Economy' *Verbraucher und Recht*, pp. 403, 404.

149 This is a selection and aggregation of the conditions set in the Kamenova-case. Selection is based on relevance to the qualification of the individual provider. Also see: L.Guibault, N. Helberger, M. Loos, C. Mak, L. Pessers, B. van der Sloot, *Digital consumers and the law: Towards a cohesive European framework* (Alphen aan den Rijn: Kluwer Law International BV, 2012), pp. 41-51; European Commission, 'A European agenda for the collaborative economy' (Brussels, 2 June 2016) COM(2016) 356 final, p. 5; European Commission, 'Exploratory study of consumer issues in online peer-to-peer platform markets' Task 1 Report (March 2017), DOI: 10.2838/7661, <C:\Users\63150jdv\AppData\Local\Temp\1\Annex1_Task1_ReportMay2017.pdf.pdf> accessed 31 October 2019. Also see: Organisation for Economic Co-operation and Development, 'Protecting Consumers In Peer Platform Markets: Exploring The Issues Draft Background Paper for Panel 3.1 of the 2016 Ministerial on the Digital Economy' (28 April 2016) DSTI/CP(2015)4/REV2, p. 18, <[https://one.oecd.org/document/DSTI/CP\(2015\)4/REV2/en/pdf](https://one.oecd.org/document/DSTI/CP(2015)4/REV2/en/pdf)> accessed 28 July 2020; L.Guibault, N. Helberger, M. Loos, C. Mak, L. Pessers, B. van der Sloot, *Digital consumers and the law: Towards a cohesive European framework* (Alphen aan den Rijn: Kluwer Law International BV, 2012). CJEU, Case C-105/17, 4 October 2018, ECLI:EU:C:2018:808 (*Kamenova*) with annotation of D.W.F. Verkade.

Lastly, *availability* is a factor that plays a role. With a professional party such as the self-employed individual, the availability of mobility usership is on demand whereas with the prosumer the car is available only when it is not in use by the prosumer and they make the car available.

The factors above contribute to the case-by-case assessment on whether an individual provider can be considered a professional party, but – as will be mentioned shortly – the factors are neither exhaustive, nor exclusive.¹⁵⁰ This means that these factors help in deciding what qualification should be followed, but conclusions cannot be drawn too quickly and other factors might also be relevant. The individual provider does not necessarily qualify as a professional party based on fulfilling only one or two factors, unless it is already indisputable from those few factors that business activity exists.¹⁵¹

All factors help to identify a certain degree of professionalism, whereby a *ratio legis* of consumer law, namely levelling the (in)equality between the parties, is always underlying.¹⁵² Therefore, whether or not an inequivalence between the contracting parties exists could also be included as a more immaterial factor in the assessment because such an inequivalence in bargaining power is traditionally nullified by consumer law.¹⁵³

In addition to the factors above, it is useful to give a homogeneous interpretation of the definition of ‘professional party’ for the selected EU directives. The factors can contribute as a starting point to assess whether a prosumer should qualify as a professional party in a particular case. This is not only because the definitions are almost identical in the EU directives, but also because they are closely related to the exercise of an economic activity

150 CJEU, Case C-105/17, 4 October 2018, ECLI:EU:C:2018:808 (*Kamenova*), pp. 39-40; European Commission, ‘A European agenda for the collaborative economy’ (Brussels, 2 June 2016) COM(2016) 356 final, p. 9; C. Meller-Hannich, E. Krausbeck, R. Wittke (2019) ‘Der Verbraucher in der Sharing Economy’ *Verbraucher und Recht*, pp. 403, 408.

151 CJEU, Case C-105/17, 4 October 2018, ECLI:EU:C:2018:808 (*Kamenova*) with annotation of D.W.F. Verkade; M.Y. Schaub (2019) ‘Wie is handelaar?’ *Tijdschrift voor Consumentenrecht en handelspraktijken* 2019(1), pp. 5-13.

152 European Commission, ‘A European agenda for the collaborative economy’ (Brussels, 2 June 2016) COM(2016) 356 final, p. 5; European Commission, ‘Exploratory study of consumer issues in online peer-to-peer platform markets’ Task 1 Report (March 2017), DOI: 10.2838/7661, <C:\Users\63150jdv\AppData\Local\Temp\1\Annex1_Task1_ReportMay2017pdf.pdf> accessed 31 October 2019. Also see: Organisation for Economic Co-operation and Development, ‘Protecting Consumers In Peer Platform Markets: Exploring The Issues Draft Background Paper for Panel 3.1 of the 2016 Ministerial on the Digital Economy’ (28 April 2016) DSTI/CP(2015)4/REV2, p. 18, <[https://one.oecd.org/document/DSTI/CP\(2015\)4/REV2/en/pdf](https://one.oecd.org/document/DSTI/CP(2015)4/REV2/en/pdf)> accessed 28 July 2020; L.Guibault, N. Helberger, M. Loos, C. Mak, L. Pessers, B. van der Sloot, *Digital consumers and the law: Towards a cohesive European framework* (Alphen aan den Rijn: Kluwer Law International BV, 2012).

153 J. Valant (2015) ‘Consumer protection in the EU – policy overview’ *European Parliamentary Research Service*, DOI: 10.2861/575862.

between a professional party and a consumer.¹⁵⁴ Furthermore, terms that arise from an EU directive must be interpreted in accordance with and in the light of the objective of the directive. The starting point is that the concepts must be interpreted autonomously, but since the targets of the selected directives are similar, terms could be interpreted homogeneously.¹⁵⁵ However, the degree of full harmonisation that the EU legislature envisages within the scope of the directives is taken into account.¹⁵⁶ The selected directives are all based, despite their different material scope, on the fundament of contributing to the proper functioning of the internal market and achieving a high level of consumer protection.¹⁵⁷

National jurisdictions

The national jurisdictions do not differ much in nature from the factors formulated on a national level. The differences are mainly visible in the number of factors; some Member States base their evaluation on a few core elements, while others are more fragmented and take secondary circumstances into account.¹⁵⁸ The factors used by each Member State are discussed below.

In the Netherlands, the bar is quite high for a natural person to be seen as a professional party.¹⁵⁹ It follows from Dutch case law that qualifying as a professional party depends

154 CJEU, Case C-105/17, 4 October 2018, ECLI:EU:C:2018:808 (*Kamenova*), p. 29; CJEU, Case C-52/00, 25 April 2002, ECLI:EU:C:2002:252 (*Commission/France*), p. 16; CJEU, Case C-192/04, 14 July 2005, EU:C:2005:475 (*Lagardère Active Broadcast*), p. 46). Definition professional party (seller/trader/creditor/supplier): Article 2(2) Consumer Rights Directive; Article 2(3) Consumer Sales Directive; Article 1(c) Consumer Sales Directive; Article 3(b) Consumer Credit Directive 2008; Article 2(b) Unfair Commercial Practices Directive; Article 2(c) Unfair Contract Terms Directive.

155 M.Y. Schaub (2019) 'Wie is handelaar?' *Tijdschrift voor Consumentenrecht en handelspraktijken* 2019(1), pp. 5-13. Note: An important difference is the level of harmonization of the selected directives.

156 CJEU, Case C-105/17, 4 October 2018, ECLI:EU:C:2018:808 (*Kamenova*).

157 See: Table 4: Elements of the notion of the professional party; Table 7: Elements of the notion of the consumer.

158 G. Aquaro (2003) 'Enhancing the Legal Protection of the European Consumer' *European Business Law Review* 14(3), pp. 405-413; H. Schulte-Nölke, C. Twigg-Flesner, M. Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States* (Sellier, 2009); M.B. Loos, L. Guibault, N. Helberger, C. Mak, L. Pessers, K.J. Cseres, and R. Tigner (2011) 'Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts: Final report, comparative analysis, law & economics analysis, assessment and development of recommendations for possible future rules on digital content contracts' (Amsterdam: University of Amsterdam, Centre for the Study of European Contract Law, 2011).

159 E.g. a dogbreeder who sold two litters annually for more than 20 consecutive years was not deemed a professional party. Dutch Court of Appeal Arnhem, 6 November 2007, ECLI:NL:GHARN:2007:BC2967; also see: Dutch Court of Rotterdam, 9 June 2010, ECLI:NL:RBROT:2010:BN7294; Dutch Court of Appeal Amsterdam, 19 December 1996, ECLI:NL:GHAMS:1996:AJ6472; Dutch Court of 's-Hertogenbosch, 22 March 2012, ECLI:NL:RBSHE:2012:BW0410; Asser/Hijma 7-I 2019/121.

on whether trust is generated by that party (*gewekte vertrouwen*).¹⁶⁰ This trust would be generated when the consumer can rely on the professionalism of the other party. For example, in a Dutch case, a dog seller had presented himself as a responsible and professional breeder by drawing on years of experience and collaboration with veterinarians. The Court considered it relevant that the breeder had a professional website, the breeding was of a serious volume, and was not an incidental activity. Consequently, the consumer was therefore entitled to rely on consumer law because the consumer could reasonably assume they were dealing with a professional party.¹⁶¹ The Dutch Court of Appeal also ruled in another case that the fact that the activities involved a considerable amount is not a distinctive criterion for professional or commercial action. The Dutch Court first considered how the seller disclosed information, what the parties stated on both sides, and what they had been allowed to deduce from each other's statements and conduct (*gewekte vertrouwen*). In this case the sale was made as a favour for friends and the fact that the provider could have made profit and had multiple consumers does not detract from this.¹⁶² However, individual providers are considered professional parties if the provider conveys the image of a professional business in their conduct to the consumer. This could follow from, for example, refurbishing cars from a garage building, using a trade name, having a professional website, and advertising. In this scenario, the individual provider qualifies as a professional party even if – in fact – it would only concern an occasional earning. This does not occur with a prosumer, which means that the prosumer does not qualify as a professional party under Dutch law.

In Germany, both law and case law can be used to determine when an individual provider can be considered a professional party. According to the German legal definition, an entrepreneur (*unternehmer*) is a natural or legal person or a partnership with legal capacity who, when concluding a legal transaction, is exercising its commercial or independent professional activity.¹⁶³ Several characteristics are of central importance for the term entrepreneur. An entrepreneur can be both a natural person, such as a self-

160 Dutch Court of Appeal 's-Hertogenbosch, 26 August 2014, ECLI:NL:GHSHE:2014:2976, p. 6.7; Dutch Court of Appeal Arnhem, 6 November 2007, ECLI:NL:GHARN:2007:BC2967, p. 5.1-5.22; Article 7:5 lid 1 Dutch Civil Code; Asser/Hartkamp 3-I 2023/12.

161 Dutch Court of Appeal 's-Hertogenbosch, 26 August 2014, ECLI:NL:GHSHE:2014:2976, p. 6.7; Dutch Court of Appeal Arnhem, 6 November 2007, ECLI:NL:GHARN:2007:BC2967, p. 5.1-5.22.

162 Dutch Court of Rotterdam, 9 June 2010, ECLI:NL:RBROT:2010:BN7294; Dutch Court of Appeal Amsterdam, 19 December 1996, ECLI:NL:GHAMS:1996:AJ6472; Dutch Court of 's-Hertogenbosch, 22 March 2012, ECLI:NL:RBSHE:2012:BW0410.

163 Section 14(1) German Federal Code; Section 2 German Unfair Competition Law; German Federal Court of Justice, 18 October 2017, VIII ZR 32/16; H.-W. Micklitz, *Münchener Kommentar zum BGB*, 9. Auflage 2021, BGB § 14 Unternehmer, Rn. 1-38.

employed individual, as well as a legal person.¹⁶⁴ In addition, the party must act in the exercise of a commercial or independent professional activity. The German Federal Court of Justice states that both commercial and self-employed professional activity require – in any case – an independent and planned, long-term offering of paid services on the market. In addition, the German Federal Court of Justice states that the intention to make a profit is not necessary because there are no factors to suggest that the consumer's need for protection should be of less importance if the seller, who appears on the market as an entrepreneur, has no intention of making a profit.¹⁶⁵ Furthermore, the concept of independent professional activity is any professional activity that is not associated with a relationship of dependency (*abhängigkeitsverhältnis*). There is independent action if the party is free to organise his activity and freely determine his working hours.¹⁶⁶ Furthermore, the classification of acting as a professional depends on the purpose of the activities. The objective content of the activity, based on the objective circumstances, is the only decisive factor to determine this purpose.¹⁶⁷ This means that an activity can be seen as a professional activity, even though it is not the party's core activity. For example, a lawyer selling his professionally used car would in this case, under German law, be considered a professional party.¹⁶⁸ An entrepreneur who presents himself as a consumer, although he is acting in the exercise of his commercial or independent professional activity, is not protected by consumer legislation.¹⁶⁹ Adversely, a consumer fraudulently presenting himself as an entrepreneur when contracting, although he is actually acting for private purposes, can – in principle – not invoke consumer legislation unless the other party

164 Section 14(1) German Federal Code; H.-W. Micklitz, *Münchener Kommentar zum BGB*, 9. Auflage 2021, BGB § 14 Unternehmer, Rn. 1-38. Note: Section 14(2) German Federal Code states that partnerships with legal capacity (ie the German open trading company (*offene Handelsgesellschaft, oHG*), German limited partnership (*Kommanditgesellschaft, KG*) also fall under the concept of entrepreneur.

165 German Federal Court of Justice, 29 March 2006, VIII ZR 173/05, p. 14; German Federal Court of Justice, 18 October 2017, VIII ZR 32/16, p. 30aa *et seq*; German Federal Court of Justice, 13 March 2013, VIII ZR 186/12, NJW 2013, 2107, p. 18; German Federal Court of Justice, 4 December 2008, I ZR 3/06, p. 33; H.-W. Micklitz, *Münchener Kommentar zum BGB*, 9. Auflage 2021, BGB § 14 Unternehmer, Rn. 1-38; S. Martens, *BeckOK BGB*, Hau/Poseck, 67. Edition, Stand: 01 August 2023, BGB § 14 Unternehmer, Rn. 17-21; Jauernig/Mansel, 18. Aufl. 2021, BGB § 14 Rn. 1, 2; Note: a part-time entrepreneurial activity is also sufficient to qualify as an entrepreneur under German law.

166 Section 84(1) German Commercial Law Act.

167 German Federal Court of Justice, 24 February 2005, III ZB 36/04.

168 Section 14 German Federal Code; section 344 German Commercial Law Act; H.-W. Micklitz, *Münchener Kommentar zum BGB*, 9. Auflage 2021, BGB § 14 Unternehmer, Rn. 1-38; S. Martens, *BeckOK BGB*, Hau/Poseck, 67. Edition, Stand: 01 August 2023, BGB § 14 Unternehmer, Rn. 17-21; H.-P. Mansel, Jauernig, Bürgerliches Gesetzbuch, 19. Auflage 2023, BGB § 14 Unternehmer, Rn. 1, 2.

169 For example: a self-employed sells a car from his business assets without notifying the other contracting party. See C. Herresthal (2006) 'Scheinunternehmer und Scheinverbraucher im BGB' *JuristenZeitung* 61(14), p. 695; S. Martens, *BeckOK BGB*, Hau/Poseck, 67. Edition, Stand: 01 August 2023, BGB § 14 Unternehmer, Rn. 17-21.

has acknowledged the appearance of entrepreneurship.¹⁷⁰ The German Federal Court of Justice also emphasised that the relevance of the consumer's perspective, the professional impression, the types of goods sold and the frequency of transactions are important indicators to consider whether a prosumer is a professional party under German law.¹⁷¹ However, a prosumer will not qualify as a professional party under German law.

Contrary to Germany, French law formulated a small number of elements to define whether a party is professional or not. Three cumulative elements exist for an individual provider to qualify as a trader (*commerçant*), namely the party should perform commercial activities, the party should do this in a professional and customary manner, and the party should be independent.¹⁷² The status of professionalism is generally fulfilled when it is the individual's main activity or when the income from the commercial activity constitutes a large part of the personal income. French case law also developed three non-cumulative elements.¹⁷³ First, the party should pursue regular activity. Regarding regularity, the French Court examines whether the party carries out this activity on a frequent and regular basis and not on an occasional basis.¹⁷⁴ The doctrine was thus able to estimate that '*the individual who regularly engages in acts of sale on a commercial site*' is a *de facto* trader.¹⁷⁵ The party should also do this in an organised manner with the intention of making a profit.¹⁷⁶ The lack of sufficient income to live does prove the unprofessional nature of the sale of goods.

170 Section 242 German Federal Code; German Federal Court of Justice, 22 December 2004, Az. VIII ZR 91/04; H.-W. Micklitz, *Münchener Kommentar zum BGB*, 9. Auflage 2021, BGB § 14 Unternehmer, Rn. 1-38; S. Martens, *BeckOK BGB*, Hau/Poseck, 67. Edition, Stand: 01 August 2023, BGB § 14 Unternehmer, Rn. 17-21; S. Lorenz, *Münchener Kommentar zum BGB*, 8. Auflage 2019, BGB § 474 Begriff des Verbrauchsgüterkaufs; anwendbare Vorschriften, Rn. 22-24.

171 Regarding the types of goods sold, new goods and many goods of the same kind point at trade. German Federal Court of Justice, 29 March 2006, VIII ZR 173/05, p. 14; German Federal Court of Justice, 18 October 2017, VIII ZR 32/16, p. 30aa *et seq*; German Federal Court of Justice, 13 March 2013, VIII ZR 186/12, NJW 2013, 2107, p. 18; German Federal Court of Justice, 4 December 2008, I ZR 3/06, p. 33; H.-W. Micklitz, *Münchener Kommentar zum BGB*, 9. Auflage 2021, BGB § 14 Unternehmer, Rn. 1-38; S. Martens, *BeckOK BGB*, Hau/Poseck, 67. Edition, Stand: 01 August 2023, BGB § 14 Unternehmer, Rn. 17-21; H.-P. Mansel, *Jauernig, Bürgerliches Gesetzbuch*, 19. Auflage 2023, BGB § 14 Unternehmer, Rn. 1, 2.

172 Article 121-1 French Code of Trade. With regard to the element 'independent': an employee cannot be a trader because of his employment contract he is not independent.

173 French Court, 12 January 2006, n° 122/2006. In this case, the Tribunal de Grand Instance de Mulhouse recognized the quality of professional seller to a person selling goods through a platform by application of solely 2 criteria. Also see: M.B. Loos, L. Guibault, N. Helberger, C. Mak, L. Pessers, K.J. Cseres, and R. Tigner (2011) 'Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts: Final report, comparative analysis, law & economics analysis, assessment and development of recommendations for possible future rules on digital content contracts' (Amsterdam: University of Amsterdam, Centre for the Study of European Contract Law, 2011).

174 French Court, 12 January 2006, n° 122/2006.

175 Article 121-1 French Code of Trade.

176 B. Tabaka (2006) 'Le spectre du paracommercialisme électronique' *Revue Lamy Droit de l'Immatériel* 2006/19.

Vice versa, any serious profession likely to produce profits and to provide for the needs of existence should be considered a regular profession.¹⁷⁷ As a result, a prosumer does not qualify as a professional party under French law.

In Belgium there is no definition of the professional party with regard to consumer protection but the Belgian Code of Economic Law defines a company (*onderneming*) as any natural person who independently pursues a professional activity or any legal person.¹⁷⁸ Two main components of this definition are relevant, namely ‘independently’ and a ‘professional activity’.¹⁷⁹ The component ‘independently’ comprises the person who acts on his own account and who bears the financial risks of his actions or activities.¹⁸⁰ In addition, the natural person must also exercise a ‘professional activity’.¹⁸¹ An activity is professional under Belgian law when the provider makes this activity his primary or additional business. Therefore, occasional providers, such as prosumers, do not qualify as a professional party under Belgian consumer law, while natural persons who are traders, craftsmen, liberal professionals, or directors of companies would be captured by the definition.¹⁸²

177 French Court of Appeal Paris, 30 April 1906, DP 1907.5.9. This case considers that any serious occupation likely to produce profits and meet the needs of existence must be considered a profession within the meaning Article 121-1 French Code of Trade. M.B. Loos, L. Guibault, N. Helberger, C. Mak, L. Pessers, K.J. Cseres, and R. Tigner (2011) ‘Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts: Final report, comparative analysis, law & economics analysis, assessment and development of recommendations for possible future rules on digital content contracts’ (Amsterdam: University of Amsterdam, Centre for the Study of European Contract Law, 2011).

178 Article I.1.1° Belgian Code of Economic Law; Belgische Kamer van Volksvertegenwoordigers, ‘Wetsontwerp betreffende marktpraktijken en consumentenbescherming’ (28 December 2009) DOC 52 2340/001, p. 35; Belgian Explanatory Memorandum, ‘Wetsontwerp houdende invoeging van boek VI ‘Marktpraktijken en consumentenbescherming’ in het Wetboek van economisch recht en houdende invoeging van de definities eigen aan boek VI, en van de rechtshandhabingsbepalingen eigen aan boek VI, in de boeken I en XV van het Wetboek van economisch recht’ (24 September 2013, Kamer 2012-2013), DOC 53-3018/001, p. 11; G. Straetmans, ‘Onderneming, vrij beroep en consument’ in: G. Straetmans and R. Steennot, *Wetboek Economisch Recht En de Bescherming van de Consument* (Antwerpen: Intersentia, 2015), pp. 11-15.

179 The choice of the terms ‘independent’ and ‘professional activity’ has the effect of eliminating earlier discussions regarding ‘a sustainable economic activity’. After all, the concept of ‘self-employed’ is the opposite of ‘in employment’ (the distinction between a self-employed individual and an employee).

180 Belgian Explanatory Memorandum ‘Wetsontwerp houdende hervorming van het ondernemingsrecht’ (7 december 2017, Kamer 2017 2018), DOC 54-2828/001, p. 10. Also see: G. Straetmans, *Actualia economisch recht en consumentenbescherming* (Antwerpen: Intersentia, 2017), p. 6; J. Vananroye and K.-J. Vandormael, ‘Boek I WER En Wet Natuurlijke Rechter. Van Handelsrecht Naar Ondernemingsrecht’ in: B. Keirsbilck and E. Terryn (eds.), *Het Wetboek Van Economisch Recht: van nu en straks?* (Antwerpen: Intersentia, 2014), pp. 5, 26.

181 Belgian Explanatory Memorandum ‘Wetsontwerp houdende hervorming van het ondernemingsrecht’ (7 december 2017, Kamer 2017 2018), DOC 54-2828/001, p. 10.

182 Belgian Explanatory Memorandum ‘Wetsontwerp houdende hervorming van het ondernemingsrecht’ (7 december 2017, Kamer 2017 2018), DOC 54-2828/001, p. 10.

Although Member States use different criteria to determine whether an individual provider is a professional party, the same conclusion can be drawn for all Member States. In all Member States the self-employed individual is generally qualified as a professional party, whereas prosumers do not qualify as such.

Table 6 summarises how both the private company and cooperatives qualify as professional parties under EU consumer law. The private company qualifies as a professional party by satisfying the elements of the notion of the professional party as explicated in Table 4. This also applies to cooperatives.¹⁸³ The nature of the private company and the cooperatives justifies qualification as a professional party in line with the rationale of consumer law, namely the existing imbalance between the contracting parties and the goal of protecting the weaker party.¹⁸⁴ The individual provider is twofold. In principle, the individual provider can be a self-employed individual who can be qualified as a professional party, or a prosumer who does not qualify as a professional party. As a result, the duties of the professional party that follow from consumer law do not apply to the prosumer.¹⁸⁵

Table 6: Interim conclusion of professional party

<i>Ratione personae</i> scope: Provider				
	Private company	Cooperative	Individual	
			Self-employed	Prosumer
CSD	Yes	Yes	Yes	No
CRD	Yes	Yes	Yes	No
CCD	Yes	Yes	Yes	No
UCTD	Yes	Yes	Yes	No
UCPD	Yes	Yes	Yes	No

183 Belgian and French law both know two types of associations, namely without and with legal status. In this respect, associations without legal personality are not professional parties.

184 C.W.M. Lieveerse and J.G.J. Rinkes, *Onerlijke handelspraktijken en handhaving consumentenbescherming. Preadvies voor de Vereniging voor Effectenrecht 2010*. (Serie Van der Heijden Instituut, nr. 106, Deventer: Kluwer, 2010), II.2.1; Asser/ Vonken 10-I 2018/280.

185 H.N. Schelhaas, *Commerciële contractanten – consistentere differentiëren* (Den Haag: Boom juridisch, 2018); Organisation for Economic Co-operation and Development, 'Protecting Consumers In Peer Platform Markets: Exploring The Issues Draft Background Paper for Panel 3.1 of the 2016 Ministerial on the Digital Economy' (28 April 2016) DSTI/CP(2015)4/REV2, p. 18, <[https://one.oecd.org/document/DSTI/CP\(2015\)4/REV2/en/pdf](https://one.oecd.org/document/DSTI/CP(2015)4/REV2/en/pdf)> accessed 28 July 2020; L.Guibault, N. Helberger, M. Loos, C. Mak, L. Pessers, B. van der Sloot, *Digital consumers and the law: Towards a cohesive European framework* (Alphen aan den Rijn: Kluwer Law International BV, 2012), pp. 46-48; G. Straetmans, 'Onderneming, vrij beroep en consument' in: G. Straetmans and R. Steennot, *Wetboek Economisch Recht En de Bescherming van de Consument* (Antwerpen: Intersentia, 2015), pp. 53-54.

2.6 RATIONE PERSONAE SCOPE: WHO QUALIFIES AS A CONSUMER?

In this paragraph the other side of the *ratione personae* scope is discussed, namely the mobility usership user and to what extent this user, in its various capacities, can be seen as a consumer. The challenge of this analysis is not so much related to the individual user and whether he is a consumer; the situation becomes more complicated when a cooperative performs as a consumer, buying or leasing a vehicle from another party. Examining whether these parties are considered consumers is important because this could affect consumer rights. Another situation that may create complexities is when the private company acts as a consumer, buying or leasing a fleet of vehicles from a party. However, this relationship as such will not be included in this research as it falls outside the scope of the study, concerning either a B2B or C2B relationship. This research focusses on the consumer perspective. Uncertainties that are relevant in this regard are the rights that a mobility usership consumer has vis-à-vis the provider, but also potentially vis-à-vis the producer or seller of that provider. Related to that, the issue arises on whether the consumer has identical rights against these parties.

This paragraph examines whether the mobility usership user qualifies as a consumer under EU consumer law. This covers the right side of Figure 4 and is discussed below from bottom to top.¹⁸⁶ Again, if the parties cannot be qualified as a consumer under EU law, national laws are examined as well. All EU directives define a consumer as any natural person who is acting for purposes which are outside his trade, business, (craft), or profession.¹⁸⁷ Table 7 shows that the definitions of ‘consumer’ include a common core, namely that a consumer is (1) a natural person (2) who is acting outside the scope of an economic activity.¹⁸⁸ A basic element in qualifying as a consumer protected under consumer law is also that the consumer must enter into a contract with a professional

186 Namely: Individual, corporation (and association), and private company.

187 Article 2(2) Consumer Sales Directive, 2(1) Consumer Rights Directive, 3(1) Consumer Credit Directive 2008, 2(b) Unfair Contract Terms Directive, 2(a) Unfair Commercial Practices Directive.

188 Trade, business, craft, and/or profession. Asser/Hartkamp 3-I 2023/163; Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) ‘Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)’ p. 141, <http://www.transformacje.pl/wp-content/uploads/2012/12/european-private-law_en.pdf> accessed 12 August 2020; V. Cap, P. Schwarzenegger, B. Luger, P. Bydlinski, and J. Stabentheiner (2012) ‘Die Richtlinie über die Rechte der Verbraucher (2011/83/EU vom 25. Oktober 2011)’ *Manz’sche Verlags- und Universitätsbuchhandlung GmbH*, Wien, pp. 15-20; R. Steennot ‘De impact van de rechtspraak van het hof van justitie op de regelen inzake onrechtmatige bedingen’ in: G. Straetmans and R. Steennot, *Wetboek Economisch Recht En de Bescherming van de Consument* (Antwerpen: Intersentia, 2015), pp. 147-148.

party. As stated before, the consumer who buys a car from another consumer (C2C) is not protected by consumer protection rules.¹⁸⁹

Table 7: Elements of the notion of the consumer

Elements of the notion consumer							
EU Directive	Consumer	Natural persons	Acting for purposes which are outside their:				
			Trade	Commerce	Business	Craft	Profession
Article 2(2) CSD	Consumer	x	x		x	x	x
Article 2(1) CRD	Consumer	x	x		x	x	x
Article 3(a) CCD	Consumer	x	x		x		x
Article 2(b) UCTD	Consumer	x	x		x		x
Article 2(a) UCPD	Consumer	x	x		x	x	x

2.6.1 Individual user

For an individual who enters into an agreement with a professional party, such as the user does in a mobility usership contract, the individual can clearly be qualified as a consumer when he acts outside the scope of an economic activity.¹⁹⁰ This assessment becomes more

¹⁸⁹ European Commission, 'A European agenda for the collaborative economy' (Brussels, 2 June 2016) COM(2016) 356 final, pp. 9-10; European Commission, 'Exploratory study of consumer issues in online peer-to-peer platform markets' Task 1 Report (March 2017), DOI: 10.2838/7661, <C:\Users\63150jdv\AppData\Local\Temp\1\Annex1_Task1_ReportMay2017pdf.pdf> accessed 31 October 2019; Asser/Hijma 7-I 2019/103-121; E.H. Hondius (2006) 'The Notion of Consumer: European Union versus Member States' *Sydney Law Review* (28)89, pp. 95 *et seq*; S. Lorenz, *Münchener Kommentar zum BGB*, 8. Auflage 2019, BGB § 474 Begriff des Verbrauchsgüterkaufs; anwendbare Vorschriften, Rn. 22-24; E.H. Hondius (2006) 'The Notion of Consumer: European Union versus Member States' *Sydney Law Review* (28)89, pp. 95 *et seq*; V. Cap, P. Schwarzenegger, B. Luger, P. Bydliniski, and J. Stabentheiner (2012) 'Die Richtlinie über die Rechte der Verbraucher (2011/83/EU vom 25. Oktober 2011)' *Manz'sche Verlags- und Universitätsbuchhandlung GmbH*, Wien, pp. 15-20.

¹⁹⁰ Article 2(2) Consumer Sales Directive; Article 2(1) Consumer Rights Directive; Article 3(a) Consumer Credit Directive 2008; Article 2(b) Unfair Contract Terms Directive; Article 2(a) Unfair Commercial Practices Directive. J. Calais-Auloy, H. Temple and M. Depincé, *Droit de la consommation* (10th Edition, Paris: Dalloz, 2020), pp. 7-12. See on the notion of consumer under Consumer Sales Directive: R. Canavan, 'Contracts of sale' in: C. Twigg-Flesner (ed.), *Research handbook on EU Consumer and Contract Law* (Glos, Edward Elgar Publishing Limited, 2016), pp. 266-274. See on the notion of consumer under Unfair Commercial Practices Directive: P. Cartwright 'The consumer image within EU law' in: C. Twigg-Flesner (ed.), *Research handbook on EU Consumer and Contract Law* (Glos, Edward Elgar Publishing Limited, 2016), pp. 199 *et seq*. See on the notion of consumer under Unfair Contract Terms Directive: P. Rott 'Unfair

complicated in case an individual uses mobility for a (partially) work-related trip for example. In such a case, the question arises as to whether an individual who enters into an agreement for partly private and partly business purposes (a so-called mixed-purpose contract) can still be considered a consumer. The Consumer Rights Directive mentions that in such mixed purpose contracts, the individual should be considered a consumer when the commercial purpose is sufficiently constrained that it does not dominate within the overall context of the agreement.¹⁹¹

In a ruling of the European Court of Justice, the Court considers, in line with the Consumer Rights Directive, that a person entering into an agreement partly intended for professional use may be classified as a consumer under the Unfair Contract Terms Directive when the commercial purpose is so limited that it does not dominate within the overall context of the agreement.¹⁹² The mandatory character of the protection provided by the Unfair Contract Terms Directive and the associated specific requirements of consumer protection dictate that a broad interpretation of the concept of consumer is preferred to ensure the effective implementation of the directive. To determine whether the commercial purpose is so limited that it does not dominate within the overall context of the agreement, the Court considers that both the quantitative and qualitative approach is relevant.¹⁹³ If the mobility usership consumer uses a car for business purposes for less than fifty percent of their trips, he would, in my opinion, qualify as a consumer, since the part of trips with a business purpose does not dominate. At the same time, the Court emphasizes that the criteria are neither exhaustive nor exclusive and leaves all discretion to national judges to assess on a case-by-case basis whether an agreement is concluded by a consumer or not.¹⁹⁴

contract terms' in: C. Twigg-Flesner (ed.), *Research handbook on EU Consumer and Contract Law* (Glos, Edward Elgar Publishing Limited, 2016), pp. 289-290; C-M. Péglion-Zika, *La Notion de Clause Abusive: Étude de Droit de la Consommation* (Issy-les-Moulineaux Cedex, LGDJ, Lextenso éditions, 2018), pp. 31-55; G. Howells, C. Twigg-Flesner and T. Wilhemsson, *Rethinking EU Consumer Law* (London, New York: Routledge, 2018), pp. 23-31; V. Mak (2022), 'A Primavera for European consumer law: re-birth of the consumer image in the light of digitalisation and sustainability' *Journal of European Consumer and Market Law* 11(3), pp. 77-80.

191 Recital 17 CRD. In the context of the *Gruber*-case, the commercial part of the agreement must be very small, to the extent that it is so marginal that it is insignificant, for a contracting party to be considered a consumer. The *Gruber*-case concerns the interpretation of the concept of consumer in the context of the rules regarding jurisdiction. See: CJEU, Case C-464/01, 20 January 2005, ECLI:EU:C:2005:32 (*Gruber*)

192 CJEU, Case C-570/21, 8 June 2023, ECLI:EU:C:2023:456 (YYY. SA), p. 39 with annotation of M.Y. Schaub 'Uitleg begrip 'consument' *Tijdschrift voor Consumentenrecht en handelspraktijken* 2023-5. Also see: CJEU, Case C-485/21, 27 October 2022, ECLI:EU:C:2022:839 (S.V. OOD).

193 CJEU, Case C-570/21, 8 June 2023, ECLI:EU:C:2023:456 (YYY. SA), p. 57 with annotation of M.Y. Schaub 'Uitleg begrip 'consument' *Tijdschrift voor Consumentenrecht en handelspraktijken* 2023-5.

194 CJEU, Case C-570/21, 8 June 2023, ECLI:EU:C:2023:456 (YYY. SA), p. 58 with annotation of M.Y. Schaub.

In addition, the debate regarding the definition of the consumer becomes also more complicated when determining the different types of consumers. This takes into account the measure of the average, informed, circumspect, and observant ordinary consumers and the lower standards, such as the vulnerable consumer, used in consumer protection.¹⁹⁵ However, given the scope of this study, this will not be discussed here.

2.6.2 Private company and cooperative

In this paragraph, it will be considered whether private companies and cooperatives other than natural persons can qualify as consumers. Given the fact that the law requires that the consumer is a *natural person*, the answer seems self-evident and legal entities, including private companies and cooperatives, do not qualify as consumers.¹⁹⁶ Nevertheless, the protection that is granted to consumers is, under certain conditions, granted to legal entities.¹⁹⁷ In the proposal of the Consumer Rights Directive, the definition of consumer initially covered only natural persons.¹⁹⁸ The European Economic and Social Committee (EESC) supplemented this proposal to the effect that the Member States may maintain or extend the rules of the directives to natural or legal persons who are not consumers within the meaning of the directive.¹⁹⁹ The Member States also have the right to decide

195 The concept of an average consumer was developed in the case law of the European Court of Justice, see e.g. CJEU, Case C-210/96, 16 July 1998, ECLI:EU:C:1998:369 (*Gut Springenheide*). The concept of the average consumer, even when not explicitly mentioned in a piece of legislation, is considered in EU consumer law and thus goes beyond the Unfair Commercial Practices Directive, whereas the vulnerable consumers are considered an exception specific to the Unfair Commercial Practices Directive. Also see: P. Cartwright ‘The consumer image within EU law’ in: C. Twigg-Flesner (ed.), *Research handbook on EU Consumer and Contract Law* (Glos, Edward Elgar Publishing Limited, 2016), p. 199; S.M. Baker, J.W. Gentry, T.L. Rittenburg (2005) ‘Building understanding of the domain of consumer vulnerability’ *Journal of Macromarketing* 25(2), pp. 128-139; C. Riefa and S. Saintier ‘In search of (access to) justice for vulnerable consumers’ in: C. Riefa and S. Saintier (eds.), *Vulnerable consumers and the law: Consumer protection and access to justice* (First Published 2021, Routledge, 2021), pp. 1 *et seq*; C. Riefa and S. Saintier ‘The way forward: For an ‘inclusive’ access to justice to protect vulnerable consumers’ in: C. Riefa and S. Saintier (eds.), *Vulnerable consumers and the law: Consumer protection and access to justice* (First Published 2021, Routledge, 2021), pp. 244 *et seq*; G. Howells, C. Twigg-Flesner and T. Wilhelmsson, *Rethinking EU Consumer Law* (London, New York: Routledge, 2018); S. Commuri and A. Ekici (2008) ‘An enlargement of the notion of consumer vulnerability’ *Journal of Macromarketing* 28(2), pp. 183-186.

196 For both exclusive access and shared access.

197 Article I.-1:105 DCFR; C. Joustra, ‘Naar een uniform begrip ‘consument?’ in: J.M. van Buren-Dee *Consument zonder grenzen* (Deventer: Kluwer 1996), pp. 208 *et seq*.

198 Commission of the European Communities ‘Proposal for a Directive of the European Parliament and of the Council on consumer rights’ (Brussels, 8 October 2008) COM(2008) 614 final, pp. 20 *et seq*; Recital 17 Consumer Rights Directive. Also see: European Commission ‘Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights’ *Official Journal of the European Union* (29 December 2021) C525/1.

199 Commission of the European Communities ‘Proposal for a Directive of the European Parliament and of the Council on consumer rights’ (Brussels, 8 October 2008) COM(2008) 614 final.

to extend the application of the rules of the directive to legal persons or to natural persons who are not consumers within the meaning of the directive.²⁰⁰ However, (legal) persons that have equal rights to consumers should not be referred to as ‘consumers’ as that would be incompatible with the definitions in the proposal for a directive.²⁰¹ While private companies and cooperatives could get, in exceptional cases, similar protections as consumers, they could not be considered to be a consumer for the scope *ratione personae*. The Consumer Sales Directive also provides for the possibility that Member States may extend the application of the rules of the Directive to contracts that are excluded from the scope of this Directive, or to otherwise regulate such contracts. Here too, Member States are free to extend the protection to consumers to legal persons that are not consumers within the meaning of the Consumer Sales Directive.²⁰² Contrary to the directives mentioned above, it is not specifically mentioned in the Unfair Contract Terms Directive and the Unfair Commercial Practices Directive that Member States can extend the protection provided to consumers to legal persons that are not consumers within the meaning of those directives. Member States are of course free to offer non-consumers (equivalent) rights because Member States are free to regulate matters that fall outside the scope of the directives.

National jurisdictions

In this section, the space that exists in the Member States to classify private companies and cooperatives as consumers is researched. In cases where these parties cannot be qualified as consumers, the study examines whether the national law leaves room to assign them consumer rights.

In Dutch law, circumstances exist under which a contracting party is granted a more extensive right. Under specific conditions, small legal entities can be protected more generally as if they were consumers without being qualified as such, such as *reflexwerking*.²⁰³

200 Such as: non-governmental organisations, start-ups or small and medium-sized ventures. Recital 13 Consumer Rights Directive.

201 Commission of the European Communities ‘Proposal for a Directive of the European Parliament and of the Council on consumer rights’ (Brussels, 8 October 2008) COM(2008) 614 final.

202 Such as: non-governmental organisations, start-ups or SMEs. Recital 21 Consumer Sales Directive.

203 Jac. Hijma, *Algemene voorwaarden (Monografieën BW nr. B55)* (Deventer: Wolters Kluwer, 2016), p. 31; C. Joustra, ‘Naar een uniform begrip ‘consument?’ in: J.M. van Buren-Dee *Consument zonder grenzen* (Deventer: Kluwer 1996), p. 208; R.R.R. Hardy, *Differentiatie in het (Europees) contractenrecht. Rechtsvergelijkende studies naar de consument, de ondernemer en hun overeenkomsten* (Den Haag: Boom Juridische uitgevers, 2009), pp. 22-24; R. Tjittes, *De hoedanigheid van contractspartijen* (Deventer: Kluwer 1994), pp. 201-202; M.B.M. Loos, *Consumentenkoop (Monografieën BW nr. B65b)* (Deventer: Wolters Kluwer, 2019), pp. 23-24. Also see: Dutch Court of Appeal Leeuwarden, 31 October 2001, ECLI:NL:GHLEE:2001:AD7180.

Although there are various forms of *reflexwerking*,²⁰⁴ this paragraph only discusses the variation of *reflexwerking* that affects the influence of a clause on the black, grey, or blue list on agreements where the other party is not a consumer because only this variation is relevant here. In general terms and conditions, it is assumed that the grey and black lists of unreasonably onerous clauses can have *reflexwerking*,²⁰⁵ in the context of the general criterion of article 6:233(a) of the Dutch Civil Code, which stipulates that a clause in general terms and conditions is voidable if it is unreasonably burdensome/onerous for the other party.²⁰⁶ The fact that a clause is on a list contributes to the judgment that the clause is unreasonably burdensome/onerous. A rule of thumb is that with small, ‘consumer-like’ counterparties the *reflexwerking* is usually strong, and with large counterparties, this effect is usually weak or absent.²⁰⁷ The content of the relevant clause on the black, grey, or blue list and its mutual interests play an important role.²⁰⁸ The fact that a clause is on one of the lists has consequences for the assessment of the clause against the open standard of article 6:233(a) of the Dutch Civil Code; when a small, legal entity or a natural person who acts in the exercise of a profession or business, it is argued that the clause is also unreasonably burdensome/onerous towards him.

The general requirement for *reflexwerking* is that the nature of the agreement does not differ essentially from a consumer agreement.²⁰⁹ It is possible under certain circumstances that even a (small) legal entity that acts in the exercise of its profession or business, but outside

204 See for various forms of *reflexwerking*: M.B.M. Loos, *Algemene voorwaarden* (3rd edition, Den Haag: Boom juridisch, 2018), pp. 264-268.

205 Article 6:236, 6:237 Dutch Civil Code.

206 Article 6:233 (a) of the Dutch Civil Code stipulates that a clause in general terms and conditions is voidable if, given the nature and other content of the agreement, the manner in which the terms and conditions were concluded, the mutually recognizable interests of the parties and the other circumstances of the case is unreasonably burdensome/onerous for the other party. See: R.H.C. Jongeneel and B. Wessels (2010) ‘Ondernemingen en algemene voorwaarden’ *Vermogensrechtelijke Analyses* 2(7), pp. 21-27; Asser/Hijma 7-I 2019/119; Jac. Hijma, *Algemene voorwaarden (Monografieën BW nr. B55)* (Deventer: Wolters Kluwer, 2016), 31, 32; M.B.M. Loos, *Algemene voorwaarden* (3rd edition, Den Haag: Boom juridisch, 2018), pp. 257-264; B. Wessels and R.H.C. Jongeneel (red.), *Algemene voorwaarden (Recht en Praktijk nr. CA1)* (Deventer: Wolters Kluwer, 2017), 7, 17.

207 Dutch Supreme Court, 21 September 2007, ECLI:NL:HR:2007:BA7627; Dutch Court of Breda, 22 January 2009, ECLI:NL:RBBRE:2009:2342; Dutch Court of Rotterdam, 11 January 2006, ECLI:NL:RBROT:2006:AU9755. Also see: Jac. Hijma, *Algemene voorwaarden (Monografieën BW nr. B55)* (Deventer: Wolters Kluwer, 2016), 31; Asser/Hijma 7-I 2019/119; M.B.M. Loos, *Consumentenkoop (Monografieën BW nr. B65b)* (Deventer: Wolters Kluwer, 2019), 13; B. Wessels, *Koop: algemeen (Monografieën Nieuw BW, nr. B65)* (Deventer: Kluwer, 2015), p. 6.

208 Jac. Hijma, *Algemene voorwaarden (Monografieën BW nr. B55)* (Deventer: Wolters Kluwer, 2016), 31; M.B.M. Loos, *Algemene voorwaarden* (3rd edition, Den Haag: Boom juridisch, 2018), pp. 257-264.

209 Jac. Hijma, *Algemene voorwaarden (Monografieën BW nr. B55)* (Deventer: Wolters Kluwer, 2016), 31; M.B.M. Loos, *Algemene voorwaarden* (3rd edition, Den Haag: Boom juridisch, 2018), pp. 257-264.

the field of its own professional or business activities, can benefit from the *reflexwerking*.²¹⁰ This means that if a clause from either of the lists appears, the judge can assume that the clause is unreasonably burdensome/onerous, unless the counterparty (user of the general terms and conditions) makes the contrary plausible.²¹¹ At the same time, with a less strong *reflexwerking*, the placement of the clause on one of the lists is an indication that the clause is unreasonably burdensome/onerous, but this is only one of the factors that play a role in the assessment of the clause.²¹² If there is no *reflexwerking*, this does not expressly mean that a clause on either of the lists is not unreasonably burdensome/onerous. This only means that the occurrence of the clause on one of the lists during the assessment cannot constitute an argument in favour of the other party.²¹³

For general terms and conditions, the grey and black lists can have *reflexwerking*, which also raises the question of whether the consumer law can have a certain reflex effect in favour of, for example, a small private company or cooperative, which is not essentially different from a consumer. To a limited extent, *reflexwerking* appears to be permitted for consumer law, which would allow them to benefit similarly from the protective rules.²¹⁴ It is evident here as well that *reflexwerking* is only applicable if the nature of the agreement does not differ essentially from a consumer agreement and the agreement in any case does not concern the actual field of the buyer's professional or business activities.²¹⁵ Application

210 See for example: Dutch Supreme Court, 8 September 2023, ECLI:NL:HR:2023:1197 (*Hibma Zuivel*). M.B.M. Loos *Algemene voorwaarden* (3rd edition, Den Haag: Boom juridisch, 2018), p. 259. H.N. Schelhaas (2024) 'Het toepassingsbereik van de algemenevoorwaardenregeling: Over diensten en de reflexwerking van de grijze en zwarte lijst' *Ars Aequi*, pp. 49-55.

211 Jac. Hijma, *Algemene voorwaarden* (Monografieën BW nr. B55) (Deventer: Wolters Kluwer, 2016), 31; M.B.M. Loos, *Algemene voorwaarden* (3rd edition, Den Haag: Boom juridisch, 2018), pp. 257-264.

212 Jac. Hijma, *Algemene voorwaarden* (Monografieën BW nr. B55) (Deventer: Wolters Kluwer, 2016), 31; M.B.M. Loos, *Algemene voorwaarden* (3rd edition, Den Haag: Boom juridisch, 2018), pp. 257-264; B. Wessels and R.H.C. Jongeneel (red.), *Algemene voorwaarden* (Recht en Praktijk nr. CA1) (Deventer: Wolters Kluwer, 2017), 17.3.

213 Jac. Hijma, *Algemene voorwaarden* (Monografieën BW nr. B55) (Deventer: Wolters Kluwer, 2016), 31; M.B.M. Loos, *Algemene voorwaarden* (3rd edition, Den Haag: Boom juridisch, 2018), pp. 257-264; B. Wessels and R.H.C. Jongeneel (red.), *Algemene voorwaarden* (Recht en Praktijk nr. CA1) (Deventer: Wolters Kluwer, 2017), 17.3.

214 Here too, the same restrictions would apply as for *reflexwerking* in the general terms and conditions. Asser/Hijma 7-I 2019/119; B. Wessels, *Koop: algemeen* (Monografieën Nieuw BW, nr. B65) (Deventer: Kluwer, 2015), p. 6; M.B.M. Loos, *Consumentenkoop* (Monografieën BW nr. B65b) (Deventer: Wolters Kluwer, 2019), p. 13.

215 Jac. Hijma, *Algemene voorwaarden* (Monografieën BW nr. B55) (Deventer: Wolters Kluwer, 2016), 31; M.B.M. Loos, *Algemene voorwaarden* (3rd edition, Den Haag: Boom juridisch, 2018), pp. 257-264; Asser/Hijma 7-I 2019/119; M.B.M. Loos, *Consumentenkoop* (Monografieën BW nr. B65b) (Deventer: Wolters Kluwer, 2019), 13; B. Wessels, *Koop: algemeen* (Monografieën Nieuw BW, nr. B65) (Deventer: Kluwer, 2015), p. 6. See in this regard *inter alia*: Dutch Supreme Court, 21 September 2007, ECLI:NL:HR:2007:BA7627; Dutch Court of Breda, 22 January 2009, ECLI:NL:RBBRE:2009:2342; Dutch Court of Rotterdam, 11 January 2006, ECLI:NL:RBROT:2006:AU9755.

of *reflexwerking* has a strong casuistic character and should therefore be assessed on a case-by-case basis.²¹⁶ Nevertheless, most private companies that offer mobility usership are often not organised in such a way that they can make use of *reflexwerking* as they cannot be equated with a consumer. Many of the mobility usership providers are private companies, which means that there is likely little to no *reflexwerking* and restraint is advised. Of course, situations could occur in which the mobility usership provider is small and the nature of the agreement does not differ essentially from a consumer agreement and it therefore does not concern the actual field of their professional or business activities. For small cooperatives and associations that do not differ materially from a consumer, the application of *reflexwerking* is obvious according to Dutch parliamentary history.²¹⁷ Cooperatives and associations could therefore be granted consumer rights if they do not materially differ from a consumer.

Consequently, the private company, cooperative and association can *strico sensu* not qualify as consumers under Dutch law. Under limited circumstances, these parties can be granted consumer protection; however, restraint is advised.

French legislation did not offer a definition of the notion of consumer. While some provisions in the French Consumer Code contained indications of the scope of the legislation, a general definition was missing, and case law defined the notion of consumer.²¹⁸ Many proposed definitions take the purpose of the legal activity as its starting point. In 2014, the legislator defined the notion of consumer. This legal definition is general and defines a consumer (*consommateur*) as a natural person who is acting for purposes not falling within the scope of his commercial, industrial, craft, liberal, or agricultural activity.²¹⁹ This means that legal persons are in principle excluded from the qualification as consumer. The term ‘non-professional’ (*non-professionnel*) was later added to the article.²²⁰ The non-professional person is defined as a legal person not acting for professional

216 See for example: B. Wessels and R.H.C. Jongeneel (red.), *Algemene voorwaarden (Recht en Praktijk nr. CA1)* (Deventer: Wolters Kluwer, 2017), 17.2; M.B.M. Loos, *Algemene voorwaarden* (3rd edition, Den Haag: Boom juridisch, 2018), pp. 260-264.

217 Dutch Court of Appeal Leeuwarden, 31 October 2001, ECLI:NL:GHLEE:2001:AD7180; B. Wessels and R.H.C. Jongeneel (red.), *Algemene voorwaarden (Recht en Praktijk nr. CA1)* (Deventer: Wolters Kluwer, 2017), 17.

218 Article L311-3, L312-3, L121-21, L121-22 and L132-1 French Consumer Code. Also see: J. Calais-Auloy, H. Temple and M. Depincé, *Droit de la consommation* (10th Edition, Paris: Dalloz, 2020), p. 6; C. Joustra, *De internationale consumentenovereenkomst* (Deventer: Kluwer, 1997), p. 27.

219 Article L823-2 French Consumer Code, also see the French Hamon Law. J. Calais-Auloy, Propositions pour un code de la consommation: rapport de la Commission de codification du droit de la consommation (Paris: la Documentation française, 1990).

220 Article L823-2 French Consumer Code; French Regulation regarding the legislative part of the consumer law, also see the French Law relating to the legislative part of the Consumer Code and consumer credit agreements.

purposes.²²¹ The non-professional will not benefit from all the provisions of consumer law, but from the provisions explicitly indicated. The following rule is developed: The person who concludes a contract directly related (*rapport direct*) to their professional activity is not a consumer and therefore does not benefit from the protective rules.²²² This means that if there is no direct link between the transaction and someone's professional or business activity, businesspersons may, in certain circumstances, invoke consumer law. For example, an estate agency ordering an alarm system was considered to be acting as a consumer, not as a professional, since it would lack technical competence in this specific field.²²³ Nevertheless, private companies, cooperatives, and associations do not qualify as consumers under French law but can under limited circumstances be granted consumer protection, similarly to Dutch law.

Under German law, the starting point is that legal persons, including small businesspersons, cannot be regarded as consumers, as the article requires that the consumer is a natural person.²²⁴ Even if it concerns legal persons that do not develop a business or a professional activity, such as cooperatives, associations, or foundations.²²⁵ As a result, cooperatives and associations are also excluded from consumer protection provisions.²²⁶ Even a businessperson who concludes an agreement whose content falls outside the scope of normal activities cannot be regarded as a consumer.²²⁷ If a contract is concluded by a businessperson for purposes that are *entirely* outside the independent professional

221 Article L823-2 French Consumer Code.

222 J. Calais-Auloy and F. Steinmetz, *Droit de la consommation* (Paris: Dalloz 2006), p. 12; J. Chazal (1997) 'Le consommateur, existe t-il?' *Recueil Dalloz Chronique*, pp. 261-262; French Court of Cassation (1st civil chamber) 24 January 1995, *Recueil Dalloz*, 1995, Jurisprudence, p. 327; French Court of Cassation, 23 November 1999, *Jurisclasseur*, Contrats-Concurrence-Consommation 2000.

223 French Court of Cassation, 28 April 1987, *Jurisclasseur periodique*, 1987.II.20893. Also see: R.R.R. Hardy, *Differentiatie in het (Europees) contractenrecht. Rechtsvergelijkende studies naar de consument, de ondernemer en hun overeenkomsten* (Den Haag: Boom Juridische uitgevers, 2009), p. 41.

224 Section 13 German Federal Code; A. von Vogel, *Verbrauchervertragsrecht und allgemeines Vertragsrecht: Fragen der Kohärenz in Europa* (Berlin: De Gruyter 2006), pp. 21-22; J. Engelhardt, *Europäisches Verbrauchervertragsrecht im BGB: Eine systematische Untersuchung der §§ 13, 14, 361a und 361b BGB und Induktion weiterführender Ansätze aus HTWG, VerbrKrG, AGBG, TzWrG und FernAG* (Diss., Frankfurt: Peter Lang, 2002), p. 94; J. Smits (2002) 'De herziening van het Duitse verbintenissenrecht: een overzicht en vergelijking' *Nederlands Tijdschrift voor Burgerlijk Recht*, p. 378.

225 Respectively: Section 21 German Federal Code (associations) and Section 80 German Federal Code (foundations).

226 J. Engelhardt, *Europäisches Verbrauchervertragsrecht im BGB: Eine systematische Untersuchung der §§ 13, 14, 361a und 361b BGB und Induktion weiterführender Ansätze aus HTWG, VerbrKrG, AGBG, TzWrG und FernAG* (Diss., Frankfurt: Peter Lang, 2002), pp. 57-58.

227 Section 13 German Federal Code; J. Engelhardt, *Europäisches Verbrauchervertragsrecht im BGB: Eine systematische Untersuchung der §§ 13, 14, 361a und 361b BGB und Induktion weiterführender Ansätze aus HTWG, VerbrKrG, AGBG, TzWrG und FernAG* (Diss., Frankfurt: Peter Lang, 2002), p. 94.

activity, he could, however, qualify as a consumer.²²⁸ Germany applies a stricter notion of the consumer, which means that the private company, cooperative, and association do not qualify as consumers under German law, except when a contract is concluded by a businessperson for purposes that are entirely outside the independent professional activity.

Under Belgian law, the consumer is defined in the Belgian Code of Economic Law as: ‘any natural person who acts for purposes outside his trade, business, craft or profession.’²²⁹ In general, anyone who is a company is not a consumer insofar as the party obtains a certain benefit in the exercise of his professional activity.²³⁰ The legislator no longer requires that the term ‘consumer’ is used ‘exclusively’ for non-professional purposes.²³¹ This definition is broader than the older definition from the Belgian law on market practices and consumer protection, because it also includes mixed purpose contracts as it includes the professional activity of the data subject when this activity is so limited that it is not predominant within the overall context of the agreement. A consumer is, for example, the trader who buys a mobile phone, which he uses both in his private life and in his professional life.²³² However, the idea that the party qualifies as a consumer if the non-professional part predominates is far-reaching.²³³ This means that legal persons

228 R.R.R. Hardy, *Differentiatie in het (Europees) contractenrecht. Rechtsvergelijkende studies naar de consument, de ondernemer en hun overeenkomsten* (Den Haag: Boom Juridische uitgevers, 2009), p. 28. Under current German law, (small) start-up businesses can under certain circumstances rely on provisions specifically drawn up for the consumer based on Section 507 German Federal Code.

229 By including the definition of ‘consumer’ in Book I Belgian Code of Economic Law, a uniform definition of consumer is obtained for the entire Belgian Code of Economic Law. Article I.1.2° Belgian Code of Economic Law; Belgian Explanatory Memorandum, ‘Wetsontwerp houdende invoeging van titel 1 ‘Algemene definities’ in boek I ‘Definities’ van het Wetboek van economisch recht’ (27 mei 2013, Kamer 2012-2013), DOC 53 2836/001, p. 6; G. Straetmans, ‘Onderneming, vrij beroep en consument’ in: G. Straetmans and R. Steennot, *Wetboek Economisch Recht En de Bescherming van de Consument* (Antwerpen: Intersentia, 2015), pp. 49-53; R. Steennot and E. Terryn (2014) ‘De nieuwe bepalingen uit boek VI van het Wetboek Economisch Recht: een eerste commentaar’ *Droit de la consommation – Consumentenrecht* 104, pp. 4-5.

230 Belgian Court of Cassation, 11 May 2001, *Juristenkrant* 2001, 32, N-20010511-6 (C.97.0465.N), p. 6; Article 1,7 ° Belgian Commercial Practices Act; Belgian Court of Appeal Antwerp, 30 June 2009, *Nieuw Juridisch Weekblad* 2010, 504 with annotation R. Steennot; R. Steennot ‘De impact van de rechtspraak van het hof van justitie op de regelen inzake onrechtmatige bedingen’ in: G. Straetmans and R. Steennot, *Wetboek Economisch Recht En de Bescherming van de Consument* (Antwerpen: Intersentia, 2015), pp. 147-148; R. Steennot and E. Terryn (2014) ‘De nieuwe bepalingen uit boek VI van het Wetboek Economisch Recht: een eerste commentaar’ *Droit de la consommation – Consumentenrecht* 104, pp. 4-5.

231 Article I.1.2 Belgian Code of Economic Law. The Belgian legislator makes this change following the definition of consumer in the Consumer Rights Directive.

232 Belgian Explanatory Memorandum, ‘Wetsontwerp houdende invoeging van titel 1 ‘Algemene definities’ in boek I ‘Definities’ van het Wetboek van economisch recht’ (27 mei 2013, Kamer 2012-2013), DOC 53 2836/001, p. 6.

233 J. Vananroye and K.-J. Vandormael, ‘Boek I WER En Wet Natuurlijke Rechter. Van Handelsrecht Naar Ondernemingsrecht’ in: B. Keirsbilck and E. Terryn (eds.), *Het Wetboek Van Economisch Recht: van nu en straks?* (Antwerpen: Intersentia, 2014), p. 24; B. Keirsbilck, ‘Marktpraktijken en consumentenbescherming, ook voor vrije beroepen’ in B. Keirsbilck en E. Terryn (eds.), *Het Wetboek van economisch recht: van nu en*

such as private companies are not consumers.²³⁴ Cooperatives and associations will also predominantly not qualify as a consumer, but this must be assessed on the basis of the criteria above. To assess whether or not a person is acting for professional purposes, two distinct criteria were used, namely the destination criterion (*bestemmingscriterium*) and the specialisation criterion (*specialisatiecriterium*). Currently, only the first criterium applies in order to distinguish a non-consumer from a consumer because a consumer should only use the purchased goods or services exclusively for non-professional purposes. As soon as the goods or services are purchased for professional purposes, exclusively or partially, they are consequently no longer considered a consumer.²³⁵ In addition, the quality at the time of the act and its organised character at that moment are decisive.²³⁶ Therefore, a private company cannot be classified as a consumer insofar as the company obtains a certain benefit in the exercise of his professional activity. The criteria – the purposes of the product and the knowledge of particular matters – result in professional activity for a private company.

Table 8 summarises that users of mobility usership are qualified as consumers under EU consumer law. In addition, legal persons in principle do not qualify as consumers, which is in line with the rationale of consumer law that the imbalance between the contracting parties should be mitigated and the goal of protecting the weaker party should be central.²³⁷ German law seems the strictest and only provides consumer protection when a contract is concluded by a businessperson for purposes that are entirely outside the independent professional activity. At the same time, the unfair terms legislation in Germany does protect professional parties in B2B contracts. The Dutch, French, and Belgian approach seem more nuanced and leave some space open to apply

straks? (Antwerpen: Intersentia, 2014), p. 151; E. Terryn (2013) 'La transposition de la directive droits des consommateurs en Belgique – champ d'application personnel et exclusions' *Revue européenne de droit de la consommation*, pp. 374, 382. G. Straetmans, 'Onderneming, vrij beroep en consument' in: G. Straetmans and R. Steennot, *Wetboek Economisch Recht En de Bescherming van de Consument* (Antwerpen: Intersentia, 2015), pp. 49-53.

234 G. Straetmans (2006) 'Beroepsbeoefenaar en consument van handelspraktijken?' *Le droit des affaires – Het ondernemingsrecht* 80, pp. 433-440; G. Straetmans (2009) 'De (rechtspersoon) n.v. is geen consument in handelspraktijken' *Le droit des affaires – Het ondernemingsrecht* 92, pp. 403-407.

235 Belgische Kamer van Volksvertegenwoordigers, 'Wetsontwerp betreffende marktpraktijken en consumentenbescherming' (28 December 2009) DOC 52 2340/001, p. 35; G. Straetmans, 'Onderneming, vrij beroep en consument' in: G. Straetmans and R. Steennot, *Wetboek Economisch Recht En de Bescherming van de Consument* (Antwerpen: Intersentia, 2015), pp. 49-53.

236 G. Straetmans, 'Onderneming, vrij beroep en consument' in: G. Straetmans and R. Steennot, *Wetboek Economisch Recht En de Bescherming van de Consument* (Antwerpen: Intersentia, 2015), pp. 49-53.

237 C.W.M. Lieveise and J.G.J. Rinkes, *Onerlijke handelspraktijken en handhaving consumentenbescherming. Preadvies voor de Vereniging voor Effectenrecht 2010*. (Serie Van der Heijden Instituut, nr. 106, Deventer: Kluwer, 2010), II.2.1; Asser/ Vonken 10-I 2018/280.

consumer protection to legal persons, although they can in principle not be classified as a consumer.

Table 8: Interim conclusion of consumer

<i>Ratione personae</i> scope: consumer			
	Private company	Cooperative	Individual
CSD	No	No	Yes
CRD	No	No	Yes
CCD	No	No	Yes
UCTD	No	No	Yes
UCPD	No	No	Yes

2.7 CONCLUSION

In this chapter, the cornerstones of EU consumer policy were examined. The most important cornerstones of EU policy are, of course, the pursuit of a high level of consumer protection and stimulation of the internal market. Furthermore, legal certainty, consumer confidence, and consumer knowledge are central. The balance between the contracting parties in consumer law is also important, whereby the weaker consumer must be protected against the powerful supplier. This rationale of consumer protection applies to the traditional sales-based consumer but should equally apply to mobility usership consumers. Furthermore, the cornerstones of EU consumer policy might not all be reflected by each directive separately, a patchwork of the selected directives exists which results in an overlap of EU legislation and, consequently, an adequate representation of the EU consumer policy cornerstones. Since the same policy considerations underlie the protection of the mobility usership consumer, there is essentially no clear reason to approach consumers differently. The fact that it concerns a mobility usership consumer does not change this.

Bearing in mind these cornerstones, the *ratione personae* scope is examined bilaterally, namely from the perspectives of the provider and of the consumer. The professional party is generally defined as any natural person or any legal person that is acting for purposes relating to that person's trade, business, or profession. The mobility usership provider in the capacity of private company or cooperative is considered a professional party. The fact that also small cooperatives would qualify as a professional party could result in more obligations which could potentially discourage starting a small-scale cooperative to share mobility. Furthermore, the individual provider of mobility usership can in principle be a

professional self-employed individual or a (non-professional) prosumer. See Table 9 for an overview.

The consumers' side of the *ratione personae* scope shows that individual users of mobility usership qualify as consumers as long as they are acting primarily for purposes outside their trade, business, or profession. This assessment becomes a more difficult area when an individual who enters into an agreement for partly private and partly business purposes. Although it is considered important that in such cases the commercial purpose does not dominate within the overall context of the agreement, this remains a grey area. Moreover, the private company and the cooperative do not, in principle, qualify as such. Although exceptions to grant consumer rights to them do exist and should be made on a case-by-case basis, the parties do not qualify as a consumer.

Table 9 also provides an overview of this assessment.

Table 9: Conclusion on *ratione personae* scope

<i>Ratione personae</i> scope			
	<i>Private Company</i>	<i>Collaborative</i>	<i>Individual</i>
<i>Professional party</i>	Yes, see paragraph 2.5.1.	Yes, see paragraph 2.5.2.	Yes, for a self-employed individual as long as the natural person primarily acts for purposes which are related to his or her trade, business, or profession. No, for a prosumer. See paragraph 2.5.3.
<i>Consumer</i>	No, in principle not. See paragraph 2.6.2.	No, in principle not. See paragraph 2.6.2.	Yes, as long as the natural person is acting primarily for purposes which are not related to his or her trade, business, or profession. See paragraph 2.6.1.

3 *RATIONE MATERIAE* SCOPE

3.1 INTRODUCTION

The previous chapter provided insight into the qualification of the contracting parties of a mobility usership contract, to what extent these contracting parties fall under the *ratione personae* scope of the EU consumer directives, and the complexities that may arise in qualification. In addition to the *ratione personae* scope, the applicability of consumer law is also determined by the *ratione materiae* scope. Consequently, in this chapter, the question of whether equivalent protection exists for the mobility usership consumer will be studied through the lens of this scope. In concrete terms, this chapter examines whether the mobility usership contract can qualify as a consumer contract as defined in each EU directive as these consumer contracts differ per directive. For example, the Consumer Sales Directive covers the sales contract, and the Consumer Credit Directive covers the credit agreement.¹ This means that the mobility usership contract may fall within the *ratione materiae* scope of one directive and not within this scope of another directive. The common denominator of mobility usership contracts is that it concerns the use of a vehicle but, as discussed in detail in paragraph 1.2, there is an important difference within mobility usership between exclusive mobility use contracts and shared mobility use contracts. Both types of mobility usership contracts will therefore be examined in each directive in this chapter. Despite the fact that the EU legislator strives for maximum harmonisation, national implementations will also be studied as maximum harmonisation does not always exist in practice and there may be national deviations. The consumer sales contract in the Consumer Sales Directive (paragraph 3.2), the credit agreement in the Consumer Credit Directive (paragraph 3.3), and any contract in the Consumer Rights Directive (paragraph 3.4) are discussed successively. Subsequently, the commercial practice in the Unfair Commercial Practices Directive (paragraph 3.5) and the contracts in the Unfair Contract Terms Directive (paragraph 3.6) are discussed.

3.2 THE SALES CONTRACT IN THE CONSUMER SALES DIRECTIVE

The Consumer Sales Directive applies to sales contracts between a consumer and a professional seller (B2C).² Although the old Consumer Sales Directive 1999 did not yet

1 Article 1, 2(1), and 3(1) Consumer Sales Directive; Article 1, and 2(1) Consumer Credit Directive 2008.

2 Article 1, 2(1), and 3(1) Consumer Sales Directive. Also see: Article 2(1) Consumer Sales Directive 1999.

define a sales contract,³ the current Consumer Sales Directive defines the sales contract as “any contract under which the seller transfers or undertakes to transfer ownership of goods to a consumer, and the consumer pays or undertakes to pay the price thereof”.⁴ The requirement of transferring ownership of a good makes application of the Consumer Sales Directive to mobility usership contracts especially complicated. After all, with mobility usership agreements, the ownership always remains with the mobility provider and thus a transfer of ownership is non-existent in both exclusive and shared mobility usership agreements. Consequently, the nature of the sales contract prevents the application of the Consumer Sales Directive to both exclusive as well as shared mobility usership agreements. The Consumer Sales Directive is a maximum harmonisation directive, which means that Member States shall not maintain or introduce in their national law provisions diverging from those laid down in the Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in the Consumer Sales Directive.⁵ It is, however, possible that a broader application of the Consumer Sales Directive is granted in Member States because they are free to extend the application of the rules of the Directive to contracts that are excluded from the *ratione materiae* scope, or to otherwise regulate such contracts.⁶

3.2.1 *The sales contract in the national law of the Member States*

In all Member States, the consumer sales contract is defined similarly to the Consumer Sales Directive, namely an agreement whereby one person (seller) undertakes to give a good and the other (consumer) to pay a price for it.⁷ Furthermore, the agreement must

3 It follows from case law that, although Consumer Sales Directive 1999 does not specifically define it, it is an autonomous EU law concept. As a result, the national courts are obliged to interpret the law as much as possible in accordance with the directive. See: CJEU, Case C-247/16, 7 September 2017, ECLI:EU:C:2017:638 (*Schottelius*), pp. 23, 32. Also see, by analogy, judgment CJEU, Case C-34/10, 18 October 2011, ECLI:EU:C:2011:669 (*Brüstle*), p. 26; R. Canavan, ‘Contracts of sale’ in: C. Twigg-Flesner (ed.), *Research handbook on EU Consumer and Contract Law* (Glos, Edward Elgar Publishing Limited, 2016), pp. 270-274; Asser/Hijma 7-I 2019/102, 103; D. Martiny, *Münchener Kommentar zum BGB*, 8. Auflage 2021, Rom I-VO Art. 4 Mangels Rechtswahl anzuwendendes Recht, Rn. 28.

4 Article 2(1) Consumer Sales Directive. See: R. Canavan, ‘Contracts of sale’ in: C. Twigg-Flesner (ed.), *Research handbook on EU Consumer and Contract Law* (Glos, Edward Elgar Publishing Limited, 2016), pp. 270-274.

5 Recital 10, 25, 47; Article 4 Consumer Sales Directive.

6 Recital 21 Consumer Sales Directive. See for an elucidation: R. Canavan, ‘Contracts of sale’ in: C. Twigg-Flesner (ed.), *Research handbook on EU Consumer and Contract Law* (Glos, Edward Elgar Publishing Limited, 2016), pp. 270-274.

7 The Netherlands: ‘Article 7:1, 7:5 Dutch Civil Code; Dutch proposal of law, *Kamerstukken II 2020/21*, 35734, 2. Germany: Section 474 German Civil Code. Belgium: It concerns the sales of consumer goods by a seller to a consumer (whereby the contracting parties are defined in subsequent articles of law); Article 16489bis (2) Belgian Civil Code. France: Article L217-1 (I) French Consumer Code.

relate to movable property, such as a vehicle. This requirement is made explicit in the national jurisdictions, except France.⁸ However, the subject of the agreement – the movable property – is of secondary importance compared to the legal consequences of the act of contract, because the application of consumer sales rules fails due to the lack of a transfer of ownership. After all, the transfer of ownership is important for all jurisdictions. In other words, the mobility usership contract, being exclusive or shared, does not fall within the *ratione materiae* scope of the Member States. Nevertheless, some room is left for broader application of the rules. In the Netherlands and Germany, an agreement which concerns both the delivery of movable property and the provision of services is considered a consumer sale.⁹ Furthermore, in all Member States, contracts for the delivery of consumer goods to be manufactured or produced are also regarded as sales contracts.¹⁰ Although the definition of a consumer sale should only be interpreted *stricto sensu* under French law and despite the broader understanding of this notion in the other Member States, the national implementation of the directive does not extend the *ratione materiae* scope regarding mobility usership contracts. After all, including (ancillary) services to the definition of the sales contract offers no solace for protecting mobility usership contracts under national jurisdiction because the core of the mobility usership agreement is explicitly not the transfer of ownership. Consequently, mobility usership contracts are inevitably exempted from both the EU and national consumer sales rules.

3.3 THE CREDIT AGREEMENT IN THE CONSUMER CREDIT DIRECTIVE

The Consumer Credit Directive applies to agreements whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan, hire purchase or other similar financial accommodation, and the consumer pays for such services or goods for the duration of their provision by means of instalments.¹¹ An exception is included for agreements in which services are provided on a continuing basis or for the supply of goods of the same kind.¹² The foregoing definition might presume that the mobility usership contract falls under the definition of a consumer credit agreement, since the mobility usership provider grants or promises to grant to a consumer the use of a vehicle (as a credit in goods) and the consumer pays for the duration of the use of that

8 The Netherlands: Article 7:5(1); 3:2; 3:3(2); 3:3(1) Dutch Civil Code. Belgium: Article 1649bis (1) 4° last sentence Belgian Civil Code. Germany: Section 474(1) German Civil Code. No requirement of movability in French law: Article L217-1 and Article L217-2 French Consumer Code.

9 The Netherlands: Article 7:5(6) Dutch Civil Code. Note: This applies to several articles Dutch Civil Code, book 7. Germany: Section 474(1) German Civil Code.

10 Article 3(2) Consumer Sales Directive.

11 Article 1, 2(1), and 3(c) Consumer Credit Directive 2008.

12 Article 1, 2(1), and 3(c) Consumer Credit Directive 2008.

vehicle.¹³ In addition, exclusive use also involves payment in instalments, while shared mobility involves a one-off payment of vehicle use. In that sense, the credit agreement is most similar to exclusive mobility use also known as private lease, but there are also many similarities with shared mobility use. However, the directive explicitly excludes rental and lease agreements that do not include an obligation to purchase the rented or leased object, either in the agreement itself or in a separate agreement; narrowing down the scope of this directive was the only way to reach an agreement among Member States on its adoption as a maximum harmonisation measure.¹⁴ This means that private lease, or in other words exclusive mobility use, is explicitly excluded from the *ratione materiae* scope of the Consumer Credit Directive.¹⁵ The shared mobility agreements differ in the duration of use and (payment) frequency compared to exclusive use but are also excluded from the Consumer Credit Directive because the agreement is classified as a hiring agreement. Although shared mobility consists of a use component and a service component, the agreement meets the characteristics of hiring.¹⁶ Both hiring and shared mobility refer to the provision of use of an item by the provider and the performance of a consideration for this by the consumer. If one of the essentials – either ‘use’ or ‘consideration’ – is missing, there is no hiring. This means that mobility usership agreements are excluded from the scope of the directive as these agreements fall under the definition of rental or lease agreements (without a purchase option) and these are excluded from the *ratione materiae* scope of the directive.

13 For an extensive discussion of this matter, see: J. de Vogel (2020) ‘Private Lease: Consumer Credit in Disguise?’ *Journal of European Consumer and Market Law* (9)2, pp. 51-60.

14 S. Weatherill, *EU Consumer Law and Policy* (Second Edition, Edward Elgar Publishing Ltd, 2014), p. 90; M. Westphal ‘The EU financial Services Policy and its Effect on Consumer Law’ in: M. Kelly-Louw, J.P. Nehf and P. Rott (eds.), *The Future of Consumer Credit Regulation: Creative Approaches to Emerging Problems* (London: Routledge, 2008), pp. 80-87; P. Rott ‘Consumer Credit’ in: H.W. Micklitz, N. Reich and P. Rott, *Understanding EU Consumer Law* (Intersentia Publishers, 2009), pp. 184-187; O.O. Cherednychenko, ‘Full Harmonisation of Retail Financial Services Contract Law in Europe: A Success or a Failure?’ in: S. Grundmann and Y.M. Atamer (eds.), *Financial Services, Financial Crisis and General European Contract Law* (Alphen aan den Rijn: Kluwer Law International, 2011), pp. 221, 235; O.O. Cherednychenko and J.M. Meindertsma ‘Mis-selling of Financial Products: Consumer Credit’ (June 2018) PE 618.997 *Study for the European Parliament Committee on Economic and Monetary Affairs (ECON)*; O.O. Cherednychenko and J.M. Meindertsma (2019) ‘Irresponsible Lending in the Post-Crisis Era: Is the EU Consumer Credit Directive Fit for Its Purpose?’ *Journal of Consumer Policy* 42, pp. 483-519. Also see: European Commission ‘Proposal for a Directive of the European Parliament and of the Council on the harmonization of the laws, regulations and administrative provisions of the Member States concerning credit for consumers’ (Brussels, 2002) COM(2002)443; D. Vandone *Consumer credit in Europe: Risks and opportunities of a dynamic industry* (Springer Science & Business Media, 2009), p. 99.

15 Article 2(2)(d) Consumer Credit Directive 2008. M. Pébureau (2008) ‘Pour un grand marché intégré des services bancaires et financiers’ *Revue Banque* 701, pp. 56-58; P.-M. Brien (2008) ‘Les difficultés de l’harmonisation en Europe’ *Revue Banque* 701. Also see: J. de Vogel (2020) ‘Private Lease: Consumer Credit in Disguise?’ *Journal of European Consumer and Market Law* (9)2, pp. 51-60.

16 Figure 1: Operationalisation PSS and use-oriented services.

Although the Consumer Credit Directive strives for full harmonisation, the fact is that the directive still allows Member States a degree of freedom in this matter because the European legislator has not harmonised all aspects of consumer credit.¹⁷ After all, Member States retain the option to introduce or maintain (stricter) national provisions for aspects that fall outside the scope of the Directive.¹⁸

3.3.1 *The credit agreement in national laws of the Member States*

In Belgium, France and the Netherlands, the term ‘credit agreement’ is broadly defined.¹⁹ In these Member States, the credit agreement is defined as an agreement whereby a creditor grants or promises to grant credit to a consumer in the form of a deferral of payment, a loan or other similar payment facility, except for agreements for continuous provision of services and continuous supply of the same goods, where the consumer, if the services or goods are delivered, pays the costs thereof in instalments.²⁰ Under these laws mobility usership falls under the definition of ‘credit’. Contrary to these Member States, German law adopts the definition from the Consumer Credit Directive less exactly and defines the consumer credit agreement as credit contracts against payment between an entrepreneur as the lender and a consumer as the borrower.²¹ Nevertheless, mobility usership agreements fall under the definition of a credit agreement in all jurisdictions as the use of the vehicle is provided and the consumer will be obliged to make one or more payments on the lease (use) of the vehicle.

Exclusion of rental and lease agreements

In line with the European legislator, some national legislators chose to exclude certain agreements from the scope of their consumer credit rules. The Dutch legislator adopted

¹⁷ Article 22(1) Consumer Credit Directive 2008.

¹⁸ In other words, as Article 2(2) Consumer Credit Directive 2008 lists several excluded agreements, Member States may maintain existing national rules or introduce new rules about these agreements. For example, Member States can choose to apply in whole or in part the rules contained in the Consumer Credit Directive 2008 on other types of contracts. Recital 9, 10 Consumer Credit Directive 2008; J. Vannerom, *De bijzondere kredietvormen* (Diss., Katholieke Universiteit Leuven, Faculty of Law, 2011); Dutch Explanatory Memorandum, *Kamerstukken II 2009/10*, 32339, 3.

¹⁹ M. De Muynck and J.M. van Poelgeest (2012) ‘Het aanbieden van consumentenkrediet na Richtlijn 2008/48/EG: de Nederlandse en Belgische regelgeving aan elkaar getoetst’ *Tijdschrift voor consumentenrecht en handelspraktijken* (2), pp. 55-63.

²⁰ Netherlands: Article 7:57(c) Dutch Civil Code; Dutch Explanatory Memorandum, *Kamerstukken II 2009/10*, 32339, 3. Belgium: Article I.9, 39° Belgian Code of Economic Law. Mortgages are explicitly excluded from the definition. France: Article L311-1, 6° French Consumer Code.

²¹ Section 491(2) German Civil Code. Also see: A. Weber, *Münchener Kommentar zum BGB*, 9. Auflage 2023, BGB § 491 Verbraucherdarlehensvertrag, Rn. 76; C. Berger, O. Jauernig, *Bürgerliches Gesetzbuch*, 18. Auflage 2021, BGB § 491 Verbraucherdarlehensvertrag, Rn. 1-8.

the exclusion of rental and lease agreements into their national law ensuing from the Consumer Credit Directive as exact as possible.²² Belgium also strived to implement rules in compliance with the directive.²³ Both Member States exclude rental or lease agreements that do not oblige the lessee to buy the property, either in the contract itself or in a separate agreement, from the scope of their consumer credit rules.²⁴ Conversely, both Member States do include in their definitions of a credit agreement any rental or lease agreements with an option to purchase.²⁵ Both French and German law also include a list of exceptions, but this list does not include the exception of the lease or rental agreement.²⁶ In French law, leasing with an option to purchase is explicitly equated with a credit transaction in a separate article.²⁷ On this point, French law is therefore in line with Belgian and Dutch law; the transfer of ownership plays a leading role in the applicability of consumer credit rules in French law. On the contrary, such an obligation to purchase the object is not necessary under German law to fall under the protection of the implemented directive. As a result, mobility usership contracts fall under the protection of German consumer credit law.

For the Netherlands, Belgium and France, no further distinction needs to be made between the types of mobility use (exclusive and shared) because there is no protection from the Directive's implementation in either of these Member States as there is no transfer of ownership. This transfer of ownership is absent for both types of mobility use. Nevertheless, a distinction between exclusive and shared mobility use is relevant for Germany because rental and lease agreements are covered by German credit rules. Exclusive mobility use

22 Article 1:20(1)(c) Dutch Financial Supervision Act; Article 7:58(2)(c) Dutch Civil Code; Dutch Explanatory Memorandum, *Kamerstukken II 2009/10*, 32339, 3.

23 Belgian Explanatory Memorandum 'Ontwerp van wet op het consumentenkrediet' (28 March 1990) 916/1, p. 4.

24 Netherlands: Article 7:58(2)(c) Dutch Civil Code. Belgium: Article VII. 3(2) 2° Belgian Code of Economic Law. Note: Such an obligation is deemed to exist if the lessor decides to do so unilaterally. M. De Muynck and J.M. van Poelgeest (2012) 'Het aanbieden van consumentenkrediet na Richtlijn 2008/48/EG: de Nederlandse en Belgische regelgeving aan elkaar getoetst' *Tijdschrift voor consumentenrecht en handelspraktijken* (2), p. 57; R. Steennot, 'Toepassingsgebied van de Wet Consumentenkrediet' in: Instituut Financieel Recht (ed.), *Financiële regulering in de kering* (Antwerpen: Intersentia, 2012), p. 13; J.M. van Poelgeest, *Kredietverstrekking aan consumenten (Recht en Praktijk nr. FR8)* (Deventer: Kluwer, 2020), p. 11.

25 Belgium: Article I.9, 47° Belgian Code of Economic Law. Netherlands: The Dutch legislator explicitly differentiates between a 'pure' rental/lease agreement and rental/lease agreement with a purchase obligation at the end of the agreement with the result that it (actually) concerns a payment in instalments (a.k.a. hire-purchase); Article 7:58(2), (c) Dutch Civil Code; Article 1:20(1), (c) Dutch Financial Supervision Act; Article 7A:1576h(2); Article 7A:1576(3) Dutch Civil Code. Also see: J. de Vogel (2020) 'Private Lease: Consumer Credit in Disguise?' *Journal of European Consumer and Market Law* (9)2, pp. 51-60; Poelgeest, J.M. van Poelgeest, *Kredietverstrekking aan consumenten (Recht en Praktijk nr. FR8)* (Deventer: Kluwer, 2020), 1.3.6; European Commission, 'Study on the calculation of the annual percentage rate of charge for consumer credit agreements' (Original Report 2009, Revised October 2013), pp. 91-92.

26 Germany: Section 491(2) German Civil Code. France: Article L212-4 French Consumer Code.

27 Article L312-2 French Consumer Code.

is, as elaborated on above, similar to lease, which means that this type of use is covered by German credit rules. German law excludes cases wherein the ‘loan’ needs to be repaid within three months and ‘low’ costs have been agreed.²⁸ The concept of costs is to be understood broadly and central to the assessment of the conditions should be the extent to which the consumer’s risk is manageable.²⁹ This means that shared mobility usership is precluded by German law because the model meets these conditions. After all, the use will not exceed 24 hours and the costs are manageable by the consumer.³⁰

In conclusion, the definition of consumer credit is in fact broad enough to cover, and thus protect, mobility usership consumers. However, except for German law, the rental and lease agreement – and thus the mobility usership agreement – is explicitly excluded from *ratione materiae* scope because it opposes the requirement of transfer of ownership. Under German law, the consumer credit rules do not exclude rental and lease agreements. This means that exclusive mobility use is covered by German credit law, whereas shared mobility use is excluded because German law precludes the short-term nature (and low costs) of shared mobility contracts.

3.4 ‘ANY CONTRACT’ IN THE CONSUMER RIGHTS DIRECTIVE

Contrary to the Consumer Sales Directive 2019 and the Consumer Credit Directive, the Consumer Rights Directive protects any contract concluded between a trader and a consumer. A reservation is made that this only applies under the terms and conditions and to the extent set out in the directive itself.³¹ In principle, mobility usership qualifies as a *sui generis* contract within the scope of the directive because it concerns a contract concluded between a provider and a consumer.³² While many provisions of the directive generally apply to ‘any contract’, there are rules that apply to only one specific type of the four types of contracts defined in the Consumer Rights Directive, namely the sales

28 Section 491(2)3 German Civil Code; A. Weber, *Münchener Kommentar zum BGB*, 9. Auflage 2023, BGB § 491 Verbraucherdarlehensvertrag, Rn. 76; C. Berger, O. Jauernig, *Bürgerliches Gesetzbuch*, 18. Auflage 2021, BGB § 491 Verbraucherdarlehensvertrag, Rn. 1-8.

29 A. Weber, *Münchener Kommentar zum BGB*, 9. Auflage 2023, BGB § 491 Verbraucherdarlehensvertrag, Rn. 76; J. Schürnbrand, A. Weber, *Münchener Kommentar zum BGB*, GB § 491 Verbraucherdarlehensvertrag, 8. Auflage 2019, Rn. 76.

30 The exclusion that applies to shared mobility usership in Germany does also exist in the other Member States but I will not elaborate on this because the applicability – *ratione materiae* scope – already fails with the exclusion of rent and lease agreements.

31 Article 1, 3(1) Consumer Rights Directive. The Directive does not apply to a number of agreements, see: Article 3(3)(a)-(m) Consumer Rights Directive.

32 Article 1, 3(1) Consumer Rights Directive. Note: Of course, under the condition that the contract is concluded between professional party and consumer as elaborated on in Chapter 2.

contract, service contract, distance contract and off-premises contract.³³ For example, different contracts have different rules for the calculation of the period during which the right of withdrawal can be exercised.³⁴ The contracts defined in the Consumer Rights Directive are the sales contract, the service contract, distance contract, and off-premises contract. For the sales contract, a uniform definition is used as that in the Consumer Sales Directive, which means that mobility usership is also not included in the definition of a sales contract under the Consumer Rights Directive.³⁵ For a more detailed discussion, please see paragraph 3.2. The other three contracts are discussed below.

Service contract

The Consumer Rights Directive qualifies the service contracts as any contract other than a sales contract where the trader provides or undertakes to provide a service to the consumer and the consumer pays or undertakes to pay the price thereof.³⁶ This could include, for example, a lease car agreement in which the professional party offers the car so that the consumer can use the car in exchange for a monthly payment. Moreover, as appears from the definition in the directive, the name of the contract is irrelevant. As a result, mobility usership contracts – for either exclusive or shared usership – fall under the definition of a service contract in the Consumer Rights Directive (Table 10). Paragraph 3.4.1 elaborates on possible deviations of the national implementations of the Consumer Rights Directive.

Distance contracts

Distance contracts are defined as contracts concluded between the trader and the consumer under an organised distance service provision scheme in which there is no

33 Article 2(5)-(8), 3(1) Consumer Rights Directive; Europese Commissie, 'Leidraad betreffende Richtlijn 2011/83/EU van het Europees Parlement en de Raad van 25 oktober 2011 betreffende consumentenrechten, tot wijziging van Richtlijn 93/13/EEG van de Raad en van Richtlijn 1999/44/EG van het Europees Parlement en de Raad en tot intrekking van Richtlijn 85/577/EEG en van Richtlijn 97/7/EG van het Europees Parlement en de Raad' (DG Justitie, juni 2014), p. 7; V. Cap, P. Schwarzenegger, B. Luger, P. Bydlinski, and J. Stabentheiner (2012) 'Die Richtlinie über die Rechte der Verbraucher (2011/83/EU vom 25. Oktober 2011)' *Manz'sche Verlags- und Universitätsbuchhandlung GmbH*, Wien, pp. 8-15; A. Schwab and A. Giesemann (2012) 'Die Verbraucherrechte-Richtlinie, Ein wichtiger Schritt zur Volharmonisierung im binnenmarkt' *Europäische Zeitschrift für Wirtschaftsrecht* 253; F. Zoll 'The problems associated with the implementation of directives into national legal systems – a few examples from the codified legal traditions' in: C. Twigg-Flesner (ed.), *Research handbook on EU Consumer and Contract Law* (Glos, Edward Elgar Publishing Limited, 2016), pp. 73-74; G. Howells, C. Twigg-Flesner and T. Wilhelmsson, *Rethinking EU Consumer Law* (London, New York: Routledge, 2018), pp. 99-101.

34 Article 9 Consumer Rights Directive; Europese Commissie, 'Leidraad betreffende Richtlijn 2011/83/EU van het Europees Parlement en de Raad van 25 oktober 2011 betreffende consumentenrechten, tot wijziging van Richtlijn 93/13/EEG van de Raad en van Richtlijn 1999/44/EG van het Europees Parlement en de Raad en tot intrekking van Richtlijn 85/577/EEG en van Richtlijn 97/7/EG van het Europees Parlement en de Raad' (DG Justitie, juni 2014), p. 7.

35 Article 2(5) Consumer Rights Directive.

36 Article 2(6) Consumer Rights Directive.

expectation of simultaneous physical presence of the trader and the consumer, and where the contract can be concluded and maintained exclusively by means of one or more distance communication (such as e-mail, mobile application, or telephone) up to and including the time at which the contract is concluded.³⁷ Shared mobility would, in principle, qualify as a distance contract as this is inherent to the business model of these contracts. After all, it concerns flexible, short-term (use of) mobility, which is services-focussed, prioritising ease and accessibility often through an online mobile app.³⁸ Prior to entering individual (ad hoc) agreements, a framework agreement is typically established, wherein consumers are requested to accept the general terms and conditions applicable to the future individual agreements. These framework agreements are also often concluded as a distance contract through the provider's mobile application (paragraph 4.2).

One example is the shared mobility provider *Lime*, which provides two-wheelers such as mopeds, bicycles, and scooters. Users of *Lime* access the vehicles by downloading a mobile app. Using the app, the consumer can see which two-wheelers are available in the area, select a vehicle and scan to unlock it. Payment is also executed via the mobile app by entering payment details and the price per ride depends on the duration of the ride.³⁹ With shared mobility, there is an organised distance service provision scheme and no simultaneous physical presence of the contracting parties. Furthermore, parties use the mobile app exclusively as their means of communication. Therefore, shared mobility in principle qualifies as a distance contract. In the scenario where shared mobility use is offered via an online platform (Type e in paragraph 1.2.2 and Figure 2) the requirement of *organised distance service provision scheme* includes schemes provided by a third party other than the trader, but used by the trader, such as platforms.⁴⁰ This means that shared mobility contracts would qualify as a distance contract, despite being offered through a platform. In contrast to shared mobility, consumers of exclusive mobility conclude a contract at the business premises or as a distance contract.⁴¹ For example, *Swappfiets*, an exclusive mobility provider, offers two options. The consumer concludes an online contract whereafter the

37 Article 2(7) Consumer Rights Directive; Recital 20 Consumer Rights Directive; G. Howells, C. Twigg-Flesner and T. Wilhelmsson, *Rethinking EU Consumer Law* (London, New York: Routledge, 2018), pp. 99-101.

38 Figure 1: Operationalisation PSS and use-oriented services.

39 *Lime*, <<https://www.li.me/about-us>> accessed 24 November 2021.

40 The concept of *organised distance service-provision scheme* does not apply to cases where websites merely provide information about the trader, his goods and/or services and his contact details. Recital 20 Consumer Rights Directive; Europese Commissie, 'Leidraad betreffende Richtlijn 2011/83/EU van het Europees Parlement en de Raad van 25 oktober 2011 betreffende consumentenrechten, tot wijziging van Richtlijn 93/13/EEG van de Raad en van Richtlijn 1999/44/EG van het Europees Parlement en de Raad en tot intrekking van Richtlijn 85/577/EEG en van Richtlijn 97/7/EG van het Europees Parlement en de Raad' (DG Justitie, juni 2014), p. 36.

41 Article 2(7) Consumer Rights Directive; Recital 20 Consumer Rights Directive; G. Howells, C. Twigg-Flesner and T. Wilhelmsson, *Rethinking EU Consumer Law* (London, New York: Routledge, 2018), pp. 99-101.

bicycle is delivered to their front door or can be picked up at a *Swapfiets* shop.⁴² In the latter scenario, the contract is a distance contract only if the parties (*Swapfiets* and the consumer) meet after the contract is concluded.⁴³ Evidently, if consumers of exclusive mobility conclude a contract at the business premises, the contract does not qualify as a distance contract. Therefore, in the case of exclusive mobility use, the method of contract conclusion determines whether the contract qualifies as a distance contract. This needs to be assessed on a case-by-case basis (Table 10). Furthermore, the Consumer Rights Directive aims for full harmonisation, which means that Member States shall not maintain or introduce in their national law any provisions that diverge from those laid down in this directive, including more or less stringent provisions to ensure a different level of consumer protection. Member States may deviate from this on points specified in the directive.⁴⁴

In any case where a provision of this Consumer Rights Directive conflicts with a provision of another EU law, relating to specific sectors, the provision of that other EU law prevails and applies to those specific sectors.⁴⁵ As explained in paragraph 3.2, the principle of maximum harmonisation does not prevent Member States from applying provisions of the directive to areas not falling within its scope.⁴⁶ For example, it is possible to interpret

42 *Swapfiets*, <<https://swapfiets.nl>> accessed 24 November 2021.

43 By contrast, a contract actively negotiated on the business' premises and ultimately concluded using a means of distance communication should not be regarded as a distance contract. Europese Commissie, 'Leidraad betreffende Richtlijn 2011/83/EU van het Europees Parlement en de Raad van 25 oktober 2011 betreffende consumentenrechten, tot wijziging van Richtlijn 93/13/EEG van de Raad en van Richtlijn 1999/44/EG van het Europees Parlement en de Raad en tot intrekking van Richtlijn 85/577/EEG en van Richtlijn 97/7/EG van het Europees Parlement en de Raad' (DG Justitie, juni 2014), p. 36; V. Cap, P. Schwarzenegger, B. Luger, P. Bydlinski, and J. Stabentheiner (2012) 'Die Richtlinie über die Rechte der Verbraucher (2011/83/EU vom 25. Oktober 2011)' *Manzsche Verlags- und Universitätsbuchhandlung GmbH*, Wien, pp. 1-20; G. Howells, C. Twigg-Flesner and T. Wilhelmsson, *Rethinking EU Consumer Law* (London, New York: Routledge, 2018), p. 101.

44 Article 4 Consumer Rights Directive; Recital 2, 4, 5, 7 and 13 Consumer Rights Directive; European Commission, 'Study on the application Consumer Rights Directive 2011/83/EU, Final Report' (Luxembourg: Publications Office of the European Union, May 2017), p. 20. G. Heirman 'De algemene informatieverplichting t.a.v. consumenten in het wetboek van economisch recht (art. VI.2 WER)' in: G. Straetmans and R. Steennot, *Wetboek Economisch Recht En de Bescherming van de Consument* (Antwerpen: Intersentia, 2015), pp. 63-64. For some criticism on the premise of maximum harmonization, see: A. Verhoeven, 'Consument en interne markt – beschouwingen bij het voorstel van richtlijn betreffende consumentenrechten' in: J. Meeusen, G. Straetmans en A. van den Bossche (eds.), *Het EG-consumentenacquis: nu en straks* (Antwerpen: Intersentia, 2009), pp. 39 *et seq*; M. Desomer and B. Ballester (2011) 'De nieuwe Richtlijn Consumentenrechten in het kort' *Droit de la consommation – Consumentenrecht* (243) 244; C. Cauffman (2012) 'The Consumer Rights Directive – Adopted' *Maastricht Journal of European and Comparative Law* 19(1), pp. 212-218. C. Cauffman, M.G. Faure and T. Hartlief (2010) 'Het richtlijnvoorstel consumentenrechten: quo vadis?' *Contracteren* 3, pp. 72-73; M.B.M. Loos (2011) 'Harmonisatie van het consumentencontractenrecht' *Nederlands Juristenblad* (408), p. 410; C. Twigg-Flesner and D. Metcalfe (2009) 'The proposed Consumer Rights Directive – less haste, more thought?' *European Review of Contract Law* (368), pp. 370-371.

45 Article 3(2) Consumer Rights Directive.

46 Recital 13 Consumer Rights Directive.

the definition of the distance contract more broadly by stipulating that the rules still apply to distance contracts, even though *an organised system of services* is not used.⁴⁷ Therefore, the implementation into national jurisdictions is examined in paragraph 3.4.1.

Off-premises contract

An off-premises contract should be defined as a contract concluded with the simultaneous physical presence of the trader and the consumer in a place which is not the business premises of the trader, for example at the consumer's home or workplace.⁴⁸ Exclusive mobility could theoretically be concluded as an off-premises contract. In practice however, exclusive mobility contracts are either concluded online or on the business premises. Shared mobility contracts could also theoretically be considered off-premises contracts. However, an off-premises agreement is not obvious in this situation because it inherently opposes the rationale behind shared mobility, namely direct accessibility to use of a vehicle. Even with C2C collaborative sharing (Type f and Type g in paragraph 1.2.2 and Figure 2), the probability of concluding the contract as an off-premises contract is of a theoretical nature. Although an individual provider's vehicle is often not equipped with a method for contactless key transfer, meaning that the contract parties must meet physically, this is not the moment of conclusion of the contract. In practice, these contracts are also concluded as distance contracts, in line with the rationale of shared use. Since the method of concluding an off-premises contract contradicts the rationale of mobility usership, the off-premises contract will not be discussed further.

3.4.1 'Any contract' in national law of the Member States

The implementations of the *rationae materiae* scope of the Consumer Rights Directive in the national law of the Member States are discussed below. Subsequently, the service contract and the distance contract are discussed.

Service contract

In Germany, Belgium and the Netherlands, a directive-compliant interpretation of the definition of the service contract is used.⁴⁹ In addition, there is a connection with the

47 Recital 13 Consumer Rights Directive.

48 In addition, the definition of off-premises contracts should include situations where the consumer is personally and individually addressed in an off-premises context, but the contract is concluded directly afterwards on the business premises or via any means of distance communication, see Recital 21 Consumer Rights Directive.

49 Germany: § 312 German Civil Code. Belgium: Article I.8, 34° Belgian Code of Economic Law. Netherlands: Article 6:230g (1)(d) Dutch Civil Code; Dutch Consumer Rights Directive Implementation Act; Dutch Explanatory Memorandum, *Kamerstukken II 2012/13*, 33520, 3, p. 16; M.Y. Schaub, '4 Overeenkomst tot

interpretation of the term ‘service’ from the Treaty on the Functioning of the European Union and the Services Directive.⁵⁰ This definition is very broad, defining ‘service’ as any self-employed economic activity, normally provided for remuneration.⁵¹ With this definition, all mobility usership contracts are covered. In France, however, the civil code and the French consumer code do not explicitly define the service contract. However, French law clarifies that notwithstanding any stipulation to the contrary, the consumer may not be deprived of the protection afforded to him by the provisions adopted by the Consumer Rights Directive.⁵² This also indicates a directive-compliant interpretation. In this respect, mobility usership contracts are in all jurisdictions service contracts, which means that they are protected by the national rules that apply to these service contracts (Table 10).

Distance contract

France, Belgium, and the Netherlands implemented and defined the distance contract in accordance with the Consumer Rights Directive.⁵³ The definition of the distance contract in Germany is also very similar to that of the other jurisdictions and is defined as a contract that is concluded with the exclusive use of distance communication means that can be used to initiate or conclude a contract between a consumer and a professional party without the simultaneous physical presence of the contracting parties.⁵⁴ In contrast to the definition of the Consumer Rights Directive and the other national jurisdictions, German law uses the negative wording *es sei den* (meaning: unless) in the definition of a distance contract.⁵⁵ This means that the burden of proof of the absence of an organised distance service provision scheme lies with the professional party.⁵⁶ This difference in definition

het verrichten van diensten’ in: R.J.Q. Klomp & H.N. Schelhaas (red.), *GS Verbintenissenrecht* (Deventer: Wolters Kluwer); M.Y. Schaub, ‘5 Overeenkomst op afstand’ in: R.J.Q. Klomp & H.N. Schelhaas (red.), *GS Verbintenissenrecht* (Deventer: Wolters Kluwer).

50 Article 4 Services Directive; Article 57 TFEU; Tweede Kamer der Staten-Generaal, *Kamerstukken II 2012/13*, 33520, 3, p. 16. Also see: M.Y. Schaub, ‘4 Overeenkomst tot het verrichten van diensten’ in: R.J.Q. Klomp & H.N. Schelhaas (red.), *GS Verbintenissenrecht* (Deventer: Wolters Kluwer).

51 Article 4 Services Directive; Article 57 TFEU.

52 Article L. 232-3 French Consumer Code.

53 France: Article L221-1, 1° French Consumer Code. Belgium: Article 1.8, 15° Belgian Code of Economic Law. Netherlands, *overeenkomst op afstand*: Article 6:230g(1) sub e Dutch Civil Code; Dutch Consumer Rights Directive Implementation Act; Dutch Explanatory Memorandum, *Kamerstukken II 2012/13*, 33520, 3, p. 16; M.Y. Schaub, ‘4 Overeenkomst tot het verrichten van diensten’ in: R.J.Q. Klomp & H.N. Schelhaas (red.), *GS Verbintenissenrecht* (Deventer: Wolters Kluwer); M.Y. Schaub ‘5 Overeenkomst op afstand’ in: R.J.Q. Klomp & H.N. Schelhaas (red.), *GS Verbintenissenrecht* (Deventer: Wolters Kluwer).

54 Section 312c(1) German Civil Code.

55 Germany: Section 312c German Civil Code; C. Wendehorst, *Münchener Kommentar zum BGB*, 8. Auflage 2019, BGB § 312c Fernabsatzverträge, Rn. 2; J.D. Brinkmann and J. Ludwigkeit (2014) ‘Neuerungen des situativen Anwendungsbereichs besonderer Vertriebsformen’ *Neue Juristische Wochenschrift* 3270, p. 3272.

56 Germany: Section 312c German Civil Code; C. Wendehorst, *Münchener Kommentar zum BGB*, 8. Auflage 2019, BGB § 312c Fernabsatzverträge, Rn. 1; J.D. Brinkmann and J. Ludwigkeit (2014) ‘Neuerungen

does not alter the fact that shared mobility usership qualifies as a distance agreement in all Member States. This is also, under specific circumstances, the case for exclusive mobility use (as determined under paragraph 3.4).

In Dutch and Belgian law, the requirement of an *organised system for distance services* must indicate a systematic and not a more or less accidental use of a means of distance communication, with a focus on the means by which a distance contract is concluded. In other words, it should indicate that the provider regularly concludes distance contracts.⁵⁷ In Belgium, it must be examined for each specific case whether it fits within an organised system.⁵⁸ This is, for example, the use of mobile applications to view the offer of shared mobility or an offer on the *Swapfiets* website.⁵⁹ Here too, the national implementation of the scope does not appear to deviate from the directive, meaning that the qualification of the mobility usership contract as a distance contract does not deviate from the EU level. In line with the directive, the Member States also acknowledge that the concept of organised distance service provision schemes includes schemes provided by a third party other than the trader, but used by the trader, such as an online platform.⁶⁰ This means that mobility usership would in such cases qualify as a distance contract.⁶¹ It is important, however, that

des situativen Anwendungsbereichs besonderer Vertriebsformen' *Neue Juristische Wochenschrift* 3270, p. 3272.

- 57 Belgium: E. Terryn, 'Artikel 2.21°-2.23° WMPC' in: *Handels- en economisch recht: Commentaar met overzicht van rechtspraak en rechtsleer* (Mechelen: Kluwer, 2011); G. Straetmans, 'Recente tendensen in handelspraktijken' *CBR Jaarboek 2005-2006* (Antwerpen: Maklu, 2006), pp. 173-174; R. Steennot, C. Biquet-Mathieu, J. Loly (2009) 'Het herroepingsrecht: het voorstel van Richtlijn betreffende consumentenrechten en haar impact op de Belgisch wetgeving' *Droit de la consommation – Consumentenrecht* (81), pp. 89-90; R. Steennot and E. Terryn (2014) 'De nieuwe bepalingen uit Boek IV van het wetboek Economisch Recht: een eerste commentaar' *Droit de la consommation – Consumentenrecht* (3), pp. 3-62. Netherlands: Dutch Explanatory Memorandum, *Kamerstukken II 2012/13*, 33520, 3, pp. 16-17. This is in line with Recital 20 Consumer Rights Directive.
- 58 For example, consumers cannot rely on distance contract protection if products are occasionally offered at a distance. Therefore, it does not mean that because an agreement is concluded via e-mail, this automatically constitutes a distance agreement. See for more: C. Biquet-Mathieu and J. Decharneux (2002) 'Aspects de la conclusion du contrat par voie électronique' *Actualités du Droit* (149), p. 173; R. Steennot, 'Commentaar bij art. I.8, 15° en I.8, 16° WER' in: *Handels- en economisch recht: Commentaar met overzicht van rechtspraak en rechtsleer* (Mechelen: Kluwer, 2014).
- 59 Dutch Explanatory Memorandum, *Kamerstukken II 2012/13*, 33520, 3, p. 16; Dutch Explanatory Memorandum, *Kamerstukken II 1999/2000*, 26861, 3.
- 60 The concept of *organised distance service-provision scheme* does not apply to cases where websites merely provide information about the trader, his goods and/or services and his contact details. Recital 20 Consumer Rights Directive; Europese Commissie, 'Leidraad betreffende Richtlijn 2011/83/EU van het Europees Parlement en de Raad van 25 oktober 2011 betreffende consumentenrechten, tot wijziging van Richtlijn 93/13/EEG van de Raad en van Richtlijn 1999/44/EG van het Europees Parlement en de Raad en tot intrekking van Richtlijn 85/577/EEG en van Richtlijn 97/7/EG van het Europees Parlement en de Raad' (DG Justitie, juni 2014), p. 36.
- 61 Especially collaborative C2C platform sharing (Type e). See Figure 2.

such a website does not solely contain information about the mobility usership service of the professional party.⁶²

A distance contract exists when an agreement is concluded by way of techniques for communication at a distance. Difficulties in delimitation might arise when the conclusion of the contract itself was carried out using only means of distance communication, but the conclusion of the contract was preceded by personal contact with the professional party.⁶³ In that circumstance, the contract may no longer qualify as a distance contract because the contracting parties have *simultaneous physical presence* and there might not be an *exclusive use of one or more means of distance communication*. As mentioned in paragraph 3.4 the mere collection of the item (for example picking up a *Swapfiets* in a store) does not mean that there is no longer a distance contract. Also, the prior collection of information in business premises will not prevent the contract from being a distance contract. This interpretation is similar in the national jurisdictions.⁶⁴ All relevant contractual acts up to and including the conclusion of the contract must take place 'distantly' with distance

62 The Netherlands: For example: Dutch Court of Rotterdam, 12 January 2017, ECLI:NL:RBROT:2017:751; Dutch Court of Noord-Holland, 27 June 2018, ECLI:NL:RBNHO:2018:5363. Germany: German Federal Court of Justice Karlsruhe, 3 November 2004, VIII ZR 375/03, pp. 1-23. Belgium: A. Dierick (2014) 'De Europese Richtlijn Consumentenrechten. Richtlijn 2011/83/EU en de impact op de Belgische Wet Marktpraktijken' *Nieuw Notarieel Kwartaalschrift* 1, p. 5; E. Terryn, 'De richtlijn consumentenrechten – nieuwe reglementering op komst voor onder meer overeenkomsten op afstand en buiten verkoop ruimten gesloten overeenkomsten' in: J. Falconis *De wet marktpraktijken en consumentenbescherming toegepast* (Intersentia: Antwerpen, 2011); E. Cruysmans (2013) 'La Directive 2011/83/UE du 25 octobre 2011 relative aux droits des consommateurs' *Tijdschrift voor Belgisch Burgerlijk Recht* 2013, 4(174), p. 190; R. Steennot, 'Commentaar bij art. I.8, 15° en I.8, 16° WER' in: *Handels- en economisch recht: Commentaar met overzicht van rechtspraak en rechtsleer* (Mechelen: Kluwer, 2014); R. Steennot, 'Distance Selling' in: G. Straetmans en J. Stuyck (eds.), *Commercial Practices* (Brussel: Larcier, 2014), pp. 143, 145; R. Steennot, 'Bescherming van de consument bij overeenkomsten op afstand' in: R. De Corte (ed.), *Praktijkboek Recht en Internet* (Brugge: Vanden Broele, 2010), p. 10. Also see: Recital 20 Consumer Rights Directive and Article 2(7) Consumer Rights Directive; J. Goddaer (2012) 'De Richtlijn Consumentenrechten: Gevolgen voor de WMPC an de Elektronische Handel' *Droit de la consommation – Consumentenrecht* 97(7), p. 13. Belgian Explanatory Memorandum, nr. 53-3018/001 van de Belgische Kamer van Volksvertegenwoordigers aangaande 'Wetsontwerp houdende invoeging van boek VI 'Marktpraktijken en consumentenbescherming' in het Wetboek van economisch recht en houdende invoeging van de definities eigen aan boek VI, en van de rechtshandhabingsbepalingen eigen aan boek VI, in de boeken I en XV van het Wetboek van economisch recht' (24 september 2013), p. 12.

63 Recital 20 Consumer Rights Directive.

64 Netherlands: Dutch Court of Rotterdam, 12 January 2017, ECLI:NL:RBROT:2017:751, p. 3.1. Belgium: Recital 20 Consumer Rights Directive; Belgian Explanatory Memorandum, nr. 53-3018/001 van de Belgische Kamer van Volksvertegenwoordigers aangaande 'Wetsontwerp houdende invoeging van boek VI 'Marktpraktijken en consumentenbescherming' in het Wetboek van economisch recht en houdende invoeging van de definities eigen aan boek VI, en van de rechtshandhabingsbepalingen eigen aan boek VI, in de boeken I en XV van het Wetboek van economisch recht' (24 september 2013), p. 12. Germany: Section 312 (c) German Civil Code; D. Brinkmann and J. Ludwigkeit (2014) 'Neuerungen des situativen Anwendungsbereichs besonderer Vertriebsformen' *Neue Juristische Wochenschrift* 3270, pp. 3272-3273.

contracts.⁶⁵ Therefore the national implementations of this requirement does not change the circumstances under which a mobility usership contract is qualified as a distance contract.

In all jurisdictions, the *exclusive use of one or more means of distance communication* is, as in the directive, a requirement.⁶⁶ In Germany, there is a non-exhaustive list of examples of what these distance communication means could entail, such as emails, letters and messages sent via phone.⁶⁷ Like in the other national jurisdictions, this means of distance communication could entail the use of mobile applications to contract with a shared mobility usership provider. This condition is met for shared mobility usership but is also possible under certain circumstances for exclusive mobility usership. In all jurisdictions, a distance contract also exists if the consumer has visited the business premises of the professional party to find out about the services, provided that the actual negotiations themselves, including the conclusion of the contract, take place purely by means of distance communication.⁶⁸ The distinction between ‘information’ and ‘negotiation’ is difficult, especially since consumer contracts concluded at a distance are typically contracts of adhesion that do not involve individual negotiations.⁶⁹ In this respect, shared mobility usership falls under the definition of the distance contract. For exclusive mobility usership, this needs to be determined on a case-by-case basis along the lines of the applicable requirements because these contracts can be concluded on a business premises

65 Dutch Explanatory Memorandum, *Kamerstukken II 2012/13*, 33520, 3, p. 17.

66 Belgium: Article I.8, 16° Belgian Code of Economic Law. Germany: Section 312c(2) BGB; C. Wendehorst, *Münchener Kommentar zum BGB*, 8. Auflage 2019, BGB § 312c Fernabsatzverträge, Rn. 13-16. The Netherlands: Article 6:230g Dutch Civil Code. Also see: Belgian Explanatory Memorandum, ‘Wetsontwerp houdende invoeging van boek VI ‘Marktpraktijken en consumentenbescherming’ in het Wetboek van economisch recht en houdende invoeging van de definities eigen aan boek VI, en van de rechtshandhabingsbepalingen eigen aan boek VI, in de boeken I en XV van het Wetboek van economisch recht’ (24 September 2013, Kamer 2012-2013), DOC 53-3018/001, p. 12; R. Steennot (2013) ‘Consumer protection with regard to distance contracts after the transposition of the Consumer Rights Directive in Belgium and France’ *European Consumer Law Journal* 3-4, pp. 415-458; R. Steennot (2013) ‘The right of withdrawal under the Consumer rights Directive as a tool to protect consumers concluding a distance contract’ *Computer Law & Security Review*, p. 107.

67 Section 312c(2) BGB. The list is partly based on the list in Appendix I Distance Selling Directive, which is also non-exhaustive, see Article 2(4) Distance Selling Directive. Also see: C. Wendehorst, *Münchener Kommentar zum BGB*, 8. Auflage 2019, BGB § 312c Fernabsatzverträge, Rn. 13-16.

68 Recital 20 Consumer Rights Directive; C. Wendehorst, *Münchener Kommentar zum BGB*, 8. Auflage 2019, BGB § 312c Fernabsatzverträge, Rn. 21-23; M.Y. Schaub ‘5 Overeenkomst op afstand’ in: R.J.Q. Klomp & H.N. Schelhaas (red.), *GS Verbintenissenrecht* (Deventer: Wolters Kluwer).

69 Germany: C. Wendehorst, *Münchener Kommentar zum BGB*, 8. Auflage 2019, BGB § 312c Fernabsatzverträge, Rn. 21-23; F. Buchmann (2014) ‘Das neue Fernabsatzrecht 2014’ *Kommunikation & Recht*, p. 371; S. Bittner, J. Clausnitzer, C. Föhlisch, *Das neue Verbrauchervertragsrecht* (Köln: Verlag Dr. Otto Schmidt KG, 2014), Rn. 84; M. Martinek ‘III. Abgrenzung der Fernabsatzverträge’ in: M. Martinek, F.-J. Semler, E. Flohr, *Handbuch des Vertriebsrechts* (München: C.H. Beck, 2016), Rn. 9. Belgium: Article I.8, 16° Belgian Code of Economic Law.

(as a service contract) but also at a distance as a distance contract. This is summarised in Table 10.

Table 10: Qualification of mobility usership *ratione materiae* scopes of the CRD

Qualification of mobility usership under the CRD		
MU contracts CRD Contracts	<i>Exclusive mobility use</i>	<i>Shared mobility use</i>
<i>Sales agreement</i>	No	No
<i>Service agreement</i>	Yes	Yes
<i>Distance contract</i>	Yes or no To be determined on a case-by-case basis	Yes
<i>Off-premises contract</i>	In theory possible	In theory possible

3.5 COMMERCIAL PRACTICES IN THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE

The Unfair Commercial Practices Directive applies to unfair B2C commercial practices before, during and after a commercial transaction in relation to a product.⁷⁰ These practices are specified in the directive.⁷¹ The Unfair Commercial Practices Directive works slightly different from the directives discussed above because the Unfair Commercial Practices Directive prohibits unfair commercial practices as acts on their own accord, rather than protecting consumers that conclude legal contracts.⁷² In previous directives, the definition of the contract could be examined in order to determine whether the mobility usership contract qualifies as the contract protected under the directive. Regarding the *ratione materiae* scope, the directive applies to commercial practices, whereas the remedies only apply where the commercial practice is unfair. This ‘unfairness’ of the practice will not be elaborated on. This is only relevant when mobility usership can be qualified as a commercial practice and research into unfairness is not relevant for this chapter. Moreover, the classification of ‘unfair’ depends largely on the facts and circumstances of the case. This means that this paragraph examines whether mobility usership qualifies as

70 Article 3(1) Unfair Commercial Practices Directive. Also see: E. Bülesbach (2008) ‘Auslegung der irreführenden Geschäftspraktiken des Anhangs I der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken’ *Münchener Universitätschriften*, Reihe der Juristischen Fakultät, Band 222 (München: C.H. Beck), pp. 13-15.

71 Article 5(2) Unfair Commercial Practices Directive.

72 C.J.J.C. Nispen, ‘Begrip Oneerlijke handelspraktijken’ in: C.J.J.M. Stolker (red.), *GS Onrechtmatige daad* (Deventer: Wolters Kluwer).

a commercial practice. If this is the case, and an unfair practice occurs, the rights deriving from this directive have effect. The commercial practice entails any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale, or supply of a product to consumers.⁷³ It protects the economic interests of consumers before, during and after a commercial transaction takes place.⁷⁴ The directive entails principle-based provisions that cover a wide range of practices. While the broadness of the notion of commercial practices is somewhat tempered because the act, omission, conduct, representation or commercial communication must be ‘directly related to’ the promotion, sale or supply of a product,⁷⁵ the EU nevertheless states that the scope is broad enough to cover rapidly evolving products, services, and sales methods. This seems to reflect that mobility usership is covered under the directive as it concerns a commercial practice.⁷⁶

The Unfair Commercial Practices Directive is based on the principle of full harmonisation. To remove barriers to the internal market and provide greater legal certainty for both consumers and businesses, a uniform regulatory framework has been established at the EU level to harmonise national rules.⁷⁷ Below, I will examine how the notion of commercial practice is implemented into national jurisdictions.

73 Article 2(d) Unfair Commercial Practices Directive. For an elucidation on this definition: E. Bülesbach (2008) ‘Auslegung der irreführenden Geschäftspraktiken des Anhangs I der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken’ *Münchener Universitätsschriften*, Reihe der Juristischen Fakultät, Band 222 (München: C.H. Beck), pp. 17-20.

74 In part, this may involve the *ratione temporis* scope. This will not be discussed further. The first judgments of the CJEU take a broader course in terms of the scope of the directive, as it is not only protecting the economic interests of the consumer, but also of the interests of the competitor. See for example: CJEU, Case C-261/07, 23 April 2009, ECLI:EU:C:2009:244 (*VTB/Total*) with annotation of M.R. Mok; CJEU, Case C-304/08, 14 January 2010, ECLI:EU:C:2010:12 (*Plus Warenhandelsgesellschaft*) with annotation of M.R. Mok.

75 Recital 7 Unfair Commercial Practices Directive; D.W.F. Verkade, *Oneerlijke handelspraktijken jegens consumenten (Monografieën BW nr. B49a)* (Deventer: Wolters Kluwer, 2016), nr. 20-22; C.J.J.C. van Nispen, ‘5 Handelspraktijk (lid 1 sub d)’ in: C.J.J.M. Stolker (red.), *GS Onrechtmatige daad* (Deventer: Wolters Kluwer); E. Bülesbach (2008) ‘Auslegung der irreführenden Geschäftspraktiken des Anhangs I der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken’ *Münchener Universitätsschriften*, Reihe der Juristischen Fakultät, Band 222 (München: C.H. Beck), pp. 17-20.

76 Article 3(1) Unfair Commercial Practices Directive; European Commission, ‘Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices: Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: a comprehensive approach to stimulating cross-border e-Commerce for Europe’s citizens and businesses’ (Brussels, 25 May 2016) SWD(2016) 163 final.

77 Recitals 5, 12, 13 Unfair Commercial Practices Directive; Europese Commissie, ‘Guidance on the Implementation/Application Of Directive 2005/29/EC On Unfair Commercial Practices Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A comprehensive approach to stimulating cross-border e-Commerce for Europe’s citizens and businesses’ (Brussels, 25 May 2016)

3.5.1 Commercial practices in national law of the Member States

In line with the directive, the national definitions should be broadly interpreted due to the choice of terminology in the directive.⁷⁸ In Dutch and French law, the definition of the commercial practice is equivalent to the definition in the directive,⁷⁹ whereas in German and Belgian law, the definition goes further than the concept of commercial practices under EU law.⁸⁰ This follows from the fact that in Germany and Belgium, the concept includes actions in the vertical relationship with other market participants, for example actions directed against competitors. In addition, it includes actions taken when buying goods and services, actions by third parties who are not acting in the name and/or on behalf of the entrepreneur or who are not entrepreneurs, to promote the sale or purchase of a third-party company and actions that lie outside the scope of the Unfair Commercial

SWD (2016) 163 final, pp. 11-13; S. Whittaker, 'The Relationship of the Unfair Commercial Practices Directive to European and National Contract Laws' in: S. Weatherill and U. Bernitz, *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Bloomsbury Publishing, 2006), p. 139. The ECJ has been in favour of full harmonization. See: CJEU, Case C-261/07, 23 April 2009, ECLI:EU:C:2009:244 (*VTB/Total*), p. 52; P. Remy-Corlay (2005) 'La directive 2005/29 CE sur les pratiques déloyales, directive d'harmonisation maximale' *Revue Trimestrielle De Droit Civil*, p. 746; E. Büllsbach (2008) 'Auslegung der irreführenden Geschäftspraktiken des Anhangs I der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken' *Münchener Universitätschriften*, Reihe der Juristischen Fakultät, Band 222 (München: C.H. Beck), p. 13.

- 78 Netherlands: D.W.F. Verkade, *Oneerlijke handelspraktijken jegens consumenten (Monografieën BW nr. B49a)* (Deventer: Wolters Kluwer, 2016), nr. 20-22; C.J.J.C. van Nispen, '5 Handelspraktijk (lid 1 sub d)' in: C.J.J.M. Stolker (red.), *GS Onrechtmatige daad* (Deventer: Wolters Kluwer); Dutch Explanatory Memorandum, *Kamerstukken II 2006/07*, 30928, 3, p. 2. France: P. Remy-Corlay (2005) 'La directive 2005/29 CE sur les pratiques déloyales, directive d'harmonisation maximale' *Revue Trimestrielle De Droit Civil*, p. 746.
- 79 Netherlands: Article 6:193a(1)(d) Dutch Civil Code; Dutch Law adapting the Directive on Unfair Commercial Practices by companies towards consumers in the internal market, pp. 397-398; Dutch Explanatory Memorandum, *Kamerstukken II 2006/07*, 30928, 3, pp. 2-14. Dutch Note Subsequent to the Report, *Kamerstukken II 2006/07*, 30928, 8, p. 6; Dutch Supplementary Explanatory Memorandum, *Kamerstukken I 2007/08*, 30928, E, pp. 6-7; Dutch Court of Appeal Arnhem-Leeuwarden, 13 May 2014, ECLI:NL:GHARL:2014:3884, p. 3.13 with annotation of C.M.D.S. Pavillon; Dutch Court of Appeal Arnhem-Leeuwarden, 20 December 2016, ECLI:NL:GHARL:2016:10382, p. 5.43 and 5.44. On the criticism see: Dutch Court of Appeal Arnhem-Leeuwarden, 20 december 2016, ECLI:NL:GHARL:2016:10832, with annotation of P.G.F.A. Geerts, pp. 10-11; D.W.F. Verkade, *Oneerlijke handelspraktijken jegens consumenten (Monografieën BW nr. B49a)* (Deventer: Wolters Kluwer, 2016), nr. 8-14. France: Article L. 121-1 French Consumer Code; P. Remy-Corlay (2005) 'La directive 2005/29 CE sur les pratiques déloyales, directive d'harmonisation maximale' *Revue Trimestrielle De Droit Civil*, p. 746.
- 80 Belgium: Article 93(5) Belgian Act of 14 July 1991 on commercial practices and consumer information and protection; Germany: Section 2(1)(2) German Unfair Competition Law; H. Köhler, Köhler/Bornkamm/Feddersen, *UWG*, 41. Auflage 2023, *UWG* § 2 Begriffsbestimmungen, Rn. 3-6b; J. Stuyck and B. Keirsbilck (2019) 'De nieuwe Belgische wet met betrekking tot misbruik van economische afhankelijkheid, onrechtmatige bedingen en oneerlijke marktpraktijken tussen ondernemingen: een eerste commentaar' *Tijdschrift voor Europees en economisch recht* 9, pp. 374-394.

Practices Directive.⁸¹ The extension of the scope to B2B contracts will not be discussed further, as this research explicitly focusses on B2C contracts. In conclusion, the national implementations of the directive do not alter the fact that mobility usership qualifies as a commercial practice.

3.6 CONTRACTS CONCLUDED BETWEEN A SELLER OR SUPPLIER AND A CONSUMER IN THE UNFAIR CONTRACT TERMS DIRECTIVE

The Unfair Contract Terms Directive protects consumers in the EU from unfair terms and conditions which might be included in a standard contract for goods and services purchased by consumers.⁸² This means that the directive applies to *all* contracts for both the purchase of goods and the supply of services. The European Court of Justice also endorses that the directive applies to all sectors of economic activity.⁸³ However, this does not *a priori* preclude Member States from extending the scope of national rules transposing the Unfair Contract Terms Directive to other contracts, for example to contracts between two sellers or two consumers.⁸⁴

Terms not individually negotiated

In addition to the requirement that the directive applies to all contracts between seller and consumer, the directive only applies to contract terms that have not been individually negotiated.⁸⁵ The directive included certain assumptions and provisions on the burden of proof as to whether a contract term is individually negotiated.⁸⁶ In general, *standard*, *standardised*, and *pre-drafted* contract terms, which are often included in the general

81 H. Köhler, Köhler/Bornkamm/Feddersen, UWG, 41. Auflage 2023, UWG § 2 Begriffsbestimmungen, Rn. 3-6b.

82 Article 1(1) and 2(a) of Unfair Contract Terms Directive. The Directive applies to contracts concluded between a seller or supplier and a consumer, see: Chapter 2; Article 1, 2(b), 2(c) Unfair Contract Terms Directive; Recital 10 Unfair Contract Terms Directive; European Commission ‘Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts’ *Official Journal of the European Union* (27 September 2019) C323/4; See on the notion of consumer under Unfair Contract Terms Directive: P. Rott ‘Unfair contract terms’ in: C. Twigg-Flesner (ed.), *Research handbook on EU Consumer and Contract Law* (Glos, Edward Elgar Publishing Limited, 2016), pp. 290-292.

83 CJEU, Case C-290/16, 6 July 2017, ECLI:EU:C:2017:523 (*Air Berlin*), p. 44.

84 Article 1(1) Unfair Contract Terms Directive; European Commission ‘Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts’ *Official Journal of the European Union* (27 September 2019) C323/4, pp. 10-13. P. Rott “Unfair contract terms” in: C. Twigg-Flesner (ed.), *Research handbook on EU Consumer and Contract Law* (Glos, Edward Elgar Publishing Limited, 2016), pp. 290-292.

85 Article 2 and 3(1) Unfair Contract Terms Directive.

86 Article 3(2) Unfair Contract Terms Directive.

terms and conditions, fall within the scope.⁸⁷ Furthermore, it is relevant that the terms co-determine the rights and obligations of the parties and that no separate negotiation has taken place on the specific term(s) in question.⁸⁸ The directive is a minimum harmonisation directive; it merely indicates a mandatory minimum level that legislation of a Member State must comply with. Member states have the freedom to include stricter or more far-reaching standards in their legislation.⁸⁹

3.6.1 B2C contracts in national law of the Member States

All national jurisdictions qualify mobility usership as a contract as protected under the Directive.⁹⁰ In the Netherlands, Belgium, and Germany the provisions extend to B2B contracts. However, an extension of the scope to B2B contracts is not discussed further, as this falls outside the scope of this research.⁹¹ In France, the application of the directive's provisions is limited to B2C contracts. In addition, French law extends the protection of the directive to unfair contract terms that have been individually negotiated.⁹² Regardless

87 Article 3(2) Unfair Contract Terms Directive; Recital 9, 11 Unfair Commercial Practices Directive; CJEU, Case C-191/15, 28 July 2016, ECLI:EU:C:2016:612 (*Verein für Konsumenteninformation/Amazon*), p. 63.

88 Recital 11 Unfair Contract Terms Directive. It is not of decisive importance in what form the terms are laid down, how the agreement was concluded, in which part of the agreement the terms are placed and whether they are included in one or more documents.

89 Article 8 Unfair Contract Terms Directive; European Commission 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (27 September 2019) C323/4.

90 Netherlands: Article 6:231-6:247 TFEU. Germany: German federal legal gazette, Teil I, 'Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz)' (9 December 1976) Z1997A, 142, pp. 3317-3324; N. Reich (1997) 'The implementation of Directive 93/13/EEC on unfair terms in consumer contracts in Germany' *European Review of Private Law* 5(2), pp. 165-172. Belgium: Article I.8, 22° Belgian Code of Economic Law; Belgian Chamber of Representatives, 'Proposition de loi modifiant le Code de droit économique en ce qui concerne l'abus d'une position dominante significative' (12 février 2019) DOC 54 1451/003, p. 32; R. Steennot, 'Inleiding' in: R. Steennot, *Onrechtmatige bedingen in de wet van 6 april 2010 betreffende marktpraktijken en consumentenbescherming: artikelsgewijze bespreking* (Kluwer: Mechelen, 2012), p. 5. I. Demuyne, *De inhoudelijke controle van onrechtmatige bedingen* (Diss., Universiteit Gent, 1999-2000), pp. 86-87; H. Schulte-Nölke, C. Twigg-Flesner, M. Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States* (Sellier, 2009), p. 329.

91 Germany: N. Reich (1997) 'The implementation of Directive 93/13/EEC on unfair terms in consumer contracts in Germany' *European Review of Private Law* 5(2), pp. 165-172. Belgium: H. Schulte-Nölke (2015) 'No Market for 'Lemons': On the Reasons for a Judicial Unfairness Test for B2B Contracts' *European Review of Private Law* 2, pp. 195-216. The Netherlands: There is, however, a nuance in the Netherlands. For example, contract parties who employ more than 50 people cannot invoke the annulment of a clause as referred to in Articles 6:233 and 6:234 Dutch Civil Code, see: For other conditions under which annulment cannot be invoked: Article 6:235(1)(a)(b); 2:360; 2:403(1) Dutch Civil Code.

92 Article L. 132-1 *et seq* French Consumer Code; European Commission 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (27 September 2019) C323/4, pp. 90-92.

of this discrepancy, mobility usership is subject to the national implementations of the directive if the terms are not individually negotiated, and in France, even if the terms are individually negotiated.

3.7 CONCLUSION

This chapter examines the *ratione materiae* scope to find whether mobility usership falls under the scope of the researched directives. Each EU directive protects a specific contract, so this is considered for each directive.

The Consumer Sales Directive and the Consumer Credit Directive do not protect mobility usership because the *ratione materiae* scope includes a transition of ownership, a requirement that is not fulfilled with mobility usership. The fact that there is no equivalent protection is remarkable since exclusive use shows many similarities with consumer credit. Despite these similarities, it is unclear why equivalent protection does not apply here, especially considering the rationale of consumer protection that applies in both scenarios. It does not seem to be without reason that there exists an exception on a national level for exclusive mobility use, whereby the German implementation of the Consumer Credit Directive covers exclusive mobility usership contracts. The Consumer Rights Directive, Unfair Commercial Practices Directive, and the Unfair Contract Terms Directive all have a broader scope of application where the transfer of ownership is not necessary for the acquisition of protection. This means that these directives protect the consumer of mobility usership to a greater or lesser extent. The Consumer Rights Directive includes targets for different contract types, namely the sales contract, the service contract, the distance contract, and the off-premises contract. Naturally, mobility usership does not qualify as a sales contract. Furthermore, mobility usership does fall under the definition of the service contract, whereas for the distance contract, a distinction exists between exclusive use and shared use. Shared mobility use qualifies as a distance contract as well but for exclusive use, this needs to be determined on a case-by-case basis because its qualification depends on the way the contract is concluded.

In the next chapter, Table 11 provides an overview of the *ratione personae* scope and the *ratione materiae* scope. This provides insight into the (in)equivalent protection of consumers in mobility usership.

4 NON-APPLICABLE SUBSTANTIVE RIGHTS TO MOBILITY USERSHIP

4.1 INTRODUCTION

Chapters 2 and 3 examined the *ratione personae* and *ratione materiae* scopes of the selected directives and their implementations into Dutch, Belgian, German and French law. Table 11 summarises these results. The white boxes symbolise the circumstances in which the mobility usership consumer is offered protection based on the abovementioned scopes. The dark grey boxes symbolise the circumstances where either one or both scopes do not cover mobility usership, resulting in an inequivalent protection. On the one hand, the inequivalence arises from not satisfying the *ratione personae* scope because a prosumer is not a professional party and only B2C relationships fall within the scope. On the other hand, this inequality arises from the *ratione materiae* scope, where the mobility usership contract is not always covered by the scope of the respective directives.¹ The light grey boxes indicate that it depends on the circumstances whether the mobility usership contract falls within the scope of the directive. Where necessary, a distinction is made in the type of mobility usership contract (exclusive or shared).

Table 11 indicates when the substantive rights of the directives apply to mobility usership and when they do not. For both scenarios, the substantive rights are examined in the two upcoming chapters. This chapter examines all substantive rights that do **not** apply to B2C mobility usership due to the scope of the directives. At first glance, this approach may seem odd; however, it is important to investigate these non-applicable rights because it provides insight into the extent to which the rationale of the directive should also apply to mobility usership, and subsequently whether this would be practically possible and offer proportional protection. The C2C relationship (right column of Table 11) is not discussed in these chapters because this study focusses on consumer protection; consumer law does not apply to C2C agreements due to the *ratione personae* scope (chapter 2).

1 For example, the mobility usership contract does not fall under the scope of the Consumer Sales Directive 2019 because there must be a transfer of ownership to fall under the scope of the directive and this transfer of ownership is absent in mobility usership contracts. Recital 23 Consumer Sales Directive; Article 2(1) Consumer Sales Directive.

Table 11: *Ratione personae* scope versus *rationae materiae* scope

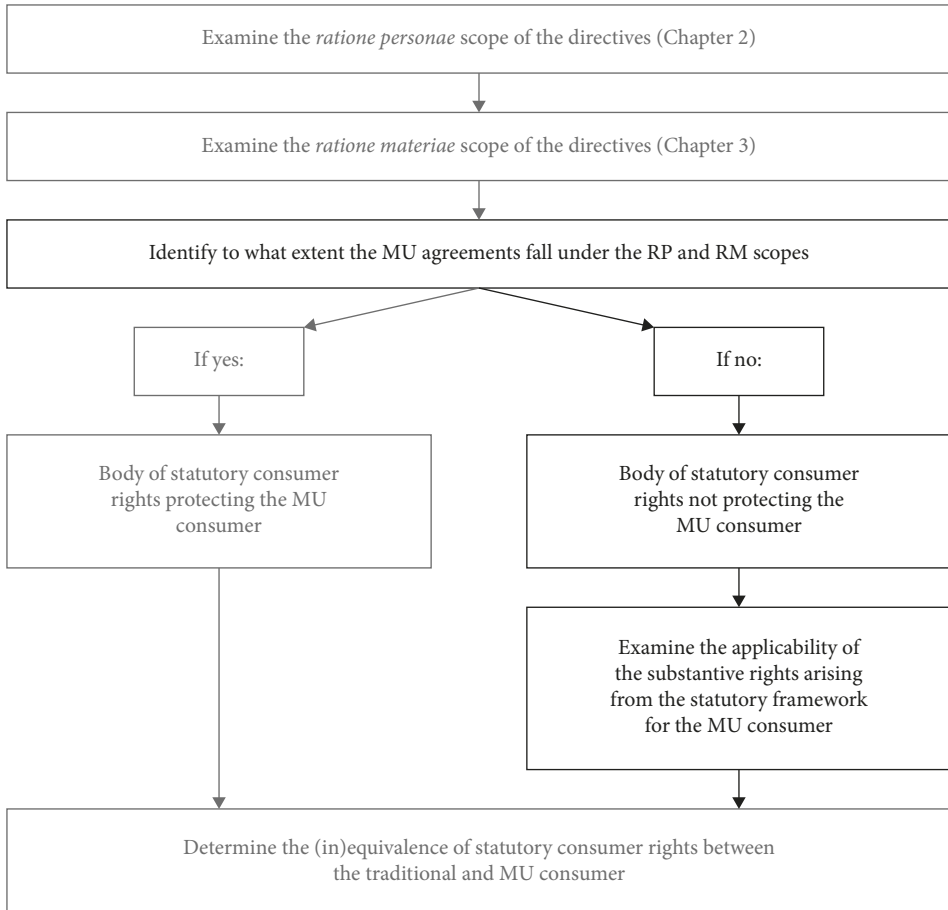
<i>Ratione personae</i> scope versus <i>rationae materiae</i> scope					
<i>Ratione personae</i> scope	<i>Professional party</i>				<i>Non-professional party</i>
	<i>Private company</i>	<i>Collaborative</i>		<i>Individual provider</i>	
		<i>Co-owner</i>	<i>Sole consumer</i>	<i>Self-employed person</i>	<i>Prosumer</i>
<i>Sales contract</i>	No	Yes	No	No	No, as neither of the directives covers C2C contracts.
<i>Consumer credit agreement</i>	No, for all MU contracts in NL, BE, and FR. Yes, for exclusive MU in GER.	Yes	No, for all MU contracts in NL, BE, and FR. Yes, for exclusive MU in GER.	No, for all MU contracts in NL, BE, and FR. Yes, for exclusive MU in GER.	
<i>Any contract</i>	Yes	Yes	Yes	Yes	
<i>Service contract</i>	Yes	Yes	Yes	Yes	
<i>Distance contract</i>	Exclusive use on case-by-case basis. Yes, for shared MU.	Yes	Exclusive use on case-by-case basis. Yes, for shared MU.	Exclusive use on case-by-case basis. Yes, for shared MU.	
<i>Off-premises</i>	In theory possible but goes against the MU rationale.				
<i>Sales contract</i>	No	Yes	No	No	
<i>Commercial practices in UCPD</i>	Yes	Yes	Yes	Yes	
<i>All contracts in UCTD</i>	Yes, FR also covers individually negotiated terms.	Yes	Yes, FR also covers individually negotiated terms.	Yes, FR also covers individually negotiated terms.	

Consideration of common contract law versus consumer law is necessary when accounting for issues such as the qualification of the prosumer and the question of whether the addition of a new category to private law – besides the consumer and professional parties – makes sense.² The possible overlap if the non-applicable rules would apply exists, for example, in the right to information, where the provider is obliged to inform the consumer about

2 V. Mak (2022) ‘De ‘prosumert’ in de platformeconomie: startpunt voor herijking van het privaatrecht’ *Nederlands Juristenblad* 2022/1663; V. Mak, *De prosumert en de digitale economie. Een verkenning van het privaatrecht van de toekomst* (Inaugural lecture, Universiteit Leiden 2021); C.M.D.S. Pavillon, W.H. van Boom *Privaatrechtelijke bescherming herijkt: Preadvies van de Nederlandse Vereniging voor Burgerlijk Recht 2021* (Zutphen: Uitgeverij Paris, 2021), p. 11 et seq; H.-W. Micklitz, *Brauchen Konsumenten und Unternehmen eine neue Architektur des Verbraucherrechts? Gutachten A zum 69. Deutschen Juristentag* (München: CH Beck, 2012); V. Mak, *Legal Pluralism in European Contract Law* (Oxford: Oxford University Press, 2020), p. 119;

the type of contract under the Consumer Credit Directive, whereas this obligation also exists – in less specific terms – for providers under the Consumer Rights Directive.³ Since these rights overlap, inequivalent protection arising from the Consumer Credit Directive is dissolved by the Consumer Rights Directive and inequivalent protection ceases to exist. Chapter 5 also refers to the policy targets set out in paragraph 2.2 and 2.3 by analysing whether the EU policy targets that are translated into the applicable legislation are also achieved for the mobility usership consumer. The approach and structure of chapter 4 and 5 are shown below in Figure 5 and are considered in conjunction with chapter 2 and 3.

Figure 5: Schematic approach of chapter 4



J. Rutgers (2022) 'Kroniek van het Europees privaatrecht' *Nederlands Juristenblad* 2022/956; T. Hartief (2022) 'De boer en de consument als helden in nieuw privaatrecht' *Nederlands Juristenblad* 2022/91.

³ Article 5(1)(a), 6(1)(a) Consumer Rights Directive; Article 5(1)(a) Consumer Credit Directive 2008.

Several rights arising from the statutory body of consumer rights are not discussed because they fall outside the scope of this research. Consequently, all enforcement-related rights and the discussion of specific rights for digital content will be omitted since they are not related to the research question. Before discussing the non-applicable substantive rights of the selected directives and their national implementations, case studies on mobility usership are introduced below.

4.2 MOBILITY USERSHIP CASE STUDIES

Due to the scope of the directives, the mobility usership consumers do not enjoy substantive rights that follow from the Consumer Sales Directive, the Consumer Credit Directive and a part of the Consumer Rights Directive.⁴ However, besides determining the inequivalence of the consumer protection by concluding that rules do not apply, this chapter delves also into the question of whether these substantive rules can and should apply and whether application is proportional in light of the mobility usership model. To do this, three exemplary case studies are designed to allow for clarification of the mutual differences and to study the application of the rules and their proportionality in concrete terms. Several components are considered in the assessment of proportionality. First, the balance between the interests of the contract parties is of importance. If the application of a legal rule places a larger burden on (one of) the parties, this could lead to a disproportional outcome, hindering applicability. For example, the application of a legal term of one year for short-term contracts such as shared mobility would lead to disproportional results that go against the *ratio legis* of consumer protection. In addition, the *ratio legis* of the rule factors the assessment of proportionality, where the length and nature of the contract play a significant role.

The case studies are outlined below and serve as an illustration of the existing types within mobility usership to examine the detailed possibilities and bottlenecks in the application of the non-applicable substantive legal framework to mobility usership. Furthermore, these different exemplary case studies are a solid representation of the mobility usership typology. As introduced in paragraph 1.2, all mobility usership contracts consist of a use component and a service component, and the balance of these components is especially relevant when examining the application of the substantive rules as it can affect the (proportionate) applicability of the law. In this chapter, a division is made for

⁴ Article 3(1) Consumer Sales Directive; Article 2(1) Consumer Credit Directive 2008; Article 3(1); 17(1) Consumer Rights Directive. Also see: European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1.

different variations of mobility usership, namely (1) exclusive use, (2) shared use and (3) collaborative sharing as cooperative.

Case study 1: Business-to-Consumer MU leased bicycle

The consumer leases a bicycle from provider Y for 4 years for €15 per month. Before the consumer puts the bicycle into use, they receive a lengthy digital document of 10 pages with general terms and conditions, informing them about their rights. Before being able to use the bicycle, they must accept these general terms and conditions by ticking a box. Within the fifth month of the contract, the bicycle has problems with the chain which must be remedied for the consumer to continue using the bicycle. The consumer immediately reports the broken bicycle to provider Y.

Case study 2: Business-to-Consumer MU shared bicycle

A shared bicycle from provider X is offered for use on the public road. The shared bicycle is visible as 'available' on X's digital platform. The consumer decides to use this shared bicycle to move from point A to point B and retrieves the shared bicycle by means of the (un)lock feature on the application. This trip usually takes them 7 minutes and costs €1.50. Before the consumer unlocked the bicycle, they received a notification that stated a lengthy digital document of 10 pages with general terms and conditions, informing them about their rights. Before being able to use the bicycle, they had to accept these general terms and conditions by checking a box. The consumer inspects the bicycle before trying to ride off with it, and the bicycle appears to be working properly. However, there is something wrong with the chain and the consumer is unable to use the bicycle. The consumer immediately reports the broken bicycle to provider X through the application.

Case study 3: Collaborative sharing as cooperative

A group of 10 people cooperatively purchased a fleet of 3 bicycles to share amongst the co-owners but also with other users, being non-owners, within their neighbourhood. One of the co-owners wants to use the bicycle and reserves the bicycle 24 hours in advance, for a duration of 3 hours. When the co-owner wants to use the bicycle during the time slot reserved by them, there appears to be a problem with the bicycle chain, because of which the co-owner cannot use the bicycle. The co-owner immediately reports the damage to their fellow co-owners.

Case study 1 entails the B2C exclusive use of mobility (types (a) and (b)).⁵ Case study 2 entails the B2C shared use of a vehicle (types (c) and (d)) and concerns a free-floating principle but the station-based principle is also elaborated on in case this leads to a different outcome.⁶ Prior to the individual (ad hoc) agreements, a framework agreement is often concluded in which consumers are asked to create an account and accept the general terms and conditions which makes the general terms and conditions applicable to all subsequent individual agreements. Case study 3 entails collaborative sharing as cooperative (type h).⁷ Collaborative mobility sharing also includes C2C sharing (types (e), (f) and (g)). As explained above, these are not included in these chapters because these typologies entail C2C relationships, whereas this research focusses on consumer protection. Collaborative sharing as cooperative can exist in various scales. There are smaller-scale cooperatives in which individuals jointly purchase a vehicle or a fleet of vehicles to offer between co-owners or as open sharing. In addition, there are also larger-scale cooperatives with sizeable fleets and, for example, 10.000 co-owners. These variants have a different use-to-service ratio. Where small-scale cooperatives predominantly focus on the use component and subordinate on the service component, largescale cooperatives emphasise the availability and accessibility of use, indicating a predominant focus on the service component. Although case study 3 represents a small-scale sharing cooperative, large scale cooperatives are elaborated on where relevant for the (proportionality) of the applicability of the substantive rules. These different exemplary case studies are a solid representation of the mobility usership typology.

Would another mean of transport lead to other outcomes?

In the case studies, the mean of transport is a bicycle, a common mobility usership mode of transport. However, the question is whether the application of the currently inapplicable legal framework would lead to different results for a different mode of transport. Besides bicycles, I also include cars, mopeds, and scooters, as these vehicles are most common in mobility usership. One component that may lead to applicability differences is the propulsion system of the vehicles. In some cases, the vehicle is propelled by a motor and in other cases, the vehicle depends on mechanical propulsion. While cars, mopeds, and scooters are always motorised, bicycles are not. For bicycles, however, both motorised and unmotorised options exist. An argument could be made that the more complicated the

5 In case of an exclusive mobility usership contract, case study 1, the service-component predominates and is supplemented by a subordinate use-component. See paragraph 1.2.1 for an extensive theoretical description of the mobility usership typology.

6 Shared mobility usership predominantly focuses on the short distance means of mobility. This means that emphasis lies on the use component because the ease and accessibility of shared mobility use is central. See paragraph 1.2.2 for an extensive theoretical description of the mobility usership typology.

7 See Figure 2. See 1.2.2 for an extensive theoretical description of the mobility usership typology.

technology of the vehicles, the greater the chance of defects. However, in principle, the propulsion system has no influence on the formal legal applicability of EU consumer law, only on the chances of defects. Finally, the expected lifecycle of the vehicle may play a role. Cars have a relatively longer lifespan than mopeds, bicycles, and scooters. Nevertheless, the life of the vehicle itself does not influence the applicability of EU consumer law, which means that the example of a bicycle is valid. However, should the lifespan of the vehicle prove to be important when discussing the case studies, it will be considered. As a result, for the examination of the (possible) legal application of the substantive rules, there would be no differences if another means of transport is chosen.

4.3 APPLICATION OF THE CONSUMER SALES DIRECTIVE

In this paragraph, I discuss the substantive rights arising from the application of the Consumer Sales Directive, despite the fact that the directive does not apply to the mobility usership contract due to the *ratione materiae* scope. This directive substantively complements the Consumer Rights Directive. While the Consumer Rights Directive primarily lays down provisions regarding precontractual information requirements, the right of withdrawal for some contracts, and rules on delivery and passing of risk for sales contracts,⁸ the Consumer Sales Directive commences rules on the conformity of goods, remedies for non-conformity and modalities for their exercise. The parts discussed are the lack of conformity (paragraph 4.3.1), remedies for non-conformity (paragraph 4.3.2), commercial guarantees (paragraph 4.3.3), and consumer information (paragraph 4.3.4), since these topics are essential for consumer protection. As addressed earlier, the right of redress, despite being regulated by this directive, will not be discussed because this research focusses on the contractual relationship between professional party and consumer.⁹ In other words, the right of redress does not address the (in)equivalence of consumer rights and is therefore outside the scope of this research. In addition, both the Consumer Sales Directive and the Consumer Sales Directive 1999, as well as the transpositions of the selected Member States, will be discussed. The Consumer Sales Directive 1999 is included because there was a significant divergence on essential elements, such as the absence or existence of a hierarchy of remedies. In that light, it is useful to examine to what extent such deviations might be negated by maximum harmonisation.¹⁰

8 European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1.

9 Article 18 Consumer Sales Directive.

10 Recital 6, 10, 18, 19 Consumer Sales Directive.

4.3.1 Lack of conformity

In all case studies, the provider – if it was a sale – would have the obligation to ensure that the vehicle is in conformity with the contract under the directive.¹¹ Dutch law states, for example, that the performance of the provider must be assessed based on the characteristics the consumer could reasonably expect on the basis of the agreement.¹² However, in the case studies, the bicycle is not (at the time) in conformity with the contract due to a broken bicycle chain; it does not fulfil the contract in terms of functionality.¹³ Under the directive, the scenario is accounted for in which a defect arises directly after the purchase, making the vehicle out of compliance with the contract unless providers rebut the presumption of non-conformity. While rebutting the presumption by the provider is theoretically possible, it is likely to be complicated in practice because the provider should be able to prove that the product complied with the agreement upon delivery. The consumer should not have to account for a defect arising within a certain time after the purchase.¹⁴ This could also apply in a case where a bicycle is commissioned under a mobility usership contract.

Requirements of conformity

In the case studies, the bicycle cannot be used because the chain is not working properly, which results in non-compliance with the subjective conformity requirements.¹⁵ Subjective conformity means that the goods must comply with what was agreed in the agreement.¹⁶

11 Article 5 Consumer Sales Directive; Recital 6, 11, 25 Consumer Sales Directive. Also see for the requirements: Articles 6, 7, 8, 9 Consumer Sales Directive. Netherlands: Article 7:17(1) Dutch Civil Code; Dutch proposal of law, *Kamerstukken 2020/21*, 35743, 2. Germany: Section 434 German Civil Code; Section 438(1)(2) German Civil Code. See: Asser/Hijma 7-I 2019/482-512.

12 Article 7:17(2) Dutch Civil Code; Dutch Supreme Court, 13 March 1981, ECLI:NL:HR:1981:AG415 (*Haviltex*) with annotation of C.J.H. Brunner; Dutch Implementation Act Books 3, 5 and 6 new Civil Code, pp. 69, 70.

13 Article 6(a) Consumer Sales Directive. Germany: Section 434(2), S. 1 nr. 1, nr. 3 German Civil Code. France: Article L217-4; L217-5 French Consumer Code.

14 B. Wessels, *Koop: algemeen (Monografieën Nieuw BW, nr. B65)* (Deventer: Kluwer, 2015), pp. 33-34; P. Klik, *Koop en consumentenkoop* (10e druk, Deventer: Wolters Kluwer, 2022), p. 6.8; M.B.M. Loos, *Consumentenkoop, Monografieën BW, nr. B65b* (Deventer: Kluwer, 2019), 30; Asser/Hartkamp 3-I 2023/263; Asser/Hijma 7-I 2019/482-512.

15 Article 6 Consumer Sales Directive; Recital 25 Consumer Sales Directive. Germany: Section 434(2) S. 1 nr. 1, nr. 3 German Civil Code. France: Article L217-4; L217-5 French Consumer Code. Netherlands: Dutch proposal of law, *Kamerstukken 2020/21*, 35743, 2. Also see: M.B.M. Loos, *Consumentenkoop (Monografieën BW nr. B65b)* (Deventer: Wolters Kluwer, 2019), pp. 27-32; M.M. van Rossum, '1 Ratio van Article 7: 18 BW' in: S.E. Bartels (red.), *GS Bijzondere overeenkomsten* (Deventer: Wolters Kluwer); M.M. van Rossum, '2 Subjectieve conformiteitseisen' in: S.E. Bartels (red.), *GS Bijzondere overeenkomsten* (Deventer: Wolters Kluwer).

16 Article 6 Consumer Sales Directive. N.R. Verhoeff (2020) 'Een nieuwe richtlijn consumentenkoop: wijzigingen op het gebied van conformiteit en commerciële garanties' *Bedrijfsjuridische berichten 2020/84*; M.B.M. Loos, *Consumentenkoop (Monografieën BW nr. B65b)* (Deventer: Wolters Kluwer, 2019), pp. 27-32;

For (subjective) conformity with the contract, the bicycle must correspond *inter alia* to the description, type, quantity and quality, functionality, compatibility, interoperability, and other features in the purchase contract.¹⁷ These conditions are perfectly applicable to mobility usership, which makes it clear that subjective conformity is not met in the case studies because it does not meet the agreed quality and functionality. In addition to the obligation to meet these subjective conformity requirements, the provider cumulatively has the obligation to meet the objective conformity requirements.¹⁸

Objective conformity means, *inter alia*, that the goods must be suitable for the purposes for which goods of the same type would normally be used. The delivered goods must also comply with what is normal for the same type of goods and what the consumer can reasonably expect given the nature of the goods and based on public announcements made by or on behalf of the professional party.¹⁹ In light of mobility usership, this raises

M.M. van Rossum, '2 Subjectieve conformiteitseisen' in: S.E. Bartels (red.), *GS Bijzondere overeenkomsten* (Deventer: Wolters Kluwer).

- 17 Article 6(a) Consumer Sales Directive. Also see: E. Helmig (2019) 'Die neuen Richtlinien zum europäischen Verbraucherkaufrecht' *Zeitschrift für Internationales Wirtschaftsrecht* 200, pp. 201-203; M.B.M. Loos, *Consumentenkoop (Monografieën BW nr. B65b)* (Deventer: Wolters Kluwer, 2019), pp. 27-32; M.M. van Rossum, '2 Subjectieve conformiteitseisen' in: S.E. Bartels (red.), *GS Bijzondere overeenkomsten* (Deventer: Wolters Kluwer); F. van den Abeele and B. Tillemans 'Conformiteit in de Richtlijn Consumentenkoop 2019: heeft de berg een muis gebaard?' in: E. Terry, I. Claeys, *Nieuw recht inzake koop & digitale inhoud en diensten* (Brussel: Intersentia, 2020).
- 18 Article 6, 7 Consumer Sales Directive; Recital 25, 29 Consumer Sales Directive. Netherlands: Article 7:18 Dutch Civil Code; Dutch proposal of law, *Kamerstukken 2020/21*, 35743, 2; N.R. Verhoeff (2020) 'Een nieuwe richtlijn consumentenkoop: wijzigingen op het gebied van conformiteit en commerciële garanties' *Bedrijfsjuridische berichten* 2020/84; E.A.G. van Schagen (2021) 'De implementatie van de herziene Richtlijn consumentenkoop en de Richtlijn digitale inhoud; nog enkele vraagtekens en verschillen' *Maandblad voor Vermogensrecht* 9; M.M. van Rossum, '3 Objectieve conformiteitseisen' in: S.E. Bartels (red.), *GS Bijzondere overeenkomsten* (Deventer: Wolters Kluwer). Germany: F.M. Wilke (2021) 'Das neue Kaufrecht nach Umsetzung der Warenkauf-Richtlinie' *Verbraucher und Recht*, p. 283; S. Lorenz (2021) 'Die Umsetzung der EU-Warenkaufrichtlinie in deutsches Recht' *Neue Juristische Wochenschrift*, pp. 2065-2073; P.T. Schrader (2021) 'Umsetzung der Warenkauf-Richtlinie: Auswirkungen auf die Haltbarkeit von Fahrzeugen mit digitalen Elementen' *Neue Zeitschrift für Verkehrsrecht*, p. 67; H.-W. Micklitz, P. Rott, 'V. Verbraucherschutz' in: M.A. Dausen, M. Ludwigs, *Handbuch des EU-Wirtschaftsrechts: H. V. Verbraucherschutz*, 58. Auflage. 2023 (C.H. Beck, 2023), pp. 315-320; E. Helmig (2019) 'Die neuen Richtlinien zum europäischen Verbraucherkaufrecht' *Zeitschrift für Internationales Wirtschaftsrecht* 200, pp. 201-203. Belgium: F. van den Abeele and B. Tillemans 'Conformiteit in de Richtlijn Consumentenkoop 2019: heeft de berg een muis gebaard?' in: E. Terry, I. Claeys, *Nieuw recht inzake koop & digitale inhoud en diensten* (Brussel: Intersentia, 2020).
- 19 This sub includes, where appropriate, existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific codes of conduct. Article 7(1)(a) Consumer Sales Directive. Also see: N.R. Verhoeff (2020) 'Een nieuwe richtlijn consumentenkoop: wijzigingen op het gebied van conformiteit en commerciële garanties' *Bedrijfsjuridische berichten* 2020/84; F. van den Abeele and B. Tillemans 'Conformiteit in de Richtlijn Consumentenkoop 2019: heeft de berg een muis gebaard?' in: E. Terry, I. Claeys, *Nieuw recht inzake koop & digitale inhoud en diensten* (Brussel: Intersentia, 2020); S. Lorenz (2021) 'Die Umsetzung der EU-Warenkaufrichtlinie in deutsches Recht' *Neue Juristische Wochenschrift*, pp. 2065-2073.

the question of what is considered normal and what the consumer of mobility usership may reasonably expect given the nature of usership. This is difficult to assess because the consumer purchases the mobility and not the vehicle/product itself. For shared mobility (and sometimes exclusive use too), an additional difficulty arises as it involves a second-hand vehicle (by which I mean the multiple uses of a vehicle by different users and explicitly not the transfer of ownership). What can the user of micro-mobility expect from second-hand vehicle? Is the fact that the bicycle is not brand new, but for example has some scratches, something that could lead to non-conformity, and if not, what kind of wear and tear or missing parts may exist before there is indeed non-conformity? In my opinion, the consumer of mobility usership may at least expect a (safe and) well-functioning bicycle as this would align with what the consumer can reasonably expect given the nature of the good and based on public announcements made by the mobility provider. In addition, this would be considered normal for the same type of services because the mobility is at the core of usership. In all case studies, the provider breaches this obligation of objective conformity as well, because the bicycle is not fit for the purposes for which the bicycle would normally be used.²⁰ As a result, a lack of conformity would exist.

Under the Consumer Sales Directive, Member States are free to allow consumers to choose a specific remedy if the lack of conformity of the goods becomes apparent shortly after delivery.²¹ Based on (Dutch) law implementing the Consumer Sales Directive, a lack of conformity does not pose a legal problem if this has been eliminated by a notice that a particular characteristic of the vehicle was deviating from the objective requirements for conformity, or if the consumer expressly and separately accepted that deviation.²² However, this is not the case in the case studies.

Liability of the provider

In case studies 2 and 3, the lack of conformity became clear when the consumer tried to commission the bicycle, immediately after unlocking the vehicle. A non-conformity judgment can be based on facts that only become apparent after conclusion of the contract. Thus, whether or not the defect was visible at the time of delivery is not decisive.²³ In all

20 Note: considering, where applicable, any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct. Article 7(1)(a) Consumer Sales Directive. Germany: Section 434(1) S. 2 nr. 2 and S. 3 German Civil Code. Also see: Article 7(1)(b), (c), (d) Consumer Sales Directive. S. Lorenz (2021) 'Die Umsetzung der EU-Warenkaufrichtlinie in deutsches Recht' *Neue Juristische Wochenschrift* 2021, pp. 2065-2073.

21 Recital 19 Consumer Sales Directive. National provisions which provide for a right for the consumer to reject goods with a defect and to treat the contract as repudiated or ask for immediate replacement, within a specific short period of time after the delivery of the goods, which should not exceed 30 days.

22 Article 7(5) Consumer Sales Directive. Netherlands: Article 7:18(6) Dutch Civil Code.

23 Asser/Hijma 7-I 2019/475; Section 434(1) German Civil Code.

case studies, the bicycle did not show any defects before it was put into use and the defect became immediately apparent when the consumer wanted to commission the bicycle (case studies 2 and 3) or after five months (case study 1). In all case studies, the provider would be liable for (consequential) damages if the Consumer Sales Directive were to apply: what is decisive is that the non-conformity became clear within two years after delivery, regardless of which examined legal system applies to the consumer's contract.²⁴ This is also known as a legal guarantee.²⁵ In case study 3, the consumer is also a co-owner of the bicycle which means that the consumer is also the provider of the vehicle. This is of course only the case if the consumer is also a co-owner; it is also possible to be a sole user with cooperative sharing.²⁶

Under the Consumer Sales Directive, the provider in case study 1 would be liable for damages for the non-conformity and the applicability of the rules is proportional because the consumer has agreed to lease the bicycle for a total of four years.²⁷ By applying the two-year period, the rationale behind the rule is therefore retained, with which the promotion of the internal market, a high level of consumer protection, and the balance between contracting parties are of paramount importance. By applying the Consumer Sales Directive rules, the consumer is entitled to a compliant bicycle for the first two years and provider Y is liable if it falls out of conformity within that period of time.²⁸

Case study 2 concerns a ride of seven minutes. This causes the two-year term to be redundant for bicycle sharing. In the light of a wish for equivalent protection, it would also be disproportionate if the consumer of the shared vehicle was entitled to the use of a vehicle in conformity with the contract for a period of two years. In this case study, this two-year term does not work in practise and does not contribute to the rationale of retaining a balance between the contracting parties. Consumer law is often applied to stimulate the policy targets that seek a balance between the contracting parties and create

24 Article 10(1), (3) Consumer Sales Directive; Recital 41, 45 Consumer Sales Directive; Germany: F.M. Wilke (2021) 'Das neue Kaufrecht nach Umsetzung der Warenkauf-Richtlinie' *Verbraucher und Recht*, pp. 283, 287. France: Article L217-3, L217-12 French Consumer Code. Netherlands: Article 7:23(2) Dutch Civil Code. Belgium: Article 1649quater(1) Belgian Civil Code.

25 M.M. van Rossum and P.H.L.M. Kuypers, *Garanties in de rechtspraak (Recht en Praktijk nr. CA12)* (Deventer: Wolters Kluwer, 2015), 4.1-4.10.

26 Note that the Consumer Sales Directive specifically refers to the providers' liability in the event of non-conformity, whereas Dutch law does not use the same terminology. Compare Article 10(1) Consumer Sales Directive and Article 7:23(2) Dutch Civil Code.

27 Article 10(1), (3) Consumer Sales Directive; Recital 41, 45 Consumer Sales Directive; Germany: F.M. Wilke (2021) 'Das neue Kaufrecht nach Umsetzung der Warenkauf-Richtlinie' *Verbraucher und Recht*, pp. 283, 287. France: Article L217-12 French Consumer Code. Netherlands: Article 7:21(1) Dutch Civil Code. Belgium: Article 1649quater(1) Belgian Civil Code.

28 Article 10(1), (3) Consumer Sales Directive; Recital 41, 45 Consumer Sales Directive.

a high level of consumer protection. That balance does not exist in this example, and this provision disproportionately favours the consumer.²⁹ In addition, a two-year term would conflict with the *ratio legis* behind such a term.³⁰ That functionality would be hampered by imposing a disproportionate risk on the providers. In case study 2, it would be more reasonable and proportional to apply a liability period that corresponds with the duration of the contract; the two-year term is simply not designed for short-term contracts and is neither practical nor proportionate for such mobility contracts. A shorter term should therefore apply to align with the abovementioned rationale of consumer policy.

The consumer in case study 3 has a double capacity and they have the right to a functioning product vis-à-vis the seller of the bicycle because they are a (co-)owner. Despite the fact that those roles overlap in case study 3, the equivalence in protection is provided for them in their capacity as (co-)owner and not as consumer. In addition, the (co-)owner also bears responsibilities associated with (co-)ownership. For instance, when a bicycle breaks down, the (co-)owner is responsible for repair and maintenance. Case study 3 may also involve a consumer who is not a (co-)owner, but solely a user of the cooperative. This user does not have the option of holding the seller or the provider liable if the broken bicycle chain became clear within two years.³¹ In their capacity as user, the same situation and disproportionalities occur as in case study 2. Here too, applying a two-year term to short-term contracts is not only impractical but also leads to a disproportionate and unjustified burden on (in this case) the cooperative. With the rationale of legal certainty and consistency, solutions would therefore point in the same direction as they do in case study 2, seeking connection with the EU policy goals such as promoting a high level of consumer protection and the EU internal market.

To enhance legal certainty, the Consumer Sales Directive also states that the contract between the parties should include a clear stipulation of the time when the conformity of the vehicle should be assessed, namely the time when the vehicles are delivered.³² However, the Consumer Sales Directive does not regulate the meaning of 'delivery', but does clarify that delivery constitutes what the seller must do in order to fulfil their obligation to deliver the goods.³³ Nevertheless, the Consumer Rights Directive could provide guidance on

29 Recital 53 Consumer Sales Directive; Recital 2, 3, 4, 6, 10 Consumer Sales Directive; Recital 1, 19 and 20 Consumer Sales Directive 1999. Also see: Article 169(1), (2)(a) Treaty on the Functioning of the European Union.

30 Article 1 Consumer Sales Directive; Recital Consumer Sales Directive. Also see: Article 26(1), (2) Treaty on the Functioning of the European Union.

31 Article 10(1) Consumer Sales Directive.

32 Recital 3, 5, 24, 37, 47, 71 Consumer Sales Directive; Article 10(1) Consumer Sales Directive. Asser/Hijma 7-I 2019/475; Dutch Implementation Act Books 3, 5 and 6 new Civil Code, p. 118.

33 Recital 38 Consumer Sales Directive. The definition of delivery is left to national law.

the meaning of ‘delivery’ as the directive defines this as the acquisition of the physical possession or control of the goods by the consumer (paragraph 4.5.1 for a more detailed explanation of the term).³⁴ In case studies 2 and 3, this requirement is met as soon as the consumer unlocks the vehicle. After all, the consumer chooses a vehicle on their own, irrespective of whether the system is a free-float or station-based system.³⁵ Case study 1 concerns exclusive use, whereby the consumer collects the vehicle at the start of the contract at the business premises, or the vehicle is delivered by the provider at an agreed location. In either method, the moment of delivery – as defined within the Consumer Sales Directive – occurs when the provider fulfils their obligation to deliver the goods.

Presumption of non-conformity

The Consumer Sales Directive includes a presumption of non-conformity, for which counterevidence is possible³⁶ if the lack of conformity becomes apparent within one year of the time when the bicycle was delivered.³⁷ In other words, if the Consumer Sales Directive were to apply, for a period of one year, the consumer only has to demonstrate that the good is not in conformity; they do not have to prove that the lack of conformity actually existed at the time relevant for the determination of conformity.³⁸ This is only different when proved otherwise or unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity.³⁹ By applying the Consumer Sales Directive to the case studies, the consumer should assert and prove that the vehicle does not conform with the contract, for example because it does not possess the properties laid down in the contract or is unsuitable for the use normally expected of the vehicle.⁴⁰ As mentioned, the consumer only has to prove the existence of a lack of conformity during the one-year period following delivery. The consumer is not obliged to prove the cause

34 Recital 51 Consumer Rights Directive; Article 18(1) Consumer Rights Directive.

35 See paragraph 1.2.2 for an explanation of the term station-based mobility (and free-float mobility). Case study 3 concerns generally a station-based system.

36 Article 11(1) Consumer Sales Directive. F. Faust ‘BGB Section 477 Beweislastumkehr’ in: W. Hau and R. Poseck *BeckOK BGB* (67th edition, München: C.H. Beck, 2023); S. Lorenz, *Münchener Kommentar zum BG*, 8. Auflage 2019, BGB Section 477 Beweislastumkehr; H. Roth (2004) ‘Beweislastumkehr beim Verbrauchsgüterkauf’ *Zeitschrift für Wirtschaftsrecht* 2025.

37 Article 11(1) Consumer Sales Directive; Note: unless proved otherwise or unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity. Germany: Section 477 German Civil Code; H. Roth, (2004) ‘Beweislastumkehr beim Verbrauchsgüterkauf’ *Zeitschrift für Wirtschaftsrecht* 2025.

38 Recital 45, first sentence Consumer Sales Directive. Also see: N.R. Verhoeff (2020) ‘Een nieuwe richtlijn consumentenkoop: wijzigingen op het gebied van conformiteit en commerciële garanties’ *Bedrijfsjuridische berichten* 2020/84; On former Consumer Sales Directive: B. Gsell (2005) ‘Die Beweislast für den Sachmangel beim Verbrauchsgüterkauf’ *Juristische Schulung* 967.

39 Article 11(1) Consumer Sales Directive; Recital 45 Consumer Sales Directive. Note: unless proved otherwise or unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity. Germany: Section 477 German Civil Code.

40 See the requirement for conformity: Article 6; 7 Consumer Sales Directive.

of that defect or to prove that its origin is attributable to the provider.⁴¹ In addition, the consumer must prove that the lack of conformity in question manifested itself within a period of one year following the delivery of the item.⁴² In case study 1, the non-conformity became apparent within the period of presumption of non-conformity. Therefore, this presumption is applicable for case study 1 and the application is proportional because the duration of the use contract (a four-year lease) is longer than the one-year period. The rationale behind this presumption naturally contributes to a high level of consumer protection and a balance between the contracting parties.⁴³ Case study 2 is a shared mobility contract. As elaborated on in paragraph 1.2.2, this type of mobility usership has a predominant use component. Consequently, if a provider does not comply with the contracted use of providing the consumer with a vehicle that can transport them from point A to point B, the provider is liable.⁴⁴ This means that the service must be provided as contractually agreed. By applying the directive, the presumption of non-conformity would apply when the defect becomes apparent within one year of completion of the service. However, as opposed to the sales contract, the shared mobility usership contract has no future effect because the contract is finished after completion of the service. In the sales contract, the consumer's future right of ownership is preserved. As a result, the rights can also exist for the consumer after delivery of the good.⁴⁵ Case study 3 predominantly focusses on the use component. However, the presumption of non-conformity should be limited by the duration of the contract, which in this case is a maximum of three hours. After all, when the use is finalised, there is no future effect for the consumer. For the co-owner vis-à-vis the seller, however, this claim continues to exist under sales law. The predominant use component fades into the background when there is a large-scale shared cooperative, whereby more emphasis is placed on the service component. In that case, the application of the rule on presumption of non-conformity can be aligned with case study 2.

41 CJEU, Case C-497/13, 4 June 2015, ECLI:EU:C:2015:357 (*Faber*), p. 70. Also see: S. Lorenz, *Münchener Kommentar zum BGB*, 8. Auflage 2019, BGB Section 477 Beweislastumkehr, 4-7.

42 CJEU, Case C-497/13, 4 June 2015, ECLI:EU:C:2015:357 (*Faber*), p. 71. Note: This ruling was before the entry into force of Consumer Sales Directive. The term for the presumption of evidence in the case was still six months, but under new law it is one year. Also see: S. Lorenz, *Münchener Kommentar zum BGB*, 8. Auflage 2019, BGB Section 477 Beweislastumkehr, 4-7; S. Lorenz (2004) 'Sachmangel und Beweislastumkehr im Verbrauchsgüterkauf: Zur Reichweite der Vermutungsregelung in Section 476 BGB' *Neue Juristische Wochenschrift* 3020; F. Faust 'BGB Section 477 Beweislastumkehr' in: W. Hau and R. Poseck *BeckOK BGB* (67th edition, Munchen: C.H. Beck, 2023); R. Koch (2017) 'Die Erweiterung des Anwendungsbereichs der Beweislastumkehr im Kaufrecht' *Neue Juristische Wochenschrift* 1068; H. Roth (2004) 'Beweislastumkehr beim Verbrauchsgüterkauf' *Zeitschrift für Wirtschaftsrecht* 2025; G. Rühl (2009) 'Zur Vermutung der Mangelhaftigkeit beim Verbrauchsgüterkauf' *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 73, 912.

43 Recital 2, 3, 4, 6, 10 Consumer Sales Directive.

44 See above on the liability of the provider (in case of non-conformity), Article 10 Consumer Sales Directive.

45 Unless it concerns the alienation of goods by the consumer concerned.

Under German and Dutch law, the broken chain would be presumed to have existed at the time when the vehicle was put into use because, in the case studies, it became apparent within one year from the moment the bicycle was put into use.⁴⁶ However, if this were to be considered under French law, this period is extended to two years.⁴⁷ As a result, the same conclusion can be drawn for the case studies under French law, but with a longer-term application.⁴⁸ The term ‘delivery’ (for sale) is interpreted here as ‘*put into use*’ (with mobility usership) because in the case studies, this is the moment that the consumer receives the vehicle and puts it into use. This is in line with the Consumer Sales directive as mentioned above.

Obligation to notify the provider

On the basis of the Consumer Sales Directive, the consumer has the obligation to notify the provider of a lack of conformity.⁴⁹ The consumer must inform the seller of a lack of conformity within a period of at least two months following the date on which the consumer detected such lack of conformity.⁵⁰ Member States are allowed to maintain or introduce provisions stipulating that the consumer must inform the seller of a lack of conformity within a period of at least two months from the date on which the consumer detected such lack of conformity.⁵¹ In all case studies, the consumer immediately notified the provider and can exercise their rights. However, like the other terms in the Consumer Sales Directive, this two-month term is much longer than the short-term use of the bicycle and therefore seems incompatible. After all, the rationale behind this legal duty to notify is related to the balance between the contracting parties as the duty protects

46 Note: unless proved otherwise or unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity. Article 11(1), (2) Consumer Sales Directive; Recital 45 Consumer Sales Directive; Netherlands: Article 7:18a(2) Dutch Civil Code; Dutch proposal of law, *Kamerstukken 2020/21*, 35743, 2, pp. 5, 6. Germany: Section 477(1) German Civil Code; S. Lorenz (2004) ‘Sachmangel und Beweislastumkehr im Verbrauchsgüterkauf: Zur Reichweite der Vermutungsregelung in Section 476 BGB’ *Neue Juristische Wochenschrift* 3020; F. Faust ‘BGB Section 477 Beweislastumkehr’ in: W. Hau and R. Poseck *BeckOK BGB* (67th edition, München: C.H. Beck, 2023); R. Koch (2017) ‘Die Erweiterung des Anwendungsbereichs der Beweislastumkehr im Kaufrecht’ *Neue Juristische Wochenschrift* 1068; H. Roth (2004) ‘Beweislastumkehr beim Verbrauchsgüterkauf’ *Zeitschrift für Wirtschaftsrecht* 2025; G. Rühl (2009) ‘Zur Vermutung der Mangelhaftigkeit beim Verbrauchsgüterkauf’ *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 73, 912; S. Lorenz, *Münchener Kommentar zum BGB*, 8. Auflage 2019, BGB Section 477 Beweislastumkehr, 2.

47 Article 11(2) Consumer Sales Directive; Recital 45 Consumer Sales Directive. France: Article L217-7 French Consumer Code.

48 Note: unless proved otherwise or unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity. Article 11(1), (2) Consumer Sales Directive; Recital 45 Consumer Sales Directive. Netherlands: Article 7:18a(2) Dutch Civil Code. Germany: Section 477(1) S. 1 German Civil Code.

49 Article 12 Consumer Sales Directive; Recital 50 Consumer Sales Directive.

50 Article 12 Consumer Sales Directive.

51 Recital 46 Consumer Sales Directive. Member States should be allowed to ensure that consumers have a higher level of protection, by not introducing such an obligation.

the seller against late (and therefore difficult to dispute) complaints by prescribing a reasonable period for the consumer to notify about the non-compliance with the agreement.⁵² This would therefore be contrary to the rationale of this obligation and leads to disproportionate results. This is particularly problematic because the provider can never trace back this ‘non-conformity’ due to the shared use model. As a result, applying this rule would put a heavy and unjustified burden on the provider, which would also negatively affect the internal market, which is at odds with significant policy targets.⁵³ To put the current rule in perspective, if the consumer in case study 2 would ride for 10 minutes, the consumer would have almost 900 times longer that the contract duration to notify the provider of that non-conformity. It would be better to limit the terms for shared mobility usership by the duration of the use contract because the predominant component relates to service. This would mean that the duration of the shared mobility usership determines the maximum period to notify the provider. However, in the case where a defect occurs, prompt notification of the defect should be made by the consumer to the provider.

Contrary to case study 2, this notification term does not cause problems or obvious disproportionalities for case study 1. Again, the longer-term use of the mobility does allow application of a notification period of two months. However, an exclusive use contract could run for less than two months, for example because monthly termination is possible.⁵⁴ In case the exclusive use contract lasts less than two months, the notification period should be paralleled to the term of the usage contract, as in case study 2, since termination ends the rights and obligations of the parties towards each other. Also, in case study 3 the notification period should be maximised by the duration of the contract because the contract should have lasted three hours. Incidentally, a large-scale cooperative sharing initiative will not change this. Furthermore, the co-owner within the cooperative sharing model has equivalent rights to the sales-based consumer in the capacity of co-owner. In general, if the term of the mobility usership contract exceeds two months, the notification period of two months applies. For each mobility usership contract that is shorter than two months, the notification period is maximised to the term of the contract, partly because the use component prevails.

52 Dutch Supreme Court, 29 June 2007, ECLI:NL:HR:2007:AZ4850 (*Amsing/Dijkstra-Post*) with annotation of Jac. Hijma; M.B.M. Loos, *Consumentenkoop (Monografieën BW nr. B65b)* (Deventer: Wolters Kluwer, 2019), p. 40; M.M. van Rossum, ‘2 Strekking klachtplicht’ in: S.E. Bartels (red.), *GS Bijzondere overeenkomsten* (Deventer: Wolters Kluwer).

53 Recital 1, 2, 4, 10, Consumer Sales Directive; Article 26(1), (2) Treaty on the Functioning of the European Union; Recital 2 Consumer Sales Directive 1999.

54 For example, the company Swapfiets where the contract can be terminated monthly. Article 9.1 General Terms and conditions Swapfiets, <<https://swapfiets.nl/nl-NL/terms>> accessed 7 November 2022.

Member States deal differently with the renewal of the presumption of non-conformity (also the legal guarantee) in case a product is repaired or replaced.⁵⁵ In the Netherlands and Belgium, the legal guarantee period does not start again if a product is repaired or replaced during the legal guarantee period. In Belgium, however, the period is extended by the time necessary for the repair or replacement.⁵⁶ If the case studies would fall under German or French law, the consumers would have their legal guarantee of conformity renewed after the vehicle has been repaired.⁵⁷ In a case where the good is replaced, a new statutory guarantee period starts.⁵⁸ However, such a full renewal would not fit mobility usership; the consumer should not have rights on the (use of the) vehicle after the usership contract is ended because at the end of the contract any responsibility for the vehicle also ends, while the owner remains burdened with the rights and obligations (and therefore also risks) of the vehicle. Therefore, this period should remain maximised with the duration of the mobility usership contract. Especially for exclusive use, a renewal of such a guarantee period could be valuable to the consumer because the term of the contract can be longer than the notification period. However, repair is often already included in the service component of the exclusive use contracts, but this will be examined more thoroughly below in the discussion of the remedies in case of non-conformity.

4.3.2 Remedies for non-conformity

In all case studies, the bicycle is in non-conformity with the mobility usership contract. If the Consumer Sales Directive would apply, the consumers would also be entitled to remedies other than a claim for compensation.⁵⁹ Under the Consumer Sales Directive a

55 M.M. van Rossum and P.H.L.M. Kuypers, *Garanties in de rechtspraak* (Recht en Praktijk nr. CA12) (Deventer: Wolters Kluwer, 2015), 4.1-4.10.

56 S. Stijns and S. Jansen 'Remedies bij consumentenkoop' in: E. Terryn, I. Claeys, *Nieuw recht inzake koop & digitale inhoud en diensten* (Brussel: Intersentia, 2020).

57 Article L217-13 French Consumer Code. Germany: Section 437-439 German Civil Code; German Federal Court of Justice, 5 October 2005, VIII ZR 16/05.

58 Article L217-13 French Consumer Code. J. Julien (2020) 'Loi du 10 février 2020, relative à la lutte contre le gaspillage et à l'économie circulaire: apports en droit de la consommation' *Revue des Contrats* 3, p. 96.

59 Article 13(1) Consumer Sales Directive; Recital 61 Consumer Sales Directive. Also see: M.B.M. Loos, *De koopregeling in het voorstel voor een richtlijn consumentenrechten* (Studiekring Offerhaus nr. 12, Deventer: Kluwer, 2009), 6; B. Wessels, *Koop: algemeen* (Monografieën Nieuw BW, nr. B65) (Deventer: Kluwer, 2015), 38; P. Klik, *Koop en consumentenkoop* (10e druk, Deventer: Wolters Kluwer, 2022), p. 6.86.4; M.B.M. Loos, *Consumentenkoop, Monografieën BW, nr. B65b* (Deventer: Kluwer, 2019), 35. Belgium: Article 1649quinquies(2) Belgian Civil Code; Netherlands: Article 7:21(1), 7:22(1) BW. Germany: Section 437, 439 German Civil Code; Section 4409, 32310 en 326 lid 5 German Civil Code; Section 441 German Civil Code; T.J.K. van Santen, *Artikel 7:25 BW: een analyse van zijn oorsprong, strekking en reikwijdte* (Recht en Praktijk nr. CA23) (Diss., Heerlen, Deventer: Wolters Kluwer, 2021). France: Article L217-8, L217-9 French Consumer Code.

hierarchy of remedies exists; a consumer is first required to request repair or replacement, and only as a second step can they ask for termination of the contract or a price reduction.⁶⁰ The Consumer Sales Directive is a maximum harmonisation directive, which means that the hierarchy of remedies applies to all Member States.⁶¹ Unlike Dutch, Belgian, and French law, the applicable German sales law that implements the directive has no separate rules for the remedies for consumer sales.⁶² The implementation of the maximum harmonisation directive has resulted in a uniformity within the scope of the directive for all buyers and sellers, whether they are consumers or not.⁶³ If the consumer discovers a non-conformity, the consumer shall be entitled to have the goods brought into conformity, to receive a proportionate reduction in the price, or to terminate the contract. To have the goods brought into conformity, the consumer may choose between repair and replacement. Only if the provider does not comply can the consumer establish secondary legal measures, such as price reduction and the right to terminate the contract. Below, the primary remedies (repair and replacement) are examined, after which the secondary remedies are discussed. This paragraph concludes with the right to compensation. In order to comply with the conformity requirements, the consumer can choose between repair and replacement, unless it is (1) impossible, or (2) would incur disproportionate costs to the provider compared to the other remedies.⁶⁴ Here, (a) the value of the good without non-conformity, (b) the significance of the lack of conformity, and (c) the question of whether the alternative remedy is possible without serious inconvenience to the consumer should be taken into account.⁶⁵ The Consumer Sales Directive also introduces a number of additional grounds for invoking a price reduction or termination. These will be elaborated below.

Primary remedies: repair and replacement

The consumer can choose between the primary remedies, (a) repair and (b) replacement, unless this would be impossible or would impose costs on the seller that would be

60 Recital 35, 42, 47, 63 Consumer Sales Directive; Article 13, 14, 15, 16 Consumer Sales Contract.

61 Belgium: Article 1649quinquies(2) Belgian Civil Code; Netherlands: Article 7:21(1), 7:22(1) Dutch Civil Code. Germany: Section 437, 439, 440, 323, 326(5), 441 German Civil Code; France: Article L217-8, L217-9 French Consumer Code. T.J.K. van Santen, *Artikel 7:25 BW: een analyse van zijn oorsprong, strekking en reikwijdte (Recht en Praktijk nr. CA23)* (Diss., Heerlen, Deventer: Wolters Kluwer, 2021).

62 C. Berger, O. Jaurnig, *Bürgerliches Gesetzbuch*, 19. Auflage 2023, BGB Section 437 Rechte des Käufers bei Mängeln, 4; H.P. Westermann, *Münchener Kommentar zum BGB*, 8. Auflage 2019, BGB Section 437 Rechte des Käufers bei Mängeln, 3, 4.

63 Recital 9, 66. See: V. Mak (2011) 'De grenzen van maximumharmonisatie in het Europese consumentenrecht' *Nederlands Tijdschrift voor Burgerlijk Recht* 2011/77.

64 Recital 49 Consumer Sales Directive; Article 13(2)(a)(b)(c) Consumer Sales Directive. Article 7:21(1), (3) Dutch Civil Code, Article 7:22 Dutch Civil Code. V. Mak, D.J.B. Op Heij (2021) 'De implementatie van de nieuwe Richtlijn consumentenkoop en de Richtlijn digitale inhoud in het BW: de implicaties voor het bestaande hiërarchische systeem van remedies' *Tijdschrift Voor Consumentenrecht & Handelspraktijken* 2021(5), pp. 272-280.

65 Article 13(2)(a), (b), (c) Consumer Sales Directive.

disproportionate.⁶⁶ The rationale behind the remedies is to ensure that consumers receive goods or services that meet the quality standards and specifications promised by the professional party, contributing to legal certainty. An underlying rationale for the remedy of repair is that an incentive for reparation encourages sustainable consumption and could contribute to greater durability of products.⁶⁷

In the first instance, both repair and replacement do not seem suitable remedies for the non-conformity in case study 2 because of the short-term seven-minute contract. However, replacement could be possible if the system is station-based or if more vehicles are available within a free-floating system at the place where the shared bicycle was put into use. Replacement by the provider, however, would be practically impossible since the provider is not present at the location: it will be the consumer themselves who will have to deploy a replacement. This would cause the least inconvenience because it results in the least disproportional loss of time for the consumer.⁶⁸ This solution aligns with the notion of micro-mobility and the predominant use component that comes with it. However, the possibility of replacement is not a certainty and depends on whether another bicycle is available, which in its turn depends on *inter alia* the size of the fleet, the user demand at the time, and whether it is a free-floating or station-based system. This uncertainty is at odds with the important rationale in (consumer) law that focusses on legal certainty. Repairing the bicycle chain on the spot is at odds with the notion of micro-mobility: if the bicycle would be repaired, a repairperson would need to come to the location and repair the bicycle on the spot. This would take up disproportional time given the short duration of the seven-minute contract and the required fast micro-mobility in these types of contracts. This is relevant since the Consumer Sales Directive states that both remedies require remediation within a reasonable time to pursue a high level of consumer protection by protecting consumers against the risk of extended delays. As these delays could disrupt the normal use of the product or service and cause inconvenience to the

66 Article 13(2), 14(1) Consumer Sales Directive; Recital 48, 49 Consumer Sales Directive. Netherlands: Article 7:21(2), (3), (4), (5) Dutch Civil Code. France: Article L217-12, L217-8 French Consumer Code. Germany: Section 437(1), 439 German Civil Code. See: C. Cauffman (2020) 'Kroniek consumentenkoop 2019' *Tijdschrift voor Consumentenrecht en Handelspraktijken* (5), pp. 275-282; V. Mak, D.J.B. Op Heij (2021) 'De implementatie van de nieuwe Richtlijn consumentenkoop en de Richtlijn digitale inhoud in het BW: de implicaties voor het bestaande hiërarchische systeem van remedies' *Tijdschrift Voor Consumentenrecht & Handelspraktijken* 2021(5), pp. 272-280.

67 Recital 48 Consumer Sales Directive. Also see: B. Tilleman, F. van den Abeele (2022) 'Remedies in het nieuwe consumenten(koop)recht: een (her)nieuw(d) getrappt systeem' *Droit de la consommation – Consumentenrecht*, 2022/2-3, pp. 135-136, 59-102; S. Stijns and S. Jansen 'Remedies bij consumentenkoop' in: E. Terryn, I. Claeys, *Nieuw recht inzake koop & digitale inhoud en diensten* (Brussel: Intersentia, 2020); European Commission 'A new Circular Economy Action Plan For a cleaner and more competitive Europe' (Brussels, 11 March 2020) COM(2020) 98 final.

68 Article 13(2)(a), (b), (c) Consumer Sales Directive.

consumer.⁶⁹ What is considered to be a reasonable time for completing a repair or replacement should correspond to the shortest possible time necessary for completing the repair or replacement. This should be objectively determined by considering the nature and complexity of the goods, the nature and severity of the lack of conformity, and the effort needed to complete the repair or replacement.⁷⁰ Furthermore, Member States are able to interpret the notion of reasonable time for completing repair or replacement by providing for fixed periods that could generally be considered reasonable for repair or replacement, in particular with regard to specific categories of products. Consequently, repair is not an appropriate remedy for shared mobility usership as illustrated in case study 2 due to the requisite fast service and mobility. If repair as a remedy should nevertheless be considered, the contract duration should also be considered as an objective condition in the assessment of the reasonable time, which means that repair should be executed without delay. This might be a possibility, and repair will not be disproportionate. The non-conformity could be remedied without delay if, for example, the provider can simply put a portable bicycle light on the bicycle if the lighting does not work (on departure) or make such a light available at the pick-up location of the shared bicycle.

With a long-term contract as in case study 1, the remedies of repair or replacement are generally not disproportionate or impossible considering the longer duration of the contract. The consumer is entitled to repair or replacement in the event of a defect in the bicycle chain.⁷¹ However, it is important to understand that the primary remedies that are offered by the directive are often included in the service component of the exclusive use contract. The right to replacement or repair could arise from the contractual conditions of the service component of exclusive mobility, coinciding with the legislative primary remedies. An example is the provider *Swapfiets*, where the consumer has the option to 'swap' in case of defects. The 'swap' includes the repair of defects to the bicycle and, if necessary, the replacement of the bicycle.⁷² At the same time, this could, for example raise the question on whether the provider would have the duty to collect a non-conforming vehicle from consumers if the Consumer Sales Directive would be applicable. Chapter 6 elaborates on the circumstances under which the remedies are included in the service component of the contract. In some cases, the service contract does not provide such contractual remedies for the broken bicycle chain. Nevertheless, these legal remedies also

69 Recital 55 Consumer Sales Directive, first sentence.

70 Recital 55 Consumer Sales Directive.

71 Article 13(1) and (2)(a)(b)(c) Consumer Sales Directive. Recital 47 Consumer Sales Directive.

72 An example is *Swapfiets*, where the consumer has the option to 'swap' in case of *inter alia* defects. The 'swap' includes the repair of defects or damage to the bicycle and, if necessary, the replacement of the bicycle. Article 8.1 en 8.2 General Terms and Conditions *Swapfiets*, <<https://swapfiets.nl/nl-NL/terms>> accessed 8 November 2022.

seem applicable since case study 1 concerns a long-term contract with a predominant use-component and is not about direct, momentary accessibility. As a result, the repair of the chain or replacement of the bicycle in case study 1 is generally neither disproportionately expensive nor impossible if it does not take up a disproportionate amount of time.⁷³

If the Consumer Sales Directive were to apply in case study 3, the co-owner in a sharing cooperative could use the remedies of repair and replacement towards the seller as long as the cooperative is a consumer because they are (co-)owner of the bicycle. If the consumer is not a (co-)owner of the bicycle and encounters a defect, the question rises to what extent the primary remedies could apply. This will depend on how the cooperative is organised. A small-scale cooperative, as in case study 3, has a predominant service component in the contract. This means that in the event of a defect, the provider, in principle, takes care of repair or replacement. The reasonable time in which this needs to be done could be slightly longer than in case study 1, because the cooperative is organised on a small(er) scale.⁷⁴ The possibility of replacing the bicycle will depend on the fleet of vehicles (available at that time). After all, small-scale cooperatives often involve a station-based system (with only one station). When the cooperative is organised on a larger scale, the emphasis will lie on the service component. As a result, solutions could be aligned with those of case study 2. A larger fleet of bicycles will make it easier (and more likely) for a consumer to take another bicycle (replacement), regardless of it being a station-based or free-floating system. However, the availability of another bicycle is not a certainty, negatively impacting the rationale of legal certainty. Repair as a remedy is, like in case study 2, at odds with the notion of these contracts: the predominant service component that focusses on the continuous availability and accessibility of mobility does not allow repairs to be carried out while a consumer is waiting.

Member States are free to allow consumers to choose a specific remedy if the lack of conformity of the goods becomes apparent shortly after delivery. The Consumer Sales Directive does not affect national provisions that allow consumers to reject goods with defects and to treat the contract as repudiated or ask for immediate replacement within a specific short period of time after the delivery of the goods. This period may in any case not exceed 30 days.⁷⁵

73 The seller may refuse to bring the goods into conformity if repair and replacement are impossible or would entail disproportionate costs for the seller, considering all circumstances, including those referred to in paragraph 2(a) and (b). Article 13(3) Consumer Sales Directive. Germany: Section 475(5) German Civil Code (also see Section 439(4) German Civil Code). France: Article L217-12 French Consumer Code. Belgium: Article 1649 quarter(2) Belgian Civil Code; S. Stijns and S. Jansen 'Remedies bij consumentenkoop' in: E. Terryn, I. Claeys, *Nieuw recht inzake koop & digitale inhoud en diensten* (Brussel: Intersentia, 2020).

74 Recital 55 Consumer Sales Directive, first sentence.

75 Recital 19 Consumer Sales Directive.

Secondary remedies: price reduction and termination of the contract

The consumer is not entitled to repair or replacement if these remedies are impossible or cannot be required of the seller.⁷⁶ The consumer's right to other secondary remedies – price reduction and termination – only arise if repair and replacement are impossible or cannot be expected from the seller, or if the seller fails to do so within a reasonable period of time and without serious inconvenience to the consumer.⁷⁷ These remedies also contribute to legal certainty by eliminating the prior obstacle of fragmented rules on the remedies of the old Consumer Sales Directive 1999, which inhibited the internal market.⁷⁸

Price reduction

A price reduction as a remedy, also *actio quanti minoris*, must be proportional to the difference between the value of the product received by the consumer and the value that the product would have had if they had been in conformity with the contract.⁷⁹ The rationale behind a price reduction is to protect the interests of consumers, with a goal of a high level of consumer protection, and to ensure that consumers receive the conforming product.⁸⁰ The assessment of a proportional price reduction is determined based on the level of depreciation of the defective product. In the case studies this is a non-rideable bicycle in comparison to a rideable bicycle.⁸¹ Case study 2 has a predominant service component in the contract. Therefore, the comparison of bicycles – rideable or not – should focus on the comparison between the value of the completed versus the uncompleted use. In other words, the benchmark should be the value of the use and not the value of the vehicle. However, in case study 2 the ride costs €1.50; a price reduction might not be a practical or proportional option. This raises the question of whether consumers will make the effort to reclaim a part of that €1.50 in case of a defect. Presumably in situations such as case study 2, many

76 See: Article 7:21(4) Dutch Civil Code; Dutch Explanatory Memorandum, *Kamerstukken II 2020/21*, 35734, 3, I.

77 Recital 51 Consumer Sales Directive. Note: That is the case where the seller has not completed repair or replacement, or where it is clear from the circumstances that the seller will not complete repair or replacement, or the seller has refused to bring the goods into conformity because repair and replacement are impossible or would impose disproportionate costs on the seller. Netherlands: Article 7:22(2) Dutch Civil Code; Dutch Explanatory Memorandum, *Kamerstukken II 2020/21*, 35734, 3, J.

78 Recital 6 Consumer Sales Directive. Note: prior refers to the Consumer Sales Directive 1999.

79 Article 13(4), 15 Consumer Sales Directive. Respectively, not completed repair or replacement in accordance with Article 14(2), (3) Consumer Sales Directive or refused to bring the goods into conformity in accordance with Article 13(3) Consumer Sales Directive. France: Article L217-15 French Consumer Code. Germany: Section 437(2), 441 German Civil Code; Netherlands: Article 7:22(1)(b) Dutch Civil Code. See: H.N. Schelhaas, S. van Beek (2019) 'De invloed van het EU-recht op het Nederlandse consumentenkooprecht' *Maandblad voor Vermogensrecht*, pp. 270-278. Belgium: S. Stijns and S. Jansen 'Remedies bij consumentenkoop' in: E. Terry, I. Claeys, *Nieuw recht inzake koop & digitale inhoud en diensten* (Brussel: Intersentia, 2020).

80 S. Jansen, *Prijzvermindering: Remedie tot bijsturing van contracten* (Diss., University of Antwerp: Intersentia, 2015), pp. 21-35, 101-110.

81 Article 15 Consumer Sales Directive.

consumers will not reclaim due to the low amount. Furthermore, the question is whether a price reduction as a remedy works here because the consumer can lock the bicycle in the event of a defect in case of a free-float system. After all, this terminates the contract and thus the consumer's payment obligation. The consumer should be able to report the defect in, for example, the provider's mobile application. In this way, the provider could prevent the defective bicycle from being offered again to another consumer (by making it available in the provider's application). Furthermore, a proportional solution for the applicability difficulties of the price reduction remedy could be that, for example, the start fee will be automatically refunded upon notification of a defect.⁸² With station-based systems, this works differently; the vehicle can only be locked at a station. If the bicycle in case study 2 shows a defect after three minutes, the contract (and thus the payment obligation) will – in principle – continue until the bicycle is returned to an available station. A notification function in the provider's mobile application would offer a solution here as it could enable the consumer to stop the contract and the payment obligation in the meantime.

For case study 1, again a price reduction should not be based on the reduction in value of the vehicle itself, because the vehicle is not the object of the agreement. The object of the agreement is the use of the vehicle. Therefore, the depreciation of the use must be the benchmark. When a defect occurs and the bicycle cannot be properly used by the consumer, the value decreases. In principle, this depreciation can be deducted from the cost of use. In other words, a reimbursement must take place on the monthly fee of €15 and the time that use is unavailable to the consumer. Here too, the question arises on whether consumers will make the effort to reclaim a part of €15 due to the small amount and whether an effectiveness problem occurs. This is different if the provider offers a replacement bicycle because this allows continuous availability of the use, and the depreciation is negated. In case study 3 the benchmark for this remedy must be the depreciation of the use. If the defect occurs at the start of use, another bicycle can – if available – be offered. However, if the defect occurs after two hours, no replacement bicycles will be available at that location. After all, the group of 10 people offer the vehicles on a round-trip basis.⁸³ In those cases, there should be a possibility to report the defect to the cooperative. A replacement bicycle can be brought by the cooperative, if possible, but in any case, the use (and the payment obligation) should be finished. The price reduction should reflect the period that the bicycle could not be used due to the defect. It may also be possible to require the reimbursement of a starting fee to compensate for the disadvantage

82 The defective vehicles are often collected to be repaired and the vehicles can then be offered again in the supplier's application. If a start fee is indeed returned when a defect is reported, some verification of the defect may be required.

83 Even if the bicycles were not offered on a round-trip basis, but on a one-way basis, the chance is nil that there is an available replacement bicycle nearby with 3 bicycles in the collaborative.

of the consumer. When dealing with a larger-scale cooperative, the situation is similar to case study 2, with a focus on the service component and availability. The benchmark to determine the price reduction should therefore also be the value of the use and not the value of the vehicle. Here too, the question about the practicality of price reduction arises as larger scale cooperatives also focus on availability. As a result, the costs per use are relatively low which makes it questionable whether the consumer considers a refund for such an amount worth the effort. In addition, with large-scale cooperatives organised as a free-float system, the consumer has the possibility to discontinue the use such as in case study 2. As a result, the payment obligation would also stop. Here too, a refund of the starting fee seems justified to level out the disadvantage of the consumer. Paragraph 8.4 explains in more depth how the right to a price reduction can enhance the currently available remedy of termination for mobility users.

Termination

The possibility to terminate the contract as a remedy for non-conformity is based on a balance between the rights and obligations of the contracting parties. After all, the rationale behind termination is that it results in the consumer being released from their contractual obligation and being reimbursed of the payment (insofar as the consumer was unable to make use of the vehicle). According to the directive, the consumer can terminate the contract when there is a non-conformity of a serious nature that justifies termination.⁸⁴ In case the consumer actually wants to terminate the contract, they need to make a statement to the provider expressing this decision.⁸⁵ The consumer can terminate the contract only in relation to the use of the vehicle that is not in conformity under the contract and when there is a ground for termination of the contract.⁸⁶ In a case where the lack of conformity is

84 Article 13(4)(c) Consumer Sales Directive; Recital 53 Consumer Sales Directive. France: Article L217-14(2) French Consumer Code. Germany: Section 437(2), 440, 326(5) German Civil Code. Netherlands: Article 7:22(1)(a) Dutch Civil Code. Belgium: Article 1649quinquies(1), (5), (7) Belgian Civil Code; S. Stijns and S. Jansen 'Remedies bij consumentenkoop' in: E. Terryn, I. Claeys, *Nieuw recht inzake koop & digitale inhoud en diensten* (Brussel: Intersentia, 2020).

85 Article 16(1) Consumer Sales Directive. Netherlands: Article 7:22(3) Dutch Civil Code. France: Article L217-8 French Consumer Code. Germany: Section 437(2), 323 German Civil Code. Belgium: Article 1649quinquies(7) Belgian Civil Code.

86 Also in relation to any other goods which the consumer acquired together with the non-conforming goods if the consumer cannot reasonably be expected to accept to keep only the conforming goods. Article 16(2) Consumer Sales Directive. Netherlands: Article 7:22(6) Dutch Civil Code; Dutch Explanatory Memorandum, *Kamerstukken II 2020/21*, 35734, 3, J; Lexplicatie, Transponeringstabel bij: Richtlijn (EU) 2019/771 betreffende bepaalde aspecten van overeenkomsten voor de verkoop van goederen, tot wijziging van Verordening (EU) 2017/2394 en Richtlijn 2009/22/EG, en tot intrekking van Richtlijn 1999/44/EG, Aanhef regeling. Germany: Section 475(6), 346 German Civil Code. Belgium: Article 1649quinquies(7) Belgian Civil Code. Also see: S. Stijns and S. Jansen 'Remedies bij consumentenkoop' in: E. Terryn, I. Claeys, *Nieuw recht inzake koop & digitale inhoud en diensten* (Brussel: Intersentia, 2020). France: Article L217-14 French Consumer Code.

minor, for example the lack of a bicycle bell, the consumer is not entitled to terminate the contract. The provider must state and prove that the seriousness of the defect is minor as soon as the consumer terminates the agreement.⁸⁷ For all case studies, a non-conformity of a serious nature that justifies termination can be accepted.⁸⁸ Although the seriousness of the defect is not minor in the case studies as the bicycle is not rideable, it is not always clear what constitutes a minor defect or adversely, a serious defect. The German Federal Court of Justice offers a possible guideline for assessing whether a defect justifies termination in relation to a sales contract.⁸⁹ This ruling by the German Federal Court of Justice is also important for the other Member States because it elaborates on the interpretation of the directive. The German Federal Court of Justice held in 2014 that a defect is not too minor to justify termination if the costs of removing the non-conformity exceeds five percent of the purchase price.⁹⁰ In addition, the German Federal Court of Justice decided that in case the costs for removing the non-conformity are less than one percent of the purchase price, the shortcoming is generally too small to justify termination.⁹¹ The one percent rule of this guideline could be applied to the case studies, however, as substantiated above, the benchmark should be the mobility use and not the purchase price of the vehicle.

In case study 2, the cost of use – if the ride were to be completed – is €1.50. The question is whether the guidelines of the German Federal Court of Justice can determine whether termination of the contract is possible. Although the guidelines are applied to case study 2, this would not lead to a proportional outcome; the repair costs of a vehicle will never be in proportion to the much lower costs for the service. In other words, five percent of the service costs will never exceed the repair costs of the vehicle. As a result, there could never be a non-conformity of a serious nature that justifies termination, which makes this an inadequate comparison.⁹² The benchmark should entail the service and not the repairment costs of the vehicle. Due to the defect, no service can be provided at all, which means that

87 Article 13(5) Consumer Sales Directive. Netherlands: Article 7:22(1)(a) Dutch Civil Code. France: Article L217-14 French Consumer Code. Germany: Section 437(2), 441 German Civil Code. Belgium: Article 1649quinquies(5), (7) Belgian Civil Code.

88 Note: When there exists a non-conformity that justifies termination depends on future case law by the Court of Justice of the European Union. Article 13(4)(c) Consumer Sales Directive; Recital 53 Consumer Sales Directive. France: Article L217-14(2) French Consumer Code. Germany: Section 437(2), 440, 326(5) German Civil Code. Netherlands: Article 7:22(2) Dutch Civil Code.

89 Guidelines that contribute to the assessment of whether a defect justifies termination in general. The German Federal Court of Justice follows German law and explicitly adds that this is an implementation of the (old) Consumer Sales Directive. See: German Federal Court of Justice, 28 May 2014, VIII ZR 94/13.

90 German Federal Court of Justice, 28 May 2014, VIII ZR 94/13, pp. 30-39, 52.

91 German Federal Court of Justice, 28 May 2014, VIII ZR 94/13, pp. 30-39, 52.

92 This means that five percent of €1.50 is calculated, which results in €0.08. It should be clear that the costs for removing the defect (ie repairing the bicycle chain) will be higher than this eight-euro cents.

the essential element of the service cannot be provided and therefore constitutes a non-conformity of a serious nature.

There is no reason in case study 1 to assume that the provider would refuse to bring the bicycle into conformity by repair or replacement. Nevertheless, the consumer would also retain the right to secondary remedies; namely, price reduction or termination of the contract.⁹³ Moreover, the guidelines provided by the German Federal Court of Justice regarding the question which breach is serious enough to terminate the contract – and the additional calculations – could also apply to case study 1.

In case study 1, the benchmark should also be the use of the vehicle and not the vehicle itself. Since the defect has made provision of (exclusive) use of the vehicle impossible, immediate termination is justified as this involves a non-conformity of a serious nature. After all, providing the exclusive use is a vital part of the agreement. Nevertheless, applying the guidelines provided by the German Federal Court of Justice to case study 1 remains complicated with regard to using the seriousness of the breach to determine when it justifies termination. Even if the German guidelines were applied using the monthly user fee (instead of the value of the vehicle), five percent of €15 remains a small amount. A repair can never be carried out for such an amount.⁹⁴ Even if five percent of the costs for using the bicycle over the entire term is assumed, only a very small part of the defects would not justify termination.⁹⁵ As a result, the German guidelines cannot be applied proportionately to mobility usership. Also, in case study 3 it applies that as long as the use cannot be completed by the consumer as a result of a defect, the non-conformity concerns a serious nature that justifies contract termination because it includes a vital part of the agreement. A larger-scale cooperative of 10.000 members will not change this, despite the fact that the emphasis shifts from the use-component to the service-component.

In a case where the consumer terminates the contract, the consumer must return the good to the provider and the provider should reimburse the price of the good to the consumer. Member States may determine the modalities for return and reimbursement.⁹⁶ The

93 Article 13(1)(2)(3)(4), 15, 16(1) Consumer Sales Directive.

94 After all, this amount would be €0.75. Even if we assume five percent of the costs for using the bicycle over the entire term, only a very small part of the defects would not justify termination.)

95 For 4 years, €15 per month comes to €720, 5 percent of €720 equals €36.

96 Article 16(3) Consumer Sales Directive. Netherlands: Article 7:22(6)(7) Dutch Civil Code; Dutch Explanatory Memorandum, *Kamerstukken II 2020/21*, 35734, 3, J; Lexplicatie, Transponeringstabel bij: Richtlijn (EU) 2019/771 betreffende bepaalde aspecten van overeenkomsten voor de verkoop van goederen, tot wijziging van Verordening (EU) 2017/2394 en Richtlijn 2009/22/EG, en tot intrekking van Richtlijn 1999/44/EG, Aanhef regeling. France: Article L217-14, L217-17 French Consumer Code. Germany: Section 475(6), 346 German Civil Code. Belgium: Article 1649quinquies(7) Belgian Civil Code; S. Stijns

Member States determine that if the performance cannot be undone due to its nature, compensation will be paid in its place equal to the value thereof at the time of receipt.⁹⁷ In case study 1, a monthly payment is made in advance. As a result, the costs of unused right of use can be reimbursed to the consumer.⁹⁸ However, in case study 2 no payment is made in advance because payment is made afterwards and based on *inter alia* the duration of the use.⁹⁹ The usership had zero value in case study 2, which means that this is the entire cost of the service should be compensated. Consequently, the consumer would receive their money back. In addition, termination by the consumer in case study 2 is possible at any time in a free-floating system. If, on the other hand, it concerns a station-based system as mentioned earlier, the use can only be terminated when the bicycle is returned to a fixed station. Interim termination is in principle impossible but limited by the distribution and availability of stations. A possibility to remotely report a defect so that an interim termination is possible would offer a solution and would guarantee the consumer's right to termination. For case study 3, the solution described in case study 1 can be followed. Contrary to these small-scale cooperatives, large-scale cooperatives will often be a free-float system, which means that the consumer is free to end the use whenever and wherever they want, whereas a station-based system would be more problematic. Moreover, the solutions provided for case study 2 also apply here.

Right to compensation

Besides the primary and secondary remedies as mentioned in the directive, an additional remedy for non-conformity exists: compensation. The principle of the seller's liability for damages is an essential element of sales contracts. Consumers should therefore have the right to claim compensation for damage caused by a lack of conformity by the provider.¹⁰⁰ The rationale behind this rule is that compensation should put the consumer as much as possible in the position they would have been in if the goods had been in conformity. The directive stipulates that the right to compensation is already guaranteed in the researched Member States. Therefore, the Consumer Sales Directive should apply without prejudice to national rules on the compensation offered to consumers for damages due to non-conformity.¹⁰¹ If a product has been delivered in any of the Member States and the good

and S. Jansen 'Remedies bij consumentenkoop' in: E. Terryn, I. Claeys, *Nieuw recht inzake koop & digitale inhoud en diensten* (Brussel: Intersentia, 2020).

97 Netherlands: Article 6:272 Dutch civil code. Also see: Asser/Sieburgh 6-III 2022/704. Germany: Section 346(2) nr. 1 BGB; R. Gaier, *Münchener Kommentar zum BGB* 9. Auflage 2022, BGB § 346. France: Article 1217, 1229 French Civil Code. Belgium: Artikel 5:90, 5:95 Belgian Civil Code.

98 A settlement can be made regarding the already used and paid days and the unused but paid days of the monthly fee.

99 Plus possibly a starting fee.

100 Recital 61 Consumer Sales Directive; Article 3(6) Consumer Sales Directive.

101 Recital 18, 61 Consumer Sales Directive; Article 3(6) Consumer Sales Directive. H.P. Westermann, *Münchener Kommentar zum BGB*, 8. Auflage 2019, BGB § 440 Besondere Bestimmungen für Rücktritt

does not have the properties that the consumer could expect based on the agreement, the consumer is entitled to compensation from the seller.¹⁰² In all case studies, the consumer therefore has an additional right to compensation under national law. In practice, the right to compensation is usually exonerated in the provider's general terms and conditions. Such general terms and conditions generally fall under the Unfair Contract Terms Directive. Such a clause does not bind the parties if, it unreasonably hinders the other party, given the nature and other content of the agreement, the way the terms and conditions were concluded, the simultaneous manifest interests of the parties and the other circumstances of the case.¹⁰³

4.3.3 Commercial guarantees

The Consumer Sales Directive also includes rules regarding commercial guarantees.¹⁰⁴ In short, a commercial guarantee concerns any undertaking by a seller or a producer (the guarantor) towards the consumer to reimburse the price paid or to replace, repair or maintain the delivered item in any way if it does not comply with certain promised characteristics. This guarantee must be more extensive than the legal guarantee that the delivered item must comply with and is provided on a voluntary basis, otherwise it is not a commercial guarantee.¹⁰⁵ When the consumer buys a bicycle, they are entitled to

und Schadensersatz, 3; M.B.M. Loos, *De koopregeling in het voorstel voor een richtlijn consumentenrechten* (Studiekring Offerhaus nr. 12, Deventer: Kluwer, 2009), 6.4.

102 Netherlands: Article 7:24(1), 6:74, 6:87, 6:277 Dutch Civil Code. Germany: Section 440, 280, 281, 283, 311a German Civil Code. Belgium: Article 1649quinquies(1) Belgian Civil Code. France: Article L217-8, L217-11 French Consumer Code.

103 Netherlands: Article 6:233(a) Dutch Civil Code. Germany: Section 307 German Civil Code; France: Article L212-1 French Consumer Code. Belgium: Article 1649septies Belgian Civil Code. Also see Netherlands: Article 6:248 Dutch Civil Code. Germany: Section 242 German Civil Code. France: Article 1104, 1112 French Code civil. Belgium: Article 1135 Belgian Civil Code. Also see: H.N. Schelhaas, *Redelijkheid en billijkheid* (Monografieën BW nr. A5) (Deventer: Wolters Kluwer, 2017), 2.14.

104 Recital 62 Consumer Sales Directive; A. Wiewiórska-Domagalska, *Consumer Sales Guarantees in the European Union* (Berlin, Boston: Otto Schmidt/De Gruyter European Law Pub, 2012), pp. 1-9; M.B.M. Loos, *Consumentenkoop* (Monografieën BW nr. B65b) (Deventer: Wolters Kluwer, 2019), p. 25; M.M. van Rossum, '5 Garantie en de richtlijn verkoop van en garanties voor consumptiegoederen en de richtlijn betreffende consumentenrechten, richtlijn consumentenkoop 2019' in: S.E. Bartels (red.), *GS Bijzondere overeenkomsten* (Deventer: Wolters Kluwer); Asser/Hijma 7-I 2019/138, 139.

105 Article 2(12) Consumer Sales Directive. Also see: Recital 24 Consumer Rights Directive; Article 2(14) Consumer Rights Directive; European Commission (2007) 'Green paper on the Review of the Consumer Acquis' *Official Journal of the European Union*, C 61/1, p. 21; A. Wiewiórska-Domagalska, *Consumer Sales Guarantees in the European Union* (Berlin, Boston: Otto Schmidt/De Gruyter European Law Pub, 2012), pp. 1-9; C. Willett, 'Direct Producer Liability' in: G. Howells, R. Schulze (eds.), *Modernising and Harmonising Consumer Contract law* (Munich: Sellier European Law Publishers, 2009), p. 194; Dutch Explanatory Memorandum, *Kamerstukken II 2012/13*, 33520, 3, p. 20; M.B.M. Loos, *De koopregeling in het voorstel voor een richtlijn consumentenrechten* (Studiekring Offerhaus nr. 12, Deventer: Kluwer, 2009),

a legal guarantee of two years (as discussed above) but the provider can additionally offer a commercial guarantee when purchasing the bicycle, for example extending the guarantee period to five years. Together with the precontractual information requirements on the existence and conditions of commercial guarantees set out in the Consumer Rights Directive,¹⁰⁶ certain requirements as regards commercial guarantees are provided in the Consumer Sales Directive to safeguard transparency.¹⁰⁷ This contributes to a high level of consumer protection, for instance since a guarantee may by no means limit any right.¹⁰⁸ Furthermore, this directive provides that, where commercial guarantee conditions contained in associated advertisements are more favourable to the consumer than those included in the guarantee statement, the more advantageous conditions prevail, providing a higher level of consumer protection.¹⁰⁹ The attempt here is to improve legal certainty and to avoid consumers being misled.¹¹⁰ The Consumer Sales Directive also contains a number of other rules on the content of the guarantee statement and on the way it is made available to consumers.¹¹¹ The rationale is that it will be relatively easy for consumers to find out the identity of the producer as their name will appear often in the case itself or in the accompanying instructions for use. In many cases, it will be easier for consumers

8.2; M.B.M. Loos, *Consumentenkoop (Monografieën BW nr. B65b)* (Deventer: Wolters Kluwer, 2019), p. 25; Asser/Hijma 7-I 2019/138, 139; Germany: Section 443 German Civil Code; H.P. Westermann, *Münchener Kommentar zum BGB*, 8. Auflage 2019, BGB § 443 Garantie, 1-23; F. Faust 'BGB Section 477 Beweislastumkehr' in: W. Hau and R. Poseck *BeckOK BGB* (67th edition, München: C.H. Beck, 2023), 1-55; C. Berger, O. Jauernig, *Bürgerliches Gesetzbuch*, 19. Auflage 2023, BGB Section 443 Garantie, 1-16.

106 Article 5(1)(e); 6(1)(m) Consumer Rights directive; European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1.

107 Article 17 Consumer Sales Directive; Recital 62 Consumer Sales Directive.

108 Recital 2, 3, 4, 6, 10, 53, 62 Consumer Sales Directive. Also see: N.R. Verhoeff (2020) 'Een nieuwe richtlijn consumentenkoop: wijzigingen op het gebied van conformiteit en commerciële garanties' *Bedrijfsjuridische berichten* 2020/84; Schaub, '11 Commerciële garantie' in: R.J.Q. Klomp & H.N. Schelhaas (red.), *GS Verbintenissenrecht* (Deventer: Wolters Kluwer); F.M. Wilke (2021) 'Das neue Kaufrecht nach Umsetzung der Warenkauf-Richtlinie' *Verbraucher und Recht*, p. 292.

109 Recital 2, 3, 4, 6, 10 Consumer Sales Directive.

110 Recital 62 Consumer Sales Directive; Dutch Explanatory Memorandum, *Kamerstukken II 2020/21*, 35734, 3, p. 29. For instance, the guarantee statement should include the terms of the commercial guarantee and state that the legal guarantee of conformity is unaffected by the commercial guarantee, making it clear that the commercial guarantee terms constitute an undertaking that is additional to the legal guarantee of conformity.

111 The guarantee does not have to be offered by the seller himself. The Directive also explicitly mentions the producer as the person who can offer the guarantee. Claims against the producer are also possible to promote the internal market and producer guarantee provides for an extra party to claim for instance damages, besides the direct contracting party. Recital 1, 2, 4, 10 Consumer Sales Directive; European Commission (2007) 'Green paper on the Review of the Consumer Acquis' *Official Journal of the European Union*, C 61/1, p. 14; C. Willett, 'Direct Producer Liability' in: G. Howells, R. Schulze (eds.), *Modernising and Harmonising Consumer Contract law* (Munich: Sellier European Law Publishers, 2009), p. 203; M.B.M. Loos, *De koopregeling in het voorstel voor een richtlijn consumentenrechten (Studiekring Offerhaus nr. 12*, Deventer: Kluwer, 2009); M.B.M. Loos, *Consumentenkoop (Monografieën BW nr. B65b)* (Deventer: Wolters Kluwer, 2019), p. 25.

to turn to the producer's local representative in their own country than to the reseller (established abroad). In addition, the producer often has more financial resilience than the smaller contracting party.

Whereas commercial guarantees are common in sales contracts, this is not the case in mobility usership contracts. In the case studies, neither the other party nor the producer has provided such a commercial guarantee. This makes sense because commercial guarantees need to extend the right of ownership that the consumer has acquired on the vehicle and the mobility usership consumer does not acquire this right.¹¹² Mobility usership contracts also include a service component that entitles the consumer to replacement, repair or maintenance of the vehicle if it does not meet certain promised properties for continued use. In other words, it is arguable that the parts that would normally be part of a commercial guarantee are now (partially) included in the service component of mobility usership. For case study 2, the contract mainly focusses on the service component of the mobility usership contract, namely the (on-demand) accessibility of the mobility use from point A to point B. The consumer is not burdened with the maintenance and repair of the vehicle as these come at the expense of the provider. This also applies to case study 1 where, for example, free repair and maintenance are included in the service component of the mobility usership contract. In case study 3, the cooperative often provides repair and maintenance as a part of the service component of the contract. This also applies to large-scale cooperatives where there exist many similarities with case study 2. The consumer's obligation for repair and maintenance is now included in the mobility usership contract, the contract focusses on (on-demand and care-free) accessibility of the use. All in all, the service component of the mobility usership contract therefore presumably does not differ much from a commercial guarantee because the service component of the contract offers additional guarantees, such as the maintenance of the vehicle. As mentioned above, the commercial guarantee could also be offered by the producer. The producer is defined under the Consumer Sales Directive as a manufacturer of goods, an importer of goods into the Union, or any person purporting to be a producer by placing its name, trademark,

112 Article 2(12), 17(1) Consumer Sales Directive. Also see: Recital 24 Consumer Rights Directive; Article 2(14) Consumer Rights Directive; European Commission (2007) 'Green paper on the Review of the Consumer Acquis' *Official Journal of the European Union*, C 61/1, p. 21; C. Willett, 'Direct Producer Liability' in: G. Howells, R. Schulze (eds.), *Modernising and Harmonising Consumer Contract law* (Munich: Sellier European Law Publishers, 2009), p. 194; Dutch Explanatory Memorandum, *Kamerstukken II 2012/13*, 33520, 3, p. 20; M.B.M. Loos, *De koopregeling in het voorstel voor een richtlijn consumentenrechten (Studiekring Offerhaus nr. 12*, Deventer: Kluwer, 2009), 8.2; M.B.M. Loos, *Consumentenkoop (Monografieën BW nr. B65b)* (Deventer: Wolters Kluwer, 2019), p. 25; Asser/Hijma 7-I 2019/138, 139; Germany: Section 443 German Civil Code; H.P. Westermann, *Münchener Kommentar zum BGB*, 8. Auflage 2019, BGB § 443 Garantie, 1-23; F. Faust, *BeckOK BGB*, Hau/Poseck, 67. Edition, 01 August 2023, 1-55; C. Berger, O. Jauernig, *Bürgerliches Gesetzbuch*, 19. Auflage 2023, BGB Section 443 Garantie, 1-16.

or other distinctive sign on the goods.¹¹³ This raises the question of whether the good should also be the benchmark when applying this to mobility usership, or whether it should be about ‘producing/manufacturing the service.’ As substantiated above, the object of the agreement is the use of the vehicle and the vehicle itself, which means that the rules on commercial guarantees would reach too far if the benchmark would be the vehicle in mobility usership contracts. The reason for this is that this vehicle has no connection to the actual contract of the mobility usership consumer, namely the sole use of the bicycle. In practice, however, this will mean that the provider is also the ‘producer.’ The provider (as an owner of the bicycle) in its turn is entitled to a compliant product vis-à-vis the seller and producer of the bicycle. Also in case study 3, when the consumer is also a co-owner, they are entitled to the guarantees vis-à-vis the seller or producer – whoever offered the commercial guarantee. If a guarantee were to be provided, additional formal requirements would apply.¹¹⁴

Member States can provide rules on other aspects concerning commercial guarantees which are not regulated in the Consumer Sales Directive, including rules on the language(s) in which the commercial guarantee statement is made available to the consumer.¹¹⁵ However, The Dutch legislator did not lay down any other aspects of commercial guarantees.¹¹⁶ The Dutch legislator has decided to regulate beyond the Consumer Sales Directive by applying the rules on commercial guarantees also to guarantees offered against payment.¹¹⁷ The question is to what extent the service-component of mobility usership contracts can be seen as a commercial guarantee against payment. That does not seem to be the case. After

113 Article 2(4) Consumer Sales Directive.

114 The commercial guarantee statement should be provided to the consumer on a durable medium at the latest at the time of the delivery of the goods. In application to the case studies, this would be before the start of mobility usership contract. Moreover, the commercial guarantee statement shall be expressed in plain, intelligible language. Furthermore, it includes a clear statement that the consumer is entitled by law to remedies from the seller, free of charge in the event of a lack of conformity of the goods and that those remedies are not affected by the commercial guarantee, see article 17(2)(a) Consumer Sales Directive. In addition, this principle can be maintained for mobility usership contracts in the case studies. In addition, it includes the name and address of the guarantor, the procedure to be followed by the consumer to obtain the implementation of the commercial guarantee, the designation of the goods to which the commercial guarantee applies, and the terms of the commercial guarantee, see article 17(2)(b)(c)(d)(e) Consumer Sales Directive.

115 Article 17(4) Consumer Sales Directive.

116 Lexplicatie, Transponeringstabel bij: Richtlijn (EU) 2019/771 betreffende bepaalde aspecten van overeenkomsten voor de verkoop van goederen, tot wijziging van Verordening (EU) 2017/2394 en Richtlijn 2009/22/EG, en tot intrekking van Richtlijn 1999/44/EG, Aanhef regeling. Also see: M.B.M. Loos, *Consumentenkoop (Monografieën BW nr. B65b)* (Deventer: Wolters Kluwer, 2019), p. 25.

117 Article 7:6a Dutch Civil Code; Dutch Note in Response to the Report, *Kamerstukken II 2000/01*, 27809, 6, p. 3; P. Klik, *Koop en consumentenkoop* (10e druk, Deventer: Wolters Kluwer, 2022), p. 5.4; M.B.M. Loos, *Consumentenkoop, Monografieën BW, nr. B65b* (Deventer: Kluwer, 2019), 25; M.M. van Rossum, ‘4 Producten rechtstreeks aansprakelijk tegenover de consument (lid 2)’ in: S.E. Bartels (red.), *GS Bijzondere overeenkomsten* (Deventer: Wolters Kluwer).

all, the service component is part of the core of the mobility usership agreement and not an offer of extra-statutory rights. However, this finally depends on the interpretation of the contract and the applicable conditions.

4.3.4 Consumer information

The Consumer Sales Directive states that Member States need to take appropriate measures to ensure that information on consumers' rights are available to consumers.¹¹⁸ No information obligations are mentioned in the Consumer Sales Directive itself, but it complements the Consumer Rights Directive.¹¹⁹ This latter directive lays down provisions regarding *inter alia* (precontractual) information requirements.¹²⁰ The sales contract should comply with the precontractual information requirements which form an integral part of the sales contract.¹²¹ Since these information requirements correspond with the Consumer Rights Directive, and this directive applies to mobility usership consumers to a considerable extent, these information rights will be discussed and applied in chapter 5.¹²² Alongside the precontractual information requirements on the existence and conditions of commercial guarantees set out in the Consumer Rights Directive, certain information requirements regarding commercial guarantees should be provided by the Consumer Sales Directive in order to safeguard transparency.¹²³ This is discussed under the section on commercial guarantees.

4.4 APPLICATION OF THE CONSUMER CREDIT DIRECTIVE

This section discusses the rights following from the Consumer Credit Directive, its national implementations, and the possibility and proportionality of applying these rules to the different case studies. Exclusive mobility, as exemplified in case study 1, is very similar to consumer credit because both cases concern (1) a contract between consumer and professional party (*ratione personae* scope) and (2) a credit because it is not necessarily a sum of money but can also entail a credit in goods (*ratione materiae* scope). Furthermore, (3) the consumer is obliged to a – often monetary – consideration in exchange for making the credit or use available. As concluded in previous chapters, exclusive mobility use is,

118 Article 20 Consumer Sales Directive.

119 Recital 11 Consumer Sales Directive.

120 Recital 11 Consumer Sales Directive.

121 Recital 26 Consumer Sales Directive.

122 Recital 20 Consumer Sales Directive; Article 20 Consumer Sales Directive.

123 Recital 62, first sentence Consumer Sales Directive.

nevertheless, not protected under the Consumer Credit Directive. This lack of protection naturally also applies to the other case studies, but these offer fewer similarities with consumer credit.

The key points of the Consumer Credit Directive are (1) precontractual information and practices, (2) the obligation to assess the creditworthiness of the consumer, (3) database access, (4) contractual information and rights, and (5) other consumer rights.¹²⁴ These will be researched below. Furthermore, overdraft facilities are omitted as this subject is irrelevant to my research; it will not play any role in mobility usership contracts.¹²⁵ The Consumer Credit Directive also elaborates on specific precontractual information requirements for certain credit agreements such as arrangements in respect of deferred payment or repayment methods. These will likewise not be discussed as they are beyond the scope of my research.¹²⁶ Furthermore, chapter VII of the Consumer Credit Directive on implementing measures and chapter VIII of the Consumer Credit Directive on transitional and final provisions are not included as they focus on enforcement or do not focus on the substantive rights.¹²⁷

4.4.1 *Precontractual information and practices*

Below, the precontractual information rights and practices that follow from the Consumer Credit Directive are examined. As in paragraph 4.3, the focus of this discussion is whether the provisions in the Consumer Credit Directive, although they legally do not apply, are relevant for mobility usership contracts and could or should apply. Respectively, this paragraph discusses the (a) standard information to be included in advertising, (b) precontractual information and (c) precontractual information requirements for certain credit agreements.¹²⁸ The objective of these information obligations is on enhancing consumer protection and the balance between the contracting parties. After all, the *ratio legis* of information obligations is that by providing clear information, consumers gain insight into the product and are warned about possible risks. The intention is that this will enable consumers to make a responsible choice when contracting.¹²⁹

124 Respectively; (1) Article 5, 6 and 7 Consumer Credit Directive 2008, (2) Article 8 Consumer Credit Directive 2008, (3) Article 9 Consumer Credit Directive 2008, (4) Article 10, 11, 12, 13, 14, 15, 16, 17, 18 Consumer Credit Directive 2008, (5) Article 19, 20, Consumer Credit Directive 2008.

125 Article 3(e) Consumer Credit Directive 2008, an overdraft.

126 Article 6 Consumer Credit Directive 2008.

127 Article 18, 22-32 Consumer Credit Directive 2008.

128 Respectively; (a) Article 4 Consumer Credit Directive 2008, (b) Article 5 Consumer Credit Directive 2008, (c) Article 6 Consumer Credit Directive 2008.

129 Dutch Explanatory Memorandum, *Kamerstukken II 2003/04*, 29507, 3, pp. 3-5.

Standard information to be included in advertising

The case studies do not provide information on advertising and do not determine whether standard information is provided. If any advertising would have been made and the provisions of the Consumer Credit Directive would apply, the provider would need to indicate an interest rate or figures relating to the cost of the credit to the consumer and include standard information to compensate for the consumer's information asymmetry by imposing information obligations.¹³⁰

Although no interest rates exist in the contracts of the case studies, clarity on the figures relating to the costs of the mobility usership contract can be provided. In addition, the payment that the provider receives for making the use available to the consumer can be compared to interest as it entails the costs of the use for the consumer. In other words, the consumer of a mobility usership contract might not pay interest, but they pay the provider, who receives the payment for making the bicycle available.¹³¹ It is possible to specify and clarify these costs for the consumer, but the question is whether this information obligation is also proportionate in practice and aligns with the *ratio legis* of the obligation. In case study 2, the provider can (and often will) specify the costs of the shared bicycle, where the price often consists of a starting rate and a rate per minute.¹³² Although there is a certain information asymmetry in case study 2, the question is whether the burden for the provider to inform the consumer is in proportion to the possible risks of the information asymmetry, as it concerns a one-off payment of a low amount of €1.50. For advertising purposes, the information obligation for case study 2 is disproportionately burdensome for the provider, especially when considering the short term of the contracts. This is different in case study 1. In this case study, the consumer pays a monthly instalment in exchange for the exclusive use of a vehicle, also known as a lease.¹³³ This exclusive use can be equated with consumer credit in the Consumer Credit Directive which entails a provision of use to a consumer, or in other words the enjoyment of a movable item (*'goederenkrediet'*).¹³⁴

130 Article 4(1), first paragraph Consumer Credit Directive 2008. Netherlands: Article 1(1) Dutch Financial Supervision Act; Article 7:118(1)(a) Dutch Civil Code. Germany: Section 247(18)(1) German Introductory Act to the Civil Code. France: Article L312-6 French Consumer Code. Belgium: Article VII.64 Section1 Belgian Code of Economic Law.

131 J. de Vogel (2020) 'Private Lease: Consumer Credit in Disguise?' *Journal of European Consumer and Market Law* (9)2, pp. 57-58.

132 For example: Lime provides (electric) bicycles and apply starting fees of €1.00 and a rate of €0.22 per minute.

133 For example: Swapfiets provides a basic bicycle for €18.90 per month (with a €2.00 discount as a student).

134 J. de Vogel (2020) 'Private Lease: Consumer Credit in Disguise?' *Journal of European Consumer and Market Law* (9)2, pp. 51-60. Netherlands: Article 1:1(b) Dutch Financial Supervision Act; Dutch Explanatory Memorandum, *Kamerstukken II 2009/10*, 32339, 3, p. 30; J.M. van Poelgeest (2010) 'Wanneer zijn de regels voor het aanbieden van consumentenkrediet van toepassing?' *Tijdschrift voor de Ondernemingsrechtpraktijk* 6, p. 216; E. van den Ing, *Markttoegang financiële dienstverleners Wft: over markttoetredingsverboden en vergunningsverlening door de AFM* (Eerste druk, Deventer: Kluwer, 2012).

As mentioned, the costs for the bicycle use are calculated within the monthly payments but under the Consumer Credit Directive there is an obligation to explicitly specify these costs.¹³⁵ Here as well, the monthly payment for the lease of a bicycle includes the costs for the use component and the costs for the service component. Despite the fact that the consumer does not pay interest, the costs for use should be made explicit by specifying the use component and the service component.¹³⁶

It is important that the information asymmetry between provider and consumer, also in MU cases, is negated by the information obligation of the provider because the contract involves a larger and monthly payment obligation by the consumer that could negatively affect the consumer's creditworthiness. Although the monthly obligation for a bicycle such as in case study 1 are not high, this does entail a significant monthly payment obligation for a lease car. Therefore, the information obligation for case study 1 for advertising purposes is proportional and limits the consumers' risks.

For the cooperative in case study 3 it is also possible to make the costs explicit. However, the cost structure depends on the type and contents of the specific cooperative. With small-scale cooperatives, as in case study 3, there will be no (prominent) profit motive. As a result, the costs for the consumer possibly consist of the depreciation costs plus contingently any budgeted costs on repairment and maintenance of the bicycle. The provider can, for example, also opt for an on-the-spot payment for necessary repairs without an increase to the user price. On the other hand, there may also be a profit motive, which will more often exist with larger scale cooperatives. Regardless of what the cost structure consists of exactly, the cooperative would be obliged if the Consumer Credit Directive were applicable to inform the consumer of these costs.¹³⁷ Like in case study 2, providing a cost specification

135 Article 4(1), second paragraph Consumer Credit Directive 2008. However, this is not an obligation in case national legislation requires the indication of the annual percentage rate of charge in advertising concerning credit agreements which does not indicate an interest rate or any figures relating to any cost of credit to the consumer. It still comes down to the fact that the consumer must be informed about the costs associated with the contract. Netherlands: Article 1(1) Dutch Financial Supervision Act; Article 7:118(1)(a) Dutch Civil Code. Germany: Section 247(18)(1) German Introductory Act to the Civil Code. Belgium: Article VII.64(1) Belgian Code of Economic Law. France: Article L312-6 French Consumer Code.

136 The question also arises to what extent these costs for use entail hidden interest here. See for a more detailed explanation: J. de Vogel (2020) 'Private Lease: Consumer Credit in Disguise?' *Journal of European Consumer and Market Law* (9)2, pp. 51-60.

137 Article 4(1), second paragraph Consumer Credit Directive 2008. However, this is not an obligation in case national legislation requires the indication of the annual percentage rate of charge in advertising concerning credit agreements which does not indicate an interest rate or any figures relating to any cost of credit to the consumer. It still comes down to the fact that the consumer must be informed about the costs associated with the contract. Netherlands: Article 1:1 Dutch Financial Supervision Act; Article 7:118(1)(a) Dutch Civil Code. Germany: Section 247(18)(1) German Introductory Act to the Civil Code. Belgium: Article VII.64(1) Belgian Code of Economic Law. France: Article L312-6 French Consumer Code.

to the users of the vehicles is well possible. In practice, advertising is not usual for non-commercial cooperatives, and certainly not in the case of small-scale cooperatives such as in case study 3. After all, these are often small-scale neighbourhood initiatives that do not benefit from a wide reach; however, the case might be different for commercial cooperatives. Larger-scale initiatives could possibly involve advertising, but this is more likely for commercial cooperatives than for non-commercial cooperatives. With a larger scale cooperative, as in case study 2, the burden for the provider to inform the consumer exceeds the possible risks of the information asymmetry since it concerns short-term use in exchange for a one-off payment of a low amount. This means that the information obligation in advertising for large scale cooperatives is disproportionately burdensome for the provider.

A number of formal requirements also apply here. For all case studies, the standard information needs to be specified in a clear, concise, and prominent way.¹³⁸ This standard information includes components such as the borrowing rate, the total amount of credit, and the annual percentage rate of charge which should be provided to the consumer.¹³⁹ Like the interest rate, these components cannot be applied for mobility usership contracts because they are not credit contracts under the Consumer Credit Directive. Nevertheless, they may indicate an obligation to provide information regarding equivalents of these terms. After all, the purpose of the obligation to inform consumers on these components is to provide consumers with the information necessary to allow them to make an informed choice and risk assessment. For case study 1, this applies to equivalents of the mentioned terms which can inform the consumer on the total amount of the mobility usership contract and the annual percentage rate of charge since this mobility usership contract continues for four years. In case study 2, smaller amounts are exchanged and as explained above, the obligation to inform in advertising does not seem proportionate here.¹⁴⁰ Case study 3 focusses on scheduled use of a bicycle, where the consumer makes a reservation for a relatively short period of time, in this case three hours. Here, the consumer could easily be informed in advance with a cost specification on the use. After

138 Article 4(2) preamble Consumer Credit Directive 2008. Netherlands: Article 1:1 Dutch Financial Supervision Act; Article 7:118(1)(a)(b) Dutch Civil Code. Germany: Section 247(18)(1) German Introductory Act to the Civil Code. Belgium: Article VII.64(1) Belgian Code of Economic Law. France: Article L312-6, 1°, 2°, 3°, 4°, 5°, 6° French Consumer Code.

139 Article 4(2)(a)(b)(c) Consumer Credit Directive 2008. Particularities regarding sub (a) should be provided on the rate being fixed or variable or both, together with particulars of any charges included in the total cost of the credit to the consumer. Sub (c) mentions that Member States may decide that the annual percentage rate of charge need not be provided. Netherlands: Article 1:1 Dutch Financial Supervision Act; Article 7:118(1)(a)(b) Dutch Civil Code. Germany: Section 247(18)(1), 1, 2 German Introductory Act to the Civil Code. Belgium: Article VII.64(1), 1°, 2°, 3° Belgian Code of Economic Law. France: Article L312-6, 1°, 2°, 3° French Consumer Code.

140 For example: Lime provides (electric) bicycles and apply starting fees of €1 and a rate of €0.22 per minute.

all, the duration of use is clear in advance, which enables the cooperative to specify the total amount of the contract and the percentage rate of charge per time unit. Nevertheless, applying an information obligation for advertisement purposes will not often occur in practice because cooperatives are often the result of neighbourhood initiatives. Moreover, the burden of the information obligation for the provider is not in proportion to the risks for the consumer. In addition to information about the costs of the mobility usership contract, the consumer must also be informed under the Consumer Credit Directive on the (a) duration of the mobility usership contract, (b) the total amount payable by the consumer and (c) the amount of the instalments.¹⁴¹ In case studies 2 and 3, the consumer determines the duration of use on their own. Therefore, the provider cannot be obliged to inform the consumer about the duration of the contract in advance.¹⁴² The total amount payable is also determined by the duration of use, which the consumer determines. In addition, these case studies do not involve instalment payments, so the consumer does not need to be informed on this aspect if the provisions of the Consumer Credit Directive would apply.

For case study 1, a minimum duration is attached to the use, namely four years. As mentioned in paragraph 4.4, this makes case study 1 similar to a consumer credit because it concerns a consumer contract and a credit in goods against a consumers' consideration in exchange for making the credit or use available.¹⁴³ Due to the great number of similarities, the provider of exclusive mobility use can comply with the Consumer Credit Directive's information obligations pertaining to the duration of the contract, the total amount payable by the consumer and the amount of the instalments.¹⁴⁴ In addition, the provider needs to provide a representative example to exemplify the consumers obligations under

141 Article 4(2)(d)(f) Consumer Credit Directive 2008. See for deferred payments: Article 4(2)(e) Consumer Credit Directive 2008. Netherlands: Article 1:1 Dutch Financial Supervision Act Article 7:118(1)(b) Dutch Civil Code. Germany: Section 247(18)(2), 1, 3 German Introductory Act to the Civil Code. Belgium: Article VII.64(1), 4°, 6° Belgian Code of Economic Law. France: Article L312-6, 4°, 6° French Consumer Code.

142 Unless there is a minimum purchase period for example.

143 The difference between credit agreements and MU lease agreements, on the other hand, is the explicit exclusion of leases. This exclusion mainly concerns the fact that there is no transfer of ownership at the end of the term of the payments. J. de Vogel (2020) 'Private Lease: Consumer Credit in Disguise?' *Journal of European Consumer and Market Law* (9)2, pp. 51-60. Netherlands: Article 1:1(b) Dutch Financial Supervision Act; Dutch Explanatory Memorandum, *Kamerstukken II 2009/10*, 32339, 3, p. 30; J.M. van Poelgeest (2010) 'Wanneer zijn de regels voor het aanbieden van consumentenkrediet van toepassing?' *Tijdschrift voor de Ondernemingsrechtpraktijk* 6, p. 216; E. van den Ing, *Markttoegang financiële dienstverleners Wft: over markttoetredingsverboden en vergunningsverlening door de AFM* (Eerste druk, Deventer: Kluwer, 2012).

144 Article 4(2)(d)(f) Consumer Credit Directive 2008. See for deferred payments: Article 4(2)(e) Consumer Credit Directive 2008. Netherlands: Article 1(1) Dutch Financial Supervision; Article 7:118(1)(b) Dutch Civil Code. Germany: Section 247(18)(2), 1, 3 German Introductory Act to the Civil Code. Belgium: Article VII.64(1), 4°, 6° Belgian Code of Economic Law. France: Article L312-6, 4°, 6° French Consumer Code.

the Consumer Credit Directive.¹⁴⁵ In case study 1, the provider can inform the consumer that the duration of the contract is four years, the total amount to be paid is €720 and the number of instalments in which to pay is 48; due to the similarities, the rationale for this information obligation is also consistent with exclusive mobility use. For case studies 1 and 3 the provider can also give a representative example of the consumers' obligations, despite the fact that the duration of the contract depends on the consumer.¹⁴⁶ After all, this does not have to be a personalised example, it is only an illustration of the cost structure. As described in detail above, the information obligation should not be applied to these case studies because this leads to disproportionate obligations for the provider that go against the rationale of the information obligation. Under the Consumer Credit Directive, the consumer also needs to be informed on ancillary services relating to the agreement in case the marketed terms and conditions make them compulsory to obtain when the consumer concludes the mobility usership contract. The obligation to enter that ancillary contract shall also be stated in a clear, concise, and prominent way, together with the annual percentage rate of charge.¹⁴⁷ The same idea applies here. Again, this obligation should apply to case study 1, in line with the rationale behind the obligation, whereas the obligation for case studies 2 and 3 do not match the *ratio legis* of the information obligation.

Precontractual information

Under the Consumer Credit Directive, the provider must enable the consumer to compare different offers in good time so that the consumer is able to make an informed decision on whether to conclude an agreement before they are bound by said agreement or offer. The provider should enable the consumer with the ability to compare the offer under the provider's conditions, with the consumer's provided information and preferences.¹⁴⁸

145 Article 4(2), preamble Consumer Credit Directive 2008. Netherlands: Article 1:1 Dutch Financial Supervision Act; Article 7:118(1)(a)(b) Dutch Civil Code. Germany: Section 247(18)(1) German Introductory Act to the Civil Code. Belgium: Article VII.64(1) Belgian Code of Economic Law. France: Article L312-6, 1°, 2°, 3°, 4°, 5°, 6° French Consumer Code.

146 Article 4(2) preamble Consumer Credit Directive 2008. Netherlands: Article 1:1 Dutch Financial Supervision Act; Article 7:118(1)(a)(b) Dutch Civil Code. Germany: Section 247(18)(1) German Introductory Act to the Civil Code. Belgium: Article VII.64(1) Belgian Code of Economic Law. France: Article L312-6, 1°, 2°, 3°, 4°, 5°, 6° French Consumer Code.

147 Article 4(3) Consumer Credit Directive 2008. Netherlands: Article 1:1 Dutch Financial Supervision Act; Article 7:118(1)(a)(b) Dutch Civil Code. Germany: Section 247(18)(3) German Introductory Act to the Civil Code; Section 6(7) German Price Indication Regulation; Belgium: Article VII.64(3) Belgian Code of Economic Law. France: Article L312-7 French Consumer Code.

148 Article 5(1) Consumer Credit Directive 2008. The creditor could also entail the credit intermediary. Netherlands: Article 1:25(2) Dutch Civil Code; Division 1.4.2 Dutch Financial Supervision Act. Germany: Section 491a German Civil Code; Section 655a(2) German Civil Code; Article 247(1) German Introductory Act to the Civil Code. Belgium: Article VII.70(1) Belgian Code of Economic Law. France: Article L312-12, L312-14 French Consumer Code.

According to the Consumer Credit Directive, this information could either be provided on paper or on another durable medium and must be provided by means of the Standard European Consumer Credit Information (SECCI) form.¹⁴⁹ First of all, the substantive requirements of the SECCI form and to what extent those information requirements are practically possible and proportional for mobility usership are discussed below. Additionally, possible added value in connection with the imbalance in the information position is also discussed. Subsequently, the formal requirement of the SECCI form and to what extent that form is practically possible and proportional for mobility usership is considered.

Several substantive elements of the SECCI have already been discussed above (paragraph 4.4.1) and will therefore only be mentioned, but considerations on application will not be repeated. These are (c) the total amount of credit, (d) the duration of the mobility usership agreement, (f) information provided by the provider on the borrowing rate, (g) the annual percentage rate of charge and the total amount payable by the consumer, which should be illustrated by means of a representative example, the obligation to inform the consumers on (h) the amount, number and frequency of payments to be made by the consumer, and (k) the obligation, if any, to enter into an ancillary service contract relating to the credit agreement.¹⁵⁰ In addition, the SECCI form should specify the (a) type of credit, which could, with a view to the applicability of the Consumer Credit Directive, entail the type of mobility usership contract for all case studies.¹⁵¹ Furthermore, it should

149 Article 5(1) Consumer Credit Directive 2008; Annex II Consumer Credit Directive 2008. Netherlands: Article 1:25(2) Dutch Civil Code; Division 1.4.2 Dutch Financial Supervision Act. Germany: Section 491a German Civil Code; Section 655a(2) German Civil Code; Article 247(1) German Introductory Act to the Civil Code. Belgium: Article VII.70(1) Belgian Code of Economic Law. France: Article L312-12 French Consumer Code.

150 Article 5(1) (c), (d), (f), (g), (h), (j), (k) Consumer Credit Directive 2008. Netherlands: Article 1:25(2) Dutch Financial Supervision Act; Division 1.4.2 Dutch Financial Supervision Act. Germany: Section 247(3)(1), nr. 1-9; Article 247(4)(1), nr. 1; Article 247(8)(1), nr. 1, 2; Article 247(13), (1); (3), (3); (3), (4), 4 German Introductory Act to the Civil Code. Belgium: Article VII.70(1), 1°, 2°, 3°, 4°, 6°, 7°, 8°, 10°, 11° Belgian Code of Economic Law. France: Article L312-12 French Consumer Code. The creditor as well as, if applicable, the identity and geographical address of the credit intermediary involved. Note: In case of a credit in the form of deferred payment for a specific good or service and linked credit agreement, the consumer needs to be informed on that good or service and its cash price, as stated in Article 5(1)(e) Consumer Credit Directive 2008.

151 Article 5(1)(a) Consumer Credit Directive 2008. Netherlands: Article 1:25(2) Dutch Financial Supervision Act; Division 1.4.2 Dutch Financial Supervision Act. Germany: Article 247(3)(1), nr. 1, 2, 4, 6, 9 German Introductory Act to the Civil Code; Article 247(13)(1) German Introductory Act to the Civil Code. Belgium: Article VII.70(1), 1°, 2°, 3°, 4° Belgian Code of Economic Law. France: Article L312-12 French Consumer Code. The creditor as well as, if applicable, the identity and geographical address of the credit intermediary involved. Note: In case of a credit in the form of deferred payment for a specific good or service and linked credit agreement, the consumer needs to be informed on that good or service and its cash price, as stated in Article 5(1)(e) Consumer Credit Directive 2008.

(b) stipulate the identity and the geographical address of the provider.¹⁵² In this regard, I do not see any application problems for any of the case studies. As stated above, the SECCI form is proportionally applicable to case study 1, meaning that these information components can also be included in the form. For case studies 2 and 3, it should be clear to the consumer where information about the type of contract and the identity of the provider can be found, as this would be in line with the rationale for this information in combination with the nature of shared use. Furthermore, the provider needs to (l) inform about the interest rate applicable in the case of late payments and the arrangements for its adjustment, and, where applicable, any charges payable for default. The provider also needs to (m) warn the consumer on the consequences of missing payments.¹⁵³ Both (l) and (m) seem to be particularly appropriate for case study 1, where the consumer commits to a long-term payment obligation, because this informs the consumer about potential risks and effects of reoccurring payment obligations and the consequences of late or missing payments. The *ratio legis* of this information component is not as significant for case studies 2 and 3, where it comes to relatively low, one-off payments. Nevertheless, it is important that consumers in case studies 2 and 3 are informed, in line with the *ratio legis* of this provision, about the consequences of late or missing payments because the fairness and transparency are central, fostering trust by treating consumers fair and avoiding hidden terms or costs. Furthermore, the provider needs to provide information on (n) the possible sureties required, (o) the existence or absence of a right of withdrawal, and (p) the right of early repayment.¹⁵⁴ Under the Consumer Credit Directive, consumers also need to (q) be informed on their rights, immediately, in case of a database consultation carried out for the purposes of assessing the consumer's creditworthiness and, on request, to

152 Article 5(1)(b) Consumer Credit Directive 2008 Netherlands: Article 1:25(2) Dutch Financial Supervision Act; Division 1.4.2 Dutch Financial Supervision Act. Germany: Article 247(3)(1), nr. 1, 2, 4, 6, 9 German Introductory Act to the Civil Code; Article 247(13)(1) German Introductory Act to the Civil Code. Belgium: Article VII.70(1), 1°, 2°, 3°, 4° Belgian Code of Economic Law. France: Article L312-12 French Consumer Code. The creditor as well as, if applicable, the identity and geographical address of the credit intermediary involved. Note: In case of a credit in the form of deferred payment for a specific good or service and linked credit agreement, the consumer needs to be informed on that good or service and its cash price, as stated in Article 5(1)(e) Consumer Credit Directive 2008.

153 Article 5(1)(l)(m) Consumer Credit Directive 2008. Netherlands: Article 1:25(2) Dutch Financial Supervision Act; Division 1.4.2 Dutch Financial Supervision Act. Germany: Article 247(3)(1), nr. 11, 12, 13, 14 German Introductory Act to the Civil Code; Article 247(4)(1), nr. 2, 3 German Introductory Act to the Civil Code. France: Article L312-12 French Consumer Code. Where applicable regarding sub (p), information should be given concerning the creditor's right to compensation and the way in which that compensation will be determined in accordance with Article 16 of the Consumer Credit Directive 2008.

154 Article 5(1)(n), (o), (p) Consumer Credit Directive 2008. Netherlands: Article 1:25(2) Dutch Financial Supervision Act; Division 1.4.2 Dutch Financial Supervision Act. Germany: Article 247(3)(1), nr. 11, 12, 13, 14 German Introductory Act to the Civil Code; Article 247(4)(1), nr. 2, 3 German Introductory Act to the Civil Code. France: Article L312-12 French Consumer Code. Where applicable regarding sub (p), information should be given concerning the creditor's right to compensation and the way in which that compensation will be determined in accordance with Article 16 of the Consumer Credit Directive 2008.

(r) be supplied with a copy of the draft credit agreement. This should be free of charge.¹⁵⁵ The provider could theoretically offer this information for all case studies but these information components lack proportionality for case studies 2 and 3. In order to meet the rationale for these components, in combination with the nature of shared use, it should be clear to the consumer in case studies 2 and 3 where these information components can be found, for example on the provider's website. Paragraph 4.4.3 discusses whether a database consultation to assess creditworthiness is substantially proportional.

In addition to the substantive requirements, there are also formal information requirements, where under the Consumer Credit Directive, the provider is deemed to have fulfilled these information requirements if they have supplied the SECCI form.¹⁵⁶ The *ratio legis* behind this formal requirement is to ensure transparency in B2C transactions by presenting key information in a standardized format to enable consumers to compare different offers and make informed decisions about whether to enter into a credit agreement. Furthermore, through the SECCI form, providers comply with the obligation to offer the information in a clear, concise, and prominent way. The SECCI form constitutes four pages of schematically displayed information about the essential rights of the consumer. The form would fit for case study 1 because the consumer enters an obligation for a longer period and therefore the SECCI is a proportional way of informing the consumer.¹⁵⁷ After all, an information asymmetry is negated by the information obligation of the provider because the contract involves a larger monthly payment obligation which might negatively affect

155 Article 5(1)(q) Consumer Credit Directive 2008, pursuant to Article 9(2) Consumer Credit Directive 2008; Article 1:25(2) Dutch Financial Supervision Act; Division 1.4.2 Dutch Financial Supervision Act. Germany: Article 247(3)(1), nr. 16 German Introductory Act to the Civil Code. Belgium: Article VII.70(1), 17° Belgian Code of Economic Law. France: Article L312-12 French Consumer Code. If applicable, the period of time during which the creditor is bound by the pre-contractual information. Article 5(1)(r), (s) Consumer Credit Directive 2008. Germany: Article 247(3)(1), nr. 15; Article 247(4)(1), nr. 4 German Introductory Act to the Civil Code. Belgium: Article VII.70(1), 18°, 19° Belgian Code of Economic Law. France: Article L312-12 French Consumer Code. Sub (r) shall not apply if the creditor is at the time of the request unwilling to proceed to the conclusion of the credit agreement with the consumer.

156 Article 5(1) Consumer Credit Directive 2008. This is also deemed for Article 3, (1) and (2) Unfair Commercial Practices Directive. Netherlands: Article 1:25(2) Dutch Financial Supervision Act; Division 1.4.2 Dutch Financial Supervision Act. Germany: Section 491a German Civil Code; Section 655a(2) German Civil Code; Article 247(1) German Introductory Act to the Civil Code. Belgium: Article VII.70(1) Belgian Code of Economic Law. France: Article L312-12 French Consumer Code. Note that under the Consumer Credit Directive 2008, any additional information which the provider may provide to the consumer is given in a separate document which may be annexed to the SECCI form. Article 5(3) Consumer Credit Directive 2008 stipulates that if the agreement is concluded at the consumer's request using a means of distance communication which does not enable the necessary information, the provider shall provide the consumer with the full pre-contractual information using the SECCI form immediately after the conclusion of the credit agreement. In all case studies, the provider can meet this requirement. However, as discussed, the SECCI form contradicts with case study 2 and 3 because in practice reading the SECCI form takes too much time compared to the use of the vehicle.

157 This also considers the similarities as mentioned above between consumer credit and MU leases.

the consumer's risks and creditworthiness.¹⁵⁸ Since the length of the SECCI is four pages, this form contradicts the essential motivation of shared mobility contracts; when a ride will take seven minutes as in case study 2, it is unlikely that the consumer will take the time to read four pages of information. Although provision of the SECCI form is only necessary once, prior to the consumer's first use, it would still be too burdensome for the first ride if the form must be read through before that ride.¹⁵⁹ The SECCI form, which contributes to providing transparent, clear and comprehensive information, does therefore not align with short-term contracts such as in case study 2. Sometimes shared mobility providers inform their consumer of the required information when registering on their mobile app. In such a case, the consumer does not have to be informed before each use. This would result in precontractual information obligations that are less demanding for the contracting parties, while improving consumer knowledge and the balance between the contracting parties by limiting the information asymmetry. This also applies for case study 3.

In addition to the SECCI form, the consumer may, if the Consumer Credit Directive would apply, request a copy of the draft credit agreement free of charge to receive and assess information about the draft agreement to decide whether or not to contract.¹⁶⁰ In case study 2, the contract is concluded by use of a mobile app. However, this does not preclude the provision of a draft agreement. Here too, the argument applies that the provision of a draft agreement might be at odds with the nature of short-term shared mobility with a predominant service component. However, this calls into question the feasibility of such an obligation when a consumer will use a bicycle for only seven minutes. Presumably few consumers will take the time to absorb the agreement. This may also be the case in case study 3. Even if the use takes three hours, absorbing the information provided in the draft agreement will consume a significant portion of those three hours. Larger-scale cooperatives are similar to case study 2 as they have a predominant service component. This means that also in this instance the consumer has the right to a draft agreement, but the obligation does not seem proportional for providers. The policy target linked to this obligation is to inform the consumer, but as long as it is too burdensome for the consumer to absorb the draft agreement, the obligation seems to exceed its purpose.

158 See for an elaboration: J. de Vogel (2020) 'Private Lease: Consumer Credit in Disguise?' *Journal of European Consumer and Market Law* (9)2, pp. 51-60.

159 With subsequent use, the consumer often does not have to accept the general terms and conditions (or a SECCI form) again.

160 Article 5(4) Consumer Credit Directive 2008. This provision shall not apply if the creditor is at the time of the request unwilling to proceed to the conclusion of the credit agreement with the consumer. Netherlands: Article 112 Dutch Decree on the Supervision of Financial Enterprises under the Wft; Germany: Section 491a(2) German Civil Code. Belgium: Article VII.70(4) Belgian Code of Economic Law. France: Article L312-13 French Consumer Code.

Lastly, for consumer credit agreements, Member States need to ensure that providers offer adequate explanations to the consumer in order to enable the consumer to assess whether the proposed contract is adapted to their needs and to their financial situation *inter alia* by explaining the necessary precontractual information, the essential characteristics of the products proposed and the specific effects they may have on the consumer, including the consequences of default in payment by the consumer. Member States may adapt *inter alia* how and the extent to which such assistance is given.¹⁶¹

Precontractual information requirements for certain credit agreements

Under the Consumer Credit Directive, Member States may determine that protective rules may apply to agreements which are concluded by an organisation which is established for the mutual benefit of its members. Such an organisation could be a cooperative as exemplified in case study 3. This would entail the application of specific information requirements.¹⁶² Although the Consumer Credit Directive assigns similar information obligations to the provider as described above, the rights are slightly more extensive.¹⁶³ In addition, instead of SECCI in Annex II, Annex III is used here to inform the consumer.¹⁶⁴ In this respect, fewer conditions are set for cooperatives on the description of the main features of the product, the costs of the credit and other important legal aspects, such as the conditions and procedure for terminating the agreement.¹⁶⁵ However, more extensive conditions are set with regards to additional information to be given where the precontractual information is provided by organisations such as cooperatives.¹⁶⁶

4.4.2 Obligation to assess the creditworthiness of the consumer

Under the Consumer Credit Directive, Member States need to ensure that the provider assesses the consumer's creditworthiness based on sufficient information before the conclusion of the agreement. The provider can obtain this information from the consumer where necessary based on a consultation of a relevant database. In the Netherlands, the provider participates in a credit registration system that is called the Dutch Central Credit

161 Article 5(6) Consumer Credit Directive 2008. This applies to the creditor as well as, where applicable, credit intermediaries. Netherlands: Article 1:25(2) Dutch Financial Supervision Act. Germany: Section 491a(3); Section 655(2) German Civil Code; Belgium: Article VII.74 Belgian Code of Economic Law.

162 Article 6(1); Article 2(5)(a), (b) Consumer Credit Directive 2008. Germany: Section 491a(3); Section 655(2) German Civil Code; Article 247(1), (10)(1), nr. 1a; Art 247(11)(1), nr. 1 German Introductory Act to the Civil Code.

163 Article 6(1)(a)-(l); Article 6(3)(a), (b); Article 6(4), (6) Consumer Credit Directive 2008.

164 Article 6(1) Consumer Credit Directive 2008 and Annex III Consumer Credit Directive 2008.

165 Annex III.2; Annex II.2; Annex III.3; Annex II.3; Annex III.4; Annex II.4. Consumer Credit Directive 2008.

166 Article 2(5) Consumer Credit Directive 2008; Annex III.5; Annex II.5. Consumer Credit Directive 2008.

Information System (CKI).¹⁶⁷ This system offers access under the same conditions to all credit providers established in a Member State.¹⁶⁸ In France, this system is the French File of Personal Loan Repayment Incidents (FICP), in Germany this is the German Protection association for general credit protection (Schufa) and in Belgium this is the Belgian Central Office for Credit to Private Individuals (CKP).¹⁶⁹

The *ratio legis* of the assessment of creditworthiness of the consumer is mainly to protect consumers from excessive credit in an attempt to prevent solvency problems.¹⁷⁰ In general, the purpose of the creditworthiness assessment comes down to reducing the risk of non-payment. This rationale is applicable for exclusive usership contracts as exemplified in the case studies. As elaborated on earlier (paragraph 4.4), case study 1 is similar to a consumer credit agreement. Both with consumer credit and exclusive mobility use, there is a longer-term contract and a recurring (monthly) payment obligation. This monthly payment obligation affects the consumer's creditworthiness, making the creditworthiness assessment useful and proportional and in line with the rationale of the assessment for case study 1. In addition, the time required for the assessment to be carried out is not disproportional for case study 1.

The creditworthiness assessment does not support the rationale of the legal rule for case studies 2 and 3. After all, a consumer in case study 2 will not quickly run into creditworthiness problems with a one-off payment obligation of €1.50 for a seven-minute ride, nor would the consumer in case study 3 when paying €5 for a three-hour ride. Applying a creditworthiness assessment to case study 2 and 3 does not seem to support its rationale. In addition, the execution time for the creditworthiness assessment would contradict the motivation behind the shared mobility business model, such as in case study 2 and 3, which also makes the application of the assessment disproportional and impractical.

In my opinion, a creditworthiness assessment for case studies 2 and 3 is neither necessary nor proportionate. If a creditworthiness assessment would be applied to situations such

167 Article 4:32 Dutch Financial Supervision Act. Stichting BKR, 'Over Stichting BKR' <<https://www.bkr.nl/over-stichting-bkr/>> accessed 31 May 2022.

168 Article 4:32 Dutch Financial Supervision Act. Stichting BKR, 'Over Stichting BKR' <<https://www.bkr.nl/over-stichting-bkr/>> accessed 31 May 2022.

169 Respectively; Article 1-8 French rules on incidents involving the repayment of personal loans; Republique Francaise, 'Fichier des incidents de remboursement des crédits aux particuliers (FICP)' <<https://www.service-public.fr/particuliers/vosdroits/F17608>> accessed 31 May 2022; Section 505a, 505b German Civil Code; Schufa, 'So funktioniert die Schufa – Wir über uns' <<https://www.schufa.de/ueber-uns/schufa/so-funktioniert-schufa/>> accessed 31 May 2022; Belgium: Article VII.77(1); VII.148-VII.157 Belgian Code of Economic Law; Nationale Bank van België, 'Centrale voor kredieten aan particulieren' <<https://www.nbb.be/nl/kredietcentrales/centrale-voor-kredieten-aan-particulieren>> accessed 31 May 2022.

170 The rationale behind the creditworthiness assessment is also to determine whether a consumer will fulfil his obligation to protect the provider.

as those in case studies 2 and 3, this could have a negative side effect on the availability of mobility for low-income consumers and therefore on (equal) access to mobility.¹⁷¹ This is a valid argument because the assessment could prevent the facilitation of an essential need (access to mobility), which seems improper given the purpose of the assessment and the small amounts at stake. If some sort of creditworthiness assessment were to be deemed necessary in case studies 2 and 3, the assessment should focus on whether the consumer can meet the one-off payment obligation at that point in time instead of assessing future payments or future creditworthiness as the current creditworthiness assessment requires. After all, this alternative focusses directly on the *ratio legis* of the creditworthiness assessment: reducing the risk of non-payment. After all, for case studies 2 and 3, a possible risk of non-payment only arises before the one-off payment.

Member States whose legislation requires providers to assess the creditworthiness of consumers based on a consultation of a relevant database can retain this requirement.¹⁷² If the parties agree to change the total amount due after the conclusion of the agreement, Member States need to ensure that the provider updates the financial information at their disposal concerning the consumer and assesses the consumer's creditworthiness before any significant increase in the total amount due.¹⁷³

4.4.3 Database access

Although mobility usership almost always involves national agreements, for the sake of completeness, this paragraph briefly discusses what applies if the case studies were to entail cross-border agreements. In such cases, each Member State needs to ensure access for providers from other Member States to databases used in that Member State for assessing the creditworthiness of consumers. Moreover, the conditions for access must be non-discriminatory.¹⁷⁴ If the contract application is rejected based on consultation

171 European Commission, 'The New EU Urban Mobility Framework' (Strasbourg, 14 December 2021) COM(2021) 811 final; I. Hidayati, W. Tan, C. Yamu (2021) 'Conceptualizing Mobility Inequality: Mobility and Accessibility for the Marginalized' *Journal of Planning Literature* 36(4), pp. 492, 495, 499; J.P. Bocarejo, D.R. Oviedo (2012) 'Transport accessibility and social inequities: a tool for identification of mobility needs and evaluation of transport investments' *Journal of Transport Geography* 24(1), pp. 142-154.

172 Article 8(1) Consumer Credit Directive 2008. Netherlands: Article 7:128b Dutch Civil Code. Germany: Section 18(2) German Banking Act. Belgium: VII.77(1) Belgian Code of Economic Law. France: Article L312-16; L751-1 French Consumer Code.

173 Article 8(2) Consumer Credit Directive 2008. Netherlands: Article 7:128b Dutch Civil Code. Germany: Section 18(3) German Banking Act.

174 Article 9(1) Consumer Credit Directive 2008. Netherlands: Article 4:9(2) Dutch Financial Supervision Act. Germany: Section X German Federal Data Protection Act. France: Article L312-16 *et seq.* Belgium: VII.77 *et seq.* Belgian Code of Economic Law.

of a database, the provider must inform the consumer of the result of such consultation and of the particulars of the database consulted, immediately and free of charge.¹⁷⁵ The rationale behind the database consultation is to make a positive contribution to the proper execution of the creditworthiness assessment and to reduce the risk of payment problems. The short duration of the contracts in case studies 2 and 3 also seem in opposition to a database consultation as proposed in the Consumer Credit Directive, similarly to the creditworthiness assessment itself (paragraph 4.4.2).¹⁷⁶ However, the rationale is supported in application to case study 1 because the consumer concludes a usership contract for four years with structural and longer-term payment obligations. The application of the consultation of a database and the affiliated rights in the Consumer Credit Directive are also not disproportional for case study 1 and application to case study 1 would contribute to transparency and consumer knowledge.¹⁷⁷ For case studies 2 and 3, in addition to the fact that the obligation is not meaningful, it is also neither proportionate nor practical (paragraph 4.4.2).

4.4.4 Contractual information and rights

In this paragraph, the Consumer Credit Directive rules regarding contractual information and rights will be applied to the mobility usership case studies.

Information to be included in mobility usership agreements

Applying the Consumer Credit Directive rules to mobility usership agreements results in the obligation that mobility usership contracts need to be drawn up on paper or on another durable medium and all the contracting parties shall receive a copy of the mobility usership agreement.¹⁷⁸ The rationale for imposing such an obligation in mobility usership agreements is that by providing clear information, consumers gain insight into the product and are warned about possible risks. The intention is that this will enable consumers to make a responsible choice when contracting.¹⁷⁹

175 Article 9(2) Consumer Credit Directive 2008. See in this regard Article 9(3) Consumer Credit Directive 2008 which holds that the information needs be provided unless the provision of such information is prohibited by other Community legislation or is contrary to objectives of public policy or public security.

176 This database consultation is a part of the creditworthiness assessment of the Consumer Credit Directive 2008.

177 Recital 19, 32 Consumer Credit Directive 2008.

178 Article 10(1) Consumer Credit Directive 2008. This Article shall be without prejudice to any national rules regarding the validity of the conclusion of credit agreements which are in conformity with Community law. Netherlands: Article 4:19(2)(4) Dutch Financial Supervision Act; Article 7:120(1)(5) Dutch Civil Code. Germany: Section 492 German Civil Code. Belgium: Article VII.78(1) Belgian Code of Economic Law. France: Article L 312-28 French Consumer Code.

179 Dutch Explanatory Memorandum, *Kamerstukken II 2003/04*, 29507, 3, pp. 3-5.

As is the case with the precontractual information requirements, the credit agreement also needs to be specified in a clear and concise manner. Furthermore, the contractual information requirements are largely similar to the precontractual requirements of the Consumer Credit Directive.¹⁸⁰ This means that the same considerations apply with regard to the application of the rules to the various case studies. Consequently, the differences will be discussed below.

Under the Consumer Credit Directive, if charges and interest are to be paid without capital amortisation, the provider should specify a statement showing the periods and conditions for the payment of the interest and of any associated recurrent and non-recurrent charge.¹⁸¹ Furthermore, the agreement should clarify the procedure to be followed when the consumer wants to exercise the right of termination of the agreement, as well as any other contractual terms and conditions and the name and address of the competent supervisory authority.¹⁸² Some other requirements should be specified in the credit agreement, but will not be discussed here as they do not apply to mobility usership or focus on enforcement, which has previously been excluded from the study.¹⁸³

Contrary to the precontractual requirements, the mobility usership agreement should not mention the obligation, if any, to enter an ancillary service contract relating to the user agreement. In addition, the mobility usership agreement should not inform on the right to be informed on a database consultation to assess the creditworthiness, the consumer's right to receive a copy of the draft credit agreement, and the term during which the creditor is bound by the precontractual information.¹⁸⁴

180 Article 10(2) Consumer Credit Directive 2008 on contractual requirements and Article 5(1) Consumer Credit Directive 2008 on the pre-contractual requirements.

181 Article 10(2)(j) Consumer Credit Directive 2008. Netherlands: Article 4:19(2)(4) Dutch Financial Supervision Act; Article 7:120(1)(5) Dutch Civil Code. Germany: Article 247(8)(2) German Introductory Act to the Civil Code. Belgium: Article VII.78(3), 5° Belgian Code of Economic Law. France: Article L312-28 French Consumer Code.

182 Article 10(2)(s)(u)(v) Consumer Credit Directive 2008. Netherlands: Article 4:19(2)(4) Dutch Financial Supervision Act; Article 7:120(1)(5) Dutch Civil Code. Germany: Article 247(6)(1), nr. 5 German Introductory Act to the Civil Code; Article 247(6)(1), nr. 3, 6 German Introductory Act to the Civil Code. Belgium: Article VII.78(3), 11°, 15° Belgian Code of Economic Law. France: Article L312-28 French Consumer Code.

183 Article 10(2)(i)(q)(t) Consumer Credit Directive 2008. Netherlands: Article 4:19(2)(4) Dutch Financial Supervision Act; Article 7:120(1)(5) Dutch Civil Code. Germany: Article 247(6)(1), nr. 4; Article 247(7)(1), nr. 4; Article 247(12)(1), nr. 2b; Article 247(14), (1), (3) German Introductory Act to the Civil Code. Belgium: Article VII.78(3), 4°, 12°, 14° Belgian Code of Economic Law. France: Article L312-28 French Consumer Code.

184 Article 5(1)(k)(q)(r)(s) Consumer Credit Directive 2008. Netherlands: Article 1:25(2) Dutch Financial Supervision Act; Division 1.4.2 Dutch Financial Supervision Act. Germany: Article 247(3)(1), nr. 16, 15; Article 247(4)(1), nr. 4; Article 247(8)(1), nr. 1, 2 German Introductory Act to the Civil Code. Belgium:

Information concerning the borrowing rate

The Consumer Credit Directive requires that the consumer is informed of any change in the borrowing rate, on paper or another durable medium, before the change enters into force.¹⁸⁵ The information will state the amount of the payments to be made after the entry into force of the new borrowing rate and, if the amount or frequency of the payments changes, particulars thereof.¹⁸⁶ The parties may, however, contractually agree that the information is to be given to the consumer periodically in cases where the change in the user rate is caused by a change in a reference rate.¹⁸⁷ In practise, these changes and the obligation to inform the consumer on these changes in mobility usership contracts would occur only in case study 1 as this entails a long-term contract with monthly payment obligations for the duration of the mobility usership contract. Case studies 2 and 3 involve short-term use and – in principle – a one-off payment which immediately closes the contract. However, it may be possible that the consumer approves the contract conditions once at the time of registration (as a member), for example, after which uses (under the same conditions) can be booked. In that case, the consumer needs to be informed of any change, for example the user rate.¹⁸⁸

Right of withdrawal

Application of the Consumer Credit Directive also results in consumers' right to a period of 14 calendar days in which to withdraw from the mobility usership agreement without giving any reason. The rationale of this right is to empower consumers when contracting a distance or off-premises contract, especially in situations where they cannot physically inspect or test a product before contracting.¹⁸⁹ The period of withdrawal starts either from

Article VII.70(1), 8°, 11°, 18°, 19° Belgian Code of Economic Law. France: Article L312-12 French Consumer Code.

185 This user rate is elaborated on in paragraph 4.4.1.

186 Article 11(1) Consumer Credit Directive 2008. Netherlands: Article 4:22(1) Dutch Financial Supervision Act; Article 7:120(2)(5) Dutch Civil Code. Germany: Section 492(5); Section 493(3) German Civil Code; Article 247(15)(1) German Introductory Act to the Civil Code. Belgium: Article VII.86(4) Belgian Code of Economic Law. France: Article L312-31 French Consumer Code.

187 Article 11(2) Consumer Credit Directive 2008. Netherlands: Article 4:22(1) Dutch Financial Supervision Act; Article 7:120(2) Dutch Civil Code. Germany: Article 247(15)(2) German Introductory Act to the Civil Code; Belgium: Article VII.86(4) Belgian Code of Economic Law. France: Article L312-31 French Consumer Code.

188 This user rate is elaborated on in paragraph 4.4.1.

189 P. Rekaiti, R. van den Bergh (2000) 'Cooling-off periods in the consumer laws of EC member states. A comparative law and economics approach' *Journal of Consumer Policy* 2000/4, pp. 371-407; J.M. van Poelgeest, *Kredietverstrekking aan consumenten (Recht en Praktijk nr. FR8)* (Deventer: Kluwer, 2020), 2.4.71; J.W.A. Biemans (2012) 'De consumentenkredietovereenkomst in titel 7.2A BW: Over losse eindjes en rafelige randen' *Nederlands Tijdschrift voor Burgerlijk Recht* 2012/46, p. 8; M.Y. Schaub, A2. Doel en strekking' in: R.J.Q. Klomp & H.N. Schelhaas (red.), *GS Verbintenissenrecht* (Deventer: Wolters Kluwer); M.B.M. Loos (2003) 'De effectiviteit van de bedenktijd als instrument van consumentenbescherming' *Tijdschrift voor Consumentenrecht & handelspraktijken* 2003/1, pp. 6-23.

the day of the conclusion of the credit agreement, or from the day on which the consumer receives the contractual terms and conditions and information, if that day is later than the day of the conclusion of the credit agreement.¹⁹⁰ Here the consequences of application of the 14-day period to each case study will be discussed. As for case study 1, this 14-day period seems appropriate and does not contradict the duration of the full contract term of four year. In addition, due to the similarities with the credit agreement, the application of the rule is proportional and in line with the rationale of the right of withdrawal. However, the right of withdrawal seems less proportional in case study 2, as the duration of the individual shared mobility contract is considerably shorter than the cooling-off period of 14 days. In addition, the vehicle is immediately put into use, so the rationale behind the cooling-off period does not exist for individual shared mobility contracts. This is less problematic if a framework agreement is concluded in advance. The right of withdrawal also exists within the Consumer Rights Directive that applies to mobility usership, also including some exceptions to the right of withdrawal (paragraph 5.2.2 for an elaborated discussion of the service contract in the Consumer Rights Directive).¹⁹¹

If the consumer exercises their right of withdrawal, they must notify the provider via the process given by the provider in the initial contract.¹⁹² The deadline shall be deemed to have been met if that notification is dispatched before the deadline expires.¹⁹³ Moreover, if the consumer exercises their right of withdrawal, they need to pay the provider the capital and the interest accrued thereon from the date the credit was drawn down until the date the capital is repaid. In other words, the exercise of the right of withdrawal terminates the obligations of the parties. This must be done without any undue delay and no later than 30 calendar days after the consumer dispatches to the creditor a notification of withdrawal.¹⁹⁴ In case study 1, a monthly payment is made in advance. As a result, the consumer can

190 Article 14(1)(a)(b) Consumer Credit Directive 2008. Netherlands: Article 4:20; 4:33; 4:74a Dutch Financial Supervision Act; Article 7:122(1) Dutch Civil Code. Germany: Section 495; Section 355 German Civil Code. France: Article L312-19; L312-20; L312-28 French Consumer Code.

191 Article 9(2) Consumer Rights Directive.

192 Information given by the creditor pursuant to Article 10(2)(p) Consumer Credit Directive 2008. Article 14(3)(a) Consumer Credit Directive 2008. Netherlands: Article 7:122(3) Dutch Civil Code. Germany: Article 247(3)(1), nr. 13; Article 247(6)(2) German Introductory Act to the Civil Code. Belgium: Article VII.83(2), 1°; Article VII.78(3), 11° Belgian Code of Economic Law.

193 Although it is on paper or on another durable medium that is available and accessible to the creditor. Article 14(3)(a) Consumer Credit Directive 2008. Netherlands: Article 7:122(3) Dutch Civil Code. Germany: Section 355(3), 3 German Civil Code. Belgium: Article VII.83(2), 1° Belgian Code of Economic Law.

194 Article 14(3)(b) Consumer Credit Directive 2008. Netherlands: Article 7:122(3) Dutch Civil Code. Germany: Section 357(1); Section 346 German Civil Code. Belgium: Article VII.83(2), 3° Belgian Code of Economic Law. France: L312-26 French Consumer Code. The creditor is not entitled to any other compensation from the consumer in the event of withdrawal, except compensation for any non-returnable charges paid by the provider to any public administrative body.

pay for the time that they (already) used the vehicle instead of the payment of the capital and interest.¹⁹⁵ This rule can be applied to case study 1 and there are reasons to do this; after all, the amount that the consumer has used the vehicle has a cost for the provider. Additionally, case study 1 entails a long-term contract, and the consumer has already had access to the use of the vehicle for – in this case – five months.

As discussed under the Consumer Sales Directive and the discussion on the right to terminate, an application problem regarding the right of withdrawal exists for case studies 2 and 3. The problem in case study 2 is that, contrary to case study 1, no payment is made in advance and payment that is made following service is directly linked to the duration of the use.¹⁹⁶ In addition, the consumer is free to ‘withdraw’ at any time in a free-floating system. This right of withdrawal means that the consumer is entitled to a refund of the costs incurred in a case where the expected use of the vehicle is not fully performed. This is in line with one of the exceptions on the right of withdrawal in the Consumer Rights Directive.¹⁹⁷ If it concerns a station-based system, in practice, the consumer can only withdraw from the contract once they reach a fixed station, as withdrawal outside a station is impossible, while, of course, legally this is possible, as only notification is required. To guarantee the withdrawal right, interim withdrawal could be secured in the mobile app of the provider by providing a notification option. This also applies for case study 3 as in this case the right of withdrawal applies per ride. With small-scale cooperatives, this will often involve station-based systems, while large-scale cooperatives will often involve a free-float system. Here too, if a framework agreement has been concluded in advance, the problem of application of the term of the right of withdrawal does not occur.

If an ancillary service relating to the mobility usership is offered by the provider based on an agreement between the third party and the provider, the consumer is no longer bound by the ancillary service contract if the consumer exercises their right of withdrawal from the agreement. This is obviously only the case if the mobility usership contract is legally withdrawn.¹⁹⁸ Furthermore, the right of withdrawal is without prejudice to any rule of national law establishing a period during which the performance of the contract may not begin.¹⁹⁹

195 This includes costs for the use and making the vehicle available.

196 Plus possibly a starting fee.

197 Article 16(a) Consumer Rights Directive; European Commission ‘Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights’ *Official Journal of the European Union* (29 December 2021) C525/1.

198 Article 14(4) Consumer Credit Directive 2008. Germany: Section 358(2) German Civil Code. Belgium: Article VII.83(3) Belgian Code of Economic Law. France: L312-23 French Consumer Code.

199 Article 14(7) Consumer Credit Directive 2008. Netherlands: Article 4:33, 4:74a Dutch Financial Supervision Act.

Early repayment

Under the Consumer Credit Directive, the consumer has the right to fulfil all or part of their obligations under the agreement even prior to the date that payment obligations become due. In such cases, they are entitled to a reduction in the total cost of the contract. This reduction should be reflected in the instalments to be paid for the remaining duration of the contract.²⁰⁰ The rationale behind this right is that it allows consumers to safeguard themselves from any changeable payment obligations. In the following paragraph, the results of the application of the Consumer Credit Directive regime to mobility usership contracts will be discussed.

In the event of early ‘repayment’ of the mobility usership contract, the provider is entitled to fair and objectively justified compensation for possible costs directly associated with early repayment of the contract.²⁰¹ Such compensation may not exceed 1 percent of the amount repaid early if the period between the early repayment and the agreed termination of the mobility usership agreement exceeds one year. If the period does not exceed one year, the compensation may not exceed 0.5 percent of the amount repaid early.²⁰² This repayment obligation can also be applied to case study 1, where the four-year exclusive mobility contract is terminated. As mentioned, in the event of early termination, the remainder of the terms must be paid. However, it is important to note that the consumer in a mobility usership contract never becomes the owner of the bicycle, regardless of whether all instalments are paid or not, while a consumer who uses credit to purchase a bicycle does become the owner of the bicycle once the credit is repaid in full. As a result, the monthly payments made earlier do not offer the same (future) benefit, to the detriment of the mobility usership consumer.²⁰³ At the same time, there is no good reason to not offer this level of protection to case study 1, given the applicable *ratio legis* of the provision. For case study 2, however, this repayment obligation is not proportional and does not serve any justification as the duration of the contract is not fixed prior to its conclusion and is determined by the consumer. Even if the consumer were legally entitled to an early

200 Article 16(1) Consumer Credit Directive 2008. Netherlands: Article 4:22, 4:33 Dutch Financial Supervision Act. Germany: Section 500(2); 501 German Civil Code. Belgium: Article VII.96 Belgian Code of Economic Law. France: L312-34 French Consumer Code.

201 Provided that the early repayment falls within a period for which the borrowing rate is fixed.

202 Article 16(2) Consumer Credit Directive 2008. Germany: Section 502(1), 1, 2 German Civil Code. Belgium: Article VII.97 Belgian Code of Economic Law. France: L312-34, 3° French Consumer Code. Netherlands: article 7:68(1) Dutch civil Code. Also see: Article 16(3)(a)(c) Consumer Credit Directive 2008. Compensation for early repayment cannot be claimed if the repayment has been made under an insurance contract intended to provide a credit repayment guarantee, or if the repayment falls within a period for which the borrowing rate is not fixed.

203 For further elaboration on this, see: J. de Vogel (2020) ‘Private Lease: Consumer Credit in Disguise?’ *Journal of European Consumer and Market Law* (9)2, p. 53.

repayment, this right is meaningless as the period of use is determined by the consumer.²⁰⁴ For large scale cooperatives, this would be the same. In case study 3, an early repayment is possible as long as the period of use is not – as in case study 2 – determined ad hoc by the consumer. Case study 3 would often entail a station-based system where the consumer could pay the provider before the three-hour use. However, since this entails a one-off payment, early repayment is less likely to occur. Given the rationale of this provision in the Consumer Credit Directive, this obligation does not make sense in mobility usership and is also not practically applicable.²⁰⁵

Assignment of rights

In the event of assignment to a third party of the creditor's rights under a credit agreement or the agreement itself, the consumer shall be entitled to plead against the assignee any defence which was available to them against the original creditor.²⁰⁶ The consumer needs to be informed of the assignment except where the original creditor, by agreement with the assignee, continues to service the credit vis-à-vis the consumer.²⁰⁷

4.4.5 Other consumer rights

In this paragraph, the other consumer rights that follow from the Consumer Credit Directive will be discussed, respectively the calculation of the annual percentage of charge, the regulation of creditors, and certain obligations of credit intermediaries vis-

204 Article 16(1) Consumer Credit Directive 2008. Netherlands: Article 4:22; 4:33 Dutch Financial Supervision Act. Germany: Section 500(2) German Civil Code. Belgium: Article VII.96 Belgian Code of Economic Law. France: L312-34 French Consumer Code.

205 Member States can provide that such compensation can be claimed by the provider on the condition that the amount of the early repayment exceeds the threshold defined by national law, which cannot exceed €10.000 within a period of 12 months. The provider may exceptionally claim higher compensation if he can prove that the loss he suffered from early repayment exceeds the threshold. In the case studies, this amount has not been exceeded, see Article 16(4)(b), (5) Consumer Credit Directive 2008. If the compensation, however, claimed by the provider exceeds the loss suffered, the consumer may claim a corresponding reduction. In addition, any compensation shall not exceed the amount of interest the consumer would have paid during the period between the early repayment and the agreed date of termination of the credit agreement.

206 This includes set-off where this is permitted in the Member State concerned. Article 17(1) Consumer Credit Directive 2008. Netherlands: Article 1 Dutch Decree on the Supervision of Financial Enterprises under the Wft; Annex Dutch Decree on the Supervision of Financial Enterprises under the Wft; Article 7:124(1) Dutch Civil Code. Germany: Section 496(1) BGB. Belgium: Article VII.104. Belgian Code of Economic Law. France: Article L312-27 French Consumer Code.

207 Article 17(2) Consumer Credit Directive 2008. Netherlands: Article 1 Dutch Decree on the Supervision of Financial Enterprises under the Wft; Annex Dutch Decree on the Supervision of Financial Enterprises under the Wft; Article 7:118(3) Dutch Civil Code. Germany: Section 496(2) German Civil Code. Belgium: Article VII.103. Belgian Code of Economic Law.

à-vis consumers. Once again, the implications and desirability of the Consumer Credit Directive rules on mobility usership contracts will be considered.

Calculation of the annual percentage rate of charge

The annual percentage rate of charge equates on an annual basis, to the present value of all commitments (drawdowns, repayments, and charges), future or existing, agreed by the creditor and the consumer. This is calculated in accordance with a mathematical formula and based on the assumption that the credit agreement is to remain valid for the period agreed and that the provider and the consumer will fulfil their obligations under the terms and by the dates specified in the mobility usership agreement.²⁰⁸ For case study 1, the factors mentioned above can be adjusted to calculate the annual costs of the mobility usership contract. For case studies 2 and 3, an annual percentage rate of charge is not proportional and would need to be adjusted; after all, it may be possible to calculate an annual rate of charge, but this calculation does not actually inform the consumer in a functional way. After all, the consumer pays per minute or hour, and calculation of annual costs is neither useful nor proportional. The rationale for applying this Consumer Credit Directive rule fails in both cases. A more comprehensive discussion of the application of an annual percentage rate of charge can be found above under precontractual information and practices (paragraph 4.4.1).

In all case studies an adjustment to the annual percentage rate of charge would contribute to the policy goals of the Consumer Credit Directive (paragraph 2.3), as it promotes legal certainty and the possibility for consumers to make an informed decision.²⁰⁹

Regulation of creditors

Member States need to ensure that creditors are regulated or supervised by a body or authority that operates independently from financial institutions.²¹⁰ The rationale behind requiring these bodies or authorities is to supervise financial markets to ensure that

208 This mathematical formula is set out in Part I of Annex I Consumer Credit Directive 2008. Article 19(1)(3) (4)(5) Consumer Credit Directive 2008. Germany: Section 6(1)(2); 6(2)(2); 6(4); 6(5), nr. 1-3 German Price Indication Regulation. Also note, as mentioned in Article 19(2) Consumer Credit Directive 2008, that for the purpose of calculating the annual percentage rate of charge, the total cost of the credit to the consumer shall be determined, with the exception of any charges payable by the consumer for non-compliance with any of his commitments laid down in the credit agreement and charges other than the purchase price which, for purchases of goods or services, he is obliged to pay whether the transaction is effected in cash or on credit.

209 Recital 18, 19, 31, 32 Consumer Credit Directive 2008; Article 5, 6 Consumer Credit Directive 2008.

210 This shall be without prejudice to the Directive on the pursuit of the business of credit institutions. Article 20 Consumer Credit Directive 2008. Germany: Section 6(1) German Banking Act; Section 2 German Law on the Federal Financial Supervisory Authority. Belgium: Article VII. 4/4 Belgian Code of Economic Law. Netherlands: Article 1:25 Dutch Financial Supervision Act.

consumers, but also the business community and the government, maintain confidence in the financial markets. In Germany, the Federal Institute is subject to the legal and technical supervision of the Federal Ministry of Finance (Federal Ministry). Furthermore, German Federal Financial Supervisory Authority (BaFin), the German supervisor of financial markets, exercises supervision of the institutes.²¹¹ In Belgium, this is the Belgian Financial Services and Markets Authority (FSMA) and in France this is French Prudential Control and Resolution Authority (ACPR).²¹² In the Netherlands, the Dutch Financial Markets Authority (AFM) has the task of supervising the conduct of business in the financial markets and deciding on the admission of financial undertakings to those markets.²¹³ In my opinion, placing mobility usership providers under supervision via the Consumer Credit Directive is not necessary, insofar as there are no increased creditworthiness risks, such as in case studies 2 and 3 (paragraph 4.4.2 and 4.4.3). For case study 1, especially in view of the similarities with consumer credit, such a supervising authority aligns with the rationale of the existence of these authorities and that existence would also be proportional and practically possible.

Certain obligations of credit intermediaries vis-à-vis consumers

Member States need to ensure that a credit intermediary indicates the extent of their powers in advertising and other documentation intended for consumers.²¹⁴ In the case where the consumer is required to pay a fee to the credit intermediary for their services, this should be disclosed and agreed between the consumer and the credit intermediary on paper or another durable medium before the conclusion of the credit agreement.²¹⁵ In the case where the consumer is required to pay this fee, this should also be communicated by the credit intermediary to the creditor in order to calculate the annual percentage rate of charge.²¹⁶ If applicable to mobility usership contracts, this situation may arise particularly in type (e) of collaborative sharing (Figure 2), where an intermediary platform offers the shared mobility. Although issues about the role and responsibilities of platforms in

211 Germany: Section 2 German Law on the Federal Financial Supervisory Authority.

212 Belgium: Article VII. 4/4 Belgian Code of Economic Law. Autoriteit voor Financiële Diensten en Markten 'Wat is de FSMA' <<https://www.fsma.be/nl/wat-de-fsma>> accessed 1 June 2022. France: Autorité de Contrôle Prudentiel et de Résolution 'Qu'est-ce que l'ACPR?' <<https://acpr.banque-france.fr/lacpr/presentation/quest-ce-que-lacpr/>> accessed 2 June 2022.

213 Netherlands: Article 1:25 Dutch Financial Supervision Act. AFM 'De Autoriteit Financiële Markten' <<https://www.afm.nl/nl-nl/over-afm>> accessed 1 June 2022.

214 Article 21(a) Consumer Credit Directive 2008. Netherlands: Article 4:32(1) 25 Dutch Financial Supervision Act. Germany: Article 247(13)(2), nr. 3 German Introductory Act to the Civil Code. Belgium: Article VII.114 Belgian Code of Economic Law.

215 Article 21(b) Consumer Credit Directive 2008. Netherlands: Article 4:32(1) 25 Dutch Financial Supervision Act. Germany: Article 247(13)(2), nr. 1, 4 German Introductory Act to the Civil Code. Belgium: Article VII.114 Belgian Code of Economic Law.

216 Article 21(c) Consumer Credit Directive 2008. Netherlands: Article 4:32(1) 25 Dutch Financial Supervision Act. Germany: Article 247(13)(3) German Introductory Act to the Civil Code. Belgium: Article VII.114 Belgian Code of Economic Law.

mobility usership, and in particular shared use, are important, this will not be discussed further because it falls outside the scope of this research in which the relationship between provider and consumer is central.

4.5 APPLICATION OF SALES CONTRACT-SPECIFIC RIGHTS IN THE CONSUMER RIGHTS DIRECTIVE

In comparison to the Consumer Sales Directive and the Consumer Credit Directive, the Consumer Rights Directive has a special stature in the sense that it partially applies to mobility usership consumers.²¹⁷ The Consumer Rights Directive has additional provisions for (a) sales contracts and (b) distance contracts.²¹⁸ Due to the nature of mobility usership contracts, the rights that are specific to sales contracts will be discussed and applied to the case studies in the following paragraph. In chapter 3, it became clear that these rights are not offered to mobility usership consumers due to the *ratione materiae* scope. The rights that are specific to distance contracts will not be discussed below because the basic principle is that the Consumer Rights Directive covers ‘any contract’, mobility usership contracts not excluded. In cases where there is a distance contract, additional rights apply, regardless of whether it is a mobility usership contract or not. As a result, the provisions on distance contracts (b) will be discussed in chapter 5. As elaborated on in paragraph 4.1, the substantive rights of the Consumer Rights Directive that do not apply to mobility usership contracts are discussed below, as supported by Table 12. These sales-specific rights are examined to determine to what extent there is (in)equivalent protection for the consumer of mobility usership compared to the sales-based consumer, and whether this is justified. This equivalent protection entails the *mutatis mutandis* application of rules, taking into account deviations in terms of business model and contract parties. Consequently, the parts discussed below concern delivery (paragraph 4.5.1) and the passing of risk (paragraph 4.5.2).

4.5.1 Delivery

Under the Consumer Rights Directive, the professional party needs to deliver the goods by transferring the physical possession or control of the goods to the consumer without undue delay, but not later than 30 days from the conclusion of the contract, unless the parties have

²¹⁷ See Table 11.

²¹⁸ Recital 13 Consumer Rights Directive; Article 18; 20 Consumer Rights Directive; European Commission ‘Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights’ *Official Journal of the European Union* (29 December 2021) C525/1, p. 10.

agreed otherwise at the time of delivery.²¹⁹ The rationale behind this is that a completed delivery marks the transfer of ownership. Applying this rule to the mobility usership case studies, the following conclusions can be drawn. In case study 2, a delivery of the shared bicycle is not necessary nor suitable since the consumer is expected to select a bicycle at a location that they wish and acquires physical control of the bicycle by taking action on their own accord, thus without undue delay.²²⁰ In addition, the term of 30 days is disproportional and impractical because with a shared contract (a) the conclusion of the contract and the moment of acquiring the control of the bicycle follow each other directly and (b) the contract, by definition, does not last 30 days. The rules regarding the length of the term(s) affect not only legal certainty but also consumer confidence.²²¹ As a result, these should be proportionate to the duration of the contract, and this depends on the contract itself. Due to the nature of the contract in case study 2, a situation where provider X fails to ‘deliver’ the vehicle at the (agreed) time would not occur. Unless, for example, the vehicle does not unlock after the agreement has been concluded via the mobile app. In that case, an undue delay could exist as that is the moment of ‘delivery’ that the contract parties agreed on. After all, the mode of mobility must be immediately available. This is also in line with the idea behind the short-term use of mobility with a predominant service-component. In case study 1 it concerns longer-term and exclusive use of the bicycle, which means that there is indeed a factual delivery of the vehicle.²²² Therefore, provider Y needs to deliver the vehicle by transferring the physical possession or control of the vehicle to the consumer without undue delay. For contracts such as those in case study 1, this could mean that the consumer collects the vehicle somewhere themselves. This should not be later than 30 days from the conclusion of the contract, unless the contracting parties have agreed otherwise at the time of delivery.²²³ The term of 30 days is feasible here because the duration of the contract is four years.

219 Article 18(1) Consumer Rights Directive; Recital 52 Consumer Rights Directive, first sentence. European Commission ‘Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights’ *Official Journal of the European Union* (29 December 2021) C525/1, pp. 10, 72. Note: The Consumer Rights Directive has no specific rules regarding service contracts if the professional party fails to indicate the time for the performance of the service. Netherlands: Article 7:9(4) Dutch Civil Code; Dutch Explanatory Memorandum, *Kamerstukken II 2012/13*, 33520, 3, p. 59; Asser/Hijma 7-I 2019/428-429; A.L.M. Keirse, ‘1.3.3.2 Juridische levering/feitelijke levering/aflevering’ in: Jac. Hijma (red.), *GS Vermogensrecht* (Deventer: Wolters Kluwer).

220 Article 18(1) Consumer Rights Directive; Recital 52 Consumer Rights Directive, first sentence.

221 Recital 7 and 41 Consumer Rights Directive.

222 A factual delivery and therefore not a delivery in the legal or property law sense. See: Recital 51 Consumer Rights Directive; Article 18(1) Consumer Rights Directive; A.L.M. Keirse, ‘1.3.3.2 Juridische levering/feitelijke levering/aflevering’ in: Jac. Hijma (red.), *GS Vermogensrecht* (Deventer: Wolters Kluwer); Asser/Hijma 7-I 2019/428-429.

223 Article 18(1) Consumer Rights Directive; Recital 52 Consumer Rights Directive, first sentence. European Commission ‘Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights’ *Official Journal of the European Union* (29 December 2021) C525/1, pp. 10, 72. Note: The Consumer Rights Directive has no specific rules regarding service contracts if the professional party fails to indicate the time for the performance of the

In case study 3, the consumer picks up the bicycle on reservation. Here, too, the consumer is in principle responsible for collecting the bicycle on time. In case of cooperative sharing, it could occur that, for example, a previous user did not return the bicycle (on time) as a result of which the bicycle is not available on time. In a normal situation, a consumer could – in that case – call upon the professional party to make the delivery within an additional term appropriate to the circumstances. To a certain extent, this is also possible for the consumer in case study 3. However, in cooperative sharing such as described in case study 3, this consumer is dependent on the fleet of (available) vehicles at that time. In case study 3, a fleet of three bicycles is available. A call upon the cooperative to make the delivery is by no means guaranteed, which impedes the consumer's legal certainty. In the case of a large-scale cooperative, there is a higher chance that the cooperative can offer another vehicle from the fleet because the fleet is larger. Yet here too, the consumer depends on the number of available vehicles at that moment. There is an undue delay when the bicycle is not immediately available because immediate availability is what the contracting parties have agreed with each other. After all, in larger-scale collaborations there is a predominant service component.

Right to terminate

Under the consumer sales rights in the Consumer Rights Directive, if the professional party has not fulfilled their obligation to deliver the goods, the consumer shall request that they make the delivery within an additional period that is appropriate in the circumstances. If the trader does not deliver the goods within the additional period, the consumer has the right to terminate the contract.²²⁴ Furthermore, the Consumer Rights Directive mentions that consumers are entitled to terminate the contract immediately if delivery within the agreed delivery period is essential or if the consumer informs the professional party, prior to the conclusion of the contract, that delivery by or on a specified date is essential.²²⁵ There would be no room for an individualised request in case study 2. Nevertheless, a timely delivery, in the capacity of immediate availability, is essential to the consumer. After all, the business model of shared usership facilitates on-demand and short-term mobility where immediate availability, as an expression of the service component, is vital.

service. Netherlands: Article 7:9(4) Dutch Civil Code; Dutch Explanatory Memorandum, *Kamerstukken II 2012/13*, 33520, 3, pp. 58, 59; A.L.M. Keirse, '1.3.3.2 Juridische levering/feitelijke levering/aflevering' in: Jac. Hijma (red.), *GS Vermogensrecht* (Deventer: Wolters Kluwer); Asser/Hijma 7-I 2019/428-429.

224 Article 18(2) first and second paragraph Consumer Rights Directive; Recital 52 Consumer Rights Directive, fourth sentence. Netherlands: Article 7:19a(1)(2) Dutch Civil Code; Dutch Explanatory Memorandum, *Kamerstukken II 2012/13*, 33520, 3, p. 61; Asser/Hijma 7-I 2019/588-589; M.B.M. Loos, *Consumentenkoop, Monografiieen BW, nr. B65b* (Deventer: Kluwer, 2019), 34.

225 Article 18(2), second paragraph Consumer Rights Directive; Recital 52 Consumer Rights Directive. Netherlands: Article 7:19a(2), (a), (b), (c) Dutch Civil Code; Dutch Explanatory Memorandum, *Kamerstukken II 2012/13*, 33520, 3, p. 61; Asser/Hijma 7-I 2019/588-589; M.B.M. Loos, *Consumentenkoop, Monografiieen BW, nr. B65b* (Deventer: Kluwer, 2019), 34.

In case of termination of the contract, the professional party needs to reimburse all sums paid under the contract without undue delay.²²⁶ This does not apply to the mobility usership consumer, because payment automatically starts after the consumer unlocks the vehicle on their own initiative. As a result, if the vehicle is not made available on time, the consumer will not be charged anything as the contract has not yet been concluded and there is therefore no payment obligation. In case studies 2 and 3 the consumer is always authorised to terminate the contract because the use (and the duration thereof) is directly determined by the consumer's demand. The provision in the Consumer Rights Directive does not change the rights of both parties under the mobility usership in this situation, and the contractual balance between the parties is maintained. The obligation to reimburse all sums paid under the Consumer Rights Directive does not make a difference in case studies 2 and 3, since no past payments exists as payment is made per use. On some occasions, a starting fee applies, which becomes due when the consumer unlocks the bicycle. If use is made of the right to terminate while the consumer has not been able to ride the bicycle, reimbursement of the starting fee should be possible, since this starting fee is a counter performance for the use of the bike.

In case study 1 the provider needs to deliver the bicycle by transferring the control of the bicycle to the consumer without undue delay. If the provider fails to deliver within that additional period of time, the consumer has the right to terminate.²²⁷ However, the monthly payments are synchronised with the use of the mobility. For case study 1, this means that all past payments for use by the consumer should remain unaffected in the event of termination because the use of mobility that already passed cannot be reclaimed. As a result, the rule from the Consumer Rights Directive regarding payment reimbursement is therefore not meaningful for mobility usership contracts.

4.5.2 *Passing of risk*

Under the Consumer Rights Directive, the risk of loss or damage to the goods passes to the consumer when the consumer has acquired the physical possession of the goods.²²⁸

226 Article 18(3) Consumer Rights Directive; Recital 52 Consumer Rights Directive; European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1, p. 72. Netherlands: Article 7:19a(3) Dutch Civil Code.

227 Article 18(2), first paragraph Consumer Rights Directive. Netherlands: Article 7:19a(1)(2) Dutch Civil Code.

228 Article 20 Consumer Rights Directive; Recital 55 Consumer Rights Directive. Netherlands: Article 7:11 Dutch Civil Code; Asser/Hijma 7-I 2019/692-695; M.M. van Rossum, 'Risico bij consumentenkoop' in: S.E. Bartels (red.), *GS Bijzondere overeenkomsten* (Deventer: Wolters Kluwer); P. Klik, *Koop en consumentenkoop* (10e druk, Deventer: Wolters Kluwer, 2022), p. 4.3; M.B.M. Loos, *Consumentenkoop, Monografiën BW, nr. B65b* (Deventer: Kluwer, 2019), 29.

Regarding the moment of the transfer of risk, a consumer should be considered to have acquired the physical possession of the goods when they actually receive them.²²⁹ However, it should be clear that this concerns the transfer of the risk of ownership. Naturally, in the case studies, there is no passing of the risk of ownership since there is no transfer of ownership whatsoever in mobility usership. This provision for mobility usership is therefore obsolete, but a provision regarding damage caused to the vehicle might be meaningful. In the case studies, the broken bicycle chain is detected after the consumer has gained physical control of the bicycle. The risk of damage to the bicycle chain would therefore have passed to the consumer. In case studies 2 and 3, the broken chain is detected before the consumer could use/ride the bicycle, however, right after gaining the physical control of the bicycle. In case study 1, the damage occurs in the fifth month of the contract. Clearly, in all case studies, ownership is never transferred. Likewise, the risk of ownership will also not transfer. Furthermore, the service component of the contract is inherent to all mobility usership contracts, regardless of whether it is the predominant component. This means that in the event of damage, like a broken bicycle chain – even if this is reported after the consumer has gained control of the vehicle – it is the responsibility of the provider due to the service component of the contract. After all, this is in the nature of the mobility usership contract. In all case studies, the risk remains with the provider during the use. A downside to this is that there is an increased risk of responsibility problems with the consumer. Since this consumer does not bear any risk, they might take poor(er) care of the vehicle. In the event of consciously inflicted damage, the provider often places the responsibility on the consumer in the general terms and conditions. This is discussed in more detail in chapter 6.

4.6 CONCLUSION

In this chapter, the non-applicable rights were examined to provide insight into the extent to which the rationale of the directive should also apply to mobility usership, and subsequently whether this would be practically possible and proportional. This is explored based on three exemplary case studies where each case study represents a certain type of mobility usership, namely B2C exclusive mobility use (case study 1), B2C shared mobility use (case study 2), and collaborative sharing of mobility as cooperative (case study 3).

229 Recital 55 Consumer Rights Directive, last sentence. Netherlands: Article 7:11 Dutch Civil Code; Asser/Hijma 7-I 2019/692-695; M.M. van Rossum, 'Risico bij consumentenkoop' in: S.E. Bartels (red.), *GS Bijzondere overeenkomsten* (Deventer: Wolters Kluwer); P. Klik, *Koop en consumentenkoop* (10e druk, Deventer: Wolters Kluwer, 2022), p. 4.3; M.B.M. Loos, *Consumentenkoop, Monografieën BW, nr. B65b* (Deventer: Kluwer, 2019), 29.

This chapter confirms that mobility usership contracts consist of two components, namely the use component and the service component. The balance of these components differs by the type of usership. Exclusive use has a predominant use-component because the consumer has exclusive and continuous use of the vehicle, whereas shared mobility involves a predominant service contract because emphasis in shared contracts lies on direct accessibility and availability of transportation. A small-scale cooperative resembles exclusive use and a large-scale cooperative resembles shared mobility, given the predominant components.

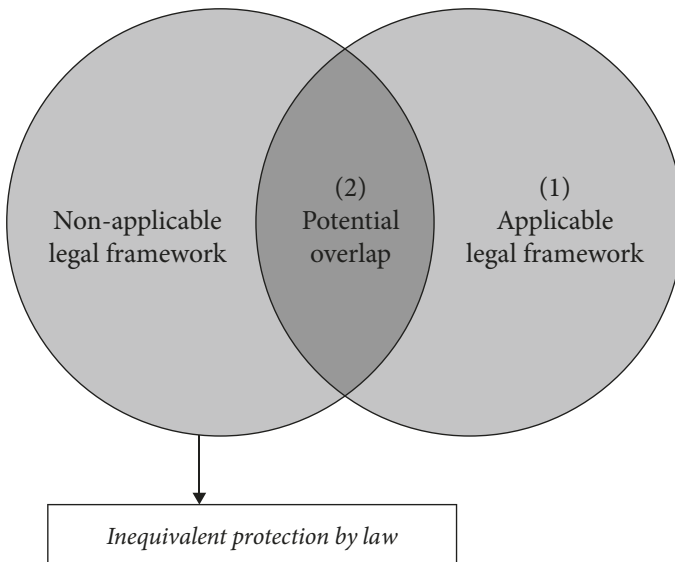
To determine the extent to which consumer law obligations should also apply to consumers of mobility services, rationale of the consumer law rule and the extent to which it applies to MU contracts, and the applicability or proportionality of that rule are important. For information rights, the *ratio legis* applies to all MU contracts, while the practical application requires adjustment of the current terminology to match with mobility usership. In this case, shared use requires more adjustment than exclusive use because the latter usership is more similar to ownership. For the remedies available in the event of non-conformity, the *ratio legis* applies to both types of contracts. However, for exclusive use, the remedies might often arise from the service component of the contract, which means that equivalence could result from the contractual conditions. At the same time, the legal remedies are also proportional for exclusive use whereas for shared use, the option of replacement depends on the available vehicles in the area, the system being used, and the size of the fleet. In addition, replacement requires action by the consumer, contradicting the rationale of short-term mobility use. For that same reason, repair in cases of shared use is not proportional, and the focus should be on continuation of mobility, aligning the rationale of shared mobility. In contrast to exclusive use, the *ratio legis* does in my opinion not apply to shared use for the creditworthiness assessment and database consultation because it is disproportionately burdensome (and impractical) as few people who make a one-off payment of a relatively low amount will run into creditworthiness problems. Equivalent protection is therefore indeed an important principle, but this principle should clearly not always apply. The question is whether in such cases a suitable protective framework would be needed instead of equivalent protection as equivalent protection will not always have the desired effect.

5 APPLICABLE SUBSTANTIVE RIGHTS TO MOBILITY USERSHIP

5.1 INTRODUCTION

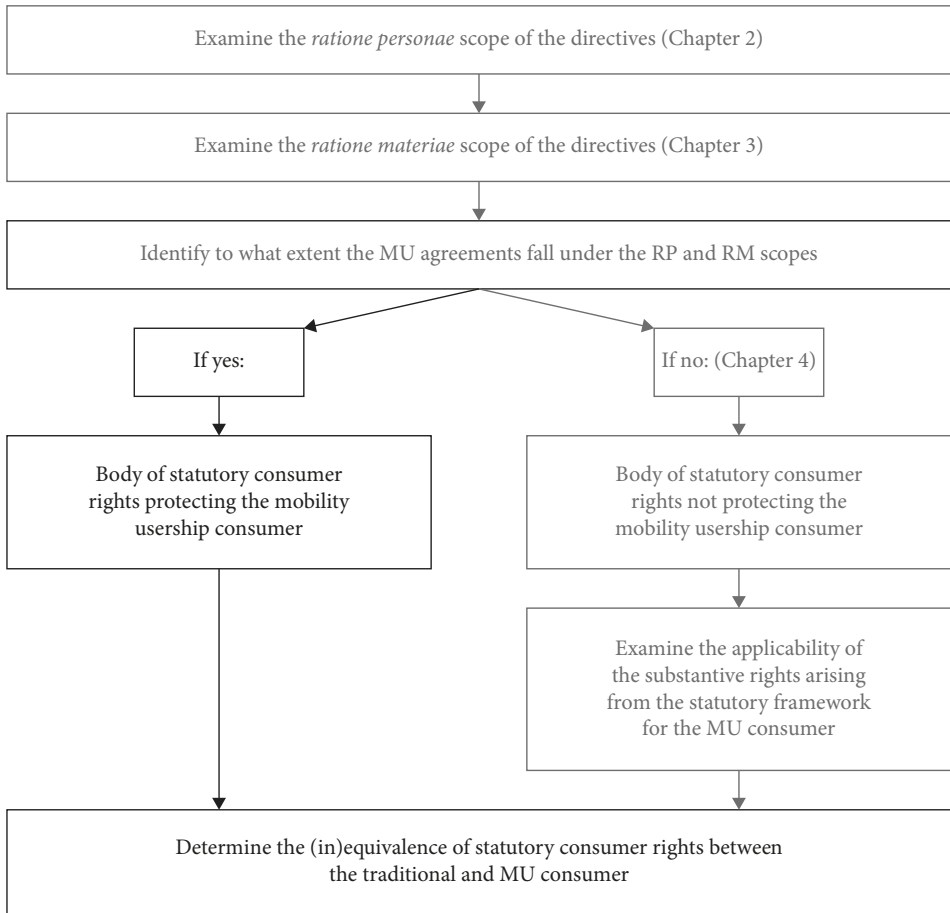
Chapter 2 on the *ratione personae* scope and chapter 3 on the *ratione materiae* scope clarified which selected EU directives do and do not apply to mobility usership consumers and contracts. Subsequently, in chapter 4 the non-applicable directives are examined regarding substantive rights and the extent to which these rules apply to mobility usership contracts and whether application problems are encountered. This is examined based on three case studies, which exemplify the different variations of mobility usership contracts. The main conclusion regarding the substantive rights to these non-applicable directives was that, in general, the *ratio legis* of the rules applies to mobility usership, whereby the application of those rules for exclusive use is often more straightforward (and proportionate) than for shared mobility use. The cause of this is that shared mobility is a short-term contract, and the emphasis lies on the *use* component.

Figure 6: Potential overlap of applicable and non-applicable legal framework



The aim of this chapter is to (1) identify the substantive rights arising from the applicable framework (the right circle of Figure 6) and (2) examine potential overlap between those applicable rights and the non-applicable rights from the previous chapter (the left circle of Figure 6). That overlap is examined because where there is overlap, the applicable legal framework eliminates the inequivalence in protection. Figure 7, shows a schematic approach to chapter 5, considered in conjunction with chapter 2, 3, and 4.

Figure 7: Schematic approach to chapter 5



As a follow-up, this chapter examines the applicable directives, namely the (non-sales specific rights in the) Consumer Rights Directive, the Unfair Commercial Practices Directive, and the Unfair Contract Terms Directive. The Omnibus Directive is a part of the EU’s New Deal for Consumers and brings changes in the Unfair Commercial Practices

Directive, the Unfair Contract Terms Directive and the Consumer Rights Directive.¹ Where applicable and relevant, the changes of the Omnibus Directive in relation to the directives that apply to mobility usership contracts are discussed. In line with the previous chapter, these applicable directives are discussed. To recall, case study 1 illustrates a defect after four months of exclusively using a long-term bicycle (lease). Case study 2 exemplified a defect at the start of the short-term B2C sharing of a bicycle. Case study 3 shows a defect at the beginning of the use of a bicycle in a cooperative sharing structure.

5.2 SUBSTANTIVE RIGHTS: CONSUMER RIGHTS DIRECTIVE

In paragraph 4.5, the Consumer Rights Directive is already acknowledged as a directive with a special capacity as its components apply to explicit contracts, such as sales contracts. As a result, there exists a distinction based on the *ratione materiae* scope and the Consumer Rights Directive, which is discussed in both chapter 4 and 5. This means that in this chapter only the Consumer Rights Directive rules that apply to mobility usership consumers are examined (the right circle of Figure 6). It is necessary to consider the structure of the Consumer Rights Directive because the kind of contract that the mobility usership consumer concludes determines the applicable rules. To recall from paragraph 3.4, all mobility usership contracts qualify as ‘any contract’ and as ‘service contract’.² When it comes to distance contracts in the Consumer Rights Directive, a shared mobility usership contract (case study 2) falls under the definition, while for the exclusive user and cooperative user (case studies 1 and 3) it depends on how the contract is concluded (Table 11).³ Table 12 below sums up how the case studies are qualified under the directive.

Table 12: Distinction per case study in the discussion of CRD

<i>Rationae materiae</i> scope distinction of CRD	Case study
(1) other than a distance or off-premises contracts (‘any contract’, ‘service contract’)	<i>Case study 1</i> : exclusive mobility <i>Case study 3</i> : small scale cooperative shared mobility
(2) distance (or off-premises) contracts	<i>Case study 2</i> : shared mobility <i>Case study 3</i> : large scale cooperative shared mobility (possibly <i>Case study 1</i> : exclusive mobility)

1 Omnibus Directive; European Commission, ‘A New Deal for Consumers’ (Brussels, 11 April 2018) COM (2018) 183 final. Also see: S. Weidert, Harte-Bavendamm/Henning-Bodewig, UWG, 5. Auflage 2021, Einleitung, Rn. 28-34; P.W. Heermann, J. Schlingloff, Münchener Kommentar zum Lauterkeitsrecht, 3. Auflage 2022, Rn. 10, 11; M. Durovic (2020) ‘Adaptation of Consumer Law to the Digital Age: EU Directive 2019/2161 on Modernisation and Better Enforcement of Consumer Law’ *Annals of the Faculty of Law in Belgrade* 68(2).

2 Article 2(6); 3(1) Consumer Rights Directive.

3 Article 2(7) and (8) Consumer Rights Directive.

The key points of the Consumer Rights Directive are consumer information (5.2.1), right of withdrawal (5.2.2), formal requirements (5.2.3), and other consumer rights (5.2.4). Chapters V and VI of the Consumer Rights Directive are excluded as these chapters focus on the enforcement, the transposition, and the entry into force of the directive.⁴ As mentioned earlier, the Consumer Rights Directive aims at maximum harmonisation, especially in regards to consumer information and the right of withdrawal in distance and off-premises contracts. This contributes to a high level of consumer protection and a better functioning of the business-to-consumer internal market.⁵

5.2.1 Consumer information

In the Consumer Rights Directive, the right to consumer information is discussed separately for (a) distance or off-premises contracts and (b) other than distance or off-premises contracts, also described as ‘in-person services contracts’ for readability purposes.⁶ This distinction, summarised in Table 12, is also used in the discussion of this paragraph. First, the information requirements are discussed and subsequently the omission of information on the right of withdrawal.

Information requirements

For all mobility usership contracts, the provider needs to provide the consumer with the necessary information in a clear and comprehensible manner before the consumer is bound by a contract.⁷ In providing information, the provider should consider the specific needs of vulnerable consumers in a way that the provider could reasonably be expected to foresee.⁸ However, considering such specific needs should not lead to different levels of consumer protection.⁹ A minor deviation exists here between the contracts discussed in the case studies. Case studies 1 and 3 are service contracts and for these contracts, this information obligation lapses when the information is apparent from the context,

4 Article 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 Consumer Rights Directive. See: Chapter 1 for a detailed explanation on the exclusion.

5 Recital 4, 5, 9 Consumer Rights Directive. Also see for some considerations: V. Mak (2009) ‘The Degree of Harmonisation in the Proposed Consumer Rights Directive: A Review in Light of Liability for Products’ in: Geraint Howells and Reiner Schulze, eds., *Modernising and Harmonising Consumer Contract Law* (Munich: Sellier, 2009), pp. 307-324.

6 Respectively Article 5(1); Article 6(1) Consumer Rights Directive. European Commission ‘Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights’ *Official Journal of the European Union* (29 December 2021) C525/1.

7 Article 5(1); 6(1) Consumer Rights Directive.

8 Recital 34 Consumer Rights Directive.

9 Vulnerability in the sense of consumer’s mental, physical, or psychological disability, age or credibility. Recital 34 Consumer Rights Directive; Article 5(1); 6(1) Consumer Rights Directive.

provided that the contract is not a distance or off-premises contract.¹⁰ Case study 2 is a distance contract, which means that the provider always needs to offer the information under the directive.¹¹ Larger scale cooperatives show similarities to case study 2 and in practice, these cooperatives mostly entail a distance contract. The rationale behind the difference in information obligations for the provider is that in a distance contract there is less opportunity for the consumer to deduce information from the context of the (conclusion of the) contract compared to an in-person service contract because the contracting parties are not physically together during the conclusion of a distance contract. As a result, a more extensive information obligation applies to the provider in case study 2 (and possibly to case study 1 and 3 in case these contracts are concluded as a distance or off-premises contract).¹² The reason for this difference in protection is not the difference of mobility usership contracts, but the way in which the contract is concluded, being a distance contract versus an in-person service contract; not being a distance or off-premises contract.

Both for in-person service contracts and distance contracts, the directive lists specific information requirements, respectively in articles 5 and 6 of the Consumer Rights Directive.¹³ An overview of the information obligations towards consumers is included in Appendix 1. This appendix also shows that there are many similarities regarding these requirements for either in-person service contracts (left column) and distance contracts (right column). The grey text indicates the areas in which the information obligation differs. All information obligations, regardless of the type of contract, for mobility usership providers (and any mutual deviations) are discussed below.

In supplement to Appendix 1, in all case studies, the mobility usership providers have the obligation to inform consumers on the main characteristics of the goods or services, the identity of the provider, and the geographical address at which the provider is established and their telephone number.¹⁴ For case study 2, in the capacity of a distance contract,

10 Article 5, exordium Consumer Rights Directive. European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1.

11 Article 6(1) Consumer Rights Directive exordium.

12 Dutch Explanatory Memorandum, *Kamerstukken II 2012/13*, 33520, 3, p. 33. See: M.Y. Schaub (2022) 'Europese informatieplichten: de ene informatieplicht is de andere niet' *Overeenkomst in de rechtspraak* 5, pp. 4-9; L.B.A. Tigelaar (2015) 'Sancties en doelstellingen van Europese informatieplichten' *Nederlands Tijdschrift voor Burgerlijk Recht* 2015/6, pp. 206-213.

13 Article 5(1); 6(1) Consumer Rights Directive. European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1.

14 Article 5(1)(a), (b); 6(1)(a), (b), (c) Consumer Rights Directive. The Netherlands: Article 6:230l(1), a, b Dutch Civil Code; Article 6:230m(1), a, b Dutch Civil Code. Germany: Article 246a (1), 1-3 German

the provider has additional information obligations. The provider should inform the consumer additionally and where available an e-mail address to enable the consumer to contact the provider quickly and communicate with them efficiently.¹⁵ Furthermore, the provider needs to inform the consumer on the geographical address of the place of business of the provider if this is different from the address of establishment, where the consumer can address any complaints.¹⁶ Of course, this also applies for case studies 1 and 3 if these contracts are concluded as a distance contract. In case a party would act on behalf of a provider, they should also inform the consumer on the geographical address and identity of the provider on whose behalf they are acting.¹⁷

In all case studies, the providers should also inform the consumer on the total price of the usership, including taxes. For case studies 1 and 3, this can often be determined in advance. For case study 1, it concerns the number of instalments multiplied by the monthly fee. In case study 3, the price of a small-scale cooperative for shared mobility is determined by the amount of hours of use multiplied by the fee per hour.¹⁸ In case of a large-scale cooperative, the contract has a predominant service-component where the end time is not clear in advance and shows similarities with case study 2. In such cases the directive states that in case the nature of the contract is such that the price cannot reasonably be calculated in advance, the provider is obliged to inform the consumer of the way the price is to be calculated.¹⁹ This means that informing the consumer on the cost structure fulfils the obligation. This is somewhat similar to the Consumer Credit Directive, which requires information about the total amount of the contract and the borrowing rate and annual percentage rate and the amount, number and frequency of payments to be made by the consumer (paragraph 4.4).

Introductory Act to the Civil Code. France: Article L221-5, 1°, 4° French Consumer Code. Belgium: Article VI.2. 1°, 2°; VI.45(1)1°-4°; VI.64. 1°, 2° Belgian Code of Economic Law.

15 Article 6(1)(c) Consumer Rights Directive; European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1.

16 Note: and, if applicable, that of the provider on whose behalf he is acting. Article 6(1)(d) Consumer Rights Directive. The Netherlands: Article 6:230m(1), d Dutch Civil Code. Germany: Article 246a (1), 2 German Introductory Act to the Civil Code. France: Article L221-5, 4° French Consumer Code. Belgium: Article VI.45(1)3°, 4° VI.64. 2° Belgian Code of Economic Law.

17 Article 6(1)(c) Consumer Rights Directive; European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1.

18 Possibly including a fixed starting amount.

19 Note: as well as, where applicable, all additional freight, delivery, or postal charges or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable. Article 5(1)(c) Consumer Rights Directive. The Netherlands: Article 6:230l(1), c Dutch Civil Code; Article 6:230m(1), e Dutch Civil Code. Germany: Article 246(1), 5 German Introductory Act to the Civil Code. France: Article L221-5, 2° French Consumer Code. Belgium: Article VI.2. 3°; VI.45(1) 5° Belgian Code of Economic Law.

For distance contracts in the case of a contract of indeterminate duration or a contract containing a subscription, the consumer must be informed about the total price.²⁰ This total price includes the total costs per billing period.²¹ Consider, for example, the provider *Swapfiets* (a concrete example of case study 1) where a ‘subscription’ to a bicycle is offered which must be paid monthly and can be terminated monthly. With *Swapfiets* the contract is of indeterminate duration and the consumer must be informed about the monthly costs.²² In case study 2 and large-scale cooperative sharing (variation to case study 3), it is difficult to determine the total price in advance because the price is determined based on the duration of the ride which is determined by the consumer. As a result, the consumer should be informed by the provider on the cost structure because the price cannot reasonably be calculated in advance.²³ Furthermore, the provider of a distance contract should inform consumers on the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate.²⁴

The provider in case study 2 is also obliged to inform consumers on the arrangements for payment, delivery, performance, the time by which the provider undertakes to perform

20 Article 6(1)(e) Consumer Rights Directive. European Commission ‘Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights’ *Official Journal of the European Union* (29 December 2021) C525/1. The Netherlands: Article 6:230m(1)(e) Dutch Civil Code. Germany: Article 246a(1), 5 German Introductory Act to the Civil Code. France: Article L221-5, 2° French Consumer Code. Belgium: Article VI.45(1) 5°; VI.64(1) 5° Belgian Code of Economic Law.

21 Where such contracts are charged at a fixed rate, the total price shall also mean the total monthly costs. Where the total costs cannot be reasonably calculated in advance, the way the price is to be calculated shall be provided. The Netherlands: Article 6:230m(1)(e) Dutch Civil Code. Germany: Article 246a(1), 5, 9 German Introductory Act to the Civil Code. France: Article L221-5, 4° French Consumer Code. Belgium: Article VI.45(1) 5°; VI.64.(1) 5° Belgian Code of Economic Law.

22 Article 6(1)(e) Consumer Rights Directive; European Commission ‘Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights’ *Official Journal of the European Union* (29 December 2021) C525/1. The Netherlands: Article 6:230m(1)(e) Dutch Civil Code. Germany: Article 246a(1), 5 German Introductory Act to the Civil Code. France: Article L221-5, 4° French Consumer Code. Belgium: Article VI.45(1) 5°; VI.64.(1) 5° Belgian Code of Economic Law.

23 Note: as well as, where applicable, all additional freight, delivery or postal charges or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable. Article 6(1)(e) Consumer Rights Directive. The Netherlands: Article 6:230m(1)(e) Dutch Civil Code. Germany: Article 246a(1), 5 German Introductory Act to the Civil Code. France: Article L221-5, 4° French Consumer Code. Belgium: Article VI.45(1) 5°; VI.64.(1) 5° Belgian Code of Economic Law.

24 Article 6(1)(f) Consumer Rights Directive; European Commission ‘Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights’ *Official Journal of the European Union* (29 December 2021) C525/1. The Netherlands: Article 6:230m(1), f Dutch Civil Code. Germany: Article 246a(1), 9 German Introductory Act to the Civil Code. France: Article L221-5, 4° French Consumer Code. Belgium: Article VI.45; VI.64. Belgian Code of Economic Law.

the service, and the provider's policy for handling complaints.²⁵ For in-person service contracts, such as in case studies 1 and 3, this only applies under certain circumstances.²⁶ Some information conditions might be apparent from the type of agreement. This especially applies to case study 2, in which the consumer unlocks the bicycle with a mobile app and therefore immediately starts using it. Informing the consumer about delivery, performance, and the time by which the provider undertakes to perform the service therefore seems rather redundant here as these are self-evident.

In case a right of withdrawal exists, the provider of a distance contract such as in case study 2 needs to inform the consumer on the conditions, time limit, and procedures for exercising the right of withdrawal in accordance with article 11(1) of the Consumer Rights Directive as well as the model withdrawal form set out in Annex I(B) of the Consumer Rights Directive.²⁷ Furthermore and where applicable, the consumer should be notified that they will have to bear the cost of returning the goods in case of withdrawal.²⁸ The possibilities of exercising the right of withdrawal will be discussed in paragraph 5.2.2, below. If a right of withdrawal is not provided for, or if circumstances exist in which the consumer can lose the right of withdrawal, the provider should convey this clearly to the consumer.²⁹

25 Article 6(1)(g) Consumer Rights Directive; European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1. The Netherlands: Article 6:230m(1), g Dutch Civil Code. Germany: Article 246a(1), 10 German Introductory Act to the Civil Code. France: Article L221-5 French Consumer Code. Belgium: Article VI.45. 6°; VI.64. 6° Belgian Code of Economic Law.

26 Article 5(1)(d) Consumer Rights Directive; European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1. The Netherlands: Article 6:230m(1), d Dutch Civil Code. Germany: Article 246(1), 4 German Introductory Act to the Civil Code. France: Article L221-5 French Consumer Code. Belgium: Article VI.2 6° Belgian Code of Economic Law.

27 Article 6(1)(h) Consumer Rights Directive; European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1. The Netherlands: Article 6:230m(1), h Dutch Civil Code. Germany: Article 246a(2), 1 German Introductory Act to the Civil Code. France: Article L221-5, 7° French Consumer Code. Belgium: Article VI.2. 7° Belgian Code of Economic Law.

28 Article 6(1)(i) Consumer Rights Directive; European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1. The Netherlands: Article 6:230m(1), i Dutch Civil Code. Germany: Article 246a(2), 2 German Introductory Act to the Civil Code. France: Article L221-5, 8° French Consumer Code. Belgium: Article VI.2. 8° Belgian Code of Economic Law.

29 This is in accordance with Article 16 Consumer Rights Directive. Article 6(1)(k) Consumer Rights Directive; European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1. The Netherlands: Article 6:230m(1), 6:230k Dutch Civil Code. Germany: Article 246a(3) German Introductory Act to the Civil Code. France: Article L221-5, 10° French Consumer Code. Belgium: Article VI.45. 10°; VI.64. 10° Belgian Code of Economic Law.

According to the Consumer Rights Directive, providers in all case studies should inform the consumer on the existence of a legal guarantee of conformity for goods. In addition, they should inform the consumer on the existence and the conditions of after-sales services and commercial guarantees in case the provider offers such services or guarantees.³⁰ For distance contracts, such as in case study 2, there is an additional obligation to provide information on after-sale customer assistance.³¹ As clarified in previous chapters, there is no (transfer of) ownership in mobility usership contracts. This complicates compliance with the requirement to inform the consumer on a legal guarantee of conformity for goods as this relates to ownership and with mobility usership, the object of the contract is the service or use and not the vehicle itself.

As a result, this information requirement with regard to the conformity of goods under the directive only applies to sales, making this requirement inapplicable for all case studies. Furthermore, in all case studies the consumer must be notified on the duration of the contract. If the contract is of indeterminate duration or is to be extended automatically, the consumer must be informed on the conditions for terminating the contract.³² As briefly discussed above, an indeterminate contract could be an exclusive mobility usership contract as in case study 1. For case study 2 and large-scale cooperatives (as a variation to case study 3), the consumer can often determine the duration of the contract themselves. Therefore, the consumer is in principle free to terminate the contract any time. In paragraph 4.3.2, the practical difficulties of termination in station-based structures were discussed extensively. In this light, the question again arises to what extent the right to terminate is proportional when, as part of the mobility usership contracts, the consumer already determines the duration of the contract. This is not further discussed here.

Providers in situations such as in case study 2 should, where applicable, inform consumers on the existence of relevant codes of conduct and how copies of them can be obtained.³³ Furthermore, the consumer must be informed on the minimum duration

30 Article 5(1)(e); 6(1)(l) and (m) Consumer Rights Directive. European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1.

31 Article 6(1)(m) Consumer Rights Directive.

32 Article 5(1)(f); 6(1)(o) Consumer Rights Directive; European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525/1.

33 Article 6(1)(n) Consumer Rights Directive. See for the definition on 'code of conduct' in Article 2(f) Unfair Commercial Practices Directive, where 'code of conduct' is defined as an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors.

of the consumer's obligations under the contract and the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the provider, in case this applies to case study 2.³⁴ Moreover, the consumer in case study 2 should be informed, where applicable, on their avenues of recourse to an out-of-court complaint and redress mechanism, to which the provider is subject, and the methods for having access to it.³⁵ The conditions that apply here for case study 2 would of course also apply to case studies 1 and 3 when those case studies conclude their contract as distance contracts.

Omission of information on the right of withdrawal

In case of a distance contract, the provider needs to provide the consumer with the information on the right of withdrawal as required by the Consumer Rights Directive. If the provider does not comply with this obligation, the withdrawal period shall expire 12 months from the end of the initial withdrawal period.³⁶ In case the provider offers the consumer the required information within those 12 months, the withdrawal period expires 14 days after the day upon which the consumer receives that information.³⁷ This period of 12 months seems long, especially for situations such as in case study 2 and the large scale variation of case study 3. The rationale behind this period is to remedy the provider's shortcomings in the information obligation about the right of withdrawal and to ensure the balance between the contracting parties. In addition, the directive does not limit the term of the contract for withdrawal. This means that the 12-month period also applies to short-term contracts such as shared mobility. This period also applies to case studies 1 and 3 when these contracts are concluded as distance contracts.

34 Article 6(1)(p) and (q) Consumer Rights Directive. The Netherlands: Article 230m(1), p, q Dutch Civil Code. Germany: Article 246a(1) 14, 15, 16 German Introductory Act to the Civil Code. France: Article L221-5, 5°; L111-1, 1° French Consumer Code. Belgium: Article VI.45. 14°, 15°, 16°; VI.64. 14°, 15°, 16° Belgian Code of Economic Law.

35 Article 6(1)(t) Consumer Rights Directive. The Netherlands: Article 6:230m(1), t Dutch Civil Code. Germany: Article 246a(1) 19 German Introductory Act to the Civil Code. Belgium: Article VI.45. 19°; VI.64. 19° Belgian Code of Economic Law.

36 Recital 43 Consumer Rights Directive; Article 10(1); 6(1)(h); 9(2) Consumer Rights Directive. The Netherlands: Article 6:230o(1), (2); 6:230(1), h Dutch Civil Code. France: Article L221-20; L221-18 French Consumer Code. Germany: Section 356 German Civil Code. Belgium: Article VI.68. Belgian Code of Economic Law. Also see: M.Y. Schaub (2014) 'Het herroepingsrecht bij overeenkomsten op afstand' *Nederlands Tijdschrift voor Burgerlijk Recht* 2014/23.

37 Recital 43 Consumer Rights Directive; Article 10(1), (2); 6(1)(h); 9(2) Consumer Rights Directive. The Netherlands: Article 6:230o(1), (2); 6:230(1), h Dutch Civil Code. France: Article L221-20; L221-18 French Consumer Code. Germany: Section 356 German Civil Code. Belgium: Article VI.48; VI.68. Belgian Code of Economic Law. Also see: M.Y. Schaub (2014) 'Het herroepingsrecht bij overeenkomsten op afstand' *Nederlands Tijdschrift voor Burgerlijk Recht* 2014/23.

5.2.2 Right of withdrawal in distance contracts and off-premises contracts

The information obligation of the provider regarding the right of withdrawal towards the consumer and the consequences of non-compliance have already been discussed above. In this paragraph, the substantive criteria for the right of withdrawal are discussed. These criteria follow from article 9 of the Consumer Rights Directive.

Right of withdrawal

The Consumer Rights Directive offers the consumer a period of 14 days to withdraw from a distance contract, without obligation to provide any reason, and without incurring any costs other than some costs following from the directive.³⁸ Some exceptions apply, which will be discussed later.³⁹ As discussed in paragraph 4.4.4 on the credit agreement in the Consumer Credit Directive, the withdrawal period expires after 14 days from the day on which the consumer acquires physical possession of the goods.⁴⁰ However, the right of withdrawal in article 9 of the Consumer Rights Directive targets distance and off-premises contracts and differentiates between goods and services in several places, such as the moment when the withdrawal period begins. All case studies qualify as service contracts (Table 12). Therefore, the cooling off period begins at the conclusion of the contract.⁴¹ In case of a sales contract, the consumer can withdraw within 14 days of receipt of the goods.⁴²

The Consumer Rights Directive refers to exceptions to the right of withdrawal and two exceptions of article 16 are relevant here: the exception on service contracts (sub a) and on

38 Costs following from Article 13(2); 14 Consumer Rights Directive. Also see: Article 9(1) Consumer Rights Directive. The Netherlands: Article 6:230o(1) Dutch Civil Code. France: Article L221-18 French Consumer Code. Germany: Section 356(3), 355(2) German Civil Code. Belgium: Article VI.47; VI.67. Belgian Code of Economic Law. Also see: M.Y. Schaub (2014) 'Het herroepingsrecht bij overeenkomsten op afstand' *Nederlands Tijdschrift voor Burgerlijk Recht* 2014/23. Also see: CJEU, Case C-489/07, 3 September 2009, ECLI:EU:C:2009:502 (*Messner*) with annotation of M.R. Mok.

39 The exceptions provided for in Article 16 Consumer Rights Directive. M.Y. Schaub (2014) 'Het herroepingsrecht bij overeenkomsten op afstand' *Nederlands Tijdschrift voor Burgerlijk Recht* 2014/23.

40 Article 9(2)(b) Consumer Rights Directive; Article 14 Consumer Credit Directive 2008. The Netherlands: Article 6:230o(1), b Dutch Civil Code. Germany: Section 355(2); Section 356b German Civil Code. France: Article L221-18; L312-19 *et seq* French Consumer Code. Belgium: Article VI.47; VI.67 Belgian Code of Economic Law.

41 Note: In case of a sales contract, the cooling-off period runs from the delivery of the goods. Article 9(2) Consumer Rights Directive. Unger (2012) 'Die Richtlinie über die Rechte der Verbraucher: Eine systematische Einführung' *Zeitschrift für Europäisches Privatrecht* 270, 296. France: Article L221-19 French Consumer Code. In French law applies that the day on which the contract is concluded or the day on which the goods are received is not included in the period specified in Article L221-18 French Consumer Code. Furthermore, the period starts at the beginning of the first hour of the first day and ends at the end of the last hour of the last day of the period. It also applies that if this period ends on a Saturday, a Sunday or a public holiday or non-working day, it will be extended to the next working day.

42 Article 9(1) Consumer Rights Directive.

the provision of accommodation other than for residential purpose, transport of goods, car rental services, catering or services related to leisure activities if the contract provides for a specific date or period of performance (sub l). The exception on service contracts, however, is strictly not an exception because withdrawal of the service agreement is initially possible. However, the option to withdraw expires when (1) the service is fully completed, (2) the consumer has expressly consented to the start of performance, and (3) the consumer acknowledged that the right of withdrawal ends when the service is completed.⁴³ Strictly speaking, the right of withdrawal applies to all case studies, as long as the service is not fully completed. From a practical point of view, this leads to a remarkable situation in which the consumer could withdraw as long as he is driving and has not yet returned the vehicle. However, several mobility usership contracts will fall within the scope of the exception in sub l of article 16 of the Consumer Rights Directive. This means that the exception relating to services (sub a) is not relevant to those mobility usership contracts because the exception in sub l already ensures the exclusion of the right of withdrawal in that case.

In paragraph 4.4.4, reference is made to the application of the right of withdrawal to service contracts under the Consumer Rights Directive when discussing the right of withdrawal under the Consumer Credit Directive. The Consumer Rights Directive offers a solution for service contracts which is in line with the rationale of the withdrawal right, offering the consumer the opportunity to reconsider the conclusion of the agreement,⁴⁴ within the limit of the contract duration.⁴⁵ The Consumer Rights Directive states that under certain circumstances, granting a right of withdrawal to the consumer could be inappropriate.⁴⁶ Such circumstances may be for services where the conclusion of the contract implies the setting aside of capacity which, if a right of withdrawal would be exercised by the consumer, the provider may find difficult to fill.⁴⁷ The rationale behind this objective is to protect

43 Article 16(a) Consumer Rights Directive. The Netherlands: Article 6:230p, d Dutch Civil Code. France: Article L221-28, 1° French Consumer Code. Belgium: Article VI.53. 1° Belgian Code of Economic Law. Germany: Section 356(4) German Civil Code; Unger (2012) 'Die Richtlinie über die Rechte der Verbraucher: Eine systematische Einführung' *Zeitschrift für Europäisches Privatrecht* 270, 296; M.Y. Schaub (2014) 'Het herroepingsrecht bij overeenkomsten op afstand' *Nederlands Tijdschrift voor Burgerlijk Recht* 2014/23.

44 P. Rekaiti, R. van den Bergh (2000) 'Cooling-off periods in the consumer laws of EC member states. A comparative law and economics approach' *Journal of Consumer Policy* 2000/4, pp. 371-407; J.M. van Poelgeest, *Kredietverstrekking aan consumenten (Recht en Praktijk nr. FR8)* (Deventer: Kluwer, 2020), 2.4.71; J.W.A. Biemans (2012) 'De consumentenkredietovereenkomst in titel 7.2A BW: Over losse eindjes en rafelige randen' *Nederlands Tijdschrift voor Burgerlijk Recht* 2012/46, p. 8; M.Y. Schaub, '2. Doel en strekking' in: R.J.Q. Klomp & H.N. Schelhaas (red.), *GS Verbintenissenrecht* (Deventer: Wolters Kluwer); M.B.M. Loos (2003) 'De effectiviteit van de bedenktijd als instrument van consumentenbescherming' *Tijdschrift voor Consumentenrecht & handelspraktijken* 2003/1, pp. 6-23.

45 Article 16(a) Consumer Rights Directive.

46 Recital 49 Consumer Rights Directive.

47 Recital 49 Consumer Rights Directive.

traders against the risk associated with the setting aside of capacity.⁴⁸ This circumstance could also occur with mobility usership. If the consumer makes a reservation of the vehicle in the provider's mobile application but withdraws the reservation, the provider has set a vehicle aside and kept it available for the consumer. This means that in the event of withdrawal, the provider may have trouble filling the vacancy. The exclusion of the provision of accommodation other than for residential purpose, transport of goods, car rental services, catering or services related to leisure activities if the contract provides for a specific date or period of performance in sub I of the Consumer Rights Directive seeks to protect the interests of the providers of certain services that require the setting aside of capacity, in order that the provider should not suffer the disproportionate consequences arising from the cancellation of a service for which there is a prior booking at no expense and with no explanation, as a consequence of the consumer's withdrawal at short notice before the date specified for the provision of that service.⁴⁹

The question is to what extent article 16 sub I of the Consumer Rights Directive applies to all types of mobility usership. Recent case law from the European Court of Justice has shown that the private lease of a car – i.e. without a transfer of ownership – falls under this exception. The Court finds that the provider may struggle to use the purchased vehicle differently to meet the specifications to comply with the consumer's preferences. Depending on, for example, the make of the car, the model or the colour of the bodywork, the provider might not succeed, within a reasonable period following the exercise of the right of withdrawal, in putting the vehicle to another equivalent use for the period corresponding to the duration of the originally planned lease, without suffering significant financial damage.⁵⁰ Therefore, the Court determines that a B2C leasing agreement for a motor vehicle, classified as a distance or off-premises service contract, comes under the exception to the right of withdrawal laid down in article 16 sub I of the Consumer Rights Directive when it concerns car rental services coupled with a specific date or period of performance, where the main purpose of that agreement is to allow the consumer to use a vehicle for the specific period of time stipulated in that agreement, in return for the regular payment of sums of money.⁵¹ This means that the consumer who leases a car or other motor vehicle does not have a right of withdrawal.

48 CJEU, Case C-96/21, 31 March 2022, ECLI:EU:C:2022:238 (*Eventim*), pp. 43-48.

49 CJEU, Case C-96/21, 31 March 2022, ECLI:EU:C:2022:238 (*Eventim*), p. 45; CJEU, Case C-38/21, C-47/21 and C-232/21, 21 December 2023, ECLI:EU:C:2023:1014 (*BMW Bank, C. Bank AG, Volkswagen Bank GmbH, Audi Bank*), pp. 196-202.

50 CJEU, Case C-38/21, C-47/21 and C-232/21, 21 December 2023, ECLI:EU:C:2023:1014 (*BMW Bank, C. Bank AG, Volkswagen Bank GmbH, Audi Bank*), p. 199.

51 CJEU, Case C-38/21, C-47/21 and C-232/21, 21 December 2023, ECLI:EU:C:2023:1014 (*BMW Bank, C. Bank AG, Volkswagen Bank GmbH, Audi Bank*), p. 202.

Consumers of exclusive mobility use, such as case study 1, are excluded from the right of withdrawal. Although the Court only mentions a car or other motor vehicle, the rental of motorbikes and means of transport other than cars (on specific dates) could also be exempted from the right of withdrawal as a service ‘related to leisure activities.’⁵² This means that for case study 1 the right of withdrawal is exempted due to article 16 sub l of the Consumer Rights Directive. The application of this exception makes it impossible for the consumer of exclusive mobility to invoke the right of withdrawal, even though their position does not significantly differ from that of a consumer who buys a bicycle.

It is possible that this exception also applies to case study 2 in case the consumer makes a reservation for the vehicle and the provider has to set a vehicle aside and keeps it available for the consumer. At the same time, shared use does not always require a setting aside of capacity, so this exception is not always applicable to shared use. In such a case, the exception on service contracts (sub a) applies and the withdrawal period ends after the service has been fully performed if the performance began with the consumer’s prior express consent and with the acknowledgement that they will lose their right of withdrawal once the contract has been fully performed by the trader.⁵³ This consideration applies equally to case study 3.

Exercise of the right of withdrawal

For the sake of completeness, the exercise of the right of withdrawal is discussed below. Before the withdrawal period expires, the consumer must inform the provider of the decision to withdraw from the contract by using the model withdrawal form (Appendix 2) or by making any other unequivocal statement setting out their decision to withdraw.⁵⁴ The consumer exercises their right of withdrawal within the withdrawal period if the communication concerning the exercise of the right of withdrawal is sent by the consumer before that period has expired.⁵⁵ The provider can also give the consumer

52 If there is a capacity limitation. European Commission ‘Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights’ *Official Journal of the European Union* (29 December 2021) C525/1.

53 Article 16(a) Consumer Rights Directive.

54 Recital 44 Consumer Rights Directive; Article 11(1)(a), (b) Consumer Rights Directive; Model withdrawal form as set out in Annex I(B) Consumer Rights Directive. The Netherlands: Article 6:230o(3) Dutch Civil Code. France: Article L221-21 French Consumer Code. Belgium: Article VI. 49; VI.69 Belgian Code of Economic Law. Germany: Section 356(1) German Civil Code.

55 Article 11(2) Consumer Rights Directive. Withdrawal period: Article 9(2) Consumer Rights Directive and Article 10 Consumer Rights Directive. The Netherlands: Article 6:230o(3) Dutch Civil Code. France: Article L221-21 French Consumer Code. Belgium: Article VI. 49; VI.69 Belgian Code of Economic Law. Germany: Section 356(1) German Civil Code. See: Asser/Hartkamp 3-I 2023/281e; M.Y. Schaub, ‘7 Uitoeven van het herroepingsrecht (lid 3 en lid 4)’ in: R.J.Q. Klomp & H.N. Schelhaas (red.), *GS Verbintenissenrecht* (Deventer: Wolters Kluwer); M.Y. Schaub (2014) ‘Het herroepingsrecht bij overeenkomsten op afstand’ *Nederlands Tijdschrift voor Burgerlijk Recht* 2014/23.

the option to electronically fill in and submit either the model withdrawal form or any other unequivocal statement on the provider's website.⁵⁶ In that case, the provider needs to provide an acknowledgement of receipt of such a withdrawal on a durable medium without delay.⁵⁷ The burden of proof of exercising the right of withdrawal in accordance with this article shall be on the consumer.⁵⁸ In case a right of withdrawal is exercised, the obligations of the contracting parties to perform the distance contract or to conclude the distance contract are terminated.⁵⁹

Obligations of the contracting parties in the event of withdrawal

To achieve comprehensiveness, the obligations of the contracting parties in the event of withdrawal are discussed below. The provider is obliged to reimburse all payments that they received from the consumer, including the costs of delivery,⁶⁰ without undue delay and not later than 14 days from the day on which they are informed of the consumer's decision to withdraw from the contract.⁶¹ The provider shall carry out this reimbursement using the same means of payment as the consumer used for the initial transaction. This applies unless the consumer has expressly agreed otherwise and provided that the consumer does not incur any fees because of such reimbursement.⁶² The provider shall not be required to reimburse the supplementary costs if the consumer has expressly opted for a more

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- 56 Recital 44 Consumer Rights Directive; Article 11(3) Consumer Rights Directive. Model withdrawal form as set out in Annex I(B) Consumer Rights Directive. The Netherlands: Article 6:230o(4) Dutch Civil Code. France: Article L221-21 second paragraph French Consumer Code. Belgium: Annex 1; Annex 2 Belgian Code of Economic Law. Germany: Annex 1 (Article 246a(1)2, 2 German Introductory Act to the Civil Code); Annex 2 (Article 246a(1)2, 1 Nr. 1; 246a(2)2 Nr. 2. See also: M.Y. Schaub, '7 Uitoefenen van het herroepingsrecht (lid 3 en lid 4)' in: R.J.Q. Klomp & H.N. Schelhaas (red.), *GS Verbintenissenrecht* (Deventer: Wolters Kluwer); M.Y. Schaub (2014) 'Het herroepingsrecht bij overeenkomsten op afstand' *Nederlands Tijdschrift voor Burgerlijk Recht* 2014/23; Asser/Hartkamp 3-I 2023/281e.
- 57 Article 11(3) Consumer Rights Directive. Asser/Hartkamp 3-I 2023/281e; M.Y. Schaub, '7 Uitoefenen van het herroepingsrecht (lid 3 en lid 4)' in: R.J.Q. Klomp & H.N. Schelhaas (red.), *GS Verbintenissenrecht* (Deventer: Wolters Kluwer).
- 58 Article 11(4) Consumer Rights Directive. The Netherlands: Article 6:230o(5) Dutch Civil Code. France: Article L221-22 French Consumer Code. Belgium: Article VI.49.(4) Belgian Code of Economic Law. Germany: Section 355 German Civil Code.
- 59 Article 12(a), (b) Consumer Rights Directive. The Netherlands: Article 6:271; 6:230q Dutch Civil Code.
- 60 CJEU, Case C-511/08, 15 April 2010, ECLI:EU:C:2010:189 (*Heinrich Heine*), M.Y. Schaub, (2010) 'De verdeling van de verzendkosten bij de uitoefening van het herroepingsrecht bij koop op afstand' *Nederlands tijdschrift voor Europees recht* 2010/7.
- 61 Article 13(1), first paragraph; 11 Consumer Rights Directive. The Netherlands: Article 6:230r(1), (2) Dutch Civil Code, Article 6:230o(3), (4), (5) Dutch Civil Code. France: Article L221-24 French Consumer Code. Belgium: Article VI.50.(1) Belgian Code of Economic Law. Germany: Section 357(1), (2) German Civil Code.
- 62 Article 13(1) second paragraph Consumer Rights Directive. The Netherlands: Article 6:230r(1), (2) Dutch Civil Code. France: Article L221-24 French Consumer Code. Belgium: Article VI.50.(1) Belgian Code of Economic Law. Germany: Section 357(3) German Civil Code.

expensive type of delivery than the least expensive type of standard delivery offered by the provider.⁶³

Exercising the right of withdrawal will result in the termination of the agreement. In case of mobility usership, this brings the obligation to return services already performed. With mobility usership, a vehicle is also delivered as part of a service, which means that the consumer is also obliged to send back the vehicle or hand the vehicle over to the provider. This should be done without undue delay and in any event not later than 14 days from the day on which they have communicated their decision to withdraw from the contract to the provider.⁶⁴ As a result, the deadline shall be met if the consumer sends back the goods before the period of 14 days has expired.⁶⁵ The consumer only needs to bear the direct costs of returning the goods unless the provider has agreed to bear them or the provider failed to inform the consumer that the consumer would be required to bear them.⁶⁶

The consumer is only liable for any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and proper functioning of the goods. The consumer is in any event not liable for diminished value of the goods where the provider has failed to provide notice of the right of withdrawal.⁶⁷ Where a consumer exercises the right of withdrawal, the consumer pays

63 Article 13(2) Consumer Rights Directive. Note: Unless the trader has offered to collect the goods himself, regarding sales contracts, the trader can withhold the reimbursement until he has received the goods back, or until the consumer supplied evidence of having sent back the goods, whichever is the earliest, Article 13(3) Consumer Rights Directive. The Netherlands: Article 6:230r(4) Dutch Civil Code. France: Article L221-24 French Consumer Code. Belgium: Article VI.50.(2) Belgian Code of Economic Law. Germany: Section 357(2) German Civil Code.

64 Article 14(1) Consumer Rights Directive, in accordance with Article 11 Consumer Rights Directive. The Netherlands: Article 6:230s(1), (2); 6:230t(4); 6:230o (3), (4), (5) Dutch Civil Code. France: Article L221-23 French Consumer Code. Belgium: Article VI.50.(1) Belgian Code of Economic Law. Germany: Section 357(1) German Civil Code.

65 Article 14(1) Consumer Rights Directive. The Netherlands: Article 6:230s(1), (2); 6:230t (4) Dutch Civil Code. France: Article L221-23 French Consumer Code. Belgium: Article VI.51(1) Belgian Code of Economic Law. Germany: Section 355(3) German Civil Code.

66 Article 14(1), second paragraph Consumer Rights Directive. The Netherlands: Article 6:230s(1), (2); 6:230t(4) Dutch Civil Code. France: Article L221-23 French Consumer Code. Belgium: Article VI.51(1) Belgian Code of Economic Law. Germany: Section 355(3) German Civil Code. Also note: In case of off-premises contracts where the goods have been delivered to the consumer's home at the time of the conclusion of the contract, the provider shall at his own expense collect the goods if, by their nature, those goods cannot normally be returned by post, Article 14(1), third paragraph Consumer Rights Directive.

67 The right of withdrawal as in accordance with point (h) of Article 6(1) Consumer Rights Directive. Article 14(2) Consumer Rights Directive. The provision reflects the decision in CJEU, Case C-489/07, 3 September 2009, ECLI:EU:C:2009:502, (*Messner*). The Netherlands: Article 6:230s(3) Dutch Civil Code. France: Article L221-23 French Consumer Code. Belgium: Article VI.51(2) Belgian Code of Economic Law. Germany: Section 357(7) German Civil Code.

an amount to the provider, in comparison with the full coverage of the contract.⁶⁸ This amount shall be in proportion to what has been provided until the time the consumer has informed the provider of their intent to exercise the right of withdrawal and after requesting such withdrawal. The proportionate amount that needs to be paid by the consumer to the provider is calculated based on the total price agreed in the contract.⁶⁹ Furthermore, the consumer will not incur any liability because of the exercise of the right of withdrawal.⁷⁰

Shared mobility use (to the extent the exclusion of article 16 sub l does not apply) cannot be returned because it has already been (partially) used. This means that a *pro rata* settlement should take place. The consumer pays for the use they have already consumed. This has been discussed extensively for all case studies in paragraph 5.2.2.

Ancillary contracts

Any ancillary contract is automatically terminated, without any costs for the consumer, if the consumer exercises their right of withdrawal from a distance or an off-premises contract in accordance with articles 9 through 14 of the Consumer Rights Directive.⁷¹ For mobility usership, such an ancillary service could, for example, relate to an insurance contract, now that insurance for road users of motorised vehicles is mandatory. Such an ancillary contract could also include requirements for the annual change from summer to winter tires and vice versa.

Exceptions

On some occasions, Member States do not provide for the right of withdrawal in respect of distance (and off-premises) contracts.⁷² The relevant exceptions here are already discussed in paragraph 5.2.2. The Consumer Rights Directive refers *inter alia* to the exception of service contracts (sub a) and the provision of accommodation other than for residential

68 This amount is in proportion to what has been provided until the time the consumer has informed the trader of the exercise of the right of withdrawal and after requesting the right of withdrawal in accordance with Article 7(3) or Article 8(8) Consumer Rights Directive. Article 14(3) Consumer Rights Directive. The Netherlands: Article 6:230s(4) Dutch Civil Code. France: Article L221-23 French Consumer Code. Belgium: Article VI.51(3) Belgian Code of Economic Law. Germany: Section 357(7) German Civil Code.

69 If the total price is excessive, the proportionate amount shall be calculated based on the market value of what has been provided. Article 14(3) Consumer Rights Directive. The Netherlands: Article 6:230s(4) Dutch Civil Code.

70 Except as provided for in Article 13(2) and Article 14 Consumer Rights Directive. Article 14(5) Consumer Rights Directive.

71 Except as provided for in Article 13(2) and in Article 14 of this Directive. Article 15(1) Consumer Rights Directive. Without prejudice to Article 15 Consumer Credit Directive 2008.

72 As set out in Articles 9 to 15 Consumer Rights Directive. Article 16 Consumer Rights Directive. The Netherlands: Article 6:230p Dutch Civil Code. France: Article L221-28 French Consumer Code. Belgium: Article VI.47. Belgian Code of Economic Law. Germany: Section 356 German Civil Code.

purpose, transport of goods, car rental services, catering or services related to leisure activities if the contract provides for a specific date or period of performance (sub l). In my opinion, sub a does not include a genuine exclusion of the right of withdrawal but an application of the right of withdrawal to service contracts. However, sub l does exclude the consumer of mobility usership from the right of withdrawal as elaborated in paragraph 5.2.2.

5.2.3 Formal requirements

Under the Consumer Rights Directive several formal requirements per contract type must be met. These will be discussed below. Only specific problems arising for mobility usership contracts will be discussed.

Formal requirements for off-premises contracts

With respect to off-premises contracts, the provider gives the necessary information to the consumer on paper or, if the consumer agrees, on another durable medium. That information shall be legible and in plain, intelligible language.⁷³ The provider shall provide the consumer with a copy of the signed contract or the confirmation of the contract on paper or, if the consumer agrees, on another durable medium.⁷⁴ Furthermore, Member States shall not impose any further formal precontractual information requirements for the fulfilment of the information obligations laid down in this directive.⁷⁵ This will not be discussed further as indicated in paragraph 3.4 because the off-premises contract opposes the rationale of mobility usership (Table 11).

Formal requirements for distance contracts

With respect to distance contracts, the provider must give the necessary information or make that information available to the consumer in plain and intelligible language in a way that is appropriate to the means of distance communication used.⁷⁶ This requirement

73 This necessary information is the information provided for in Article 6(1) Consumer Rights Directive. Article 7(1) Consumer Rights Directive. The Netherlands: Article 6:230t(1) Dutch Civil Code. France: Article L221-5 French Consumer Code. Belgium: Article VI.64(1) Belgian Code of Economic Law. Germany: Article 246a(1) German Introductory Act to the Civil Code.

74 Article 7(2) Consumer Rights Directive.

75 Article 7(5) Consumer Rights Directive. Note: This Article does not require implementation. This concerns a prohibition to impose further information obligations.

76 This necessary information is the information provided for in Article 6(1) Consumer Rights Directive. Article 8(1) Consumer Rights Directive. The Netherlands: Article 6:230v(1) Dutch Civil Code. France: Article L221-11 French Consumer Code. Belgium: Article VI.45. Belgian Code of Economic Law. Germany: Article 246a(1) German Introductory Act to the Civil Code.

is met if the information is provided on a durable medium.⁷⁷ If the distance contract is concluded electronically and it places the consumer under an obligation to pay, the provider should make the consumer aware in a clear and prominent manner, and directly before the consumer places their order, of some information regarding their rights.⁷⁸ The provider must ensure that the consumer explicitly acknowledges that placement of the order implies an obligation to pay. If the provider does not comply with this, the consumer is not bound by the contract or order.⁷⁹

If the contract is concluded through a means of distance communication which allows limited space or time to display the information, the provider must at a minimum give the consumer the precontractual information regarding the main characteristics of the goods or services, the identity of the provider, the total price, the right of withdrawal, the duration of the contract and, if the contract is of indeterminate duration, the conditions for terminating the contract.⁸⁰ Concluding the contract via a mobile application limits the available space to inform the consumer about their rights. In addition, the short-term use that is central to case study 2 is also at odds with lengthy information of consumer rights. Thus, time also plays an important role here and therefore, a framework agreement is often used, prior to the (series of) agreement(s), to at least reduce the frequency at which information is provided. Nevertheless, a slimmed-down information provision of consumer rights might be appropriate in this case but then also sending the information by email, for example, to at least provide the consumer with the necessary information is both feasible and fair. This also corresponds to the rationale for sending general terms and conditions and other contractual provisions.

For case study 3, insofar as the contract is concluded as a distance contract, the same rationale applies. In case of large-scale cooperatives as a variation of case study 3, the emphasis is even more on short-term use, which would make extensive information possibly less appropriate. However, informing the consumer by email of the necessary information would offer a feasible and reasonable option. If the consumer in a cooperative

77 Article 8(1) Consumer Rights Directive.

78 These information rights are in Article 6(1) under (a), (e), (o) and (p). Article 8(2) first paragraph Consumer Rights Directive.

79 If placing an order entails activating a button or a similar function, the button or similar function needs to be labelled in an easily legible manner only with the words 'order with obligation to pay' or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader. Article 8(2) second paragraph Consumer Rights Directive.

80 As referred to in points (a), (b), (e), (h) and (o) of Article 6(1) Consumer Rights Directive. The other information referred to in Article 6(1) shall be provided by the trader to the consumer in an appropriate way in accordance with Article 8(1) Consumer Rights Directive. Article 8(4) Consumer Rights Directive. The Netherlands: Article 6:230v(5) Dutch Civil Code. France: Belgium: Article VI.45. 15° Belgian Code of Economic Law. Germany: Article 246a(1), 14 German Introductory Act to the Civil Code.

structure also enters into an underlying membership agreement, this also does not lead to an unfeasible information obligation. In such a case, full information is provided to the consumer prior to their membership beginning. Furthermore, case study 1 focusses on long-term use and the consumer also enters a long-term payment obligation. As a result, a more extensive information obligation (provided the contract is concluded as a distance contract) is appropriate and feasible. The distance communication in this situation does not limit the amount of space or time the provider has to display the information.

In case a distance contract is concluded by telephone, Member States can require that the provider must confirm the offer in writing with the consumer, who is only bound after signing the offer and giving written consent. Member States can also require that such confirmations need to be made on a durable medium.⁸¹ Although this seems to contradict the maximum harmonisation approach of the Consumer Rights Directive as the directive lays down harmonised rules for the common aspects of distance and off-premises contracts by moving away from the minimum harmonisation approach. At the same time, the directive allows Member States to maintain or adopt national rules in relation to certain aspects.⁸² This is such a case; however, concluding a mobility usership contract by telephone call is in practice very uncommon. Such a contract is characteristically concluded electronically by an app.

Under the Consumer Rights Directive, the provider must give the consumer a confirmation of the contract concluded on a durable medium within a reasonable time after the conclusion of the distance contract, and at the latest before the performance of the service begins.⁸³ This confirmation includes all the information requirements referred to in article 6(1) of the Consumer Rights Directive unless the provider has already given the information to the consumer on a durable medium prior to the conclusion of the distance contract.⁸⁴ In the case of mobility usership, this could easily be done by sending an email to the consumer. Moreover, Member States shall not impose any further formal precontractual information requirements for the fulfilment of the information obligations laid down in the Consumer Rights Directive.⁸⁵

81 Article 8(6) Consumer Rights Directive. The Netherlands: Article 6:230v(6) Dutch Civil Code. France: Article L221-17 French Consumer Code. Belgium: Article VI.46.(6) Belgian Code of Economic Law. Germany: Article 246a(1), (2); (2) German Introductory Act to the Civil Code.

82 Recital 2 Consumer Rights Directive.

83 Article 8 preamble Consumer Rights Directive. The Netherlands: Article 6:230v Dutch Civil Code. France: Article L221-13 (L221-9) French Consumer Code. Belgium: Article VI.46. preamble, (7) Belgian Code of Economic Law. Germany: Article 246a(1), (2); (2) German Introductory Act to the Civil Code.

84 Article 8(7)(a) Consumer Rights Directive. The Netherlands: Article 6:230v(7) Dutch Civil Code. France: Article L221-13 (L221-9) French Consumer Code. Belgium: Article VI.46.(7) Belgian Code of Economic Law. Germany: Article 246a(1), (1) German Introductory Act to the Civil Code.

85 Article 8(10) Consumer Rights Directive. Note: this Article does not require implementation. This concerns a prohibition to make further pre-contractual information mandatory.

5.2.4 Other consumer rights

Below, other rights that follow from the Consumer Rights Directive are discussed. The delivery and passing of risk have already been discussed in paragraph 4.5.1 and 4.5.2, as these components specifically relate to sales contracts and are therefore not applicable to mobility usership contracts. In other words, those rights are not part of the body of applicable rights and will therefore be left out of the analysis below. However, the possibility of requesting additional payments from the consumer, the prohibition on fees for certain means of payment, and the possibilities of communication by telephone are discussed successively below.

For service contracts such as mobility usership, the provider must gain the express consent of the consumer for any additional payment to the agreed costs for the usership as the main contractual obligation before the consumer is bound by the contract or offer. Moreover, if the provider did not obtain the consumer's express consent but inferred it by using default options which the consumer is required to reject to avoid the additional payment, the consumer is entitled to reimbursement of the payment.⁸⁶ Furthermore, for service contracts such as mobility usership, Member States need to prohibit providers from charging consumers fees for use of certain means of payment that exceed the cost borne by the provider for the use of such means.⁸⁷ In addition, Member States must ensure that the consumer is not bound to pay additional fees for contacting the provider by telephone if the provider operates a telephone line for the purpose of contacting them in relation to the contract concluded.⁸⁸

5.3 SUBSTANTIVE RIGHTS: UNFAIR COMMERCIAL PRACTICES DIRECTIVE

The Unfair Commercial Practices Directive constitutes the overarching piece of EU legislation regulating unfair commercial practices in B2C transactions.⁸⁹ As mentioned

⁸⁶ Article 22 Consumer Rights Directive.

⁸⁷ Article 19 Consumer Rights Directive.

⁸⁸ This is without prejudice to the right of telecommunication services providers to charge for such calls. Article 21 Consumer Rights Directive. The Netherlands: Article 6:230k(2) Dutch Civil Code. France: Article L221-17 French Consumer Code. Belgium: Article VI.40. Belgian Code of Economic Law. Germany: Section 312a German Civil Code.

⁸⁹ Article 1 Unfair Commercial Practices Directive. European Commission, 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' *Official Journal of the European Union* (29 December 2021) C526, p. 5.

in paragraph 3.5, the directive applies to all commercial practices that occur before, during and after a business-to-consumer transaction has taken place. The Directive is discussed because it covers possible problems with contractual agreements, which means that the application to the case studies is possible when problems would arise. The key points of the Unfair Commercial Practices Directive are (1) the prohibition of unfair commercial practices and (2) implementing codes of conduct. These will be discussed below. Furthermore, I will omit the discussion from chapter 4 of the Unfair Commercial Practices Directive because this chapter entails the final provisions of the directive *inter alia* enforcement issues, which are preliminary excluded from the scope of my research.⁹⁰

5.3.1 The prohibition of unfair commercial practices

The Unfair Commercial Practices Directive includes some general clauses on unfair commercial practices; specifically, articles 5, 6, 7, 8, and 9. It is sufficient that a commercial practice fulfils only one of the tests following from the mentioned article to be considered unfair and therefore prohibited under the Unfair Commercial Practices Directive.⁹¹

In order to determine whether the commercial practice is prohibited, it should be examined first whether the commercial practice falls under the 'black list' of unfair commercial practices in Annex I of the Unfair Commercial Practices Directive.⁹² In that case, the practice is prohibited. This list, as confirmed by the CJEU in a number of rulings,

90 Article 11–21 Unfair Commercial Practices Directive. European Commission, 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' *Official Journal of the European Union* (29 December 2021) C526, pp. 5, 6.

91 Article 5(1) Unfair Commercial Practices Directive. European Commission, 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' *Official Journal of the European Union* (29 December 2021) C526, pp. 25, 26. C.J.J.C. van Nispen, 'TV.1.13 Richtlijn oneerlijke handelspraktijken' in: C.J.J.M. Stolker (red.), *GS Oneerlijke daad* (Deventer: Wolters Kluwer); C.M.D.S. Pavillon, *Open normen in het Europees consumentenrecht: De oneerlijkheidsnorm in vergelijkend perspectief (Recht en Praktijk nr. CR4)* (Diss., Groningen, Deventer: Kluwer, 2011), pp. 423-427, 452-457, 511-516, 534-537; D.W.F. Verkade, *Oneerlijke handelspraktijken jegens consumenten (Monografieën BW nr. B49a)* (Deventer: Wolters Kluwer 2016), nr. 29. Netherlands: Article 6:193b(1) Dutch Civil Code. Germany: Section 3(1) German Unfair Competition Law. Belgium: Article VI.104; VI.104/1. Belgian Code of Economic Law. France: Article L121-1 French Consumer Code.

92 Recital 17 Unfair Commercial Practices Directive; Annex I Unfair Commercial Practices Directive. Netherlands: Article 6:193g; 6:193i, Recital Dutch Civil Code. Germany: Section 3(3) German Unfair Competition Law; Annex to Section 3(3) German Unfair Competition Law. Belgium: Article VI.95; VI.94. Belgian Code of Economic Law. France: Article L121-2, L121-3, L121-4 French Consumer Code. Also see: V. Mak, 'De grenzen van maximumharmonisatie in het Europees consumentenrecht' *Nederlands Tijdschrift voor Burgerlijk Recht* 2011/77.

should be regarded as the standard.⁹³ Member States are not allowed to maintain a general prohibition that is not included in the ‘black list’.

In case the practice does not fall under the ‘black list’, it should be considered whether the practice is misleading (articles 6 and 7 of the Unfair Commercial Practices Directive) or aggressive (articles 8 and 9 of the Unfair Commercial Practices Directive) and likely to distort the transactional decision of the average consumer. If it meets these two conditions, it is a prohibited practice.

If not, it should be examined whether the practice infringes on professional diligence (article 5(2) of the Unfair Commercial Practices Directive) and is likely to distort the transactional decision of the average consumer. Again, if it meets these conditions, it is a prohibited practice. As this is the order in which to assess whether there is a prohibited practice, legislation will also be discussed in this order. This directive also uses the benchmark of the average consumer. The Court of Justice formulated an interpretation of this term in the context of this directive:⁹⁴ The average consumer is defined as a consumer who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural, and linguistic factors.⁹⁵ National courts and authorities will have to exercise their own judgement regarding the average consumer test, with regard for the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.⁹⁶

93 CJEU, Case C-261/07, 23 April 2009, ECLI:EU:C:2009:244 (*VTB-VAB*), CJEU, Case C-304/08, 14 January 2010, ECLI:EU:C:2010:12 (*Plus Warenhandelsgesellschaft*); CJEU, Case C-540/08, 9 November 2010, ECLI:EU:C:2010:660 (*Mediaprint Zeitungs- und Zeitschriftenverlag*).

94 CJEU, Case C-210/96, 16 July 1998, ECLI:EU:C:1998:369 (*Gut/Springenheide*) with annotation D.W.F. Verkade.

95 Recital 18 Unfair Commercial Practices Directive. CJEU, Case C-210/96, 16 July 1998, ECLI:EU:C:1998:369 (*Gut/Springenheide*) with annotation D.W.F. Verkade. D.W.F. Verkade, *Onerlijke handelspraktijken jegens consumenten* (*Monografieën BW nr. B49a*) (Deventer: Wolters Kluwer 2016), nr. 29; B.B. Duivenvoorde (2010) ‘De ‘gemiddelde consument’ als rationele actor’ *Weekblad voor Privaatrecht, Notariaat en Registratie* 6849, pp. 533-534; Dutch Supreme Court, 30 May 2008, ECLI:NL:HR:2008:BD2820 (*Project Themare, De Boer/TMF*) with annotation of J.B.M. Vranken; C.M.D.S. Pavillon, *Open normen in het Europees consumentenrecht: De oneerlijkheidsnorm in vergelijkend perspectief* (*Recht en Praktijk nr. CR4*) (Diss., Groningen, Deventer: Kluwer, 2011), pp. 423-427, 511-516; N. Wouters (2011) ‘De ‘sociaal zwakkere consument’ als slachtoffer van oneerlijke handelspraktijken’ *Tijdschrift voor Consumentenrecht en handelspraktijken*, pp. 146-152.

96 Netherlands: Article 6:193a(1), a; (2) Dutch civil Code. Germany: Section 2(2) German Unfair Competition Law; Section 13 German Civil Code. Belgium: Article VI.93.(b) Belgian Code of Economic Law. Also see: C.W.M. Lieveerse and J.G.J. Rinkes, *Onerlijke handelspraktijken en handhaving consumentenbescherming. Preadvies voor de Vereniging voor Effectenrecht 2010*. (Serie Van der Heijden Instituut, nr. 106, Deventer: Kluwer, 2010), II.4.1; E. Terryn (2008) ‘De omzetting van de Richtlijn oneerlijke handelspraktijken in België: reculer pour mieux sauter?’ *Tijdschrift voor Consumentenrecht en handelspraktijken* 2008/1, pp. 1-9.

Unfair commercial practices in all circumstances

Annex I of the directive contains a list of commercial practices which will be regarded as unfair in all circumstances and was drawn up to enable providers, professionals and consumers to identify certain practices and give a more immediate enforcement response to them.⁹⁷ It is desirable that those commercial practices are identified to provide greater legal certainty and therefore annex I of the directive contains the full list of all such practices.⁹⁸ These are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of articles 5 through 9 of the Unfair Commercial Practices Directive. A full list of commercial practices which will be regarded as unfair in all circumstances can be found in Appendix 3 and Appendix 4, where a division is made, respectively, between misleading commercial practices and aggressive commercial practices. Not all circumstances will be discussed in detail here, but two examples will be given which could conceivably arise in mobility usership contracts. One of the practices that could be unfair is the situation where a provider displays a quality mark without having obtained the necessary authorisation.⁹⁹ Consider, for example, the Dutch private lease quality mark (*Keurmerk Private Lease*). Misuse of such quality marks can occur and is prohibited, which means that the consumer can claim damages and terminate the contract. Another example might be if a provider makes a mobility usership offer to a consumer and presents consumer rights following from law as a distinctive feature of the trader's offer.¹⁰⁰

Misleading and aggressive commercial practices

If a commercial practice does not fall under the 'black list' of unfair commercial practices, it should be examined whether the practice constitutes a misleading or aggressive practice and whether it is likely to distort the transactional decision of the average

97 Article 5(5) Unfair Commercial Practices Directive; Annex I Unfair Commercial Practices Directive. Note: This list also applies in Member States and may only be modified by revision of this Directive. European Commission, 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' *Official Journal of the European Union* (29 December 2021) C526, p. 61 Netherlands: Article 6:193g and 6:193i Recital. Germany: Section3(3) and Annex to Section3(3) German Unfair Competition Law. Belgium: Article VI.100; VI.103 Belgian Code of Economic Law. France: L121-4 French Consumer Code.

98 Recital 17 Unfair Commercial Practices Directive; Annex I Unfair Commercial Practices Directive. Also see: Recital 12 Unfair Commercial Practices Directive. Netherlands: Article 6:193g and 6:193i Recital. Germany: Section3(3) and Annex to Section3(3) German Unfair Competition Law. Belgium: Article VI.100; VI.103 Belgian Code of Economic Law. France: Article L121-4 French Consumer Code.

99 Nr. 2 Annex I Unfair Commercial Practices Directive. Netherlands: Article 6:193g sub b Recital. Germany: Nr. 2 of Annex to Section3(3) German Unfair Competition Law. Belgium: Article VI.100 2° Belgian Code of Economic Law. France: Article L121-4, 2° French Consumer Code.

100 Nr. 10 Annex I Unfair Commercial Practices Directive. Netherlands: Article 6:193g sub j Recital. Germany: Nr. 10 of Annex to Section3(3) German Unfair Competition Law. Belgium: Article VI.100 10° Belgian Code of Economic Law France: Article L121-4, 10° French Consumer Code.

consumer. First, the misleading practices are discussed, followed by an examination of the aggressive practices. For the sake of completeness, these will be discussed, but these practices are excesses. Nevertheless, when such practices occur in mobility usership, this right applies.

A commercial practice is misleading if it contains false information and is therefore untruthful or in any way deceives or is likely to deceive the average consumer.¹⁰¹ It should in any case lead to the consumer making a transactional decision that they would not have otherwise made, even if the information is factually correct in relation to the existence or nature of the product, the main characteristics of the product, the extent of the trader's commitments, the motives for the commercial practice, the nature of the sales process and the price or the manner in which the price is calculated, the need for a service, part, replacement or repair, the nature, attributes and rights of the trader or their agent and the consumer's rights.¹⁰² As mentioned, a commercial practice is misleading if it causes or is likely to cause the average consumer to make a transactional decision that they would not have otherwise made. This involves the marketing of a product, including comparative advertising, which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor, and the non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound.¹⁰³ In this latter case, the commitment is not aspirational but is firm and is capable of being verified and the trader indicates in a commercial practice that they are bound by the code.¹⁰⁴ A commercial practice is also misleading if it omits from its factual context any material information that the average consumer needs, according to

101 Article 6(1) Unfair Commercial Practices Directive. European Commission, 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' *Official Journal of the European Union* (29 December 2021) C526, p. 19. Netherlands: Article 6:193c(1) Dutch Civil Code. Germany: Section 5(1) German Unfair Competition Law. Belgium: Article VI.97. Belgian Code of Economic Law. France: Article L121-2 French Consumer Code.

102 Article 6(1)(a)(b)(c)(d)(e)(f)(g) Unfair Commercial Practices Directive. With regard to sub (b) this could entail characteristics such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product. Netherlands: Article 6:193c(1), a-g Dutch Civil Code. Germany: Section 5(1) sub 1-7 German Unfair Competition Law. Belgium: Article VI.97. 1°-7° Belgian Code of Economic Law. France: Article L121-2, 2° (a)-(g) French Consumer Code.

103 Article 6(2)(a)(b) Unfair Commercial Practices Directive. Netherlands: Article 6:193c(2) Dutch Civil Code. Germany: Section 5(2) German Unfair Competition Law. France: Article L121-2, 2° French Consumer Code. Belgium: Article VI.98. Belgian Code of Economic Law.

104 Article 6(2)(b)(i)(ii) Unfair Commercial Practices Directive. Netherlands: Article 6:193c(2)(b), nr. 1° and 2° Dutch civil Code. Germany: Section 5(2) German Unfair Competition Law. France: Article L121-2, 2° French Consumer Code. Belgium: Article VI.98. 1°, 2° Belgian Code of Economic Law.

the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to make a transactional decision that they would not have otherwise made.¹⁰⁵ It is also a misleading omission when a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to make a transactional decision that they would not have otherwise made.¹⁰⁶ Articles 7(1) and (2) of the Unfair Commercial Practices Directive both establish in general terms a positive obligation on traders to provide all the information the average consumer needs to make an informed purchasing decision. This is the ‘material information’ mentioned in article 7 of the Unfair Commercial Practices Directive. The Unfair Commercial Practices Directive does not define ‘material information’, except for in the specific case of an ‘invitation to purchase’.¹⁰⁷ There is an invitation to purchase if, in short, a specific product with a price is mentioned that enables the consumer to make a purchase. In case of such an invitation to purchase, article 7(4) of the Unfair Commercial Practices Directive regards the following characteristics of the product as material: the geographical address and the identity of the trader, the price inclusive of taxes or the way the price is calculated, the arrangements for payment, delivery, performance and the complaint handling policy, and if applicable, the existence of the right of withdrawal or cancellation.¹⁰⁸ This means that providers will need to provide consumers with this information if it is not otherwise apparent from the context. Furthermore, the ‘characteristics of the product’ are present as soon as there is verbal or visual reference to the product. Regarding the scope, an ‘invitation to purchase’ implies

105 Article 7(1) Unfair Commercial Practices Directive. Netherlands: Article 6:193d(1) Recital. Germany: Section 5a (1), (2) German Unfair Competition Law. Belgium: Article VI.99. Belgian Code of Economic Law. France: Article L121-3 French Consumer Code.

106 Article 7(2) Unfair Commercial Practices Directive. European Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ *Official Journal of the European Union* (29 December 2021) C526, pp. 50 and 51. Netherlands: Article 6:193d(2) Dutch Civil Code. Germany: Section 5a (1), (2) German Unfair Competition Law. Belgium: Article VI.99. Belgian Code of Economic Law. France: Article L121-3 French Consumer Code.

107 European Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ *Official Journal of the European Union* (29 December 2021) C526, p. 50.

108 Article 7(4)(a)-(e); 2(i) Unfair Commercial Practices Directive. D.W.F. Verkade, *Oneerlijke handelspraktijken jegens consumenten (Monografieën BW nr. B49a)* (Deventer: Wolters Kluwer 2016), nr. 44, 45; C.M.D.S. Pavillon, *Open normen in het Europees consumentenrecht: De oneerlijkheidsnorm in vergelijkend perspectief (Recht en Praktijk nr. CR4)* (Diss., Groningen, Deventer: Kluwer, 2011), pp. 452-457, 534-537. Netherlands: Article I, part C, 6:193e(1), d, f Dutch Civil Code. Belgium: Article VI.99(4) 1°, 2°, 3°, 4°, 5° Belgian Code of Economic Law. France: Article L121-3 1°, 2°, 3°, 4°, 5° French Consumer Code.

that the concept is narrower than advertising but wider than precontractual information requirements.¹⁰⁹

The medium used to communicate the commercial practice may impose limitations in space or time. If this is the case, those limitations are taken into account when deciding whether information is omitted. This also includes any measures that the trader has taken to make the information available to consumers by other means.¹¹⁰ The limits of time and space of the communication medium used should be weighed against the nature and characteristics of a given product. An assessment is required as to whether the trader found it impossible to include or clearly communicate the information. Where it is impossible to include all material information concerning a product, the provider may refer consumers to its website which should contain further information on the main characteristics of the product.¹¹¹ However, within the definition of an ‘invitation to purchase’, a commercial communication that includes a thorough description of a service’s nature, characteristics, and benefits but not the price cannot be considered an ‘invitation to purchase’.¹¹² For the case studies, the requirements above apply to determine whether mobility usership constitutes a misleading commercial practice. For mobility usership, a situation could arise, for example, where the provider omits or provides information in an unclear manner on the recurring costs of a usership contract, which would be prohibited by the Unfair Commercial Practices Directive.¹¹³ To assess on a case-by-case basis whether material information has been omitted, national authorities and courts need to consider all features and circumstances of a given commercial practice, including the limitations of the medium used to communicate it.¹¹⁴

A commercial practice is aggressive if, by harassment or coercion, including the use of physical force or undue influence, it significantly impairs or is likely to significantly impair the average consumer’s freedom of choice or conduct regarding the product and thereby

109 Note: While pre-contractual information requirements refer to information that must be provided before the consumer enters a contract, an invitation to purchase does not necessarily mean that the consumer’s next step is to conclude a contract with a provider. This distinction is relevant in the interplay between the Unfair Commercial Practices Directive and the Consumer Rights Directive. Also see the definition of an ‘invitation to purchase’ in Article 2(i) Unfair Commercial Practices Directive.

110 Article 7(3) Unfair Commercial Practices Directive in conjunction with Article 7(1) Unfair Commercial Practices Directive.

111 CJEU, Case C-611/14, 26 October 2016, ECLI:EU:C:2016:800 (*Canal Digital Danmark*), pp. 62 and 63. Also see: CJEU, Case C-122/10, 12 May 2011, ECLI:EU:C:2011:299 (*Ving Sverige*), p. 59.

112 Article 2(i) of the Unfair Commercial Practices Directive.

113 Articles 6(1)(d) and/or 7(1), 7(2) and 7(4)(c) Unfair Commercial Practices Directive.

114 European Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ *Official Journal of the European Union* (29 December 2021) C526, p. 50.

causes them or is likely to cause them to make a transactional decision that they would not have otherwise made.¹¹⁵

A commercial practice cannot be classified as aggressive ‘until a factual and case-specific assessment of its features has been carried out in the light of the criteria set out in articles 8 and 9 of that directive’.¹¹⁶ In determining whether a commercial practice uses harassment or coercion, including the use of physical force or undue influence, account is taken of its timing, location, nature or persistence, the use of threatening or abusive language or behaviour, the exploitation by the trader of any specific misfortune or circumstance of such gravity of which the trader is aware as to impair the consumer’s judgement, to influence the consumer’s decision with regard to the product and any threat to take any action that cannot legally be taken.¹¹⁷ Providers are prevented by the Unfair Commercial Practices Directive from imposing disproportionate non-contractual barriers that are detrimental to consumers who wish to exercise their rights under a contract, including the right to terminate the contract or switch to another product or provider.¹¹⁸

Professional diligence

If a commercial practice does not constitute a misleading or aggressive practice as defined in the directive, it should be examined whether the practice infringes on professional diligence and whether it is likely to distort the transactional decision of the average consumer. This situation is also considered an unfair practice. The Unfair Commercial Practices Directive provides for a general clause setting two cumulative criteria for assessing whether commercial practices should be deemed unfair.¹¹⁹ These criteria

115 Article 8 Unfair Commercial Practices Directive. Netherlands: Article 6:193h Dutch Civil Code. Germany: Section 4a German Unfair Competition Law. Belgium: Article VI.101. Belgian Code of Economic Law. France: Article L121-6 French Consumer Code.

116 CJEU, Case C-628/17, 12 June 2019, ECLI:EU:C:2019:480 (*Orange Polska*), p. 31. Also see: European Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ *Official Journal of the European Union* (29 December 2021) C526, p. 60.

117 Article 9(a)(b)(c)(e) Unfair Commercial Practices Directive; European Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ *Official Journal of the European Union* (29 December 2021) C526, p. 60. Netherlands: Article 193h, (a), (b), (c), (e) Dutch Civil Code. Germany: Section 4a (1), (2) nr. 1, 2, 3, 5 German Unfair Competition Law. Belgium: Article VI.101. 1°, 2°, 3°, 5° Belgian Code of Economic Law. France: Article L121-6 French Consumer Code.

118 Article 9(d) Unfair Commercial Practices Directive. Netherlands: Article 6:193h, (d) Dutch Civil Code. Germany: Section 4a (1), (2) nr. 4 German Unfair Competition Law. Belgium: Article VI.101. 4° Belgian Code of Economic Law. France: Article L121-6 paragraph 2, 4° French Consumer Code.

119 Article 5(2) Unfair Commercial Practices Directive. European Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ *Official Journal of the European Union* (29 December 2021) C526, p. 37.

function as a safety net to ensure that any unfair practice which is not caught by other provisions of the Unfair Commercial Practices Directive can still be prevented or give rise to a remedy for the consumer. This is also known as the ‘catch all’ prohibition.¹²⁰

Commercial terms are unfair if (a) they are contrary to the requirements of professional diligence, and (b) they materially distort or are likely to materially distort the economic behaviour regarding the product of the average consumer it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.¹²¹ Commercial practices that are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers – who may be particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the provider could reasonably be expected to foresee – will be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.¹²² For example, when a mobility usership provider promises ‘great riding scooters that can transport the consumer day and night to a destination of the consumers’ choice’, this should not be taken literally. After all, the scooters will *inter alia* only be available in the provider’s service area and the consumer can only use the vehicle within that area. An unfair commercial practice will therefore presumably not be assumed.

5.3.2 Codes of conduct

The Unfair Commercial Practices Directive contains a rule on codes of conduct in article 10 of the directive. A code of conduct is defined in the Unfair Commercial Practices Directive as an agreement or set of rules not imposed by law, regulation or administrative

120 Article 5(2) Unfair Commercial Practices Directive. Also see: L. Kroon and C.S. Mastenbroek (2008) ‘De Richtlijn oneerlijke handelspraktijken en de implementatie daarvan in het BW: mogelijke complicaties in de praktijk’ *Intellectuele Eigendom & Reclamerecht* 2008, p. 64; European Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ *Official Journal of the European Union* (29 December 2021) C526, p. 37. Germany: Section 3(2) German Unfair Competition Law. Belgium: Article VI.104; VI.104/1. Belgian Code of Economic Law. France: Article L121-1 second paragraph French Consumer Code.

121 Article 5(2)(a)(b) Unfair Commercial Practices Directive. Netherlands: Article 6:193b(1) Dutch Civil Code. Germany: Section 3(2) German Unfair Competition Law. Belgium: Article VI.104; VI.104/1. Belgian Code of Economic Law. France: Article L121-1 second paragraph French Consumer Code.

122 Article 5(3) Unfair Commercial Practices Directive. Netherlands: Article 6:193b(1) Dutch Civil Code. Germany: Section 3(4) German Unfair Competition Law. Belgium: Article VI.104; VI.104/1. Belgian Code of Economic Law. France: Article L121-1 third paragraph French Consumer Code.

provision of a Member State which defines the behaviour of providers who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors.¹²³ The Unfair Commercial Practices Directive does not preclude the control of unfair commercial practices by code owners. This also applies to the appeal to such bodies by the persons or organisations referred to in the Unfair Commercial Practices Directive (article 11 of the directive). This is only achieved if proceedings before such bodies are in addition to the court of administrative proceedings.¹²⁴ Recourse to such control bodies shall never be deemed the equivalent of foregoing a means of judicial or administrative recourse as provided for in article 11 of the directive.¹²⁵

5.3.3 Consequences of an unfair commercial practice

The consequences of an unfair commercial practice are only briefly discussed because this relates to enforcement, and this is explicitly excluded from this research in paragraph 2.2. Nevertheless, enforcement is briefly discussed here because the Unfair Commercial Practices Directive prohibits unfair commercial practices, which raises the question of what the legal consequences of that prohibition are because the character of the Unfair Commercial Practices Directive differs from that of the other examined directives. While the other directives touch upon consumer protection and consumer rights in general, the Unfair Commercial Practices Directive specifically targets the protection in the scenario where unfair practices occur.

The Unfair Commercial Practices Directive stipulates that Member States shall ensure adequate and effective means to combat unfair commercial practices and enforce the provisions of this directive in the interests of consumers.¹²⁶ These remedies include legal provisions allowing persons or organisations with a legitimate interest under national law to combat unfair commercial practices, to take legal action against such unfair commercial practices,¹²⁷ and/or refer such unfair commercial practices to an administrative authority competent to decide on complaints or to initiate appropriate legal proceedings.¹²⁸ Furthermore, Member States shall lay down penalties for infringements of national provisions adopted in the application of the Unfair Commercial Practices Directive and shall take all necessary measures to ensure that these are enforced. These penalties must

123 Article 2(f) Unfair Commercial Practices Directive.

124 Article 10 and 11 Unfair Commercial Practices Directive.

125 Article 10 paragraph 2 Unfair Commercial Practices Directive.

126 Article 11(1) Unfair Commercial Practices Directive.

127 Article 11(1)(a) Unfair Commercial Practices Directive.

128 Article 11(1)(b) Unfair Commercial Practices Directive.

be effective, proportionate, and dissuasive.¹²⁹ Various consequences are possible, *inter alia* the power to terminate or the right to compensation as a consumer, or a fine by an administrative authority.¹³⁰

5.4 SUBSTANTIVE RIGHTS: UNFAIR CONTRACT TERMS DIRECTIVE

The Unfair Contract Terms Directive aims at approximating the national law of the Member States to increase the level of protection of consumers against unfair and not individually negotiated terms in contracts concluded between B2C.¹³¹ As mentioned before, the Directive is discussed because it covers possible problems with contractual agreements. The key points of the Unfair Contract Terms Directive are (1) the unfairness assessment and transparency requirements and (2) consequently, the non-binding character of unfair contract terms. These will be discussed below. The omnibus directive provides amendments on penalties.¹³² The discussion of penalties is excluded from the scope of my research and will not be elaborated on. According to the preamble, the aim of the Unfair Contract Terms Directive is to promote the internal market by removing barriers to trade and offering a minimum level of protection to consumers.¹³³ The directive and national law interact in different ways. There are provisions which transpose the Unfair Contract Terms Directive into national law, including those which extend their scope or lay down more stringent requirements. In other cases, there are existing provisions of national law that did not change in either a substantive or procedural nature as a result of the Unfair Contract Terms Directive. These provisions cover additional aspects but should be considered when courts have to rule on cases involving unfair

129 Article 13 Unfair Commercial Practices Directive.

130 France: Article L132 French Consumer Code. Germany: Section 8-11 German Unfair Competition Law. Netherlands: Article 6:193j Dutch Civil Code. Belgium: Article VI.125, VI.126, VI.227 Belgian Code of Economic Law. See for more information for example D.W.F. Verkade, *Ooneerlijke handelspraktijken jegens consumenten (Monografieën BW nr. B49a)* (Deventer: Wolters Kluwer 2016), nr. 68-73b, 81-87; European Commission, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (29 September 2019) C323.

131 Recital 12 Unfair Contract Terms Directive; Article 1 Unfair Contract Terms Directive. M. Fornasier, *Münchener Kommentar zum BGB*, 9. Auflage 2022, BGB § 306 Rechtsfolgen bei Nichteinbeziehung und Unwirksamkeit, Rn. 1-3. Also see: European Commission, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (29 September 2019) C323, p. 8; CJEU, Case C-147/16, 17 May 2018, ECLI:EU:C:2018:320 (*Karel de Grote*), p. 54; CJEU, Case C-488/11, 30 May 2013, ECLI:EU:C:2013:341 (*Asbeek Brusse*), p. 31; CJEU, Case C-110/14, 3 September 2015, ECLI:EU:C:2015:538 (*Costea*), p. 18.

132 Recital 5, 6 and 7 Omnibus Directive; Article 1 Omnibus Directive. Also see: Article 8b Unfair Contract Terms Directive. Also see:

133 Recital of the Unfair Contract Terms Directive, p. 30; Article 8 Unfair Contract Terms Directive; European Commission, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (29 September 2019) C323, p. 4.

contract terms.¹³⁴ In addition, national law must be interpreted in accordance with this directive.¹³⁵

5.4.1 Unfairness assessment and transparency requirements

The assessment of when contract terms shall be regarded as unfair and the transparency requirements are discussed respectively in the paragraph below.

Unfairness assessment

The general unfairness assessment follows from article 3(1) of the Unfair Contract Terms Directive. This assessment applies that a contract term which has not been individually negotiated is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.¹³⁶ In addition, the directive prescribes an *ex ante* assessment, which means that circumstances 'at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract' are included in the assessment.¹³⁷ A term is never individually negotiated in cases where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.¹³⁸ The fact that certain aspects of a term or one specific term have been individually negotiated does not make the contract individually negotiated *as a whole* if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.¹³⁹ Only the respective term is then considered individually negotiated, and falls outside the scope of the Unfair Contract

134 European Commission, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (29 September 2019) C323, p. 18.

135 W.H. Roth and C. Jopen, 'Interpretation in Conformity with Directives' in: K. Riesenhuber (ed.), *European Legal Methodology* (2nd edition, Cambridge: Intersentia, 2021), pp. 317 *et seq*; A.S. Hartkamp, C.H. Sieburgh, L.A.D. Keus, J.S. Kortmann, and M. Wissink (eds.), *The Influence of EU Law on National Private Law, General Part*. (Serie Onderneming en Recht; Vol. 81-I, Wolters Kluwer, 2014), pp. 119 *et seq*; Asser/Hartkamp 3-I 2023/181-183.

136 Article 3(1); 2(a) Unfair Contract Terms Directive. European Commission, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (29 September 2019) C323, p. 28. Also see: Recital 9, 10 and 16 of the Unfair Contract Terms Directive. See the Article L212-1 French Consumer Code, the French legislator did not transpose the criterion of good faith of Article 3(1) Unfair Contract Terms Directive.

137 Pursuant to Article 4(1) Unfair Contract Terms Directive. See e.g.: Asser/Hartkamp 3-I 2023/249; H.N. Schelhaas, '12.4.1 De richtlijn oneerlijke bedingen in consumentenovereenkomsten' in: R.J.Q. Klomp & H.N. Schelhaas (red.), *GS Verbintenissenrecht* (Deventer: Wolters Kluwer).

138 Article 3(2) first paragraph Unfair Contract Terms Directive.

139 Article 3(2) second paragraph Unfair Contract Terms Directive.

Terms Directive. The burden of proof is on the provider if they claim that a standard term has been individually negotiated.¹⁴⁰ The Unfair Contract Terms Directive provides an indicative and non-exhaustive list of the terms which may be regarded as unfair. This list is also called the ‘blue (or orange) list’.¹⁴¹

Appendix 5 lists the terms that may be considered unfair under the Unfair Contract Terms Directive.¹⁴² The terms in this list are not necessarily unfair and, contrariwise, a term not appearing in this list may nevertheless be considered unfair.¹⁴³

The selected Member States sometimes go beyond the minimum harmonisation of the Unfair Contract Terms Directive. Belgian law contains a list of standard contract terms considered unfair in all circumstances (i.e. a ‘black list’).¹⁴⁴ French law contains a list of terms considered unfair in all circumstances (i.e. a ‘black list’) and a list of terms considered unfair unless it is proven that they are fair (i.e. a form of a so-called ‘grey list’), whereas German law contains two ‘lists’ of standard contract terms considered unfair and terms considered unfair with evaluation possibility (*Wertungsmöglichkeit*).¹⁴⁵ Dutch law contains a list of contract terms considered unfair in all circumstances (i.e.

140 Article 3(2) third paragraph Unfair Contract Terms Directive.

141 A different colour typification of this indicative list exists, e.g., the blue list (Jongeneel) or orange list (Hijma). See on this: R.H.C. Jongeneel (2022) ‘Er zijn twee soorten wijzigingsbedingen’ *Nederlands Juristenblad* 2022/802; B. Wessels and R.H.C. Jongeneel (red.), *Algemene voorwaarden (Recht en Praktijk nr. CA1)* (Deventer: Wolters Kluwer, 2017), p. 13; C.M.D.S. Pavillon ‘25 De Europese lijst van verdachte bedingen: oranje, blauw of toch een tint van grijs?’ in: W. van Boom, Jac. Hijma, C. Breedveld-de Voogd, A.G. Castermans, M. de Deaugd-Dijkman (eds.), *Een kwart eeuw. Privaatrechtelijke opstellen aangeboden aan prof. mr. H.J. Sniijders ter gelegenheid van zijn emeritaat (Sniijders-bundel)* (Deventer: Wolters Kluwer, 2016). E.H. Hondius, ‘Blauwe lijst’ in: R.J.Q. Klomp & H.N. Schelhaas (red.), *GS Verbintenissenrecht* (Deventer: Wolters Kluwer); M.B.M. Loos, *Algemene voorwaarden* (Derde druk, Den Haag: Boom Juridische uitgevers, 2018), p. 229; J.W. Rutgers (2014) ‘Kroniek van het Europees privaatrecht’ *Nederlands Juristenblad* 2014/800.

142 Article 3(3) Unfair Contract Terms Directive; Annex Unfair Contract Terms Directive. See: Jac. Hijma and M.M. Olthof, *Compendium van het Nederlands vermogensrecht* (Dertiende druk, Deventer: Kluwer, 2017), pp. 483–489a; M.B.M. Loos, *Algemene voorwaarden* (Derde druk, Den Haag: Boom juridisch, 2018); M.B.M. Loos, ‘Algemene voorwaarden bij consumentenovereenkomsten’ in: E.H. Hondius and G.J. Rijken, *Handboek consumentenrecht* (Derde druk, Zutphen: Paris, 2015), pp. 67–119; R.H.C. Jongeneel (2022) ‘Er zijn twee soorten wijzigingsbedingen’ *Nederlands Juristenblad* 2022/802; E.H. Hondius, ‘Blauwe lijst’ in: R.J.Q. Klomp & H.N. Schelhaas (red.), *GS Verbintenissenrecht* (Deventer: Wolters Kluwer); M.B.M. Loos, *Algemene voorwaarden* (Derde druk, Den Haag: Boom juridisch, 2018), p. 229; J.W. Rutgers (2014) ‘Kroniek van het Europees privaatrecht’ *Nederlands Juristenblad* 2014/800.

143 CJEU, Case C-478/99, 7 May 2002, ECLI:EU:C:2002:281 (*Commission v. Sweden*); CJEU, Case C-237/02, 1 April 2004, ECLI:EU:C:2004:209 (*Freiburger Kommunalbauten*). Also see: Asser/Hartkamp 3-1 2023/249, 250.

144 Belgium: Article VI.83. Belgian Code of Economic Law.

145 France: Article R212-1 and R212-2 French Consumer Code. Germany: Section 308; 309 German Civil Code.

'black list') and a list of contract terms which may be considered unfair (i.e. a form of 'grey list').¹⁴⁶

A number of clauses from this directive could conceivably apply to mobility usership. For example, the provider could exclude or limit legal liability in the event of death or physical injury to the consumer as a result of an act or omission of this provider,¹⁴⁷ such as offering a defective vehicle. Such a term may be regarded as unfair. Furthermore, it may also be regarded as unfair if the consumer's legal rights vis-à-vis the provider are inappropriately excluded or limited in the event of total or partial breach of contract or defective performance by the provider.¹⁴⁸ In the case of exclusive mobility use, the situation could also arise in which a fixed-term agreement is automatically extended. This may not in itself be regarded as an unfair term, but it may be unfair where there is no notice given to the consumer, or if a date too far removed from the end of the contract has been set as the deadline for notification of the consumer's intention not to renew the agreement.¹⁴⁹ Another example of an unfair situation that could arise in mobility usership is a case where the consumer's consent is indisputably established, but the terms of the agreement are presented in such a way that the consumer could not actually take note before concluding the agreement. This could especially occur for shared mobility use because it is a short-term contract concluded via a mobile application where the provider may be inclined to omit information, which means that the consumer does not have the opportunity to review the purchase information prior to the agreement.¹⁵⁰

The unfairness of a contractual term is assessed at the time of conclusion of the contract, by (a) all the circumstances attending the conclusion of the contract, and by (b) all the

146 Article 6:236; 6:237 Dutch Civil Code. Jac. Hijma and M.M. Olthof, *Compendium van het Nederlands vermogensrecht* (Dertiende druk, Deventer: Kluwer, 2017), pp. 483-489a; M.B.M. Loos, *Algemene voorwaarden* (Derde druk, Den Haag: Boom juridisch, 2018); M.B.M. Loos, 'Algemene voorwaarden bij consumentenovereenkomsten' in: E.H. Hondius and G.J. Rijken, *Handboek consumentenrecht* (Derde druk, Zutphen: Paris, 2015), pp. 67-119.

147 Annex 1(a) Unfair Contract Terms Directive. Netherlands: Article 6:236(h) Dutch Civil Code. Germany: Section 309(7) German Civil Code. Belgium: Article VI.83. 25° Belgian Code of Economic Law. France: Article R212-1 French Consumer Code.

148 Annex 1(b) Unfair Contract Terms Directive. Netherlands: Article 6:236(k) Dutch Civil Code. Germany: Section 309(8) German Civil Code. Belgium: Article VI.83. 8° Belgian Code of Economic Law. France: Article R212-1, 6° French Consumer Code.

149 Annex 1(b) Unfair Contract Terms Directive. Netherlands: Article 6:236(k) Dutch Civil Code. Germany: Section 309(8) German Civil Code. Belgium: Article VI.83. 8° Belgian Code of Economic Law. France: Article R212-1, 6° French Consumer Code.

150 Annex 1(i) Unfair Contract Terms Directive.

other terms of the contract or of another contract on which it is dependent.¹⁵¹ Some clauses fall outside the scope of the directive because they do not relate to the main subject matter of the contract, or they relate to the price and remuneration and not the services or goods supplied in exchange.¹⁵² For such terms in particular, the assessment of their unfairness is excluded or limited by article 4(2) of the directive if such terms meet its transparency requirements.¹⁵³ In other words, article 4(2) of the Unfair Contract Terms Directive provides an exception to the unfairness assessment (article 3(1) Unfair Contract Terms Directive). This provision should be interpreted in a uniform and strict way.¹⁵⁴

Transparency requirements

The transparency requirements set out that a term must be drafted in plain and intelligible language, following from the Unfair Contract Terms Directive, and apply to all contract terms that are not individually negotiated.¹⁵⁵ In case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. In case there is doubt about the meaning of a term, the *contra proferentem* rule applies, meaning that the interpretation most favourable to the consumer prevails.¹⁵⁶ These conditions are relevant for mobility usership because providers often

151 This is without prejudice to Article 7 Unfair Contract Terms Directive and considering the nature of the goods or services for which the contract was concluded. Article 4(1) Unfair Contract Terms Directive.

152 Article 4(2) Unfair Contract Terms Directive; See for example: CJEU, Case C-76/10, 16 November 2010, ECLI:EU:C:2010:685 (*Pohotovost*); CJEU, Case C-92/11, 21 March 2013, ECLI:EU:C:2013:180 (*RWE Vertrieb*); CJEU, Case C-26/13, 30 April 2014, ECLI:EU:C:2014:282 (*Kásler*); CJEU, Case C-359/11, 23 October 2014, ECLI:EU:C:2014:2317 (*Schulz*); CJEU, Case C-143/13, 26 February 2015, ECLI:EU:C:2015:127 (*Matei*); CJEU, Case C-96/14, 23 April 2015, ECLI:EU:C:2015:262 (*Van Hove*); CJEU, Cases C-154/15, C-307/15, C-308/15, 21 December 2016, ECLI:EU:C:2016:980 (*Gutiérrez Naranjo and Others*); CJEU, Case C-186/16, 20 September 2017, ECLI:EU:C:2017:703 (*Andriciu*). M. Fornasier, *Münchener Kommentar zum BGB*, 9. Auflage 2022, BGB § 306 Rechtsfolgen bei Nichteinbeziehung und Unwirksamkeit, Rn. 5; Asser/Hartkamp 3-I 2023/253.

153 These transparency requirements will be discussed in detail below.

154 Article 4(2) Unfair Contract Terms Directive; European Commission, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (29 September 2019) C323, p. 23. Also see: CJEU, Case C-143/13, 26 February 2015, ECLI:EU:C:2015:127 (*Matei*), p. 53; CJEU, Case C-51/17, 20 September 2018, ECLI:EU:C:2018:750 (*OTP Bank/Ilyés and Kiss*), p. 68, with annotation of M.B.M. Loos, , CJEU, Case C-118/17, 14 March 2019, ECLI:EU:C:2019:207 (*Dunai*), p. 49.

155 Unless – of course – the national implementation applies also to contract terms that have been negotiated individually, such as France. Article 4(2) and 5 Unfair Contract Terms Directive.

156 This rule on interpretation does not apply in the context of the procedures laid down in Article 7(2) Unfair Contract Terms Directive. Article 5 Unfair Contract Terms Directive. Netherlands: Article 6:238(2) Dutch Civil Code; 6:240 Dutch Civil Code; Article 3:35 Dutch Civil Code. Also see: M.B.M. Loos (2023) 'Glashelder, toch? Het transparantievereiste in het algemene voorwaarden-recht' *Nederlands Tijdschrift voor Burgerlijk Recht* 2023/28, pp. 267-276; M.B.M. Loos, *Algemene voorwaarden* (Derde druk, Den Haag: Boom juridisch, 2018), p. 180; Jac. Hijma, *Algemene voorwaarden* (*Monografieën BW nr. B55*) (Deventer: Wolters Kluwer, 2016), p. 34.

offer their services in multiple Member States, which could create a risk that general terms and conditions are not offered in plain and intelligible language. The provider may not offer the terms and conditions in the original language of the Member State where the provider is active, but rather in English or the language of the provider's Member State of residence. Another example is the risk that could occur when providers later expand their service area and simply translate their terms and conditions that were primarily designed for the Member State of residence. This may cause ambiguities about the terms and conditions in other Member States. To assess that a given contract term is plain and intelligible within the meaning of the Unfair Contract Terms Directive, several factors are relevant.

It is, *inter alia*, important (a) whether the consumer had the real opportunity of becoming acquainted with a contract term before the conclusion of the contract (formal transparency).¹⁵⁷ It is essential for the consumer to take note of all contract conditions and the consequences of the agreement before concluding a contract.¹⁵⁸ This requirement is not about the content of the clauses, but about actually offering the consumer the opportunity to inspect the content and make a decision on that basis. Additionally, (b) the comprehensibility of the individual terms plays an important role (material transparency).¹⁵⁹ In addition to linguistic and grammatical intelligibility, the transparency requirement is also not met if the average consumer does not have all the information necessary before or at the time of concluding the contract to make an informed decision about the desirability of concluding the contract under the

157 Note: this includes the issue of whether the consumer had access and opportunity to read the contract term. In case a contract term refers to another document, the consumer should also be able to access those documents. Recital 20 Unfair Contract Terms Directive. European Commission, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (29 September 2019) C323, p. 25; M.B.M. Loos (2023) 'Glashelder, toch? Het transparantievereiste in het algemene voorwaarden-recht' *Nederlands Tijdschrift voor Burgerlijk Recht* 2023/28, pp. 267-276.

158 CJEU, Case C-92/11, 21 March 2013, ECLI:EU:C:2013:180 (*RWE Vertrieb*), pp. 43-44; CJEU, Case C-226/12, 16 January 2014, ECLI:EU:C:2014:10 (*Constructora Principado*), p. 25; CJEU, Case C-377/14, 21 April 2016, ECLI:EU:C:2016:283 (*Radlinger/Finway*), p. 64; CJEU, Cases C-154/15, C-307/15, C-308/15, 21 December 2016, ECLI:EU:C:2016:980 (*Gutiérrez Naranjo and Others*), p. 50; CJEU, Case C-51/17, 20 September 2018, ECLI:EU:C:2018:750 (*OTP Bank/Ilyés and Kiss*), p. 77, with annotation of M.B.M. Loos. Also see: J. Luzak and M. Junuzović (2019) 'Blurred Lines: Between Formal and Substantive Transparency of Consumer Credit Contracts' *Journal of European Consumer and Market Law* 8(3), pp. 97-107.

159 CJEU, Case C-96/14, 23 April 2015, ECLI:EU:C:2015:262 (*Van Hove*), p. 50. Also see: European Commission, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (29 September 2019) C323, p. 25; M.B.M. Loos (2023) 'Glashelder, toch? Het transparantievereiste in het algemene voorwaarden-recht' *Nederlands Tijdschrift voor Burgerlijk Recht* 2023/28, pp. 267-276.

conditions specified by the terms offered by the trader.¹⁶⁰ The perspective of consumers regarding the relevant terms must be taken into account. This includes the question of whether the consumers are adequately acquainted with the language of the terms.¹⁶¹ Furthermore, (c) the presentation of contract terms is relevant.¹⁶² This requires a degree of clarity of the visual presentation (such as font size, logical structure, and whether important stipulations are given the prominence they deserve and are not hidden amongst other provisions). Moreover, the presentation also entails an assessment of whether terms are incorporated in a contract or context where their presence can reasonably be expected (such as terms whose impact or meaning is only understood when read jointly with other terms).¹⁶³ In the examples above, the comprehensibility of terms is potentially a problem, while problems are also conceivable with the two other conditions. For example, the nature of short-term shared mobility could preclude extensive notification of the terms and conditions. Although it is up to the consumer to take the real opportunity of becoming acquired with a contract term before the conclusion of the contract; the provider could also be tempted to offer shared mobility in line with the nature of the contract, which means that such a real opportunity might not be offered by the provider.

5.4.2 *Non-binding character of unfair contract terms*

Unfair terms used in a contract concluded between a professional party and a consumer are ‘not binding’ on the consumer. The contract shall continue to bind the parties upon those terms if it can continue in existence without the unfair terms.¹⁶⁴ The non-binding character of unfair contract terms is a mandatory rule to tackle inequality by creating

160 CJEU, Case C-186/16, 20 September 2017, ECLI:EU:C:2017:703 (*Andriuc*), p. 47, 48; CJEU, Case C-395/21, 12 January 2023, ECLI:EU:C:2023:14 (*Honoraires d’avocat – Principe du tarif horaire*), p. 38; M.B.M. Loos (2023) ‘Glashelder, toch? Het transparantievereiste in het algemene voorwaarden-recht’ *Nederlands Tijdschrift voor Burgerlijk Recht* 2023/28, pp. 267-276.

161 CJEU, Case C-96/14, 23 April 2015, ECLI:EU:C:2015:262 (*Van Hove*), p. 48. Also see: European Commission, ‘Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts’ *Official Journal of the European Union* (29 September 2019) C323, p. 25; M.B.M. Loos (2023) ‘Glashelder, toch? Het transparantievereiste in het algemene voorwaarden-recht’ *Nederlands Tijdschrift voor Burgerlijk Recht* 2023/28, pp. 267-276.

162 European Commission, ‘Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts’ *Official Journal of the European Union* (29 September 2019) C323, p. 25.

163 Opinion of Advocate General G. Hogan, Case C-621/17, 15 May 2019, ECLI:EU:C:2019:411 (*Kiss and CIB Bank*), p. 41.

164 Recital 21 and Article 6(1) Unfair Contract Terms Directive. M. Fornasier, *Münchener Kommentar zum BGB*, 9. Auflage 2022, BGB § 306 Rechtsfolgen bei Nichteinbeziehung und Unwirksamkeit, Rn. 5.

effective balance between the contracting parties.¹⁶⁵ Moreover, the national courts must examine unfair terms *ex officio*.¹⁶⁶ Furthermore, the Member States need to provide the necessary measures to ensure that the consumer does not lose the protection granted by the Unfair Contract Terms Directive if the law of a non-member country is chosen as the law applicable to the contract if the latter country has a close connection with the territory of the Member States.¹⁶⁷

The directive specifically mentions that Member States must ensure that, in the interests of both consumers and competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by providers.¹⁶⁸ This rule is also known as the effectiveness principle and the respective laws of the Member State must provide remedies which allow consumers to invoke the unfairness of contract terms, and those remedies should be effective.¹⁶⁹ These effective means could, for example, include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may act according to the national law concerned before the courts or before competent administrative bodies to request a decision as to whether contractual terms drawn up for general use are unfair, and consequently apply appropriate and effective means to prevent the continued use of such terms.¹⁷⁰ With due regard for national laws, these legal remedies may be directed separately or jointly against several providers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.¹⁷¹

165 European Commission, 'Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts' *Official Journal of the European Union* (29 September 2019) C323, p. 4. See for example on this issue: CJEU, Case C-421/14, 26 January 2017, ECLI:EU:C:2017:60 (*Banco Primus*), p. 41; CJEU, C-169/14, 17 July 2014, ECLI:EU:C:2014:2099 (*Sánchez Morcillo and Abril García*), p. 23, CJEU, Cases C-154/15, C-307/15, C-308/15, 21 December 2016, ECLI:EU:C:2016:980 (*Gutiérrez Naranjo and Others*), p. 53, 55.

166 CJEU, Cases C-240/98-C-244/98, 27 June 2000, ECLI:EU:C:2000:346 (*Océano Grupo Editorial en Salvat Editores*); CJEU, Case C-168/05, 26 October 2006, ECLI:EU:C:2006:675 (*Mostaza Claro*) with annotation of M.R. Mok; CJEU, Case C-488/11, 30 May 2013, ECLI:EU:C:2013:341 (*Asbeek Brusse*); Dutch Supreme Court, 13 September 2013, ECLI:NL:HR:2013:691 (*Heesakkers/Voets*) with annotation of H.B. Krans. A.G.F. Ancery (2013) 'Ambtshalve toepassing van consumentenbeschermend EU-recht' *Maandblad voor Vermogensrecht* 2013(12), pp. 329-339; C.M.D.S. Pavillon (2015) 'Het Europees verbod op de herziening van oneerlijke bedingen: welke ruimte is er nog voor dwingend en aanvullend nationaal recht?' *Tijdschrift voor de Procespraktijk* 2015/3, pp. 70-76; J.H.M. Spanjaard (2013) 'Boetes in B2C-verhoudingen ambtshalve getoets' *Contracteren* 2013/3, pp. 108-112.

167 Recital 21 and Article 6(2) Unfair Contract Terms Directive. Also see: CJEU, Cases C-96/16 and C-94/17, 7 August 2018, ECLI:EU:C:2018:643 (*Banco Santander*), p. 73.

168 Article 7(1) Unfair Contract Terms Directive.

169 Article 7(1) Unfair Contract Terms Directive and Article 47 the EU Charter of Fundamental Rights. For example: CJEU, Case C-632/17, 28 November 2018, ECLI:EU:C:2018:963 (*PKO Bank Polski*), p. 43; CJEU, Case C-567/13, 12 February 2015, ECLI:EU:C:2015:88 (*Baczó and Vizsnyiczai*), p. 52, 59.

170 Article 7(2) Unfair Contract Terms Directive.

171 Article 7(3) Unfair Contract Terms Directive.

All in all, the rules arising from the Unfair Contract Terms Directive fully apply to the general terms and conditions of mobility usership contracts and therefore, it would appear that there are no problems in the applicability of those rules.¹⁷² In addition, the Directive possibly also solve possible problems within the contractual agreements.

5.5 DE FACTO INEQUALITIES IN THE LEGISLATIVE FRAMEWORK

This paragraph examines the overlap that exists between the applicable rules examined above and the rules that do not formally apply to MU contracts ((2) in Figure 6).¹⁷³ The goal of this comparison is to evaluate whether the applicable directives provide equivalent protection to MU contracts, even though some consumer directives do not apply to MU contracts at all. In case overlap exists, this would *de facto* result in equivalent protection. The legal framework has already been explained in detail. Therefore, the *de facto* overlap that exists is described below to identify which inequalities in consumer protection persist. This means that the Unfair Commercial Practices Directive and the Unfair Contract Terms Directive will not be further discussed here because previous chapters showed that they are applicable to mobility usership and thus provide equivalent protection. This means that the Consumer Sales Directive, the Consumer Credit Directive and the Consumer Rights Directive are assessed below. This assessment is divided into several fundamental consumer rights. These fundamental consumer rights are interpreted functionally. First the right to be informed (paragraph 5.5.1) is discussed, after which the right to change your mind (paragraph 5.5.2), the right to conformity (paragraph 5.5.3) and the category on consumer rights and commercial guarantees (paragraph 5.5.4) are discussed in turn.

5.5.1 *The right to be informed*

The right to be informed is included in the Consumer Sales Directive, the Consumer Credit Directive, and the Consumer Rights Directive.¹⁷⁴ Below, Table 13 provides a brief overview of all inequivalences in the protection of the mobility usership consumer regarding the right to be informed. As discussed in paragraph 4.3.4, the Consumer Sales Directive regulates that Member States need to take appropriate measures to ensure that

¹⁷² See paragraph 2.5 and 2.6 on the *ratione personae* scope and paragraph 3.6 on the *ratione materiae* scope.

¹⁷³ To exemplify; a certain information obligation that arises from the Consumer Sales Directive (and therefore does not apply to mobility usership consumers) can also arise from the Consumer Rights Directive (which does apply to mobility usership consumers).

¹⁷⁴ The right to be informed also implicitly follows from the UCPD.

information on consumer's rights is available to consumers.¹⁷⁵ However, the Consumer Sales Directive is in accordance with the Consumer Rights Directive and does not specify additional information obligations itself.¹⁷⁶ Furthermore, specific information obligations have been included on the legal concept of commercial guarantees.

Equivalent protection for sales-based consumers and mobility usership consumers exists in certain areas. The provider must supply information about the type of contract they offer under the Consumer Credit Directive. This obligation also exists – in less specific terms – for providers under the Consumer Rights Directive. The Consumer Rights Directive mentions that the provider must inform about '*the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services*'.¹⁷⁷ Due to the more general terminology in the Consumer Rights Directive, the obligation arising from the Consumer Credit Directive to inform about the amount, number, and frequency of payments to be made by the consumer may also fall under this terminology, resulting here in equivalent protection as well.

The Consumer Credit Directive also obliges the provider to inform the consumer on their identity and geographical address. Here, the Consumer Rights Directive provides more extensive information obligations; other than for distance and off-premises contracts, the provider should also provide their telephone number under this directive.¹⁷⁸ For distance and off-premises contracts, there are even more extensive information obligations related to the identity of the provider, such as a fax number and e-mail address.¹⁷⁹ Equivalent protection also exists in the obligation to inform about the duration of the contract. This obligation arises from both the Consumer Credit Directive and the Consumer Rights Directive, whereby the Consumer Rights Directive adds that, in case of contracts of indeterminate duration, consumers must be informed about the conditions for terminating such a contract.¹⁸⁰ Furthermore, the consumer should be informed on the total amount of credit allowed and the conditions governing the drawdown. The obligation to inform about the total price of the goods or services also arises from the Consumer Rights Directive. The Consumer Rights Directive specifies that the way the price is calculated should be made clear, a goal which provides for the obligation to also inform on, for example, costs for governing a drawdown. Both the Consumer Credit

175 Recital 11 Consumer Sales Directive, Article 20 Consumer Sales Directive.

176 Recital 11; 26 Consumer Sales Directive, Article 20 Consumer Sales Directive. Also see: paragraph 4.3.4.

177 Article 5(1)(a); 6(1)(a) Consumer Rights Directive; Article 5(1)(a) Consumer Credit Directive 2008. See: paragraph 4.4.1 and 5.2.1.

178 Article 5(1)(b) Consumer Rights Directive.

179 Article 6(1)(b)(c) Consumer Rights Directive. Also see: Article 6(1)(d) Consumer Rights Directive.

180 Article 5(1)(f); 6(1)(o) Consumer Rights Directive; Article 5(1)(d) Consumer Credit Directive 2008. See: paragraph 4.4.1 and 5.2.1.

Directive and the Consumer Rights Directive (in case of distance and off-premises contracts) oblige the provider to inform the consumer on the existence or absence of a right of withdrawal. The Consumer Rights Directive is more extensive in the sense that it also requires the conditions, time limit and procedures for exercising that right. Furthermore, under the Consumer Rights Directive, the provider should offer the model withdrawal form.¹⁸¹

Regarding the information already included in the contractual agreement, the Consumer Credit Directive requires agreements to be drawn up on paper or on another durable medium and that all contracting parties shall receive a copy of the credit agreement.¹⁸² This obligation is also covered under the Consumer Rights Directive for distance and off-premises contracts.¹⁸³

Inequivalent protection exists in other areas. First, the Consumer Credit Directive regulates the obligation for providers to offer standard information to consumers in advertising.¹⁸⁴ None of the applicable directives provide for such an obligation in advertising, which results in an inequivalence in protection.

Regarding the precontractual information requirements, the Consumer Credit Directive regulates that the provider should supply the consumer – in good time and before the consumer is bound by the agreement – with information the consumer needs to compare different offers in order to make an informed decision on whether to conclude an agreement.¹⁸⁵ The term ‘in good time’ leaves room for interpretation. The term aims to ensure that consumers have enough time to inform their decision before signing an agreement.

The Consumer Rights Directive, on the other hand, states that the provider should inform the consumer in a ‘clear and comprehensive manner’ and distinguishes between (1) distance and off-premises contracts and (2) contracts other than distance and off-premises contracts, whereby the information for the latter type of contracts may also become clear from the context. A stricter information obligation applies to distance and off-premises contracts; this appears to be less stringent than that of the Consumer Credit Directive. However, under both directives there is an obligation to provide information

181 Article 6(1)(h) Consumer Rights Directive; Article 5(o) Consumer Credit Directive 2008. See: paragraph 4.4.1 and 5.2.1.

182 Article 10(1) Consumer Credit Directive 2008.

183 Article 7(1)(2); 8(1)(2) Consumer Rights Directive.

184 Article 4 Consumer Credit Directive 2008.

185 Article 5 Consumer Credit Directive 2008.

on paper or another durable medium; an important difference is that the supplier must provide a SECCI form under the Consumer Credit Directive. This form provides a clear and comprehensive overview of the terms of the agreement, but it also requires explicit and more detailed (and structured) information. Moreover, the Consumer Credit Directive has several directive-specific information rights related to the *ratione materiae* scope of the Consumer Credit Directive. The consumer *inter alia* needs to be informed on (1) the borrowing rate, the conditions governing the application of the borrowing rate and any index or reference rate applicable to the initial borrowing rate.¹⁸⁶ Furthermore, they need to be informed on the (2) annual percentage rate of charge and the total amount payable by the consumer, illustrated by means of a representative example, (3) the obligation, if any, to enter into an ancillary service contract, (4) the interest rate applicable in case of late payments,¹⁸⁷ (5) the right of early repayment, and, where applicable, information concerning the creditor's right to compensation.¹⁸⁸ Again, all these information requirements are unique for the Consumer Credit Directive and no overlap exists with the Consumer Rights Directive. As a result, inequivalent protection exists here for mobility usership consumers.

Regarding the contractual information requirements that follow from the Consumer Credit Directive, the information to be included in a credit contract is largely similar as the *precontractual* information requirements under the directive. This 'double' information obligation (precontractual and contractual) from the Consumer Credit Directive does not overlap in the Consumer Rights Directive.¹⁸⁹ Furthermore, the Consumer Credit Directive, imposes more extensive information obligations to the contract itself compared to the Consumer Rights Directive.¹⁹⁰ Since the Consumer Rights Directive only recognises a contractual information obligation if this has not been done prior to the conclusion of the contract, the protection is not equivalent for mobility usership consumers. Although the contractual information obligations under the Consumer Credit Directive are largely the same obligations as the precontractual ones, the Consumer Credit Directive includes several specific information obligations (paragraph 4.4.1 and 4.4.4), which are included in Table 13 below. A full overview of the rules where inequivalence in protection for mobility usership consumers exists can be found in Table 13.

186 As well as the periods, conditions, and procedure for changing the borrowing rate; if different borrowing rates apply in different circumstances, the abovementioned information on all the applicable rates.

187 Also including the consequences of late payments, paragraph 4.4.1.

188 Article 5(1)(l)(g)(k) Consumer Credit Directive 2008. Mentioning all the assumptions used to calculate that rate.

189 Article 8(7)(a) Consumer Rights Directive.

190 Such as information about the type of contract, the identity of the provider, etc.

Table 13: Inequivalences in the right to be informed

Right to be informed		
	Inequivalent protection exists in:	Notes
Standard information to be included in advertising	Article 4 CCD.	Nothing in the CRD is said about standard information to be included in advertising.
Precontractual information	Article 5(1)(e), (f), (g), (j), (k), (l), (m), (n), (p), (q), (r), and (s) CCD.	Regarding the inequality in protection, the precontractual information obligations in the CCD are more extensive than the applicable legislative framework. This may concern, for example, formal requirements (e.g. SECCI) or specific information requirements for the type of contract (<i>ratione materiae</i> scope).
Contractual information	Article 10(1) CCD.	There is no contractual information obligation from the applicable legal framework as exists for the CCD. The fact that this is a (partly) double information obligation therefore offers an inequivalence in the protection of MU consumers.
	Article 10(2)(a)-(i), (l), (m)(r) CCD.	These contractual information obligations correspond to the precontractual information obligations from the CCD (article 5 CCD). This can therefore be referred to as a double information obligation. Although a precontractual obligation is sometimes included in the CRD, it is not included in the CRD as a contractual obligation.
	Article 10(2)(j), (k), (n), (o), (p), (q), (s), and (u) CCD; Article 11 CCD.	These contractual information obligations do not correspond to the precontractual information obligations from the CCD (article 5 CCD). The CRD therefore not only does not provide for these information obligations contractually, but also not precontractually (unlike the obligations in the row above).

5.5.2 Right to change your mind

Table 14 shows an overview of all inequivalences in the protection of the mobility usership consumer regarding the right to change your mind. The right to change your mind includes the right of withdrawal, and the right to terminate. This latter right, however, does not explicitly follow from the examined directives as a result of which only the right of withdrawal is discussed here.

Rules regarding the right of withdrawal are included in the Consumer Rights Directive and the Consumer Credit Directive.¹⁹¹ Nevertheless, the Consumer Rights Directive recognises some exceptions in article 16 Consumer Rights Directive which could cause an inequivalence in consumer protection. Sub 1 of article 16 of the Consumer Rights Directive excludes exclusive mobility use as long as it is classified as a distance or off-premises service contract.¹⁹² It is also possible that this exception applies to shared mobility in case the provider has set a vehicle aside and kept it available for the consumer. At the same time, shared use does not always require a setting aside of capacity, so this exception is not always applicable. In that case the exception on service contracts applies and the withdrawal period ends after the service has been fully performed if the performance began with the consumer's prior express consent and with the acknowledgement that they will lose their right of withdrawal once the contract has been fully performed by the trader.¹⁹³ That period is 14 days for withdrawal in case of a distance sale. There is also a difference in protection regarding the start of the withdrawal period. This difference is mainly due to the difference in the nature of the contract. Under the Consumer Credit Directive, the withdrawal period begins (1) from the day of the conclusion of the contract or (2) from the day on which the consumer receives the required contractual terms and conditions and information, if that day is later.¹⁹⁴ The Consumer Rights Directive mentions that for service contracts, the withdrawal period begins on the day of the conclusion of the contract.¹⁹⁵ However, for sales contracts, this begins the day the consumer acquires physical possession of the goods.¹⁹⁶

Both under the Consumer Credit Directive and the Consumer Rights Directive and before the expiry of the withdrawal period, the consumer should notify the provider of their decision to withdraw from the contract.¹⁹⁷ However, some differences exist as well.¹⁹⁸

191 Recital 6 Consumer Sales Directive. The rules applicable to the sales of goods are still fragmented as regards distance or off-premises contracts the right of withdrawal is fully harmonised by Consumer Rights Directive.

192 CJEU, Case C-38/21, C-47/21 and C-232/21, 21 December 2023, ECLI:EU:C:2023:1014 (*BMW Bank, C. Bank AG, Volkswagen Bank GmbH, Audi Bank*), p. 202. Also see Paragraph 5.2.2.

193 Article 16(a) Consumer Rights Directive.

194 Article 14(1)(a)(b); 10 Consumer Credit Directive 2008.

195 Article 9(2)(a) Consumer Rights Directive See: paragraph 5.2.2. The Consumer Rights Directive does distinct two moments of when the withdrawal period begins based on the contract type. The starting point is the contract that covers mobility usership, namely the service contract.

196 Consumer or a third party other than the carrier and indicated by the consumer. Article 9(2)(b) Consumer Rights Directive; also see for completeness (i)-(iii) of this Article.

197 Article 14(3) Consumer Credit Directive 2008 and Article 11(1) Consumer Rights Directive. See: paragraph 4.4.4 and 5.2.2.

198 Article 11(1)(a)(b); 11(3) Consumer Rights Directive; Article 14(3)(a) Consumer Credit Directive 2008. See: paragraph 4.4.4 and 5.2.2. Article 10(2)(p) states that the existence or absence of a right of withdrawal, the period during which that right may be exercised and other conditions governing the exercise thereof,

Under the Consumer Rights Directive, the provider has less freedom to set conditions for invoking the right of withdrawal. An unequivocal statement setting out the consumer's decision to withdraw from the contract is sufficient, which means more freedom in this regard for the consumer.¹⁹⁹ Due to the exceptions of the Consumer Rights Directive, inequivalent protection could exist. Furthermore, the Consumer Credit Directive and the Consumer Rights Directive both provide that if an ancillary service relating to the agreement is offered by the provider, the consumer shall no longer be bound by the ancillary service contract if the consumer exercises their right of withdrawal from the agreement.²⁰⁰

Under the Consumer Credit Directive, the consumer is obliged to pay to the provider the capital and the interest accrued thereon from the date the credit was drawn down until the date the capital is repaid in case they want to exercise their right of withdrawal.²⁰¹ The Consumer Rights Directive actually applies the same rule, but mentions returning the purchased good.²⁰² The rationale behind the rule concerns the consequence of a withdrawal, i.e. undoing the agreement. This means that the consumer returns the subject of the agreement (being a good, a capital or a service) in return for the price paid. Equivalent protection therefore exists for mobility usership contracts. Moreover, undoing the agreement should under both directives be done without any undue delay. However, under the Consumer Credit Directive, the consumer has 30 calendar days from the day on which they have communicated their decision to withdraw from the contract whereas the consumer under the Consumer Rights Directive only has 14 days, which causes an inequivalence in protection with regards to these terms. After all, the consumer under the Consumer Credit Directive has more time to undo the agreement.²⁰³ In both the Consumer Credit Directive and the Consumer Rights Directive, the consumer shall – in principle – only bear the direct cost of returning the goods.²⁰⁴ Table 14 provides an overview of the inequivalences in protection regarding the right to change your mind.

including information concerning the obligation of the consumer to pay the capital drawn down and the interest in accordance with Article 14(3)(b) and the amount of interest payable per day.

199 Article 11(1)(b) Consumer Rights Directive.

200 Article 14(4) and 15 Consumer Credit Directive 2008; Article 15(1) Consumer Rights Directive. See: paragraph 4.4.4 and 5.2.2. It concerns the provider or by a third party based on an agreement between the third party and the creditor.

201 The interest shall be calculated based on the agreed borrowing rate. Article 14(3)(b) Consumer Credit Directive 2008.

202 Article 13(1) and 14(1) Consumer Rights Directive.

203 Article 14(3)(b) Consumer Credit Directive 2008 and Article 13(1) and 14(1) Consumer Rights Directive. See: paragraph 4.4.4 and 5.2.2.

204 Article 14(3)(b) Consumer Credit Directive 2008 and Article 13(3); 14(1), paragraph 2 Consumer Rights Directive. See: paragraph 4.4.4 and 5.2.2. Under the Consumer Credit Directive 2008 applies that the provider shall not be entitled to any other compensation and for the Consumer Rights Directive applies

Table 14: Inequivalences for the right to change your mind

Right to change your mind		
	Inequivalent protection exists in:	Notes
Right of withdrawal	Article 14(1) CCD.	The difference mainly lies in the exceptions included in article 16 sub a and l of the CRD. The CCD does not have these exceptions. This does also have consequences for when the period of withdrawal begins.
	Article 14(3) CCD.	If the consumer exercises the right of withdrawal, the consumer has more time to undo the agreement under the CCD than under the CRD, namely 30 days compared to 14 days.
	Article 9(2)(b) CRD; also see (i), (ii) and (iii) under article 9(2)(b) CRD.	The CRD distinguishes between sales and services contracts with respect to the expiration of the withdrawal period. For sales contracts, this is 14 days from the day on which the consumer acquires physical possession of the goods; for service contracts, this is the day of the conclusion of the contract. This difference is mainly due to the difference in the nature of the contract.
	Article 13(3) CRD.	Unless the trader has offered to collect the goods themselves, regarding sales contracts, the trader may withhold the reimbursement until they have received the returned goods, or until the consumer has supplied evidence of having returned the goods, whichever is the earliest.

5.5.3 Right to conformity

The right to a conform product is explicitly regulated in the Consumer Sales Directive, which means that this is not regulated in other researched directives, resulting in inequivalent protection. In addition, remedying a good that does not conform to the contractual obligations also follows from the Consumer Sales Directive. Only the Consumer Rights Directive mentions the right to terminate regarding late delivery, but this rule solely applies to sales contracts, which means that this does not apply to mobility usership.²⁰⁵ Therefore, inequivalence in consumer protection exists between sales-based consumers and mobility usership consumers regarding the Consumer Sales Directive. Nevertheless, consumers of mobility usership may still have comparable rights

that the provider only bears the cost of returning the goods when he has agreed to bear them, he failed to inform the consumer that the consumer must bear them.

205 Article 18(2); 17 Consumer Rights Directive.

under general contract law. While these rights may not be mandatory in nature, this may be solved by the Unfair Contract Terms Directive. The inequalities in protection are comprised in Table 15 below.

Table 15: Inequivalences for the right to conformity

Right to conformity		
	Inequivalent protection exists in:	Notes
Right to a conform product	Article 5, 6, 7, 8, 10, 11, 12 CSD.	This includes <i>inter alia</i> the subjective and objective requirements for conformity, obligation to notify, the liabilities of the provider, and the burden of proof.
Right to remedies	Article 13, 14 CSD.	In the event of a lack of conformity, the consumer is entitled to have the goods brought into conformity (primary remedies) or to receive a proportionate reduction in the price, or to terminate the contract (secondary remedies).
	Article 15 CSD.	Price reduction.
	Article 16 CSD.	Termination of the sales contract.
	Article 18(2) CSD.	If the trader fails to deliver the goods (sales contract) within an additional period of time, the consumer shall be entitled to terminate the contract. The consumer shall be entitled to terminate the contract immediately in case the provider fails to deliver the goods on time and refuses to deliver the goods or where delivery within the agreed delivery period is essential, taking into account all the circumstances attending the conclusion of the contract or where the consumer informs the trader, prior to the conclusion of the contract, that delivery by or on a specified date is essential.

5.5.4 Consumer rights and commercial guarantees

There is also a residual category of rights that creates an inequivalence in consumer protection. This concerns the rules on commercial guarantees arising from the Consumer Sales Directive and the rights arising from the Consumer Credit Directive regarding the creditworthiness assessment and other consumer rights such as the right to early repayment. Below, Table 16 shows the inequivalences in consumer protection for the other rights.

Table 16: Inequivalences for consumer rights and commercial guarantees

Consumer rights and commercial guarantees		
	Inequivalent protection exists in:	Notes
Commercial guarantees	Article 17 CSD.	
Other consumer rights	Article 16 CCD.	The consumer is entitled at any time to discharge fully or partially their obligations under the agreement. In such cases, the consumer is entitled to a reduction in the total cost of the credit. As a result, the provider is entitled to fair and objectively justified compensation for possible costs directly linked to early repayment.
	Article 19 CCD.	In the Consumer Credit Directive there also exist rules on how to calculate the annual percentage rate of charge. This term does not exist in other (applicable) directives and therefore there are no rules about the method by which this should be calculated.
	Article 20 CCD.	Providers need to be supervised by a body or authority independent from financial institutions.
	Article 21 CCD.	Certain obligations of credit intermediaries vis-à-vis consumers.
Creditworthiness assessment	Article 8 CCD.	Obligation to assess the creditworthiness of the consumer.
	Article 9 CCD.	Database access.

5.6 CONCLUSION

This chapter examined the *de facto* inequivalences in protection of mobility usership providers in comparison to the sales-based consumer. The substantive rights applicable to mobility usership were first examined to investigate possible overlap between the non-applicable and applicable rights, ultimately showing the inequivalences in consumer protection.

The law provides inequivalent protection for mobility usership consumers for various fundamental consumer rights. The exact inequivalences that exist for the right to be informed are shown in Table 13. The most important inequivalences in protection exists for the precontractual and contractual information obligations because the Consumer Credit Directive offers more extensive rights. The fact that these rights do not apply to more far-reaching rights remains remarkable, considering the great similarities between consumer credit and exclusive mobility use.

For the right to change your mind, several inequivalences in protection exist. Table 14 shows a concise overview of these inequivalences, one of which concerns the most important exception on the right of withdrawal in the Consumer Rights Directive. Ensuring a suitable application of the right of withdrawal needs to be considered, as it is currently incomprehensible that the exception of the Consumer Rights Directive excludes exclusive mobility use from the right of withdrawal in case the contract is a distance or off-premises service contract.

Although the right to performance follows from non-mandatory contract law, the right to conformity is mandatory law and does not apply to MU contracts. This means that there is inequivalent protection compared to sales-based consumers for the full right to conformity. Moreover, this is also the case for the remedies in case of a non-conformity. A full overview is provided by Table 15.

Finally, regarding commercial guarantees, creditworthiness assessment and the residual category, there are rules that arise solely from the non-applicable legal framework which result in inequivalent protection on these components. This is significant because the application of, for instance, the creditworthiness assessment could (and should), in light of the *ratio legis*, also be applicable to exclusive mobility use. A brief overview is again provided in Table 16.

This chapter provides clarity about the inequalities in protection that arise from the law for mobility usership consumers. This also indicates the relevance of the following chapters. The next two chapters will not examine the law to assess equivalent protection but will focus on the (self-)regulation of the mobility usership sector.

6 STUDY OF THE GENERAL TERMS AND CONDITIONS ACCORDING TO SECTOR CONDUCT OF EXCLUSIVE MOBILITY PROVIDERS

6.1 INTRODUCTION

The previous chapters looked in broad terms at the scope of the selected EU directives and the national implementations in order to see whether (and to what extent) the directives protect consumers of mobility usership based on their scope. Subsequently, the substantive rights arising from the selected directives, which clarified that inequalities in consumer protection exist for several rights. Chapter 6 and chapter 7, however, focus on whether the mobility usership sector meets these inequalities through self-regulation. At first glance, it does not seem obvious that providers of mobility usership voluntarily choose to impose more restrictions than required by law. However, if mobility usership providers were to choose to offer consumers more extensive protection than the legal framework requires, it could improve their competitive position by helping them retain and attract consumers.

The aim of this and the subsequent chapters is to gain understanding on whether the gap in consumer protection that is revealed in the former chapters, is compensated for by additional protection in the general terms and conditions. This study thus aims to explore and understand whether the providers in the mobility usership sector give consumers equivalent protection in practice with the application of general terms and conditions (or other comparable agreements) compared to traditional sales-based consumers. This assessment of sector conduct is made in line with the case studies/typologies: mobility usership exclusive use (paragraph 6.4), mobility usership shared use (paragraph 7.2) and mobility usership collaborative sharing (paragraph 7.3). Based on the identified lacunae in the directives, it is evaluated whether the general terms and conditions of mobility usership providers meet these inequalities. This shows the extent to which mobility usership providers facilitate a similar (or even higher) protection to their consumers in comparison to traditional sales-based consumers.

In this chapter, the methodology that underpins the empirical studies of this chapter and chapter 7 will be discussed, after which the chosen method and its application will be elaborated on. Furthermore, the results of an analysis of the conduct of the exclusive use sector will be described, in which the chosen modes of transport will be evaluated: cars and two-wheelers. This discussion is made in view of fundamental consumer

rights, respectively: the right to be informed (paragraph 6.4.1), the right to change your mind (paragraph 6.4.2), the right to conformity (paragraph 6.4.3), consumer rights and commercial guarantees (paragraph 6.4.4).

6.2 CHOICE OF METHOD

The methodology chapter 6 and 7 is discussed here separately as only these chapters relate to the empirical research method. In this paragraph there will be a discussion of the most important methodological considerations pertaining and related to answering the research question central to these chapters. Therefore, I elaborate on my choices by way of a funnel approach. Respectively, I discuss my choices for the empirical approach, the qualitative method, and the document analysis.

6.2.1 *Empirical research method*

As the central question focusses on whether mobility usership providers facilitate a similar (or even higher) protection to their consumers in comparison to sales-based consumers by use of general terms and conditions, empirical examination of these general terms and conditions is used to reflect on how and to what extent law and business are (inter)related. Furthermore, this empirical approach contributes to the understanding of EU consumer law in the broader sense as it contributes to the practical implications and effects of the law on *inter alia* the behaviour of providers and consumers that act in this reality. Even though this research mainly includes doctrinal and textual analysis, this research is strengthened by the inclusion of evidence on real-life business cases.¹

6.2.2 *A qualitative document analysis*

To examine whether the lacunae in current mobility usership consumer protection could be filled by the mobility usership providers, the natural context of these providers is researched. This natural context is the contractual reality as seen in the general terms and conditions (and other comparable agreements) offered by mobility usership providers to their consumers.² In other words, the presence or absence of voluntarily increased consumer protection

1 G. Davies (2020) 'The Relationship between Empirical Legal Studies and Doctrinal Legal Research' *Erasmus Law Review* 2, pp. 3-12.

2 L. Webley (2012) 'Qualitative Approaches to Empirical Legal Research' in: P. Cane and H.M. Kritzer, *The Oxford handbook of empirical legal research* (Oxford, Oxford University Press, 2012), pp. 927-929.

by mobility usership providers is studied to deepen the understanding of the protection offered by the sector conduct. A qualitative method aligns with this goal and provides this deeper understanding of the behaviour of the sector, whereas a quantitative method could mainly provide insights into numerical data, which does not match the research objective.³

The premises of these chapters is the observation made in the previous chapters that inequivalences in consumer protection exist for mobility usership consumers insofar as the legislative framework is observed. As a follow-up, the analysis of the general terms and conditions clarifies whether the legal framework also identifies these inequivalences or whether there are differences for the mobility usership typologies.⁴ For these typologies, the pursuit is to discover certain patterns. An example of such a pattern could be that providers of private vehicle leases in France engage (more) in self-regulation (and provide (voluntary) increased consumer protection) in certain research areas. To detect such patterns, a systematic procedure for reviewing and evaluating documents is necessary to gain understanding and develop empirical knowledge. Therefore, the qualitative document analysis is most appropriate for this research.⁵ It should be noted that, although the general terms and conditions are produced, distributed, and used in a socially organised way, these general terms and conditions also have a legal implication.⁶

The choice for a document analysis is also dictated by some other, more practical considerations. First, it is an efficient method in comparison to other research methods. Such another method could, for example, be to conduct interviews of providers in the sector or experts to assess whether (and if so then to what extent) there is self-regulation. However, this would not yield better results. After all, the extent to which and information about self-regulation is more clearly assessed by studying the source of that self-regulation, namely the general terms and conditions, whereas interviews would focus instead on undisclosed perceived preferences of consumers. In addition, interviews would be more

3 J. Kirk and M.L. Miller, *Reliability and Validity in Qualitative Research* (Beverly Hills: Sage Publications, 1986); S.B. Merriam and E.J. Tisdell, *Qualitative research: A guide to design and implementation* (4th edition, San Francisco: Jossey Bass, 2016).

4 These typologies entail the different MU models, the different modes of transport, and the different Member States. On the organisation of data in themes/categories through content analysis see for example: A. Labuschagne (2003) 'Qualitative research: airy or fundamental?' *The Qualitative Report* 8(1), pp. 100-103.

5 G.A. Bowen (2009) 'Document Analysis as a Qualitative Research Method' *Qualitative Research Journal* 9(2), pp. 27-40. Also see: J. Corbin and A. Strauss, *Basics of Qualitative Research: techniques and procedures for developing grounded theory* (3rd Edition, Thousand Oaks: Sage Publications, 2008); T. Rapley, *Doing conversation, discourse and document analysis* (London: Sage Publications, 2007); S.B. Merriam, *Case study research in education: a qualitative approach* (San Francisco: Jossey Bass, 1988), p. 118.

6 P.A. Atkinson, and A. Coffey, 'Analysing documentary realities' in: D. Silverman (ed.), *Qualitative research: Theory, method and practice* (London: Sage Publications, 1997), pp. 45-62; G.A. Bowen (2009) 'Document Analysis as a Qualitative Research Method' *Qualitative Research Journal* 9(2), p. 27.

time consuming.⁷ Furthermore, the availability of documents and cost-effectiveness of the document analysis are important factors for choosing this method. Since the general terms and conditions of mobility usership providers are widely available to the public, gaining access to them is easy and free of costs.⁸ In addition, document analysis is known to be non-reactive, which contributes to a neutral analysis of the data and minimising the risk of subjective information influencing the research or researcher. Also, the general terms and conditions are suitable to be analysed in a non-reactive manner as these conditions are not designed for the purposes of research; in other words, they are stable and unaltered prior to their examination.⁹ Therefore, document analysis is the viable source and method here.

The nature of the documents

When conducting a document analysis, it is vital to consider the nature and original purpose of the documents, such as the origin, function, authenticity, and usefulness.¹⁰ For the cause of this analysis, it is important to grasp that general terms and conditions are standard terms, designed to protect the interests of one specific party of the contractual relationship, namely the mobility usership provider (who also is the party who developed the terms).¹¹ These terms are handed over to the counterparty – the mobility usership consumer – in order to enable them to be informed on the terms and conditions (within applicable law) of the mobility usership contract.

Role as a researcher

It is important to be aware of my role as a researcher as the non-bias interpretation of information is central to qualitative empirical research;¹² it is important to strive to be objective and neutral as a researcher.¹³ Since the research concerns a document analysis, it is particularly

7 G.A. Bowen (2009) 'Document Analysis as a Qualitative Research Method' *Qualitative Research Journal* 9(2), p. 31.

8 S.B. Merriam, *Case study research in education: a qualitative approach* (San Francisco: Jossey Bass, 1988); G.A. Bowen (2009) 'Document Analysis as a Qualitative Research Method' *Qualitative Research Journal* 9(2), p. 31; H. Morgan (2022) 'Conducting a Qualitative Document Analysis' *The Qualitative Report* 27(1), p. 70.

9 G.A. Bowen (2009) 'Document Analysis as a Qualitative Research Method' *Qualitative Research Journal* 9(2), p. 31.

10 G.A. Bowen (2009) 'Document Analysis as a Qualitative Research Method' *Qualitative Research Journal* 9(2), pp. 33, 34, 38. Also see: J. Evers, *Kwalitatieve analyse: kunst én kunde* (Amsterdam: Boom uitgevers, 2016), pp. 26-29.

11 G. Cordero-Moss, 'Standard contract terms as an alternative to legislation' in: C. Twigg-Flesner (ed.), *Research handbook on EU consumer and Contract law* (Cheltenham: Edward Elgar Publishing limited, 2016), p. 487.

12 J. Evers, *Kwalitatieve analyse: kunst én kunde* (Amsterdam: Boom uitgevers, 2016), pp. 43-47.

13 Within the social sciences, both objectivity and neutrality are discussed in connection with the role of the researcher. See: Y.S. Lincoln and E.G. Guba, *Naturalistic Inquiry* (Newbury Park: Sage Publications, 1985); A.S. Fink (2000) 'The Role of the Researcher in the Qualitative Research Process: A Potential Barrier to Archiving Qualitative Data' *Forum Qualitative Sozialforschung/Forum: Qualitative Social Research* 1(3); J. Evers, *Kwalitatieve analyse: kunst én kunde* (Amsterdam: Boom uitgevers, 2016), pp. 37-47.

important that the documents are interpreted consistently throughout the process. Reports are made in the interest of reconstructing the interpretation process and ensuring consistent interpretation as much as possible. In addition, interim interpretation assessments are carried out to stimulate consistency.¹⁴ Furthermore, my profession as a lawyer may factor into the interpretation of the collected data. However, this expertise is simultaneously important in the interpretation of the data because the aim is to examine the (in)equivalences in consumer protection. Using my expertise as a lawyer enables me to conduct a meticulous interpretation.¹⁵

6.2.3 Limitations

Although the choice for a qualitative document analysis method is suitable and feasible for the stated research goals, there are several limitations that emerge from this study. First, the documents selected for analysis tend to have insufficient detail because the documents are not produced for research purposes. However, by studying general terms and conditions, this limitation seems to resolve because these documents have been drawn up accurately and in detail, with the possible legal implications of practical application of the terms and conditions in mind. After all, the general terms and conditions have legal interpretations and consequences. At the same time, the documents also solely contain the information that is relevant to the legal reality, which results most likely in the exclusion of other contextual information.¹⁶ Nevertheless, this limitation does not seem to be problematic because it is mainly the degree of self-regulation, which can only be deduced from the general terms and conditions, that is examined. It is precisely the (legal) details of the reality of self-regulation that are important, which arise from the study of the general terms and conditions. Furthermore, it is not problematic for this study that a document analysis often misses contextual information because the degree of self-regulation (which is the purpose of the study) is deduced from the general terms and conditions. Also, the low retrievability of documentation is often mentioned as a limitation to this method. However, for this study this is obviated because general terms and conditions of mobility usership providers are easily available and can be freely retrieved on the providers' websites.¹⁷ After all, to retrieve the general terms

14 These reports are kept by use of memos in the Atlas.ti software program. For the need for keeping such memos, see: J. Evers, *Kwalitatieve analyse: kunst én kunde* (Amsterdam: Boom uitgevers, 2016), pp. 25-26.

15 It goes without saying that other issues such as the comprehensibility and familiarity of the law for (mobility usership) consumers are expressly not the subject of the study here. As a result, this role as a lawyer-researcher is not problematic.

16 G.A. Bowen (2009) 'Document Analysis as a Qualitative Research Method' *Qualitative Research Journal* 9(2), pp. 31-32.

17 G.A. Bowen (2009) 'Document Analysis as a Qualitative Research Method' *Qualitative Research Journal* 9(2), p. 32.

and conditions, it appears that the creation of an account with the mobility usership provider is not required, nor the installation of their mobile application or conclusion of a contract.

6.3 APPLICATION OF METHOD

The considerations that were made to perform a qualitative document analysis have been discussed above. Subsequently, it must be considered which documents should be selected to answer the research question. This document selection strategy is outlined below.

6.3.1 Document selection

As already mentioned in the previous paragraph, the selection of documents contains general terms and conditions (supplemented by any other contractual terms and/or conditions if they exist). For example, there are providers who offer general terms and conditions and additional terms and conditions on their website. In such cases, both are selected because the rationale is to study the full set of applicable conditions. The terms and conditions can be found on the website of mobility usership providers and are freely accessible. These websites are found by using specific keywords. The used keywords can be found in Table 17 below. These keywords are used in the Google search engine, where I observed the first two pages of results.¹⁸

Table 17: Keywords used for document selection

Exclusive use
Private lease, Operational Lease, Particulier fiets leasen, Voiture de location opérationnelle, Leasing pour particulier, La location de voiture longue durée, Leasing voiture, Leasing particulier, LLD, Privat leasing, Privates lease auto, Privates Leasingauto, Privates Leasing, Roller leasing, Fahrradleasing, Fahrrad leasing für privatpersonen, Bike leasing privat, (motor)roller leasing für privatpersonen.
Shared use
Auto delen, Fiets delen, Moped delen, Step delen, Micromobiliteit, coöperatief delen mobiliteit, collaboratieve mobiliteit [add: fiets, auto, moped, scooter, .nl, .be], Micromobilité, partage coopératif de la mobilité, mobilité collaborative [add: vélo, voiture, moped, trottinette, .fr, .be], Mikromobilität, ooperativess Teilen der Mobilität, kollaborative Mobilität [add: Fahrrad, Auto, Roller, .de], Deelauto's), voiture partagée, geteiltes auto, Deelfiets(en), fiets delen, Private bikesharing, geteiltes (motor)roller, geteiltes fahrrad, vélo partagée, moped partagée trottinette partagée.

¹⁸ I looked at the first two pages because no valuable search results appeared after that.

These keywords aim to find providers of both exclusive and shared vehicle use in the Netherlands, Belgium, Germany, and France. To promote consistency, this selection is in line with the selection of Member States in previous chapters. The keywords focus on cars, bicycles, mopeds, and scooters but other modes of transport for consumer use are not excluded beforehand during a search of these keywords, which could, for example, also include cargo bikes. Nevertheless, expressly excluded were modes of transport not typically for consumer use, such as airplanes and ships.¹⁹ Furthermore, all terms and conditions were retrieved between November 1, 2022 and March 6, 2023. This means that the selected providers existed in at least one of the selected Member States and made their terms and conditions available on their website at that time.

The data selection is also partly dictated by law. At the time of data selection, electric scooters may not be driven legally on public roads in the Netherlands, but they may be used in the other selected Member States. As a result, no general terms and conditions are selected from scooter sharing providers in the Netherlands. Nevertheless, sometimes scooter sharing providers in other Member States choose to offer shared (electric) bicycles or mopeds under the same brand in the Netherlands. For example, Lime offers shared bicycles in the Netherlands, but does not do so in other selected Member States.

Appropriateness of document selection

To select appropriate documents to analyse, the authenticity, credibility, representativeness, and meaning of the documents is assessed.²⁰ The selected general terms and conditions are all primary sources originating from and produced by the provider of mobility usership services. This means that the authenticity of the document is adopted.²¹ Credibility relates to the extent to which the source is free from errors and whether their producers are reliable sources.²² The documents selected in this study are highly credible; after all, general terms and conditions are formal documents of B2C providers, addressing the outside world, and intended to protect providers from

19 Think of providers as *Netjets* and *Flexjet* for example, which offer programs of shared ownership and the leasing of a jet. See for the websites of these providers respectively; www.netjets.com and www.flexjet.com, both accessed on 17th of February 2023.

20 U. Flick, *An introduction to Qualitative Research* (7th Edition, Thousand Oaks: Sage Publications ltd, 2023), pp. 159-170; H. Morgan (2022) 'Conducting a Qualitative Document Analysis' *The Qualitative Report* 27(1), pp. 64-77.

21 H. Morgan (2022) 'Conducting a Qualitative Document Analysis' *The Qualitative Report* 27(1), pp. 71; C. Kridel, 'The biographical and documentary milieu' in: M.F. He, B.D. Schultz, and W.H. Schubert (eds.), *The Sage guide to curriculum in education* (Sage Publications, 2015), pp. 311-318; U. Flick, *An introduction to Qualitative Research* (7th Edition, Thousand Oaks: Sage Publications ltd, 2023), pp. 159-170.

22 B. Dunne, J. Pettigrew and K. Robinson (2016) 'Using historical documentary methods to explore the history of occupational therapy' *British Journal of Occupational Therapy* 79(6), pp. 376-384; U. Flick, *An introduction to Qualitative Research* (7th Edition, Thousand Oaks: Sage Publications ltd, 2023), pp. 159-170.

mistakes that might have legal/financial implications for them.²³ Furthermore, the general terms and conditions are representative as these documents are typical legal documents that are distributed to the consumer prior to the conclusion of the contract and the selected documents all have the same nature.²⁴ Lastly, the meaning of the documents is assessed as general terms and conditions are in principle meant to protect the interests of one specific party of the contractual relationship, namely the mobility usership provider. Nevertheless, the interests of consumers are naturally taken into account.²⁵

Quantity of documents

The selected number of documents is not fixed prior to the study because this number depends on the research process. After all, qualitative research does not aim at providing an accurate numerical reflection, but at providing a complete picture of the different paths that exist within the target group of the research. The choices for the document selection are not focussed on the numerical distribution of variables in a population. Therefore, in this qualitative document analysis I strive for data saturation; the point of informational redundancy will determine the number of documents analysed.²⁶ In addition to adopting this criterion of data saturation, an *a priori* sample size is also adopted.²⁷ This initial sample size is estimated at a minimum of 96 documents. This is

23 G. Payne, and J. Payne, *Key concepts in social research* (London, Sage Publications, 2004).

24 G. Payne, and J. Payne, *Key concepts in social research* (London, Sage Publications, 2004); H. Morgan (2022) 'Conducting a Qualitative Document Analysis' *The Qualitative Report* 27(1), p. 72.

25 G. Cordero-Moss, 'Standard contract terms as an alternative to legislation' in: C. Twigg-Flesner (ed.), *Research handbook on EU consumer and Contract law* (Cheltenham: Edward Elgar Publishing limited, 2016), p. 487.

26 B. Saunders, J. Sim, T. Kingstone, S. Baker, J. Waterfield, B. Bartlam, H. Burroughs and C. Jinks (2018) 'Saturation in qualitative research: exploring its conceptualization and operationalization' *Quality & Quantity* 52(4), pp. 1893-1907; H. Morgan (2022) 'Conducting a Qualitative Document Analysis' *The Qualitative Report* 27(1), p. 71; S.B. Merriam and E.J. Tisdell, *Qualitative research: A guide to design and implementation* (4th edition, San Francisco: Jossey Bass, 2016); J.J. Francis, M. Johnston, C. Robertson, L. Glidewell, V. Entwistle, M.P. Eccles and J.M. Grimshaw (2010) 'What is an adequate sample size? Operationalising data saturation for theory-based interview studies' *Psychology & Health* 25(10), pp. 1229-1245. See on data saturation (also known as informational redundancy) specifically: P.I. Fusch and L.R. Ness (2015) 'Are we there yet? Data saturation in qualitative research' *The Qualitative Report* 20(9), pp. 1408-1416; M. Sandelowski 'Theoretical saturation' in: L.M. Given (ed.), *The SAGE Encyclopedia of Qualitative Research Methods* (Thousand Oaks: Sage Publications, 2008), pp. 875-876.

27 This is done in for example: P.I. Fusch and L.R. Ness (2015) 'Are we there yet? Data saturation in qualitative research' *The Qualitative Report* 20(9), pp. 1408-1416; T. Long-Suthehall, H. Willis, R. Palmer, D. Ugboma, J. Addington-Hall, and M. Coombs (2011) 'Negotiated dying: a grounded theory of how nurses shape withdrawal of treatment in hospital critical care units' *The International Journal of Nursing Studies Advances* 48(12), pp. 1466-1474; L.M. Niccolai, C.E. Hansen, M. Credle, E.D. Shapiro (2016) 'Parents' recall and reflections on experiences related to HPV vaccination for their children' *Qualitative Health Research* 26(6), pp. 842-850; J.J. Francis, M. Johnston, C. Robertson, L. Glidewell, V. Entwistle, M.P. Eccles and J.M. Grimshaw (2010) 'What is an adequate sample size? Operationalising data saturation for theory-

based on a preferred representation of documents from each category, which results in a selection of a minimum of 16 general terms and conditions per category, namely for (a) exclusive mobility usership providers of cars, (b) exclusive mobility usership providers of two-wheelers, (c) shared mobility usership providers of cars, (d) shared mobility usership providers of two-wheelers, and (e) mobility usership collaborative sharing.²⁸ In addition, for each of these categories at least four general terms and conditions are selected from every Member State.²⁹ See the tables of each category below for the initial document selection. The choice to split between cars on the one hand and two-wheelers on the other was made because there is a considerable difference in (1) the purchase value of the vehicle, (2) the distances to be covered, and to some extent (3) the costs for repair and maintenance due to the difference in technical complexity. This could possibly lead to differences in the general terms and conditions because there are greater legal and financial risks (and obligations) associated with the car than with the two-wheeler. At the same time, I chose to merge bicycles, mopeds, and scooters together as two-wheelers because the differentiating factors above largely fall away, and these modes of transport can legally be compared. In addition, many providers of bicycles, for example, also offer other two-wheelers and in many cases use the same general conditions. The choice for this range of vehicles is probably (partly) inspired by the prohibition of scooters on public roads in the Netherlands, which resulted in Dutch car providers starting to offer alternative two-wheelers.

The number of documents to be examined can exist because of two additional rules that were adopted in selecting the general conditions. First, in case the selected mobility usership provider offers its mobility usership in two or more selected Member States the general terms and conditions of the other Member States are always selected for analysis. Second, in case the mobility usership provider offers a plurality of vehicles, the general terms and conditions of all offered vehicles are selected. Consequently, more than 16 documents could be selected as the initial sample. This is done because the providers do not necessarily apply the same general terms and conditions in every selected Member State or for every type of vehicle. It is also relevant to examine the potential differences in general terms and conditions of the same provider in different Member States because these cases are well comparable. This also applies in cases where

based interview studies' *Psychology & Health* 25(10), pp. 1229-1245; B. Saunders, J. Sim, T. Kingstone, S. Baker, J. Waterfield, B. Bartlam, H. Burroughs and C. Jinks (2018) 'Saturation in qualitative research: exploring its conceptualization and operationalization' *Quality & Quantity* 52(4), pp. 1893-1907.

28 J.J. Francis, M. Johnston, C. Robertson, L. Glidewell, V. Entwistle, M.P. Eccles and J.M. Grimshaw (2010) 'What is an adequate sample size? Operationalising data saturation for theory-based interview studies' *Psychology & Health* 25(10), pp. 1229-1245.

29 This category of means of transport is divided into (1) cars and (2) two-wheelers, which are (electric) bicycles, mopeds, and scooters.

different general terms and conditions may apply to different types of vehicles offered by the same provider. In addition to the adoption of the pursuit of data saturation and the *a priori* sample size, I also adopt a stopping criterion of four documents. This means that if no level of saturation is reached after analysing the initial sample size, four new documents (one per Member State) are selected until the level of saturation is reached.³⁰

In conclusion, the principle of saturation leads to a comprehensive picture of self-regulation within the mobility usership sector where the focus is expressly not on an accurate numerical reflection but on the substantive factors and characteristics of self-regulation. The *a priori* sample size estimate of 96 documents with a stopping criterion of four serves as the starting point where the number of documents could be expanded if the saturation level was not reached.

Document selection

In this paragraph, the selected documents of each mobility usership typology and the considerations that have been made are specified. When general terms and conditions apply, this is indicated with 'GTC' in the tables; when additional conditions to the agreement apply, this is indicated with 'ATC' in the tables.

Based on the search terms in Table 17, nine exclusive mobility usership providers of cars were selected. Table 18 below shows the document selection. For each Member State, four providers were selected. Additional conditions apply for the Dutch car providers and these additional conditions are the same for each provider affiliated with the Dutch quality mark. As mentioned in the previous paragraph, these additional conditions are analysed. This means that a total of 20 documents are analysed for this type of mobility usership.

30 J.J. Francis, M. Johnston, C. Robertson, L. Glidewell, V. Entwistle, M.P. Eccles and J.M. Grimshaw (2010) 'What is an adequate sample size? Operationalising data saturation for theory-based interview studies' *Psychology & Health* 25(10), pp. 1229-1245; B. Saunders, J. Sim, T. Kingstone, S. Baker, J. Waterfield, B. Bartlam, H. Burroughs and C. Jinks (2018) 'Saturation in qualitative research: exploring its conceptualization and operationalization' *Quality & Quantity* 52(4), pp. 1893-1907.

Table 18: Selection of general terms and conditions of exclusive mobility usership providers of cars

(a) Exclusive mobility usership B2C providers of cars					
	<i>The Netherlands</i>	<i>Belgium</i>	<i>France</i>	<i>Germany</i>	
<i>ALD Automotive</i>	GTC & ATC			GTC	
<i>Arval</i>	GTC & ATC	GTC	GTC	GTC	
<i>Direct Lease</i>	GTC & ATC	GTC			
<i>Formule LLD</i>			GTC		
<i>Leaseplan</i>	GTC & ATC	GTC	GTC		
<i>Like2drive</i>				GTC	
<i>Qarson</i>			GTC		
<i>Sixt Leasing</i>				GTC	
<i>Smartrent</i>		GTC			
Total	8	4	4	4	20

Table 19 shows the initial document selection for exclusive mobility usership providers of two-wheelers. In this typology, there is less overlap in the mobility usership providers that offer services in more than one Member State. Except for a few minor deviations, *Swapfiets* and *Dance* apply the same general terms and conditions in every Member State. A total of 16 documents are analysed for this type of mobility usership.

Table 19: Selection of general terms and conditions of exclusive mobility usership providers of two-wheelers

(b) Exclusive mobility usership B2C providers of two-wheelers					
	<i>The Netherlands</i>	<i>Belgium</i>	<i>France</i>	<i>Germany</i>	
<i>ANWB</i>	GTC				
<i>Bikeloc</i>			GTC		
<i>Dance</i>			GTC	GTC	
<i>De Fietsambassade Gent</i>		GTC			
<i>E-bike to go</i>		GTC			
<i>GT Bike</i>				GTC	
<i>Lease Express</i>	GTC				
<i>LeaseGemak</i>	GTC				
<i>Leasingshop</i>				GTC	
<i>Swapfiets</i>	GTC	GTC	GTC	GTC	
<i>Véligo</i>			GTC		
<i>Zzoomer</i>		GTC			
Total	4	4	4	4	16

The initial document selection of shared mobility usership providers of cars is displayed in Table 20. No additional terms and conditions are declared applicable by any of the mobility usership providers. Except for minor deviations, *Cambio*, *GreenMobility* and *ShareNow* apply the same general terms and conditions in every Member State, whereas *Europcar* applies terms and conditions that differ between each Member State. *Ubeeqo* also offers use of cars in Germany, but only B2B. Therefore, *Ubeeqo* is excluded from the study of German share mobility. A total of 16 documents are analysed for this type of mobility usership.

Table 20: Selection of general terms and conditions of shared mobility usership providers of cars

(c) Shared mobility usership B2C providers of cars					
	<i>The Netherlands</i>	<i>Belgium</i>	<i>France</i>	<i>Germany</i>	
<i>Cambio</i>		GTC		GTC	
<i>Claus2you</i>		GTC			
<i>Europcar</i>	GTC	GTC	GTC	GTC	
<i>Greenmobility</i>	GTC	GTC			
<i>Greenwheels</i>	GTC				
<i>Marguerite</i>			GTC		
<i>ShareNow</i>	GTC		GTC	GTC	
<i>Teilauto</i>				GTC	
<i>Ubeeqo</i>			GTC		
Total	4	4	4	4	16

Table 21 shows the initial document selection of shared mobility usership providers of two-wheelers. Again, no additional terms and conditions have been declared applicable by any of the mobility usership providers. However, it is important to recognise that in this mobility usership typology, the providers often offer several two-wheeled modes of transport, such as mopeds, bicycles, and scooters. This may be prompted by the ban on electric scooters on public roads in the Netherlands. In any case, the following applies per provider: *Bird* offers bicycles and scooters in France and Belgium, and only bicycles in the Netherlands. *Donkey Republic* offers bicycles in all Member States. *Lime* and *Tier* offer bicycles, mopeds and scooters in France, Belgium, and Germany. In the Netherlands they offer bicycles and mopeds. *Emmy* only offers scooters in Germany. The providers that offer multiple modes of transport apply the same general terms and conditions in all shared use contracts. By examining one set of these general terms and conditions per provider, all the different modes of transport are included in the analysis. As a result, a total of 32 shared mobility services are included here, whereas 16 documents are analysed for this mobility usership typology.

Table 21: Selection of general terms and conditions of shared mobility usership providers of two-wheelers

(d) Shared mobility usership B2C providers of two-wheelers					
	<i>The Netherlands</i>	<i>Belgium</i>	<i>France</i>	<i>Germany</i>	
<i>Bird</i>	GTC	GTC	GTC		
<i>Donkey Republic</i>	GTC	GTC	GTC	GTC	
<i>Emmy</i>				GTC	
<i>Lime</i>	GTC	GTC	GTC	GTC	
<i>Tier</i>	GTC	GTC	GTC	GTC	
Total	4	4	4	4	16

Table 22 shows the document selection for collaborative platform sharing. After a thorough search, it was not possible to find a minimum number of 16 platforms that offer C2C mobility sharing through a platform. While this undoubtedly limits the results of the analysis on this matter, the results can still be exemplary for C2C sharing via collaborative platforms. Both *Getaround* and *SnappCar* apply the same general terms and conditions in every Member State, except for minor deviations.

Table 22: Selection of general terms and conditions of C2C mobility sharing via collaborative platforms

(e) C2C mobility sharing via collaborative platforms					
	<i>The Netherlands</i>	<i>Belgium</i>	<i>France</i>	<i>Germany</i>	
<i>CarAmigo</i>		GTC			
<i>Cozywheels</i>		GTC			
<i>GetAround</i>		GTC	GTC	GTC	
<i>Ouicar</i>			GTC		
<i>SnappCar</i>	GTC			GTC	
<i>Wibee</i>		GTC			
Total	1	4	2	2	9

Table 23 shows the document selection for formal C2C collaborative sharing. After a thorough search, it was not possible to find a minimum of 16 (model) contracts that regulate C2C collaborative sharing to meet the *a priori* sample size. This indisputably limits the results of the analysis. However, the results can still be exemplary for formal C2C collaborative sharing in case of the use of a model contract.

Table 23: Selection of model contracts of formal C2C collaborative sharing

(f) Formal C2C collaborative sharing					
	<i>The Netherlands</i>	<i>Belgium</i>	<i>France</i>	<i>Germany</i>	
<i>ADETEC</i>			GTC		
<i>Agenda 21 Herzogenaurach</i>				GTC	
<i>Dutch Association for Shared Car Use</i>	GTC				
<i>General German Automobile Club</i>				GTC	
Total	1	0	1	2	4

To ensure comprehensiveness, no terms and conditions or model contracts are selected for (g) informal C2C collaborative sharing initiatives and (h) collaborative sharing as a cooperative. For (g) informal C2C collaborative sharing initiatives, no terms and conditions or model contracts have been selected because the initiatives have not been formalised, which means that they cannot be examined based on the current research design. This could be further examined with a different research design, for example with interviews, but this is not done due to the scope and feasibility of this research. Consequently, this form of collaborative sharing is therefore not discussed in paragraph 7.3. Furthermore, the (h) cooperatives are also often organised on a small scale as a neighbourhood initiative and are often shielded from outsiders and/or non-members. This complicates the identification of these cooperatives that offer collaborative mobility sharing. Despite this challenge, I identified and contacted approximately 10 potential cooperatives that provide in the collaborative sharing of vehicles and meet the right conditions. I reached out to these cooperatives through email or a contact form on their official website. Unfortunately, I have not received a (positive) response from any of them. As a result, this form of collaborative sharing as a cooperative is therefore not discussed in paragraph 7.3. Here to, collaborative sharing as a cooperative could have been examined with a different research design, but it is not possible at this time due to the scope and feasibility of this research.

6.3.2 *Method of analysis*

To analyse and interpret the documents, I organised the information from the document selection by defining the units of meaning. This includes some objective categories, namely (1) the name of the provider, (2) the type of mobility usership model, and (3) the country where the provider applies the general terms and conditions. Once these elements of information are defined, I designed a coding system, which is discussed below.

Coding system

A combination of deductive and inductive coding is chosen for coding the data.³¹ The codes are based on thematic constructs, which are formulated in paragraph 5.5 and are based on fundamental consumer rights that touch upon the core of the contract. As a result, I expect to find in the document analysis (1) the right to be informed, (2) the right to change your mind, (3) the right to conformity, (4) formal requirements, and (5) other consumer rights. Furthermore, I opt for inductive or open coding because the documents may contain information that run the risk of not being analysed by deductive coding alone. This would not be in line with the research objective. The objective is to investigate to what extent the providers (voluntarily) offer a higher level of protection than the legislative minimum that applies to them. This would imply that if a provider grants consumer rights on a theme that is not formulated above, it may not be reflected in the analysis. I want to prevent this with open coding.³²

Appendix 6 comprehends a list of the codes used for the analysis.

**6.4 RESULTS ON EXCLUSIVE MOBILITY USERSHIP PROVIDERS OF CARS
AND TWO-WHEELERS**

In this section the results of the qualitative analysis on exclusive mobility usership providers of cars and two-wheelers are discussed. This is done per Member State and mode of transport. First, some general observations on the selected providers are discussed. Subsequently, I examine per fundamental right (a) whether and, if so, how consumer rights are regulated in the general terms and conditions, (b) whether there are differences between providers and/or between Member States and ultimately (c) whether there are differences between the means of transport. This implies that my focus lies on the *de facto* inequivalences assessed in paragraph 5.5. This means that the Unfair Commercial Practices Directive and the Unfair Contract Terms Directive will not be discussed here because they are applicable to mobility usership and thus provide equivalent protection. Accordingly, I explore the inequivalences that follow from the Consumer Sales Directive, the Consumer Credit Directive, and the Consumer Rights Directive.

Several parts of the general terms and conditions will not be included in this analysis because they fall outside its scope, such as the processing of personal data, insurance, tax, and dispute resolution. In addition, some terms and conditions are also partly be regulated nationally.

31 A. Bryman, *Social research methods* (New York: Oxford University Press, 2012), p. 290.

32 A. Bryman, *Social research methods* (New York: Oxford University Press, 2012), p. 290.

When discussing the results following the study of the general terms and conditions, reference is made to the name of the provider (e.g., *Arval* states). This always refers to the general terms and conditions of that provider. This form is chosen to improve readability.

Before reading the remainder of this chapter, I would like to inform the reader that this chapter discusses all the individual findings per provider and analyses them in detail, necessary to reach substantiated conclusions. For the reader who is looking for the overall findings per fundamental consumer right, I recommend focusing on the interim conclusions (paragraph 6.4.1.3, 6.4.2.3, 6.4.3.7 and 6.4.4.3) and final conclusion (paragraph 6.5) in this chapter to get a comprehensive picture of the most important findings.

Overarching observations

Exclusive mobility usership providers of both cars and two-wheelers offer their terms and conditions in the language used in the Member State where the mobility usership is offered.³³ Furthermore, in cases where it is explicitly stated which law is applicable to the agreement, the law of the pertinent Member State is in principle chosen.³⁴ Only the Belgian provider *Swapfiets* applies Dutch law.³⁵ The question is to what extent this is permissible under private international law. Choice of law clauses are permitted in consumer law. However, article 6 Rome I Regulation provides that B2C contracts are governed by the law of the consumer's place of residence, provided that the seller carries out his commercial or professional activities in the country where the consumer is domiciled or directs—such activities—b— whatever means—to (also) that country. However, if the professional focuses on national activities, article 6 Rome I Regulation does not apply and does not receive additional protection based on the Rome I Regulation.³⁶ The European Court of Justice formulates a relatively clear rule. A choice of law clause without the warning of Article 6 paragraph 2 of Rome I Regulation that notwithstanding the choice of law, the consumer is entitled to the protection afforded to him by the mandatory law of the country of his residence, is in consumer contracts (*ex officio*) voidable.³⁷ Providers such as *Swapfiets* can therefore declare Dutch law applicable in their general terms and conditions, but based on the above-mentioned judgment providers should also inform the consumer about the fact that the choice of law clause does not affect the protection the consumer enjoys under the mandatory law of the country of the consumer's residence.³⁸

33 Memo *Language use*.

34 Quotation 3:2; 4:32; 7:2; 8:37; 9:29; 10:2; 11:20; 12:27; 15:2; 16:16; 18:33; 19:34; 20:23; 24:19; 26:17; 27:34; 30:12; 32:12; 34:14; 35:16.

35 Quotation 29:16.

36 J.H.M. Spanjaard (2016) 'Rechtskeuzebedingen in consumentenovereenkomsten: spitsroeden lopen' *Contracteren* 2016-4, pp. 118-121.

37 CJEU Case C-191/15, 28 July 2016, ECLI:EU:C:2016:612 (*VKI/Amazon*); J.H.M. Spanjaard (2016) 'Rechtskeuzebedingen in consumentenovereenkomsten: spitsroeden lopen' *Contracteren* 2016-4, pp. 118-121.

38 CJEU Case C-191/15, 28 July 2016, ECLI:EU:C:2016:612 (*VKI/Amazon*); J.H.M. Spanjaard (2016) 'Rechtskeuzebedingen in consumentenovereenkomsten: spitsroeden lopen' *Contracteren* 2016-4, pp. 118-121.

All examined exclusive mobility usership providers of cars in the Netherlands are affiliated with the Dutch private lease quality mark, which claims to enable reliable, responsible, and safe private lease contracts. The conditions of this quality mark are developed in collaboration with the private lease sector and the Dutch Consumers Association (*Consumentenbond*).³⁹ The quality mark largely determines the general terms and conditions and is the same for all examined Dutch exclusive mobility usership providers of cars. From this quality mark may follow a higher level of consumer protection, especially now that the quality mark is the result of a collaboration between the Dutch private lease sector and the Dutch Consumers Association. These general terms and conditions also refer to additional terms and conditions, which are unique for every provider. Both documents are examined. Furthermore, such a quality mark does not exist for exclusive mobility usership providers of two-wheelers.

Table 24: Legend of tables on empirical results Table 25 up until Table 39

Legend	
–	Less protection than the (purpose of the) legal framework (whether applicable or not); negative inequivalence.
+	More protection than the (purpose of the) legal framework (whether applicable or not); positive inequivalence.
=	Equivalent to the (purpose of the) legal framework (whether applicable or not); equivalence.
Yes	A termination fee does apply.
No	No termination fee applies.

Table 24 provides an overview of the extent to which the provider complies with the examined directives, or in other words, the extent to which the provider offers (increased) self-regulatory protection. For this overview, symbols are used to indicate the relationship to the legislation, whereby the benchmark are the examined directives. When a minus sign (-) is used, this means that the provider offers less protection than the legal framework (applicable or not). In such a case, this implies a negative inequivalence in protection. When a plus sign (+) is used, this means that the provider offers more protection than the legal framework (whether applicable or not). In such a case, this implies a positive inequivalence in protection. When an equal sign (=) is used, this means that the provider offers equivalent protection to the legal framework (applicable or not). Furthermore, (Yes) and (No) in the table clarify whether a termination fee applies. Table 24 shows a legend of all tables on the empirical results of chapter 6 and 7 (Table 25 up until Table 39).

³⁹ Stichting Keurmerk Private Lease ‘Wie zijn wij?’ <<https://www.keurmerkprivatelease.nl/het-keurmerk/wie-zijn-wij>> accessed 20 March 2023.

Table 25: Results on exclusive mobility usership providers

Typologies		Right to be informed												
Countries	Providers	Clear and comprehensible manner	SECCI form	Ancillary services	Consequences of late payments	Early repayment	Cost structure	Database consultation	Copy of draft agreement	Required sureties and insurance	The right of withdrawal	Procedure right to terminate	Change in borrowing rate	
(a) Exclusive MU B2C providers of cars	NL	ALD Automotive	+	-	=	=	=	-	-	-	=	=	=	
		Arval	+	-	=	=	=	-	-	-	=	=	=	
		Direct Lease	+	-	=	=	=	-	-	-	=	=	=	
		LeasePlan	+	-	=	=	=	-	-	-	=	=	=	
	BE	Arval	=	-	=	=	-	-	-	-	=	=	=	
		Direct Lease	=	-	=	=	-	-	-	-	=	=	=	
		LeasePlan	=	-	=	=	-	-	-	-	=	=	=	
	FR	Smartrent	=	-	=	=	-	-	-	-	=	=	=	
		Arval	+	-	=	=	-	-	=	-	=	=	-	
		Formule LLD	=	-	=	=	-	-	-	-	=	=	-	
		LeasePlan	=	-	=	=	-	-	=	-	=	=	-	
	GER	Qarson	=	-	=	-	-	-	-	-	-	-	-	
		ALD Automotive	=	-	=	=	-	-	-	-	-	=	=	
		Arval	=	-	=	=	-	-	-	-	-	-	=	
		Like2drive	=	-	=	=	-	-	-	-	-	-	-	
	(b) Exclusive MU B2C providers of two-wheelers	NL	Sixt Leasing	=	-	=	=	-	-	-	-	=	=	=
ANWB			+	-	=	=	-	-	-	-	=	=	=	
Lease Express			=	-	=	=	-	-	-	-	-	=	=	
LeaseGemak			=	-	=	=	-	-	=	-	-	=	=	
BE		Swapfiets	=	-	=	=	-	-	-	-	-	=	=	
		De Fietsambassade Gent	=	-	=	=	-	-	-	-	-	=	=	
		E-bike to go	=	-	=	=	-	-	=	-	-	=	=	
		Swapfiets	=	-	=	=	-	-	-	-	-	=	=	
FR		Zzoomer	=	-	=	-	-	-	-	-	-	-	=	
		Bikeloc	=	-	=	=	-	-	-	-	-	=	-	
		Dance	=	-	=	=	-	-	=	-	-	=	=	
		Véligo	=	-	=	=	-	-	-	-	-	=	=	
GER		Swapfiets	=	-	=	=	-	-	-	-	-	=	=	
		Dance	=	-	=	=	-	-	-	-	-	=	=	
		GT Bike	=	-	=	=	-	-	=	-	-	=	=	
		Leasingshop	=	-	=	-	-	-	-	-	-	=	=	
Swapfiets	=	-	=	=	-	-	-	-	-	=	=			

6 STUDY OF THE GENERAL TERMS AND CONDITIONS ACCORDING TO SECTOR CONDUCT
OF EXCLUSIVE MOBILITY PROVIDERS

The right to change your mind			The right to conformity								Consumer rights and commercial guarantees			
Right of withdrawal	Right to early termination	Termination fee	Remedy: repair	Remedy: replacement	Repair or replacement within reasonable time	Alternative remedy when choice is disproportionate	Remedy: price reduction	Remedy: right to terminate	Maintenance	Roadside assistance	Commercial guarantee	Early repayment	Manner to calculate the annual costs percentage	Creditworthiness assessment
=	+	Yes	=	=	=	=	-	-	=	=	=	-	-	=
=	+	Yes	=	=	=	=	-	-	=	=	=	=	-	=
=	+	Yes	=	=	=	=	-	-	=	=	=	=	-	=
=	+	Yes	=	-	-	=	-	-	=	=	=	-	-	-
=	+	Yes	=	-	-	=	-	-	=	=	=	-	-	-
=	=	No	-	-	-	=	-	-	=	=	=	-	-	-
=	+	Yes	-	-	-	-	-	-	-	=	=	-	-	=
=	=	No	-	-	-	-	-	-	-	-	=	-	-	-
=	+	Yes	=	=	=	=	-	-	-	-	+	-	-	=
=	+	Yes	=	=	=	=	-	-	-	-	=	-	-	=
=	=	No	=	=	-	=	-	-	=	-	=	-	-	=
=	+	Yes	=	=	=	=	-	-	-	-	+	-	-	-
=	+	Yes	=	-	-	+	-	-	=	=	=	-	-	-
=	=	No	=	=	=	+	-	-	=	-	=	-	-	-
=	+	Yes	-	-	-	=	-	-	-	-	+	-	-	-
=	+	No	=	=	=	+	-	-	=	-	=	-	-	-
=	+	No	-	-	-	=	-	-	-	-	=	-	-	-
=	+	No	=	=	=	+	-	-	=	-	=	-	-	=
=	+	No	=	=	=	+	-	-	=	-	=	-	-	-
=	=	No	-	=	-	=	-	-	-	=	=	-	-	-
=	+	No	=	=	=	+	-	-	=	=	=	-	-	-

6.4.1 *The right to be informed*

The information obligations arising from the non-applicable legal framework (the Consumer Credit Directive) are partially superseded by the applicable legal framework (the Consumer Rights Directive) because various information components from the Consumer Rights Directive that the provider should offer to the consumer also follow from the non-applicable Consumer Credit Directive. The exact inequivalences that follow from the examined directives for mobility usership consumers are summarised in Table 13. In this paragraph, the precontractual information obligations and practices (paragraph 6.4.1.1) and contractual information obligations (paragraph 6.4.1.2) are discussed and the overlap where relevant is addressed. At the same time, the non-applicable legal framework is the starting point. The (in)equivalences that follow from self-regulation for the right to be informed are shown in Table 26.

The Consumer Rights Directive, the Unfair Contract Terms Directive, and the Consumer Credit Directive set conditions regarding the way information is made available to consumers. According to the Consumer Rights Directive and the Unfair Contract Terms Directive, this must be done in a clear and comprehensible manner before the consumer is bound by the contract.⁴⁰ As elaborated on in paragraph 4.4.1, 4.4.4, 5.2.1 and 5.4.1, it is not sufficient to provide the information merely as part of the general terms and conditions. The requirement of conciseness, clarity, and comprehensibility means that the individual elements of the mandatory information should be brought to the attention of the consumer. The Consumer Credit Directive states that providers should enable the consumer to know their rights and obligations under an agreement by informing the consumer in a clear and concise way.⁴¹ To evaluate whether the terms and conditions of providers are clear, concise, and comprehensible, I employed the benchmark of the average consumer, as assumed by the European Court of Justice, who describes the average consumer as a ‘reasonably well-informed and reasonably observant and circumspect average consumer’ (see paragraph 5.4.1).⁴²

The general terms and conditions and the additional terms and conditions of all Dutch car providers (*ALD Automotive, Arval, Direct Lease* and *Leaseplan*) are drafted along the lines of these conditions with a customer-oriented question-and-answer format and appear

40 Article 5(1), 6(1) Consumer Rights Directive; Recital of the Unfair Contract Terms Directive. Also see Chapter 5 paragraph 5.2.1 and 5.4.1.

41 Recital 31 Consumer Credit Directive 2008. The SECCI form contributes to this way of providing information to the consumer and is discussed further below.

42 See paragraph 5.4.1. CJEU, Case C-210/96, 16 July 1998, ECLI:EU:C:1998:369 (*Gut Springenheide*); CJEU, Case C-186/16, 20 September 2017, ECLI:EU:C:2017:703 (*Andriuciu*).

to comply with the examined directive.⁴³ Although the Belgian, German, and French car providers do not use this format, the general terms and conditions appear to be clear, concise, and comprehensible. The French provider *Arval* is the only provider to opt for visual support of the general terms and conditions. For example, it is indicated when the consumer should pay attention with a red block and exclamation mark with 'attention' and the consequences of certain steps are explained with green blocks. This provider is the most consumer-friendly in terms of the method of information provision, but all car providers meet the legal requirement of informing in a clear, concise, and comprehensible manner.⁴⁴

As far as the Dutch providers of two-wheelers (*ANWB*, *Lease Express*, *LeaseGemak*, *Swapfiets*) are concerned, the information is also reported in a clear, concise, and comprehensible manner. *ANWB* is the only Dutch provider that offers the information in a consumer-oriented question-and-answer format, like the Dutch car providers.⁴⁵ The Belgian (*De Fietsambassade Gent*, *Swapfiets*, *Zzoomer*, and *E-bike to go*) and German (*Dance*, *GT Bike*, *Leasingshop* and *Swapfiets*) providers of two-wheelers also provide information in their general terms and conditions in a clear, concise and comprehensible manner.⁴⁶ Also the French providers (*Bikeloc*, *Dance*, *Swapfiets*, and *Véligo*) provide their information in a clear, concise and comprehensible manner.⁴⁷

6.4.1.1 Precontractual information obligations and practices

Article 4 of the Consumer Credit Directive imposes the obligation to include standard information in advertising.⁴⁸ In addition to the fact that this legal obligation does not apply to exclusive mobility usership contracts, it is also impossible to assess whether the providers increase protection; for this type of analysis, advertising should be the subject of the research. Therefore, the assessment of whether lease providers increase the level of protection on this component is not carried out.⁴⁹

The SECCI form

Before discussing the various components of the information rights, the formal requirements of the provision of information as described in article 5(1) of the Consumer Credit Directive is discussed. This article states that in good time before the consumer is bound by the agreement, the provider shall offer the consumer with the necessary information to allow

43 Memo *Language use*.

44 Memo *Language use*.

45 Memo *Language use*.

46 Memo *Language use*.

47 Memo *Language use*.

48 Article 4 Consumer Credit Directive 2008; Table 13.

49 See paragraph 5.5.1 on the assessment of the law on this matter.

comparison between different offers and make an informed decision on whether or not to conclude a credit agreement. This means that consumers should be given enough time to inform their decision before signing an agreement.⁵⁰ The *ratio legis* behind this SECCI form is to ensure transparency in B2C transactions by presenting key information in a standardized format to enable consumers to compare different offers and make informed decisions about whether to enter into an agreement. In my opinion, the rationale of this provision also applies to exclusive use because exclusive use has many similarities with consumer credit and inequivalent protection is not justified. Nevertheless, none of the lease providers offer this in the way required by the national legal provisions that implement the Consumer Credit Directive, namely on paper or on another durable medium by means of the Standard European Consumer Credit Information (SECCI) form.⁵¹ This means that for all providers of car and two-wheelers, inequivalent protection exists in this area, compared to the provisions in the Consumer Credit Directive as far as this formal requirement is concerned. After all, whether or not the SECCI form is provided says nothing about the substantive protection of the shared mobility consumer. The substantive protection is discussed below.

Precontractual information components included in the lease contract

The precontractual information components that do not apply to mobility usership consumers follow from the Consumer Credit Directive and are summarised in Table 13.⁵² These components will be discussed below. Furthermore, not all precontractual information components that the provider should offer to the consumer – such as the identity of the trader and the main characteristics of the service – necessarily follow from the general terms and conditions (paragraph 4.4.1 and paragraph 5.2.1).⁵³ Various precontractual information components follow from the main lease contract or on the main website of the provider. Since such a lease contract is an individual offer, the extent to which the information requirements are met cannot be examined fully as these offers are not openly available.⁵⁴ This means that parts of the (pre)contractual information obligations are met in the lease contract itself instead of in the general terms and conditions. The obligation

50 European Commission, 'Study on possible impacts of a revision of the CCD', B-104 (Brussels, May 2021) <https://commission.europa.eu/system/files/2021-06/study_possible_impacts_ccd_revision_main_web.pdf> accessed 29 September 2023.

51 Article 5(1) Consumer Credit Directive 2008. The providers are deemed to have fulfilled the information requirements if he has supplied the Standard European Consumer Credit Information.

52 Article 5(1)(e), (f), (g), (j), (k), (l), (m), (n), (p), (q), (r), and (s) Consumer Credit Directive 2008.

53 For a full list of the information requirements see Article 5(1) Consumer Rights Directive, Article 6(1) Consumer Rights Directive, and Article 5(1) Consumer Credit Directive 2008. These information requirements involve *inter alia* providing information about the service and the price, where applicable, the sureties required, the period during which the creditor is bound by the precontractual information, and the existence of costs payable by the consumer to a notary on conclusion of the credit agreement.

54 Article 5(1)(a)(b)(c)(f), 6(1)(a)(b)(c)(e)(o) Consumer Rights Directive; Article 5(1)(a)(b)(c)(d)(h)(i) Consumer Credit Directive 2008. Also see paragraph 4.4.1 and paragraph 5.2.1.

to include precontractual information components into the core contract follows from the Dutch general terms and conditions such as the type of the leased car, the duration of the contract, and the monthly instalments to be paid.⁵⁵ For example, the terms and conditions of the Dutch car providers specify the information on the main characteristics of the services, the arrangements for payment, delivery, performance and the conditions, time limit and procedures for exercising the right of withdrawal.⁵⁶

Contrary to the Dutch car providers, three of the four Belgian car providers clearly state the identity of the provider in their general terms and conditions, namely *Arval*, *Direct Lease* and *LeasePlan*.⁵⁷ Only *Smartrent* does not explicitly indicate their identity in the general terms and conditions. Furthermore, the Belgian car providers elaborate on the main characteristics of the lease and indicate that the total price and the duration of the lease shall be included in the main contract.⁵⁸ *Smartrent* refers to the special conditions for the total price of the lease and states that the special conditions are an essential part of the lease contract.⁵⁹ The German car providers *ALD Automotive*, *Arval*, and *Sixt Leasing* clearly mention in their general terms and conditions their identity, whereas *Like2drive* does not.⁶⁰ *Like2drive* presents their general terms and conditions on the website where they also provide information on their identity.⁶¹ The German car providers also refer to the core lease contract for information on the main characteristics.⁶² Furthermore, *ALD Automotive*, *Arval*, and *Like2drive* refer to the core contract for the duration of the contract. *Sixt Leasing* does not mention this specifically.⁶³ Likewise, the French car providers inform the consumer on their identity.⁶⁴ *Arval*, *LeasePlan*, *Formule LLD* inform the consumer about the main characteristics of the service, the price, and the duration of the lease.⁶⁵ However, *Qarson* does not specify that these information obligations are included in the core contract.⁶⁶

For all providers of two-wheelers, the provider's identity is apparent to the consumer from the general terms and conditions.⁶⁷ The main characteristics of the service are not fully

55 Quotation 3:14; 7:10; 10:10; 15:10.

56 Quotation 3:3; 3:4; 3:5; 3:9; 7:3; 7:4; 7:5; 7:9; 10:3; 10:4; 10:5; 10:9; 15:3; 15:4; 15:5; 15:9. Article 5(1)(a)(g) Consumer Rights Directive; Article 6(1)(a)(g)(h) Consumer Rights Directive. Also see paragraph 5.5.1.

57 Quotation 4:1; 9:1; 12:1.

58 Quotation 4:2; 9:2; 9:12; 12:2; 12:12; 19:1; 4:4; 9:3; 12:3; 19:2; 19:3.

59 Quotation 19:2; 19:3. These special conditions are not accessible and therefore not included in the analysis.

60 Quotation 1:1; 8:1; 18:1.

61 *Like2drive*, <<https://like2drive.de/agb>> accessed 20 April 2023. Also see Quotation 16:1.

62 Quotation 1:5; 1:6; 8:2; 16:3; 18:2.

63 Quotation 1:7; 8:3; 16:4.

64 Quotation 5:1; 11:1; 13:1; 17:1.

65 Quotation 5:2; 11:2; 13:2.

66 Quotation 17:2.

67 Quotation 20:1; 21:1; 22:1; 23:1; 24:1; 25:1 26:1; 27:1; 28:1; 29:1; 30:1; 31:1; 32:1; 33:1; 34:1; 35:1.

specified in the general terms and conditions but can be found on the provider's websites and/or the lease contract. The general terms and conditions of the Dutch and Belgian providers of two-wheelers often hold the obligation to include precontractual information components in the main lease contract, such as the type of lease (subject), the price and the duration of the lease.⁶⁸ This also applies for the German and French providers.⁶⁹

Information on ancillary services

The Consumer Credit Directive also states that lease providers should inform in their terms and conditions on the obligation, if any, to enter an ancillary service contract relating to the agreement, where the conclusion of such a contract is compulsory in order to obtain the contract or to obtain it on the terms and conditions marketed.⁷⁰ Ancillary services contain the contracts where the conclusion is compulsory in order to obtain mobility usership or to obtain mobility usership on the terms and conditions marketed. Other services are those that may or may not be part of the contract but are not obligatory to conclude. Furthermore, the information obligation of the providers is discussed, because this follows from the scope of this information obligation. The scope or magnitude of any obligatory ancillary service is expressly not discussed as this goes beyond the information obligation.

None of the Dutch car providers oblige the consumer to enter into an ancillary service but they do mention the optional ancillary services.⁷¹ This is also the case for the Belgian car providers where optional ancillary services are available.⁷² Only the Belgian provider *Smartrent* does not explicitly mention the possibility of taking out ancillary services and states that *Smartrent* is mandated by the consumer to conclude an assistance contract with the brand on the consumer's behalf and according to the conditions described in the special conditions of this lease agreement.⁷³ The German car providers *Sixt Leasing*, *ALD*

68 Quotation 20:1; 20:2; 24:3; 26:1; 26:2; 27:1; 27:2; 27:3; 29:3; 29:2; 32:1; 32:2; 32:3; 34:2; 34:3; 35:3; 35:4.

69 Quotation 22:4; 22:5; 25:2; 25:3; 28:2; 28:3; 30:2; 30:3; 21:2; 21:3; 21:4; 21:5; 23:2; 23:3; 31:2; 31:3; 33:2; 33:4; 33:5.

70 Article 5(1)(k) Consumer Credit Directive 2008.

71 Quotation 3:15; 7:11; 10:11; 15:11. *Arval* refers, to a *Comfort Package* with which extra benefits can be obtained against payment, see Quotation 6:1; 6:2; 6:3; 6:4. *Leaseplan* refers to two ancillary services, namely an insurance for damage on passengers and the option to have winter tires installed on the car, see Quotation 14:1; 14:2; 14:3. *Direct Lease* mentions the possibility of having a replacement car available more quickly at additional costs and offers a Passenger Accident Insurance and a Passenger Damage Insurance, see Quotation 10:12; Quotation 10:22; 10:13. *ALD Automotive* offers winter tires as an ancillary service, see Quotation 2:1.

72 *Arval* mentions insurance and fuel card, winter tires, see Quotation 4:5; 4:8; 4:10; 4:9. *Direct Lease* offers a replacement car in case of immobilization after 24 hours, *Direct Lease Assistance* abroad, driver insurance, all season tires, protection plan, see Quotation 9:4. *Leaseplan* offers no ancillary services.

73 Quotation 19:4.

Automotive and *Arval* offer optional ancillary services.⁷⁴ *Sixt Leasing* offers an additional agreement for full service, the terms and conditions of this ancillary agreement are attached to the general terms and conditions.⁷⁵ *ALD Automotive* offers several ancillary services, namely (i) a technical service, (ii) a tire service and (iii) an insurance service.⁷⁶ The French car providers do not oblige consumers to enter into ancillary services, but do offer optional ancillary services such as maintenance, assistance plus, and tires.⁷⁷ Only *Qarson* does not specify the ancillaries but only mentions that the consumer can add financing options and additional benefits or services.⁷⁸

ANWB, a Dutch provider of two-wheelers offers their consumers a mandatory (included in the lease price) roadside assistance bicycle service and insurance against theft and damage.⁷⁹ *LeaseGemak* offers the consumer optional ancillary services, namely servicing, compensation for repairs, non-life insurance, theft insurance, other insurance policies, roadside assistance, and replacement of two-wheeler.⁸⁰ *Lease Express* and *Swapfiets* on the other hand, do not oblige consumers to conclude (or offer optional) ancillary services. The Belgian providers of two-wheelers *De Fietsambassade Gent* and *Swapfiets* do not oblige consumers to conclude (or offer optional) ancillary services. Although *Zzoomer* and *E-bike to go* have two types of contract options, this is a contract variation and not an ancillary service.⁸¹ None of the Belgian providers oblige the consumer to enter an ancillary service. The German providers of two-wheelers *Dance*, *GT Bike* and *Swapfiets* do not oblige consumers to conclude or offer optional ancillary services. Although *Leasingshop* also does not oblige consumers to conclude an ancillary service, *Leasingshop* does offer the option of full-service repair.⁸² None of the French providers of two-wheelers oblige consumers to conclude ancillary services. *Bikeloc* offers the consumer the opportunity to subscribe to optional ancillary services before the contract is concluded. However, their general terms and conditions do not specify which services this involves.⁸³ *Véligo* also offers optional ancillary services such as the delivery of the vehicle to the consumer's home address, a training in handling the two-wheeler, and an insurance against theft and

74 Quotation 1:3; 1:10; 1:12; 1:13; 1:14; 8:11; 18:3; 18:11.

75 Quotation 18:3; 18:11. Insurance is to be arranged by the consumer, unless the consumer concluded a full-service contract.

76 Quotation 1:3; 1:10; 1:12; 1:13; 1:14. *ALD Automotive* offers ancillaries, provided that these services are not agreed in advance as non-optional service components of the leasing contract.

77 Quotation 5:5; 5:6; 5:7; 5:8; 5:9; 5:10; 11:4; 11:5; 11:6; 11:7; 11:8; 11:9; 13:4; 17:4; 17:5.

78 Quotation 17:4.

79 Quotation 20:5; 20:6; 20:10.

80 Quotation 27:10; 27:11; 27:12; 27:14; 27:15; 27:16.

81 Quotation 34:5; 34:6; 35:7.

82 Quotation 28:4.

83 Quotation 21:7; 21:8; 21:9. The only option that is specifically mentioned by *Bikeloc* is the option 'Return to the lease company' when it is not possible for the consumer to return during *Bikeloc*'s opening hours.

accidental damage to the bicycle.⁸⁴ This therefore means that all providers of two-wheelers offer equivalent protection in terms of informing their consumers about any obligation to take out ancillary services.

Information on the interest rate in case of late payments

If the Consumer Credit Directive were applicable, the consumer needs to be informed about the interest rate applicable in the case of late payments and the arrangements for its adjustment, and, where applicable, any charges payable for default.⁸⁵ Exclusive mobility does not entail a credit agreement. Despite the mutual similarities, an interest rate in case of late payments is often not applied. Instead of applying an interest rate in case of late payment, providers apply for example a penalty. At the same time, the rationale of the rule applies as it is important that consumers receive fair and transparent information, fostering trust by treating consumers fair and avoiding hidden terms or costs. As substantiated in paragraph 4.4.1, the study examines not only whether providers have included anything about the interest rate in case of late payments in their general terms and conditions, but also whether they have included anything about the (financial) consequences of late payment.

The Dutch car providers also inform the consumer according to the Dutch legal provisions that implement the Consumer Credit Directive about the costs of late payments. If the consumer does not pay within 14 days after a reminder, the provider can charge the consumer collection costs.⁸⁶ In addition, *LeasePlan* refers to the option of requiring the consumer to pay statutory interest.⁸⁷ Furthermore, the Dutch car providers warn consumers about the consequences of missing payments, and the provider can terminate the contract due to missing payments.⁸⁸ In Belgium, *Arval* informs their consumers that invoices should be paid within 15 days after the invoice date. If payment is not made on time, the consumer owes interest and conventional compensation equal to 15 percent of the outstanding invoice amount, with a minimum of €125 per invoice. This applies without prior notice of default.⁸⁹ *Direct Lease* applies a payment term of 14 days.⁹⁰ In the event of late payment, the consumer is entitled to interest and fixed compensation. This

84 Quotation 33:6; 33:7.

85 Article 5(1)(l) Consumer Credit Directive 2008.

86 The amount thereof depends on the amount to be paid and is regulated in the Dutch Decree on compensation for extrajudicial collection costs. See Article 5(1)(l) Consumer Credit Directive 2008. Quotation 3:16; 3:17; 6:5; 7:12; 7:13; 10:15; 10:16; 14:4; 15:12; 15:13.

87 Quotation 14:5.

88 In addition, the consumer might be obliged to pay a termination fee. Article 5(1)(m) Consumer Credit Directive 2008; Quotation 3:18; 7:14; 10:17; 15:14.

89 Quotation 4:12. The interest rate is calculated in accordance with the Belgian Act of 2 August 2002 on combating late payment in commercial transactions.

90 Quotation 9:10.

is 10 percent on the amounts not paid or paid late, with a minimum of €150.⁹¹ *Smartrent* provides information according to the same structure as *Arval* and *Direct Lease* and applies an interest rate of 12 percent and a fixed amount of 15 percent of the remaining amount due for administrative costs without prior notice of default.⁹² *LeasePlan* informs the consumer more concisely and states the costs for not paying the lease price on time, namely the costs for a payment reminder of €7.50.⁹³ The Belgian car providers also warn consumers about the consequences of missing payments, namely the termination of the contract.⁹⁴ In the event of non-(timely) payment of two monthly lease fees, *Direct Lease* and *LeasePlan* are entitled to terminate the rental agreement without judicial intervention.⁹⁵ *LeasePlan* states that in addition to the outstanding lease prices, the consumer also owes a compensation amounting to three lease prices.⁹⁶ *Smartrent* and *Arval* also reserve the right to dissolve the agreement in the event of non-payment, but do not apply a strict period of non-payment of two months.⁹⁷ German car providers offer information about the costs of late payments, although less detailed than that of Belgian car providers, and warn about the consequences of missing payments. All German car providers charge the statutory default interest for late payments to the consumer during the delay.⁹⁸ Furthermore, in the event of non-payment, the provider can demand a fixed compensation of €40 for the collection costs as follows from the general terms and conditions.⁹⁹ *ALD Automotive* and *Sixt Leasing* can also terminate the lease if the consumer is overdue with at least two consecutive lease instalments and at least 10 percent of the total lease instalments and the provider has given the hirer two weeks to pay the overdue amount without success.¹⁰⁰ *Arval* also stipulates the possibility of terminating the contract if the consumer is late with the payment of the lease costs and gives as an example that this could occur with two unpaid consecutive lease instalments. This seems to be a less strict requirement compared to the other German car providers.¹⁰¹ If *Arval* does indeed terminate the contract, the consumer owes compensation in addition to the overdue lease payments.¹⁰² *Like2drive*

91 Quotation 9:8.

92 Quotation 19:8.

93 Quotation 12:9.

94 In addition, the consumer might be obliged to pay a termination fee. Article 5(1)(m) Consumer Credit Directive 2008; Quotation 3:18; 7:14; 10:17; 15:14.

95 Quotation 9:9; 12:10.

96 Quotation 12:10.

97 Quotation 4:13; 19:9. Both mention the possible right to compensation.

98 Quotation 1:15; 8:16; 16:5; 18:14. *ALD Automotive* mentions also that the default interest for a year is five percentage points above the base interest (Section 288(1) German Civil Code).

99 Quotation 1:16.

100 Quotation 1:17; 18:12.

101 Quotation 8:13. *Arval* also refers to Section 543(2), nr. 3 German Civil Code.

102 Quotation 8:15. The compensation is calculated from the sum of the lease payments still due for the remaining term of the contract as well as the penalty owed to the refinancing bank for prepayment and any third-party compensation.

reserves the right to terminate the contract if the consumer fails to pay two consecutive monthly instalments or with payment of an amount corresponding to at least two monthly instalments in a period extending over several months.¹⁰³ The French provider *Arval* informs their consumers on the costs of late payments. In case of such a late payment and after a notice has not been followed up for 15 days, the consumer is required to pay a penalty equal to three times the statutory interest.¹⁰⁴ In case of late payment, the consumer of *Formule LLD* is obliged to additionally pay interest and the amount of €40 for the flat-rate compensation for recovery costs.¹⁰⁵ *LeasePlan* notes that for any late payment, the consumer is obliged to pay interest, calculated at the rate of three times the legal interest rate applicable to the amounts due.¹⁰⁶ *Qarson* is the only provider of cars that does not inform the consumer about the costs of late payments.

The Dutch two-wheeler providers also inform the consumer about the costs of late payments. In the event of late payment, the consumer of *ANWB* must pay statutory interest on the amount that is not paid on time and any costs *ANWB* incurs to receive the money.¹⁰⁷ *Lease Express* charges costs if the payment term is exceeded, namely collection costs and two percent interest.¹⁰⁸ *LeaseGemak* charges these costs too but applies statutory interest. Moreover, *LeaseGemak* sends a reminder before charging costs for late payment. *Swapfiets* also sends such a reminder, after which *Swapfiets* also charges collection costs (and other administrative costs and extrajudicial collection costs). Nevertheless, *Swapfiets* does not specify about any payable interest.¹⁰⁹

De Fietsambassade Gent can unilaterally terminate the use contract in the event of late payment but does not mention anything on interest or payable costs. Moreover, the consumer is unable to reclaim the rent already paid. In the event of late payment, *De Fietsambassade Gent* hands over the contract after a period of 30 days to a debt collector who is charged with recovering rented goods, repair costs, and fines.¹¹⁰ *Swapfiets* sends a reminder before charging costs for late payment. *Swapfiets* also charges collection costs (and other administrative costs and extrajudicial collection costs) but does not specify on

103 Quotation 16:5.

104 Quotation 5:11. *Arval* has the right to terminate the lease when the payment default is not remedied.

105 Quotation 11:10. Interest is calculated in accordance with articles L441-6 and D441-5 of the French Commercial Code.

106 Quotation 13:5. The amounts due are calculated from the scheduled due date to the day of actual payment.

107 Quotation 20:11.

108 Quotation 26:5; 26:6; 27:18; 27:19. *Lease Express* applies two percent interest where *LeaseGemak* refers to statutory interest.

109 Quotation 32:13. In case of late payment, *Swapfiets* can trace the location of the vehicle, and confiscate the vehicle and accessories for which the consumer is at fault.

110 Quotation 24:8.

any payable interest.¹¹¹ Neither *Zzoomer* nor *E-bike to go* specify about an interest rate in case of late payment.¹¹² Contrary to *Zzoomer*, *E-bike to go* does specify the financial consequences in case of late payment. *E-bike to go* carries out an automatic direct debit order. If it is not possible for *E-bike to go* to collect the amount owed by the consumer, *E-bike to go* tries to collect the amount due again within 14 days. If this attempt is unsuccessful, *E-bike to go* can terminate the agreement and suspends its obligations towards the consumer. *E-bike to go* charges an amount of €30 for collecting the two-wheeler and is also entitled to the statutory interest and a fixed compensation of 10 percent on the unpaid amount.¹¹³

The German provider *Leasingshop* does not mention any payment obligation for late payment. If the lease amount cannot be collected by *Swapfiets* or *GT Bike*, the consumer is requested to pay all amounts due within 14 days. All additional administration costs and extrajudicial collection costs are for the account of the consumer. Both *Swapfiets* and *GT Bike* do not specify on interest in case of late payment.¹¹⁴ In the event of payment arrears of at least two consecutive payments by the consumer, *Dance* reserves the right, after unilateral termination of the contract, to collect the vehicle with immediate effect at the expense of the consumer. In addition, *Dance* has the right to claim a fixed compensation of €50.¹¹⁵

The French providers all inform their consumers on the costs and consequences of late payment. *Bikeloc* informs the consumer that in the event of late payment, a penalty rate of 10 times the legal interest rate and a flat-rate recovery fee of €40 will be due.¹¹⁶ In the event of late payment, *Véligo* informs the consumer that they owe a fine of €5 per day for late payment of the monthly lease, including options and insurance. After eight days of late payment, the following lease, and all amounts due are paid by direct debit.¹¹⁷ *Véligo* informs about the financial consequences of late payment, although not applying an interest rate. In the event of payment arrears of at least two consecutive payments by the consumer, *Dance* reserves the right, after unilateral termination of the contract, to collect the vehicle with immediate effect at the expense of the consumer. In addition, *Dance* has the right to claim a fixed compensation of €50.¹¹⁸ *Swapfiets* also charges collection costs

111 Quotation 29:5.

112 Quotation 34:7.

113 Quotation 35:8.

114 Quotation 25:4; 30:4. *Swapfiets* can engage a collection agency if the amounts due have not been paid within 14 days.

115 Quotation 22:9. *Dance* is free to make claims for compensation that go beyond this fixed amount and the consumer remains entitled to prove that *Dance* has suffered no or only minor damage.

116 Quotation 21:6.

117 Quotation 33:9. In the case of payment by check, the deposit check is cashed up to the amount due.

118 Quotation 23:5.

(and other administrative costs and extrajudicial collection costs) but does not specify about any payable interest.¹¹⁹

Information on the right to an early repayment

If the Consumer Credit Directive were applicable, the providers must inform the consumer on the right of an early repayment.¹²⁰ This paragraph discusses the information obligation of the provider towards the consumer about the right to an early repayment, while in paragraph 6.4.4.2 the substantive right in article 16 Consumer Credit Directive is discussed.

The Dutch car providers include such an obligation in their general conditions. *Arval*, *Direct Lease* and *LeasePlan* state that the consumer can do an advance payment once and only prior to the lease term. The advance payment proportionally reduces the monthly instalment. Although this is not a full early repayment option but a partial one, equivalent protection is attained because information is provided about the possibility of (restricted) early repayment. Furthermore, the consumer may not prepay more than half of all lease instalments together.¹²¹ In addition, *Arval*, *Direct Lease* and *LeasePlan* provide an exemplary calculation of these advance payments.¹²² *ALD Automotive* does not specify anything on this issue. However, none of the Belgian car providers inform about the right of early repayment. The German provider *Arval* offers the option of a special lease payment (*Leasingsonderzahlung*), which entails a one-off amount to be paid in advance and in addition to the leasing instalments, which is considered in the calculation of the leasing instalments in favour of the consumer.¹²³ In case the consumer concludes the full-service module, *Arval* allows the consumer to have an interim settlement of early payments no earlier than after 12 months. The monthly lease rates are adjusted accordingly.¹²⁴ Other German car providers do not mention a contractual option of an early repayment. Also, the French car providers do not mention an option of an early repayment. This also applies for all providers of two-wheelers.

119 Quotation 31:12.

120 Article 5(1)(p) Consumer Credit Directive 2008.

121 Quotation 6:6; 10:18; 14:6. No interest is paid on the balance of the consumers' prepayment and the prepayment does not reduce the interest amounts included in the lease instalments. Should the lease contract end earlier, the consumer receives the remaining amount of the prepayment in proportion to the remaining term of the lease contract.

122 Quotation 6:7; 10:19; 14:7.

123 Quotation 8:17. The special leasing payment serves neither to repay the leasing instalments nor as a deposit and is not refunded in full or in part at the end of the individual leasing contract. If a special leasing payment is agreed, this is due for payment upon conclusion of the respective individual leasing contract, at the latest before the beginning of the leasing period. *Arval* is entitled to postpone the vehicle order until the special leasing payment has been made.

124 Quotation 8:18.

Information on the cost structure

If the Consumer Credit Directive were applicable, article 5(1)(f) and (g) of the Consumer Credit Directive would require an information obligation about the borrowing rate, the conditions governing the application of the borrowing rate and, where available, any index or reference rate applicable to the initial borrowing rate, as well as the periods, conditions, and procedures for changing the borrowing rate. Moreover, it contains the annual percentage rate of charge and the total amount payable by the consumer, illustrated by means of a representative example mentioning all the assumptions used to calculate that rate. These factors are considered information about the cost structure because they clarify on the cost structure of consumer credit but do not fit mobility usership. As a result, an examination is made of whether information is provided on the cost structure of mobility usership as this is in line with the rationale of this information obligation.¹²⁵

The Dutch lease providers do not include a provision on the borrowing rate and the annual percentage rate of charge and the total amount payable by the consumer in their terms and conditions, illustrated by means of a representative example.¹²⁶ While the providers explain and illustrate the structure of the termination fee and the advance payments (and the additional cost of the additional kilometres driven), there is no elucidation on the price, consisting of a use and service fee. *LeasePlan* does mention a lease price with an overview, but this overview does not contain a specification of the cost structure, only an all-in price.¹²⁷ The Belgian car providers clearly indicate which components make up the lease price but these components are not given any weight or amount.¹²⁸ For example, these providers clarify that the lease price consists of *inter alia* a depreciation, the road and registration tax, interest, administration costs and management fee. How these components factor into the lease price is not clarified. As a result, the extent to which the component is part of the cost structure is not specified. German car providers do not specify on the cost structure of the lease whatsoever. The French car providers *Arval*, *Formule LLD* and *Leaseplan* also do not offer insight into the cost structure of the lease to their consumers in the general terms and conditions. Only *Qarson* mentions some that are included in their lease price but does not offer full insight into the cost structure.¹²⁹

125 This is elaborated in paragraph 4.4.1. Whereas this paragraph discusses the information obligation of the provider towards the consumer about the cost structure, paragraph 6.4.4.2 discusses the substance of article 19 Consumer Credit Directive 2008 about the calculation of the annual percentage rate of charge.

126 Article 5(1)(f), (g) Consumer Credit Directive 2008.

127 Quotation 14:8.

128 Quotation 4:3; 9:3; 12:4; 19:2.

129 Quotation 17:6.

ANWB, a Dutch provider of two-wheelers elucidates on the components that make up the price, *inter alia* the use, insurance, breakdown assistance, maintenance, and repair.¹³⁰ However, the summary of these components does not provide insight into the cost structure of the lease. The information obligation for this component is therefore not met. Nevertheless, *Swapfiets*, *Lease Express* and *LeaseGemak* do not provide any insight into the components that are considered in the lease price. The Belgian provider of two-wheelers, *De Fietsambassade Gent* refers in the general terms and conditions to a price list and a rate list on the website of the provider. Although this provides insight into the lease price for the consumer compared to the duration of the lease, it does not provide insight into the cost structure.¹³¹ *Swapfiets*, *Zzoomer*, and *E-bike to go* do not offer any insight into the components that are considered in the lease price. None of the German or French providers of two-wheelers offer information on the cost structure of the lease. The French providers *Swapfiets* and *Dance* do not offer any insight on the cost structure whatsoever, whereas *Bikeloc* and *Véligo* do offer some insight into the components that are considered in determining the price. However, *Bikeloc* and *Véligo* do not consider *inter alia* the ratio of these components.¹³² All providers, both of cars and two-wheelers, fall short in their information obligation on the cost structure if the Consumer Credit Directive were applicable.

Information on a database consultation

If the Consumer Credit Directive were applicable, the consumer needs to be informed about their right to be informed, immediately and free of charge, of the result of a database consultation carried out for the purposes of assessing their creditworthiness.¹³³ Whereas this paragraph discusses the information obligation of the provider towards the consumer about a database consultation, paragraph 6.4.4.2 discusses the substance of the database consultation as a part of the creditworthiness assessment.

The Dutch car providers inform consumers on the notification of the agreement to the *Bureau Krediet Registratie* (Dutch Credit Registration Office) and the processing of the data in the *Centraal Krediet Informatiesysteem* (Dutch Central Credit Information System).¹³⁴ However, under the Consumer Credit Directive, they should be informed, immediately and free of charge, of the result of a database consultation carried out for the purposes of assessing their creditworthiness, but none of the Dutch car providers

130 Quotation 20:12.

131 Quotation 24:9; 24:10; 24:11.

132 Quotation 21:5; 33:5; 33:10.

133 Article 5(1)(q) Consumer Credit Directive 2008. Also see Article 9(2) Consumer Credit Directive 2008.

134 Quotation 3:19; 6:5; 7:15; 10:20; 14:9; 15:15.

inform the consumer on this issue.¹³⁵ The Belgian and German car providers also do not inform on any database consultation for the assessment of creditworthiness. The French car providers *Arval* and *LeasePlan* inform the consumer that they use personal data for the evaluation of the consumer's credit risk score and repayment capacities, whereas *Formule LLD* and *Qarson* do not inform on this matter.¹³⁶

Although *ANWB*, a Dutch provider of two-wheelers, does mention that they report the lease (and any payment arrears) to the BKR, *ANWB* does not carry out a database consultation for the purposes of assessing their creditworthiness. With *LeaseGemak*, this notification is expressly not made to the BKR.¹³⁷ *LeaseGemak*, on the other hand, applies a self-conducted creditworthiness test as an acceptance criterion for a lease.¹³⁸ *LeaseGemak* complies with the information obligation to inform the consumer about the assessment of creditworthiness that is being carried out. Furthermore, neither *Swapfiets* nor *Lease Express* inform the consumer on any database consultation for the purposes of assessing the consumer's creditworthiness or any method of assessing creditworthiness whatsoever.

The Belgian provider *E-bike to go* assesses the creditworthiness of the consumer based on the registration. However, *E-bike to go* does not specify how the creditworthiness is assessed and whether a database is consulted for this. Nevertheless, equivalent protection is provided because it serves the same purpose, namely assessing the consumer's creditworthiness (by database consultation or any method of assessing creditworthiness).¹³⁹ Contrarily, inequivalent protection exists with the other three Belgian providers (*De Fietsambassade Gent*, *Swapfiets* and *Zzoomer*) on this point.

The German provider of two-wheelers, *Dance* reserves the right to transfer the information provided by the consumer during the ordering process to third parties for the purpose of assessing the consumer's creditworthiness. Regarding the purpose of assessing the consumer's creditworthiness equivalent protection exists.¹⁴⁰ However, it does not become clear from *Dance's* general terms and conditions whether consumers know the identity of the third party and on what terms the creditworthiness is assessed.

GT Bike, *Leasingshop*, and *Swapfiets* do not offer information on any database consultation or creditworthiness assessment. Therefore, there is an inequivalence here for these

135 Article 5(1)(q) Consumer Credit Directive 2008. Also see Article 9(2) Consumer Credit Directive 2008.

136 Quotation 5:13; 13:6.

137 Quotation 27:22.

138 Quotation 27:21.

139 Quotation 35:9.

140 Quotation 22:10.

providers. Like the German provider, the French variant of *Dance* informs about the transfer of the consumer's information to third parties for the assessment of creditworthiness.¹⁴¹ The other French providers of two-wheelers do not provide information on any database consultation or creditworthiness assessment.

Copy of the draft agreement

If the Consumer Credit Directive were applicable, the consumer has the right to be informed on their right to be supplied, on request and free of charge, with a copy of the draft credit agreement. This provision shall not apply if the creditor is at the time of the request unwilling to proceed to the conclusion of the credit agreement with the consumer.¹⁴² Mobility usership expressly does not concern credit, but in line with the rationale of this information obligation,¹⁴³ it makes sense that the provider of mobility usership also provides a copy of the draft agreement, even though he is not obliged to do so. Nevertheless, none of the providers state anything on the consumer's right to be supplied with a copy of the draft agreement on request and free of charge. For all providers, both of cars and of two-wheelers, there is an inequivalent protection compared to the national legal provisions that implement the Consumer Credit Directive.

6.4.1.2 Contractual information obligations

As with the precontractual information requirements, the mobility usership agreements should be drawn up on paper or on another durable medium and all the contracting parties shall receive a copy of the agreement, if the Consumer Credit Directive were applicable.¹⁴⁴ It is impossible to study this obligation with certainty due to the scope of the research because the main agreement is not part of this research and these documents have therefore not been selected or studied. Nevertheless, all providers are likely to comply with this obligation because the main agreement is always mentioned in the general terms and conditions that were studied.

Some contractual information obligations in article 10 of the Consumer Credit Directive correspond to the precontractual information obligations from the Consumer Credit Directive. This basically is a double information obligation. Furthermore, the precontractual information obligations from the Consumer Credit Directive partly overlap with the Consumer Rights Directive, but this is not the case for the contractual

141 Quotation 23:4; 23:6.

142 Article 5(1)(r) Consumer Credit Directive 2008.

143 The rationale is that by providing a draft agreement, consumers gain insight into the product and are warned about possible risks. The intention is that this will enable consumers to make a responsible choice when contracting. Also see paragraph 4.4.1.

144 Article 10(1) Consumer Credit Directive 2008. Paragraph 4.4.4; Table 13.

information obligations. The contractual information obligations of the Consumer Credit Directive do not rise from the applicable framework because the Directive is not applicable. Nevertheless, I will examine to what extent these contractual information obligations of the Consumer Credit Directive are offered by providers through their general terms and conditions. See Table 13 for an overview of the inequivalences.

If article 10 of the Consumer Credit Directive would apply, starts with the requirement that the information should be presented in a clear and concise manner. This requirement is also discussed and elaborated on in paragraph 6.4.1.1 on precontractual information requirements. Furthermore, this paragraph also touched upon the notion that the main lease contract would typically include information on the main characteristics of the services. For article 10 of the Consumer Credit Directive, these are requirements such as the identity of the provider and their contact details, the price of the service, and the duration of the contract.¹⁴⁵ In addition, various components serve to provide insight into the cost structure of the service.¹⁴⁶ These components are not discussed again here. Reference is made to paragraph 6.4.1.1 for the results.

Other contractual information requirements do not correspond to the precontractual information obligations from the Consumer Credit Directive and do not apply to mobility usership contracts.¹⁴⁷ These requirements are examined below to assess whether the general conditions may offer more protection than the legal minimum.

Information on required sureties and insurance

If the Consumer Credit Directive were applicable, providers should inform the consumer on any required sureties and insurance according to article 10(2)(o) of the Consumer Credit Directive.¹⁴⁸ Both the Dutch and Belgian car providers address the required insurances included into the monthly payments.¹⁴⁹ Dutch car providers offer a contract that includes legal liability insurance,¹⁵⁰ only *ALD Automotive* requires a *Schade Verzekering Inzittenden* (insurance for damage on passengers) as well.¹⁵¹ *LeasePlan* and *Direct Lease* offer the insurance

145 Article 10(1)(a)-(d) Consumer Credit Directive 2008. Some providers show information on their identity in their terms and conditions as well, see *inter alia* Quotation 1:1, 2:2; 4:1; 6:8; 7:16; 8:1; 9:1; 10:23; 14:10.

146 Article 10(1)(e)-(m)(r) Consumer Credit Directive 2008. Component (n) and (q) are not relevant to discuss here. (n) refers to the information component on, where applicable, a statement, that notarial fees are payable and (q) refers to the information concerning the rights resulting from Article 15 (linked credit agreements) as well as the conditions for the exercise of those rights.

147 The precontractual information obligations as in Article 5 Consumer Credit Directive 2008.

148 Article 10(2)(o) Consumer Credit Directive 2008.

149 Quotation 14:15; 2:3; 2:4; 15:17; 15:18; 10:26; 7:19; 3:22; 4:5; 4:15; 4:16; 9:13; 9:14; 12:5; 12:13; 19:12.

150 Quotation 14:15; 2:3; 2:4; 15:17; 15:18; 10:26; 7:19; 3:22. This insurance is required when owning a motorized vehicle under the Dutch Vehicle Liability Insurance Act.

151 Quotation 2:4.

as an additional option and *Arval* does not mention anything on this insurance but refers to the applicable insurance conditions.¹⁵² For Belgium, *Arval* informs their consumer about the required insurances and mentions that the consumer can request *Arval* to take out certain insurances, including those required by law.¹⁵³ In addition to the required liability insurance, *Direct Lease* and *LeasePlan* inform on the insurance for legal assistance.¹⁵⁴ *Smartrent* offers in addition to the required liability insurance an optional *omnium* insurance, which transfers the risk of material damage, fire and theft to the provider.¹⁵⁵ The private lease quality mark states that all Dutch providers can make the payment of a surety mandatory, but none of the providers does so in their general terms and conditions.¹⁵⁶ Only *Direct Lease* explicitly states that they do not require the payment of a deposit.¹⁵⁷ The Belgian car providers *Direct Lease* and *Smartrent* inform the consumer about the obligation to pay a guarantee, while *Arval* and *LeasePlan* do not.¹⁵⁸ Only *Direct Lease* in both Belgium and the Netherlands and the Belgian provider *Smartrent* offer equivalent protection.

Regarding the German car providers, *ALD Automotive* requires the consumer to take out a civil liability insurance for the term of the lease contract unless the consumer concluded an additional Insurance-Service (*Versicherungs-Service*).¹⁵⁹ *Arval* specifically mentions the consumer's obligation to take out insurance for the duration of the individual leasing contract unless they concluded an 'Insurance Management' service module.¹⁶⁰ Also *Sixt Leasing* requires the consumer to insure the vehicle unless otherwise agreed in the context of a so-called full-service contract.¹⁶¹ *Like2drive* mentions that the vehicle is covered by liability insurance and full and partial hull insurance, but does not oblige the consumer to take out (separate) insurance.¹⁶² Therefore, the German car providers inform the consumer about required insurances. None of the German providers explicitly informs about the obligation to pay a surety. *Arval* and *Sixt Leasing* do mention the requirement of a special rental payment, but they expressly do not see this as a surety.¹⁶³ As a result, inequivalent protection exists for all German lease car providers.

152 Quotation 14:1; 14:2; 10:22; 10:13; 10:14; 6:9.

153 Quotation 4:15; 4:16.

154 Quotation 9:13; 9:14; 12:5; 12:13. *LeasePlan* additionally offers the option of a driver-insurance and risk retention.

155 Quotation 19:12; 19:13.

156 Quotation 3:13; 7:34; 10:46; 15:33.

157 Quotation 10:21.

158 Quotation 9:28; 19:33.

159 Quotation 1:11; 1:12. Insurance should have a fixed coverage of at least €50 million for material damage, financial loss and personal injury – in the case of personal injury of at least €8 million per injured person.

160 Quotation 8:4.

161 Quotation 18:6. A liability insurance, partial insurance, comprehensive insurance, and GAP insurance must be taken out at the expense of the consumer.

162 Quotation 16:6.

163 Quotation 8:36; 18:32.

The French provider *Arval* obliges the consumer to take out multi-risk insurance (and maintain it during the lease agreement) with a reputable solvent insurer. This insurance must designate *Arval* as the direct beneficiary of the compensation paid by the insurer in the event of total damage to the vehicle.¹⁶⁴ Furthermore, *Arval* offers the possibility to take out an ancillary financial loss insurance.¹⁶⁵ *Formule LLD* draws the consumer's attention to the obligation to take out an all-risk insurance contract from the day of delivery.¹⁶⁶ *LeasePlan* also points out the requirement of insurance coverage. *LeasePlan* mentions that the consumer who does not wish to make use of the insurance contract concluded by *LeasePlan* undertakes to take out an insurance contract at their own expense that covers damage to others, as well as an All Risks guarantee and cover for financial loss.¹⁶⁷ *LeasePlan* also informs about the standard insurance offered with the lease contract.¹⁶⁸ Furthermore, *LeasePlan* attaches an information sheet of this standard insurance contract to the general terms and conditions.¹⁶⁹ *Qarson* mentions the option for consumers to subscribe to ancillary services such as insurance, but does not specify any required insurances.¹⁷⁰ Regarding sureties, of the examined French car providers, only *Formule LLD* and *LeasePlan* inform the consumers that they are required to pay a surety.¹⁷¹ Consequently, both *Formule LLD* and *LeasePlan* offer equivalent protection.

In contrast to lease cars, the consumer is not always obliged to take out insurance with two-wheelers. Nevertheless, if the Consumer Credit Directive were applicable, the provider still has to inform the consumer on a sureties or insurance is required. Therefore, if no information is provided in the general terms and conditions, this is indicated in Table 24 with a minus sign (-) and this results in inequivalent protection.

ANWB, the Dutch provider of two-wheelers, obliges consumers to take out bicycle insurance. The insurance is seen by *ANWB* as part of the lease agreement and is included in the monthly price.¹⁷² *Lease Express* arranges a liability insurance for the consumer during the entire lease period whereas the consumer should arrange for insurance for the

164 Quotation 5:15. *Arval* refers to Articles L121-13, R211-2 French Insurance Code. The insurance must in any case cover civil liability, accident in traffic and outside traffic, unlimited for damage of any kind caused to third parties, to family and to the driver, damage suffered by the Vehicle as a result of, among other things, an accident, theft, fire, glass breakage, impact against a fixed or moving body, up to the contractual value set out in the section Liability and damage to the Vehicle, third party defence, recovery and insolvency.

165 Quotation 5:9.

166 Quotation 11:11.

167 Quotation 13:7.

168 Quotation 13:8.

169 Quotation 13:9.

170 Quotation 17:7.

171 Quotation 11:19; 13:25.

172 Quotation 20:6; 20:12; 20:13.

passenger.¹⁷³ *LeaseGemak* states that damage insurance, theft insurance, passenger accident insurance and legal assistance insurance are included in the contract.¹⁷⁴ At the same time, these insurances do not always seem to be included in the contract because a choice is incorporated in the details of the insurances.¹⁷⁵ With *Lease Express* and *LeaseGemak* it is not clearly formulated whether it concerns an obligation to take out such insurance. As a result, information is not provided correctly. *Swapfiets* informs the consumer that it is the consumer's obligation to have insurance(s) during the lease period. *Swapfiets* does not specify which insurance(s) this concerns.¹⁷⁶ Regarding the information obligation on sureties, only the Dutch provider *LeaseGemak* informs the consumer about any payment obligations of sureties for their consumers. As a result, no Dutch two-wheeler provider offers equivalent protection compared to the Dutch implementation of the Consumer Credit Directive.

Regarding the Belgian providers of two-wheelers, *Zzoomer* includes insurance for civil liability and legal assistance policy, if required by law. This insurance policy provides for the coverage of all damage to third parties in accordance with the legal requirements. If the consumer opts for the comfort option, the consumer is also responsible for taking out omnium insurance for the two-wheeler.¹⁷⁷ *De Fietsambassade Gent* only mentions the option of ancillary insurance against theft.¹⁷⁸ *Swapfiets* informs the consumer that it is the consumer's obligation to have insurance(s) during the lease period. *Swapfiets* does not specify which insurance(s) this concerns, whereas *E-bike to go* does not mention anything about required sureties or insurances.¹⁷⁹ Only *De Fietsambassade Gent* informs its consumer about the obligation to pay a surety and therefore offers equivalent protection.¹⁸⁰

The German providers of two-wheelers *GT Bike* and *Leasingshop* both do not inform on any required insurances. *Dance* only mentions optional insurances in a comfort option.¹⁸¹ *Swapfiets* like in the other Member States where it operates, informs the consumer that it is the consumer's obligation to have insurance(s) during the lease period.¹⁸² Like the German provider *Swapfiets*, the French variant of *Swapfiets* also informs consumers that it is their obligation to have insurance(s) during the lease.¹⁸³ The German providers *Dance*

173 Quotation 26:10; 26:12.

174 Quotation 27:23.

175 Quotation 27:12; 27:14; 27:15.

176 Quotation 32:14.

177 Quotation 34:4.

178 Quotation 24:12.

179 Quotation 29:7.

180 Quotation 24:18.

181 Quotation 22:11.

182 Quotation 30:5.

183 Quotation 31:5.

and *GT Bike* do provide information about the obligation and the circumstances under which the consumer has to pay a surety.¹⁸⁴ Nevertheless, no German providers of two-wheelers offer equivalent protection compared to the provisions in the Consumer Credit Directive. Furthermore, the French provider *Bikeloc* offers third-party insurance included in the lease and three additional insurance policies that allow the consumer to reduce their own risk in the event of theft or accident.¹⁸⁵ Moreover, *Véligo* offers optional insurance that covers theft and accidental damage to the bicycle, assistance in case of accidental breakage, breakdown, theft or flat tire of the bicycle (within the monthly lease) but does not include mandatory insurance.¹⁸⁶ Also *Dance* does not inform on any requirement of insurance or sureties, which means that the level of protection on this component is not equivalent. Regarding sureties, *Véligo* explicitly informs the consumer about the obligation to pay for a surety, whereas *Bikeloc* only implies this obligation by mentioning that amounts will be deducted from the paid surety in case of damages.¹⁸⁷ Therefore, *Bikeloc* does not comply with the information obligation on sureties, which means that none of the French providers of two-wheelers offer equivalent protection.

Information on the existence or absence of a right of withdrawal

If the Consumer Credit Directive were applicable, the Consumer Credit Directive stipulates in article 10(2)(p) that the consumers also need to be informed on the existence or absence of a right of withdrawal, the period during which that right may be exercised and other conditions governing the exercise thereof, including information concerning the obligation of the consumer to pay the capital drawn down and the interest and the amount of interest payable per day.¹⁸⁸ As substantiated in paragraph 4.4.1, the application of the right of withdrawal is sensible and proportional, aligning the *ratio legis* of the right to information. Therefore, the general terms and conditions are assessed.

All Dutch car providers inform the consumer through the Dutch quality mark private lease.¹⁸⁹ Only *LeasePlan* elaborates on the right of withdrawal in their additional terms and conditions.¹⁹⁰ This information obligation about the consumer's legal right of

184 Quotation 22:20; 25:5.

185 Quotation 21:10; 21:11.

186 Quotation 33:8.

187 Quotation 21:15; 21:17; 33:16.

188 Article 10(2)(p) Consumer Credit Directive 2008. Under paragraph 6.4.1.1 the consumer's right to a copy of the draft agreement is discussed, a right that is not expressly provided for by any of the providers. In case a right of withdrawal exists, the lack of a draft agreement may be less problematic, because the consumer could still withdraw within, in principle, 14 days. However, this does not apply when – as often happens with service contracts – the consumer waives this right to start the service immediately.

189 Quotation 3:6; 7:6; 10:6; 15:6.

190 Quotation 14:12.

withdrawal is less consistently met with the providers in Belgium. *Arval* and *Smartrent* do not inform on the right of withdrawal in their general terms and conditions, while *Direct Lease* and *LeasePlan* do, although concisely.¹⁹¹ The German provider *ALD Automotive* states in line with the Consumer Credit Directive that the consumer must be informed of the withdrawal information.¹⁹² *Sixt Leasing* does not explicitly inform about the right of withdrawal but mentions the right of withdrawal in connection with the consequences of withdrawal, where in the event of a justified withdrawal, the consumer is refunded the paid lease instalments.¹⁹³ *Arval* also informs the consumer about the consequences for the consumer if they decide to withdraw. *Arval's* consumer is obliged to reimburse all costs (to be) incurred in connection with the purchase of the leased vehicle.¹⁹⁴ Furthermore, *Arval* charges a processing fee for the extra work involved in processing the withdrawal.¹⁹⁵ The question arises as to what extent such a processing fee is allowed when a consumer withdraws his agreement. *Like2bike* does not mention the right of withdrawal. Article L221-28 of the French Consumer Code excludes car rental services from the right of withdrawal. The French providers *Arval* and *Formule LLD* are actively informing their consumers about the absence of the right of withdrawal.¹⁹⁶ Consequently, the consumer is bound by the contract once it is signed with the provider. *LeasePlan* does not inform the consumer about the right of withdrawal in the general terms and conditions, nor about its absence. *Qarson* mentions that the withdrawal conditions are specified in the related financing contract in the relationship between the consumer and the financial institution.¹⁹⁷ Consequently, this information obligation that follows from the Consumer Credit Directive is not contractually met by *Qarson* and *LeasePlan*.

The Dutch provider of two-wheelers, *ANWB* specifies the right of withdrawal in connection with the possibilities to otherwise end the agreement. Nevertheless, the consumer can conclude from this that a right of withdrawal applies to the lease.¹⁹⁸ With *LeaseGemak* and *Swapfiets*, the consumer also has a right of withdrawal within the first 14 days. To exercise this right, *LeaseGemak* specifically points out the option of completing the withdrawal form and sending it to *LeaseGemak*.¹⁹⁹ *Lease Express*, on the other hand, does not mention the possibility of withdrawal in the general terms and conditions.

191 Quotation 9:15; 12:14.

192 Quotation 1:21; 1:22.

193 Quotation 18:15.

194 Quotation 8:19.

195 Quotation 8:20.

196 Quotation 5:17; 11:12.

197 Quotation 17:9.

198 Quotation 20:8.

199 Quotation 27:8; 32:7.

The Belgian providers of two-wheelers, *De Fietsambassade Gent*, *Swapfiets* and *E-bike to go* all inform the consumer on the existence of the right of withdrawal.²⁰⁰ Only *Zzoomer* does not mention the existence or absence of the right of withdrawal.

The consumer of the examined German providers of two-wheelers has the right to withdraw within 14 days and without giving reasons. To exercise this right, the consumer must inform the provider by means of a clear statement. These providers also offer an attached model withdrawal form for this purpose.²⁰¹ In addition, *Dance*, *GT Bike*, and *Leasingshop* explicitly state the consequences of withdrawal for the consumer in their general terms and conditions.²⁰²

The French providers of two-wheelers *Dance*, *Swapfiets*, and *Véligo* inform the consumer about the possibility to withdraw from the contract within 14 days without giving reasons. *Dance* also informs about the consequences of revoking the lease.²⁰³ *Bikeloc*, on the other hand, provides a withdrawal period of 7 days before the lease date to obtain a full withdrawal.²⁰⁴ In any case, all providers inform about the consumer's right of withdrawal. The interpretation of this right of withdrawal is discussed under the paragraph on the right to change your mind (6.4.2.).

Information on the procedure on exercising the right to termination

If the Consumer Credit Directive were applicable, the consumer needs to be informed on the procedure to be followed in exercising the right of termination of the credit agreement.²⁰⁵ This explicitly concerns the information obligation that the provider has to inform the consumer about the right to termination. This paragraph explicitly concerns the information obligation under the Consumer Credit Directive that the provider must inform the consumer about the right to termination, while I also discuss (substantially) the right to early termination in paragraph 6.4.2.2 and the right to terminate as a remedy for a defect in paragraph 6.4.3.4.

All Dutch car providers inform the consumers on the procedure to be followed in exercising the right of termination of the agreement in the Dutch private lease quality

200 Quotation 24:13; 24:4; 29:8; 35:5.

201 Quotation 22:12; 25:6; 25:8; 28:6; 28:7; 30:6.

202 Quotation 22:13; 25:7; 28:5. *Leasingshop* also mentions reasons for exclusion or expiry of the right of withdrawal in their general terms and conditions.

203 Quotation 23:7; 31:6. The consumer can use the attached model withdrawal form but is not obliged to do so. To comply with the withdrawal period, it is sufficient for the consumer to send communication concerning his exercise of the right of withdrawal before the withdrawal period has expired.

204 Quotation 21:12.

205 Article 10(2)(s) Consumer Credit Directive 2008.

mark.²⁰⁶ Also the Belgian car providers inform on this procedure in their general terms and conditions.²⁰⁷ The German car providers *ALD Automotive* and *Sixt Leasing* inform about the termination procedure.²⁰⁸ *Arval* provides extensive information about the right to terminate insofar as it includes *Arval's* rights and options for termination.²⁰⁹ However, *Arval* briefly mentions that the right of termination is not affected.²¹⁰ *Like2drive* also emphasises how the right to terminate affects them and does not inform the consumer as such about their right to termination.²¹¹ None of the French car providers inform the consumer about their right to terminate. However, the French car providers occasionally mention their own possibilities for termination.²¹²

All studied Dutch providers of two-wheelers inform the consumer about the procedure to be followed in the event of termination of the lease contract.²¹³ *Lease Express* only offers the option to terminate after 12 months of the lease. Interim termination is therefore not possible.²¹⁴

At *De Fietsambassade Gent* the consumer can unilaterally terminate the lease contract provided that the bicycle is returned. Rents already paid are not refundable.²¹⁵ The consumer of *Swapfiets* and *E-bike to go* inform about the procedure for terminating the contract and both have a notice period of one month.²¹⁶ *Zzoomer* does not provide an option to terminate the agreement early. If the consumer nevertheless does so, *Zzoomer* is free to claim either the (forced) execution of the contract or the end of the lease with compensation.²¹⁷

The German provider of two-wheelers *Dance* and the consumer can terminate the contract period at the end of the contract period. However, the procedure to be followed by the consumer upon termination is not made explicit.²¹⁸ By contrast, *GT Bike*, *Leasingshop*, and *Swapfiets* do inform on the procedure to be followed in case

206 Quotation 3:20; 7:17; 10:24; 15:16.

207 Quotation 4:18; 4:20; 9:9; 9:20; 9:21; 9:22; 12:10; 12:15; 19:5.

208 Quotation 1:23; 1:24; 1:25; 18:21; 18:22; 18:14.

209 Quotation 8:22; 8:23; 8:15.

210 Quotation 8:21.

211 Quotation 16:10; 16:11.

212 Quotation 5:21; 11:13.

213 Quotation 20:14; 26:8; 27:24; 27:25; 32:15.

214 Quotation 26:14.

215 Quotation 24:14.

216 Quotation 29:9; 29:11; 35:11.

217 Quotation 34:11.

218 Quotation 22:14. *Dance* is free to make claims for compensation that go beyond the fixed amount. The consumer remains entitled to prove that *Dance* has suffered no or only minor damage.

of termination. *GT Bike* states that the contract can be terminated by either party without giving reasons with a notice period of one month at the earliest at the end of the minimum contract term. As to the procedure to follow, notices of termination must be in text (fax or email suffices) to be effective.²¹⁹ *Leasingshop* informs the consumer about the need for correct and timely termination of the lease because the lease is otherwise automatically extended. For the applicable notice period and procedure, *Leasingshop* refers to the lease contract.²²⁰ Consequently, the information obligation is fulfilled because the necessary information is provided in the main lease agreement. *Swapfiets* informs about the procedure for terminating the contract and applies a notice period of one month.²²¹ This also applies to the French version of *Swapfiets*.²²² The French provider *Dance* does not clarify on the procedure to be followed by the consumer upon termination.²²³ *Véligo* does discuss the options *they* have to terminate the lease, but does not specify the procedure that must be followed if the consumer wishes to terminate the lease.²²⁴ *Bikeloc* also does not clarify the procedure to be followed by the consumer in the event of termination.

Information on changes in the borrowing rate

If the Consumer Credit Directive were applicable, the consumer should be informed of any change in the borrowing rate, on paper or another durable medium, before the change enters into force in case this occurs.²²⁵ The changes in the borrowing rate provide the consumer with insight on the changes in the costs of the credit. Nevertheless, this borrowing rate does not fit mobility usership. As a result, I examine whether information is provided on changes in the cost structure of mobility usership as this is in line with the rationale of this information obligation. This is elaborated on in paragraph 4.4.1 and therefore the extent to which consumers are informed about changes in the price or cost structure is examined. Through the Dutch quality mark private lease, all car providers state that the monthly lease payment may only change under certain circumstances after the conclusion of the lease agreement. This may only happen if, after signing the lease contract, any taxes or duties associated with the ownership or use of the vehicle are changed or introduced or if the purchase price of the vehicle is increased between

219 Quotation 25:9. The minimum term of the contract is automatically extended by one month at a time, unless one of the parties terminates the contract before the minimum term has expired.

220 Quotation 28:9.

221 Quotation 30:7.

222 Quotation 31:8.

223 Quotation 23:10.

224 Quotation 33:11.

225 Article 11(1) Consumer Credit Directive 2008. The information shall state the amount of the payments to be made after the entry into force of the new borrowing rate and, if the number or frequency of the payments changes, particulars thereof.

the signing of the lease contract and the delivery of the vehicle.²²⁶ In other words, this includes situations where the costs for the provider change. Furthermore, all car providers mention in their general terms and conditions that the contract can be amended together with the consumer and changes are confirmed in writing.²²⁷ The Belgian car providers also inform their consumers about any changes in the lease price that are related to changes in the cost structure. This often concerns higher costs incurred by the provider, which are passed on to the consumer.²²⁸ It can therefore be assumed here that the sector offers equivalent protection compared to the (non-applicable) Consumer Credit Directive provisions. As mentioned earlier, the German provider *ALD Automotive* does not provide specific information about the cost structure, but does provide information in the general terms and conditions about the possibilities of changes in the lease price due to changes in turnover tax legislation or the assessment of the respective legal situation by the tax authorities.²²⁹ While *Arval* also does not specify the cost structure, they do clearly state that the lease costs of the relevant individual lease contract may change before the start of the lease term if there is a change to the total costs on which the calculation of the lease payments is based.²³⁰ When the acquisition costs of a vehicle change for *Sixt Leasing*, they can adjust the monthly lease rate. In the event of an increase of more than five percent in the costs, the consumer can terminate within three weeks by means of a written statement. *ALD Automotive*, *Arval* and *Sixt Leasing* offer their consumer equivalent protection as they provide information about the possible changes in the lease price. At the same time, it is also possible to formulate more detailed information on the possible changes in the lease price and in a clear manner and elaborate on when such changes may occur. Only *Like2drive* does not mention anything on informing the consumer of changes in the price of cost structure. The French providers also do not inform about any change in the cost structure.²³¹

All studied Dutch providers of two-wheelers inform the consumer on possible price (structure) changes. *ANWB* states that it may adjust the monthly amount of the lease if a government tax changes between the date that the monthly amount is calculated and the date that the bicycle is delivered to the shop or if the consumer incurs more costs than average through careful use. According to the general terms and conditions

226 Quotation 3:11; 7:20; 10:28; 15:19.

227 Quotation 3:23; 7:21; 10:29; 15:20.

228 Quotation 4:19; 9:19; 12:18; 19:15.

229 Quotation 1:26.

230 Quotation 8:25; 8:27; 8:28. If the parties have not concluded a deviating agreement, they can demand a corresponding adjustment of the leasing fees until the start of the lease period if *Arval's* financing costs change because of changed capital market conditions, see Quotation 8:26.

231 *Qarson* only mentions that the change in the official price of the registration tax by the competent official body cannot be considered as a termination clause of the order, see Quotation 17:10.

of *Lease Express* the provider is at all times entitled to increase the lease price while the consumer is not entitled to terminate the lease subsequently. *Lease Express* reserves this right to a price increase in the necessity arises as a result of a power or obligation under the law, an increase in the price of raw materials and/or insurance and/or parts or on other grounds that were not reasonably foreseeable when entering into the agreement. Furthermore, *Lease Express* can increase the price as a result of intensive use of the two-wheeler.²³² *LeaseGemak* has the right to change the lease price if, in the period between the conclusion of the lease and the consumer receiving the bicycle, the purchase price, the costs for insurance, delivery, or maintenance have changed, or government measures or legislation give rise to a necessity to change the price.²³³ *LeaseGemak* also reserves the right to change the lease price during the lease on the basis of the price index determined by Dutch central bureau of statistics cost-increasing effects as a result of government measures or changed legislation, or changed specifications of the bicycle (at the request of the consumer or as a result of legal provisions).²³⁴ *Swapfiets* reserves the right to make reasonable changes to the lease in the event that their costs change due to changes in applicable laws, or for annual price indexations. The consumer is permitted to terminate the lease due to a price change by written notice from the effective date of the price change.²³⁵

Besides the Dutch providers, the Belgian providers of two-wheelers also inform the consumer on possible price (structure) changes. *De Fietsambassade Gent* reserves the right to change these general terms and conditions, including the price and rate list that forms an integral part thereof. However, changes only apply to lease contracts concluded after the change date.²³⁶ *Swapfiets* reserves the right to make reasonable changes to the lease if their costs change due to changes in applicable laws, or for annual price indexations. The consumer is permitted to terminate the lease due to a price change by written notice from the effective date of the price change.²³⁷ *Zzoomer* and *E-bike to go* reserve the right to revise the monthly lease price at any time in case of changed conditions such as price elements. The consumer is notified of the new amount of the

232 Quotation 26:13. Incidentally, any changes or adjustments are passed on to the consumer in a timely manner.

233 Quotation 27:20. If the lease price is increased by *LeaseGemak* in the period between the conclusion of the lease agreement and the consumer taking delivery of the bicycle, the consumer can terminate the lease agreement free of charge within five days after *LeaseGemak* has informed the consumer about this increase. The consumer can do this by completing the withdrawal form within the period of five days and sending it to *LeaseGemak*.

234 Quotation 27:26.

235 Quotation 32:16. Price changes are communicated to the consumer by e-mail at least one month before the effective date.

236 Quotation 24:6.

237 Quotation 29:12.

lease price.²³⁸ Contrary to *Swapfiets*, *E-bike to go* mentions that price changes resulting from law, such as the increase in value added tax, can be implemented immediately and do not entitle the consumer to terminate the lease. *De Fietsambassade Gent* and *Zzoomer* do not state whether the consumer is entitled to terminate the contract because of price changes.

The German providers of two-wheelers *Dance*, *GT Bike* and *Swapfiets* reserve the right to make changes to their general terms and conditions, which may also concern the changes in the cost structure of the lease. For these providers, changes are made available to the consumer by notification in writing or by e-mail.²³⁹ These providers offer equivalent protection by informing their consumer of any change in the cost structure, on paper or another durable medium, before the change enters into force. Only *Leasingshop* does not inform the consumer on this issue.

The French providers of two-wheelers *Véligo*, *Dance*, and *Swapfiets* state in their general terms and conditions that any change to the terms and conditions are brought to the attention of the consumer by e-mail and/or are published on the website and/or their mobile application. This also includes changes in terms of lease price and cost structure because of which this information obligation is contractually met and there is equivalent protection.²⁴⁰ However, *Bikeloc* does not clarify on this information obligation and does not meet the level of traditional sales-based protection.

6.4.1.3 Interim conclusion

The right to information is divided into several components and Table 26 summarises the inequivalences in protection for mobility usership consumers. Regarding formal requirements, all studied exclusive providers meet the minimum requirements of providing the information in a clear and comprehensible way to the consumer. Thanks to the private lease quality mark, the Dutch providers of cars even offer information in a

²³⁸ Quotation 34:10; 35:12.

²³⁹ The question is whether this is allowed under German law. For example, the European Blue List (Annex on Terms Referred to in Article 3(3) of the Unfair Contract Terms Directive) states that a clause that stipulates that the price of the goods or services is only determined at the time of delivery, or grants the provider the right to increase the price, it is presumed to be unfair if the consumer does not have the right to terminate the agreement in the event of a price increase compared to the price at the time of concluding the agreement. German law also prohibits a provision stipulating an increase in payment for goods or services that are to be delivered or rendered within four months of the contract having been concluded in section 309(1) German Civil Code. *Dance*, *GT Bike* and *Swapfiets* stipulate that the consumer can object to the price change, but that the provider subsequently reserves the right to terminate the contract in case the consumer objects to that change. *Vice versa*, it is not clear whether the consumer has the option to terminate the contract because of a price change. See Quotation 22:15; 25:10; 30:8.

²⁴⁰ Quotation 23:11; 31:9; 33:12.

consumer-friendly way through the question-and-answer structure of the general terms and conditions. Also, the Dutch two-wheeler provider *ANWB* maintains this question-and-answer structure. The provider of lease cars *Arval* also offers consumer-friendly general terms and conditions because they offer visual support and an explanation of the consequences of actions or events. These general terms and conditions go beyond the standard of information provision in a clear and comprehensible manner, which means that it can be referred to as increased consumer protection. This standard follows, as discussed in paragraph 6.4.1.1, from the Consumer Rights Directive, the Unfair Contract Terms Directive, the Unfair Commercial Practices Directive and the Consumer Credit Directive. This more extensive protection contradicts the general terms and conditions of the French car provider *Arval* and the Dutch provider of two-wheelers *ANWB* whereas the Dutch lease car providers go beyond the standard level of information provision. The SECCI form as laid down in the Consumer Credit Directive,²⁴¹ is a form requirement that none of the providers meet, just like none of the providers inform their consumer about the cost structure of the lease and the right to a copy of a draft agreement. This means that inequivalent protection for these information components concerns all providers. To the contrary, all providers inform consumers about any ancillary services voluntarily through their general terms and conditions, although article 5(1)(k) of the Consumer Credit Directive does not apply. Apart from two providers (one of each mode of transport: *Qarson* (FR) and *Leasingshop* (GER)), this equivalent protection also applies to the obligation to inform about the consequences of late payments.

The Dutch car lease providers that fall under the private lease quality mark, unlike the other providers (of either cars or two-wheelers) do inform consumers about the options for early repayment. For this component, the protection for the Dutch lease car consumer is increased to the level of the Consumer Credit Directive. Furthermore, the German provider *Arval* also informs their consumers about the options for early repayment. Most exclusive providers do not inform their consumers about a database consultation in connection with the assessment of the consumer's creditworthiness. Only two French providers of lease cars offer their consumers information about such a consultation, compared to four providers of two-wheelers (one from each Member State). Therefore, these providers voluntarily comply with the provisions of the Consumer Credit Directive and offer equivalent protection, while most providers do not comply with that level of protection. Furthermore, only the lease car providers *Direct Lease*, regardless of the Member State, *Smartrent*, *Formule LLD* and *LeasePlan*

241 See subheading *The SECCI form*, paragraph 6.4.1.1 on whether the SECCI form imposes obligations that are feasible and proportional for mobility usership relationships.

(FR), inform their consumers about required sureties and insurances. None of the providers of two-wheelers comply with this information obligation, resulting in inequivalent protection.

Informing about the right of withdrawal is done by most providers. As far as two-wheelers are concerned, only two providers (*Lease Express* (NL) and *Zzoomer* (BE)) do not offer this information. The quality mark applies to the Dutch providers and that is why this information obligation is met for them. It is striking to see that the Dutch provider *Arval* provides this information, while the same provider does not provide for this obligation in the other three Member States. This discrepancy also occurs for *Leaseplan*, where the Dutch and Belgian provider offers information about the right of withdrawal, but the German provider does not. Furthermore, *Qarson* (FR) and *Sixt Leasing* (GER) also do not provide explicit information about the existence or absence of a right of withdrawal. Mobility usership providers are not bound by the Consumer Credit Directive (nor the national implementations of that directive), which means that inequivalent protection, in principle, exists. Only through voluntary self-regulation in the provider's general terms and conditions can possibly bring about equivalent protection. The consumer must also be informed by the providers about the procedure regarding the right to terminate. All of the French and two of the German car leasing providers do not offer this information whereas the other car leasing providers do. The majority of two-wheeler providers also comply with the information obligation. *Swapfiets* applies the same general terms and conditions on this part for all Member States which means that *Swapfiets* is the only French provider that complies with the French implementation of the Consumer Credit Directive. For the other French providers, there is inequivalent protection for the mobility usership consumer. This inequivalence also exists for *Lease Express* (NL) and *Dance* (GER). Furthermore, most providers, either of cars or two-wheelers, offer equivalent protection regarding the information obligation on any changes in the cost structure. This is only different for the French providers of lease cars because none of the providers offer information about this component. This also applies to *Like2drive* (GER), *Bikeloc* (FR), and *Leasingshop* (GER).

Table 26: Interim results of exclusive mobility use on the right to be informed

Typologies	Countries	Providers	Right to be informed											
			Clear and comprehensible manner	SECCI form	Ancillary services	Consequences of late payments	Early repayment	Cost structure	Database consultation	Copy of draft agreement	Required sureties and insurance	The right of withdrawal	Procedure right to terminate	Change in borrowing rate
(a) Exclusive MU B2C providers of cars	NL	ALD Automotive	+	-	=	=	=	-	-	-	-	=	=	=
		Arval	+	-	=	=	=	-	-	-	-	=	=	=
		Direct Lease	+	-	=	=	=	-	-	-	=	=	=	=
		LeasePlan	+	-	=	=	=	-	-	-	-	=	=	=
	BE	Arval	=	-	=	=	-	-	-	-	-	-	=	=
		Direct Lease	=	-	=	=	-	-	-	-	=	=	=	=
		LeasePlan	=	-	=	=	-	-	-	-	-	=	=	=
		Smartrent	=	-	=	=	-	-	-	-	=	=	=	=
	FR	Arval	+	-	=	=	-	-	=	-	-	=	-	-
		Formule LLD	=	-	=	=	-	-	-	-	=	=	-	-
		LeasePlan	=	-	=	=	-	-	=	-	=	=	-	-
		Qarson	=	-	=	-	-	-	-	-	-	-	-	-
	GER	ALD Automotive	=	-	=	=	-	-	-	-	-	=	=	=
		Arval	=	-	=	=	=	-	-	-	-	-	-	=
		Like2drive	=	-	=	=	-	-	-	-	-	-	-	-
		Sixt Leasing	=	-	=	=	-	-	-	-	-	=	=	=
(b) Exclusive MU B2C providers of two-wheelers	NL	ANWB	+	-	=	=	-	-	-	-	-	=	=	=
		Lease Express	=	-	=	=	-	-	-	-	-	=	=	=
		LeaseGemak	=	-	=	=	-	-	=	-	-	=	=	=
		Swapfiets	=	-	=	=	-	-	-	-	-	=	=	=
	BE	De Fietsambassade Gent	=	-	=	=	-	-	-	-	-	=	=	=
		E-bike to go	=	-	=	=	-	-	=	-	-	=	=	=
		Swapfiets	=	-	=	=	-	-	-	-	-	=	=	=
		Zzoomer	=	-	=	-	-	-	-	-	-	-	-	=
	FR	Bikeloc	=	-	=	=	-	-	-	-	-	=	-	-
		Dance	=	-	=	=	-	-	=	-	-	=	-	=
		Véligo	=	-	=	=	-	-	-	-	-	=	-	=
		Swapfiets	=	-	=	=	-	-	-	-	-	=	=	=
	GER	Dance	=	-	=	=	-	-	=	-	-	=	-	=
		GT Bike	=	-	=	=	-	-	-	-	-	=	=	=
		Leasingshop	=	-	=	=	-	-	-	-	-	=	=	-
		Swapfiets	=	-	=	=	-	-	-	-	-	=	=	=

6.4.2 *The right to change your mind*

The extent to which the general terms and conditions comply with the right to change your mind is examined below. The right to change your mind consists of the right of withdrawal and the right to terminate. This right of withdrawal arises partly from the non-applicable Consumer Rights Directive and partly from the Consumer Credit Directive that partly is applicable (Table 14).²⁴² The existing overlap and inequivalence in these directives is elaborated on in paragraph 5.5.2. The right to termination as part of the right to change your mind is also discussed. This is not regulated in the selected directives but is included in the terms and conditions. The (in)equivalences that follow from self-regulation for the right to change your mind are shown below in Table 27.

6.4.2.1 **The right of withdrawal**

Rules regarding the right of withdrawal are included in the Consumer Rights Directive and the Consumer Credit Directive.²⁴³ However, the Consumer Rights Directive excludes exclusive mobility use as long as it is classified as a distance or off-premises service contract.²⁴⁴ In addition, the Consumer Credit Directive excludes all types of mobility usership. Therefore, the right of withdrawal under the Consumer Credit Directive is examined as it is slightly stricter, which could mean that there are inequivalences in consumer protection.²⁴⁵ If the Consumer Credit Directive were applicable, the consumer has a period of 14 days in which to withdraw from the agreement without giving any reason.²⁴⁶ The rationale of this right is to empower consumers when contracting a distance or off-premises contract, especially in situations where they cannot physically inspect or test a product before contracting. This stricter variation of the right of withdrawal under the Consumer Credit Directive seems appropriate and does not contradict the duration of exclusive use. In addition, due to the similarities with the credit agreement, the application of this variation of the rule is

242 Article 14(1), (3) Consumer Credit Directive 2008; Article 9(2)(b), 16 Consumer Rights Directive; paragraph 5.5.2. The inequivalence mainly lies in the exceptions included in article 16 of the Consumer Rights Directive. This shows that the right of withdrawal for service contracts is not absolute. For distance and off-premises contracts that are service contracts, the right of withdrawal does not exist after the service has been fully performed if the performance began with the consumer's prior express consent, and with the acknowledgement that they will lose their right of withdrawal once the contract has been fully performed by the trader. The Consumer Credit Directive 2008 does not have this exception.

243 Recital 6 Consumer Sales Directive. The rules applicable to the sales of goods are still fragmented as regards distance or off-premises contracts the right of withdrawal is fully harmonised by Consumer Rights Directive.

244 CJEU, Case C-38/21, C-47/21 and C-232/21, 21 December 2023, ECLI:EU:C:2023:1014 (*BMW Bank, C. Bank AG, Volkswagen Bank GmbH, Audi Bank*), p. 202. Also see Paragraph 5.2.2.

245 Table 14.

246 That period of withdrawal shall begin either from the day of the conclusion of the agreement, or from the day on which the consumer receives the contractual terms and conditions and information, if that day is later. Article 9 Consumer Rights Directive; paragraph 5.2.2; Article 14 Consumer Credit Directive 2008 and paragraph 4.4.4.

proportional and in line with the rationale of the right of withdrawal. Although equivalent protection also results from the Consumer Rights Directive, it is examined whether exclusive use providers nevertheless apply the level of protection of the Consumer Credit Directive.

In all general terms and conditions of the studied Dutch car providers, a consumer can withdraw the contract free of charge within 14 days after the provider has received the contract signed by the consumer.²⁴⁷ The consumer can do this by completing the withdrawal form – which the consumer received from the provider when entering into the agreement – and sending it to the provider within a period of 14 days. Instead of the withdrawal form, the consumer can also use another statement, in which the consumer clearly states that they are withdrawing from the lease.²⁴⁸ This is exactly in line with the legislative right of withdrawal in the Consumer Rights Directive.²⁴⁹ Furthermore, a consumer of these car providers can collect the car as soon as the cooling-off period has expired. This period expires because the consumer did not use this period, or the consumer has waived their cooling-off period by signing the lease contract to use their car immediately.²⁵⁰ This waiver should be signed in the presence of an employee of the lease provider at the lease provider's business premises and should state in writing that the consumer wishes to have the car immediately.²⁵¹ Although very similar to the Consumer Rights Directive, there are some minor deviations. The Consumer Rights Directive is less concrete and mentions that this waiver should be made with the consumer's prior express consent and with the acknowledgement that they lose their right of withdrawal once the contract has been fully performed by the provider. This concerns a specification of the legislative rule, but this rule applies to distance and off-premises contracts, while under the general terms and conditions the prior express consent should be given in writing in the presence of an employee of the lease provider at the business premises. In the Netherlands, *Direct Lease* and *LeasePlan* have included additional conditions regarding the right of withdrawal. *Direct Lease* deviates positively from this condition in their additional terms and conditions because the requirement to pay a deposit is not applicable.²⁵² *LeasePlan* largely repeats the right of withdrawal as stated in the Dutch Private Lease Quality Mark.²⁵³ *LeasePlan* complements this right in case they cannot deliver the car in the desired colour. In that case, the consumer can choose a different colour (possibly with associated costs) and if the consumer no longer wants the car, they may terminate the agreement free of charge.²⁵⁴

247 Quotation 3:6; 7:6; 10:6; 14:12; 15:6.

248 Quotation 3:6; 7:6; 10:6; 14:12; 15:6.

249 Article 9, 16 Consumer Rights Directive; paragraph 5.2.2.

250 In case the consumer paid the deposit, and the vehicle is available, in Quotation 3:24; 7:22; 10:30; 15:21.

251 If the vehicle is already available. See Quotation 3:6; 7:6; 10:6; 14:12; 15:6.

252 Quotation 10:21.

253 Quotation 14:12.

254 Quotation 14:12.

In Germany, *ALD Automotive* and *Sixt Leasing* both confirm that the right of withdrawal is a statutory right,²⁵⁵ whereas *Arval* and *Like2drive* do not elucidate on this. *ALD Automotive* states that the provider is also entitled to compensation from the consumer for the damage suffered by the provider as a result of the early withdrawal.²⁵⁶ Here the question arises as to what extent such compensation for damages suffered by the provider as a result of the early withdrawal is allowed. The fact that *Like2drive* chooses not to mention anything about the right of withdrawal in its general terms and conditions is not unexpected as the right of withdrawal is not an addition to the applicable legal framework, but a part of it (paragraph 5.2.2). At the same time, *Like2drive* could also actively inform about the right of withdrawal, as is done *inter alia* by the Dutch car providers by means of the Dutch private lease quality mark to guarantee the right to be informed. This also applies to *Arval* and is discussed under the right to be informed. Although *Arval* does not explicitly state that the consumer has a right of withdrawal, it does follow from the general terms and conditions that the consumer is obliged to reimburse *Arval* for any costs (to be) incurred in connection with the purchase of the car in the event of withdrawal.²⁵⁷ Furthermore, *Arval* charges a processing fee for the additional work involved in processing the withdrawal.²⁵⁸ *Sixt Leasing* states a few sections about the right of withdrawal.²⁵⁹ *Sixt Leasing* also considers the contractual relationship (being the sales contract) with the seller and recognises that *Sixt Leasing* has a right of withdrawal vis-à-vis the supplier.²⁶⁰ *Sixt Leasing* also mentions that they assign all related claims and rights from the sales contract against the supplier to the consumer due to material defects in the leased vehicle.²⁶¹ In addition, the consumer must accept this assignment. This means that the consumer is entitled and obliged to assert the claims and rights in their own name with the proviso that in the event of withdrawal, any payments by the supplier must be made directly to *Sixt Leasing*. A waiver of claims against the supplier requires the prior written consent of *Sixt Leasing*. To obtain any necessary cooperation from *Sixt Leasing*, the consumer undertakes to inform *Sixt Leasing* comprehensively and immediately about the assertion of claims and rights due to vehicle defects.²⁶² In case the consumer wants to terminate due to the defective nature of the car, the consumer is obliged and entitled to declare to the supplier their withdrawal from the sales contract with *Sixt Leasing*. In the event of the supplier's consent or their final conviction,

255 Quotation 1:27; 18:18.

256 Quotation 1:27. The calculation of claims for compensation when asserting a statutory right of termination results from separate withdrawal information. This separate withdrawal information is not issued publicly.

257 Quotation 8:19. In return, the consumer receives *Arval's* claims against the supplier (and other third parties) involved in the delivery.

258 Quotation 8:20. The exact fee can be found in the table of fees at *Arval's* website.

259 In any case, *Sixt Leasing* also explicitly excludes entrepreneurs within the meaning of Section 14 German Civil Code from the right of withdrawal. See Quotation 18:16.

260 Quotation 18:18.

261 This includes warranty claims against the manufacturer/third parties. See Quotation 18:18.

262 Quotation 18:18.

there is no obligation to pay leasing instalments.²⁶³ The consumer is entitled to withhold the leasing instalments as soon as they file a suit after the declaration of withdrawal if the supplier does not recognise the right of withdrawal.²⁶⁴ This right of retention no longer applies retrospectively if the consumer's legal action is unsuccessful. The retained instalments are to be paid immediately in one amount. Furthermore, the consumer needs to compensate for the damage caused by the delay.²⁶⁵ In the event of a justified withdrawal, the consumer is reimbursed by the supplier. This entails the leasing instalments paid and any special lease payment and ancillary costs.²⁶⁶ However, the general terms and conditions state that expenses for the services included in the contract and compensation for the use of the vehicle must be deducted from this.²⁶⁷ With the transfer of ownership rights by these German car providers also come ownership obligations that the consumer needs to perform towards the supplier, even if the consumer never becomes the owner. While equivalent protection exists, this also entails a disproportionality in the sense that there is an increased burden for the consumer, while there is no increase in ownership rights.

Consumers of the Belgian car providers also have the right of withdrawal under the Belgian Civil Code, but the providers do not elaborate on this in their general terms and conditions as the Dutch car providers do. Where *Direct Lease* and *Leaseplan* mention the right of withdrawal, *Arval* and *Smartrent* do not.²⁶⁸ Therefore, the level of protection is not influenced by the general terms and conditions because the right of withdrawal arises from the applicable legal framework, namely the respective implementation laws of the Consumer Rights Directive.

In France, *Arval* and *Formule LLD* merely recall the existence of article L221-28, 12° of the French Consumer Code in their general terms and conditions. This article excludes car rental services from the right of withdrawal.²⁶⁹ *LeasePlan* does not mention anything on the right of withdrawal whereas *Qarson* does. Although *Qarson* addresses rules regarding the right of withdrawal, these rules do not apply to private lease contracts because *Qarson's* general terms and conditions apply to various contracts.²⁷⁰ *Qarson* also mentions that for private leases, the terms of withdrawal are specified in the related financing contract.²⁷¹ This contract is not freely accessible on their website, so this could not be examined further.

263 Quotation 18:19.

264 Quotation 18:20.

265 Quotation 18:20.

266 Quotation 18:15. This also includes sales tax.

267 The claim for vehicle damage or mercantile reduction in value remains unaffected insofar as the damage/mercantile reduction in value is not based on the vehicle defect asserted, see Quotation 18:15.

268 Quotation 9:15; 12:14.

269 Quotation 5:17; 11:12.

270 Quotation 17:9; 17:11.

271 Quotation 17:9.

The Dutch providers of two-wheelers *ANWB*, *LeaseGemak* and *Swapfiets* explicitly mention the right of withdrawal.²⁷² Both *LeaseGemak* and *Swapfiets* also mention that this right applies during the first 14 days. *LeaseGemak* also explains to the consumer how to exercise this right.²⁷³ *Lease Express* does not mention the possibility of withdrawal. Nevertheless, this right still follows from the Dutch legal provisions that implement the Consumer Rights Directive.

The Belgian providers of two-wheelers *De Fietsambassade Gent*, *Swapfiets* and *E-bike to go* all inform the consumer on the existence of the right of withdrawal.²⁷⁴ *De Fietsambassade Gent* and *E-bike to go* elaborate the right of withdrawal in detail by pointing out to the consumer the duration of the right of withdrawal, how the consumer can exercise the right of withdrawal, and the consequences of exercising the right of withdrawal.²⁷⁵ However, this extra information does not increase the level of protection of the withdrawal right as this remains only during the aforementioned 14 days after the conclusion of the contract. *Swapfiets* mentions the right of withdrawal and that this right applies during the first 14 days.²⁷⁶ Only *Zzoomer* does not mention the existence or absence of the right of withdrawal, but this right still follows from the Belgian legal provisions that implement the Consumer Rights Directive.

All studied German providers of two-wheelers offer the right to withdraw where the consumer can withdraw within 14 days and without giving any reason. To exercise this right, the consumer must inform the provider by means of a clear statement. These providers also provide an attached model withdrawal form for this purpose.²⁷⁷ In addition, *Dance*, *GT Bike*, and *Leasingshop* explicitly state the consequences of withdrawal for the consumer in their general terms and conditions. In addition, all amounts already paid are refunded. *Dance* and *GT Bike* do not charge the consumer for the refund under any circumstance, whereas *Leasingshop* obliges the consumer to pay a fee for the service provided until the moment of withdrawal, if the consumer has been informed of this legal consequence before submitting their contract statement and the consumer has expressly agreed to have *Leasingshop* start performing the lease before the end of the withdrawal period.²⁷⁸

The French provider of two-wheelers *Bikeloc* does not mention anything about the right of withdrawal. However, since the right of withdrawal is implemented in French

272 Quotation 20:8; 27:8; 32:7.

273 Quotation 27:8; 32:7.

274 Quotation 24:13; 24:4; 29:8; 35:5.

275 Quotation 24:4; 35:5.

276 Quotation 29:8.

277 Quotation 22:12; 25:6; 25:8; 28:6; 28:7; 30:6.

278 Quotation 22:13; 25:7; 28:5. *Leasingshop* also mentions reasons for exclusion or expiry of the right of withdrawal in their general terms and conditions.

law,²⁷⁹ *Bikeloc*'s consumer is entitled to a right of withdrawal.²⁸⁰ Furthermore, the French providers *Dance*, *Swapfiets*, and *Véligo* offer the consumer the right to withdraw from the lease contract within 14 days without giving reasons. To exercise the right of withdrawal, the consumer must inform the provider by means of an unambiguous statement. Furthermore, the consumer may use an attached model withdrawal form for this, but this is not obligatory.²⁸¹ However, the consequences of withdrawal differ. *Swapfiets* mentions that in case of withdrawal, the lease and registration costs are invoiced to the consumer in *pro rata* the number of days that the two-wheeler was available to the consumer, while *Véligo* and *Dance* refund the payments made by the consumer.²⁸² *Swapfiets* may only require this payment for use if the consumer waived the right of withdrawal in advance. However, this is not reflected in the terms and conditions of *Swapfiets*. Most likely, this waiver is included in the main contract, because without the waiver, there would not only be inequivalent protection, but *Swapfiets* would also fail to comply with the Consumer Rights Directive. However, whether the waiver is included in the lease contract cannot be stated with certainty. Moreover, *Dance* specifically mentions that if the consumer has requested that the performance of the lease commence during the withdrawal period, the consumer must pay *Dance* an amount that is proportional to what was provided until the consumer notified *Dance* of its withdrawal from the contract, in proportion to the total coverage of the contract.²⁸³ This is fully in line with the applicable Consumer Rights Directive. In addition to the legal right of withdrawal, *Véligo* also speaks of a contractual right of withdrawal from the 15th to the 30th or 31st calendar day after delivery of the two-wheeler. In case of withdrawal from the 15th calendar day and up to the 30th or 31st calendar day following the delivery of the bicycle, only the first month's lease is due by the consumer. The right of withdrawal seems to have been extended here. Although this payment amounts to a use fee, the contractual right offers the consumer a more extensive right of withdrawal compared to the statutory right of withdrawal.²⁸⁴ However, with a mandatory user fee, this resembles the contractual termination of the lease which is only offered from the 15th to the 30th or 31st day of the contract. In Table 24, the right of withdrawal is therefore indicated as equivalent protection for *Véligo*. Despite the fact that *Véligo* seems to extend the right of withdrawal, in legal reality, this includes a right to terminate.

279 Paragraph 5.2.2; Article L221-18 French Consumer Code.

280 Quotation 21:12. *Bikeloc* mentions a seven day period for the right of withdrawal, but this is – in line with the Consumer Rights Directive – because the right of withdrawal expires with the departure date of the vehicle.

281 Quotation 23:7; 23:9.

282 Quotation 23:12; 31:6; 33:3.

283 Quotation 23:12.

284 Quotation 33:13. This right of withdrawal is limited to lease of two-wheelers for a period of more than one month.

6.4.2.2 Right to early termination

As part of the right to change your mind, the right to terminate the mobility usership contract early is also discussed as it offers a solution in case a consumer changes their mind about concluding the contract. Although this right is not mentioned in the directives, it is often provided for in the general terms and conditions. This paragraph explicitly discusses the consumer's right to early termination, while in paragraph 6.4.1.2, the provider's information obligation toward the consumer on the right to termination is also discussed. Discussion on the right to terminate as a remedy for a defect follows in paragraph 6.4.3.4.

Consumers who contract with Dutch car providers can terminate the agreement as early as on the first day of the second year of the lease period.²⁸⁵ In addition, the consumer must observe a notice of termination period of at least one month.²⁸⁶ *Arval* offers an ancillary service, which means that under certain circumstances no termination fee is due after the expiry of a minimum of 12 months.²⁸⁷ Termination occurs when the consumer sends a letter to the provider. If the consumer has concluded the lease agreement by e-mail or via the internet, the consumer can also terminate by e-mail.²⁸⁸ For all Dutch car providers, the consumer must pay a termination fee in the event of termination. The termination fee and all other outstanding amounts must be paid before the day of the termination of the agreement, otherwise the termination has no effect and the lease agreement continues.²⁸⁹ If the consumer is forced to terminate the agreement because they became unable to pay the lease instalments through no fault of their own, the provider tries to find a reasonable solution together with the consumer for the payment of the termination fee.²⁹⁰

The Dutch car providers supply explanations on how the termination fee is determined and give calculative examples.²⁹¹ In addition, the car providers also apply a maximum termination fee.²⁹² Furthermore, they determined through the quality mark private lease that an heir or the provider can immediately terminate the lease if the consumer dies. No costs are due for the termination in the event of a death.²⁹³

285 Quotation 3:25; 7:23; 10:31; 15:22.

286 Quotation 3:25; 7:23; 10:31; 15:22.

287 Quotation 6:4.

288 Quotation 3:25; 7:23; 10:31; 15:22. The contact details to which the termination can be sent are stated in the Additional Terms of the providers. See Quotation 2:6; 6:11; 10:33; 14:17.

289 Quotation 3:25; 7:23; 10:31; 15:22.

290 Quotation 3:25; 7:23; 10:31; 15:22; 6:12; 14:18.

291 Quotation 3:26; 7:24; 10:32; 10:34; 15:23; 2:5; 6:10; 14:16.

292 Quotation 3:26; 7:24; 10:32; 10:34; 15:23; 2:5; 6:10; 14:16.

293 The consumer's heirs are obliged to return the vehicle immediately after the termination and remain obliged to pay the outstanding amounts. If the lease contract is signed by two persons and the other person has not died, the lease contract cannot be terminated on account of the consumer's death. The other person then becomes the only contract partner. *Arval*, *LeasePlan*, *Direct Lease* deviate positively from this, because

Regarding the right to terminate early, the Belgian car providers *Arval*, *Direct Lease* and *LeasePlan* acknowledge the option of early termination against the payment of a termination fee, whereas *Smartrent* does not acknowledge this right in their general terms and conditions.²⁹⁴ *Arval's* consumers should, in the case of early termination, pay *Arval* an amount equal to the number of days that the lease period is shorter than agreed and multiplied by the agreed daily rate.²⁹⁵ *Direct Lease* makes a distinction for the termination fee to be paid at the moment of termination. If the consumer terminates more than 30 days before delivery of the vehicle, the consumer should pay €400. If the consumer terminates 30 days or less before the delivery of the vehicle, the consumer should pay a fee of €650. If the consumer terminates after delivery of the vehicle but during the first year of the lease, the consumer must pay a fee equal to all remaining monthly instalments of the first year, with a minimum of three instalments. In case of termination during the second year of the lease, the termination fee consists of 35 percent of all remaining monthly instalments.²⁹⁶ If the consumer wants to terminate during the first year of the lease with *LeasePlan*, the termination fee is equal to the remaining lease instalments up to one year, with a minimum of three lease instalments. Otherwise, *LeasePlan* charges the consumer at least three lease instalments unless the number of remaining lease instalments is less than three lease instalments. In that case, the consumer needs to pay for the remaining lease instalments up to the expiry date of the lease contract.²⁹⁷

The German car providers provide an option to terminate the lease early, but do not actively inform or mention this. The car providers only mention the consumer's consequences in case of termination. *Sixt Leasing* obliges the consumer to pay compensation in the event of termination.²⁹⁸ *Arval* and *ALD Automotive* also mention this consequence.²⁹⁹ *Like2drive* does not specify the consumer's right to terminate.³⁰⁰

the second contracting party has the choice to terminate. *ALD Automotive* does not specify anything on this issue in the Additional Terms and Conditions. Quotation 3:27; 7:25; 10:35; 10:36; 15:24; 6:13; 14:19.

294 Quotation 4:17; 9:17; 12:16; 12:17.

295 Quotation 4:17.

296 Quotation 9:17; 9:22.

297 Quotation 12:16; 12:17.

298 Quotation 18:17. The compensation results from the difference between the cash value of the contract and the proceeds of the vehicle. The present value of the contract is made up of the discounted calculated residual value, the discounted outstanding lease instalments up to the contractual end of the lease term, less any saved term-related costs. Default interest must be added. Further damage cannot be ruled out.

299 Quotation 8:29; 8:30; 1:28. *Arval* mentions that if the consumer and *Arval* wish to terminate the lease before the end of the contract period, they enter a termination agreement governing the indemnity to *Arval* and the consumer's obligations.

300 Quotation 16:12 does elaborate on the consequences for the consumer when the contract is terminated by *Like2drive*.

The French provider *Arval* allows the consumer to terminate the lease early, in writing, with due observance of a notice period of two months and only after the ninth month from the date of delivery of the car. In case the agreement is terminated, the consumer must pay a fee for early termination.³⁰¹ *Formule LLD* specifies the possibilities under which the parties may terminate the contract, but this is only possible in the event of a shortcoming (which gives the contracting party the option to terminate the contract). However, there is no provision for a right to early termination.³⁰² With *LeasePlan*, the consumer is obliged to pay a compensation upon termination and a formula is provided to calculate this compensation. It does not seem to matter which contracting party terminates.³⁰³ In case of early termination, the consumer shall undertake to return the vehicle to a place indicated by the provider.³⁰⁴ Furthermore, in case of early termination, the contractual kilometric quota as well as the reference base for the increase in the rate for additional kilometres are also reduced *pro rata temporis* to the duration of the effective use of the car.³⁰⁵ *Qarson* only mentions the right to early termination in the event that the car ordered is unavailable. The consumer has the choice of requesting either a refund of the sums paid within 30 days of their payment at the latest, or the exchange of the car.³⁰⁶

All studied Dutch providers of two-wheelers should inform the consumer about the procedure to be followed in the event of termination of the lease contract.³⁰⁷ The *ANWB* states that the consumer may terminate the lease agreement if they report it in writing and return the bicycle in accordance with *ANWB*'s return protocol. If the consumer wishes to terminate the lease after the 14-day cooling-off period, but before the delivery of the bicycle, the consumer pays the costs incurred by *ANWB* for this.³⁰⁸ Upon termination, the consumer must pay 40 percent of the costs that the consumer would pay for the remainder of the lease contract. This fee also applies if *ANWB* terminates the lease. In addition to the termination fee, *ANWB* can charge additional costs. *ANWB* reserves the right to charge the value of the vehicle at the time of termination in the event of late return. *ANWB* also charges costs in case of termination for unreported damage to the bicycle, statutory interest, and any collection costs.³⁰⁹ *Lease Express*, on the other hand, states that the lease agreement can only be terminated in writing by registered letter after a minimum

301 Quotation 5:20. Termination fee is calculated according to an exemplary formula.

302 See in the right to terminate Quotation 11:14; 11:15.

303 Quotation 13:10.

304 Quotation 13:11. Under the consumer's sole responsibility and at his own expense and within 48 hours.

305 Quotation 13:13. Any mileage exceeding the allocated quota are invoiced for this purpose by applying the rate mentioned for this purpose in the special conditions of *LeasePlan*. Also see Quotation 13:14 in connection with the termination of the order of the car specifically.

306 Quotation 17:12. *Qarson* is not liable for any termination compensation.

307 Quotation 20:14; 26:8; 27:24; 27:25; 32:15.

308 Quotation 20:14.

309 Quotation 20:26. This value is gradually amortized over the term of three years.

of 12 months with due observance of a notice period of one month.³¹⁰ If the lease ends earlier, the consumer's obligation to pay the full amount of the instalments still due remains.³¹¹ *LeaseGemak* also has a period of 12 months during which the lease may not be terminated. After that, the consumer owes *LeaseGemak* a termination fee of 50 percent of the remaining lease terms.³¹² Termination by the consumer is approved by *LeaseGemak* if it is properly requested, the consumer has no payment debts with *LeaseGemak*, paid the termination fee, and returned the vehicle.³¹³ With *Swapfiets* it is possible to terminate the lease monthly with due observance of a notice period of one month. In the case where *Swapfiets'* lease has a minimum term, early termination is not possible unless *Swapfiets* has repeatedly or seriously failed to fulfil its obligations as described in the lease or the general terms and conditions.³¹⁴

The Belgian provider of two-wheelers *De Fietsambassade Gent* mentions the possibility for the consumer to terminate the lease contract early, provided that the bicycle is returned and that leases already paid are not refunded.³¹⁵ Contrary to *De Fietsambassade Gent*, *Zzoomer* does not offer the option to terminate the lease early. If the consumer nevertheless terminates the agreement, *Zzoomer* can demand forced performance or the dissolution of the agreement with compensation.³¹⁶ The agreement with *E-bike to go* is entered into for an indefinite period, unless the contracting parties agree otherwise, and the consumer can terminate the agreement prematurely, with a notice period of one month. The two-wheeler can be returned by the consumer free of charge at a pick-up point. *E-bike to go* charges €30 for collecting the two-wheeler.³¹⁷ *Swapfiets* also allows termination of the lease with due observance of a notice period of one month. If a *Swapfiets* lease has a minimum term, however, early termination is not possible unless

310 Quotation 26:8. The consumer can also use a deregistration form that is provided on request by *Lease Express*. This form must be signed upon return of the moped. The agreement cannot be terminated without written termination.

311 Quotation 26:14.

312 *LeaseGemak* also provides the following example to calculate the fee: If the lease agreement has a term of 36 months, the lease price is €60 per month and the consumer wishes to terminate the lease early after 24 months, the termination fee is calculated as follows: 50 percent multiplied by 12 (remaining) lease instalments multiplied with €60 equals €360.

313 Quotation 27:24. In the event of the death of the consumer, the heir/heirs or *LeaseGemak* can immediately terminate the lease agreement, see Quotation 27:25.

314 Quotation 32:15; 32:8. At the end of the minimum subscription period and provided that the subscription is not terminated by either party, the subscription changes to a monthly subscription.

315 Quotation 24:14.

316 Quotation 34:11. In the fourth year of the lease, the consumer must still pay the due lease price for the next 12 months. In the third-last year of the lease, the consumer must still pay the due lease price for the next 10 months. In the penultimate year, the consumer must still pay the due lease price for the next eight months. In the last year, the consumer must still pay the lease price that is due, with a maximum of six months.

317 Quotation 35:11.

Swapfiets has repeatedly or seriously failed to fulfil its obligations as described in the lease or the general terms and conditions.³¹⁸ No termination fee applies for any of the Belgian providers of two-wheelers.

The German providers of two-wheelers *Leasingshop*, *Dance* and *GT Bike* do not provide a contractual right to early termination. When the consumer does not uphold the lease contract, the consumer is obliged to pay a contractual penalty and *Dance* has the right to terminate the lease agreement without notice and demands the immediate return of the two-wheeler.³¹⁹ *GT Bike* and the consumer both have the right to terminate the contractual relationship at any time for valid reasons. *GT Bike* mentions that such a reason may arise, for example, if the consumer has more than two lease arrears, if the consumer uses the leased object in violation of the usage rules or if the consumer has unlawfully provided false information when concluding the contract. However, a consumer's right to termination is not offered by *Dance* and *GT Bike*.³²⁰ Contrarily, *Swapfiets* provides the consumer a monthly opportunity to terminate the lease with due observance of a notice period of one month. In case a *Swapfiets* lease has a minimum term, early termination is not possible unless *Swapfiets* has repeatedly or seriously failed to fulfil its obligations described in the lease or the general terms and conditions.³²¹ This also concerns the French variation of *Swapfiets*.³²² The consumer can send their termination to *Bikeloc* by e-mail within 48 hours before the date and time of departure of the vehicle.³²³ Moreover, *Dance* does not offer the right to termination in their general terms and conditions, whereas *Véligo* applies an extended right of withdrawal which actually entails the right of termination.³²⁴ This is further elaborated on under paragraph 6.4.2.1 on the right of withdrawal.

6.4.2.3 Interim conclusion

The right to change your mind is divided into the right of withdrawal and the right to early termination. The right of withdrawal is primarily associated with distance and off-premises contracts and offers the consumer the option to terminate the agreement within 14 days without giving any reasons. The rationale of this right is to empower consumers when contracting a distance or off-premises contract, especially in situations where they

318 Quotation 29:10; 29:11.

319 Quotation 22:16. *Dance* does not allow the leased vehicle to be used for commercial purposes without prior consultation with *Dance*.

320 Quotation 25:9.

321 Quotation 30:9; 30:7.

322 Quotation 31:8.

323 Quotation 21:12.

324 Quotation 23:10.

cannot physically inspect or test a product before contracting.³²⁵ After the period of 14 days, a right to terminate the contract early is often offered by the providers, whereby this early termination is regularly subject to conditions, such as a termination fee. See paragraph 4.4.4 for substantiation that the 14-day right of withdrawal is not useful and proportionate in most cases for mobility usership, given the nature of the contract. The legislator also recognizes this through the right of withdrawal for service contracts, see paragraph 5.2.2, a useful and proportional application of the rule that leads to equivalent protection.

Consumers of exclusive mobility usership have – via the Consumer Rights Directive – the right to withdraw the agreement within 14 days without giving any reasons.³²⁶ As a result, all studied providers meet this minimum requirement. Most providers also explain what the right of withdrawal entails, but there are also several providers that only mention the existence of the right (and any restrictions on it). These restrictions then concern – in line with the Consumer Rights Directive – the consumer’s waiver of the right of withdrawal when the means of transport is used before the end of the withdrawal period of 14 days. Only *Véligo* (FR) seems to offer more protection than the legal minimum by contractually extending the withdrawal period. However, this entails a right to early termination.

The effect of the Dutch private lease quality mark is of importance regarding the right to early termination. The Dutch providers offer the termination right and apply a termination fee, which offers Dutch consumers not only a level of legal certainty but also more protection than the sales-based legal framework provides. Furthermore, most providers of cars do offer an early termination right and every provider that offers this right also applies a termination fee. For the providers of two-wheelers, this is different. A smaller majority of the providers of two-wheelers offer the option to terminate early, namely 10 out of 16. Not all studied providers that offer the right of termination apply a termination fee. This is mainly because some two-wheeler lease contracts can be terminated monthly. In addition, the difference that exists between the modes of transport for these fees lies in the purchase and/or contract value and therefore the (financial) risks for the providers differ considerably. In the event of a higher risk (cars), this risk is partially levelled off by the application of a termination fee.

325 Paragraph 4.4.4.

326 Article 9 Consumer Rights Directive; paragraph 5.2.2; Article 14 Consumer Credit Directive 2008 and paragraph 4.4.4.

Table 27: Interim results of exclusive mobility use on the right to change your mind

Typologies	Countries	Providers	Right to change your mind		
			Right of withdrawal	Right to early termination	Termination fee
(a) Exclusive MU B2C providers of cars	NL	ALD Automotive	=	+	Yes
		Arval	=	+	Yes
		Direct Lease	=	+	Yes
		LeasePlan	=	+	Yes
	BE	Arval	=	+	Yes
		Direct Lease	=	+	Yes
		LeasePlan	=	+	Yes
		Smartrent	=	=	No
	FR	Arval	=	+	Yes
		Formule LLD	=	=	No
		LeasePlan	=	+	Yes
		Qarson	=	=	No
	GER	ALD Automotive	=	+	Yes
		Arval	=	+	Yes
		Like2drive	=	=	No
		Sixt Leasing	=	+	Yes
(b) Exclusive MU B2C providers of two-wheelers	NL	ANWB	=	+	Yes
		Lease Express	=	=	No
		LeaseGemak	=	+	Yes
		Swapfiets	=	+	No
	BE	De Fietsambassade Gent	=	+	No
		E-bike to go	=	+	No
		Swapfiets	=	+	No
		Zzoomer	=	=	No
	FR	Bikeloc	=	+	No
		Dance	=	=	No
		Véligo	=	+	Yes
		Swapfiets	=	+	No
	GER	Dance	=	=	No
		GT Bike	=	=	No
		Leasingshop	=	=	No
		Swapfiets	=	+	No

6.4.3 *The right to conformity*

The consumer who buys a product is entitled to a so-called ‘conform’ product. This right to conformity is mandatory and based on the Consumer Sales Directive and the requirements are specified in the directive.³²⁷ If a good is not in conformity with the contract, a consumer is subsequently entitled to remedies to obviate the non-conformity. Obviously, these provisions do not apply to mobility usership agreements, since no sales contract is concluded, but only services provided. As substantiated in paragraph 4.3.1, the application of the right to conformity is sensible and proportional, aligning the *ratio legis* of the provision. Therefore, the general terms and conditions are assessed.

The right to conformity is not explicitly included in any of the general terms and conditions studied for this research, which is not especially notable since the Consumer Sales Directive does not apply to mobility usership. Below, the general terms and conditions are assessed to examine whether they regulate the remediation of non-conformity. In the event of a lack of conformity, the consumer is primarily entitled to conformity and should therefore be enabled to choose between repair and replacement. Secondly, the consumer is entitled to receive a proportionate reduction in the price or to terminate the contract.³²⁸ These remedies and the provisions in the general terms and conditions are discussed below. The inequivalences with the Consumer Sales Directive for mobility usership consumers is summed up in Table 15. The (in)equivalences that follow from self-regulation for the right to conformity are shown below in Table 28.

6.4.3.1 **Remedy: Repair**

Under the Consumer Sales Directive, the consumer shall be entitled to have the goods brought into conformity, to receive a proportionate reduction in the price, or to terminate the contract in the event of a lack of conformity (Table 15).³²⁹ In order to have the goods brought into conformity, the consumer may choose between repair and replacement, unless the remedy chosen would be impossible or, compared to the other remedy, would impose costs on the seller that would be disproportionate, taking into account all circumstances.³³⁰ As this paragraph discusses repair, it is important to emphasize that the remedies provided by the Consumer Sales Directive, such as repair, do not apply to mobility usership. A possible right to repair, as discussed below, therefore stems from the general terms and conditions that guarantee repair (under specific conditions) in the event of various types of damage.

327 Article 5, 6, 7, 8, 10, 11, 12 Consumer Sales Directive; paragraph 5.5.3.

328 Article 13(1) Consumer Sales Directive.

329 Article 13(1) Consumer Sales Directive.

330 Article 13(2)(a)(b)(c) Consumer Sales Directive.

In all studied general terms and conditions of the Dutch car providers, the consumer is entitled to claim reparation if the car has a defect that needs to be repaired. This must be done at a garage designated by the provider. In addition, when offering the vehicle for repair, the consumer must state that the vehicle is owned by the provider and that the provider must be asked for permission. The provider pays the costs for repair (or maintenance) directly to the garage if it has given prior permission for the repair or maintenance. This is in case of a defect – a non-conformity – as stated in the Consumer Sales Directive. The consumer remains liable for damage they have caused or increased maintenance costs due to their misuse of the vehicle and those costs are charged to the consumer.³³¹ This right to repair is not only conditional regarding the selected car garages where the consumer may bring their car for repairment, the Dutch car providers also impose conditions when a defect (non-conformity) occurs outside the Dutch national borders. In such cases, the consumer must request permission from the provider for the repair. Furthermore, the provider promises that they make every effort to ensure that the vehicle can be used again as soon as possible.³³² To a certain extent there are equivalent rights of repair for mobility usership consumers compared to the sales-based consumer, at the same time, inequivalences exist because there are restrictions for the mobility usership consumer on the right to repair in the event of non-conformity.

The Belgian car providers also offer a conditional right of repair in their general terms and conditions.³³³ *Arval*, *Direct Lease* and *LeasePlan* require the consumer to timely offer the vehicle for repair. In case the consumer does so, the costs for repair are covered by the provider. Furthermore, the consumer should obtain prior permission from the provider in case any repair should be done, and the repair must be carried out by a company designated by the provider.³³⁴ *Smartrent* has included that insofar as the consumer has entered into the lease, *Smartrent* is mandated by the consumer to conclude a contract in their name and for their account (of the lessee) for repairs according to the conditions described in the special conditions of this lease agreement.³³⁵ While the construction is different for *Smartrent*, the right to repair also seems to be an ancillary right that does not arise from the standard contract, resulting in inequivalent protection. *Smartrent* states that the ancillary agreement covers all costs of repair, resulting from normal use of the

331 Quotation 3:29; 7:27; 10:38; 15:26; 6:14; 14:20.

332 Quotation 3:29; 7:27; 10:38; 15:26; 6:14; 14:20. For repairs (and maintenance) abroad for which the provider has given permission, the consumer can pay the costs himself whereafter the consumer is reimbursed – up to the amount for which permission has been given – by the provider.

333 Quotation 4:22; 9:23; 12:19.

334 Quotation 4:22; 9:23; 12:19.

335 Quotation 19:32.

vehicle, necessary to keep the vehicle in normal mechanical condition and states that in case the costs of repair are more than €150, the provider should pre-approve the repair.³³⁶ Furthermore, unlike the other Belgian car providers, *Smartrent* also states that they pay all costs of repair resulting from the *normal use of the vehicle*. This term is ambiguous, which creates uncertainty about the interpretation of the right to repair by this provider.³³⁷

The German provider *ALD Automotive* states in its general terms and conditions that the provider is responsible for remedying the detected and registered defects upon acceptance. The consumer must report any defects in their own name to a garage authorised by the provider. This repair is carried out free of charge for the consumer.³³⁸ This only indicates the time of delivery (upon acceptance), which results in an inequivalence in the right to conformity. After all, under the Consumer Sales Directive the providers should remedy a non-conformity when it became clear within two years after delivery.³³⁹ The right to repair therefore extends much further in time. *Sixt Leasing* waives all related claims and rights from the purchase agreement against the supplier due to material defects in the leased vehicle and transfers these rights and obligations to the consumer.³⁴⁰ These concern, for example, the demand for an additional performance (e.g. repair), or a reduction of the purchase price or compensation.³⁴¹ In principle, with this transfer of rights, similar rights are granted to the lease consumer as the consumer who acquires ownership of the vehicle. However, the provider sets limits on the rights of the lease consumer. For example, the consumer must first obtain permission or consult with the lease provider (reduced freedom of handling) and repair of a defect must be arranged by the consumer themselves but can only be carried out at garages selected by the provider. Furthermore, the lease consumer also has the responsibility of enforcing the duties associated with the ownership. *Like2drive* mentions that *Like2drive* is liable for material defects and these defects must be reported to the provider immediately after discovery. The consumer should make the vehicle available for inspection and repair upon request.³⁴² In contrast to *ALD Automotive*, the right to repair is not limited by time. The obligation to remedy the defect also remains in the hands of the provider. Lastly, *Arval* does not mention anything about repair in relation to (the remedying of) defects.

336 Quotation 19:22.

337 Quotation 19:22.

338 Quotation 1:29.

339 Article 10(1), (3) Consumer Sales Directive. Recital 41, 45 Consumer Sales Directive.

340 Quotation 18:18.

341 Quotation 18:18. If the consumer requires additional performance by remedying the defect, he is entitled and obliged to assert this at a provider recognized by the manufacturer in accordance with the applicable conditions. If the initial remedy of the defect is unsuccessful, *Sixt Leasing* assists, upon written request, the consumer in enforcing the claim for remedy of the defect, see Quotation 18:23.

342 Quotation 16:13.

The French car providers *Arval* and *Formule LLD* oblige the consumer in their general terms and conditions to carry out and pay for necessary operations or repairs according to the manufacturer's recommendations, including technical inspections. These operations are exclusively entrusted to a partner approved by the provider.³⁴³ *Arval* and *Formule LLD* both offer an ancillary maintenance service that covers these costs of maintenance and repairs, but this is not generally included in the lease contract.³⁴⁴ *LeasePlan* also obliges the consumer to carry out repair on the car at their own expense, unless an ancillary service has been taken out.³⁴⁵ *Qarson* does not mention the right of repair with regard to a lease contract.³⁴⁶

Under the Dutch two-wheeler provider *ANWB*, the consumer is entitled to repairs in the general terms and conditions. This also happens at a selected bicycle shop. The damage is compensated if it is insured in accordance with the terms and conditions of the *ANWB* bicycle insurance. The repair is only reimbursed if it is necessary due to the normal use of the bicycle.³⁴⁷

Lease Express mentions in the general terms and conditions that the consumer should keep the mopeds in good condition. As a result, the consumer arranges the repair and replacement of parts of the two-wheeler at the expense of *Lease Express*. These costs pass on to the consumer in cases where it is their own fault.³⁴⁸

LeaseGemak stipulates in their general terms and conditions to reimburse the costs of repairs. However, the repair of the two-wheeler does not seem to be automatically included in the lease contract. *LeaseGemak* states that if repairs are not included in the lease agreement, costs for repairs are borne by the consumer unless the repair is covered by the insurance or the (extended) guarantee.³⁴⁹ Repair is included in the lease agreement of *LeaseGemak* when parts have become defective due to external disaster or when repair is necessary without being the result of a collision.³⁵⁰ In the event of a repair, *LeaseGemak* reimburses the costs of carrying out the repair minus the (possible) personal contribution

343 Quotation 5:22; 11:16; 11:17.

344 Quotation 5:23; 11:16 For a detailed explanation on what the maintenance service entails see Quotation 5:6; 11:4.

345 Quotation 13:15; 13:16; 13:17; 13:18.

346 *Qarson* does mention the right to repair insofar as it includes the purchase of cars. After all, *Qarson* offers several contracts. See Quotation 17:3.

347 Quotation 20:17; 20:12.

348 Quotation 26:15.

349 Quotation 27:29. Furthermore, as a consumer it is expressly not permitted to repair the bicycle himself or to have it repaired by a company other than the supplier of the bicycle unless *LeaseGemak* has given written permission for this.

350 Quotation 27:30.

of the consumer. *LeaseGemak* only reimburses these costs directly to the supplier of the bicycle.³⁵¹ Damage to personal property or parts and/or accessories applied by the consumer or conflicting use of the two-wheeler are not eligible for repair.³⁵²

Swapfiets uses the term ‘swapping’ for repairing or replacing the two-wheeler in the general terms and conditions. ‘Swapping’ means that in the event of a defective vehicle, the provider will repair the vehicle on site or exchange it for another bicycle. In case of repair, it refers to the repair of defects or damage to the two-wheeler because of reasonable wear and tear and normal use of the vehicle. The repair is included in the lease costs. *Swapfiets* strives to repair the two-wheeler within 48 hours after registration by the consumer.³⁵³ This essentially means that *Swapfiets* meets the *rationale* of the right of repair and offers equivalent protection.

De Fietsambassade Gent does not offer a right to repair in the general terms and conditions, so this is done at the expense of the consumer. In addition, the provider does not offer an ancillary maintenance and/or repair contract. However, repairs due to normal wear and tear are the responsibility of *De Fietsambassade Gent*.³⁵⁴

With *Zzoomer*, the consumer should carry out all maintenance and repair of the two-wheeler during the lease in accordance with the maintenance instructions provided by the supplier to maintain the two-wheeler in its original condition, except for normal wear and tear resulting from normal use. The consumer should also conclude a maintenance and repair agreement with the supplier for the duration of this lease at the consumer’s expense for the repair of defects of the two-wheeler (and periodic maintenance).³⁵⁵ As mentioned with the Dutch provider *Swapfiets*, the same applies for the Belgian provider of two-wheelers. The repair is included in the lease costs and the provider strives to repair the two-wheeler within 48 hours after damage has been reported by the consumer.³⁵⁶ *E-bike to go* takes care of the regular maintenance of the two-wheeler and assesses the cause of the defect or damage and repairs the two-wheeler unless this cannot reasonably be expected of *E-bike to go*. Any repair for damage caused by old age, normal wear and tear or force majeure to the

351 Quotation 27:32. If the consumer must make a personal contribution for the repair, the consumer must pay this directly to the supplier of the bicycle before the repair is carried out by the supplier of the bicycle. The consumer must also indicate to the supplier that the bicycle is the ownership of *LeaseGemak*, and that written permission must be requested from *LeaseGemak* to carry out the repair.

352 Quotation 27:31.

353 Quotation 32:18. The consumer cannot claim compensation or payment if this target time is not met and may be liable to pay a fee if he/she misses an agreed Swapping arrangement, as set out in Annex III-D of the general terms and conditions.

354 Quotation 24:15; 24:16.

355 Quotation 34:6.

356 Quotation 29:13.

two-wheeler is at the expense of *E-bike to go*.³⁵⁷ Furthermore, the consumer may not have the two-wheeler repaired by a third party, other than with the permission of *E-bike to go*.³⁵⁸

The German providers of two-wheelers *Dance*, *Swapfiets*, and *GT Bike* offer repair of the vehicle in case of a defect in their general terms and conditions. *Dance* incorporates an on-demand repair/maintenance service for the duration of the lease.³⁵⁹ In the event of a defect of the vehicle due to damage, the consumer must inform *Dance* within 24 hours of becoming aware of the damage. In the event of damage to the vehicle, *Dance* carries out the repair at the consumer's location or in a garage. If the damage cannot be repaired within a reasonable time, the damaged vehicle is replaced by a comparable model. The consumer only bears the costs for repairs and spare parts if the damage is caused by non-contractual or improper use, parts of the vehicle must be replaced and/or the damage is caused by intent or negligence of the consumer.³⁶⁰ If repairs to the bicycle are necessary during the lease period to ensure the operation or road safety of the vehicle, *GT Bike* carries out a repair free of charge or offers the consumer a suitable replacement vehicle if the cause is not due to improper use by the consumer. The consumer may only use selected garages for repairs otherwise the consumer bears the costs of the repair.³⁶¹ *Swapfiets* includes repair in the lease costs and strives to repair the two-wheeler within 48 hours after damage has been reported by the consumer.³⁶² *Leasingshop* states that all repairs must be reported via the repair request form in *Leasingshop's* portal. Furthermore, when requesting a covered repair, it is always necessary to submit a quote for approval prior to the repair.³⁶³ It is not made clear which repairs are eligible for compensation as this seems to differ per contract choice and form. Repair of defects is therefore not included as standard in the lease contract. Therefore, only *Leasingshop* offers inequivalent protection regarding the right to repair in case of defects compared to the provisions in the Consumers Sales Directive.

With the French two-wheeler providers *Bikeloc* and *Véligo*, all costs of repair are the responsibility of the consumer, regardless of the amount of the repairs.³⁶⁴ For *Bikeloc*,

357 Quotation 35:13; 35:15. If, in the opinion of *E-bike to go*, there is a defect or damage because of use by or on behalf of the Renter, then the costs of maintenance, repair, replacement or otherwise are for the Renter's account.

358 Quotation 35:14.

359 Quotation 22:17.

360 Quotation 22:19. Further use of the defective vehicle is not permitted until the damage has been repaired.

361 Quotation 25:11. If the consumer wants to use another garage for the repair, the consumer needs prior consent of *GT Bike*.

362 Quotation 30:10.

363 Quotation 28:4.

364 Quotation 21:13; 21:14. The consumer is obliged to reimburse *Bikeloc* for the costs of repair or replacement of the vehicle that are the result of visible or invisible damage caused while the consumer had the vehicle in his possession.

any repair that is required without notification to *Bikeloc* is deducted from the amount of the deposit.³⁶⁵ Furthermore, *Véligo* requires in the general terms and conditions that these repairs need to be performed only by an authorised *Véligo* repair agent. Neither *Bikeloc* nor *Véligo* include information about repair in their lease contracts. This means that they do not offer equivalent protection, contrary to the providers *Dance* and *Swapfiets*. After all, *Dance* offers in the general terms and conditions a lease that provides the consumer with a two-wheeler, accessories and on-demand repair and maintenance services for the duration of the lease. In the event of damage to the two-wheeler, *Dance* carries out the repair at the consumer's location or in a workshop. If the damage cannot be repaired within a reasonable period, the damaged two-wheeler is replaced by a comparable model.³⁶⁶ *Swapfiets* also includes repair in the lease costs and strives to repair the two-wheeler within 48 hours after damage has been reported by the consumer.³⁶⁷

6.4.3.2 Remedy: Replacement

According to article 13 of the Consumer Sales Directive, the consumer shall be entitled to have the goods brought into conformity in the event of a lack of conformity (Table 15).³⁶⁸ In order to have the goods brought into conformity, the consumer may choose between repair and replacement, unless the remedy chosen would be impossible or, compared to the other remedy, would impose costs on the seller that would be disproportionate, taking into account all circumstances.³⁶⁹ As this paragraph discusses replacement, it is important to emphasize that the remedies provided by the Consumer Sales Directive, such as replacement, do not apply to mobility usership. A possible right to replacement, as discussed below, therefore stems from the general terms and conditions that offer replacement (under specific conditions).

The right to replacement arising from the general terms and conditions of the Dutch car providers offers less protection because the replacement car may be of a different brand, type, and version than the leased car. Although the additional terms and conditions state the minimum (lease) class of the replacement vehicle, it does not offer a right to a particular replacement. Furthermore, the general terms and conditions mention that the consumer should return the replacement vehicle as soon as the leased car is available again.³⁷⁰

365 Quotation 21:15.

366 Quotation 23:13.

367 Quotation 31:11.

368 Article 13(1) Consumer Sales Directive.

369 Article 13(1) Consumer Sales Directive; Table 15.

370 Quotation 3:33; 7:31; 10:42; 15:30. The rules that apply for the leased car also apply for the replacement car.

In Belgium, the examined lease contracts do not guarantee the right of replacement. Only *Smartrent* offers a replacement car in the contract, but only for a maximum of one working day, which does not attain the level of protection that results from the Consumer Sales Directive.³⁷¹ *Arval*, *Direct Lease*, and *LeasePlan* do not offer the right of replacement in their lease contracts, but it can be included in the lease contract as an ancillary.³⁷² Even if the right of replacement is concluded by the consumer as an ancillary contract/right, it remains a conditional right. For example, the providers set conditions for the type of replacement car, the duration, and the time of availability of the replacement car.³⁷³

The general terms and conditions of the German car providers do not explicitly mention the possibility of a replacement vehicle. Nevertheless, the consumer is entitled to a replacement vehicle because *ALD automotive*, *Arval* and *Sixt Leasing* transfer the legal remedy claims against the supplier from the purchase contract regarding material defects in the vehicle. This transfer entitles consumers to a replacement vehicle. In the event of material defects to the vehicle, the consumer is entitled and obliged to submit the assigned material defect claims in their own name to the respective supplier.³⁷⁴ *Like2drive* does not transfer rights (and obligations) to the consumer. *Like2drive* only provides information about the procedure for making a replacement vehicle available after notification of the defect or damage.³⁷⁵

None of the French car providers offer a replacement vehicle within the lease. Both *Arval* and *Qarson* do not mention the right of replacement.³⁷⁶ *Formule LLD* and *LeasePlan* only offer replacement transport as an ancillary service.³⁷⁷

371 Quotation 19:27.

372 Quotation 4:25; 9:25.

373 Quotation 4:25; 9:25; 12:25; 19:24. For example, *Arval* offers the consumer a replacement vehicle for repairs in Belgium that cannot be carried out within 24 hours and for (damage) repairs in Europe that take more than two working days. For the 24 hours or the two days respectively, the costs for replacement transport are for the consumer. Another example is *Direct Lease*, which offers a replacement car to the consumer either when the leased vehicle is immobilized in Belgium and the repairs to the immobilized vehicle cannot be completed within 24 hours, or the leased vehicle is stolen. The replacement car is made available to the consumer during the repair period, or in the event of theft for a maximum period of five days.

374 Quotation 1:30; 8:31; 18:18; 18:19; 18:23; 18:24.

375 Quotation 16:14. Furthermore, *Like2drive* states that if the consumer caused the damage, the consumer is not entitled to a free replacement vehicle during the standstill of the vehicle (for example for damage assessment or repair).

376 *Qarson* does mention the right to repair insofar as it includes the purchase of cars. After all, *Qarson* offers several contracts. See Quotation 17:3.

377 Quotation 11:6; 13:1; 13:19.

Both Dutch two-wheeler providers, *Lease Express* and *Swapfiets* offer a replacement vehicle. In the event of defects to a moped, *Lease Express* strives to remedy the vehicle on the same day, or the moped is replaced in cases where the consumer reports the defect to *Lease Express* by phone or digitally before six o'clock in the morning. Replacing mopeds is only possible if a person is on location to sign for proper receipt and return of the defective moped.³⁷⁸ *Swapfiets* uses the term 'swapping' also for replacing the two-wheeler. In case of replacement, *Swapfiets* tries to replace the vehicle with the same type, wherever possible. The replacement is included in the lease costs. *Swapfiets* strives to replace the two-wheeler within 48 hours after damage has been reported by the consumer.³⁷⁹ *LeaseGemak* only states that if the lease agreement includes the right to a replacement bicycle, it will be described in the lease agreement; in other words, a replacement vehicle is not offered as a standard in the lease contract.³⁸⁰ *ANWB* does not offer a replacement vehicle.³⁸¹

At *De Fietsambassade Gent*, the consumer is entitled to a replacement bicycle for the lease period in a case where the bicycle is stolen if the consumer has taken out theft insurance and the consumer has followed the mandatory procedure.³⁸² This means that no replacement is provided in the event of a defect, and therefore inequivalent protection exists with *De Fietsambassade Gent*, whereas the other providers do offer a replacement two-wheeler in order to have continuation of the use. After all, *Swapfiets* offers a replacement vehicle when necessary and tries to replace the vehicle with the same type of vehicle. This is included in the lease price. *Swapfiets* strives to replace the two-wheeler within 48 hours after damage has been reported by the consumer.³⁸³ *E-bike to go* also offers replacement transport if the two-wheeler cannot be repaired immediately.³⁸⁴ *Zzoomer* only offers a replacement vehicle for the duration of the maintenance if the comfort contract variation is concluded.³⁸⁵

The German providers of two-wheelers *Dance*, *GT Bike*, and *Swapfiets* offer a replacement vehicle in case the damaged vehicle cannot be repaired within a reasonable time, whereas *Leasingshop* does not offer a replacement.³⁸⁶

378 Quotation 26:7.

379 Quotation 32:18. When *Swapfiets* replaces a two-wheeler, the consumer returns the two-wheeler to *Swapfiets*, including all other items, including batteries and keys that came with the two-wheeler.

380 Quotation 27:17.

381 Quotation 20:18.

382 Quotation 24:17. If the stolen bicycle is found during the lease or at the latest six months after its termination, the paid exemption fee is refunded to the consumer. Any repair costs are the responsibility of the consumer.

383 Quotation 29:15; 29:14.

384 Quotation 35:15. *E-bike to go* contacts the consumer within 48 hours to schedule an exchange of the bicycle.

385 Quotation 34:12.

386 Quotation 22:19; 25:11; 30:10.

The French provider *Bikeloc* does offer a replacement vehicle, but the consumer must bear the costs for this, which means it is not part of the lease contract.³⁸⁷ The other French providers, however, do offer a replacement two-wheeler within their contract. If a defect cannot be repaired by *Dance* within a reasonable period, the two-wheeler is replaced by a comparable model. Consequently, *Dance* offers replacement for the continuation and remediation of the lease.³⁸⁸ Moreover, *Véligo* states that if the two-wheeler is immobilised for more than 72 hours, a new two-wheeler is made available as a replacement.³⁸⁹ *Swapfiets* also offers a replacement vehicle, when necessary, within 48 hours after damage has been reported by the consumer and tries to replace the vehicle with the same type of vehicle.³⁹⁰

Under article 13(2) of the Consumer Sales Directive, the consumer cannot opt for repair or replacement when the remedy chosen would be impossible or, compared to the other remedy, would impose costs on the seller that would be disproportionate.³⁹¹ In the Netherlands, the general terms and conditions of the car providers state that the consumer has in principle the same vehicle during the full lease term unless the costs of repair (and maintenance) due to a technical defect are so much higher than normal that it is financially irresponsible for the provider to continue offering the vehicle. Then the provider can replace the car with a car that is at least of the same class. The instalment amount and the duration of the lease period then remain the same.³⁹² For the Belgian car providers, only *Arval* and *Direct Lease* reserve the right not to have maintenance or repairs carried out if the costs for repair are not in proportion to the value of the car or the contract.³⁹³ In this case, the lease contract comes to an end. The consumer is left no choice here and therefore replacement is not offered as an alternative remedy in the first place.³⁹⁴ As mentioned above, the German car providers *ALD automotive*, *Arval* and *Sixt Leasing* transferred their rights to the consumer in their general terms and conditions. This means that consumers cannot, in line with the rights transferred to them, choose repair or replacement in a case where the remedy chosen would be impossible or, compared to the other remedy, would impose costs on the seller that would be disproportionate.³⁹⁵

387 Quotation 21:16.

388 Quotation 23:14.

389 Quotation 33:14. Two-wheeler is made available within the limits of available stocks.

390 Quotation 31:11.

391 Article 13(2) Consumer Sales Directive. To determine on the disproportionality all circumstances, including the value the goods would have if there were no lack of conformity, the significance of the lack of conformity and whether the alternative remedy could be provided without significant inconvenience to the consumer should be considered.

392 Quotation 3:28; 7:26; 10:37; 15:25.

393 Quotation 4:26; 9:23.

394 Quotation 9:23.

395 Article 13(1) Consumer Sales Directive. Quotation 1:30; 8:31; 18:18; 18:19; 18:23; 18:24.

The French car providers do not mention anything in their general terms and conditions on the limitation of the consumer's choice of remedies in case it would be impossible or impose costs on the provider that would be disproportionate. The providers of two-wheelers also do not mention this. The fact that this rule is not found in the general terms and conditions for two-wheelers may also have to do with the mode of transport; disproportionality is less likely to arise with a two-wheeler since the purchase/contract value (and therefore the financial risk) is considerably lower compared to a car, and the two-wheeler is less complex than a car.

Repair or replacement within reasonable time

According to article 14(1) of the Consumer Sales Directive, a defective product should be repaired or replaced free of charge, within a reasonable time, and without significant inconvenience to the consumer (Table 15).³⁹⁶ The rationale behind this provision is that consumer inconvenience should be minimized (paragraph 4.3.2) as delays in these remedies could disrupt the normal use of the product or service and cause inconvenience to the consumer. This rationale also applies here.

The general terms and conditions of the studied Dutch car providers assure this rule because the consumer is provided with a replacement car in case the repair (or maintenance) lasts longer than 72 hours.³⁹⁷ This is in line with the rationale of the Consumer Sales Directive as it results in the continuation of mobility, although the car might not be repaired quickly. After all, the central service with mobility usership contracts is the use of mobility and this means that the consumer is not without this use for an unreasonable amount of time. This term of 72 hours applies for *LeasePlan*, *Direct Lease*,³⁹⁸ and *ALD Automotive*.³⁹⁹ *Arval* deviates positively from the Quality Mark Private Lease and arranges a replacement car after 48 hours.⁴⁰⁰ Again, a territorial limitation applies for all studied car providers. If repair or maintenance is carried out outside the Netherlands, the consumer is not at all entitled to a replacement vehicle, creating an inequivalence of protection in such cases.⁴⁰¹ Furthermore, the general terms and conditions stipulate that in case the defect is attributable to the consumer, the consumer must pay for repair or maintenance.

396 Article 14(1)(a)(b)(b) Consumer Sales Directive.

397 Quotation 3:32; 7:30; 10:41; 15:29.

398 In both cases the consumer can purchase an ancillary service, which entitles the consumer to a replacement car after 24 hours. Quotation 14:21; 10:12.

399 Quotation 2:7.

400 The consumer can purchase an ancillary service, which entitles the consumer to a replacement car after 24 hours. Quotation 6:1; 6:3.

401 Quotation 3:32; 7:30; 10:41; 15:29.

Furthermore, the consumer is not entitled to a replacement vehicle, which is in line with the Consumer Sales Directive.⁴⁰²

The Belgian provider *Smartrent* provides a replacement car for a maximum of one working day and after making an appointment at least 24 hours in advance. *Smartrent* does not specifically mention a time period in which the replacement transport must be offered but *Smartrent* does oblige the consumer to make their request at least 24 hours in advance.⁴⁰³ Since the other Belgian car providers do not offer a replacement in their lease contract, an alternative remedy is of course not provided within a reasonable time, which results in inequivalent protection here. Nevertheless, in case the ancillary service of a replacement (against payment) is obtained, *Arval* and *Direct Lease* offer a replacement car if the repair takes more than 24 hours, which is considered to be within a reasonable time.⁴⁰⁴ *Smartrent* states that a replacement car is available upon request at least 24 hours in advance, which does not guarantee anything on the period in which a replacement car becomes available.⁴⁰⁵ Furthermore, *LeasePlan* does not state a period in which a replacement car is made available.⁴⁰⁶

The German car providers *ALD Automotive*, *Arval* and *Sixt Leasing* also do not regulate anything specifically about a replacement vehicle in their general terms and conditions. The sales rights (and obligations) are transferred from the provider to the consumer and therefore the statutory reasonable term applies here. As a result, equivalent protection is offered by the transfer of the rights (and obligations).⁴⁰⁷ *Like2drive* only clarifies on the terms of a replacement vehicle after the defect of damage occurs.⁴⁰⁸ Since none of the French car providers offer repair or replacement within the standard lease contract, no reasonable term is discussed in the general terms and conditions.⁴⁰⁹

The Dutch providers of two-wheelers *Lease Express* and *Swapfiets* seem to offer their remedies within a reasonable time. *Swapfiets* strives to offer remedies within 48 hours and *Lease Express* promises a remedy on the same day if the defect is reported before six in the morning.⁴¹⁰ *LeaseGemak* does not provide any remedies within the contract, consequently

402 Quotation 3:32; 7:30; 10:41; 15:29.

403 Quotation 19:24; 19:27. Although *Smartrent* stipulates that a replacement car is available upon request at least 24 hours in advance.

404 Quotation 4:25; 9:26.

405 Quotation 19:24; 19:27.

406 Quotation 12:20.

407 Quotation 1:30; 8:31; 18:18; 18:19; 18:23; 18:24.

408 Quotation 16:14.

409 Some providers offer repair or replacement as an ancillary service but since this is not included in the general contract these terms are not discussed here.

410 Quotation 26:7; 32:18.

there is no question of a reasonable period in this regard. Although ANWB does provide repair of the two-wheeler, the provider does not elucidate on the time in which the repair would take place.

The Belgian providers of two-wheelers *E-bike to go* and *Swapfiets* strive to offer remedies within 48 hours.⁴¹¹ *E-bike to go* only replaces the vehicle when repair is not possible on the spot.⁴¹² *De Fietsambassade Gent* and *Zzoomer* do not mention any term in which the remedies should be executed.

The German provider of two-wheelers, *Swapfiets* obliges itself in its general terms and conditions to try to offer remedies within 48 hours.⁴¹³ In contrast, both *Dance* and *GT Bike* do not make any promises about the time frame within which a remedy is implemented. They only oblige the consumer to report a defect within 24 hours.⁴¹⁴ *Leasingshop* does not offer remedies, so the reasonable time in which these are offered is irrelevant and therefore not discussed. Consequently, only *Swapfiets* meets the requirement of offering a remedy within a reasonable period.

The French providers of two-wheelers *Véligo* and *Swapfiets* mention a period of 72 and 48 hours, respectively, as the period in which the remedies are aimed to be executed. This can be considered a reasonable time.⁴¹⁵ The provider *Dance*, on the other hand, is less concrete and – just as in the Consumer Sales Directive – simply mentions a reasonable time. It can therefore also be assumed here that equivalent protection is offered. This is only different for the French provider *Bikeloc*, who does not offer any remedies, making the (reasonable) time irrelevant.⁴¹⁶

6.4.3.3 Remedy: Price reduction

According to the Consumer Sales Directive, the consumer shall be entitled to a proportionate reduction of the price in accordance with article 15 of the Consumer Sales Directive in case the provider has not completed repair or replacement, or the provider has refused to bring the goods into conformity.⁴¹⁷ The consumer is also entitled to a price reduction when a lack of conformity appears despite the provider having attempted to

411 Quotation 29:13.

412 Quotation 35:15.

413 Quotation 30:10.

414 Quotation 22:19; 25:12. In addition, *Dance* reserves the right to inspect and service the vehicle, make repairs, or replace the vehicle 24 hours after prior notice. See Quotation 22:7.

415 Quotation 31:11; 33:14.

416 Quotation 23:14.

417 Or the provider has not completed repair or replacement in accordance with Article 14(2) and (3) Consumer Sales Directive.

bring the goods into conformity, the lack of conformity is of such a serious nature as to justify an immediate price reduction, or the provider has declared – or it is clear from the circumstances – that the provider will not bring the goods into conformity within a reasonable time or without significant inconvenience for the consumer.⁴¹⁸ Furthermore, the reduction of price shall be proportionate to the decrease in the value of the goods which were received by the consumer compared to the value the goods would have if they were in conformity.⁴¹⁹

In the general terms and conditions of the researched car providers, nothing is mentioned on the right of a price reduction as a remedy to a defect as follows from the Consumer Sales Directive.⁴²⁰ This remedy is, in the event of non-conformity, not mentioned in the general terms and conditions for both cars and two-wheeler lease contracts. As a result, inequivalent protection exists here for consumers of leases.

The German car providers *ALD Automotive*, *Arval*, and *Sixt Leasing* transfer sales rights in case of a non-conformity (defect) to the consumer in their general terms and conditions. Consequently, this could also include the secondary remedy of the price reduction.⁴²¹ However, this would entail a price reduction on the sales price, which would benefit the provider. After all, no information is provided about passing on this price reduction on the sales price to the monthly lease price. *Like2drive* does not mention anything on price reduction.

6.4.3.4 Remedy: Right to terminate

In the event of a lack of conformity, the consumer shall be entitled to terminate the contract. This paragraph specifically discusses the right to terminate as a remedy for a non-conformity, while the provider's information obligation on the right to termination is also discussed in paragraph 6.4.1.2 and the consumer's right to early termination are discussed in paragraph 6.4.2.2. The consumer shall be entitled to the termination of the contract in accordance with article 16 of the Consumer Sales Directive if the provider has not completed repair or replacement or has refused to bring the goods into conformity.⁴²² The consumer also has the right to terminate as a consequence of a lack of conformity when this lack appears despite the provider having attempted to bring the goods into conformity, the lack is of such a serious nature as to justify an immediate price reduction

418 Article 13(4) of the Consumer Sales Directive; Table 15.

419 Article 13(4), 15 Consumer Sales Directive. See paragraph 4.3.2.

420 Article 13(4), 15 Consumer Sales Directive. See paragraph 4.3.2. The French provider *Qarson* only mentions the right to a price reduction regarding sales contracts, see Quotation 17:13. Also see Table 15.

421 Quotation 1:30; 8:31; 18:18; 18:19; 18:23; 18:24.

422 Article 13(1), (4)(a), (3), 16 Consumer Sales Directive.

or termination of the sales contract, or the provider has declared – or it is clear from the circumstances – that they will not bring the goods into conformity within a reasonable time or without significant inconvenience for the consumer.⁴²³ According to article 16 of the Consumer Sales Directive, the consumer shall exercise the right to terminate the sales contract by means of a statement to the seller expressing the decision to terminate the sales contract.

The right to terminate is mentioned in several instances in the general terms and conditions of the researched car providers but the right to terminate is not deployed as a remedy for a defect.⁴²⁴ However, under all studied national legal systems, general contract law provides for the right to terminate but this is not mandatory law.⁴²⁵ Consequently, to some extent equivalent protection exists here.

6.4.3.5 Maintenance

Maintenance does of course not directly follow from the examined directives. Nevertheless, maintenance is discussed here because a right to maintenance could ensure that a non-conformity does not occur or can eliminate a non-conformity. In other words, maintenance activities such as repairs, adjustments or replacements may be needed to correct defects. Simultaneously, protection against non-conformities does not guarantee durability.

There are providers who offer maintenance in their general terms and conditions. The question is to what extent this concerns an additional (consumer) right of maintenance or whether this maintenance is for the provider's interest and responsibility that originally lies with the provider (as the owner of the vehicle) and should therefore remain there. In case of vehicle ownership, the consumer is responsible for maintaining their vehicle. Since ownership of the vehicle in case of mobility usership does not transfer to the consumer, the provider remains the owner and the provider is therefore responsible for the necessary maintenance of the vehicle so that the consumer can use the vehicle in conformity of the contract. Nevertheless, providers sometimes decide to include a consumer's right to maintenance in their general terms and conditions, as though they extend the consumer's rights or remove obligations to maintain the vehicle from the consumer. Although this

423 Article 13(4)(b)(c)(d), 16 Consumer Sales Directive.

424 The instances where the right to terminate mainly concern contract changes or the impossibility of delivering according to the agreed time. Incidentally, the Belgian provider *Direct Lease* describes the consumer's right to terminate the contract in a more general sense, but this also does not specifically concern the possibility of termination by the consumer in the event of non-conformity (or the occurrence of a defect), see Quotation 9:21.

425 The Netherlands: Artikel 6:265 Dutch Civil Code. Germany: Section 314 German Civil Code. Belgium: Article 5:90 *et seq* Belgian Civil Code. France: Article 1178 French Civil Code.

seems to offer advantages to the consumer, maintenance is the providers' responsibility and interest. In addition, the provider naturally benefits from controlling the maintenance of their own vehicles. At the same time, providers often transfer the obligation to carry out and monitor the need for (periodic) maintenance to the consumer. This transfer is detrimental for the consumer when consumers are burdened with ownership obligations. Consequently, an inequality in protection could arise in case the consumer is obliged by the provider to (extensively) maintain the vehicle. This is indicated with a minus sign (-) in Table 28 where appropriate.

For the Dutch car providers, responsibility for the performance and cost of daily maintenance of the car such as tire pressure and maintaining the engine oil level remains the burden of the consumer, according to the general terms and conditions.⁴²⁶ The consumer must keep track of when the car needs other maintenance according to the manufacturer's guidelines and makes an appointment for this. The consumer is responsible for the proper maintenance of the car, whereas the costs of other maintenance are borne by the Dutch car providers. Again, the consumer must inform the car garage that the car is owned by the provider and that the car garage should request the provider's prior permission for maintenance.⁴²⁷ Although the consumer bears the responsibility to notify about the necessity of maintenance of the vehicle, the provider bears the costs for this. As the consumer is not extensively burdened with maintenance obligations, an equivalent level of protection exists.⁴²⁸ For the Belgian car providers *Arval*, *Direct Lease*, and *LeasePlan*, the consumer is obliged to present the car for maintenance in good time to a party designated by the provider. Periodic maintenance is previously approved by the provider at the provider's expense when it is executed in accordance with the manufacturer's instructions. Prior permission from the provider is always required for any other maintenance.⁴²⁹ Just as with repair, *Smartrent* states to be mandated by the consumer to conclude a contract in their name and for the consumer's account for maintenance according to the conditions described in the special conditions of the lease agreement.⁴³⁰ No maintenance is included without concluding the (ancillary) agreement of maintenance with *Smartrent*. This leads to discrepancy because the obligation

426 For example, the maintenance of the tire pressure and the level of the engine oil and other fluids. Quotation 3:30; 7:28; 10:39; 15:27.

427 Quotation 3:31; 7:29; 10:40; 15:28.

428 Quotation 3:31; 7:29; 10:40; 15:28. In the Netherlands, if the car is abroad when it needs a service according to the maintenance schedule, the service can be postponed until the vehicle is back in the Netherlands. This is subject to the condition that the vehicle does not drive more than 1000 kilometres abroad after the time at which maintenance is required according to the schedule. Otherwise, the consumer must call the leasing provider for consultation.

429 Quotation 4:22; 4:27; 9:23; 12:19.

430 Quotation 19:32.

to maintain the vehicle does not lie with the consumer. At the same time, *Smartrent* reserves the right to enter a contract in the name and for the account of the consumer, resulting in *Smartrent* taking care of maintenance. Consequently, equivalent protection exists because there are no maintenance obligations on the consumer. However, the question is to what extent this equivalent protection does not also exist without the required ancillary contract. The consumer contracting with the German provider *ALD Automotive* can take out an ancillary service, namely the ‘Technology Service.’ With this service, the provider pays the costs and reimbursements for *inter alia* the maintenance work and installation inspections prescribed by the manufacturer, including the materials required for this, as well as the costs for repairing wear and tear damage as part of normal wear and tear, depending on the mileage and the age of the vehicle.⁴³¹ Here too, a territorial restriction applies. If the vehicle is maintained outside Germany, the leasing instalments are not reimbursed during the maintenance.⁴³² The consumers of *Sixt Leasing* and *Arval* must carry out maintenance at their own expense, unless the consumer has concluded respectively a full-service contract or a service maintenance module.⁴³³ The consumer is partially burdened with the (financial) obligations of maintenance, resulting in inequivalent protection. Nevertheless, *Like2drive* includes maintenance costs if the maximum permissible kilometrage is not exceeded, resulting in equivalent protection.⁴³⁴ The French car providers *Arval*, *Formule LLD*, and *LeasePlan* oblige the consumer to carry out and pay for necessary maintenance according to the manufacturer’s recommendations, including technical inspections. These operations are exclusively entrusted to a partner approved by the provider.⁴³⁵ *Arval*, *Formule LLD*, and *LeasePlan* offer ancillary maintenance services that cover the costs of maintenance, but this is not generally included in the lease contract.⁴³⁶ *Qarson* does not mention the right of maintenance regarding a lease contract.⁴³⁷ This results in inequivalent protection with all studied French providers.

Regarding the Dutch providers of two-wheelers, *ANWB* maintains the bicycle at a selected bicycle shop, where the consumer is responsible for having periodic maintenance

431 Quotation 1:13. The general terms and conditions of *ALD automotive* also include an option for additional tire service, see Quotation 1:14.

432 Quotation 1:31.

433 Quotation 18:25; 8:32; 8:33.

434 Quotation 16:2.

435 Quotation 5:22; 11:16; 11:17; 13:15; 13:16; 13:17; 13:18. For example, *Arval* consumers are also obliged to keep a maintenance log, see Quotation 5:24.

436 Quotation 5:23; 11:16 For a detailed explanation on what the maintenance service entails see Quotation 5:6; 11:4.

437 *Qarson* does mention the right to repair insofar as it includes the purchase of cars. After all, *Qarson* offers several contracts. See Quotation 17:3.

carried out.⁴³⁸ *Swapfiets* also offers maintenance of the two-wheeler. After prior notice, *Swapfiets* states that they reserve the right to inspect the two-wheeler at any time, to replace it in whole or in part, and to perform maintenance, service, and repairs on the two-wheeler. The consumer is expected to cooperate in this.⁴³⁹ *Lease Express* stipulates in their general terms and conditions that the consumer should keep the mopeds in good condition at the expense of *Lease Express*. These costs are passed on to the consumer in a case where it is their own fault.⁴⁴⁰ Furthermore, *Lease Express* expressly stipulates that the costs of washing and polishing the moped are borne by the consumer.⁴⁴¹ Although the costs of maintenance for the consumer are borne by the provider with *ANWB*, *Swapfiets*, and *Lease Express*, the consumer also bears some burden/responsibility for having maintenance (timely) carried out at locations designated by the provider. *LeaseGemak* specifies optional maintenance services that can be added to the lease contract. This means that maintenance of the two-wheeler is not offered by *LeaseGemak* as a standard condition.⁴⁴²

Both Belgian providers *E-bike to go* and *Swapfiets* include maintenance in their lease contracts whereas *De Fietsambassade Gent* does not offer this and holds the consumer responsible for maintenance.⁴⁴³ *Zzoomer* does not offer maintenance either in the standard contract and orders the consumer to have the bicycle serviced at a company selected by *Zzoomer*. When the consumer concludes a comfort contract with *Zzoomer*, however, these costs and maintenance are assumed by *Zzoomer*.⁴⁴⁴ For both *De Fietsambassade Gent* and *Zzoomer* inequivalent protection exists because a maintenance burden is put on the consumer. The German providers of two-wheelers *Dance* and *Swapfiets* offer maintenance in their lease contracts, whereas *GT Bike* and *Leasingshop* do not offer maintenance as standard in the lease contract.⁴⁴⁵ All studied French providers offer a maintenance service for the duration of the subscription with the lease contract, resulting in equivalent protection.⁴⁴⁶

438 Quotation 20:19. In addition, the consumer must indicate to the bicycle shop that the bicycle is a lease bicycle from *ANWB Fiets Lease*. *ANWB* understands maintenance to be the usual maintenance to prevent damage. This is the maintenance as prescribed by the manufacturer.

439 Quotation 32:19.

440 Quotation 26:15.

441 Quotation 26:16. These costs are considered normal daily maintenance and are therefore the responsibility of the consumer.

442 Quotation 27:10.

443 Quotation 24:15; 29:14; 35:13.

444 Quotation 34:6; 34:5.

445 Quotation 22:17; 28:4; 30:11.

446 Quotation 21:3; 23:3; 31:10; 33:15. *Véligo* offers routine maintenance in their lease. This includes normal wear and tear and the first possible flat tire. Moreover, *Bikeloc* undertakes to provide the consumer with the vehicle maintained according to the manufacturer's instructions.

6.4.3.6 Roadside assistance

Roadside assistance entails in principle a service that assists consumers whose vehicles suffered a breakdown, whether caused by a mechanical failure or not, that cannot be resolved by the consumer or has prevented the consumer from transporting the vehicle to a garage. Sometimes additional services are added by providers. The right to roadside assistance does not follow from the examined directives because the directives only provide for the right of repair and not the right of repair alongside the road, or on-site.⁴⁴⁷ Roadside assistance means that in the case of a non-compliant vehicle, the vehicle is repaired and therefore – temporarily – brought into conformity. Therefore, roadside assistance is discussed here. In the scenario where roadside assistance is required, it is often first established that (except in the event of an accident for example) there is non-conformity if a car breaks down during the ride. The consumer would in that case be entitled to repair or replacement under the Consumer Sales Directive. Roadside assistance offers repair directly on the road for minor repairs with the aim of helping the consumer get back on the road (the vehicle brought back into compliance through this repair).⁴⁴⁸ However, a larger repair may also be necessary because of a defect. In such a scenario, roadside assistance can only take the vehicle to a garage but will not provide any further ad hoc repairs. In other words, roadside assistance can implicitly (and only partly) contribute to the provider's obligation under the Consumer Sales Directive to remedy a non-conforming vehicle. At the same time, for example, taking the vehicle to a garage is not an obligation arising from the examined directives, but the responsibility and interest in having the vehicle repaired lies expressly with the provider who owns the vehicle. As a result, there are providers who offer roadside assistance in their general terms and conditions. Yet this responsibility is sometimes explicitly transferred to the consumer, creating inequivalent protection in comparison with the provisions of the Consumer Sales Directive by increasing the burden on the consumer. All studied providers who put such a burden on the consumer compared to those at the sales-based level are indicated with a minus sign (-) in Table 28.

Dutch car providers of private lease offer the consumer roadside assistance in case the car breaks down on the road due to a defect of the car. The conditions of the roadside assistance are described in the additional terms and conditions or in separate provisions. The roadside assistance consists at least of emergency repair on site or, if that is not possible, transport of the vehicle and its occupants to a car garage.⁴⁴⁹ However, if the

447 CJEU, Case C-52/18, 23 May 2019, ECLI:EU:C:2019:447 (*Füllla/Toolport*).

448 Roadside assistance is partly an element of the legal remedies (namely repair, replacement, price reduction and right to terminate) in Article 13 of the Consumer Sales Directive that exist to remedy non-conformity.

449 Quotation 2:8; 3:34; 6:15; 7:32; 10:43; 10:44; 14:22; 15:31.

consumer has a car breakdown but it is the fault of the consumer, the consumer can ask the provider for help but the consumer must pay the costs themselves.⁴⁵⁰

The Belgian car providers *Arval*, *Direct Lease*, and *LeasePlan* provide roadside assistance within the lease contract.⁴⁵¹ *Smartrent* offers roadside assistance as an ancillary contract. In addition, *Smartrent* states that the provider is mandated by the consumer to conclude a roadside assistance contract at the expense of the consumer.⁴⁵² This mandate does not assure that *Smartrent* concludes this contract for the consumer. As a result of this non-commitment, there is less protection compared to the sales-based consumer. Moreover, none of the German car providers include roadside assistance in their general lease contracts.

The French providers *Arval* and *Qarson* do not offer roadside assistance in the standard contract.⁴⁵³ *Formule LLD*, however, does offer roadside assistance if the car is more than 100 km away from the consumer's place of residence or is immobilised due to a breakdown or a traffic accident. *Formule LLD* offers on-site repairs. If the repair work requires a prolonged immobilisation of the car, the provider pays for a maximum period of seven days for the organisation and costs related to the lease of an assistance vehicle and the costs related to the transport by taxi from the consumer to the provider.⁴⁵⁴ *LeasePlan* also offers roadside assistance regarding (mechanical) defects and offers accommodation or return home (depending on the circumstances).⁴⁵⁵

The Dutch provider of two-wheelers *ANWB* offers roadside assistance as part of the lease agreement. *ANWB* tries to help the consumer with either on-site repairs or a temporary (emergency) repair that needs repairment later.⁴⁵⁶ In addition, *ANWB* offers transport assistance to a repair shop or home when the bicycle is no longer rideable.⁴⁵⁷ *LeaseGemak* specifies an optional breakdown service with the lease contract, which means that this service is not included as standard.⁴⁵⁸ *Lease Express* and *Swapfiets* do not

450 Quotation 3:34; 7:32; 10:43; 15:31.

451 Quotation 4:31; 9:27; 12:20. These assistances are called respectively *Arval Assistance* and *Dienst Directlease Assistance*.

452 Quotation 19:4.

453 As an ancillary service, see Quotation 5:7.

454 Quotation 11:18.

455 Quotation 13:20; 13:21; 13:22; 13:23.

456 Quotation 20:20. Also see Quotation 20:5. During the lease agreement the consumer receives roadside assistance. The consumer becomes member of the *ANWB* as soon as he signs the lease agreement. The 2019 Terms and Conditions of the Roadside Assistance Bicycle Service apply in Appendix 1 of the *ANWB* General Terms and Conditions.

457 Quotation 20:5.

458 Quotation 27:16.

provide a roadside assistance service at all. Only the Belgian provider of two-wheelers, *Zzoomer* offers breakdown assistance when the consumer concludes a comfort contract, but this assistance is not offered with the basic contract.⁴⁵⁹ *De Fietsambassade Gent*, *Swapfiets*, and *E-bike to go* do not offer any roadside assistance, just like all studied German and French providers of two-wheelers. As a result, only the Dutch provider of two-wheelers *ANWB* offers an increased level of protection compared to sales-based consumers.

6.4.3.7 Interim conclusion

According to the Consumer Sales Directive, the provider has the obligation to deliver a conforming product. If the provider does not meet that requirement of conformity, the consumer has rights to certain remedies. One of these remedies is the right to repair, that is not provided for by any of the general terms and conditions of the French car providers in the standard contract. However, the French consumer can often conclude an ancillary contract which includes repair. All Dutch and German providers of cars, on the other hand, do offer the right to repair in the standard contract and only one out of four Belgian providers do not offer repair in the standard contract. For two-wheelers, there are more mutual deviations for the right to repair where six out of the 16 providers, spread across the Member States, do not provide for the right to repair in the standard contract.

The Dutch private lease quality mark offers an equivalent level of protection compared to the Consumer Sales Directive regarding a replacement vehicle. This replacement vehicle is not offered by French and Belgian car providers, while the German car providers offer equivalent protection through a transfer of ownership rights in their general terms and conditions. As a result, for German consumers there exists a right to replacement as arises from article 13(1) in conjunction with article 14 of the Consumer Sales Directive instead of a right to a replacement vehicle. This is only different for *Like2Drive* (GER) where this transfer of ownership rights does not apply. Like the Dutch car providers, this *Like2Drive* (GER) offers a replacement vehicle. For providers of two-wheelers, there is not a clear line per Member State or per provider. Only the general terms and conditions of *Swapfiets* – regardless of the Member State – always includes a replacement vehicle.

The reasonable term within which repair and replacement must be realised according to article 14(1)(b) of the Consumer Sales Directive is also guaranteed by the Dutch quality mark private lease to the sales-based level of protection. In addition to the general terms

459 Quotation 34:13.

and conditions of the Dutch car providers who guarantee this term, the three German car providers who explicitly transfer the ownership rights to the consumer guarantee this term as well. For two-wheelers, half of the providers guarantee to offer a remedy within a reasonable period.

The right to a price reduction and the right to terminate as a result of a defect are not offered in any of the terms and conditions. This is at least noteworthy for the German general terms and conditions whereby ownership rights are transferred because these rights do exist for consumers who buy a vehicle.

The right to roadside assistance entails in principle the consumer's right to a service that assists consumers whose vehicles suffered a breakdown, whether caused by a mechanical failure or not, that cannot be resolved by the consumer and prevents them from transporting the vehicle to a repair shop. The right to roadside assistance is a contractual right that does not explicitly rise from the examined directives. However, road assistance means that in the case of a non-compliant vehicle, the vehicle is repaired and therefore – temporarily – brought into conformity. As elaborated on in paragraph 6.4.3.6, the roadside assistance could partly and implicitly arise from the provider's obligation to offer a compliant product and the consumer's right to repair (and replacement) that follows from the Consumer Sales Directive. At the same time, roadside assistance does not fully cover this obligation. The provider has the interest and responsibility to bring the vehicle into conformity because the provider is the owner of the vehicle (and can only (re)offer a compliant vehicle to consumers). As a result, all studied Dutch and Belgian and two French lease car providers offer roadside assistance. In addition, ANWB (NL) is the only lease provider of two-wheelers that includes roadside assistance in their contracts.

All studied Dutch, Belgian and one German lease car provider assume the responsibility of maintenance in the standard contract, as follows from ownership. This results in equivalent protection here, whereas the other providers put a burden of maintenance on the consumer, causing inequivalent protection. Furthermore, five out of 16 two-wheeler providers burden the consumer with maintenance obligations, resulting in inequivalent protection.

Table 28: Interim results of exclusive mobility use on the right to conformity

Typologies	Countries	Providers	Right to conformity							
			Remedy: Repair	Remedy: Replacement	Repair or replacement within reasonable time	Alternative remedy when choice is disproportionate	Remedy: Price reduction	Remedy: Right to terminate	Maintenance	Roadside assistance
(a) Exclusive MU B2C providers of cars	NL	ALD Automotive	=	=	=	=	-	-	=	=
		Arval	=	=	=	=	-	-	=	=
		Direct Lease	=	=	=	=	-	-	=	=
		LeasePlan	=	=	=	=	-	-	=	=
	BE	Arval	=	-	-	=	-	-	=	=
		Direct Lease	=	-	-	-	-	-	=	=
		LeasePlan	=	-	-	=	-	-	=	=
		Smartrent	-	-	-	=	-	-	=	=
	FR	Arval	-	-	-	-	-	-	-	-
		Formule LLD	-	-	-	-	-	-	-	=
		LeasePlan	-	-	-	-	-	-	-	=
		Qarson	-	-	-	-	-	-	-	-
	GER	ALD Automotive	=	=	=	=	-	-	-	-
		Arval	=	=	=	=	-	-	-	-
		Like2drive	=	=	-	=	-	-	=	-
		Sixt Leasing	=	=	=	=	-	-	-	-
(b) Exclusive MU B2C providers of two-wheelers	NL	ANWB	=	-	-	+	-	-	=	=
		Lease Express	=	=	=	+	-	-	=	-
		LeaseGemak	-	-	-	=	-	-	-	-
		Swapfiets	=	=	=	+	-	-	=	-
	BE	De Fietsambassade Gent	-	-	-	=	-	-	-	-
		E-bike to go	=	=	=	+	-	-	=	-
		Swapfiets	=	=	=	+	-	-	=	-
		Zzoomer	-	=	-	=	-	-	-	-
	FR	Bikeloc	-	-	-	+	-	-	=	-
		Dance	=	=	=	+	-	-	=	-
		Véligo	-	=	=	+	-	-	=	=
		Swapfiets	=	=	=	+	-	-	=	=
	GER	Dance	=	=	-	+	-	-	=	=
		GT Bike	=	=	-	=	-	-	-	=
		Leasingshop	-	-	-	=	-	-	-	=
		Swapfiets	=	=	=	+	-	-	=	=

6.4.4 Consumer rights and commercial guarantees

The inequivalences in consumer protection can relate to commercial guarantees (article 17 of the Consumer Sales Directive), the creditworthiness assessment (articles 8 and 9 of the Consumer Credit Directive), and other consumer rights. These are discussed below in connection with the general terms and conditions of the exclusive mobility providers. These other consumer rights contain namely the right to early repayment (article 16 of the Consumer Credit Directive), the manner to calculate the annual costs (article 19 of the Consumer Credit Directive), regulation on creditors (article 20 of the Consumer Credit Directive), and certain obligations of credit intermediaries vis-à-vis consumers (article 20 of the Consumer Credit Directive).⁴⁶⁰ Table 16 shows an overview of the inequivalences with the Consumer Sales Directive and the Consumer Credit Directive for mobility usership consumers. In addition, the (in)equivalences that follow from self-regulation for the consumer rights and commercial guarantees are shown below in Table 29.

6.4.4.1 Commercial guarantees

As elaborated on in paragraph 4.3.3, a commercial guarantee is defined as an undertaking by the guarantor to the consumer, in addition to the provider's legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement (or in the relevant advertising available) at the time of, or before the conclusion of the contract, according to article 2(12) in conjunction with article 17 of the Consumer Sales Directive. To some extent, all the plus signs (+) in Table 24 entail commercial guarantees because they extend beyond the legal guarantees. In this paragraph, only cases where a commercial guarantee is provided are explicitly discussed, because other components that extend beyond the legal guarantee are discussed elsewhere. The application of a commercial guarantee is not likely given the *ratio legis* of the provision. Nevertheless, the general terms and conditions are assessed and briefly discussed.

None of the Dutch car providers seem to include such a concept of commercial guarantee in their general terms and conditions. Reimbursement of the price and the right to repair or replace are included in the mobility usership price and entail a legal right, while a commercial guarantee must extend beyond the legal guarantee.

From the Belgian car providers, only *Smartrent* mentions guarantees, but this does not entail commercial guarantees. Additionally, to make use of these guarantees, consumers

460 For an overview of the inequivalences following from legislation see paragraph 5.5.4.

need to conclude an *Omnium* agreement.⁴⁶¹ In other words, these guarantees are not part of the lease contract including its general terms and conditions.

For the German provider *ALD Automotive*, all contractual guarantee claims against the supplier are also transferred. The contractual guarantee claims do not form part of the service due under the lease contract and are therefore only transferred in the event that the provider is entitled to such claims in individual cases.⁴⁶² *Sixt Leasing* makes no distinction between legal and commercial guarantees and claims to transfer all guarantee claims against the supplier to the consumer.⁴⁶³ These providers offer more protection than required by the directives because a commercial guarantee goes beyond applicable law. *Arval* and *Like2drive* mention nothing on the commercial guarantee (or guarantees in general).⁴⁶⁴

The French provider *Arval*, *Qarson*, and *Formule LLD* mention guarantees, but these concern ancillary guarantees that are not automatically included in the lease contract.⁴⁶⁵ *LeasePlan* describes that the assistance service consists of the organisation of assistance operations during the contractual (commercial) guarantee period of the vehicle.⁴⁶⁶ This assistance seems to relate to the possibilities for repair, maintenance and roadside assistance, which were discussed under the paragraph dedicated to the right to conformity, paragraph 6.4.3.

Only the Dutch two-wheeler provider *LeaseGemak* mentions the (commercial) guarantee. *LeaseGemak* extends the manufacturer's guarantee on all parts for which the standard manufacturer's guarantee is shorter than the term of the lease agreement. For the extended guarantee, *LeaseGemak* applies the same conditions as the manufacturer of the bicycle.⁴⁶⁷ As a result, *LeaseGemak* offers more protection than required by the directives because a commercial guarantee goes beyond applicable law. None of the Belgian, German, nor French providers of two-wheelers mention (commercial) guarantees in their general terms and conditions.

6.4.4.2 Other consumer rights

This subparagraph discusses the sector regulation by exclusive providers as a result of the inequivalent protection by the Consumer Credit Directive for three components,

461 Quotation 19:12; 19:13.

462 Quotation 1:32.

463 Quotation 18:26; 18:27.

464 *Arval* does mention something on the legal guarantee specifically, see Quotation 8:34.

465 Quotation 5:7. Quotation 5:25 mentions the exclusion of all costs of repair and damages, material and physical, under the legal and/or contractual (commercial) guarantee.

466 Quotation 13:20.

467 Quotation 27:13.

namely the consumer's entitlement to discharge fully or partially their obligations under the agreement,⁴⁶⁸ the calculation of the annual percentage rate of charge,⁴⁶⁹ and the supervision of the creditors.⁴⁷⁰ Table 16 also summarises *inter alia* the inequivalences in the consumer's protection whereas Table 29 shows the level of self-regulation.

Right to an early repayment

According to article 16(1) of the Consumer Credit Directive, the consumer is entitled at any time to discharge fully or partially their obligations under an agreement (paragraph 4.4.4 on elucidation on the scenarios in which application of this right is useful and proportional). In such cases, the consumer shall be entitled to a reduction in the total cost of the contract, such reduction consisting of the interest and the costs for the remaining duration of the contract. In the event of such an early repayment, the provider shall be entitled to fair and objectively justified compensation for possible costs directly linked to early repayment of credit, provided that the early repayment falls within a period for which the borrowing rate is fixed.⁴⁷¹ Whereas paragraph 6.4.1.1 discussed the right to inform about the consumers right to discharge fully or partially their obligations under the agreement (article 5(1)(p) of the Consumer Credit Directive), this paragraph discusses the substance of this right, elaborated on in article 16 of the Consumer Credit Directive.

For the Dutch car providers *Direct lease*, *Arval*, and *LeasePlan*, the general terms and conditions include a possibility to partially discharge obligations, comprising the idea of an early repayment.⁴⁷² Furthermore, this right to an early repayment is illustrated by means of a calculative example.⁴⁷³ *ALD Automotive* does not offer the possibility of an early repayment. Fully discharging payment obligations is not provided for in the general terms and conditions of the Dutch car providers. This means that an inequivalence exists in protection for the full dischargement of payment obligations, whereas partial dischargement is provided by three out of four Dutch car providers. Furthermore, none of the Belgian car providers mention the consumer's entitlement to full or partial dischargement of their obligations under the agreement by way of an early repayment. Consequently, inequivalent protection exists for the Belgian car providers compared to the provisions of the Consumer Credit Directive.

468 Article 16 Consumer Credit Directive 2008. Under this article the consumer is entitled at any time to discharge fully or partially his obligations under the agreement. In such cases, the consumer is entitled to a reduction in the total cost of the credit. As a result, the provider is entitled to fair and objectively justified compensation for possible costs directly linked to early repayment.

469 Article 19 Consumer Credit Directive 2008.

470 Article 20 Consumer Credit Directive 2008.

471 Article 16(2) Consumer Credit Directive 2008.

472 Quotation 6:6; 10:18; 14:6.

473 Quotation 6:7; 10:19; 14:7.

The German provider *ALD Automotive* provides for an early repayment on the monthly lease instalments, which leads to a corresponding reduction in the monthly lease instalments. Any agreed special lease payments must be paid separately in addition to the lease instalments.⁴⁷⁴ *Sixt Leasing* does not mention the possibility of prepayments in the general terms and conditions but mentions prepayments of ancillary services in case these services are concluded.⁴⁷⁵ At *Arval*, the consumer can agree on a special lease payment, a one-time upfront payment in addition to the lease instalments, which is taken into account when calculating the lease instalments in favour of the consumer; however, this is not an early payment or another option that allows a consumer to discharge fully or partially their obligations.⁴⁷⁶ *Like2drive* does not mention any option to discharge fully or partially their obligations.

The French car providers *Arval*, *Formule LLD*, and *Qarson* do not mention the option for consumers to discharge their obligations fully or partially. *LeasePlan* offers its consumer the opportunity to reduce the amount of their monthly lease by paying a contribution to *LeasePlan*. This amount is debited from the consumer's account in addition to the first lease period.⁴⁷⁷ This could be seen as a possibility to discharge their payment obligation partially. Although *LeasePlan* offers the one-off option to pay part of the lease to reduce the monthly instalments, *LeasePlan* does not meet the Consumer Credit Directive's condition where the consumer is entitled at any time to discharge fully or partially their obligations under the agreement. Therefore, there is inequivalent protection for all studied French car providers regarding the option of an early repayment. None of the providers of two-wheelers elucidate on the consumer's entitlement to discharge fully or partially their obligations under the agreement.

Calculation of the annual percentage rate of charge

Article 19 of the Consumer Credit Directive explains the manner in which the annual percentage rate of charge should be calculated, which would be the annual costs (percentage) for mobility usership contracts.⁴⁷⁸ Whereas paragraph 6.4.1.1 discusses the right to inform about the annual percentage rate of charge (article 5(1)(g) of the

474 Quotation 1:33. The invoice for the full amount of the special lease payment is made at the conclusion of the lease contract for the amount agreed in the contract. An agreed special lease payment constitutes an additional payment as part of the lease payments in addition to the monthly lease instalments; it does not serve as a deposit.

475 For example, Quotation 18:29; 18:30; 18:31.

476 Quotation 8:17. The special lease payment serves neither for the repayment of the lease instalments nor as a security and is not repaid in whole or in part at the end of the individual lease contract.

477 Quotation 13:24. This amount constitutes a contribution and as such is not reimbursed at the end of the contract, for any reason whatsoever, not even in the event of damage or total loss of the car.

478 Article 19 Consumer Credit Directive 2008. Also see paragraph 4.4.5.

Consumer Credit Directive), this paragraph focusses on the substance of this right. The calculation of the annual percentage rate of charge is largely useful and proportional for exclusive use (paragraph 4.4.5). In the terms and conditions for the researched car or two-wheeler providers, there is no clarification on these costs. However, it cannot be assessed on the basis of the general terms and conditions whether such an annual percentage rate is calculated in accordance with the Consumer Credit Directive because no information is provided about this right (paragraph 6.4.1.1). This means that inequivalence in protection is adopted, see Table 29.

Supervision of the creditors

Creditors need to be supervised, if the Consumer Credit Directive would apply, by a body or authority independent from financial institutions.⁴⁷⁹ The rationale behind requiring these bodies or authorities is to supervise financial markets to ensure that consumers, but also the business community and the government, maintain confidence in the financial markets. For exclusive use, especially in view of the similarities with consumer credit, such a supervising authority aligns with the rationale of the existence of these authorities and that existence would also be proportional and practically possible (paragraph 4.4.5). However, this obligation rises not from the terms and conditions of car providers because this obligation is legally imposed on the Member States. This also applies for the obligations of credit intermediaries vis-à-vis consumers that follow from article 21 of the Consumer Credit Directive, which also legally imposes an obligation on Member States. Consequently, these legal inequivalences are not discussed here further.

Creditworthiness assessment

The provider's obligation to assess the creditworthiness of the consumer before the conclusion of the agreement follows from article 8 of the Consumer Credit Directive.⁴⁸⁰ The provider needs to do this based on sufficient information, obtained from the consumer where appropriate and, where necessary, on the basis of a consultation of the relevant database.⁴⁸¹ This paragraph discusses the substance of the creditworthiness assessment in conjunction with the database assessment, while paragraph 6.4.1.1 elaborates on the provider's information obligation on a database consultation carried out for the purposes of assessing their creditworthiness.

All Dutch car providers report the lease agreement, the associated financial obligation, and any payment arrears to the Dutch Credit Registration Office (*Bureau Krediet Registratie*)

479 Article 20 Consumer Credit Directive 2008.

480 Article 8 Consumer Credit Directive 2008. Also see Table 5(ch5) on the inequivalences of consumer protection of the mobility usership consumer.

481 See Article 9 of the Consumer Credit Directive 2008 for this database access.

who strives to limit and prevent creditworthiness risks for providers and consumers.⁴⁸² The amount of the financial obligation to be registered depends on the regulations of the Dutch Credit Registration Office and may be lower (but not higher) than the actual amount of the financial obligation.⁴⁸³ Only the Belgian provider *Direct Lease* states in the general terms and conditions that the consumer must fill in information about creditworthiness on the website before entering into a lease contract. The other Belgian car providers do not have a similar provision, which means that they offer inequivalent protection regarding the obligation to carry out such a creditworthiness assessment.⁴⁸⁴

The German provider *ALD Automotive* requires a creditworthiness assessment because *ALD Automotive* can request the consumer to provide evidence of their financial situation as part of the credit assessment and authorise their banks to provide information about their creditworthiness.⁴⁸⁵ *Arval* also states that they lease vehicles at the choice of the consumer in case of a positive credit assessment decision by *Arval*. This assessment is based on terms stipulated in *Arval's* general terms and conditions.⁴⁸⁶ *Like2drive* reserves the right to assess the creditworthiness of the consumer and has the right to refuse access to the lease agreement for legitimate reasons.⁴⁸⁷ Only *Sixt Leasing* does not mention the creditworthiness assessment.⁴⁸⁸ The French provider *Arval* does require consumers to meet solvency requirements, whereas *LeasePlan* also briefly mentions that they can collect personal data for the validation of the lease, which includes an element of creditworthiness.⁴⁸⁹ *Qarson* refers to the financing agreement for any assessment on the creditworthiness for the lease and *Formule LLD* does not mention any assessment of creditworthiness.⁴⁹⁰

A creditworthiness assessment prior to the conclusion of the contract is not included in the general terms and conditions for any of the Dutch providers of two-wheelers. However, *ANWB* reports to the Dutch Credit Registration Office that the consumer has entered into the lease agreement and when the consumer is in arrears of payment, but the *ANWB* does not perform a prior creditworthiness assessment if the consumer wants to conclude a lease, which could have adverse consequences for the consumer.⁴⁹¹

482 Quotation 3:19; 6:5; 7:15; 10:20; 14:9; 15:15.

483 Quotation 3:19; 6:5; 7:15; 10:20; 14:9; 15:15.

484 Quotation 9:11.

485 Quotation 1:4.

486 Quotation 8:35.

487 Quotation 16:15.

488 Quotation 18:13. *Sixt Leasing* only mentions an important reason that entitles them to terminate the lease contract without notice if the consumer stops paying, which could lead to a risk to the consumer's solvency.

489 Quotation 5:13; 5:14; 5:26; 5:27; 5:28; 13:6.

490 Quotation 17:14.

491 Quotation 20:22.

At the same time, *LeaseGemak* states that the lease agreement that the consumer enters into with *LeaseGemak* and the associated financial obligations are not assessed, reported or registered with the Dutch Credit Registration Office.⁴⁹² *Lease Express* and *Swapfiets* mention nothing about a creditworthiness assessment. Only the Belgian provider of two-wheelers *E-bike to go* mentions in the general terms and conditions that they assess the creditworthiness of the consumer based on the registration.⁴⁹³ Contrary to *GT Bike*, *Leasingshop*, and *Swapfiets*, the German provider *Dance* executes a creditworthiness assessment. *Dance* is entitled to transfer the information provided by the consumer during the ordering process to third parties for the purpose of assessing the consumer's creditworthiness. Furthermore, *Dance* reserves the right to refuse a consumer's application if the consumer is not creditworthy.⁴⁹⁴ The consumer authorises *Dance* to carry out a creditworthiness assessment by providing a means of payment to identify risks associated with the conclusion of the lease contract.⁴⁹⁵ Contrary to the French providers *Bikeloc*, *Swapfiets*, and *Véligo*, *Dance* reserves the right to refuse a consumer's application if the consumer is not creditworthy.⁴⁹⁶ The consumer authorises *Dance* to carry out a creditworthiness assessment by providing a means of payment to identify risks associated with the conclusion of the lease contract.⁴⁹⁷

Exclusive mobility use providers might offer equivalent protection compared to article 8 of the Consumer Credit Directive by reserving the right to a creditworthiness assessment. However, there is a risk that such an assessment is carried out based on arbitrariness because the choice for performing credit assessments and rejecting consumers rests with the providers and they do not necessarily use clear and objectifiable criteria.

6.4.4.3 Interim conclusion

Commercial guarantees are guarantees that extend beyond the legal guarantees. For the discussion of commercial guarantees, I focussed on general terms and conditions where this type of guarantee is mentioned. Two of the four German providers – *ALD Automotive* and *Sixt Leasing* – transfer all (either legal or commercial) guarantee claims against the supplier to the consumer, which is in line with the transfer of ownership rights of the German car providers. In addition, the provider of two-wheelers *LeaseGemak* (NL) extends the manufacturer's guarantee on all parts for which the standard manufacturer's guarantee is shorter than the term of the lease agreement. Furthermore, the consumer has the right

492 Quotation 27:22.

493 Quotation 35:9.

494 Quotation 22:10.

495 Quotation 22:2.

496 Quotation 23:6.

497 Quotation 23:4.

Table 29: Interim results of exclusive mobility use on consumer rights and commercial guarantees

Typologies	Countries	Providers	Consumer rights and commercial guarantees			
			Commercial guarantee	Discharge obligations under the agreement	Manner to calculate the annual costs percentage	Creditworthiness assessment
(a) Exclusive MU B2C providers of cars	NL	ALD Automotive	=	-	-	=
		Arval	=	=	-	=
		Direct Lease	=	=	-	=
		LeasePlan	=	=	-	=
	BE	Arval	=	-	-	-
		Direct Lease	=	-	-	=
		LeasePlan	=	-	-	-
		Smartrent	=	-	-	-
	FR	Arval	=	-	-	=
		Formule LLD	=	-	-	-
		LeasePlan	=	-	-	=
	GER	Qarson	=	-	-	-
		ALD Automotive	+	-	-	=
Arval		=	-	-	=	
Like2drive		=	-	-	=	
		Sixt Leasing	+	-	-	-
(b) Exclusive MU B2C providers of two-wheelers	NL	ANWB	=	-	-	-
		Lease Express	=	-	-	-
		LeaseGemak	+	-	-	-
		Swapfiets	=	-	-	-
	BE	De Fietsambassade Gent	=	-	-	-
		E-bike to go	=	-	-	=
		Swapfiets	=	-	-	-
	FR	Zzoomer	=	-	-	-
		Bikeloc	=	-	-	-
		Dance	=	-	-	=
		Véligo	=	-	-	-
	GER	Swapfiets	=	-	-	-
		Dance	=	-	-	=
GT Bike		=	-	-	-	
Leasingshop		=	-	-	-	
		Swapfiets	=	-	-	-

to discharge their obligations partially or fully under the agreement. Only three Dutch car providers offer the option of partial prepayment in their additional terms and conditions, which partially relieves consumers of their payment obligation. Moreover, none of the providers of either cars or two-wheelers offer insight on the way the price of the lease is calculated. As a result, inequivalent protection exists compared to sales-based consumers.

The Dutch private lease quality mark is also of importance in the creditworthiness assessment, whereby all studied car providers reserve the right not to conclude the lease contract if there is a negative creditworthiness assessment. Such a creditworthiness assessment is also performed by most German car providers, *Arval* (FR), *LeasePlan* (FR), and *Direct Lease* (BE). Furthermore, it is not customary to carry out a creditworthiness assessment when offering two-wheelers. Only three providers reserve this option. The difference between cars and two-wheelers lies in the difference of risk for provider, the question of whether a creditworthiness assessment is useful. After all, the monthly instalments to be paid by the consumer with a lease car weighs much more on the consumer's creditworthiness than the monthly instalments for a two-wheeler. As a result, the need for a creditworthiness assessment of a consumer of a lease car is of more importance than for two-wheelers.

6.5 CONCLUSION

This chapter focusses on whether the mobility usership sector provides equivalent consumer protection in practice due to the application of general terms and conditions of exclusive mobility usership providers. By performing a qualitative document analysis, better understanding is gained of the relationship between consumer protection that follows from the examined directives and self-regulation in the mobility usership sector. See Table 25 for a full overview of the results for each provider. The interim conclusions provide an overview of the findings per fundamental consumer right examined. This conclusion focusses on the most important overarching remarks and conclusions.

This study looks at equivalent protection instead of equal protection, which means that the inequalities of the business models are taken into consideration. Directives are interpreted with the meaning and purpose that these rights could/should have for mobility usership contracts. In this context, protection for mobility usership consumers often involves restricted use of the vehicle, which means that the provider imposes restrictions on how the vehicle may be used. This restriction can, for example, be territorial, whereby a vehicle may not be used outside the relevant Member State or Europe, or operational, in case the consumer needs approval for repairs and maintenance and that this may only be carried out by a supplier of the provider's choice. Although there is certainly self-regulation on

parts, inequality in protection remains inherent to ownership, which entails complete freedom of action, whereas usership simply cannot offer this freedom. This inequality always exists because mobility usership is by very nature a different legal construction where such freedom simply cannot be offered. This is a crucial observation to consider when contemplating (equivalent) protection of mobility usership and the benchmark that should be used.

The most equivalent and far-reaching protection is offered in the Netherlands by car lease providers, due to the Dutch private lease quality mark. This quality mark is, in my opinion, a solid example of sector regulation that contributes to legal certainty. In addition, the quality mark offers protection beyond legal minimums by regularly offering protection equivalent to the sales-based rules.

German car providers transfer ownership rights to their consumers (paragraph 6.4.2.1 and 6.4.3). This obliges the consumer to fulfil certain ownership obligations, such as a notification obligation towards the provider and the execution of rights against the supplier. Due to this transfer, the consumer is burdened with ownership obligations, while they never enjoy ownership rights. This is undesirable because it entails a disproportionality or imbalance in the sense that there is an increased burden/responsibility for the consumer, while there is no increase in the level of (ownership) rights. This imbalance between contractual parties contradicts the policy goals of EU consumer law and do not facilitate the adoption of mobility usership models.

There is also a difference in the degree of contract standardisation per mode of transport, generated by the maturity of the industry. Car lease contracts have existed for some time, which might have resulted in a certain degree of synchronisation and standardisation with considerably fewer mutual deviations of the rights of car lease consumers compared to the two-wheeler industry. This might be favourable for the consumer as this might contribute to the level of legal certainty. The two-wheeler industry is an emerging industry, which means that the synchronisation and standardisation of the general terms and conditions has not yet been developed further.

While mobility usership contracts basically consist of a use component and a service component, in practice, some providers seem to opt for a minimalist mobility usership contract in which the consumer only pays for the use of the mobility and services can be added on against additional payment. This seems undesirable because such additional payments for an add-on do not only apply to services that are not regulated by the examined directives, such as maintenance and roadside assistance, but sales-based remedies, such as repair and replacement, can also be purchased by the consumer. To some extent,

the consumer can 'buy' equivalent protection, which also highlights the volatility and uncertainty associated with leaving these issues to self-regulation.

Finally, the analysis includes providers offering their services in several Member States. The providers of two-wheelers, active in multiple Member States, apply the same general terms and conditions in each Member State. The opposite is found for providers of lease cars that offer their services in multiple Member States. It is noteworthy that these providers apply (very) different general terms and conditions in each Member State. To some extent, the Dutch private lease quality mark partly causes this because in the Netherlands the protection has been voluntarily increased by the quality mark and the level of protection of this quality mark is not necessarily adopted by the providers for the other Member States as this is costly and not mandatory.

7 STUDY OF THE GENERAL TERMS AND CONDITIONS ACCORDING TO SECTOR CONDUCT OF SHARED MOBILITY

7.1 INTRODUCTION

This chapter focusses on whether the shared mobility sector offers equivalent consumer protection as compared to sales-based consumer protection. In practice due to the application of self-regulatory general terms and conditions (or other agreements, such as model contracts). Initially, it may not seem self-evident that providers of mobility usership voluntarily choose to impose more restrictions than required by law. Nevertheless, mobility usership providers can choose to offer consumers more extensive protection than the legal framework because this can, for example, improve their competitive position by retaining consumers.¹ As a result, providers would allow equivalent consumer protection in practice due to the application of general terms and conditions (or other comparable agreements) of mobility usership providers.

As discussed in paragraph 1.2.2, shared mobility exists in various types and these are examined to the extent possible in this chapter. In line with the previous chapter on exclusive use, this concerns the shared use of B2C providers (c) of cars and (d) of two-wheelers. Additionally, in contrast to exclusive use, collaborative sharing is also discussed, which can be divided into (e) collaborative platform sharing, (f) formal C2C collaborative sharing, (g) informal C2C collaborative sharing and (h) collaborative sharing as cooperative. The aim is to offer a better understanding of the relationship between the consumer protection rules set by the examined directives and the shared mobility sector to explore and understand whether the shared mobility sector provides equivalent consumer protection in practice compared to traditional sales-based consumers. Whereas the previous chapter focusses on the long-term exclusive use of mobility, this chapter focusses on short-term shared mobility use. Furthermore, the most important methodological considerations pertaining and related to answering the central research question of this chapter are discussed in paragraph 6.2 and 6.3.

1 Chapter 8 will discuss the motives and considerations for self-regulation in more detail.

In this chapter, the results on shared mobility providers of cars and two-wheelers is discussed first. The same structure is used for this as in the previous chapter, respectively; The right to be informed (paragraph 7.2.1), The right to change your mind (paragraph 7.2.2), The right to conformity (paragraph 7.2.3), and Consumer rights and commercial guarantees (paragraph 7.2.4). Subsequently, I discuss the results on collaborative mobility sharing, according to the same structure; the right to be informed (paragraph 7.3.1), the right to change your mind (paragraph 7.3.2), the right to conformity (paragraph 7.3.3). When discussing the results following the study of the general terms and conditions, reference is made to the name of the provider (e.g., *Europcar* states). This always refers to the general terms and conditions of that provider. This form is chosen to improve readability. There are several themes of the general terms and conditions that are not examined for shared mobility usership because these themes fall outside the scope of this research, the most important are the processing of personal data, insurance, tax, and dispute resolution.

Before reading the remainder of this chapter, I would like to inform the reader that this chapter also discusses all the individual findings per provider and analyses them in detail, necessary to reach substantiated conclusions. For the reader who is looking for the overall findings per fundamental consumer right, I recommend focusing on the interim conclusions (For shared mobility: paragraph 7.2.1.3, 7.2.2.3, 7.2.3.5 and 7.2.4.3 and for collaborative sharing: paragraph 7.3.1.3, 7.3.2.3, 7.3.3.5 and 7.3.4.3) and final conclusion (paragraph 7.4) in this chapter to get a comprehensive picture of the most important findings.

7.2 RESULTS ON SHARED MOBILITY USERSHIP PROVIDERS OF CARS AND TWO-WHEELERS

This paragraph discusses the results of the qualitative analysis of shared mobility usership providers of cars and two-wheelers. This is done per Member State and mode of transport. First, some general observations on the selected providers are discussed. Subsequently, I examine per fundamental right (a) whether and, if so, how consumer rights are regulated in the general terms and conditions, (b) whether there are differences between providers and/or between Member States and ultimately, (c) whether there are differences between the means of transport. This indicates that I focus on the *de facto* inequivalences assessed in paragraph 5.5, which means that the Unfair Commercial Practices Directive and the Unfair Contract Terms Directive are not discussed here because they are applicable to mobility usership and thus provide equivalent protection. Accordingly, I examine the inequivalences that follow from the Consumer Sales Directive, the Consumer Credit Directive, and the Consumer Rights Directive.

All studied two-wheeler providers that are included in this research offer multiple modes of transport, such as mopeds, bicycles, and scooters. The providers apply the same general terms and conditions to the various modes of transport. Nevertheless, there are (small) differences in the general terms and conditions in the different Member States with the same provider. Furthermore, as explained earlier, electric scooters are prohibited in the Netherlands on public roads.²

Basically, this study focusses on shared mobility use, whereby the consumer pays per use, as in case study 1 on B2C bicycle sharing referred to in chapter 4. During the research into shared mobility use it appears that, in addition to the pay per use principle, sometimes a shared use subscription is offered whereby the consumer can use the shared transport for several minutes for a (reduced) amount per month.³ Although the analysis is based on the pay-per-use principle, where relevant, the subscription principle is also included.

As in paragraph 6.4, a table is used to indicate to what extent the provider complies with the examined directives, or in other words, the extent to which the shared mobility provider offers (increased) self-regulatory protection. Table 30 provides an overview for this and uses the same symbols as introduced in Table 24.

2 This ban on these electric scooters in the Netherlands may have stimulated the supply of other modes of transport such as (electric) bicycles and scooters (in the Netherlands).

3 For example, *Donkey Republic*, Quotation 59:19; 60:13; 61:14; 62:13 and *Lime*, Quotation 67:16; 68:7; 69:15; 70:13.

Table 30: Results on shared mobility usership providers

Typologies		Right to be informed													
Countries	Providers	Clear and comprehensible manner	SECCI form	Ancillary services	Consequences of late payments	Early repayment	Cost structure	Database consultation	Copy of draft agreement	Required sureties and insurance	The right of withdrawal	Procedure right to terminate	Change in borrowing rate		
(c) shared MU B2C providers of cars	NL	Europcar	-	-	-	=	=	-	-	-	-	=	=		
		GreenMobility	=	-	=	=	=	-	=	-	=	=	=		
		Greenwheels	+	-	=	=	-	-	-	-	=	-	=	=	
		ShareNow	=	-	=	=	-	-	-	-	=	=	=	=	
	BE	Cambio	=	-	=	=	-	-	-	-	=	-	=	=	
		Europcar	-	-	=	=	=	-	-	-	=	-	=	=	
		Claus2you	=	-	=	=	-	-	-	-	=	-	=	=	
	FR	GreenMobility	=	-	=	=	=	-	=	-	=	=	=	=	
		Europcar	-	-	=	-	=	-	-	-	=	-	=	=	
		Ubeeqo	-	-	=	=	-	-	-	-	=	=	=	=	
		Marguerite	-	-	=	=	-	-	-	-	=	=	=	=	
	GER	ShareNow	=	-	=	=	-	-	-	-	=	=	=	=	
		Cambio	=	-	=	=	-	-	-	-	=	-	=	=	
		Europcar	-	-	=	=	=	-	-	-	=	-	=	=	
		Teilauto	=	-	=	=	-	-	-	-	=	=	=	=	
	(d) shared MU B2C providers of two-wheelers	NL	ShareNow	=	-	=	=	-	-	-	=	=	=	=	
Bird			=	-	=	=	-	-	-	-	=	=	=	=	
Donkey Republic			=	-	=	=	-	-	-	-	=	=	=	=	
Lime			=	-	=	-	-	-	-	-	=	=	=	=	
BE		Tier	=	-	=	=	-	-	-	-	=	=	=	=	
		Bird	=	-	=	=	-	-	-	-	=	=	=	=	
		Donkey Republic	=	-	=	=	-	-	-	-	=	=	=	=	
FR		Lime	=	-	=	-	-	-	-	-	=	=	=	=	
		Tier	=	-	=	=	-	-	-	-	=	=	=	=	
		Bird	=	-	=	=	-	-	-	-	=	=	=	=	
		Donkey Republic	=	-	=	=	-	-	-	-	=	=	=	=	
GER		Lime	=	-	=	-	-	-	-	-	=	=	=	=	
		Tier	=	-	=	=	-	-	-	-	=	=	=	=	
		Emmy	=	-	=	=	-	-	-	-	=	=	=	=	
		Donkey Republic	=	-	=	=	-	-	-	-	=	=	=	=	
			Lime	=	-	=	-	-	-	-	=	=	=	=	
	Tier		=	-	=	=	-	-	-	=	=	=	=		

7 STUDY OF THE GENERAL TERMS AND CONDITIONS ACCORDING TO SECTOR CONDUCT
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The right to change your mind			The right to conformity								Consumer rights and commercial guarantees			
Right of withdrawal	Right to early termination	Termination fee	Remedy: repair	Remedy: replacement	Repair or replacement within reasonable time	Alternative remedy when choice is disproportionate	Remedy: price reduction	Remedy: right to terminate	Maintenance	Roadside assistance	Commercial guarantee	Early repayment	Manner to calculate the annual costs percentage	Creditworthiness assessment
=	+	Yes	=	=	=	=	-	-	=	=	+	=	-	-
=	=	No	-	-	-	-	-	-	=	=	=	-	-	=
=	+	No	-	=	-	-	-	-	=	=	=	-	-	-
=	+	No	=	-	-	-	-	-	=	=	=	-	-	-
=	+	Yes	=	-	-	-	-	-	-	=	=	-	-	-
=	+	No	=	=	-	-	-	-	=	=	=	-	-	-
=	=	No	-	-	-	-	-	-	=	=	=	-	-	=
=	+	Yes	-	=	-	-	-	-	-	=	=	=	-	-
=	+	Yes	-	-	-	-	-	-	=	=	=	-	-	-
=	+	Yes	-	-	-	-	-	-	=	=	=	-	-	-
=	+	No	-	-	-	-	-	-	=	-	=	-	-	-
=	+	No	=	=	-	-	-	-	=	-	=	-	-	-
=	+	Yes	=	=	-	-	-	-	-	-	=	=	-	-
=	+	No	-	-	-	-	-	-	=	-	=	-	-	=
=	+	No	-	-	-	-	-	-	=	-	=	-	-	-
=	=	No	-	-	-	-	-	-	=	-	=	-	-	-
=	=	No	-	-	-	-	-	-	=	-	=	-	-	-
=	+	No	-	-	-	-	-	-	=	-	=	-	-	-
=	+	No	-	-	-	-	-	-	=	-	=	-	-	-
=	=	No	-	-	-	-	-	-	=	-	=	-	-	-
=	=	No	-	-	-	-	-	-	=	-	=	-	-	-
=	+	No	-	-	-	-	-	-	=	-	=	-	-	-
=	+	No	-	-	-	-	-	-	=	-	=	-	-	-
=	=	No	-	-	-	-	-	-	=	-	=	-	-	-
=	=	No	-	-	-	-	-	-	=	-	=	-	-	-
=	+	No	-	-	-	-	-	-	=	-	=	-	-	-
=	+	No	-	-	-	-	-	-	=	-	=	-	-	-
=	+	No	-	-	-	-	-	-	=	-	=	-	-	-
=	+	No	-	-	-	-	-	-	=	-	=	-	-	-

7.2.1 *The right to be informed*

The right to information follows from the applicable and non-applicable legal framework and is divided into various components. In paragraph 6.4.1 the right to be informed is elaborated on for exclusive mobility usership. In this paragraph, the precontractual information obligations and practices (paragraph 7.2.1.1) and contractual information obligations (paragraph 7.2.1.2) are discussed and the overlap is addressed where relevant, whereas the non-applicable legal framework is the premises for shared mobility usership. The Consumer Rights Directive, the Unfair Contract Terms Directive, and the Consumer Credit Directive set conditions for the way in which information is made available to consumers. According to the Consumer Rights Directive and the Unfair Contract Terms Directive, which do apply to mobility usership, information should be made available in a clear and comprehensible manner before the consumer is bound by the shared mobility contract. If the Consumer Credit Directive were applicable, providers should enable the consumer to know their rights and obligations under an agreement by informing the consumer in a clear, concise, and concise way.⁴ As elaborated on in paragraph 5.2.1, it is not sufficient to provide the information merely as part of the general terms and conditions but the requirement of clear and comprehensible means that the individual elements of the mandatory information should be brought to the attention of the consumer.⁵ The conditions follow from the applicable legal framework (Consumer Rights Directive, the Unfair Contract Terms Directive) and the non-applicable legal framework (Consumer Credit Directive) and have a slightly different interpretation and scope (paragraph 5.5.1). Therefore, the (in)equivalences that follow from self-regulation for the right to be informed are shown below in Table 31.

The Dutch shared car providers *ShareNow*, *Greenwheels* and *GreenMobility* provide the information in their general terms and conditions in a clear, concise, and comprehensible way. *ShareNow* offers the conditions in both Dutch and English. *Greenwheels* takes the requirement of clear and comprehensible even further by offering the information in a consumer-oriented question-and-answer format. *Greenwheels* therefore applies an increased level of protection compared to the sales-based protection. Furthermore, *Europcar* offers their conditions only in English, which means that *Europcar* does not meet the requirement of providing clear information for all consumers because this is not the native language of the Dutch consumer. As a result, a lower level of protection

4 Article 5(1), 6(1) Consumer Rights Directive; Recital 31 Consumer Credit Directive 2008. See paragraph 5.2.1.

5 European Commission 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights' *Official Journal of the European Union* (29 December 2021) C525, pp. 22-26.

exists here compared to applicable law because the general terms and conditions in a language other than a native language is insufficient in an EU context to qualify as clear information.⁶

The Belgian carsharing providers *Cambio*, *Claus2you*, and *GreenMobility* also offer equivalent protection as they also meet the requirements following from the applicable Consumer Rights Directive. Like the Dutch provider *Europcar*, the Belgian and German branch solely offers their general terms and conditions in English, which results in a lower level of protection.⁷ The other German carsharing providers offer their information in a clear and comprehensive manner, resulting in equivalent protection on this matter.⁸ The general terms and conditions of the French providers of shared cars show a different picture, with only *ShareNow* offering the general terms and conditions in French. The other providers only offer their general terms and conditions in English, which means that they do not meet the (non-applicable) requirements arising from the directives and that there is therefore inequivalent protection.⁹

The providers of shared two-wheelers from all researched Member States (*Bird*, *Donkey Republic*, *Tier*, *Lime*, and *Emmy*) offer equivalent protection because all enable the consumer to know their rights and obligations under an agreement by informing the consumer in a clear and concise manner in (at least one of) the official language(s) of the Member State.¹⁰

7.2.1.1 Precontractual information obligations and practices

As elaborated on in paragraph 6.4.1.1, the Consumer Credit Directive imposes the obligation to include standard information in advertising in article 4 of the Consumer Credit Directive (Table 13).¹¹ In addition to the fact that this legal obligation does not apply to shared mobility usership contracts, it is also impossible to assess whether the providers increase protection as advertising would have to be the subject of the research. Therefore, the assessment of whether lease providers increase the level of protection on this component is not carried out. However, the precontractual information obligations and practices are discussed in this paragraph since these are subject to the research.

6 Memo *Language use*.

7 Memo *Language use*.

8 Memo *Language use*.

9 Memo *Language use*.

10 Memo *Language use*.

11 Article 4 Consumer Credit Directive 2008.

The SECCI form

Before considering the various components of the information rights, the formal requirements of the provision of information as described in article 5(1) of the Consumer Credit Directive is discussed. In due time before the consumer is bound by the agreement, the provider should supply the consumer with the information needed to compare different offers in order to make an informed decision on whether to conclude a credit agreement. The *ratio legis* behind this SECCI form is to ensure transparency in B2C transactions by presenting key information in a standardized format to enable consumers to compare different offers and make informed decisions about whether to enter into an agreement. The rationale for this formal requirement carries more weight when the (financial) interests are greater. As mentioned in paragraph 4.4.1, the financial interests for shared mobility are much smaller compared to a consumer credit and the rationale of this provision ceases to apply. Therefore, it is comprehensible that none of the shared mobility providers offer a SECCI form.¹² This means that for all studied providers inequivalent protection exists as far as this formal requirement is concerned. However, this inequivalence is proportional as the rationale of the formal requirement does not apply to shared mobility. After all, whether or not the SECCI form is provided says nothing about the substantive protection of the shared mobility consumer.

Precontractual information components included in the lease contract

Not all precontractual information components that the provider should offer to the consumer necessarily follow from the general terms and conditions, such as the identity of the trader and the main characteristics of the use.¹³ Different precontractual information components follow from the contract, the website, or the mobile application of the provider. Shared mobility contracts are individual but standardised, which means that the information obligations cannot be examined fully as the individual offers are not accessible (paragraph 5.2.1).¹⁴ However, some precontractual information 'obligations' are met in the general terms and conditions of the shared mobility providers. The Dutch carsharing providers *GreenMobility*, *Greenwheels* and *ShareNow* clearly state their identity in the general terms and conditions, whereas *Europcar* does not.¹⁵ Furthermore, *GreenMobility*, *Greenwheels* and

12 Article 5(1) Consumer Credit Directive 2008. The providers are deemed to have fulfilled the information requirements if he has supplied the Standard European Consumer Credit Information.

13 For a full list of the information requirements see Article 5(1), 6(1) Consumer Rights Directive; Article 5(1) Consumer Credit Directive 2008. Also see paragraph 5.2.1. These information requirements involve *inter alia* providing information about the service and the price, where applicable, the sureties required, the period during which the creditor is bound by the precontractual information, and the existence of costs payable by the consumer to a notary on conclusion of the credit agreement.

14 Article 5(1)(a)(b)(c)(f), 6(1)(a)(b)(c)(e)(o) Consumer Rights Directive; Article 5(1)(a)(b)(c)(d)(h)(i) Consumer Credit Directive 2008.

15 Quotation 46:1; 47:1; 51:2.

ShareNow elaborate on the main characteristics of the contract and indicate that the total price can be found on the provider's websites, mobile application and/or shared mobility contract (paragraph 5.2.1).¹⁶ *Europcar* states that the price and conditions apply as agreed in the main contract.¹⁷ The Belgian, German and French carsharing providers all clearly state their identity and elaborate on main characteristics of their contracts. Again, information on many characteristics can be found on the provider's websites, mobile applications and/or contracts.¹⁸ This is also the case for all studied providers of two-wheelers, irrespective of the Member State in which they operate.¹⁹ Except for the Dutch branch of *Europcar*, and insofar as this can be assessed, there is equivalent protection here.

Information on ancillary services

If the Consumer Credit Directive were applicable, providers should inform on the obligation, if any, to enter an ancillary service contract relating to the agreement where the conclusion of such a contract is compulsory to obtain the contract or to obtain it on the terms and conditions marketed.²⁰ The term 'ancillary services' is defined as the contracts where the conclusion is compulsory in order to obtain the contract or to obtain it on the terms and conditions marketed. The term 'other services' means those that may or may not be part of the contract but are not compulsory to conclude. The information obligation of the providers on the requirement of the consumer to enter an ancillary service contract relating to the agreement is discussed as this constitutes the scope of this information obligation. The scope or magnitude of any obligatory ancillary service is expressly not discussed as this goes beyond the information obligation.

The Dutch carsharing providers *GreenMobility* and *Greenwheels* do not oblige their consumer to enter an ancillary service contract relating to the agreement.²¹ *GreenMobility* offers an optional subscription that gives the consumer access to various discounts and benefits and *Greenwheels* offers different rates, namely *Regelmatig* or *Zakelijk Pro*, obtaining different services.²² Furthermore, *ShareNow* offers an optional insurance extension in

16 Quotation 46:2; 46:3; 46:4; 47:2; 47:3; 47:4; 51:4; 51:5; 51:6. See Article 5(1)(a)(g), 6(1)(a)(g)(h) Consumer Rights Directive.

17 Quotation 41:1; 41:2.

18 Quotation 36:1; 38:2; 45:1; 52:1; 37:1; 39:1; 49:1; 53:2; 37:2; 39:3; 49:3; 40:2; 40:3; 48:1; 48:2; 50:1; 50:2; 54:3 54:5.

19 Quotation 62:2; 66:2; 70:1; 70:2; 73:1; 73:2; 73:3; 59:2; 59:8; 59:9; 63:2; 67:1; 71:1; 71:2; 71:3; 60:1; 64:1; 68:1; 68:2; 74:1; 74:2.

20 Article 5(1)(k) Consumer Credit Directive 2008.

21 See Quotation 46:6; 47:7, referring to a liability insurance cover that is included in the contract and is therefore not an ancillary service. *Greenwheels* also offers a passenger accident insurance within the contract.

22 Quotation 46:11; 47:9.

addition to the standard liability insurance.²³ These Dutch providers offer non-obligatory services, which means that they do not concern an obligation to enter an ancillary service contract relating to the agreement. *Europcar* mentions the Motor Insurance Liability Act but does not mention whether liability insurance is arranged by *Europcar* or whether it is the consumer's obligation.²⁴ This means that the information obligation is not met, resulting in inequivalent protection. While the Belgian, German, and French *Europcar* branches do offer and inform on ancillary services, these different branches offer mutually different services.²⁵ Moreover, none of the providers of the other Member States explicitly oblige the consumer to conclude an ancillary service but do inform on optional services. For example, the Belgian provider *Greenwheels* offers a subscription that gives the consumer access to various discounts and benefits.²⁶ The German branch of *Cambio* offers the possibility to the consumer to reduce the deductible by taking out a safety package.²⁷ *Teilauto* reports that all vehicles are legally insured within the standard contract, whereas *ShareNow* only offers optional insurances.²⁸ However, it is not clear to the consumer whether these optional insurances are not compulsory by (national) law. Another example follows from the French provider *Marguerite*, who offers different protection packs with different levels of coverage such as a protection against damage and theft and an optional contractual protection.²⁹ Furthermore, the contract includes, for example insurance and protection conditions.³⁰ Additionally, *ShareNow* and *Ubeego* offer a mandatory third-party liability insurance.³¹ *ShareNow* also offers an optional insurance coverage with reduced or no deductible regarding the consumer's liability for damage, whereas *Ubeego* includes a collision damage protection in addition to the standard carsharing contract.³² All in all, none of the ancillary services are obligatory to conclude for the consumer. This does not necessarily lead to inequivalent protection because there is no need to inform about

23 Quotation 51:7.

24 Quotation 41:6; 41:7.

25 Quotation 38:3; 39:4; 39:5; 39:6; 40:4; 40:5. The Belgian branch offers services such as a vehicle cleaning service and refuelling service. The German branch includes several services, such as automobile third-party liability, a collision Damage Waiver, and a technical assistance for the vehicle in case of impairment of the vehicle. Furthermore, the German branch offers optional ancillaries, such as emergency management service abroad, refuelling cost service, and delivery and collection service. The French branch includes technical assistance, and third-party liability insurance, whereas it offers optional services such as refuelling service, special vehicle cleaning, insurance, and delivery and/or recovery vehicle services.

26 Quotation 45:2.

27 Quotation 37:4 The contract already includes liability, partial and full comprehensive insurance as standard, see Quotation 37:5.

28 Quotation 49:5.

29 Quotation 48:12.

30 Quotation 48:13.

31 Quotation 50:6.

32 Quotation 50:7.

mandatory services that simply do not exist. As a result, there is equivalent protection, insofar as this can be concluded from the examination of the general terms and conditions.

None of the two-wheeler providers offer mandatory ancillary services. Nevertheless, the provider *Donkey Republic*, regardless of the Member State, offers the possibility to cover the consumer during use of the two-wheeler with a theft insurance.³³ The German provider *Emmy* offers liability insurance which, in the event of damage, the consumer is placed in a contractual relationship with the provider as if they would be with a full, comprehensive insurance plan.³⁴ Furthermore, *Tier* covers its vehicles with liability insurance in all Member States, whereas *Lime* does not mention any ancillary services irrespective of the Member State.³⁵ This is also the case for all branches of *Bird*. As a result, none of the ancillary services are obligatory to conclude for the consumer and consumers are also informed about optional ancillaries, which results in equivalent protection, insofar as this can be concluded from the examination of the general terms and conditions.

Information on the interest rate in case of late payments

If the Consumer Credit Directive were applicable, the consumer needs to be informed about the interest rate applicable in the case of late payments and the arrangements for its adjustment, and, where applicable, any charges payable for default.³⁶ Shared mobility does explicitly not entail a credit agreement. As a result, an interest rate in case of late payments is often not applied because the payments are often one-off. Therefore, the shared mobility providers do often not work with an interest rate, but with one-off fines as this better fits the nature of the payment obligation. At the same time, the rationale of the rule does apply as it is important that consumers receive fair and transparent information, fostering trust by treating consumers fair and avoiding hidden terms or costs. As substantiated in paragraph 4.4.1, the study examines not only whether providers have included anything about the interest rate in case of late payments in their general terms and conditions, but also whether they have included anything about the (financial) consequences of late payment.

The Dutch carsharing provider *GreenMobility* informs the consumer that if an invoice remains unpaid, the amount due is increased by default interest and fixed interest and *GreenMobility* is entitled to suspend future rides.³⁷ Furthermore, *GreenMobility* can charge

33 Quotation 62:1; 59:1; 60:11; 61:12.

34 Quotation 74:4.

35 Quotation 66:1; 63:1; 64:2; 65:13.

36 Article 5(1)(l) Consumer Credit Directive 2008.

37 Quotation 46:7; 46:8. The consumer must protest an invoice within eight days of receipt, otherwise it is considered too late. Amounts are set up to the maximum permitted by national regulations. Furthermore, to terminate or dissolve the agreement between the parties by blocking the *GreenMobility* account.

reminder costs, fines and damages in the event of non-compliance with the payment conditions.³⁸ With *Greenwheels*, the general terms provide that the consumer must pay default interest of 1.5 percent and collection costs, which are calculated on the basis of the Dutch Decree on Compensation for Extrajudicial Collection Costs. In addition, *Greenwheels* reserves the right to temporarily suspend the obligations they have under the agreement with the consumer.³⁹ If the amount due with *ShareNow* cannot be debited, the consumer must pay bank charges and reminder costs.⁴⁰ Furthermore, if the consumer does not pay on time with *Europcar*, the consumer owes statutory interest on the amount due and is liable for collection costs.⁴¹ The Dutch carsharing providers offer the information on costs of late payment according to the Consumer Credit Directive, which means that equivalent protection is obtained compared to the Consumer Credit Directive.

All studied Belgian carsharing providers inform about the consequences of late payment for the consumer. In the event of late payment, *Cambio* sends a payment reminder and charges administrative costs. After a second reminder or with outstanding claims of more than €150, *Cambio* can suspend or terminate the contract. In addition, unpaid invoices are increased by a lump sum compensation of 15 percent with a minimum of €50 per invoice as well as annual interest according to the legal interest rate.⁴² *Europcar* reserves the right to terminate the contract after late payment (after consumer is formally in default) whereas *GreenMobility* can charge reminder costs, fines, and damages but does not specify these amounts in the general terms and conditions.⁴³ At *Claus2you*, the consumer buys credit. The use price is charged after the end of the applicable period by deducting this price from the credit. It is the consumer's responsibility to charge sufficient credit at the start of the ride to cover the costs. If the driving credit is negative after the ride ends, the consumer should immediately clear this. Otherwise, *Claus2you* has the right to clear the balance and charge an administrative fee of €75.⁴⁴

All studied German carsharing providers inform their consumer about the financial consequences of late payment even though these consequences differ. *Cambio* is authorised by the consumer to pay all amounts due by direct debit from the consumer's account and

38 Quotation 46:7. *GreenMobility* can call in the bailiff, if necessary.

39 Quotation 47:8. *Greenwheels* mentions that this interest is one point five percent per month or part of a month, but never more than the legal maximum percentage for commercial transactions.

40 Quotation 51:8. The reminder costs are calculated in accordance with the rate and cost overview applicable at that time.

41 Quotation 41:8. The extrajudicial collection costs are determined in advance and adjusted to the amount of the principal sum. See the general terms and conditions for an exact listing.

42 Quotation 36:2. While retaining the right to any further claim for damages.

43 Quotation 45:3. Quotation 38:4. For *GreenMobility* applies that by receiving a written notice by registered letter demanding payment remaining unanswered for 15 calendar days.

44 Quotation 52:3.

Cambio charges a processing fee. In addition, *Cambio* can provisionally block the use of mobility if payment is not made within the agreed terms and charges administrative costs for each reminder.⁴⁵ To the extent the German *ShareNow* consumer does not have (enough) credit on the consumer's account, the consumer's preferred means of payment is used for the charges.⁴⁶ Furthermore, *ShareNow* is entitled to termination without notice if the consumer defaults on two payments due.⁴⁷ *Teilauto* also uses a direct debit. If it was not possible to debit the amount after 10 days, the consumer is in default, which means that the consumer owes statutory default interest and any collection costs and a fixed reminder fee of €5 per reminder.⁴⁸ The German provider *Europcar* informs their consumers that if they do not pay after receiving a written warning, the consumer owes a default interest of five percent and if necessary, collection costs.⁴⁹

The French branch of *Europcar* does elaborate on the consequences of late payment regarding businesses, but not for consumers.⁵⁰ With *Marguerite*, the consumer is suspended from their right to reserve vehicles until the sum is paid in full, but no additional costs are charged.⁵¹ *Ubeeqo* debits payment directly from the consumer's bank account. The sums due in respect of the consumer's use of the car is paid at the time of its reservation.⁵² If the consumer owes any amount at the end of the use period, the sums due are charged to the bank card registered to the consumer's account.⁵³ Consequently, no late payment occurs because the payment is made with the reservation of the car and the car is only released after payment has been completed. The French branch of *ShareNow* applies the same consequences for late payment as the German branch.⁵⁴

The provider of two-wheelers *Donkey Republic*, regardless of the Member State, does a new attempt for an automatic top-up for a lower amount in the event of a failed payment. If this succeeds, the outstanding balance is charged immediately according to another payment method chosen by the consumer. If the automatic top-up fails at all, the use of the two-

45 Quotation 37:10; 37:11. *Cambio* consumers buy a credit. These are used for travel by car and can be offset against the travel costs, but not against the monthly contributions, personal contributions, and other allowances. If there is a credit, this is automatically used to pay for the trips. *Cambio* can also block access if a direct debit is not served without prior notice or if the consumer is more than €75 in arrears with payment.

46 Quotation 49:8.

47 Quotation 49:9.

48 Quotation 53:4. *Teilauto* may also terminate the contract in the event of non-payment, see Quotation 53:6.

49 Quotation 39:7.

50 Quotation 40:11.

51 Quotation 48:14.

52 Quotation 54:8.

53 Quotation 54:9.

54 Quotation 50:8; 50:9.

wheeler is not disabled for the consumer, but the consumer is charged at the next mobility use. As a result, no additional costs are charged for late payment and the consumer is informed about this.⁵⁵ *Tier*, irrespective of the Member State, informs the consumer that if a payment cannot be made, *Tier* can charge the consumer a fee for the costs actually incurred. Incidentally, it is not specified what these costs involve and what the amount of those costs are.⁵⁶ In all studied Member States where *Bird* operates, *Bird* reserves the right to re-attempt invoicing after a failed attempt. The consumer remains responsible for all amounts and all costs incurred in connection with the collection of these amounts, including and without limitation overdraft fees, collection agency fees, reasonable attorneys' fees and arbitration or court costs. Unlike *Tier*, for example, *Bird* offers some clarity about the extra costs, but not about the amount.⁵⁷ The provider *Lime* only implicitly informs about possible consequences of late payment. *Lime* states that the consumer agrees to be responsible for all claims, actions, costs, damages, penalties, fines, demands, losses, obligations, and expenses (including reasonable attorneys' fees and court costs) related to the consumer's breach of any of these terms and conditions, like the consumer's payment obligations.⁵⁸ As a result, *Lime* does not comply with this information obligation, because possible consequences of late payment are only made implicitly. This applies to all studied Member States where *Lime* operates. With the German provider *Emmy*, the consumer must ensure that their means of payment are sufficient. If a payment cannot be redeemed, *Emmy* may charge the consumer a collection fee.⁵⁹ Furthermore, *Emmy* is free to claim compensation from the consumer that goes beyond the compensation for reversing a direct debit.⁶⁰

Information on the right to an early repayment

The providers should, if the Consumer Credit Directive were applicable, inform the consumer on the right of an early repayment and, where applicable, information concerning the right to compensation and the way in which that compensation will be determined.⁶¹ This paragraph discusses the information obligation of the provider towards the consumer about the right to an early repayment, while in paragraph 7.2.4.2, the substantive right in article 16 of the Consumer Credit Directive is discussed.

55 Quotation 59:10; 60:2; 61:2; 62:11.

56 Quotation 63:4; 64:3; 65:1; 66:6.

57 Quotation 73:4; 71:4; 72:3.

58 Quotation 70:10; 67:9; 69:1; 68:3.

59 Unless the consumer demonstrates that *Emmy* has made no or less effort and/or the fee for reversing the collection is higher than the actual effort in the usual course of business. Quotation 74:6.

60 This is subject to proper proof and *Emmy* can transfer its claims against the consumer at any time to third parties for collection of claims (collection service). Quotation 74:6.

61 Article 5(1)(p) Consumer Credit Directive 2008.

All studied branches of *Europcar* inform the consumer about this matter and state that an early repayment can be requested up to a maximum of 50 percent of the use sum, where use of the vehicle must commence within three months.⁶² *GreenMobility* offers the option of early payment, but the payment for use is essentially structured differently. The consumer can buy a package with prepaid minutes or for an hour or day. The price of the package is deducted at the beginning of the usage period.⁶³ *Greenwheels* and *ShareNow* do not offer options for early repayment.⁶⁴ Most mobility sharing providers offer an option of early payment because, in contrast to lease contracts, use is paid once, directly before or after the use. However, there is inequivalent protection since early payment is not early repayment and loses its purpose if the use is paid once, directly before or after the use. After all, a right to an early repayment enables the consumer to release themselves from the reoccurring payment obligation before the end of the term. Furthermore, the Belgian provider *Claus2you* does not offer the option of prepayment. Only when used for a longer period and with rides abroad is an advance payment sometimes required.⁶⁵ Both Belgian providers *Cambio* and *Claus2you* do not offer equivalent protection on this matter, contrary to *GreenMobility* and *Europcar*. The remainder of German and French carsharing providers do not elaborate on the matter.⁶⁶ With short-term sharing contracts, the moment of conclusion of the contract and payment follow each other immediately, unlike the lease contracts which involve instalment payments. Although the right lapses for the shared mobility business model, inequivalent protection exists compared to the provisions from the Consumer Credit Directive.

As elaborated on above, the provider *Donkey Republic*, regardless of the Member State, provides the option to pay either per ride or in a subscription. With *Donkey Republic*, advance payment is always the method of payment with the subscription.⁶⁷ In addition, the German provider *Emmy* offers prepaid minute discount packages and a subscription.⁶⁸ Although the providers offer possibilities of prepayment, the starting point remains the individual and standard contract, for which prepayment is not possible. The other providers of shared two-wheelers also do not provide this option. Although inequivalent protection exists here, the right lapses for the shared mobility business model because

62 Quotation 38:6; 39:11; 40:12; 41:9.

63 Quotation 46:9; 46:10; 45:15; 45:16. Prepaid minutes are valid for six to 12 months from the date of purchase. Minutes driven in addition to the minutes included in the packages are priced at the standard rate. All hour and day packages are valid for three months from the date of purchase.

64 *ShareNow* offers in the Netherlands, France, and Germany prepaid day uses but this is a specific type of contract.

65 Quotation 52:4.

66 *ShareNow* offers in the Netherlands, France, and Germany prepaid day uses but this is a specific type of contract.

67 Quotation 62:12; 59:11; 60:3; 61:3.

68 Quotation 74:7; 74:8.

the standard agreement pertains to one-off payments and the repayment obligation is determined by the consumer themselves. This means that the necessity of protection for the consumer lapses as elaborated on in paragraph 4.4.4.

Information on the cost structure

If article 5(1)(f) and (g) of the Consumer Credit Directive were applicable, the provider would be obliged to inform about the borrowing rate, the conditions governing the application of the borrowing rate and, where available, any index or reference rate applicable to the initial borrowing rate, as well as the periods, conditions, and procedures for changing the borrowing rate. Moreover, it contains the annual percentage rate of charge and the total amount payable by the consumer, illustrated by means of a representative example mentioning all the assumptions used to calculate that rate. These factors are considered information about the cost structure because these factors clarify on the cost structure of consumer credit but do not fit mobility usership. As a result, I examine whether information is provided on the cost structure of mobility usership as this is in line with the rationale of this information obligation.⁶⁹ This is elaborated on in paragraph 4.4.1.

The price or cost structure with mobility sharing is specified more than with the mobility lease contracts. The Dutch and Belgian branch of *GreenMobility* refers to the website for an up-to-date price list, but also explains the components that make up the price, namely a time-dependent part and/or a distance-dependent part.⁷⁰ Although this provides important information because the consumer can determine the duration and distance of use themselves, there is no equivalent protection because ratio of these parts is not specified. The Dutch provider *Greenwheels* informs that the price is determined based on the period and the agreed rate. In contrast to *GreenMobility*, the distance of the ride is not included in the user price.⁷¹ Here too, the ratio of these components in the determination of the price is not made explicit, resulting in inequivalent protection compared to the provisions in the Consumer Credit Directive as well. At *ShareNow*, regardless of the Member State, and *Teilauto*, the relevant rate that determines the shared mobility price is displayed in the *ShareNow* mobile application and/or portal.⁷² Both *Teilauto* and the branches of *ShareNow* do not make the components or the ratio of those components that determine the price explicit. This also applies to the Dutch branch of *Europcar*, where

69 Whereas this paragraph discusses the information obligation of the provider towards the consumer about the cost structure, paragraph 7.2.4.2 discusses the substance of article 19 of the Consumer Credit Directive 2008 about the calculation of the annual percentage rate of charge.

70 Quotation 46:2; 46:3; 45:4; 45:5; 45:6.

71 Quotation 47:10; 47:2. *Greenwheels* applies best pricing. If a rate other than the chosen rate is more advantageous for the consumer, *Greenwheels* automatically applies this. *Greenwheels* also gives an example of best pricing.

72 Quotation 51:9; 49:7; 53:5; 50:10.

it is not clear which components (and the ratio) add up to the carsharing price.⁷³ The carsharing providers *Europcar*, operating in either Belgium, Germany or France, and the Belgian provider *Claus2you*, inform the consumer about the components influencing the price of the mobility use, such as the duration of the use, the age of the consumer, and the daily use charge, but the ratio of these components is not made clear.⁷⁴ In addition, the Belgian branch of *Cambio* requires consumers to pay a one-off financing contribution, entry fee and monthly instalments.⁷⁵ Furthermore, the German provider *Cambio* calculates the price of the use of the car based on the time booked and used and the kilometres driven, which is gauged using the kilometrage known at the start of the ride and what is reported at the time of return, then priced according to the price list on *Cambio's* website.⁷⁶ With the French providers *Marguerite's* and *Ubeeqo's*, the consumer pays for a monthly subscription and, for example, the use price, additional costs, repair and excess costs, penalties, and fines.⁷⁷ The price of the French provider *Ubeeqo* is made up of a subscription price, costs linked to use, ancillary costs, and any fines or penalties. However, none of carsharing providers inform about the ratio of the different components that are part of the price for the ride, such as the services component, use component and possibly a starting fee, resulting in inequivalent protection.

None of the providers offer clarity about the cost structure of the shared use of the two-wheelers, where also the ratio of cost elements is particularly lacking. In all studied Member State branches where *Donkey Republic*, *Bird*, and *Tier* operate, the current ride price is displayed in the mobile application during the use.⁷⁸ In addition, *Tier* specifies that the use price consists of an amount for unlocking the two-wheeler (starting fee) and an amount for each minute of use. Before entering the use, the consumer can see the costs for unlocking the two-wheeler and the price per minute of use in the mobile application. The use price is due at the end of the contract.⁷⁹ *Bird* also elucidates that shared use includes a starting fee, fees based on distance or time, and/or a required minimum fee.⁸⁰ *Lime* in Belgium, Germany, and the Netherlands, on the other hand, inform about the maximum use price for a maximum duration of use of 24 hours.⁸¹ For the Dutch provider *Lime*, a

73 Quotation 41:1.

74 Quotation 38:7; 52:6; 39:3; 40:6.

75 Quotation 36:3. The price is also depending on the tariff chosen. All costs mentioned follow the current price list.

76 Quotation 37:2.

77 Quotation 48:15; 54:6; 54:10. The applicable rates are those in force at the time of booking. The pricing conditions can be modified by *Marguerite*.

78 Quotation 62:3; 62:6; 66:3; 66:4; 73:1; 59:3; 59:4; 63:5; 63:6; 71:5; 60:4; 60:4; 61:4; 61:5; 64:4; 64:5; 65:2; 65:3; 72:4.

79 Quotation 63:7; 64:6; 65:4; 66:7.

80 Quotation 73:5; 71:6; 72:4.

81 Quotation 67:10; 70:3; 68:4.

24 hour use costs €40 for non-electric two-wheelers and €150 for electric two-wheelers.⁸² The Belgian and German branches of *Lime* apply one maximum amount of €175 and €200, respectively, regardless of the type of two-wheeler.⁸³ The French provider *Lime*, on the other hand, states that all prices are listed in the mobile application, and elaborates that the branch charges a starting fee for unlocking the two-wheeler and a per-minute use rate.⁸⁴ Furthermore, the German provider *Emmy* provides a list of prices and fees on the website.⁸⁵ *Emmy* also provides insight into the total price, which consists of a starting fee, the price of the use per minute and the price of the use during temporary parking.⁸⁶ All in all, none of the providers of shared two-wheelers inform about the ratio of the different components that are part of the price for the ride, resulting in inequivalent protection compared to the contracts that are subject to the Consumer Credit Directive.

Information on a database consultation

If article 5(1)(q) Consumer Credit Directive were applicable, consumers should be informed immediately and free of charge of the result of a database consultation carried out for the purposes of assessing their creditworthiness.⁸⁷ Whereas this paragraph discusses the information obligation of the provider towards the consumer about a database consultation, paragraph 7.2.4.2 discusses the substance of the database consultation as a part of the creditworthiness assessment.

The Dutch providers *Greenwheels*, *ShareNow* and *Europcar* do not inform the consumer about the consultation of a database to assess the consumer's creditworthiness. The Dutch and Belgian carsharing provider *GreenMobility*, on the other hand, reserves the right to request credit reports and possibly refuse the registration of a consumer.⁸⁸ Equivalent protection is provided by *GreenMobility* on this matter because these credit reports contribute to the creditworthiness assessment of the consumer, and they are informed about these credit reports. The Belgian providers *Cambio* and *Claus2you* do not mention anything about the assessment of the creditworthiness of their consumer. While the Belgian provider *Europcar* assesses the consumer's identity, this is not used as part of the credit assessment process.⁸⁹ Furthermore, the German carsharing provider *Teilauto* reserves the right to send a credit

82 Quotation 70:3.

83 Quotation 67:10; 68:4.

84 Quotation 69:9. The current fare is displayed in the mobile application before the consumer starts the ride. Furthermore, the amount *Lime* charges may change depending on location, day of the week versus weekend and time of day. Some rides may have minimum fees that may be in addition to applicable unlock fees.

85 Quotation 74:9.

86 Quotation 74:10.

87 Article 5(1)(q) Consumer Credit Directive 2008. Also see Article 9(2) Consumer Credit Directive 2008.

88 Quotation 46:12; 45:7.

89 Quotation 38:8.

agency details to receive information about the consumer's creditworthiness from the credit agency. The conclusion of the contract is linked to a positive credit assessment, which must be obtained at the conclusion of the contract. If the credit assessment is negative, *Teilauto* can choose not to conclude a contract or to request a higher down payment than stated in the price list applicable at that time and the consumer is informed of this.⁹⁰ None of the French carsharing providers, nor the shared two-wheeler providers apply a database consultation carried out for the purposes of assessing the consumer's creditworthiness, which results in inequivalent protection on the matter.

Copy of the draft agreement

If the Consumer Credit Directive were applicable, the consumer has the right to be informed about their right to be supplied, on request and free of charge, with a copy of the draft credit agreement. This provision shall not apply if the creditor is, at the time of the request, unwilling to proceed to the conclusion of the credit agreement with the consumer.⁹¹ The *ratio legis* of this information obligations is that consumers gain insight into the product and are warned about possible risks. The intention is that this will enable consumers to make a responsible and informed choice when contracting.⁹² Mobility usership expressly does not concern credit and the rationale does not apply here. In my opinion, it would be sufficient to inform consumers on, for example, the provider's website (paragraph 4.4.1). It is therefore comprehensible that none of the sharing providers state anything on the consumer's right to be supplied with a copy of the draft credit agreement, on request and free of charge, as is mandatory under the Consumer Credit Directive.⁹³ As a consequence therefore, again the situation of shared mobility users differs from the Consumer Credit Directive, resulting in inequivalent protection.

7.2.1.2 Contractual information obligations

If the Consumer Credit Directive would apply, the carsharing agreement should be drawn up on paper or on another durable medium and all the contracting parties shall receive a copy of the agreement.⁹⁴ Just as for lease, it is impossible to study this obligation with certainty due to the scope of the research since the study focusses on general terms and conditions and not on the agreements itself and therefore this question cannot be part of this study. This information obligation is only fulfilled when the contracting parties have received a copy of the agreement. To verify this with certainty, a study of that practice is necessary.

90 Quotation 53:1.

91 Article 5(1)(r) Consumer Credit Directive 2008.

92 Paragraph 4.4.1; Dutch Explanatory Memorandum, *Kamerstukken II 2003/04*, 29507, 3, pp. 3-5.

93 Article 5(1)(r) Consumer Credit Directive 2008.

94 Article 10(1) Consumer Credit Directive 2008. Paragraph 4.4.4. This is similar to the precontractual requirement.

Most likely, the contract is visible in the mobile application or portal of the provider. Some precontractual information obligations overlap with the contractual information obligations; if overlap exists, this is not discussed here again. This concerns, for example, the way in which the information is presented to the consumer and the information about the main characteristics of the services, such as the identity of the provider and their contact details, the price of the service, and the duration of the contract.⁹⁵ Reference is made to paragraph 6.4.1.1. The remaining contractual information obligations are examined to assess whether mobility sharing providers increase protection in their general terms and conditions.

Information on required sureties and insurance

Mobility sharing providers should inform the consumer on any required sureties and insurance if the Consumer Credit Directive were applicable.⁹⁶ The rationale of this information obligation is to enable consumers to make a responsible and informed decision on when contracting.⁹⁷ It is comprehensible that not all providers offer equivalent protection to the consumer compared to the Consumer Credit Directive. There is a difference between providers of cars and two-wheelers. Some car providers offer equivalent protection because the financial risk is greater compared to two-wheelers. Nevertheless, shared use in general concerns smaller amounts compared to exclusive use. In other words, the situation is essentially different for shared mobility which means that also inequivalent protection is sensible and not problematic. The Dutch carsharing providers *Greenwheels* and *ShareNow* apply a surety in some cases, but not for the standard contract. All studied Dutch providers also take out necessary insurance, so the consumer is not obliged to do so.⁹⁸ All studied Belgian providers include third-party liability insurance with their carsharing contract, but no providers oblige the consumer to take out insurance as this is included in the contract.⁹⁹ Furthermore, the Belgian providers *Europcar* and *Claus2you*, on the other hand, both mention an obligation to pay a surety.¹⁰⁰ Consequently, inequivalent protection exists for the Belgian provider *Cambio*, the Dutch provider *Europcar* and *GreenMobility*, regardless of the Member

95 Article 10(1)(a)-(m)(r) Consumer Credit Directive 2008. Component (n) and (q) are not relevant to discuss here. (n) refers to the information component on, where applicable, a statement, that notarial fees are payable and (q) refers to the information concerning the rights resulting from Article 15 (linked credit agreements) as well as the conditions for the exercise of those rights.

96 Article 10(2)(o) Consumer Credit Directive 2008.

97 Paragraph 4.4.1.

98 Quotation 47:11; 51:25; 46:6; 41:7; 41:6.

99 Quotation 36:5; 38:10; 45:8; 52:7. The Belgian provider *Cambio* also provides civil liability insurance, directors' insurance, and legal assistance. In addition, *Europcar* includes a *Europcar* Insurance and Protection Provisions.

100 Quotation 38:9; 38:10; 52:8. At *Claus2you*, the deposit is the same as the minimum amount of ride credit that must be present, determined by the number of hours reserved and estimated kilometres. *Europcar* specifies the deposit amount of €300.

State. Regarding the German carsharing providers, only *ShareNow* occasionally applies a surety, but the consumer is not required to fulfil this in the standard contract.¹⁰¹ *Europcar*, on the other hand, does require a surety from the consumer.¹⁰² Moreover, all studied German carsharing providers offer liability and/or fully comprehensive insurance but do not oblige the consumer to take out these insurances.¹⁰³ This results in inequivalent protection for the German providers *Cambio* and *Teilauto*. The French providers *Europcar* and *Ubeeqo* require a surety from the consumer. With the French branch of *Europcar* this depends on the category of the booked vehicle.¹⁰⁴ With *Ubeeqo* the surety is in the form of a pre-authorisation hold on the consumer's bank card, whereas *ShareNow* only occasionally applies a surety.¹⁰⁵ Furthermore, several insurances are included as part of the contracts of the French providers, but no providers require separate conclusion of insurances. Moreover, only *Marguerite* does not inform about an included obligation to pay a surety, resulting in inequivalent protection for *Marguerite's* consumer compared to the protection that is offered under the Consumer Credit Directive

All studied branches of *Tier* and *Donkey Republic* inform about the obligation to take out insurance.¹⁰⁶ In addition, the French branch of *Lime* and the German provider *Emmy* inform the consumer about any obligation to take out insurance.¹⁰⁷ Nevertheless, none of the shared two-wheeler providers inform on any required sureties, which results in inequivalent protection for all studied shared two-wheeler providers on this matter. As discussed at the beginning of this paragraph, this inequivalence is justified because the *ratio legis* of the provision does not shared mobility, a model which is essentially different.

Information on the existence or absence of a right of withdrawal

If the Consumer Credit Directive were applicable, consumers also need to be informed on the existence or absence of a right of withdrawal, the period during which that right may be exercised, and other conditions governing the exercise thereof.¹⁰⁸ The Dutch and Belgian consumer of *GreenMobility* has a right of withdrawal from the date on which the consumer contracts and expires once the ride is started. The consumer must withdraw in writing before the expiry of the term.¹⁰⁹ Furthermore, Dutch, German, and French

101 Quotation 49:12.

102 Quotation 39:12; 39:13.

103 Quotation 37:5; 39:14; 49:4; 53:3.

104 Quotation 40:7; 40:13; 40:14.

105 Quotation 50:11.

106 Quotation 63:1; 64:2; 65:13; 66:1; 59:1; 60:11; 61:12; 62:1.

107 Quotation 69:2; 74:4.

108 Article 10(2)(j)(p) Consumer Credit Directive 2008. This includes information concerning the obligation of the consumer to pay the capital drawn down and the interest in accordance with Article 14(3)(b) and the amount of interest payable per day.

109 Quotation 45:9; 46:13.

branches of *ShareNow* state that their consumer has the right of withdrawal regarding the validation agreement whereby *ShareNow* provides more extensive information compared to *GreenMobility* and discusses the procedure, the consequences of withdrawal and the moment of expiry of the right of withdrawal.¹¹⁰ Both *GreenMobility* and *ShareNow* provide equivalent protection on this matter. Neither *Greenwheels* nor the branches of *Europcar* inform the consumer about the existence or absence of a right of withdrawal, which results in inequivalent protection of the carsharing consumer compared to the sales-based consumer. The other German providers do not elaborate on the existence or absence of a right of withdrawal. For the French carsharing provider *Marguerite*, the right of withdrawal applies to the subscription of use and does not apply to reservations of the use of cars made under the subscription. This is in accordance with article L221-28, 12° of the French Consumer Code which excludes the right of withdrawal for vehicle rental services.¹¹¹ *Ubeeqo* does not mention the right of withdrawal. Nevertheless, *Ubeeqo* provides and informs about this right, described as the right to termination. After all, *Ubeeqo* mentions that their consumer benefits from a termination right of 14 days from the start of the subscription and the consumer can exercise their so-called termination right and notify *Ubeeqo* by completing and submitting the termination form or any other unambiguous declaration of termination.¹¹² Although this right is described in the general terms and conditions of *Ubeeqo* as a right to cancellation, in view of the Consumer Rights Directive this involves a right of withdrawal because it offers the right to withdraw from the agreement within 14 days from the start of the agreement.¹¹³

The Dutch, German, and French provider *Tier* offers the consumer the possibility to withdraw from the agreement. However, it is unclear which agreement this is exactly now that the maximum use period at *Tier* is respectively 60 minutes.¹¹⁴ For the Belgian provider *Tier* a maximum period of 45 minutes applies.¹¹⁵ Furthermore, none of the branches of *Tier* provide information, for example, about the fact that it follows from the Consumer Rights Directive that the right of withdrawal lapses when the vehicle is already being used by the consumer and the consumer explicitly waives the right of withdrawal.¹¹⁶ The Belgian provider *Tier* only offers a model withdrawal form and explains to the consumer when this

110 Quotation 49:10; 50:5; 51:10.

111 Quotation 48:4.

112 Quotation 54:15; 54:18.

113 Quotation 54:15 stipulates ‘... you benefit from a cancellation right of fourteen (14) days from the Subscription Activation Date. You can exercise your cancellation right and notify us of your intention by completing and submitting the cancellation form (Appendix 1 to these Rental Terms) or any other unambiguous cancellation declaration...’.

114 Quotation 66:12; 64:8; 65:6.

115 Quotation 63:8.

116 Quotation 66:8; 63:9; 65:7; 64:9.

form must be used. This is less extensive information compared to the information that the other branches of *Tier* provide. Moreover, the Dutch, Belgian, and French branches of *Lime* mention that there is a right of withdrawal for the use subscription but states that the consumer waives the right of withdrawal in these general terms and conditions because *Lime* starts to deliver its mobility services immediately after confirmation. The same consequences apply here as with *Tier*; the consumer is obliged to pay the costs for the use already expired.¹¹⁷ None of the other providers mention the right of withdrawal.

Information on the procedure on exercising the right to termination

If the Consumer Credit Directive were to apply, all studied mobility sharing providers would be required to inform the consumers on the procedure to be followed in exercising the right of termination of the agreement.¹¹⁸ The right to termination is also discussed (substantially) in paragraph 7.2.2.2 and paragraph 7.2.3.2 (as a remedy for a defect).

The Dutch carsharing providers *GreenMobility* and *Greenwheels* inform their consumers quite extensively about the contract termination procedure. In principle, both contracts can be terminated by the consumer at any time. At *Greenwheels*, it matters which rate has been chosen, but if the consumer has ended the use earlier, the use period ends.¹¹⁹ All studied branches of *ShareNow* also inform about how the use can be terminated at any time with practical conditions about, among other things, where the car must be parked and how the car should be left behind.¹²⁰ *Europcar* does not inform about the procedure of termination for the consumer.¹²¹ The Belgian provider *GreenMobility* allows the consumer to terminate the carsharing agreement at any time.¹²² *Cambio* and *Claus2you* allow this too but do apply a notice period of one month on the total package.¹²³ With *Claus2you*, for example, the consumer is connected to the mobile application with which they can access shared cars and other mobility services. When the connection is terminated, there is no longer access to any of the *Claus2you* facilities.¹²⁴ *Europcar* also informs their consumer on the procedure to follow regarding termination. The consumer can terminate free of charge provided that they notify *Europcar* at least 48 hours before the use is due to start. This focusses on underlying services, such as the use of the mobile application. This expressly makes it impossible to terminate the shared use prematurely. Furthermore, the German

117 Quotation 70:14; 69:7; 67:12.

118 Article 10(2)(s) Consumer Credit Directive 2008.

119 Quotation 46:14; 47:12. Payments due must be paid by the consumer before the consumer can be permanently removed from the *GreenMobility* system.

120 Quotation 51:13; 49:13; 50:12.

121 Quotation 41:10. *Europcar* informs about their possibilities of termination.

122 Quotation 45:10.

123 Quotation 36:6.

124 Quotation 52:9.

provider of shared cars *Teilauto* also informs about the procedure for terminating the usage contract, which is concluded for an indefinite period and can be terminated in writing with a notice period of six weeks. The right of the contracting parties to extraordinary termination for serious reasons, due to a serious breach of contract, remains unaffected.¹²⁵ The German provider *Cambio* allows the consumer to terminate the contract at any time with a notice period of two weeks prior to the end of the month.¹²⁶ Moreover, the French provider *Marguerite's* subscription is, unless agreed otherwise, concluded for an indefinite period.¹²⁷ The consumer can terminate the subscription by email declaring their desire to stop the subscription.¹²⁸ The termination takes effect within 48 hours of receipt of this email. The subscription and options for the current month as well as consumption and reservations not yet invoiced remain due by the consumer.¹²⁹ The French provider *Ubeeqo* makes termination possible in case of non-compliance of a contractual obligation, in case of material breach, or for convenience. In case of non-compliance, the consumer may terminate the subscription by giving the defaulting party a period of 15 days to remedy the event that breaches its contractual obligations.¹³⁰ The terms and conditions stipulate that termination in case of material breach is possible by notice in writing if continuation of the contractual relationship becomes impossible. Furthermore, the consumer may at any time terminate the subscription for the use of *Ubeeqo's* car sharing service with written notice 10 working days in advance.¹³¹ The French branch of *Europcar* only elaborates on the possibilities of termination for B2B contracts.¹³² The fact that the use in carsharing contracts can (often) be terminated at any time is inherent to the business model in which the consumer has control over the duration (and the travelled distance) of the agreement. This is confirmed by the way these providers arranged the procedure for terminating the shared agreements in their general terms and conditions. This also applies for two-wheelers. The two-wheeler provider *Donkey Republic*, irrespective of the Member State, explains that the use period ends when the consumer returns the bike to a drop-off location and presses the 'return' button, then 'end use' in the mobile application, and completes the process until the mobile application confirms that the use period is terminated.¹³³ Furthermore, upon termination, the consumer must ensure that the bicycle is correctly locked and

125 Quotation 53:6.

126 Quotation 37:13. The termination must be done in text form.

127 Quotation 48:16.

128 With acknowledgment of receipt, subject to having previously returned any used car during the contract.

129 Quotation 48:17.

130 Quotation 54:13. If the non-compliance is not rectified within the stated remedy period, then the subscription is terminated.

131 Quotation 54:13. No partial refunds of any fees paid related to the subscription are repayable. All fees which could be due to *Ubeeqo* is promptly paid.

132 Quotation 40:15; 40:16.

133 Quotation 62:14; 59:12; 60:6; 61:7; 65:8. With a subscription from *Donkey Republic*, the contract is terminated in the same way.

parked in a station.¹³⁴ Irrespective of the branch's Member State, when a *Tier* consumer wishes to end the ride, they must park the two-wheeler properly and follow the procedure in the mobile application to end the use.¹³⁵ However, the use can only be terminated if the two-wheeler is within the provider's service area.¹³⁶ If the consumer cannot terminate the use via the mobile application for technical reasons, the consumer must immediately inform *Tier* to coordinate the procedure for the termination of use.¹³⁷ With the Belgian and Dutch branch of *Bird*, the consumer terminates the mobility use at the moment the consumer receives confirmation via the mobile application about the ended ride. If, for whatever reason, the consumer has technical problems with *Bird* terminating a ride, the consumer must immediately report this via the mobile application. Failure to report a problem when terminating a ride may result in continued charges.¹³⁸ However, the French branch of *Bird* states that the agreement can be terminated by either party without cause, upon seven days' written notice to the other party or by either party immediately, without notice, in the event of a material breach of the terms of the agreement by the other party.¹³⁹ Equivalent protection exists for all consumers of *Bird* on this matter. Furthermore, the Dutch, German, and French provider *Lime* allows consumers to stop using mobility at any time, but the procedure for this is not clarified in the general terms and conditions, which means that *Lime* does not provide equivalent protection on this matter.¹⁴⁰ Contrarily, the Belgian provider *Lime* does inform the consumer about the termination procedure. The consumer has the right to terminate the subscription at any time by giving notice to *Lime*.¹⁴¹ In order to terminate the use via the mobile application as a consumer of the German provider *Emmy*, the two-wheeler must be returned correctly.¹⁴²

Information on changes in the borrowing rate

If the Consumer Credit Directive were applicable, the consumer should be informed of any change in the borrowing rate, on paper or another durable medium, before the change enters into force.¹⁴³ This borrowing rate does not fit shared mobility because it involves short-

134 Quotation 62:17; 59:13; 60:6; 61:6; 65:8.

135 Quotation 66:13; 63:10; 64:10.

136 The service area is the area where the provider offers its mobility use. With shared mobility this is often limited to urban areas.

137 Quotation 66:14; 63:11; 64:11; 64:12.

138 Quotation 73:6; 71:7.

139 Quotation 72:5. The consumer may terminate the services at any time, provided, however, that no refund is made by *Bird*, and the consumer remains liable for any additional charges applicable in accordance with the contract.

140 Quotation 70:12; 68:5; 69:10.

141 Quotation 67:11.

142 Quotation 74:11.

143 Article 11(1) Consumer Credit Directive 2008. The information shall state the amount of the payments to be made after the entry into force of the new borrowing rate and, if the number or frequency of the payments changes, particulars thereof.

term use and – in principle – a one-off payment which immediately closes the contract, a borrowing rate does therefore not apply (paragraph 4.4.4). However, I examine whether information is provided on changes in the cost structure of mobility usership as this is in line with the rationale of this information obligation. In my opinion this rationale also applies to shared mobility. After all, the rationale of this provision is to enable consumers to make a responsible and informed decision on the consequences of contracting. In line with that rationale, the shared mobility consumer must be informed of changes in the price or cost structure enabling consumers to make a responsible and informed decision.

All studied carsharing providers reserve the right to make price changes, which results in equivalent protection on this information component.¹⁴⁴ *GreenMobility* announces changes on their website, while *Greenwheels* does this by reporting via e-mail, website and/or mobile application.¹⁴⁵ For *Greenwheels*, the new conditions and rates immediately apply after notification.¹⁴⁶ If *Greenwheels* changes the prices within three months after the start of the agreement, the consumer may immediately terminate the agreement within one month after the price change.¹⁴⁷ Furthermore, all studied branches of *ShareNow* announce changes by reporting via e-mail, website and/or mobile application. The *ShareNow* consumer can object within one month after the changes have been announced. However, a change to a different price rate is not possible after the start of the individual sharing period.¹⁴⁸ If the Dutch branch of *Europcar*'s prices change within three months of the conclusion of the contract, this does not affect the carsharing price.¹⁴⁹ The other branches of *Europcar* reserve the right to change the price of the mobility use due to changes in, for example, the duration of the use and the consumer's age.¹⁵⁰ Moreover, the Belgian provider *Cambio* reserves the right to adjust kilometre rates in the event of changing fuel or electricity prices and to adjust the kilometre rates with immediate effect according to the conditions in the price list applicable at that time. Other changes in the price list are communicated to the consumer in writing or by email four weeks before they come into effect.¹⁵¹ The Belgian providers *GreenMobility* and *Claus2you* publish price changes on their websites, where

144 Quotation 41:11; 46:17; 46:18; 47:13; 47:14; 51:14; 51:15.

145 Quotation 46:17; 46:18; 47:13. If *GreenMobility* makes substantial changes to the terms and conditions, the consumer must accept the changed terms and conditions before the start of a new use period.

146 Quotation 47:13.

147 Quotation 47:14.

148 Quotation 51:14; 51:15; 49:11; 50:13.

149 Quotation 41:11. This does not apply to any price changes due to legislative changes, for example changes to the rate of value added tax. Furthermore, *Europcar*'s consumer is entitled to terminate the contract if the price is raised after a three-month period following the conclusion of the contract but prior to the start of the sharing period, unless the contract stipulates that the sharing period shall begin later than three months after the conclusion of the agreement.

150 Quotation 38:7; 39:3; 40:17.

151 Quotation 36:4.

Claus2you allows price changes due to changes in the consumer price index or fuel prices.¹⁵² In addition, the German provider *Teilauto* allows price changes as these are offered to the consumer in text form no later than six weeks before they take effect. The offered changes only take effect if the consumer accepts them.¹⁵³ *Cambio* also reserves the right to change prices and these changes are communicated to the consumer six weeks before the changes come into effect. Likewise, the French provider *Marguerite* also reserves the right to change the pricing conditions.¹⁵⁴ Although *Ubeejo* chooses more general wording, *Ubeejo* also allows price amendments.¹⁵⁵ The providers *Donkey Republic* and *Tier*, regardless of the Member State, may make changes to subscriptions and/or the prices of services. However, these changes do not take effect before 30 days or 4 weeks after notification.¹⁵⁶ Only the Belgian provider *Tier* deviates from this by applying a term of 14 days.¹⁵⁷ Notwithstanding the Member State, the provider *Lime* shows the prices in the mobile application and reserves the right to change the prices for mobility use as *Lime* deems necessary or appropriate.¹⁵⁸ The prices of the Dutch and Belgian provider *Bird* are also subject to change. In any event, mobility use charges and other fees may include taxes and other local government levies.¹⁵⁹ The German provider *Emmy* also reserves the right to adjust the price and list of fees.¹⁶⁰ All studied shared mobility providers offer equivalent protection here as they inform their consumer about their opportunity to change the price or cost structure.

7.2.1.3 Interim conclusion

The right to information is discussed based on several components. Table 31 provides an overview of the results per provider for each information component. Contrary to the exclusive providers (paragraph 6.4.1.1), not all studied shared mobility providers meet the requirements of providing the consumer with information in a clear and comprehensible way, resulting in an inequivalence of protection compared to the Consumer Rights Directive, the Unfair Contract Terms Directive, and the Consumer Credit Directive. Such deviations do not exist for providers of two-wheelers; they give an unambiguous picture of equivalent protection compared to the requirements outlined in the directives. The

152 Quotation 45:5; 52:11.

153 Quotation 53:5. The changes offered only take effect if the consumer accepts them with consent, if necessary and only if the conditions below are met, by means of the fictitious consent. The silence of the consumer only counts as acceptance of the change offer (fictitious consent) in the situations set out in more detail in the general terms and conditions.

154 Quotation 48:5.

155 Quotation 54:14.

156 Quotation 62:8; 62:20; 66:15; 59:14; 59:15; 60:7; 60:8; 61:8; 61:9; 64:13; 65:9.

157 Quotation 63:12.

158 Quotation 70:5; 67:4; 68:6; 69:8; 69:11.

159 Quotation 73:7; 71:8; 72:6. The consumer is charged the amount of the fees as described in the mobility agreement and the mobile application, including any recurring payments the consumer chooses.

160 Quotation 74:3.

difference is prominent because the (financial) risks and obligations are greater with the use of cars and the importance of clear and comprehensible information for the consumer therefore weighs more heavily. Of all studied shared mobility providers, only *Greenwheels* provides in my view a higher level of protection than the directives in terms of presentation and communication by providing information in a consumer-friendly way through the question-and-answer structure of the general terms and conditions. Clearly, *Greenwheels* is an outlier here in a positive sense.

For three of the information components, none of the shared mobility providers offer equivalent protection compared to the Consumer Credit Directive. First, the SECCI form or an equivalent form to structure the important information components is not provided in either of the researched terms and conditions. Furthermore, the information obligation on the cost structure and the provision of a copy of the draft agreement are obligations that are not met by any of the providers. On the contrary, all studied providers, except *Europcar* (NL), comply with the obligation of the Consumer Credit Directive to inform consumers about any required ancillary services, which means that there is largely equivalent protection regarding that component. Furthermore, almost all studied providers offer equivalent protection in relation to the Consumer Credit Directive regarding the obligation to inform about the consequences of late payments and the options for early repayment. Moreover, a minority of providers do inform their consumers about a consultation in connection with the assessment of the consumer's creditworthiness, which means that these providers comply with the Consumer Credit Directive. In addition, some shared car providers inform the consumer on any required sureties and insurances, which offers a somewhat fragmented landscape where some providers do and some do not comply with this requirement of the Consumer Credit Directive. None of the shared two-wheeler providers offer equivalent protection on this matter. Such a fragmented image also exists regarding the information obligation on the existence or absence of the right of withdrawal. In contrast to exclusive use (paragraph 6.4.1.1), the same provider in different Member States does not apply the same information threshold here. All studied providers that do not inform about the existence of the right, consistently do not do so in any of the Member States, and *vice versa*. The providers who do not provide this information do not comply with the Consumer Credit Directive and therefore allow inequivalent protection. The consumer must also be informed by the providers about the procedure regarding the right to terminate. Most providers do indeed inform their consumers about this. However, there also exist mutual deviations for branches that operate in multiple Member States (Table 31). Lastly, all studied providers of shared mobility, either of cars or two-wheelers, provide equivalent protection regarding the information obligation on any changes in the cost structure.

Table 31: Interim results of shared mobility use on the right to be informed

Typologies		Right to be informed													
		Countries	Providers	Clear and comprehensible manner	SECCI form	Ancillary services	Consequences of late payments	Early repayment	Cost structure	Database consultation	Copy of draft agreement	Required sureties and insurance	The right of withdrawal	Procedure right to terminate	Change in borrowing rate
(c) Shared MU B2C providers of cars	NL	Europcar	-	-	-	=	=	-	-	-	-	-	=	=	
		GreenMobility	=	-	=	=	=	-	=	-	-	=	=	=	
		Greenwheels	+	-	=	=	-	-	-	-	=	-	=	=	=
		ShareNow	=	-	=	=	-	-	-	-	=	-	=	=	=
	BE	Cambio	=	-	=	=	-	-	-	-	-	-	=	=	=
		Europcar	-	-	=	=	=	-	-	-	-	=	-	=	=
		Claus2you	=	-	=	=	-	-	-	-	=	-	=	=	=
	FR	GreenMobility	=	-	=	=	=	-	-	=	-	=	=	=	=
		Europcar	-	-	=	-	=	-	-	-	-	=	-	=	=
		Ubeeqo	-	-	=	=	-	-	-	-	-	=	=	=	=
		Marguerite	-	-	=	=	-	-	-	-	-	=	=	=	=
	GER	ShareNow	=	-	=	=	-	-	-	-	-	=	=	=	=
Cambio		=	-	=	=	-	-	-	-	-	-	=	=	=	
Europcar		-	-	=	=	=	=	-	-	-	=	-	=	=	
Teilauto		=	-	=	=	-	-	-	=	-	=	=	=	=	
ShareNow		=	-	=	=	=	-	-	=	-	=	=	=	=	
(d) Shared MU B2C providers of two-wheelers	NL	Bird	=	-	=	=	-	-	-	-	-	-	=	=	
		Donkey Republic	=	-	=	=	-	-	-	-	-	-	=	=	=
		Lime	=	-	=	-	-	-	-	-	-	=	-	=	=
		Tier	=	-	=	=	-	-	-	-	-	=	=	=	=
	BE	Bird	=	-	=	=	-	-	-	-	-	-	=	=	=
		Donkey Republic	=	-	=	=	-	-	-	-	-	-	=	=	=
		Lime	=	-	=	-	-	-	-	-	-	=	=	=	=
		Tier	=	-	=	=	-	-	-	-	-	=	=	=	=
	FR	Bird	=	-	=	=	-	-	-	-	-	-	=	=	=
		Donkey Republic	=	-	=	=	-	-	-	-	-	-	=	=	=
		Lime	=	-	=	-	-	-	-	-	-	=	-	=	=
		Tier	=	-	=	=	-	-	-	-	-	=	=	=	=
GER	Emmy	=	-	=	=	-	-	-	-	-	-	=	=	=	
	Donkey Republic	=	-	=	=	-	-	-	-	-	-	=	=	=	
	Lime	=	-	=	-	-	-	-	-	-	=	-	=	=	
	Tier	=	-	=	=	-	-	-	-	-	=	=	=	=	

In general, information is provided explicitly in line with the Consumer Credit Directive about the obligation to provide ancillary services, the consequences of late payments, the procedure for terminating the contract and changes in the cost structure. At the same time, there is largely unequal protection compared to the Consumer Credit Directive with regard to the right to information about early repayment, the cost structure, a database consultation, required sureties and insurance, the existence or absence of the right of withdrawal and the right to a copy of the draft agreement.

7.2.2 *The right to change your mind*

The extent to which the general terms and conditions comply with the right to change your mind is examined below. This right arises partly from the Consumer Rights Directive and partly from the Consumer Credit Directive. Both the right of withdrawal and the right to early termination are discussed. The (in)equivalences that follow from self-regulation are shown below in Table 32.

7.2.2.1 **The right of withdrawal**

Rules regarding the right of withdrawal are included in the Consumer Rights Directive and the Consumer Credit Directive.¹⁶¹ However, the Consumer Rights Directive excludes exclusive mobility use as long as it is classified as a distance or off-premises service contract.¹⁶² In addition, the Consumer Credit Directive excludes all types of mobility usership. Therefore, the right of withdrawal under the Consumer Credit Directive is examined as it is slightly stricter, which could mean that there are inequivalences in consumer protection. However, the right of withdrawal of the Consumer Credit Directive is less proportional for shared use, as the duration of the shared mobility contract is considerably shorter than the cooling-off period of 14 days. In addition, the vehicle is immediately put into use, so the rationale behind this cooling-off period does not exist for shared mobility (paragraph 4.4.4).¹⁶³ The right of withdrawal of the Consumer Rights Directive, which is applicable, regulates this right for service contracts (paragraph 5.2.2).¹⁶⁴ Especially because shared mobility contracts are predominantly service contracts, this solution is proportional. With the purpose of

161 Recital 6 Consumer Sales Directive. The rules applicable to the sales of goods are still fragmented as regards distance or off-premises contracts the right of withdrawal is fully harmonised by Consumer Rights Directive.

162 CJEU, Case C-38/21, C-47/21 and C-232/21, 21 December 2023, ECLI:EU:C:2023:1014 (*BMW Bank, C. Bank AG, Volkswagen Bank GmbH, Audi Bank*), p. 202. Also see Paragraph 5.2.2.

163 The rationale of this right is to empower consumers when contracting a distance or off-premises contract, especially in situations where they cannot physically inspect or test a product before contracting.

164 Article 9(2), 16(a) Consumer Rights Directive.

consistency regarding exclusive use, it is briefly explained below whether and how the providers regulate this right in their general terms and conditions.

Regarding the Dutch carsharing providers, neither *Greenwheels* nor *Europcar* inform the consumer about the existence or absence of a right of withdrawal, which means there is a lapse in the substantive discussion of the right. Fully in line with the Consumer Rights Directive, *GreenMobility* and *ShareNow* offer the consumer a right of withdrawal for 14 days from the date on which the consumer concludes the contract. The consumer must withdraw in writing before the expiry of the term.¹⁶⁵ *GreenMobility* mentions that the right of withdrawal lapses if the minutes have been used in whole or in part.¹⁶⁶ *ShareNow* offers the consumer a model withdrawal form and offers extensive information on the procedure, the consequences of withdrawal and the moment of expiry of the right of withdrawal. *ShareNow's* right of withdrawal only relates to the rehabilitation agreement.¹⁶⁷

The Belgian provider *GreenMobility* provides the right of withdrawal from the date on which the consumer contracts for 14 days; the consumer must withdraw in writing before the expiry of this term. The withdrawal right also expires when a ride begins.¹⁶⁸ *GreenMobility* mentions that the right of withdrawal lapses if the minutes have been used in whole or in part, which is in line with the Consumer Rights Directive. The other providers do not offer the consumer the right of withdrawal. Nevertheless, equivalent protection still exists due to the right of withdrawal that follows from the Consumer Rights Directive and which applies to shared mobility.

The German carsharing provider *ShareNow* states that their consumer has the right of withdrawal regarding the validation agreement and discusses the procedure, the consequences of withdrawal and the moment of expiry of the right of withdrawal, offering equivalent protection on this matter.¹⁶⁹ The other German providers do not elaborate on the existence or absence of a right of withdrawal. The French carsharing providers *Marguerite* and *ShareNow* provide extensive information about the existing right of withdrawal. For *Marguerite*, the right of withdrawal applies to the subscription of use and does not apply to reservations of the use of cars made under the subscription. This is in accordance with article L221-28, 12° of the French Consumer Code which excludes the right of withdrawal for vehicle rental services.¹⁷⁰ For *ShareNow* the right of withdrawal exists regarding the

165 Quotation 46:13; 51:10.

166 Quotation 46:13.

167 Quotation 51:10.

168 Quotation 45:9.

169 Quotation 49:10.

170 Quotation 48:4.

validation agreement, but not on the use of mobility.¹⁷¹ In conformity with the Consumer Rights Directive, both providers offer a withdrawal period of 14 days from the date of conclusion of the contract and refund any payment already made by the consumer. With *Marguerite*, the subscription cannot take effect during the withdrawal period unless the consumer gave prior agreement by means of a checkbox when subscribing.¹⁷² The other providers do not elaborate on the existence or absence of a right of withdrawal in their general terms and conditions. As mentioned, *Ubeeqo* does not mention the right of withdrawal but does provide and inform about this right, formulated as the right to termination. After all, *Ubeeqo* mentions that their consumer benefits from a termination right of 14 days from the start of the subscription and the consumer can exercise their so-called termination right and notify *Ubeeqo* by completing and submitting the termination form or any other unambiguous termination declaration. If the consumer exercises this right, *Ubeeqo* reimburses all sums the consumer has already paid within 14 days of the date *Ubeeqo* receives the notice. If the consumer used a car during the period and the period expires during the use then *Ubeeqo* does not refund the use amount; additionally, *Ubeeqo* retains a portion of the subscription amount that corresponds to the use *Ubeeqo* provided up until the moment when the consumer completed the notice.¹⁷³

The provider *Tier* includes the right of withdrawal in its general terms and conditions in every Member State. All studied branches apply a model withdrawal form which can be used to withdraw, but this is not mandatory.¹⁷⁴ Contrary to the Belgian branch of *Tier*, the Dutch, German and French branches of *Tier* elaborate that the consumer has the right to withdraw from the contract without giving reasons within 14 days. To exercise the right of withdrawal, the consumer must inform *Tier* of their decision by means of an 'unambiguous statement'.¹⁷⁵ In the case of withdrawal, *Tier* immediately refunds all payments received from the consumer.¹⁷⁶ If the consumer has requested the commencement of the mobility use within the withdrawal period, the consumer pays *Tier* an amount that is proportional to the services already provided to the consumer until the moment the consumer has notified *Tier* of their withdrawal from the agreement, in relation to the total service provision under the agreement.¹⁷⁷ As mentioned above, there is no right of withdrawal for *Lime* for singular mobility use. Nevertheless, the Dutch, Belgian and French branches of *Lime* mention a right of withdrawal regarding the use subscription and states that the

171 Quotation 50:5. *ShareNow* also offers a withdrawal form, see Quotation 50:14.

172 Quotation 48:4; 48:18; 48:19. *Marguerite* also offers a withdrawal form, see Quotation 48:11.

173 Quotation 54:15; 54:18.

174 Quotation 66:8; 63:9; 65:7; 64:9.

175 Quotation 66:8; 65:7; 64:9. For example a letter sent by post, fax or e-mail.

176 Quotation 66:8. In any event no later than 14 days after *Tier* has been notified of the consumer's decision to withdraw from the agreement.

177 Quotation 66:8; 65:7; 64:9.

consumer waives the right of withdrawal in these general terms and conditions as *Lime* delivers its mobility services immediately after confirmation.¹⁷⁸

7.2.2.2 Right to early termination

As part of the right to change your mind, the right to terminate the mobility usership contract early is also discussed because it offers a solution in case a consumer changes their mind about closing the contract. Although this right is not mentioned in the Directives, it is often provided for in the general terms and conditions. This paragraph explicitly discusses the consumer's right to early termination; however, I also discuss the provider's information obligation on the right to termination in paragraph 7.2.1.2 and the right to terminate as a remedy for a defect in paragraph 7.2.3.2.

Regarding the Dutch carsharing providers, at *ShareNow*, a framework agreement is concluded with the consumer for an indefinite period and can be terminated early without cause by either party by giving written notice two weeks before the end of a calendar month.¹⁷⁹ Furthermore, the consumer can terminate at any time with *Greenwheels*.¹⁸⁰ *Greenwheels* can conclude an agreement for a definite or indefinite period. In principle, a carsharing agreement is concluded by the consumer for a month. After this month, the agreement is extended by one month by *Greenwheels*, until the consumer terminates the agreement. A carsharing agreement for an indefinite period ends if the consumer (or *Greenwheels*) terminates. The termination must be done in writing within 30 days.¹⁸¹ *ShareNow* and *Greenwheels* may terminate the agreement without prior notice if the consumer falls short of their contractual obligations.¹⁸² *GreenMobility's* sharing contract is entered into for an indefinite period and ends upon termination by one of the parties. *GreenMobility* provides an ancillary 'Greensaver' subscription to obtain extra benefits that can be terminated with a notice period of one month before the end of the consumer's payment period.¹⁸³ However, the standard contract does not offer the possibility of early termination. *Europcar* generally stipulates the right to terminate and that regardless of who terminates, the consumer is liable for termination costs. This implies that termination is possible for the consumer.¹⁸⁴

178 Quotation 70:14; 67:12; 69:7.

179 Quotation 51:16. If a minimum term has been agreed for concluded packages, a notice period of two weeks after the expiry of this minimum term generally applies to the termination of the framework agreement.

180 Quotation 47:15.

181 Quotation 47:16.

182 Quotation 47:17; 51:16. If a minimum term has been agreed for concluded packages, a notice period of two weeks after the expiry of this minimum term generally applies to the termination of the framework agreement.

183 Quotation 46:19; 46:24.

184 Quotation 41:4.

All studied Belgian carsharing providers offer their consumers the option of termination. *Cambio*'s contract can be terminated before the 16th of the current month and must be done in writing.¹⁸⁵ The consumer of *GreenMobility* is entered into the contract for an indefinite period and ends upon termination by one of the parties.¹⁸⁶ In addition, *GreenMobility* provides an ancillary 'Greensaver' subscription to obtain extra benefits that can be terminated with a notice period of one month before the end of the consumer's payment period. *Claus2you* also applies a notice period of one month in case of termination. This leads to the termination of access and use of the mobile application, the cars and all other (mobility) services and facilities.¹⁸⁷ *Europcar* offers the consumer the option to terminate the booking free of charge provided that the consumer gave *Europcar* notice of at least 48 hours before commencement of the use. If the consumer terminates within the 48-hour window, a penalty of up to €50 is applied. The amount of the fee shall not exceed the price of the use.¹⁸⁸

In case of the German shared car provider *Cambio*, either contract party can terminate at any time in writing with a notice period of two weeks before the end of the month. Upon termination of the contract, the consumer is obliged to return all objects and tools that they have received in the context of the contractual relationship.¹⁸⁹ *ShareNow* also applies a two-week notice period with regard to the framework agreement.¹⁹⁰ *Teilauto* also has a contract for an indefinite period and can be terminated in writing by either party with a notice period of six weeks prior to the end of the quarter.¹⁹¹ *Europcar*'s consumer can terminate their booking free of charge provided that the consumer notified *Europcar* at least 48 hours before the use is due to start. If the consumer gives less than 48 hours of notice, they are liable to pay a penalty of up to €50.¹⁹²

The consumer with the French provider *Europcar* can also terminate their booking free of charge provided that the consumer notifies *Europcar* at least 48 hours before the use is due to start. If the consumer gave less than 48 hours notice, *Europcar* can apply a fee. The amount of this fee is mentioned in a tariffs guide and shall not exceed the price of the use.¹⁹³ *Marguerite* also allows termination via the website or mobile application. The consumer may terminate the reservation free of charge up to four hours before the start

185 Quotation 36:6.

186 Quotation 45:11.

187 Quotation 52:9; 52:12. If the termination takes place within a period of 30 days after an announced amendment to the terms and conditions, the old terms and conditions apply until the end of the termination period.

188 Quotation 38:12; 38:11.

189 Quotation 37:13.

190 Quotation 49:14.

191 Quotation 53:10.

192 Quotation 39:15; 39:16. The amount of this penalty shall not exceed the price of the use if it is lower.

193 Quotation 40:18.

of the ride. After this period, any termination results in the application of termination fees.¹⁹⁴ *ShareNow* provides agreements for an indefinite period and both contract parties are entitled to terminate the main agreement in writing two weeks prior to the end of each calendar month and no termination fee applies.¹⁹⁵ *Ubeeqo* also provides the consumer with a right to termination and allows the consumer to terminate before the start of use of the car by clicking the terminate button in the mobile application. The cost to terminate the reservation is set out in a ‘fees and costs guide’.¹⁹⁶

Regardless of the Member State, the mobility agreement of *Tier* is entered into for an indefinite period and can be terminated by the consumer in writing with due observance of a notice period of two weeks.¹⁹⁷ Furthermore, the Dutch and Belgian branches of *Lime* also allows the consumer to terminate the use subscription, but if the consumer is in the middle of the subscription period, the consumer does not receive a refund for partial months.¹⁹⁸ The German and French branches of *Lime*, however, states that the subscription is subject to additional terms and conditions, which are made available prior to conclusion of such a subscription.¹⁹⁹ The other providers do not elaborate on an option to terminate the agreement. The German provider *Emmy* makes it possible for the consumer to terminate the use via the mobile application when the two-wheeler has been returned correctly. The conditions for correct return are listed in *Emmy*’s general terms and conditions.²⁰⁰

7.2.2.3 Interim conclusion

The right to change your mind is divided into the right of withdrawal and the right to early termination. The right of withdrawal is primarily associated with distance and off-premises contracts and offers the consumer the option to withdraw the agreement within 14 days without giving any reasons. The rationale of this right is to empower consumers when contracting a distance or off-premises contract, especially in situations where they cannot physically inspect or test a product before contracting. After the period of 14 days, a right to terminate the contract early is often offered by the providers, whereby this early termination is regularly subject to conditions, such as a termination fee. Mobility sharing consumers may in principle withdraw the contract free of charge within 14 days after the provider has received the contract signed by the consumer.²⁰¹ However, mobility use

194 Quotation 48:20; 48:21.

195 Quotation 50:16.

196 Quotation 54:17.

197 Quotation 66:16; 63:13; 64:14; 65:10.

198 Quotation 70:15; 70:16; 67:13.

199 Quotation 68:7; 69:12.

200 Quotation 74:11.

201 Article 9 Consumer Rights Directive; paragraph 5.2.2; Article 14 Consumer Credit Directive 2008; paragraph 4.4.4.

Table 32: Interim results of shared mobility use on the right to change your mind

Typologies	Countries	Providers	Right to change your mind		
			Right of withdrawal	Right to termination	Termination fee
(c) shared MU B2C providers of cars	NL	Europcar	=	+	Yes
		GreenMobility	=	=	No
		Greenwheels	=	+	No
		ShareNow	=	+	No
	BE	Cambio	=	+	No
		Europcar	=	+	Yes
		Claus2you	=	+	No
		GreenMobility	=	=	No
	FR	Europcar	=	+	Yes
		Ubeeqo	=	+	Yes
		Marguerite	=	+	Yes
		ShareNow	=	+	No
	GER	Cambio	=	+	No
		Europcar	=	+	Yes
		Teilauto	=	+	No
		ShareNow	=	+	No
(d) shared MU B2C providers of two-wheelers	NL	Bird	=	=	No
		Donkey Republic	=	=	No
		Lime	=	+	No
		Tier	=	+	No
	BE	Bird	=	=	No
		Donkey Republic	=	=	No
		Lime	=	+	No
		Tier	=	+	No
	FR	Bird	=	=	No
		Donkey Republic	=	=	No
		Lime	=	=	No
		Tier	=	+	No
	GER	Emmy	=	+	No
		Donkey Republic	=	=	No
		Lime	=	=	No
		Tier	=	+	No

cannot be returned, which is why some specific rules apply. According to the Consumer Rights Directive, the right of withdrawal lapses when a consumer has agreed to the full delivery of the use within the cooling-off period and has also explicitly waived the right of withdrawal. In case these conditions are met, the consumer has no right of withdrawal, but this is in equivalence to the Consumer Rights Directive. Furthermore, there appears to be a difference in the right to terminate early between the different modes of transport. Regarding the cars, only *GreenMobility* – irrespective of the Member State – does not provide the right to terminate early in their general terms and conditions. For two-wheelers, the providers *Donkey Republic* and *Bird* do not elaborate on the right to terminate early in any of the Member States where they operate, while *Lime* has diverging contract terms in different Member States (Table 32). Furthermore, termination fees do not seem common as only a few carsharing providers require them.

7.2.3 *The right to conformity*

The consumer who buys a product is, according to article 5 of the Consumer Sales Directive, entitled to a conform product.²⁰² As a result of non-conformity, a consumer is subsequently entitled to remedies to obviate this non-conformity. Obviously, these provisions do not apply to mobility usership agreements, since no sales contract is concluded, but only services provided. As substantiated in paragraph 4.3.1, the application of the right to conformity is sensible and proportional for shared mobility, aligning the *ratio legis* of the provision. Therefore, the general terms and conditions are assessed. The (in)equivalences that follow from self-regulation for the right to conformity are shown hereafter in Table 33.

7.2.3.1 Remedies: Repair and replacement

If the Consumer Sales Directive were applicable, the consumer shall be entitled to have the goods brought into conformity or to receive a proportionate reduction in the price, or to terminate the contract in the event of a lack of conformity (Table 15).²⁰³ In order to have the goods brought into conformity, the consumer may choose between repair and replacement, unless the remedy chosen would be impossible or, compared to the other remedy, would impose costs on the seller that would be disproportionate, taking into account all circumstances.²⁰⁴ The remedies provided by the Consumer Sales Directive, such as replacement, do not apply to mobility usership. The right to replacement (and repair),

202 Article 5, 6, 7, 8, 10, 11, 12 Consumer Sales Directive. Chapter 5 paragraph 5.5.3.

203 Article 13(1) Consumer Sales Directive.

204 Article 13(2)(a)(b)(c) Consumer Sales Directive.

as discussed below, stem from the general terms and conditions that offer replacement (and repair) under specific conditions.

The rationale behind the remedies is to ensure that consumers receive goods or services that meet the quality standards and specifications promised by the professional party, contributing to legal certainty. Although shared mobility is expressly not a sales contract, the *ratio legis* of this provision does apply to shared mobility. This means that this level of protection should be offered to shared mobility consumers as well. However, the premise, as substantiated in paragraph 4.3.2, is that the subject of the agreement is the use and not the vehicle itself, so continuation of mobility is central.

Continuation of mobility is not offered by the Dutch carsharing provider *GreenMobility* because they state that they cannot be held liable under any circumstances for damage caused by a defect of the car during the consumer's sharing period.²⁰⁵ Furthermore, *GreenMobility* also prohibits the consumer from carrying out repairs to the car without prior approval from *GreenMobility* but does not specify who should take care of repairment.²⁰⁶ *GreenMobility* also provides no options for replacement mobility in the event of a defect.²⁰⁷ Clearly there is no concern about the continuation of the mobility use for the consumer. Likewise, *ShareNow* does not focus on mobility continuation in case of a defect. *ShareNow* obliges the consumer to check the car for visible defects before taking it into use and to report this via the *ShareNow* mobile application, telephone or e-mail.²⁰⁸ Furthermore, defects that occur during the ride must be reported immediately by the consumer and do not release the consumer from a duty of care.²⁰⁹ In addition, *ShareNow* chooses the garage to repair the car in case of a defect.²¹⁰ Although *ShareNow* states what the consumer is obligated to do in the event of a defect, no right of repair or replacement is granted, nor any right on continuation of mobility. Regarding replacement, *ShareNow* reserves the right, in consultation with the consumer, to take back the car at any time and replace it with a comparable car, but this does not aim at addressing a consumers right to remedy of a non-conformity.²¹¹ *Greenwheels* also includes rules on how to act in the event of a defect. The consumer is obliged to examine the vehicle for defects before use and, if defects are present, to report this to *Greenwheels* before the consumer starts

205 Quotation 46:20.

206 Quotation 46:22.

207 Quotation 46:21.

208 Quotation 51:17; 51:18. In the event of serious defects, damage and/or contamination, the consumer must, if necessary, contact the service centre by telephone to report the nature and seriousness of the defects, damage and/or contamination.

209 Quotation 51:19.

210 Quotation 51:20.

211 Quotation 51:22.

the car. If the consumer reports a damage or defect to *Greenwheels* before using the car, *Greenwheels* attributes the defect to the previous consumer. This means that if the consumer does not report the defect (and the next party does), the damage is attributed to them.²¹² However, *Greenwheels* facilitates mobility continuation by providing replacement mobility. *Greenwheels* tries to find a replacement mobility option for the consumer as quickly as possible, for example, by referring the consumer to a car at a different location or to replacement (public) transport. In such an event, *Greenwheels* reimburses the additional costs for transport to the nearest location of a replacement car, the nearest public transport station, or another place.²¹³ In addition, if necessary, *Greenwheels* can replace a reserved car with a comparable car at any time and the consumer may not have defects to the car repaired without *Greenwheels* express prior consent.²¹⁴ With regard to the right to repair, *Greenwheels* does not offer equivalent protection; they do, however, offer equivalent protection with regard to replacement. In any case, *Greenwheels* provides an opportunity for consumers to continue their mobility, which is in line with the purpose of the sales-based remedies. Contrary to the other Dutch carsharing providers, *Europcar* is obliged to repair any defect, unless this is impossible or the required expenditure cannot, under the given circumstances, be reasonably expected of *Europcar* at the request of the consumer. This obligation shall not be applicable if the consumer is liable to *Europcar* for the cause of the defect and/or for the consequences of the defect.²¹⁵ If a defect in the vehicle necessitates repair that takes longer than two working days, *Europcar* provides a replacement vehicle.²¹⁶ To note, the consumer in a sales contract has the choice of repair or replacement in case of a defect, while this choice is never offered to the sharing mobility consumer. Although the protection is inequivalent because the situation is essentially different, making the inequivalence sensible and proportional.

The Belgian provider *Cambio* arranges that in the case of a defect occurring during the ride or which is not previously mentioned to the consumer, the consumer must immediately notify *Cambio*. If *Cambio* allows the consumer to have a defect repaired, the costs are reimbursed by *Cambio* upon presentation of a valid proof of payment, insofar as the consumer is not personally liable for the defect. *Cambio*'s general terms and conditions do not stipulate under what conditions *Cambio* allows the consumer to have a defect repaired. In any case, the consumer is obliged to limit the damage.²¹⁷ *Cambio* can assign the consumer

212 Quotation 47:20.

213 Quotation 47:18. *Greenwheels* reimburses the costs to the consumer upon submission of proof of payment.

214 Quotation 47:18; 47:19. *Greenwheels* reimburses the costs to the consumer upon submission of proof of payment.

215 Quotation 41:12.

216 Quotation 41:13. If the defect is the fault of the consumer, the cost of assistance is not reimbursed by *Europcar*.

217 Quotation 36:7. Driving after the defect is only permitted with the express permission of *Cambio*.

a replacement car in the context of roadside assistance.²¹⁸ *Europcar* should be notified if the consumer notices any apparent defect that is not described on the use agreement.²¹⁹ The consumer may only carry out repair to the car with prior written agreement from *Europcar* and in that case *Europcar* pays the costs for repair.²²⁰ *GreenMobility* also prohibits the consumer from carrying out repairs to the car without prior approval from *GreenMobility* but does not specify who should take care of the repair.²²¹ Neither *Europcar* nor *GreenMobility* offer any options for replacement mobility in the event of a defect (or a remedy that provides for continuation of the mobility).²²² This results in inequivalent protection. Also, at *Claus2you* the consumer is not allowed to repair a defect without explicit and prior permission.²²³ In addition, it may happen that the car is not available in time due to a previous user and/or necessary repair of defects. A defect can also occur while the car is in use. If *Claus2you* is therefore unable to provide the use of a car, *Claus2you* is obliged to find replacement transport options, which aims at mobility continuation.²²⁴

If defects occur during the ride on the vehicle of the German shared car provider *Cambio*, the consumer must immediately inform *Cambio* of this. A further ride is then only permitted with the express permission of *Cambio*, which is not refused if the grounds are reasonable. The consumer is obliged to do everything possible to limit the damage.²²⁵ If amounts are paid by the consumer to repair a defect which is required to be able to continue the ride, a claim for compensation exists if the type and extent of the repair has been expressly approved by *Cambio*. The costs are reimbursed by *Cambio* on presentation of a proper invoice, provided that the consumer is not liable for the damage.²²⁶ If the car is not available at the booked time, the ride can be terminated free of charge or rebooked to another car. If only a higher quality replacement car is available at the same station, the price range originally booked is charged. If a replacement vehicle of at least the same value is not available at the same station, the consumer receives a compensation credit according to the applicable price list.²²⁷ Furthermore, the consumer of *ShareNow* and *Teilauto* is prohibited from carrying out repairs or changes to the car on their own authority.²²⁸ With *ShareNow*, the consumer must immediately inform *ShareNow* of any defects that occur during the

218 Quotation 36:9.

219 Quotation 38:14.

220 Quotation 38:15.

221 Quotation 45:12.

222 Quotation 45:13.

223 Quotation 52:14.

224 Quotation 52:15.

225 Quotation 37:14.

226 Quotation 37:15. If a fuel card malfunctions, only the fuel costs paid by the consumer is refunded by *Cambio*.

227 Quotation 37:16.

228 Quotation 49:16; 53:11.

mobility or which are visible at the start of the use. Defects do not release the consumer from fulfilling the required duty of care.²²⁹ *ShareNow* is solely responsible for selecting the garage for repairs in case of damage.²³⁰ Nevertheless, no right of repair or replacement is granted, nor any right to continuation of mobility. Furthermore, *Teilauto* informs the consumer if the booked vehicle is not available. Vehicle replacement is offered for another vehicle, subject to availability. If *Teilauto* cannot provide a vehicle, the consumer does not owe any compensation.²³¹ Since *Teilauto* has only included an obligation to try to offer a replacement vehicle, this expressly does not comprise equivalent protection. After all, *Teilauto*'s promises remain without obligation. Regarding *Europcar*, the consumer may have repairs that are necessary to ensure the operating and road safety of the vehicle; these repairs may be carried out up to maximum €50 without further implications. Larger repairs may only be carried out with the agreement of *Europcar* and *Europcar* bears repair costs.²³² If the car cannot be repaired on the spot, *Europcar* tries to locate a replacement car within a radius of 100 kilometres. A replacement car of the same category is sought, but no guarantee can be given. *Europcar* also offers transportation of the consumer to the station where the replacement vehicle is made available.²³³

The French provider *Marguerite* states that any defect occurring on the car during the ride is the responsibility of the consumer. The consumer should inform *Marguerite* of any defect of which the consumer is aware and not use the car if it does not present normal safety conditions. The consumer is prohibited from carrying out or having carried out any repairs on the car, except with the prior written consent of *Marguerite*.²³⁴ The consumer owes *Marguerite* any repair and excess costs.²³⁵ The consumer of *ShareNow* should also report defects occurring during the ride, by telephone, without undue delay. The same applies to defects the car shows at the commencement of the lease.²³⁶ Furthermore, *ShareNow* appoints the workshop for repairing the car in case of defects.²³⁷ *Ubeeqo* does not charge the consumer for normal wear and tear.²³⁸ However, if the consumer does not notify *Ubeeqo* of any pre-existing defect or damage, then the consumer is deemed to have

229 Quotation 49:17.

230 Quotation 49:18.

231 Quotation 53:12; 53:13. If *Teilauto* is guilty of not making the vehicle available, the consumer can claim compensation from *Teilauto* for the proven damage to the extent permitted by law.

232 Quotation 39:18.

233 Quotation 39:19. Transportation costs are compensated up to €150 in taxi costs. If no replacement vehicle can be provided, either a hotel room or transportation by other means of transport to the domicile or destination is offered.

234 Quotation 48:22.

235 Quotation 48:15.

236 Quotation 50:17.

237 Quotation 50:18.

238 Quotation 54:19.

accepted the car in the condition indicated in the condition report provided.²³⁹ In case of a defect, *Europcar* requires prior authorisation by *Europcar* in case of any modification to or mechanical work on the car. Furthermore, *Europcar* is entitled to assume that the consumer accepted the car in the condition set out on the shared car agreement and to charge the consumer for any defects that could be noted when the vehicle is inspected at the time of its return. In any case, the consumer is invoiced for the cost of necessary repairs.²⁴⁰ None of the French shared car providers include repair. Only *Europcar* assists in locating a replacement vehicle within a radius of 100 kilometres if the car cannot be repaired on the spot. *Europcar* tries to offer a car of the same category but gives no guarantees.²⁴¹

For all studied branches of *Donkey Republic*, the provider stipulates in their general terms and conditions that the consumer is obliged to check the bicycle for any visible defects or damage prior to unlocking the bicycle.²⁴² If there is a defect for the use of the two-wheeler, the consumer must terminate the mobility use by pressing the 'terminate use' button in the mobile application.²⁴³ If a defect is detected on the two-wheeler after unlocking, the consumer can exchange the two-wheeler by pressing the 'change bicycle' button in the mobile application.²⁴⁴ If desired, the consumer can also end the use by pressing the 'end use' button in the mobile application.²⁴⁵ Furthermore, *Donkey Republic's* general terms and conditions do not provide clarity about the possible continuation of mobility in the event of a defect.

If the consumer of the branches of *Tier* discovers a defect in the two-wheeler, the general terms and conditions stipulate that the consumer is obliged to inform *Tier's* consumer service as soon as possible, but at the latest before the consumer starts using the two-wheeler.²⁴⁶ If a defect is likely to affect road safety or the general functionality of the two-wheeler, the consumer may not use the two-wheeler.²⁴⁷ However, *Tier* does not provide repair or replacement of the vehicle in order to continue the consumer's mobility. The

239 Quotation 54:10.

240 Quotation 40:22; 40:23.

241 Quotation 40:21.

242 Including – but not limited to – tires and lights, brakes, saddle, and handlebars if applicable. Quotation 62:21; 59:16; 60:9; 61:10.

243 In this case, the driver is not charged any amount for the defect or damage. Quotation 62:21; 59:16; 60:9; 61:10.

244 If desired, the consumer can also end the use by pressing the 'end use' button in the mobile application. Quotation 62:21; 59:16; 60:9; 61:10.

245 The general terms and conditions also state that the consumer should never use a vehicle that is unsafe for use (e.g., due to damage or a defect). *Donkey Republic's* general terms and conditions do not provide clarity about the possible consequences if the consumer does so anyway. Quotation 59:16; 60:9; 61:10; 62:21.

246 Quotation 66:18; 63:14; 64:15; 65:11. The consumer must provide complete and truthful information.

247 Quotation 66:19; 63:15; 64:15; 65:12.

Dutch, German, and French provider *Lime* states that any defects must be reported to *Lime* as soon as possible. If the consumer does not do this, *Lime* can attribute the costs to the consumer. If a defect occurs before use, the consumer should not use the two-wheeler and reserve another one instead. When this occurs during use, the consumer should stop the ride as safely and quickly as possible.²⁴⁸ The Belgian provider *Lime* only states that *Lime* should be notified by the consumer in case of a defect.²⁴⁹ Furthermore, the consumer of *Bird* at either the Dutch, Belgian, or French branches must report any defect of a two-wheeler to *Bird* as soon as possible. While *Bird* states that the consumer is not responsible for normal wear and tear occurring during normal use of the two-wheeler, the consumer must at the same time agree to responsibility and liability arising from misuse and its consequences, all requests, complaints, grievances, damage, loss, liabilities, bodily injuries, costs and expenses, penalties, attorneys' fees, judgments and prosecutions, expenses of any kind or order whatsoever in connection with the loss or theft of a two-wheeler.²⁵⁰ Furthermore, the German provider of two-wheelers *Emmy* acknowledges liability for compensation in the event of, among other things, the lack of the guaranteed quality and when damage is the result of a culpable breach of a contractual obligation. This describes obligations, the fulfilment of which is essential for the proper performance of the contract and on the compliance of which the contractual partner may regularly rely. The right to conformity (and the corresponding right to claim performance of the contract) can also be understood here. However, *Emmy* does not offer any remedies arising from the Consumer Sales Directive in the event of a violation of the proper performance of the contract, namely the right of repair or replacement or any other remedy that targets the continuation of mobility.²⁵¹ Providers of two-wheelers elaborate on the event of defects but do not offer remedies in the event of a defect. While providers often refer to the option to exchange the two-wheeler on the spot in case of a defect, it remains unclear how this remedy of replacement can be guaranteed by the provider. After all, it is not clear in advance whether a replacement vehicle can be offered, because it is not certain whether a replacement vehicle is available at the station in a station-based model or nearby on public roads with a free-float model. As a result, these providers do not offer equivalent protection compared to the right of a replacement that follows from article 13(2) of the Consumer Sales Directive. Nevertheless, there is no reason to not offer equivalent protection here, because the nature of shared mobility is not that different.

248 Quotation 70:18; 68:8; 69:13. *Lime* instructs the consumer to consider that if an electric two-wheeler does not take the consumer where he needs to be, this does not mean a defect on *Lime's* part, see Quotation 70:17; 68:9.

249 Quotation 67:14.

250 Quotation 73:9; 73:10; 71:9; 71:10; 72:7; 72:8.

251 Quotation 74:12.

Only the Dutch carsharing provider *Europcar* mentions that it is, under its own general terms and conditions, obliged to repair any defect at the consumer's request, unless this is impossible or the required expenditure cannot reasonably be expected of *Europcar*, resulting in equivalent protection compared to sales-based consumers.²⁵² None of the Belgian, German or French shared car providers included the possibility of alternative remedies in case the requested remedy is impossible or the required expenditure cannot reasonably be expected of the provider. None of the two-wheeler providers provide alternative remedies in case repair is impossible, or the required expenditure cannot reasonably be expected of the provider, resulting in inequivalent protection compared to sales-based consumers.

Repair or replacement within reasonable time

If article 14(1) of the Consumer Sales Directive would apply, a defective product should be repaired or replaced free of charge within a reasonable time and without significant inconvenience to the consumer (paragraph 4.4.4).²⁵³ The rationale behind this provision is that consumer inconvenience should be minimized. This rationale also applies to shared mobility in view of the continuation of mobility. Only the Dutch carsharing provider *Europcar* mentions the requirement, namely that if repairs take longer than two days, *Europcar* offers a replacement vehicle.²⁵⁴ In my opinion, this is reasonable as this term emphasises the continuation of the mobility. *Greenwheels*, *GreenMobility* and *ShareNow* do not stipulate terms within which the continuation of mobility (repair or replacement) should take place, resulting in inequivalent protection. In addition, none of the Belgian, German, or French shared car providers mention anything on the terms within which the remedies are executed. The only provider of two-wheelers that offers a replacement vehicle is *Donkey Republic* and this provider of two-wheelers does not elaborate on a remedied defect within a reasonable term.²⁵⁵ Consequently, none of the two-wheeler providers provide equivalent protection compared to sales-based consumers (article 14(1) of the Consumer Sales Directive), even though this protection is in my view also reasonable for shared mobility.

7.2.3.2 Remedies: Price reduction and the right to terminate

If the Consumer Sales Directive were applicable, the consumer shall be entitled to either a proportionate reduction of the price (article 15 of the Consumer Sales Directive) or the termination of the sales contract (article 16 of the Consumer Sales Directive) in case the provider has not completed repair or replacement, or the provider has refused to bring the

252 Quotation 41:12.

253 Article 14(1)(a)(b)(b) Consumer Sales Directive.

254 Quotation 41:13.

255 Quotation 62:18; 59:17; 60:10; 61:11.

goods into conformity.²⁵⁶ This paragraph specifically discusses the right to terminate as a remedy for a non-conformity, while I also discuss the provider's information obligation regarding the right to termination in paragraph 7.2.1.2 and the consumer's right to early termination in paragraph 7.2.2.2. The consumer is also entitled to either of these remedies when a lack of conformity appears despite the provider having attempted to bring the goods into conformity, the lack of conformity is of such a serious nature as to justify an immediate price reduction, or the provider has declared – or it is clear from the circumstances – that the provider will not bring the goods into conformity within a reasonable time, or without significant inconvenience for the consumer (Table 15).²⁵⁷

The right of a price reduction as a remedy to a defect follows from the Consumer Sales Directive and is not applicable to the current case (paragraph 4.3.2).²⁵⁸ The rationale behind a price reduction and the right to terminate is to protect the interests of consumers, with a goal of a high level of consumer protection, and to safeguard that consumers receive the conforming product. Although this *ratio legis* applies to shared mobility, this remedy encounters a practical problem. The payments for shared use are often low, which makes it questionable whether consumers will make use of a price reduction if the amounts are low (paragraph 4.3.2). As a result, it is comprehensible that this remedy is not granted by the general terms and conditions of shared mobility providers. Consequently, inequivalent protection exists for consumers of shared mobility. Furthermore, the right to terminate is mentioned in many instances in the general terms and conditions of the researched providers but the right to terminate is not deployed as a remedy for a defect. The remedies of price reduction and right to terminate are only mentioned by the French provider *ShareNow* regarding the statutory warranty of legal conformity. As mentioned, this warranty does not apply to the mobility use, but to the digital content or service. Therefore, this is not discussed here any further. Moreover, *Ubeeqo* mentions in their general terms and conditions specifically that, in case of non-compliance, the consumer may terminate the subscription by giving *Ubeeqo* a period of 15 days to remedy the non-compliance.²⁵⁹ None of the two-wheeler providers offer either one of the secondary remedies of a price reduction or termination as a remedy for a defect. This results in inequivalent protection compared to sales-based consumers (article 13 in conjunction with 15 and 16 of the Consumer Sales Directive).

256 Or the provider has not completed repair or replacement in accordance with Article 14(2) and (3) of the Consumer Sales Directive. Article 15, 16 of the Consumer Sales Directive.

257 Article 13(4) of the Consumer Sales Directive.

258 Article 13(4), 15 Consumer Sales Directive. The French provider *Qarson* only mentions the right to a price reduction regarding sales contracts, see Quotation 17:13.

259 Quotation 54:13. If the non-compliance is not rectified within the stated remedy period, then the subscription is terminated.

7.2.3.3 Maintenance

Maintenance does of course not directly follow from the examined directives. Nevertheless, maintenance is discussed here because a right to maintenance could ensure that a non-conformity does not occur or can eliminate a non-conformity. In other words, maintenance activities such as repairs, adjustments or replacements may be needed to correct defects. Simultaneously, protection against non-conformities does not guarantee durability. There are providers who offer maintenance in their general terms and conditions. Some shared mobility providers seem to provide an extension of the legal remedies (namely repair, replacement, price reduction and right to terminate) for non-conformity in article 13(1) of the Consumer Sales Directive by offering a right to maintenance. However, the maintenance of the vehicle is basically the responsibility of the owner of the vehicle, which is, in case of use-based models, the provider of the mobility use. As a result, the provider often offers maintenance as if it were an additional service, whereas in reality it is simply in the interest and for the responsibility of the provider. Furthermore, the provider sometimes imposes additional obligations on the consumer, resulting in a reduction or limitation of consumer protection, for example, holding the consumer responsible for overdue maintenance. Such an inequality in protection could arise if the consumer is obliged by the provider to maintain the vehicle. This is indicated with a minus sign (-) in Table 33 where appropriate.

The Belgian, German, and French branches of the provider of shared cars *Europcar* state that maintenance (which includes modification) is prohibited and can only be allowed with prior permission from the maintenance department.²⁶⁰ Furthermore, *Europcar* still holds the consumer explicitly liable for all adverse consequences resulting from a breach of maintenance obligations set out in the general terms and conditions.²⁶¹ The French shared car provider *Ubeego* carries out ongoing car maintenance outside shared usership periods.²⁶² The provider *Lime*, regardless of the Member State, mentions that its services include maintenance of the two-wheelers.²⁶³ Moreover, the consumer of *Bird*, irrespective of the Member State in which it operates, must report when there is a need for maintenance of the two-wheeler used by *Bird* as the vehicle seems to be maintained by *Bird*.²⁶⁴

7.2.3.4 Roadside assistance

Roadside assistance entails in principle a service that assists consumers whose vehicles suffered a breakdown, whether caused by a mechanical failure or not, that cannot be resolved by the consumer or has prevented the consumer from transporting the vehicle

260 Quotation 38:16; 39:20; 40:24; 40:25.

261 Quotation 39:20.

262 Quotation 54:21.

263 Quotation 70:19; 67:15; 68:10; 69:14.

264 Quotation 73:14; 71:11; 72:9.

to a garage. Sometimes additional services are added by providers. The right to roadside assistance does not follow from the examined directives because the directives only provide for the right of repair and not the right of repair alongside the road, or on-site.²⁶⁵ The right to roadside assistance does not follow from the examined directives. However, road assistance means that in the case of a non-compliant vehicle, the vehicle is repaired and therefore – temporarily – brought into conformity. Therefore, roadside assistance is discussed here. In the scenario where roadside assistance is required, it is often first established that (except in the event of an accident) there is non-conformity if a car breaks down during the ride. The consumer would in that case be entitled to repair or replacement under the Consumer Sales Directive. Roadside assistance offers repair directly on the road for minor repairs with the aim of helping the consumer get back on the road (the vehicle brought back into compliance through this repair).²⁶⁶ However, a larger repair may also be necessary because of a defect. In such a scenario, roadside assistance can only take the vehicle to a garage but will not provide any further ad hoc repairs. In other words, roadside assistance can implicitly (and only partly) contribute to the provider's obligation of the Consumer Sales Directive to remedy a non-conforming vehicle. However, this is not conceivable and proportional for shared mobility. At the same time, for example, taking the vehicle to a garage is not an obligation arising from the examined directives, but the responsibility and interest in having the vehicle repaired lies expressly with the provider who owns the vehicle. As a result, there are providers who offer roadside assistance in their general terms and conditions. Yet this responsibility is sometimes explicitly transferred to the consumer, creating inequivalent protection by increasing the burden on the consumer. All studied providers who put such a burden on the consumer to a greater level in comparison to the sales-based level are indicated with a minus sign (-) in Table 33.

Some providers do offer this right within the mobility sharing contract, like in the exclusive lease contracts (paragraph 6.4.3.2). The Dutch carsharing providers *Europcar*, *GreenMobility* and *Greenwheels* provide roadside assistance during the consumer's shared use.²⁶⁷ *GreenMobility* additionally provides information about the consumer's behaviour in the event of a breakdown. In such a case, the consumer must contact *GreenMobility*'s consumer service, and the consumer is obliged to follow the instructions.²⁶⁸ *ShareNow* states that where the consumer intentionally causes a car breakdown outside the work area, the consumer bears the costs resulting from returning the car to the work area or from providing roadside

265 CJEU, Case C-52/18, 23 May 2019, ECLI:EU:C:2019:447 (*Fülla/Toolport*).

266 Roadside assistance is partly an element of the legal remedies (namely repair, replacement, price reduction and right to terminate) in Article 13 of the Consumer Sales Directive that exist to remedy non-conformity.

267 Quotation 41:14; 46:23; 47:21.

268 Quotation 46:23. Calling in roadside assistance outside *GreenMobility* is at the expense of the consumer.

assistance.²⁶⁹ On the contrary, if the breakdown is not caused intentionally by the consumer, *ShareNow* provides breakdown assistance, but this is not clear from the terms and conditions. Therefore, an increased protection above the level of sales-based protection is adopted for all studied Dutch carsharing providers. Like all studied Dutch carsharing providers, the Belgian providers also offer roadside assistance.²⁷⁰ *Europcar* offers a towing and roadside assistance service in case of a defect that prevents the consumer from continuing the ride.²⁷¹ In addition, *GreenMobility* additionally provides information about the consumer's behaviour in the event of a breakdown. In such a case, the consumer must contact *GreenMobility's* consumer service, and the consumer is obliged to follow the instructions.²⁷² Contrary to the Netherlands and Belgium, none of the German providers offer roadside assistance in their standard carsharing contract. *Europcar* does provide a towing and roadside assistance service, but this is optional to include in the contract. The *Ubeeqo* partner company provides roadside assistance services to consumers in the event of breakdown or accident.²⁷³ The *Marguerite* consumer can contact assistance in the event of breakdown. In addition, the consumer must undertake to inform *Marguerite* of this loss, in writing, within 48 hours and, if necessary, *Marguerite* repatriates the consumer to their home or to a *Marguerite* station.²⁷⁴ *Europcar* also offers to the consumer for the duration of the use the benefit of a breakdown and assistance service regarding the use of the vehicle at no extra cost.²⁷⁵ None of the two-wheeler providers offer roadside assistance within their contract, which results in equivalent protection compared to sales-based consumers, but no increased protection as with other providers. It seems sensible that none of the shared two-wheeler providers offer roadside assistance because the traffic risks and financial risks are considerably greater for cars than for two-wheelers, which means that roadside assistance is of more importance for cars.

7.2.3.5 Interim conclusion

According to the Consumer Sales Directive, the provider has the obligation to deliver a conforming product. If the provider does not meet that requirement of conformity,

269 Quotation 51:23.

270 Quotation 36:10; 38:13; 45:14; 52:16. Regarding *Cambio*, the conditions of this roadside assistance can be consulted by the consumer at any time on the *Cambio* website. When the call centre sends an employee or roadside assistance to the scene, the consumer is obliged to remain with the vehicle until that employee or roadside assistance arrives. If the problem has been resolved sooner, the consumer must notify the call centre and request permission to continue driving.

271 Quotation 38:13. This service does not include motor breakdown, error made by the consumer in the choice of fuel, defective or lost keys, empty batteries, and flat tires. For interventions on Belgian territory, this breakdown service is included in the price. If the consumer wants this service while abroad, the consumer needs to subscribe to an optional protection named 'Emergency Management Service Abroad'.

272 Quotation 45:14.

273 Quotation 54:22.

274 Quotation 48:6.

275 Quotation 40:26.

the consumer has rights to remedies (namely repair, replacement, price reduction and a right to terminate). The right to repair, for shared mobility translated as aiming at the continuation of mobility (paragraph 4.3.2), is offered by a minority of providers; none of the two-wheeler providers offer repair. As is the case with exclusive mobility use, the right to repair is not provided for by any of the French providers in the standard contract (paragraph 6.4.3.1). In all other studied Member States, *Europcar* does provide this right, together with *Cambio* (BE, GER) and *Claus2you* (BE). It is perhaps comprehensible that the right to repair is not often offered because this is usually at odds with the ad hoc and ephemeral nature of shared mobility use. After all, it is exactly the providers who offer repairs who also offer the possibility of contracts that can extend to several days. Although the same ephemeral nature and ad hoc availability may also seem to oppose the right to replacement, six carsharing providers nevertheless provide for this right and somewhat provide a solution that focusses on the continuation of mobility. The quality of the replacement varies; some providers offer a replacement car, others provide both a replacement car and/or other replacement (public) transport at the expense of the provider. The extent to which and the way in which the provider wants to contribute to the continuation of mobility by offering replacements varies.

For two-wheelers, often an option exists to exchange the two-wheeler on the spot. Although the possibility to exchange the bicycle is offered, it is not clear how this possibility for a replacement can be guaranteed by the provider. After all, with free-float models it is not clear in advance whether replacement vehicle can be offered, because the provider cannot give any guarantees. As a result, there is no equivalent protection by these providers, compared to the rights consumers that buy goods have under the Consumer Sales Directive. Moreover, none of the shared mobility providers elaborate on the reasonable term within which remedies must be realised. Although *Europcar* (NL) stipulates in its general terms and conditions that if a repair takes longer than two days, *Europcar* provides a replacement vehicle, this only concerns the reasonable period for repair, not for replacement. This means that equivalent protection to the rights under the Consumer Sales Directive also does not exist in the case of *Europcar* (NL).

The right to a price reduction and the right to terminate as a remedy for a defect for goods under the Consumer Sales Directive, are not offered in any of the terms and conditions of shared mobility. The maintenance of the vehicle is basically in the interest and for the responsibility of the owner of the vehicle, which is, in case of use-based models, the provider of the mobility use. The provider often stipulates to offer maintenance as if it were an additional service, but the consumer would have the right to a compliant vehicle as a sole user of the mobility (paragraph 7.2.3). Additional maintenance obligations on the

Table 33: Interim results of shared mobility use on the right to conformity

Typologies	Countries	Providers	Right to conformity							
			Remedy: Repair	Remedy: Replacement	Repair or replacement within reasonable time	Alternative remedy when choice is disproportionate	Remedy: Price reduction	Remedy: Right to terminate	Maintenance	Roadside assistance
(c) Shared MU B2C providers of cars	NL	Europcar	=	=	=	=	-	-	=	=
		GreenMobility	-	-	-	-	-	-	=	=
		Greenwheels	-	=	-	-	-	-	=	=
		ShareNow	-	-	-	-	-	-	=	=
	BE	Cambio	=	=	-	-	-	-	=	=
		Europcar	=	-	-	-	-	-	-	=
		Claus2you	=	=	-	-	-	-	=	=
		GreenMobility	-	-	-	-	-	-	=	=
	FR	Europcar	-	=	-	-	-	-	-	=
		Ubeeqo	-	-	-	-	-	-	=	=
		Marguerite	-	-	-	-	-	-	=	=
		ShareNow	-	-	-	-	-	-	=	-
	GER	Cambio	=	=	-	-	-	-	=	-
		Europcar	=	=	-	-	-	-	-	-
		Teilauto	-	-	-	-	-	-	=	-
		ShareNow	-	-	-	-	-	-	=	-
(d) Shared MU B2C providers of two-wheelers	NL	Bird	-	-	-	-	-	-	=	-
		Donkey Republic	-	-	-	-	-	-	=	-
		Lime	-	-	-	-	-	-	=	-
		Tier	-	-	-	-	-	-	=	-
	BE	Bird	-	-	-	-	-	-	=	-
		Donkey Republic	-	-	-	-	-	-	=	-
		Lime	-	-	-	-	-	-	=	-
		Tier	-	-	-	-	-	-	=	-
	FR	Bird	-	-	-	-	-	-	=	-
		Donkey Republic	-	-	-	-	-	-	=	-
		Lime	-	-	-	-	-	-	=	-
		Tier	-	-	-	-	-	-	=	-
	GER	Emmy	-	-	-	-	-	-	=	-
		Donkey Republic	-	-	-	-	-	-	=	-
		Lime	-	-	-	-	-	-	=	-
		Tier	-	-	-	-	-	-	=	-

consumer could even lead to a reduction or curtailment of consumer protection. However, this does not occur – with the exception of one provider – among providers of shared use.

Although the right to roadside assistance does not rise from the examined directives, roadside assistance is discussed in this paragraph because road assistance means that in the case of a non-compliant vehicle, the vehicle is repaired and therefore – temporarily – brought into conformity. All studied Dutch, Belgian and three out of four French carsharing providers offer roadside assistance in their contracts, compared to none of the two-wheeler providers. This is not an unexpected finding that providers of shared cars provide roadside assistance since the providers, as the owners, have an interest and responsibility in preserving the vehicle they own. That interest and responsibility naturally has more (financial) consequences when using a car compared to a two-wheeler. Although roadside assistance also provides help to consumers by, for example, offering a towing service, replacement transport or overnight accommodation, it is in principle in the provider's interest and responsibility. Providers who do not offer roadside assistance therefore place a burden/responsibility on the consumer, meaning that these providers offer a lower level of protection compared to the interest and responsibilities arising from their ownership.

7.2.4 Consumer rights and commercial guarantees

The inequivalences in consumer protection relate to commercial guarantees (article 17 of the Consumer Sales Directive), the creditworthiness assessment (articles 8 and 9 of the Consumer Credit Directive), and other consumer rights.²⁷⁶ These are discussed below in connection with the general terms and conditions of the shared mobility providers.²⁷⁷ The (in)equivalences that follow from self-regulation for the consumer rights and commercial guarantees are shown below in Table 34.

7.2.4.1 Commercial guarantees

The commercial guarantee is defined comprehensively in paragraph 4.3.3 and in accordance with article 2(12) in conjunction with article 17 of the Consumer Sales Directive.

²⁷⁶ These other consumer rights contain the right to early repayment (article 16 of the Consumer Credit Directive 2008), the manner to calculate the annual costs (article 19 of the Consumer Credit Directive 2008), regulation on creditors (article 20 of the Consumer Credit Directive 2008), and certain obligations of credit intermediaries vis-à-vis consumers (article 20 of the Consumer Credit Directive 2008).

²⁷⁷ For an overview of the inequivalences following from legislation see paragraph 5.5.4.

It is in any case characteristic for the commercial guarantee that it extends beyond the legal guarantee. This means that, to some extent, all the plus signs (+) in Table 30 entail commercial guarantees. This paragraph only discusses cases where a (commercial) guarantee is provided explicitly, because other components that extend beyond the legal guarantee are discussed under paragraph 7.2.3, in comparison to (other) sales-based rights. The application of a commercial guarantee is not likely given the *ratio legis* of the provision. Nevertheless, the general terms and conditions are assessed and briefly discussed.

The Dutch carsharing provider *ShareNow* informs the consumer that they have all legal guarantees and all additional rights as included in these terms and conditions.²⁷⁸ As mentioned above, *ShareNow* sees all additional rights as a commercial guarantee. Furthermore, *ShareNow* does not mention any commercial guarantees, like *Greenwheels* and *GreenMobility*. *Europcar*, on the other hand, explicitly provides a commercial BOVAG guarantee. With this guarantee, BOVAG guarantees the fulfilment of *Europcar*'s responsibilities if *Europcar* does not comply.²⁷⁹ None of the other providers, either of shared cars or two-wheelers, provide a (commercial) guarantee specifically, which results in equivalent protection compared to sales-based consumers because a commercial guarantee goes beyond applicable law.

7.2.4.2 Other consumer rights

This subparagraph discusses the sector regulation by shared providers as a result of the inequivalent protection by the Consumer Credit Directive for three components, namely the consumer's entitlement to discharge fully or partially their obligations under the agreement,²⁸⁰ the calculation of the annual percentage rate of charge,²⁸¹ and the supervision of the creditors.²⁸² Table 16 also summarises *inter alia* the inequivalences on the consumer's protection whereas Table 34 shows the level of self-regulation.

Right to an early repayment

According to article 16(1) of the Consumer Credit Directive, the consumer is entitled at any time to discharge fully or partially their obligations under an agreement. In such cases, the consumer is entitled to a reduction in the total cost of the contract, such reduction consisting of the interest and the costs for the remaining duration of the contract. In the

278 Quotation 51:24.

279 Quotation 41:15.

280 Article 16 Consumer Credit Directive 2008. Under this Article the consumer is entitled at any time to discharge fully or partially his obligations under the agreement. In such cases, the consumer is entitled to a reduction in the total cost of the credit. As a result, the provider is entitled to fair and objectively justified compensation for possible costs directly linked to early repayment.

281 Article 19 Consumer Credit Directive 2008.

282 Article 20 Consumer Credit Directive 2008.

event of such an early repayment, the provider shall be entitled to fair and objectively justified compensation for possible costs directly linked to early repayment of credit provided that the early repayment falls within a period for which the borrowing rate is fixed.²⁸³ Whereas paragraph 7.2.1.1 discussed the right to inform about the consumers right to an early repayment (article 5(1)(p) of the Consumer Credit Directive), this paragraph discusses the substance of this right, elaborated on in article 16 of the Consumer Credit Directive.

The Dutch carsharing provider *Europcar* provides the consumer the opportunity to request an early repayment of up to a maximum of 50 percent of the use sum, whereby use of the vehicle must commence within three months to partially discharge the consumer from their payment obligation.²⁸⁴ The Dutch and Belgian provider *GreenMobility* also offers the option of early repayment, but the payment for use is essentially structured differently. The consumer can buy a discount package with prepaid minutes or for an hour or day, which also (partially) discharges the consumer from their payment obligations.²⁸⁵ However, this does not comprise an option to discharge the obligations under the agreement because it does not enrich the consumer's options, as this is the standard way of payment. Furthermore, the Dutch providers *Greenwheels* and *ShareNow* and the other Belgian providers do not provide options to discharge obligations under the agreement.

The German and French carsharing provider *Europcar* entitles the consumer to discharge fully or partially their obligations under the agreement. The consumer can pay for the use – including the daily use charge, accessories, and additional mobility services – in advance. The consumer receives a booking reservation confirmation including the advance payment.²⁸⁶ The other French and German providers do not provide the option to their consumer to discharge fully or partially their obligations under the shared use contract. None of the two-wheeler providers entitle their consumers to discharge fully or partially their obligations under the shared mobility agreement. This results in inequivalent protection compared to the provisions in the Consumer Credit Directive.

283 Article 16(2) Consumer Credit Directive 2008.

284 Quotation 41:9.

285 Quotation 45:15; 45:16; 46:9; 46:10. Prepaid minutes are valid for six to 12 months from the date of purchase. Minutes driven in addition to the minutes included in the packages are priced at the standard rate. All hour and day packages are valid for three months from the date of purchase. The price of the package is deducted at the beginning of the use period.

286 Quotation 39:11; 40:12.

Although inequivalent protection exists for the examined providers who do not offer the right to an early repayment in their general terms and conditions, the right lapses and is often meaningless for the shared mobility business model because the standard agreement pertains to one-off payments and the duration of the use (and therefore the repayment obligation) is determined by the consumer themselves. This means that the necessity of protection for the consumer lapses as elaborated on in paragraph 4.4.4.

Calculation of the annual percentage rate of charge

Article 19 of the Consumer Credit Directive explains the manner used to calculate the annual percentage rate of charge, which would be the annual costs (percentage) for mobility usership contracts.²⁸⁷ Whereas paragraph 7.2.1.1 discussed the right to inform about the annual percentage rate of charge (article 5(1)(g) of the Consumer Credit Directive), this paragraph focusses on the substance of this right, elaborated on in article 19 of the Consumer Credit Directive. The calculation of the annual percentage rate of charge is not useful nor proportional for shared mobility (paragraph 4.4.5). Therefore, it is evident that there is no clarification on these costs in the terms and conditions for the researched car or two-wheeler providers.²⁸⁸ Nevertheless, this means that inequivalence in protection exists, but that this inequivalence is not problematic, see Table 34.

Supervision of the creditors

Creditors need to be supervised under the Consumer Credit Directive by a body or authority independent from financial institutions.²⁸⁹ In my opinion, placing mobility usership providers under supervision via the Consumer Credit Directive is not necessary, because with shared mobility there are no increased creditworthiness risks (paragraph 4.4.5). In addition, this obligation does not arise from the terms and conditions of car providers because this obligation is legally imposed on the Member States. This also applies for the obligations of credit intermediaries vis-à-vis consumers that follow from article 21 of the Consumer Credit Directive, which also legally imposes an obligation on Member States. Consequently, these legal inequivalences are not discussed here further.

Creditworthiness assessment

If the Consumer Credit Directive would be applicable, the providers would be obliged to assess the creditworthiness of the consumer before the conclusion of the agreement. This

²⁸⁷ Also see paragraph 4.4.5.

²⁸⁸ However, it cannot be assessed based on the general terms and conditions whether such an annual percentage rate is calculated in accordance with the Consumer Credit Directive 2008 because no information is provided about this right (paragraph 7.2.1.1).

²⁸⁹ Article 20 Consumer Credit Directive 2008.

follows from article 8 of the Consumer Credit Directive (Table 16).²⁹⁰ The provider needs to do this based on sufficient information, obtained from the consumer where appropriate and, where necessary, on the basis of a consultation of a relevant database.²⁹¹ The *ratio legis* of the assessment of creditworthiness of the consumer is mainly to protect consumers from excessive credit in an attempt to prevent solvency problems.²⁹² As elaborated on in paragraph 4.4.2, The creditworthiness assessment does not support the rationale of the legal rule for shared mobility because a consumer of such shared mobility will not quickly run into creditworthiness problems with a one-off payment obligation. In addition, the execution time for the creditworthiness assessment would contradict the shared mobility business model, which would also make application of the assessment disproportional and impractical. Nevertheless, this paragraph will briefly discuss the substance of the creditworthiness assessment in conjunction with the database assessment.²⁹³

The Dutch carsharing providers *Greenwheels*, *ShareNow* and *Europcar* do not assess the creditworthiness of the consumer. While this shows inequivalent protection for these providers, it is comprehensible that they do not assess the creditworthiness. After all, the amounts payable with shared mobility is considerably lower compared to lease prices, which means that the creditworthiness of consumers is considerably less affected and less relevant while using shared mobility. Furthermore, carsharing does not involve monthly recurring amounts, but a one-off payment. The consumer can consider per use whether they can afford the costs. Consequently, a deterioration in the consumer's financial situation does not lead quickly to creditworthiness problems. In addition, the shared car provider runs less risk with one-off payments because payment problems become immediately clear after a ride and the provider can therefore act immediately on this. On the other hand, the shared car provider *GreenMobility*, operating in the Netherlands and Belgium, reserves the right to request credit reports and may possibly refuse the registration of a consumer.²⁹⁴ While *GreenMobility* offers equivalent protection, there seems to be a risk that creditworthiness assessments are carried out on the basis of arbitrariness, because the choice for performing credit assessments and rejecting consumers rests with the providers without objectifiable criteria. The German carsharing provider *Teilauto* is the only provider who reserves the right to send a credit agency details to receive information about the consumer's creditworthiness from the credit agency. The conclusion of the contract

290 Article 8 Consumer Credit Directive 2008.

291 See Article 9 of the Consumer Credit Directive 2008 for this database access.

292 The rationale behind the creditworthiness assessment is also to determine whether a consumer will fulfil his obligation to protect the provider.

293 Paragraph 7.2.1.1 elaborates on the provider's information obligation on a database consultation carried out for the purposes of assessing his creditworthiness.

294 Quotation 46:12; 45:7.

is linked to a positive credit assessment, which is compulsory at the conclusion of the contract.²⁹⁵ Moreover, none of the French shared car providers assess the creditworthiness of the consumer, resulting in inequivalent protection. Comprehensibly, none of the two-wheeler providers execute a creditworthiness assessment within their contract, which results in inequivalent protection compared to sales-based consumers because application of the creditworthiness assessment disproportional and impractical.

7.2.4.3 Interim conclusion

None of the shared mobility providers, either of shared cars or two-wheelers, offer a (commercial) guarantee specifically. The only exception to this is the provider *Europcar* (NL), who explicitly provides a commercial BOVAG guarantee. Furthermore, the consumer has the right to an early repayment. *Europcar* (NL) also offers more protection than many other providers by providing this right. Nevertheless, the fact that many providers do not offer the right to an early repayment or a commercial guarantee is not unexpected nor undesirable (paragraph 7.2.4.1 and 7.2.4.2). Many providers offer mobility use per ride, with (one-off) payment through a credit immediately after the ride (when the costs are clear). The option to discharge the payment obligation early serves to protect the consumer who enters a longer-term payment obligation and is therefore more relevant and important for exclusive mobility use, where also the financial risks for the different modes of transport should be considered (paragraph 6.4.4). None of the shared mobility providers require a creditworthiness assessment of the consumer in their general terms and conditions. While this shows not the same protection compared to article 8 of the Consumer Credit Directive, this inequivalence is sensible because the creditworthiness assessment does not support the rationale of the provision for shared mobility; protecting consumers from excessive credit in an attempt to prevent solvency problems. Furthermore, carsharing does not often involve monthly recurring amounts, but a one-off payment. Creditworthiness is therefore not an issue, and it is understandable that the providers do not include a provision in this respect in their general terms and conditions. The shared car provider *GreenMobility*, operating in the Netherlands and Belgium, reserves the right to request credit reports and may possibly refuse the registration of a consumer. Although *GreenMobility* offers equivalent protection, there seems to be a jeopardy that creditworthiness assessments are arbitrary as they lack objectifiable criteria. *Teilauto* (GER) is the only provider who requires a positive credit assessment from the consumer in case of contracting, resulting in equivalent protection. However, the inequivalences

295 Quotation 53:1. If the credit assessment is negative, *Teilauto* can choose not to conclude a contract or to request a higher down payment than stated in the price list applicable at that time and the consumer is informed of this.

Table 34: Interim results of shared mobility use on consumer rights and commercial guarantees

Typologies		Consumer rights and commercial guarantees				
Countries	Providers	Commercial guarantee	Early repayment	Manner to calculate the annual costs percentage	Creditworthiness assessment	
(c) Shared MU B2C providers of cars	NL	Europcar	+	=	-	-
		GreenMobility	=	-	-	=
		Greenwheels	=	-	-	-
		ShareNow	=	-	-	-
	BE	Cambio	=	-	-	-
		Europcar	=	-	-	-
		Claus2you	=	-	-	-
		GreenMobility	=	-	-	=
	FR	Europcar	=	=	-	-
		Ubeeqo	=	-	-	-
		Marguerite	=	-	-	-
		ShareNow	=	-	-	-
	GER	Cambio	=	-	-	-
		Europcar	=	=	-	-
		Teilauto	=	-	-	=
		ShareNow	=	-	-	-
(d) Shared MU B2C providers of two-wheelers	NL	Bird	=	-	-	-
		Donkey Republic	=	-	-	-
		Lime	=	-	-	-
		Tier	=	-	-	-
	BE	Bird	=	-	-	-
		Donkey Republic	=	-	-	-
		Lime	=	-	-	-
		Tier	=	-	-	-
	FR	Bird	=	-	-	-
		Donkey Republic	=	-	-	-
		Lime	=	-	-	-
		Tier	=	-	-	-
	GER	Emmy	=	-	-	-
		Donkey Republic	=	-	-	-
		Lime	=	-	-	-
		Tier	=	-	-	-

in protection for the application of the creditworthiness assessment are sensible and not problematic as the *ratio legis* for this provision does not apply to shared mobility.

The shared mobility providers examined therefore largely do not offer equivalent protection on the components summarised in Table 34.

7.3 RESULTS ON COLLABORATIVE MOBILITY SHARING

This section examines the extent to which equivalent protection is offered to collaborative mobility sharing consumers. Collaborative mobility sharing includes different types of sharing constructions, introduced in paragraph 1.2.2. Collaborative mobility sharing refers to consumer-to-consumer (C2C) sharing, with or without the intervention of a platform. Collaborative mobility sharing therefore differs from B2C shared mobility usership, in which the provider purchases a fleet of vehicles to facilitate and offer shared mobility use. In contrast to B2C shared mobility usership, the consumer uses a car owned by a private individual or cooperative with collaborative mobility sharing. The different types that are examined are (e) collaborative platform sharing, (f) formal C2C collaborative sharing, (g) informal C2C collaborative sharing, and (h) collaborative sharing as a cooperative.

The type (e) collaborative platform initiatives are the only collaborative sharing initiative that has been set up on a larger scale and therefore the various platforms often publish general terms and conditions on their websites or mobile applications. As an illustration, the initiatives found in the various Member States are discussed. Equivalent protection for the consumer compared to the examined directives can be offered by the platform or by the individual provider. In both cases this leads to equivalent protection for the consumer. In Table 35 no distinction is made on this matter because the focal point is the effect on consumer protection. Furthermore, I found several model contracts designed by the sector that apply to (f) formal C2C collaborative sharing. By way of illustration, these are examined to see what and how consumer rights are regulated. One of the model contracts has been drawn up by the *Dutch Association for Shared Car Use*. The *Dutch Association for Shared Car Use* provides information and promotion of the mutual loan of vehicles and promotes the importance of mutual carsharing. The *Dutch Association for Shared Car Use* offers its members tools for the practical implementation of mutual carsharing agreements such as model contracts. The association also clarifies that the *Dutch Association for Shared Car Use* is not a party to the sharing agreements between individual providers and consumers and does not guarantee that individual providers and consumers, correctly

and fully implement the sharing agreement.²⁹⁶ The French entity *ADETEC* is leading *inter alia* in carsharing. *ADETEC* has carried out several studies on carsharing between individuals and this entity also offers a sample contract with an accompanying document for individuals who wish to share their vehicles.²⁹⁷ Furthermore, I include two model contracts of German entities. The first is the working group *Agenda 21 Herzogenaurach*, which designed a model contract for private carsharing. The working group notes that the preview contract can be used as a model and should be drawn up in accordance with the standards. The other model contract is offered by the *General German Automobile Club* and this club intends to stimulate carsharing by ensuring that shared use of the car can be handled satisfactorily for all parties by providing a model contract.

To ensure comprehensiveness, no terms and conditions or model contracts are selected for (g) informal C2C collaborative sharing initiatives and (h) collaborative sharing as a cooperative. For (g) informal C2C collaborative sharing, initiatives lack formalisation, rendering them unsuitable for examination within the current research design. Additionally, (h) cooperatives that share mobility are often organised at a small, neighbourhood level, making it challenging to identify them. Despite these obstacles, I identified and reached out to approximately 10 potential cooperatives meeting the desired criteria by email and contact forms on their official websites. Regrettably, none of these cooperatives responded positively to my inquiries. As a result, for both (g) and (h) no documents were selected. This is elaborated on in more detail in in paragraph 6.3.1.

Table 35 below shows the results for collaborative mobility sharing. The characters are defined in Table 24.

296 Quotation 93:2.

297 *ADETEC* Deplacements 'Le centre de ressources de L'autopartage' <<http://www.adetec-deplacements.com/ressources%20autopartage.htm>> accessed 29 June 2023.

Table 35: Results on collaborative sharing

Typologies		Countries	Providers	Right to be informed										
				Clear and comprehensible manner	SECCI form	Ancillary services	Consequences of late payments	Early repayment	Cost structure	Database consultation	Copy of draft agreement	Required sureties and insurance	The right of withdrawal	Procedure right to terminate
(e) Collaborative platform sharing	NL	SnappCar	=	-	=	-	-	-	-	-	-	=	-	-
			BE	CarAmigo	=	-	=	-	-	-	-	-	-	-
	Cozywheels	=		-	=	=	-	-	=	-	-	=	-	-
	Getaround	=		-	=	=	-	-	=	-	-	=	-	-
	Wibee	=		-	=	=	-	-	-	-	-	-	-	-
	FR	Getaround	=	-	=	=	-	-	=	-	-	=	-	-
		Ouicar	=	-	=	=	-	-	-	-	-	-	-	-
	GER	Getaround	=	-	=	=	-	-	=	-	-	=	-	-
		SnappCar	=	-	=	-	-	-	-	-	-	=	-	-
	(f) Formal C2C collaborative sharing	NL	Dutch Association for Shared Car Use	=	-	=	=	-	-	-	-	=	-	-
FR			ADETEC	=	-	=	-	-	-	-	=	-	-	=
GER		General German Automobile Club	=	-	=	-	-	-	=	-	-	-	-	=
		Agenda 21 Herzogenaurach	=	-	=	-	-	-	-	-	=	-	-	=

7 STUDY OF THE GENERAL TERMS AND CONDITIONS ACCORDING TO SECTOR CONDUCT
OF SHARED MOBILITY

The right to change your mind			The right to conformity								Consumer rights and commercial guarantees			
Right of withdrawal	Right to early termination	Termination fee	Remedy: repair	Remedy: replacement	Repair or replacement within reasonable time	Alternative remedy when choice is disproportionate	Remedy: price reduction	Remedy: right to terminate	Maintenance	Roadside assistance	Commercial guarantee	Early repayment	Manner to calculate the annual costs percentage	Creditworthiness assessment
-	=	No	-	-	-	-	-	-	=	-	=	-	-	-
-	=	No	-	=	-	-	-	-	=	-	=	-	-	-
-	=	No	-	-	-	-	-	-	-	-	=	-	-	-
-	=	No	=	-	-	-	-	-	=	=	=	-	-	=
-	=	No	=	-	-	-	-	-	=	=	=	-	-	=
-	=	No	=	-	-	-	-	-	=	-	=	-	-	=
-	=	No	=	-	-	-	-	-	=	=	=	-	-	=
=	=	No	-	-	-	-	-	-	=	-	=	-	-	-
-	+	No	-	-	-	-	-	-	=	-	=	-	-	-
-	+	No	-	-	-	-	-	-	=	-	=	-	-	-
-	+	No	-	-	-	-	-	-	=	-	=	-	-	-
-	+	No	-	-	-	-	-	-	=	-	=	-	-	-

7.3.1 *The right to be informed*

In this paragraph I discuss the precontractual information obligations and practices (paragraph 7.3.1.1) and contractual information obligations (paragraph 7.3.1.2) and address this overlap where relevant. The Consumer Credit Directive is the starting point and the (in)equivalences that follow from self-regulation for the right to be informed are shown below in Table 36. According to the Consumer Rights Directive and the Unfair Contract Terms Directive, information is to be made available in a clear and comprehensible manner before the consumer is bound by the shared mobility contract, whereas the Consumer Credit Directive stipulates that providers should enable the consumer to know their rights and obligations under an agreement by informing the consumer in a clear and concise manner (paragraph 5.2.1).²⁹⁸

The Belgian collaborative sharing platforms *CarAmigo*, *Cozywheels*, *Getaround*, and *Wibee* offer the information in their general terms and conditions in a clear, concise, and comprehensible way. Furthermore, they provide the terms and conditions in at least one official language of the concerning Member State.²⁹⁹ This also applies for all studied German (*Getaround* and *SnappCar*), French (*Getaround* and *Ouicar*) and Dutch (*SnappCar*) platforms.³⁰⁰ The formal C2C collaborative sharing model contracts (*Dutch Association for Shared Car Use*, *ADETEC*, *Agenda 21 Herzogenaurach*, and the *General German Automobile Club*) contribute to clear, concise, and comprehensible information distribution for the individual provider and the consumer. In addition, the contracts have a clear structure that improves their comprehensibility. As a result, the researched collaborative sharing platforms, and model contracts for C2C mobility sharing both offer equivalent protection because they enable the consumer to know their rights and obligations under an agreement by informing the consumer in a clear and concise manner in (at least one of) the official language(s) of the Member State.

7.3.1.1 **Precontractual information obligations and practices**

The precontractual information obligations that are examined below are the SECCI form, the precontractual information components in the collaborative sharing contract, ancillary services, late payments, early repayments, cost structure, database consultation, and copy of draft agreement.

298 Article 5(1), 6(1) Consumer Rights Directive; Recital 31 Consumer Credit Directive 2008.

299 *Memo Language use*.

300 *Memo Language use*.

The SECCI form

Before considering the various components of the information rights, the formal requirements of the provision of information as described in article 5(1) of the Consumer Credit Directive are discussed. In due time before the consumer is bound by the agreement, the provider should supply the consumer with the information necessary to compare different offers to make an informed decision on whether to conclude a credit agreement. The *ratio legis* behind this SECCI form is to ensure transparency in B2C transactions by presenting key information in a standardized format to enable consumers to compare different offers and make informed decisions about whether to enter into an agreement. The rationale for this formal requirement carries more weight when the (financial) interests are greater. As mentioned in paragraph 4.4.1, the financial interests for collaborative sharing platforms and the formal C2C mobility sharing model contracts are much smaller compared to a consumer credit and the rationale of this provision ceases to apply. Therefore, it is comprehensible that none of the collaborative sharing platforms or formal C2C mobility sharing model contracts offer a SECCI form.³⁰¹ This means that inequivalent protection exists as far as this formal requirement is concerned. However, this inequivalence is proportional as the rationale of the formal requirement does not apply here. After all, whether or not the SECCI form is provided says nothing about the substantive protection of the shared mobility consumer.

Precontractual information components in the collaborative sharing contract

According to article 5(1) of the Consumer Credit Directive, the provider should supply precontractual information components to the consumer such as the identity of the trader and the main characteristics of the service. However, providers do not necessarily offer these precontractual information components in the general terms and conditions.³⁰² Different precontractual information components follow from the main shared mobility contract or on the main website or mobile application of the provider.³⁰³ Collaborative platform sharing contracts are not fully regulated, but mainly facilitated by the platforms, whereby the individual provider and the consumer can mutually determine the price and duration of the contract. Nevertheless, there are in my opinion a few main characteristics about which rules or information is laid down in the general terms and conditions. In any case, the collaborative

301 Article 5(1) Consumer Credit Directive 2008. The providers are deemed to have fulfilled the information requirements if he has supplied the Standard European Consumer Credit Information.

302 For a full list of the information requirements see Article 5(1), 6(1) Consumer Rights Directive; Article 5(1) Consumer Credit Directive 2008. Also see paragraph 5.2.1. These information requirements involve *inter alia* providing information about the service and the price, where applicable, the sureties required, the period during which the creditor is bound by the precontractual information, and the existence of costs payable by the consumer to a notary on conclusion of the credit agreement.

303 Article 5(1)(a)(b)(c)(f), 6(1)(a)(b)(c)(e)(o) Consumer Rights Directive; Article 5(1)(a)(b)(c)(d)(h)(i) Consumer Credit Directive 2008. Also see paragraph 5.2.1.

platforms all specify their identity.³⁰⁴ Furthermore, the platforms all provide information on their role as a platform regarding the collaborative mobility sharing agreement.³⁰⁵

Information on ancillary services

The Consumer Credit Directive also states that providers should inform in their terms and conditions on the obligation, if any, to enter an ancillary service contract relating to the agreement if the conclusion of such a contract is compulsory to obtain the contract or to obtain it on the terms and conditions marketed.³⁰⁶ The information obligation of the providers on the obligation, if any, to enter an ancillary service contract relating to the agreement is discussed, because this constitutes the scope of the information obligation. The scope or magnitude of any obligatory ancillary service is expressly not discussed as this goes beyond the information obligation.

The Belgian platform *Cozywheels* informs about the obligation to provide vehicles that are made available on the platform for sharing with civil liability insurance. *Cozywheels* also mentions that the individual provider can insure their vehicle with their own civil liability insurance, provided that the insurer with whom the insurance has been taken out accepts that the vehicle is shared with other people.³⁰⁷ The Belgian platforms *Wibee* and *CarAmigo* both inform about the included liability insurance. In addition, *Wibee* informs about an included individual cover for bodily injury, vehicle damage, and legal protection, whereas *CarAmigo* informs about the inclusion of legal expenses insurance and comprehensive insurance.³⁰⁸ With *Getaround*, the individual provider is informed about the obligation to only offer vehicles that have the mandatory civil liability insurance in the Member State where the vehicle is offered.³⁰⁹ In addition, *Getaround* offers an insurance that is intended to protect the individual providers against any damage to their vehicle, which is included in the use contract.³¹⁰ This applies to the Belgian, German, and French branches of *Getaround*. Also, the German and Dutch branches of the platform *SnappCar* informs the consumer that the vehicles offered for use must at least have the legally required motor vehicle liability insurance.³¹¹ As a result, equivalent protection exists. Furthermore, the consumer who uses a vehicle via the French *Ouicar* platform has the possibility to subscribe to additional and ancillary options, but these are not mandatory.³¹²

304 Quotation 75:1; 76:1; 77:1; 78:1; 79:1; 80:2.

305 Quotation 75:7; 76:1; 76:7; 77:5; 78:1; 79:2; 80:3; 84:1; 88:1; 90:4.

306 Article 5(1)(k) Consumer Credit Directive 2008.

307 Quotation 76:6.

308 Quotation 75:11; 78:3.

309 Quotation 77:6; 79:3.

310 Quotation 77:7; 79:4.

311 Quotation 80:4; 90:5.

312 Quotation 88:2.

Under the model contract of the *Dutch Association for Shared Car Use*, the consumer is obliged to ensure that the vehicle is adequately insured.³¹³ None of the other providers of these model contracts obliges the consumer to take out ancillary services, such as insurance, unless the contract parties agree that such services should be taken out in the model contract of the *General German Automobile Club*.³¹⁴

Information on the interest rate in case of late payments

If the Consumer Credit Directive would apply, the consumer should be informed about the interest rate applicable in the case of late payments, the arrangements for its adjustment, and, where applicable, any charges payable for default.³¹⁵ Shared mobility, including collaborative sharing does explicitly not entail a credit agreement. As a result, an interest rate in case of late payments is often not applied because payments are often one-off. Therefore, interest rate in case of late payments is often not applied. Alternatively, one-off fines are applied, for example, as this fits better with the nature of the payment obligation. At the same time, the rationale of the rule does apply as it is important that consumers receive fair and transparent information, fostering trust by treating consumers fair and avoiding hidden terms or costs. As a result, I examine whether providers have included anything about the interest rate in case of late payments in their general terms and conditions, but also whether they have included anything about the (financial) consequences of late payment (as substantiated in paragraph 4.4.1).

The Belgian platform *Cozywheels* advises the individual provider to contact *Cozywheels* if they have a problem collecting the vehicle sharing fees. *Cozywheels* promises to examine how they can support the individual provider. However, it is not clear what costs may be charged to the consumer.³¹⁶ Furthermore, *CarAmigo* does not at all elaborate on the costs of late payment for the consumer. Both *Getaround* and *Wibee* do inform the consumer about the costs of late payment. With the Belgian platform *Getaround*, any late payment leads to an increase in the amount due (including taxes) for every period of 15 days, counting from the first day of the delay after a written notification from *Getaround*.³¹⁷ The Platform *Wibee* informs the consumer that if an invoice is not paid, *Wibee* sends the consumer a payment reminder. In this case, the consumer is liable, in addition to the outstanding amounts, to pay an administrative fee of a fixed amount of €50.³¹⁸ The same applies for the German

313 Quotation 93:3.

314 Quotation 91:2.

315 Article 5(1)(l) Consumer Credit Directive 2008.

316 Quotation 76:2.

317 Quotation 77:3. The increase is equal to three times the French statutory interest in force on the billing day unless the consumer gives a valid reason for this.

318 Quotation 78:2. *Wibee* also reserves the right to suspend the contract without notice until all amounts due have been settled, or to terminate the contract, while maintaining its rights to claim damages. Invoices that

and French branches of *Getaround*.³¹⁹ The Dutch and German *SnappCar* platform does not inform the consumer on the consequences of late payments.³²⁰ The consumer who wants to use a vehicle via the French platform *Ouicar* pays prior to use, after acceptance of the use request by the individual provider. The payment must therefore be received in advance, so the consumer could not be informed about the costs of late payments as late payments would not occur.³²¹

The individual provider is authorised to claim from the consumer what the consumer owes the individual provider under the user agreement or general terms and conditions of the *Dutch Association for Shared Car Use*. In addition, all reasonable costs – such as judicial and extrajudicial costs and execution costs – incurred to obtain the amounts owed by the consumer are borne by the consumer.³²² None of the other providers of the model contracts inform the consumer about the costs or consequences of late payments.

Information on the right to an early repayment

The providers should, if the Consumer Credit Directive were applicable, inform the consumer on the right of an early repayment and, where applicable, information concerning the right to compensation and the way in which that compensation will be determined.³²³ This paragraph discusses the information obligation of the provider towards the consumer about the right to an early repayment, while in paragraph 7.3.4.2, the substantive right is discussed.

The rationale behind this right is that it allows consumers to safeguard themselves from any changeable payment obligations. As elaborated on in paragraph 4.4.4, the *ratio legis* of this provision does not apply to collaborative sharing and application would not be proportional nor sensible. It is therefore comprehensible that none of the collaborative mobility sharing platforms nor the formal C2C collaborative sharing model contracts inform about this possibility.³²⁴ The protection is inequivalent because the situation is essentially different, making the inequivalence sensible and proportional.

are not paid on the due date are increased automatically and without formal notice by a fixed compensation of 15 percent with a minimum of €50 per invoice and subject to the legal interest rate.

319 Quotation 79:5; 84:2. The increase is equal to three times the French statutory interest in force on the billing day unless the consumer gives a valid reason for this.

320 This can of course follow from additional law (for example article 6:119 Dutch Civil Code).

321 Quotation 88:4.

322 Quotation 93:4.

323 Article 5(1)(p) Consumer Credit Directive 2008.

324 Only the consumer that concludes a contract through the French platform *Ouicar* pays prior to use, but this is not an additional option or right, see Quotation 88:4.

Information on the cost structure

Article 5(1)(f) and (g) of the Consumer Credit Directive contain an information obligation about the borrowing rate, the conditions governing the application of the borrowing rate and, where available, any index or reference rate applicable to the initial borrowing rate, as well as the periods, conditions, and procedures for changing the borrowing rate. Moreover, it contains the annual percentage rate of charge and the total amount payable by the consumer, illustrated by means of a representative example mentioning all the assumptions used to calculate that rate. These factors are considered information about the cost structure because they clarify on the cost structure of consumer credit but do not fit mobility usership. As a result, I examine whether information is provided on the cost structure of mobility usership as this is in line with the rationale of this information obligation. This is elaborated on in paragraph 4.4.1. Whereas this paragraph discusses the information obligation of the provider towards the consumer about the cost structure, paragraph 7.3.4.2 discusses the substance of article 19 of the Consumer Credit Directive regarding the calculation of the annual percentage rate of charge.

The Belgian platform *CarAmigo* does provide information about the components that are included in the price and mentions, among other things, the fixed and variable participation costs.³²⁵ The platform *Cozywheels* specifies that the individual provider is responsible for determining the price for which they wish to share their vehicle, but the rate must remain in the spirit of sharing the cost of the vehicle. The individual provider cannot make a profit. *Cozywheels* also specifies that the price for a shared car includes fuel, car insurance, maintenance, repairs, and taxes. For bicycles, the price includes any insurance and expected maintenance and repairs.³²⁶ *Getaround* uses a total use price that is paid by the consumer. That total use price includes the amount paid to the individual provider, the insurance premium, the premium for roadside assistance, the service costs that the consumer paid to *Getaround* and the kilometres included as standard.³²⁷ *Wibee* elaborates on the amount due at the end of the vehicle use, namely the use price, where applicable, the costs and/or penalties, and the costs *Wibee* incurs (including legal costs) in recovering the sums the consumer owes *Wibee*.³²⁸ Furthermore, the price for collaborative mobility use also includes a liability insurance, an individual cover for bodily injury, omnium insurance and legal protection.³²⁹ The German and French branches of the *Getaround* platform specifies the same as the Belgian branch regarding the cost structure.³³⁰ The

325 Quotation 75:2; 75:3; 75:4.

326 Quotation 76:3.

327 Quotation 77:4.

328 Quotation 78:7.

329 Quotation 78:8.

330 Quotation 79:9; 84:3; 77:4.

Dutch and German platform *SnappCar* states that the price for use consists of the usage price, the mileage allowance, the *SnappCar* allowance, the insurance premium and any additional costs.³³¹ The total price for the consumer when using a vehicle via the French platform *Ouicar* is made up of the use price, the platform costs, optional insurance/assistance and, if applicable, a young drivers supplement. Furthermore, additional costs and any excess may be charged to the consumer at the end of the use period.³³² None of the platforms stipulate the ratio of the components that determine the price, which results in inequivalent protection compared to the Consumer Credit Directive.

All studied formal C2C collaborative sharing model contracts leave the determination of the price to the contracting parties. The only statement the *Dutch Association for Shared Car Use* makes regarding the price is that the use of the vehicle should be offered for no more than a cost covering fee for a vehicle.³³³ In the model contract of *ADETEC*, the components that make up the prize are mentioned, such as insurance, accessories, repairs, technical controls.³³⁴ Furthermore, *Agenda 21 Herzogenaurach* proposes that consumers pay a fixed amount per month and a usage fee per kilometre, determined by the contracting parties.³³⁵ Only the *General German Automobile Club* offers the consumer the possibility to calculate the costs prior to the use because it explains how the financial obligations related to the use can be calculated. After all, the *General German Automobile Club* uses a different settlement of the cost structure. To cover the costs of the car, the *General German Automobile Club* proposes that the contracting parties set up a joint fund. To calculate the amount of the contribution, the contracting parties estimate the annual mileage of the vehicle and calculate the probable annual costs. The annual cost divided by 12 months gives the total expenditure per month.³³⁶ Although the sample contract of the *General German Automobile Club* provides an insight into the cost structure, it does not provide an exemplary calculation, which means that inequivalent protection exists because offering an exemplary calculation is part of the information obligations that follow from the Consumer Credit Directive.

Information on a database consultation

Consumers should be informed immediately and free of charge of the result of a database consultation carried out for the purposes of assessing their creditworthiness according

331 Quotation 80:6; 90:6.

332 Quotation 88:3. The platform costs are eight percent of the use price.

333 Quotation 93:5; 93:6.

334 Quotation 92:2.

335 Quotation 94:1.

336 Quotation 91:3.

to article 5(1)(q) of the Consumer Credit Directive.³³⁷ Whereas this paragraph discusses the information obligation of the provider towards the consumer about a database consultation, paragraph 7.3.4.2 discusses the substance of the database consultation as a part of the creditworthiness assessment.

Only the platform *Getaround*, regardless of the Member State, informs the consumer of an assessment of the consumer's creditworthiness. At the time of the consumer's first booking, *Getaround* has a credit assessment performed on the consumer. *Getaround* states that it includes a payment system, which allows *Getaround* to obtain a credit score for each consumer whose profile has been verified.³³⁸ With the French platform *Ouicar*, the consumer needs to give the express authorisation to *Ouicar* to make direct debits from their bank account, before or after the use, for any credit assessment and for the sums due in respect of additional costs incurred during the use. However, this does not specifically refer to a creditworthiness assessment, but the possibility of a credit assessment in case additional costs are incurred.³³⁹ None of the formal C2C collaborative sharing model contracts refer to a database consultation to assess the consumer's creditworthiness, resulting in inequivalent protection compared to article 5(1)(q) of the Consumer Credit Directive.

Copy of the draft agreement

If the Consumer Credit Directive were applicable, the consumer would have the right to be informed on their right to be supplied, on request and free of charge, with a copy of the draft credit agreement. This provision shall not apply if the creditor is at the time of the request unwilling to proceed to the conclusion of the credit agreement with the consumer.³⁴⁰ The *ratio legis* of this information obligations is that consumers gain insight into the product and are warned about possible risks. The intention is that this will enable consumers to make a responsible and informed choice when contracting.³⁴¹ Collaborative sharing expressly does not concern credit and the rationale does not apply here. In my opinion, it would be sufficient to inform consumers on, for example, the provider's website (as elaborated on in paragraph 4.4.1). It is therefore comprehensible that none of the collaborative mobility sharing platforms nor the formal C2C collaborative sharing model contracts state anything on the consumer's right to be supplied with a copy of the draft credit agreement on request and free of charge which results in inequivalent protection compared to the Consumer Credit Directive.³⁴²

337 Article 5(1)(q) Consumer Credit Directive 2008. Also see Article 9(2) Consumer Credit Directive 2008.

338 Quotation 77:2; 79:10.

339 Quotation 88:5.

340 Article 5(1)(r) Consumer Credit Directive 2008.

341 Paragraph 4.4.1; Dutch Explanatory Memorandum, *Kamerstukken II 2003/04*, 29507, 3, pp. 3-5.

342 Article 5(1)(r) Consumer Credit Directive 2008.

7.3.1.2 Contractual information obligations

In case equivalent protection compared to the Consumer Credit Directive would exist, the collaborative mobility sharing agreement should be drawn up on paper or on another durable medium and all the contracting parties shall receive a copy of the agreement.³⁴³ As substantiated in paragraph 7.2.1.2, due to the scope of this research, this is not explored or explained further. If overlap exists between the precontractual information obligations and the contractual information obligation, this is not repeated here. The remaining contractual information obligations are examined to assess whether mobility sharing providers increase protection in their general terms and conditions.

Information on required sureties and insurance

Mobility sharing providers should inform the consumer on any required sureties and insurance if the Consumer Credit Directive were applicable.³⁴⁴ The rationale of this information obligation is to enable consumers to make a responsible and informed decision on when contracting.³⁴⁵ It is comprehensible that none of the platforms offer equivalent protection to the consumer compared to the Consumer Credit Directive and this inequivalence is also sensible due to the rationale. After all, none of the platforms mention any required sureties, the Belgian *Cozywheels*, Dutch and German *SnappCar* and all studied branches of *Getaround* require civil liability insurance for the shared vehicles.³⁴⁶ The French platform *Quicar* does not elaborate on any required sureties and insurance whatsoever. Nevertheless, the *Dutch Association for Shared Car Use* explicitly states that the individual provider is obliged to make the vehicle available to the consumer for the duration of the user agreement and does not require a surety for this. In addition, the consumer is obliged to ensure that the vehicle is adequately insured.³⁴⁷ The contract of *ADETEC* and *Agenda 21 Herzogenaurach* include a required surety by the consumer of an amount to be determined by the contracting parties to the individual provider. This surety is refunded at the end of the carsharing, minus any sums that may be due for repairs or for any other reason.³⁴⁸ Furthermore, *ADETEC* and *Agenda 21 Herzogenaurach* also inform users about required insurances.³⁴⁹ Only the *General German Automobile Club's* contract offer inequivalent protection because the contract does not elaborate on any requirement to conclude sureties and/or insurances.

343 Article 10(1) Consumer Credit Directive 2008. Paragraph 4.4.4. This is similar to the precontractual requirement.

344 Article 10(2)(o) Consumer Credit Directive 2008.

345 Paragraph 4.4.1.

346 Quotation 76:6; 77:6; 79:3; 80:4; 84:4; 90:5.

347 Quotation 93:3.

348 Quotation 92:3; 94:2.

349 Quotation 92:6; 94:7.

Information on the existence or absence of a right of withdrawal

According to article 10(2)(j)(p) of the Consumer Credit Directive, the consumers also need to be informed on the existence or absence of a right of withdrawal, the period during which that right may be exercised and other conditions governing the exercise thereof.³⁵⁰ The platform *Getaround*, irrespective of the Member State where *Getaround* offers its services, stipulates that their consumers have no right of withdrawal for distance and off-premises contracts.³⁵¹ The German platform *SnappCar* reports that with regard to the intermediary contract concluded between the consumer and *SnappCar* as part of a vehicle use, the consumer has a right of withdrawal in accordance with German law, which means that a right of withdrawal exists within a period of 14 days after the conclusion of the agreement. If the contract parties agree to start the use before that period, the right of withdrawal is deemed to be expired.³⁵² The Dutch branch of *SnappCar*, however, states that the contract parties can, in principle, withdraw from the agreement within a period of 14 days after the conclusion of the agreement. However, the agreement cannot be withdrawn if the use is started earlier than those 14 days and the right of withdrawal is deemed to be expired.³⁵³ For *Ouicar*, the consumer expressly waives the right of withdrawal as soon as the reservation for the use of the vehicle has been confirmed by the individual provider.³⁵⁴ Moreover, none of the formal C2C collaborative sharing model contracts mention the right of withdrawal.

Information on the procedure on exercising the right to termination

The Consumer Credit Directive stipulates that the consumer must be informed on the procedure to be followed in exercising the right of termination of the credit agreement.³⁵⁵ This paragraph explicitly concerns the information obligation that the provider has to inform the consumer about the right to termination, while I also discuss (substantively) the right to early termination in paragraph 7.3.2.2 and the right to terminate as a remedy for a defect in paragraph 7.3.3.2.

All studied carsharing providers should inform the consumers on the procedure to be followed in exercising the right of termination of the agreement.³⁵⁶ Only the Belgian platform *Cozywheels* informs the consumer about possibilities to terminate collaborative

350 Article 10(2)(j)(p) Consumer Credit Directive 2008. This includes information concerning the obligation of the consumer to pay the capital drawn down and the interest in accordance with Article 14(3)(b) of the Consumer Credit Directive 2008 and the amount of interest payable per day.

351 Quotation 77:8; 79:11; 84:5.

352 Quotation 80:5; 80:8. See section 312g, 355, 356 German Civil Code.

353 Quotation 90:7.

354 Quotation 88:6.

355 Article 10(2)(s) Consumer Credit Directive 2008.

356 Article 10(2)(j)(s) Consumer Credit Directive 2008.

mobility sharing.³⁵⁷ The duration of the agreement is determined by the consumer at *CarAmigo*, so the end of the agreement can also be determined by the consumer. There is no mention of any early termination.³⁵⁸ The other collaborative platforms do not elaborate on the procedure to be followed in exercising the right of termination. Moreover, the model contract from the *Dutch Association for Shared Car Use* allows both the individual provider and the consumer to dissolve the use agreement without notice of default or judicial intervention. The consumer does not timely or completely fulfil its obligations under the use agreement unless the shortcoming does not reasonably justify termination of its consequences.³⁵⁹ Although it is noted that the consumer has the option to terminate, nothing is explained about the procedure for termination. The model contract of *ADETEC* offers both parties the possibility to terminate the contract unilaterally and without justification at any time, subject to a notice period of one month. At the end of the contract, the costs are divided between the parties according to the same calculation method as at the end of a period.³⁶⁰ According to the model contract of *Agenda 21 Herzogenaurach*, the contract can be terminated by mutual consent of all contracting parties or by termination of a contract partner. In the latter case, the notice period is three months until the end of the month.³⁶¹ The termination of the *General German Automobile Club's* contract for carsharing requires an agreement between all contracting parties. In case not all contracting parties want to terminate the carsharing contract, the contract is continued between the remaining contracting parties. The *General German Automobile Club* advises that in case of termination, the contract parties adjust the contract accordingly, especially regarding the rights of use.³⁶²

Information on changes in the borrowing rate

Providers should also inform consumers of any change in the borrowing rate, on paper or another durable medium, before the change enters into force in case this occurs.³⁶³ The changes in the borrowing rate provides the consumer insight on the changes in the costs of the credit. Nevertheless, this borrowing rate does not fit collaborative sharing because it involves short-term use and – in principle – a one-off payment which immediately closes the contract and a borrowing rate does therefore not apply (paragraph 4.4.4).

357 Quotation 76:8.

358 Quotation 75:12.

359 Quotation 93:8.

360 Quotation 92:4. If this termination is due to damage to the vehicle, it is effective immediately. The destruction or sale of the car results in the automatic termination of the contract, unless the two parties decide by change to transfer it to another vehicle.

361 Quotation 94:3. The contract is also terminated if the shared vehicle is lost.

362 Quotation 91:4.

363 Article 11(1) Consumer Credit Directive 2008. The information shall state the amount of the payments to be made after the entry into force of the new borrowing rate and, if the number or frequency of the payments changes, particulars thereof.

However, I examine whether information is provided on changes in the cost structure of collaborative sharing as this is in line with the rationale of this information obligation. In my opinion this rationale also applies to collaborative sharing. After all, the rationale of this provision is to enable consumers to make a responsible and informed decision on the consequences of contracting. In line with that rationale, the collaborative sharing consumer must be informed of changes in the price or cost structure enabling consumers to make a responsible and informed decision.

The collaborative sharing platforms reserve the right to change the general terms and conditions and informs the consumer of such changes. However, none of the platforms offer insight into whether these changes also explicitly apply to any price or cost structure changes.³⁶⁴ Consequently, inequivalent protection exists here compared to article 11(1) of the Consumer Credit Directive.

The *Dutch Association for Shared Car Use* has the right to change these general terms and conditions at any time, but the amended terms and conditions do not apply to agreements concluded before the publication of the amended terms and conditions.³⁶⁵ *ADETEC*'s contract may be modified at any time by mutual agreement between the contracting parties. To allow adaptations of the contract, it is reconsidered every 3 to 6 months.³⁶⁶ At *Agenda 21 Herzogenaurach*, components that determine the use price can be adjusted. However, the conditions under which the price may be adjusted have been laid down by *Agenda 21 Herzogenaurach*. The lump sum can be adjusted annually according to the change in the consumer price index for Germany. In additions, if the fuel prices change by more than 20 percent, an adjustment of the kilometre allowance is possible.³⁶⁷ Moreover, the model contract of *General German Automobile Club* mentions that changes or additions to this contract require the written consent of all contracting parties.³⁶⁸

7.3.1.3 Interim conclusion

As is the case for shared mobility, the right to information consists of several components. Due to limited availability and contrary to the discussion of previous samples on exclusive use and shared mobility, nine collaborative sharing platforms were selected, namely four from Belgium, two each from Germany and France and one from the Netherlands. Furthermore, four example contracts are analysed for illustration of sector regulation in this sector, namely two from Germany and one from France and the Netherlands.

364 Quotation 75:13; 76:5; 77:10; 78:9; 79:12; 80:9; 84:6 88:7; 90:8.

365 Quotation 93:9.

366 Quotation 92:5.

367 Quotation 94:4.

368 Quotation 91:5.

Both with collaborative sharing platforms as with formal C2C collaborative sharing, the contracts meet the requirements of the Consumer Rights Directive and the Consumer Credit Directive of an information provision in a clear and comprehensible way,³⁶⁹ resulting in an equivalence of protection. For three of the information components, neither the collaborative sharing platforms nor the formal C2C collaborative sharing contracts offer equivalent protection compared to the consumer who concludes a sales agreement where the Consumer Sales Directive is applicable. First, the SECCI form or an equivalent form to structure the important information components is not offered. Furthermore, the early repayments and the provision of a copy of the draft agreement are obligations that are met. This results in inequivalent protection by all studied platforms and C2C contracts. On the contrary, all studied providers, comply with the obligation to inform consumers about any ancillary services, which means that there is equivalent protection regarding that component. Regarding platform sharing, the majority informs consumers about the (financial) consequences of late payments. However, *SnappCar*, regardless of the Member State, *CarAmigo*, and *Cozywheels* offer inequivalent protection compared to the Consumer Credit Directive because they do not inform about these consequences. Regarding formal C2C sharing, only the contract of the *Dutch Association for Shared Car Use* offers information, whereas the other example contracts do not elaborate on this, resulting in inequivalent protection for those contracts. Moreover, none of the platforms or contracts are informed about the cost structure. Although the sample contract of the *General German Automobile Club* provides an insight into the cost structure, it does not provide an exemplary calculation, which means that inequivalent protection exists. After all, offering such an exemplary calculation is part of the legal information obligations of article 5(1)(g) of the Consumer Credit Directive. Only *Getaround*, regardless of the Member State in which *Getaround* performs its services, informs the consumer of an assessment of the consumer's creditworthiness and offers equivalent protection. Furthermore, none of the collaborative platforms provide information about any required sureties and/or insurances. The collaborative model contracts, on the other hand, offer a different picture, as one German supplier does not offer equivalent protection. Both *Getaround* and *SnappCar*, irrespective of the Member State, inform about the absence or existence of the right of withdrawal. In addition, only the Belgian platform *Cozywheels* informs the consumer about possibilities to terminate collaborative mobility sharing, which means that only this platform offers equivalent protection on this matter. Contrary to all studied exemplary C2C sharing contracts, none of the collaborative sharing platforms offer information on the possibilities of any price or cost structure changes.

369 Article 5(1), 6(1) Consumer Rights Directive; Article 10(2) Consumer Credit Directive 2008 and Recital 31 Consumer Credit Directive 2008. Also see paragraph 5.2.1.

Table 36: Interim results of collaborative mobility sharing on the right to be informed

Typologies	Countries	Providers	Right to be informed												
			Clear and comprehensible manner	SECCI form	Ancillary services	Consequences of late payments	Early repayment	Cost structure	Database consultation	Copy of draft agreement	Required sureties and insurance	The right of withdrawal	Procedure of right to terminate	Change in borrowing rate	
€ Collaborative platform sharing	NL	SnappCar	=	-	=	-	-	-	-	-	-	-	=	-	-
		CarAmigo	=	-	=	-	-	-	-	-	-	-	-	-	-
	BE	Cozywheels	=	-	=	-	-	-	-	-	-	-	-	=	-
		Getaround	=	-	=	=	-	-	-	=	-	-	=	-	-
		Wibee	=	-	=	=	-	-	-	-	-	-	-	-	-
	FR	Getaround	=	-	=	=	-	-	-	=	-	-	=	-	-
		Oucar	=	-	=	=	-	-	-	-	-	-	-	-	-
	GER	Getaround	=	-	=	=	-	-	-	=	-	-	=	-	-
SnappCar		=	-	=	-	-	-	-	-	-	-	=	-	-	
(f) Formal C2C collaborative sharing	NL	Dutch Association for Shared Car Use	=	-	=	=	-	-	-	-	-	=	-	-	
	FR	ADETEC	=	-	=	-	-	-	-	-	-	=	-	-	
	GER	General German Automobile Club	=	-	=	-	-	-	=	-	-	-	-	-	=
		Agenda 21 Herzogenaurach	=	-	=	-	-	-	-	-	-	=	-	-	=

7.3.2 The right to change your mind

The extent to which the general terms and conditions comply with the right to change your mind, also known as the right of withdrawal, is examined below. This right arises partly from the Consumer Rights Directive and partly from the Consumer Credit Directive. The existing overlap and inequivalence in these directives is summed up in Table 14. The right to termination as part of the right to change your mind is also discussed. This is not regulated in the selected directives but is included in the terms and conditions. The (in)equivalences that follow from self-regulation for the right to change your mind are shown below in Table 37.

7.3.2.1 The right of withdrawal

The right of withdrawal was examined for exclusive use in paragraph 6.4.2.1 because the right of withdrawal under the Consumer Credit Directive is slightly stricter, which could mean that there are inequivalences in consumer protection. However, the right of withdrawal of the Consumer Credit Directive is less proportional for collaborative sharing, as the duration of the shared mobility contract is often considerably shorter than the cooling-off period of 14 days. In addition, the vehicle is often immediately put into use, so the rationale behind the cooling-off period does not necessarily exist for collaborative sharing (paragraph 4.4.4).³⁷⁰ Although due to the *ratione personae* scope of the Consumer Rights Directive collaborative sharing would not be covered (C2C), the right of withdrawal of the Consumer Rights Directive provides an exception to this right for service contracts which would provide a proportional solution for collaborative sharing.³⁷¹

None of the Belgian platforms offer the right of withdrawal. The Belgian and German platform *Getaround* even explicitly mentions that the consumer does not have this right regarding distance and off-premises contracts (paragraph 5.2.2 and 4.4.4).³⁷² The German platform *SnappCar*, however, reports that with regard to the intermediary contract concluded between the consumer and *SnappCar* as part of a vehicle use, the consumer has a right of withdrawal in accordance with German law.³⁷³ The right of withdrawal expires when *SnappCar* has fully provided the service and has only started performing the service after the user has given their express consent and at the same time confirmed that they lose their right of withdrawal if *SnappCar* has fully fulfilled the contract. Furthermore, *SnappCar* is entitled to claim reimbursement of the actual expenses from the consumer, insofar as the consumer exercises their right of withdrawal because *SnappCar* is entitled to the *SnappCar* fee and insurance fee insofar as the consumer or individual provider withdraw from the use agreement on the platform after the use agreement has been concluded.³⁷⁴ The Dutch branch of *SnappCar*, however, states that the contracting parties can withdraw from the use agreement within a period of 14 days after the conclusion of the agreement. However, the user agreement cannot be withdrawn after the start of the use. From the beginning of that period, the agreement, regarding the right of withdrawal, is deemed to be fully fulfilled.³⁷⁵ As mentioned under the right to be informed, none of

370 The rationale of this right is to empower consumers when contracting a distance or off-premises contract, especially in situations where they cannot physically inspect or test a product before contracting.

371 Article 9(2), 16(a) Consumer Rights Directive.

372 Quotation 77:8; 79:11. Also see Article 9 Consumer Rights Directive; Article 14 Consumer Credit Directive 2008.

373 Quotation 80:5; 80:8. See section 312g, 355, 356 German Civil Code.

374 Quotation 80:8.

375 Quotation 90:7.

the formal C2C collaborative sharing model contracts offer the right of withdrawal, which is not unusual given the nature of C2C collaborative sharing.

7.3.2.2 Right to early termination

As part of the right to change your mind, the right to terminate the mobility usership contract early is also discussed because it offers a solution in case a consumer changes their mind about closing the contract. Although this right is not mentioned in the directives, it is often provided in the general terms and conditions. This paragraph explicitly discusses the consumer's right to early termination, while the provider's information obligation on the right to termination is also discussed in paragraph 7.3.1.2 and the right to terminate as a remedy for a defect in paragraph 7.3.3.2.

None of the collaborative mobility sharing platforms mentions the right to early termination, nor the obligation to pay a termination fee. Only the French platform *Ouicar* discusses the end of the contract, with the options mainly relating to the possibilities of ending the membership for things like death and unpaid debts. This does not necessarily concern the early termination of the agreement.³⁷⁶ As a result, equivalent protection exists for all platforms as this obligation does not follow from the examined directives.

The model contract from the *Dutch Association for Shared Car Use* states that a contracting party can terminate their membership via the website, by e-mail or in writing by letter. These terms and conditions shall continue to apply to conduct committed by the contracting party prior to the termination of the membership.³⁷⁷ The model contract of *ADETEC* offers both parties the possibility to terminate the contract unilaterally and without justification at any time, subject to a notice period of one month. At the end of the contract, the costs are divided between the parties according to the same calculation method as at the end of a payment period.³⁷⁸ According to the model contract of *Agenda 21 Herzogenaurach*, the contract can be terminated by mutual consent of all contracting parties or by termination of a contract partner. In the latter case, the notice period is three months before the end of the month.³⁷⁹ The termination of the *General German Automobile Club's* contract for carsharing requires an agreement between all contracting parties. If any of the contracting parties does not wish to terminate the carsharing contract, the contract is continued between the remaining contracting parties. The *General German Automobile Club* advises

376 Quotation 88:8.

377 Quotation 93:7.

378 Quotation 92:4. If this termination is due to damage to the vehicle, it is effective immediately. The destruction or sale of the car results in the automatic termination of the contract, unless the two parties decide by change to transfer it to another vehicle.

379 Quotation 94:3. The contract is also terminated if the shared vehicle is lost.

that in case of termination, the contract parties adjust the contract accordingly, especially regarding the rights of use. However, the *General German Automobile Club* states in the contract that the consumer can also arrange the termination of the car sharing contract completely differently and, for example, can provide for the termination of the contract even if only one party to the contract terminates. In other words, the contract of the *General German Automobile Club* offers some solutions in case (one of the) consumers want to terminate the car sharing contract early but does not make a very concrete proposal.³⁸⁰ This means that all exemplary contracts propose an additional right to early termination, resulting in an increased protection compared to the examined directives.

7.3.2.3 Interim conclusion

The right to change your mind is divided into the right of withdrawal and the right to early termination. The right of withdrawal follows from the Consumer Credit Directive and is primarily associated with distance and off-premises contracts and offers the consumer the option to terminate the agreement within 14 days without giving any reasons. However, this right also follows from the Consumer Rights Directive and this directive offers an exception of the right of withdrawal with regard to services. Although due to the *ratione personae* scope of the Consumer Rights Directive collaborative sharing is not covered (C2C), this exception would provide a proportional solution for collaborative sharing. After all, the rationale of this provision also applies to collaborative sharing as the provision should empower consumers when contracting a distance or off-premises contract, especially in situations where they cannot physically inspect or test a product before contracting.

Regarding the right of withdrawal, only the German platform *SnappCar* provides equivalent protection by reporting that regarding the intermediary contract concluded between the consumer and *SnappCar* as part of mobility use, the consumer has a right of withdrawal in accordance with German law.³⁸¹ The right of withdrawal expires when *SnappCar* has fully provided the service and has only started performing the service after the user has given their express consent and at the same time confirmed that they lose their right of withdrawal if *SnappCar* has fully fulfilled the contract. Furthermore, none of the collaborative mobility sharing platforms mentions the right to early termination, nor the obligation to pay a termination fee. Although none of the exemplary C2C collaborative contracts apply any obligation to pay a termination fee, all contracts propose an additional right to terminate the carsharing contract early. The exemplary C2C collaborative contracts offer voluntarily a higher level of protection than required by applicable law.

380 Quotation 91:4.

381 Article 9 Consumer Rights Directive; paragraph 5.2.2; Article 14 Consumer Credit Directive 2008; paragraph 4.4.4.

Table 37: Interim results of collaborative mobility sharing on the right to change your mind

Typologies	Countries	Providers	Right to change your mind		
			Right of withdrawal	Right to early termination	Termination fee
(e) Collaborative platform sharing	NL	SnappCar	-	=	No
		CarAmigo	-	=	No
	BE	Cozywheels	-	=	No
		Getaround	-	=	No
		Wibee	-	=	No
	FR	Getaround	-	=	No
		Ouicar	-	=	No
	GER	Getaround	-	=	No
SnappCar		=	=	No	
(f) Formal C2C collaborative sharing	NL	Dutch Association for Shared Car Use	-	+	No
	FR	ADETEC	-	+	No
	GER	General German Automobile Club	-	+	No
		Agenda 21 Herzogenaurach	-	+	No

7.3.3 The right to conformity

As elaborated on in paragraph 7.2.3, the consumer is primarily entitled to a conform product according to article 5 of the Consumer Sales Directive.³⁸² As a result of non-conformity, a consumer is subsequently entitled to remedies to obviate this non-conformity. Obviously, these provisions do not apply to collaborative sharing, since no sales contract is concluded and the agreement is a C2C agreement. Paragraph 4.3.1 substantiates that the application of the right to conformity is sensible and proportional for collaborative sharing, aligning the *ratio legis* of the provision. Therefore, the general terms and conditions are assessed. These remedies are discussed below. Moreover, the (in)equivalences that follow from self-regulation for the right to conformity are shown below in Table 38.

³⁸² Article 5, 6, 7, 8, 10, 11, 12 Consumer Sales Directive. Paragraph 5.5.3.

7.3.3.1 Remedies: Repair and replacement

If the Consumer Sales Directive would be applicable, the consumer shall be entitled to have the goods brought into conformity or to receive a proportionate reduction in the price, or to terminate the contract in the event of a lack of conformity (Table 15).³⁸³ In order to have the goods brought into conformity, the consumer may choose between repair and replacement, unless the remedy chosen would be impossible or, compared to the other remedy, would impose costs on the seller that would be disproportionate, taking into account all circumstances.³⁸⁴ The rationale behind these remedies is to ensure that consumers receive goods or services that meet the quality standards and specifications promised by the professional party, contributing to legal certainty. Collaborative sharing is fundamentally different from a consumer sale and the *ratio legis* of this provision does not apply because collaborative sharing is a C2C agreement, where individual providers offer their own vehicle sporadically. This means that these remedies would also not be possible practically. It is also possible that a platform, to some extent, provides these remedies. Regardless of which party offers the protection, equivalent protection is marked with an equal sign (=) in Table 35. Nevertheless, the premise, as substantiated in paragraph 4.3.2, is that the subject of the agreement is the use and not the vehicle itself, so continuation of mobility is central.

The Belgian platform *CarAmigo* offers assistance in the event of a defect. The assistance includes, among other things, a replacement vehicle for a maximum of 5 days if a provisional or permanent repair is impossible.³⁸⁵ This clearly emphasises the continuation of mobility where equivalent protection exists because shared mobility use involves short-term use, often shorter than 5 days. The platform *Cozywheels*, however, only mentions that expected maintenance and repairs are included in the use price. These costs are borne by the individual provider, who is also the owner of the vehicle.³⁸⁶ As a result, no full equivalent protection is offered on this matter, because unexpected maintenance must be borne by the consumer. At *Wibee*, the consumer can call for assistance in case of an incident because of a defect.³⁸⁷ The consumer is obliged to inform the platform immediately.³⁸⁸ In the event of a proven defect, *Wibee* sends a repairer to take over and evacuate the vehicle. The consumer must remain near the vehicle until the repairer arrives. Failure to comply with

383 Article 13(1) Consumer Sales Directive.

384 Article 13(2)(a)(b)(c) Consumer Sales Directive. It is important to mention that the remedies provided by the Consumer Sales Directive, such as replacement, do not apply to mobility usership. The right to replacement and repair, as discussed in this paragraph stem from the general terms and conditions that offer replacement and repair (under specific conditions).

385 Quotation 75:14. Territorial scope of this right is Belgium, Luxembourg and within a radius of 50 km outside the Belgian border.

386 Quotation 76:9.

387 Quotation 78:10. In case of mechanical breakdown, accident, lack of fuel, use of wrong fuel, vehicle getting stuck, vandalism, theft, or loss of keys.

388 Quotation 78:10.

this obligation results in the costs being invoiced to the consumer. The moment of loss, defect or theft means the end of the use of the vehicle.³⁸⁹ The repair is explicitly included into the contract via *Wibee*, whereas no replacement vehicle is offered. With the platform *Getaround*, irrespective of the Member State, the consumer must immediately report defects to the vehicle to the individual provider of the vehicle. The individual provider must subsequently report all damage.³⁹⁰ The consumer who uses a vehicle via *Getaround* can call on roadside assistance that offers, among other things, a replacement vehicle in case the consumer has paid for the option to reduce the deductible.³⁹¹ This entails an additional option and is not included in the standard collaborative mobility sharing contract, which means that inequivalent protection exists for both remedies. In the event of a breakdown, the individual provider authorises *Getaround* to repair the vehicle for a maximum of €200. These costs are charged to the individual provider of the vehicle unless the consumer is deemed responsible due to abnormal use of the vehicle.³⁹² Via the *Getaround* platform, the consumer is offered an opportunity to continue mobility through a right to repair, resulting in equivalent protection. The platform *SnappCar*, regardless of the Member State, does not mention anything on the right to repair or replacement, nor does *SnappCar* mention anything on alternative remedies when the consumer's choice is disproportionate. Moreover, in the event of a breakdown of the vehicle during use via *Ouicar*, the individual provider remains responsible for the costs associated with the repair of the vehicle, unless it is demonstrated by an expert, carried out at the provider's expense, that the damage is related to abnormal use of the vehicle by the consumer. The individual provider must inform the consumer in any way of the date, time, and place of the assessment. In the event of a vehicle breakdown, any additional towing and storage costs are also the full responsibility of the individual provider.³⁹³ In case of damage – including, for example, flat tires – any additional towing costs are the sole responsibility of the consumer.³⁹⁴

The *Dutch Association for Shared Car Use* obliges the consumer to immediately inform the individual provider of any damage. If the damage is not covered by the insurance or the damage is caused by not acting with due care, the consumer is fully liable for defects and damage caused

389 Quotation 78:11.

390 Quotation 77:13; 79:13; 84:7.

391 Quotation 77:15; 79:14; 84:8. There are specific rules in case of a flat tire and clutch failure, see Quotation 77:11; 77:12; 84:9.

392 Quotation 77:15; 79:14; 84:8.

393 Quotation 88:12. However, upon presentation of an expert report attributing the consumer's liability in connection with abnormal use of the vehicle, the individual provider demands payment of an amount for the repair of the vehicle. The consumer has the option of conducting a counter-assessment at his own expense to dispute his liability. In the event consumer liability is invoked in accordance with the expert report, any additional towing costs are fully borne by the consumer.

394 Quotation 88:11.

to or by the vehicle.³⁹⁵ Furthermore, the individual provider and the consumer mutually agree which agreements apply in the event of damage that is not covered by the insurance. The consumer does not have the remedies that they would have as the owner of the vehicle.³⁹⁶ In ADETEC's model contract, responsibility for the good condition and proper functioning of the vehicle rests on the consumer. The consumer informs the individual provider of any defect. The individual provider alone decides on repairs and maintenance.³⁹⁷ The model contract of *Agenda 21 Herzogenaurach* states that the consumer is liable to the individual provider for all damage and defects caused by them in connection with the use unless an insurance company is responsible for this. Minor repairs of up to €50 which are required to enable continued use can be arranged by the consumer without consultation with the individual provider.³⁹⁸ The model contract of the *General German Automobile Club* determines that in the event of defects to the vehicle that occurred during use, the consumer must have the necessary repairs carried out, unless the cost of such repairs exceeds €350. In that case, the consent of the contracting parties must be obtained for the repair to be carried out. After any repairs made, all contracting parties must be notified immediately.³⁹⁹ The formal C2C collaborative sharing model contracts do not elaborate on the availability of a replacement vehicle or the continuation of mobility in another manner. Understandably, no replacement vehicle (with one exception) is offered with collaborative sharing, because the individual provider, via a platform or not, offers a vehicle that they privately own and only share sporadically with others and a replacement vehicle is not readily available. This situation is so fundamentally different from a sales contract that an inequivalence here is justified and does not pose any problems.

Repair or replacement within a reasonable time

According to article 14(1) of the Consumer Sales Directive, a defective product should be repaired or replaced free of charge, within a reasonable time and without significant inconvenience to the consumer (Table 15).⁴⁰⁰ The rationale behind this provision is that consumer inconvenience should be minimized (paragraph 4.3.2) as delays could disrupt the normal use of the product or service and cause inconvenience the consumer. However, as this situation is C2C and so fundamentally different from a sales contract, the *ratio legis* does not apply and an inequivalence in protection is justified and does not pose any problems. Consequently, it is comprehensible that none of the collaborative mobility sharing platforms nor the formal C2C collaborative sharing model contracts provide any remedy.

395 Quotation 93:10.

396 Quotation 93:11.

397 Quotation 92:1.

398 Quotation 94:5. This liability includes compensation for the increase in insurance premiums, including the deductible.

399 Quotation 91:1.

400 Article 14(1)(a)(b)(b) Consumer Sales Directive.

7.3.3.2 Remedies: Price reduction and right to terminate

If the Consumer Sales Directive would apply, the consumer shall be entitled to either a proportionate reduction of the price (according to article 15 of the Consumer Sales Directive) or the termination of the sales contract (according to article 16 of the Consumer Sales Directive) in case the provider has not completed repair or replacement, or the provider has refused to bring the goods into conformity.⁴⁰¹ This paragraph specifically discusses the right to terminate as a remedy for a non-conformity, while the provider's information obligation on the right to termination is also discussed in paragraph 7.3.1.2 and the consumer's right to early termination in paragraph 7.3.2.2.

The consumer is also entitled to either of these remedies when a lack of conformity appears despite the provider having attempted to bring the goods into conformity, the lack of conformity is of such a serious nature as to justify an immediate price reduction, or the provider has declared – or it is clear from the circumstances – that the provider will not bring the goods into conformity within a reasonable time or without significant inconvenience for the consumer (Table 15).⁴⁰² The right to a price reduction as a remedy for a defect is not offered by any of the collaborative sharing platforms/individual providers or the formal C2C collaborative sharing model contracts. In addition, there is also no provision for the right to terminate the contract for the consumer when the contract is concluded via the collaborative mobility sharing platform or with a formal C2C collaborative sharing model contract. This results in inequivalent protection compared to sales-based consumers (article 13 in conjunction with 15 and 16 of the Consumer Sales Directive).

7.3.3.3 Maintenance

Maintenance does not directly follow from the examined directives. As substantiated in paragraph 7.2.3.3, maintenance is discussed here because a right to maintenance relates to conformity. Maintenance could ensure that a non-conformity does not occur or can eliminate a non-conformity. However, there are providers who offer maintenance in their general terms and conditions, which means that the protection goes further than the protection offered by the legislator regarding purchase. After all, in case of vehicle ownership, the consumer is responsible for the maintenance of their vehicle. Some collaborative platforms and model contracts of shared mobility also seem to offer their consumer the right to maintenance. As elaborated previously, the individual provider is the owner of the vehicle, and the individual provider is therefore responsible for the maintenance of the

401 Or the provider has not completed repair or replacement in accordance with Article 14(2) and (3) of the Consumer Sales Directive. See Article 15, 16 Consumer Sales Directive.

402 Article 13(4) of the Consumer Sales Directive.

vehicle. However, only the Belgian platform *Cozywheels* transfers the (financial) burden of unexpected maintenance to the consumer which results in inequivalent protection for the consumer, indicated as a minus sign (-) in Table 38.⁴⁰³ Furthermore, the Belgian *CarAmigo* and *Getaround* specify that maintenance is the responsibility of the individual provider.⁴⁰⁴ This entails that the consumer uses a maintained vehicle and is not responsible for any maintenance. *Wibee* does not elaborate on who is responsible for the vehicle, therefore this is contractually the responsibility of the individual provider who is also the owner. The German and French platforms *Getaround* specify that maintenance is the responsibility of the individual provider, whereas the German and Dutch branches of *SnappCar* do not mention maintenance of the vehicle.⁴⁰⁵ Therefore this is contractually the responsibility of the individual provider. The French collaborative platform *Ouicar* only allows the individual provider to offer vehicles for use which are validly insured, in good working order with all recommended maintenance and the technical inspection is performed as directed by the manufacturer. The individual provider accepts and undertakes to respond to any request from *Ouicar* for proof of proper maintenance and conformity of the vehicle offered for use.⁴⁰⁶ The individual provider using the *ADETEC* contract is the contracting party that decides on the maintenance of the vehicle. This means that the consumer is not responsible for this.⁴⁰⁷ Also with *Agenda 21 Herzogenaurach*, the individual provider makes their vehicle available for shared use and the provider is responsible for the necessary maintenance and general inspections carried out in a timely manner.⁴⁰⁸ Furthermore, the model contracts of the *General German Automobile Club* and the *Dutch Association for Shared Car Use* do not mention anything specific about the responsibility of maintenance, which causes the individual provider to be responsible for maintenance.

7.3.3.4 Roadside assistance

Roadside assistance entails in principle a service that assists consumers whose vehicles suffered a breakdown, whether caused by a mechanical failure or not, that cannot be resolved by the consumer or has prevented the consumer from transporting the vehicle to a garage. Sometimes additional services are added by providers. The right to roadside assistance does not follow from the examined directives because the directives only provide for the right of repair and not the right of repair alongside the road, or on-site.⁴⁰⁹ The right to roadside assistance does not follow from the examined directives. As substantiated in

403 Quotation 76:9.

404 Quotation 75:15; 77:16.

405 Quotation 79:15; 84:10.

406 Quotation 88:13.

407 Quotation 92:1.

408 Quotation 94:6.

409 CJEU, Case C-52/18, 23 May 2019, ECLI:EU:C:2019:447 (*Füllä/Toolport*).

paragraph 7.2.3.4, road assistance means that in the case of a non-compliant vehicle, the vehicle is repaired and therefore – temporarily – brought into conformity. Therefore, roadside assistance is discussed here. It is for this reason that it is necessary to include this remedy in my study. In the scenario where roadside assistance is required, it is often first established that (except in the event of an accident) there is non-conformity if a car breaks down during the ride. The consumer would in that case be entitled to repair or replacement under the Consumer Sales Directive. Roadside assistance offers repair directly on the road for minor repairs with the aim of helping the consumer get back on the road (the vehicle brought back into compliance through this repair).⁴¹⁰ However, a larger repair may also be necessary because of a defect. In such a scenario, roadside assistance can only take the vehicle to a garage but will not provide any further ad hoc repairs. In other words, roadside assistance can implicitly (and only partly) contribute to the provider's obligation of the Consumer Sales Directive to remedy a non-conforming vehicle. However, this is not conceivable and proportional for shared mobility. At the same time, for example, taking the vehicle to a garage is not an obligation arising from the examined directives, but the responsibility and interest in having the vehicle repaired lies expressly with the provider who owns the vehicle. As a result, there are providers who offer roadside assistance in their general terms and conditions. Yet this responsibility is sometimes explicitly transferred to the consumer, creating inequivalent protection by increasing the burden on the consumer. All studied providers who put such a burden on the consumer compared to the sales-based level are indicated with a minus sign (-) in Table 38.

All studied branches of the platform *Getaround* offer roadside assistance that consumers who use a vehicle through *Getaround* can rely on. In the event of a breakdown (whether as a result of a defect or not) of a vehicle, the individual provider authorises *Getaround* to repair the vehicle for a maximum of €200. These costs are charged to the individual provider of the vehicle unless the consumer is deemed responsible due to abnormal use of the vehicle.⁴¹¹ Not surprisingly, these general terms and conditions do not discuss the burden of proof. The Belgian platform *Wibee* provides roadside assistance. If the consumer needs assistance, the consumer can call support as listed in the on-board documents. Assistance is available to the consumer in the event of an incident on the territory of Belgium and Luxembourg. Such an incident also includes a defect as the general terms and conditions specify the incident as *inter alia* including mechanical breakdown, accident, lack of fuel,

410 Roadside assistance is partly an element of the legal remedies (namely repair, replacement, price reduction and right to terminate) in Article 13 of the Consumer Sales Directive that exist to remedy non-conformity.

411 Quotation 77:14; 79:14; 84:8. The breakdown assistance includes on-site breakdown assistance or towing of the vehicle to the nearest garage, transportation to the consumer's place of residence or continuation of the mobility to only one location; a replacement car if the Renter has paid for the option to reduce the Excess, and the costs incurred by the individual provider to travel to the garage where the vehicle has been taken.

use of incorrect fuel, vehicle getting stuck, vandalism, theft, or loss of keys.⁴¹² *CarAmigo* negotiates and organises roadside assistance for the account of the individual provider and the consumer but does not include these services for the consumer into the contract.⁴¹³ As a result, the consumer's contract does not include roadside assistance which means that inequivalent protection exists. Furthermore, *Ouicar* refers to additional conditions for any assistance, which also does not indicate whether any assistance includes roadside assistance and whether this is included in the use contract.⁴¹⁴ None of the formal C2C collaborative sharing contracts include roadside assistance within the model contract.

7.3.3.5 Interim conclusion

According to the Consumer Sales Directive, the provider has the obligation to deliver a conforming product. If the provider does not meet that requirement of conformity, the consumer has rights to remedies (namely repair, replacement, price reduction and termination). These remedies are also important for collaborative sharing. Generally, none of the collaborative sharing platforms nor the formal C2C collaborative sharing contract offer these remedies. Only two exceptions exist; namely *CarAmigo* offers in their general terms and conditions that, in case of a defect, a replacement vehicle can be made available for a maximum of five days if a provisional or permanent repair is impossible. This emphasises the continuation of mobility where equivalent protection exists especially because shared mobility use involves short-term use, often shorter than five days. The second exception is *Wibee*, who offers repair in the event of a defect in case the consumer timely notifies the platform. These two exceptions manifest equivalent protection compared to the Consumer Sales Directive, whereas all other components of other platforms and contracts lead to inequivalent protection. Although a defective product should be remedied within a reasonable time, none of the platforms nor the formal C2C collaborative contracts elaborate on the time in which they provide any remedy, which results in inequivalent protection. Furthermore, none of the platforms nor the formal C2C collaborative contracts reserve the right to provide for an alternative remedy when the consumer's choice for a remedy is disproportionate. In case of consumer sales, the interest and responsibility to maintain the vehicle passes to the consumer because the consumer becomes the owner. With collaborative sharing, however, this obligation to maintain does not transfer to the consumer with use of a vehicle because the consumer does not become the owner of the vehicle. On the other side of the coin, the provider remains the owner of the vehicle, which gives them the right and responsibilities for maintenance of the vehicle. However, there are some situations in which the provider transfers maintenance obligations to the

412 Quotation 78:10.

413 Quotation 75:16. When new parts are needed, the consumer can be obliged to pay for them.

414 Quotation 88:14. Also see for the additional terms and conditions of *Ouicar*, <<https://support.Ouicar.fr/hc/fr/articles/360004863518>> accessed 28 June 2023.

consumer, resulting in more burden/responsibility for the consumer (while the consumer does not receive more rights/interest to the vehicle). *SnappCar*, regardless of the Member State, *Wibee* and contracts of the *Dutch Association for Shared Car Use* and the *General German Automobile Club* do not openly offer maintenance in the terms and conditions or the collaborative sharing contract, which results in inequivalent protection; therefore, these providers offer a lower level of protection compared to the responsibilities arising from their ownership. Furthermore, the right to roadside assistance does also not follow from the examined directives. Nevertheless, only *Getaround*, in all studied Member States, and *Wibee* offer equivalent protection compared to the responsibilities arising from their ownership regarding roadside assistance. The other platforms and all studied formal C2C collaborative sharing contracts do not offer roadside assistance, which means that they offer a lower level of protection compared to the responsibilities arising from their ownership.

Table 38: Interim results of collaborative mobility sharing on the right to conformity

Typologies	Countries	Providers	Right to conformity							
			Remedy: Repair	Remedy: Replacement	Repair or replacement within reasonable time	Alternative remedy when choice is disproportionate	Remedy: Price reduction	Remedy: Right to terminate	Maintenance	Roadside assistance
(e) Collaborative platform sharing	NL	SnappCar	-	-	-	-	-	-	=	-
		CarAmigo	-	=	-	-	-	-	=	-
	BE	Cozywheels	-	-	-	-	-	-	-	-
		Getaround	=	-	-	-	-	-	=	=
		Wibee	=	-	-	-	-	-	=	=
	FR	Getaround	=	-	-	-	-	-	=	=
		Ouicar	=	-	-	-	-	-	=	-
	GER	Getaround	=	-	-	-	-	-	=	=
SnappCar		-	-	-	-	-	-	=	-	
(f) Formal C2C collaborative sharing	NL	Dutch Association for Shared Car Use	-	-	-	-	-	-	=	-
		FR	ADETEC	-	-	-	-	-	-	=
	GER	General German Automobile Club	-	-	-	-	-	-	=	-
		Agenda 21 Herzogenaurach	-	-	-	-	-	-	=	-

7.3.4 Consumer rights and commercial guarantees

The inequivalences in consumer protection relate to commercial guarantees (article 17 of the Consumer Sales Directive), the creditworthiness assessment (article 8 and 9 of the Consumer Credit Directive), and other consumer rights. These are discussed below. These other consumer rights contain namely the right to early repayment (article 16 of the Consumer Credit Directive), the manner to calculate the annual costs (article 19 of the Consumer Credit Directive), regulation on creditors (article 20 of the Consumer Credit Directive), and certain obligations of credit intermediaries vis-à-vis consumers (article 20 of the Consumer Credit Directive).⁴¹⁵ Table 16 shows an overview of the inequivalences in the examined directives for mobility usership consumers. In addition, the (in)equivalences that follow from self-regulation for the consumer rights and commercial guarantees are shown below in Table 39.

7.3.4.1 Commercial guarantees

The commercial guarantee is defined comprehensively in paragraph 4.3.3 and according to article 2(12) in conjunction with article 17 of the Consumer Sales Directive.

It is in any case characteristic for the commercial guarantee that it extends beyond the legal guarantee. This means that, to some extent, all the plus signs (+) in Table 39 entail commercial guarantees. This paragraph only discusses cases where a (commercial) guarantee is provided explicitly, because other components that extend beyond the legal guarantee are discussed under paragraph 7.3.3, in comparison to (other) sales-based rights. The application of a commercial guarantee is not likely given the *ratio legis* of the provision. As a result, it is comprehensible that only the Belgian collaborative mobility sharing platform *CarAmigo* mentions that, in addition to the general guarantees provided for in the general terms and conditions of the assistance and insurance, there are assistance guarantees and insurance guarantees during carsharing. However, these are conditional guarantees, which means that they are not covered by the commercial guarantee.⁴¹⁶ Moreover, none of the formal C2C collaborative sharing model contracts provide a commercial guarantee in any form.

415 For an overview of the inequivalences following form legislation see paragraph 5.5.4.

416 Quotation 75:18.

7.3.4.2 Other consumer rights

Three other components of the Consumer Credit Directive are relevant: the consumer's entitlement to discharge fully or partially their obligations under the agreement,⁴¹⁷ the calculation of the annual percentage rate of charge,⁴¹⁸ and the supervision of the creditors.⁴¹⁹ Table 16 also summarises *inter alia* the inequivalences on the consumer's protection, whereas Table 39 shows the level of self-regulation.

Right to an early repayment

If article 16(1) of the Consumer Credit Directive would be applicable, the consumer is entitled at any time to discharge fully or partially their obligations under an agreement.⁴²⁰ The exact content of this rule is discussed in detail in paragraph 4.4.4. In any case, that is important that the rationale of this provision is to allow consumers to safeguard themselves from any changeable payment obligations. As elaborated on in paragraph 7.3.1.1, the *ratio legis* of this provision does not apply to collaborative sharing and application would not be proportional nor sensible. It is therefore comprehensible that none of the collaborative mobility sharing platforms nor the formal C2C collaborative sharing model contracts offers this right. As a result, the protection is inequivalent, but this is sensible and proportional because the situation is essentially different.

Calculation of the annual percentage rate of charge

Article 19 of the Consumer Credit Directive explains the manner to calculate the annual percentage rate of charge, which would be the annual costs (percentage) for mobility usership contracts.⁴²¹ Whereas paragraph 7.3.1.1 discusses the right to inform about the annual percentage rate of charge (article 5(1)(g) of the Consumer Credit Directive), this paragraph focusses on the substance of this right. The calculation of the annual percentage rate of charge is not useful nor proportional for collaborative sharing (paragraph 4.4.5). Therefore, it is evident that there is no clarification on these costs in the terms and

417 Article 16 Consumer Credit Directive 2008. Under this article the consumer is entitled at any time to discharge fully or partially his obligations under the agreement. In such cases, the consumer is entitled to a reduction in the total cost of the credit. As a result, the provider is entitled to fair and objectively justified compensation for possible costs directly linked to early repayment.

418 Article 19 Consumer Credit Directive 2008.

419 Article 20 Consumer Credit Directive 2008.

420 Article 16(2) Consumer Credit Directive 2008. The consumer shall be entitled to a reduction in the total cost of the contract, such reduction consisting of the interest and the costs for the remaining duration of the contract. In the event of such an early repayment, the provider shall be entitled to fair and objectively justified compensation for possible costs directly linked to early repayment of credit provided that the early repayment falls within a period for which the borrowing rate is fixed.

421 Also see paragraph 4.4.5.

conditions for the researched car or two-wheeler providers.⁴²² Nevertheless, his means that inequivalence in protection exists, but that this inequivalence is not problematic, see Table 39.

Supervision of the creditors

As mentioned under paragraph 4.4.5, creditors need to be supervised under the Consumer Credit Directive by a body or authority independent from financial institutions.⁴²³ In my opinion, placing individual providers under supervision via the Consumer Credit Directive is not necessary nor proportional, because with collaborative sharing there are no increased creditworthiness risks. In addition, this obligation does not rise from the terms and conditions of car providers because this obligation is imposed on the Member States. In addition, collaborative sharing concerns a very different scenario which makes comparison insignificant. This also applies for the obligations of credit intermediaries vis-à-vis consumers that follow from article 21 of the Consumer Credit Directive, which also imposes an obligation on Member States. Consequently, these possible inequivalences are not discussed here further.

Creditworthiness assessment

If the Consumer Credit directive would be applicable, the providers would be obliged to assess the creditworthiness of the consumer before the conclusion of the agreement. This follows from article 8 of the Consumer Credit Directive (Table 16).⁴²⁴ This paragraph discusses the substance of the creditworthiness assessment in conjunction with the database assessment.⁴²⁵ The *ratio legis* of the assessment of creditworthiness of the consumer is mainly to protect consumers from excessive credit in an attempt to prevent solvency problems.⁴²⁶ The creditworthiness assessment does not support the rationale of the legal rule for collaborative sharing and the application of the provision is, in my opinion neither necessary nor proportionate and the assessment would also contradict the short-term nature of collaborative sharing (paragraph 4.4.2). Nevertheless, all studied branches of *Getaround* mention the credit assessment. *Getaround* is entitled to obtain a credit score for any consumer whose profile is verified because *Getaround* contains a

422 However, it cannot be assessed based on the general terms and conditions whether such an annual percentage rate is calculated in accordance with the Consumer Credit Directive 2008 because no information is provided about this right (paragraph 7.3.1.1).

423 Article 20 Consumer Credit Directive 2008.

424 Article 8 Consumer Credit Directive 2008. The provider needs to do this based on sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database, See Article 9 of the Consumer Credit Directive 2008 for this database access.

425 Paragraph 7.3.1.1 elaborates on the provider's information obligation on a database consultation carried out for the purposes of assessing his creditworthiness.

426 The rationale behind the creditworthiness assessment is also to determine whether a consumer will fulfil his obligation to protect the provider.

payment system. At the consumer's first booking, *Getaround* asks an external party to perform a credit assessment on the consumer. To pass the credit assessment, the consumer needs a minimum credit score, based on the consumer's payment history.⁴²⁷ Furthermore, *Ouicar* reserves the express authorisation given by the consumer to *Ouicar* to make direct debits from its bank account before or at the end of the use for any credit assessments and for the amounts due under additional charges incurred during the use.⁴²⁸ The purpose of *Getaround* and *Ouicar* is to assess the creditworthiness of the consumer, whereas there is no underlying obligation that follows from the Consumer Credit Directive. Therefore, there is equivalent protection by these platforms. None of the formal C2C collaborative sharing model contracts mention any creditworthiness assessment.

7.3.4.3 Interim conclusion

In this section on consumer rights and commercial guarantees it becomes clear that there is inequivalent consumer protection on almost all components for all studied collaborative platforms and C2C collaborative sharing contracts as compared to the rules that apply for the Consumer Credit Directive and the Consumer Sales Directive. Regarding commercial guarantees, the possibility to discharge obligations under the agreement, and the manner to calculate the annual costs percentage, no connection is sought with the Consumer Credit Directive. The only exception concerns the possibility of a creditworthiness assessment, which right is only reserved by *Getaround*, in all Member States in which they operate, and *Ouicar*. Consequently, equivalent protection only exists for these platforms in comparison to the Consumer Credit Directive. However, the inequivalences in protection for the application of the creditworthiness assessment are sensible and not problematic as the *ratio legis* for this provision does not apply to collaborative sharing.

427 Quotation 77:2; 79:10.

428 Quotation 88:5.

Table 39: Interim results of collaborative mobility sharing on consumer rights and commercial guarantees

Typologies	Countries	Providers	Consumer rights and commercial guarantees			
			Commercial guarantee	Early repayment	Manner to calculate the annual costs percentage	Creditworthiness assessment
(e) Collaborative platform sharing	NL	SnappCar	-	-	-	-
		CarAmigo	-	-	-	-
	BE	Cozywheels	-	-	-	-
		Getaround	-	-	-	=
		Wibee	-	-	-	-
	FR	Getaround	-	-	-	=
		Ouicar	-	-	-	=
	GER	Getaround	-	-	-	=
		SnappCar	-	-	-	-
(f) Formal C2C collaborative sharing	NL	Dutch Association for Shared Car Use	-	-	-	-
		ADETEC	-	-	-	-
	GER	General German Automobile Club	-	-	-	-
		Agenda 21 Herzogenaurach	-	-	-	-

7.4 CONCLUSION

This chapter focusses on whether the shared mobility sector, including collaborative sharing, provides equivalent consumer protection, compared to consumers under a sales-based-contract, in practice due to the application of general terms and conditions or model contracts. Reference can be made to Table 30 and Table 35 for a full overview of the results for each provider, platform and model contract. This conclusion focusses on the most important overarching remarks and conclusions.

An important difference with chapter 6 is that the *ratio legis* of many provisions apply to exclusive use, while that *ratio legis* does not apply or only partially applies to shared mobility use, including collaborative sharing. In those cases, the nature of the business model deviates too much from the *ratio materiae* scope of the directive. This makes the

application of the provisions not proportionate but also not practically feasible. Therefore, it is comprehensible that in principle providers of shared mobility and collaborative sharing do not offer an increased level of protection. This means that inequivalent protection does exist but, unlike exclusive mobility use, this inequivalence is under certain circumstances justified. There are also rights for which the *ratio legis* does apply to shared mobility and in such cases the possibilities for suitable legislation should be considered.

As stressed in paragraph 6.5, this study looks at equivalent protection instead of equal protection, which means that the inequalities of the business models are taken into consideration. Like with exclusive use, equivalent protection for consumers often involves restricted use of the vehicle, which means that the provider imposes restrictions on how the vehicle may be used, whereas with a sale, the consumer would have complete freedom of action regarding the vehicle. This inequality in protection is inherent to the difference between ownership versus usership and is a vital factor that needs to be considered when assessing equivalent protection and examining possibilities for regulation.

A difference in the degree of contract standardisation per mode of transport exists, but for shared mobility use this is reversed compared to exclusive mobility use. The shared two-wheeler contracts show a degree of mutual adaptation and standardisation with considerably fewer mutual deviations of the rights compared to the carsharing sector. The collaborative platforms and model contracts also seem to be subject to a degree of contract standardisation with minimal mutual deviations.

While examining the model contracts of formal C2C collaborative mobility sharing, considerably less protection is proposed to the consumer compared to the sales-based consumer and other B2C shared mobility. This is in line with expectations, stemming from the *ratione personae* scope as it does not concern a B2C contract, but rather a C2C agreement. Consequently, the need to level out any imbalance between the contracting parties does not exist like in B2C relationships. In my opinion, the premise of equivalent protection continues to exist without the need for intervention. This also applies to collaborative platform sharing, where sharing also takes place between C2C, and the platform often absolves itself of any responsibility by declaring that it merely facilitates supply and demand between individual providers and consumers.

Some shared providers and platforms offer their services in multiple Member States. Independent of the means of transport, these providers do not apply the same general terms and conditions in each Member State. In case of exclusive use, these deviations also exist, especially for providers of lease cars but those deviations are more fundamental compared to the deviation that exist for shared use. Consequently, a different level of

protection between branches is only created for a few providers on a few components for shared mobility. The difference between exclusive use and shared use mainly arises from the fact that only in the exclusive use sector does a Dutch quality mark apply that increases the level of protection.

The difference that exists in whether or not equivalent protection is offered may also be affected by the difference in purchase/contract value of the mode of transport (and thus the financial risk). In the event of a higher risk (cars), this risk is, for example, partially mitigated by the application of a termination fee. This does not apply to collaborative shared mobility, because the individual provider remains the owner and does not share the vehicle for business purposes and is therefore not at a similar (financial) risk.

Finally, mobility usership contracts consist of a use component and a service component. As substantiated on in paragraph 1.2.2, with short-term shared mobility use the emphasis of the contract lies on the availability of the mobility instead of the use. The availability of mobility is certainly considered a premise by the two-wheeler providers. Shared providers mention the option of replacing a defective vehicle on the spot for a working one. While this appears to remediate the defect, the availability of a replacement vehicle can by no means be guaranteed. This (legal) uncertainty leads to an undesirable scenario in terms of equivalent protection. To some extent, this also highlights the volatility and uncertainty associated with leaving these issues to self-regulation.

8 KEY IMPROVEMENTS FOR EQUIVALENT PROTECTION AND ITS ACCESSIBILITY THROUGH REGULATION

8.1 INTRODUCTION

In chapter 2 to 5 it became clear under which circumstances the mobility usership consumer is protected by the current legal consumer protection framework (i.e. European directives) and when they are not. The (in)equivalence of protection may indeed arise from the *ratione personae* scope (chapter 2) and the *ratione materiae* scope (chapter 3), whereby the rights of sales-based consumers are not applicable to the use-based consumer, but application issues were discussed to investigate the equivalent protection (chapter 4). In other cases, the sales-based legal framework applies, and equivalent protection exists (chapter 5). Subsequently, in chapter 6 and chapter 7 it was examined whether the (in)equivalence of mobility usership consumer protection also results from self-regulation, namely by the general terms and conditions of the mobility usership sector. In these chapters it was identified when (and when not) there is equivalent protection of the mobility usership consumer compared to the sales-based consumer. The current chapter discusses the possibilities to improve protection for cases where inequivalent consumer protection exists. As already mentioned in paragraph 1.3, this research aims at the *mutatis mutandis* application of the selected EU directives. A direct application is not the aim, because the fact that a consumer is not an owner but only a user has consequences for the legal status and relationship. The basis is therefore equivalent protection, which explicitly not equals identical protection, because the business models (sale versus use) have a different nature. Therefore, the qualities, assets, performance, and other modalities of the mobility usership model are taken into consideration while assessing equivalent consumer protection for mobility usership. Central to this chapter is the consideration of whether the rights should become equivalent or not, taking into account the special nature of mobility usership contracts.¹

1 See paragraph 1.3 for an elaboration on the definition of ‘equivalence’. Either way, the equal protection of consumers is an important spearhead of the EU consumer policy, and this concerns equal protection in equal cases. In this study, the term equivalent was deliberately chosen because the research examines equivalent protection vis-à-vis consumers who purchase a product. This concerns a comparison of dissimilar cases, so the research must expressly focus on equal protection. After all, an ownership right entails far-reaching rights and obligations, going beyond use. On equal protection, see for example: BEUC, ‘The Consumer Voice in Europe: Proposal for a Better Enforcement and Modernisation of EU Consumer Protection Rules: BEUC response to the Commission ex-post consultation’ (31 May 2018) BEUC-X-2018-041, p. 2.

Consequently, I formulate key improvements that could contribute to the achievement of equivalent protection for mobility usership consumers. This is based on the inequalities arising from the legal framework (and not self-regulation). Research on self-regulation has provided important insights into the extent to which the mobility use sector provides consumers equivalent protection in practice with the application of terms and conditions compared to sales-based consumers. Self-regulation that increased the level of protection has also served as an important source of inspiration to arrive at rules and solutions that suit the mobility usership sector. Yet self-regulation is to a certain extent volatile and uncertain because it exists *inter alia* on a voluntary basis, so that the most important improvements are formulated on the basis of the (in)equivalencies in the legal framework.

At the same time, the current level of self-regulatory consumer protection is taken into consideration when exploring solutions to improve protection of mobility usership consumers. These improvements may take effect by either adjusting or implementing legal rules enforced by governmental regulation or by self-regulatory measures, such as a quality mark. In this chapter, both ways of regulation are ways to implement the suggested improvements. Although this consideration is ultimately also a political choice, advantages and disadvantages for both self-regulation and legislation are elaborated in light of the mobility usership business model.

When discussing the solutions for equivalent mobility usership consumer protection, a distinction is made, if relevant, between solutions for exclusive mobility use and shared mobility use, which fall under the *ratione personae* scope. As argued in paragraph 2.5.3 and 2.6.1, collaborative mobility use is excluded from the *ratione personae* scope of the researched legislation because this constitutes a C2C agreement. After all, EU consumer law does not apply to C2C contracts since they are an agreement between an individual provider and a consumer.² As a result, general contract law applies here and not specific consumer laws.

Collaborative shared mobility also includes C2C sharing with the intervention of a platform. Platforms also bear a level of responsibility by making shared mobility available but the responsibilities of such platforms do not touch the core of the study. Nevertheless, the C2C relationship of collaborative platform sharing is, in view of consistency, discussed because the relationship between provider and consumer of the (use of the) vehicle is central to this study.³

Following the order of Table 13, Table 14, Table 15 and Table 16 the inequalities in protection will be cited and for each inequality, the possibilities in providing equivalent

2 Table 6 and Table 8.

3 Paragraph 1.2.

protection are discussed. The following sections will be discussed successively: the right to information (paragraph 8.2), the right to change your mind (paragraph 8.3), the right to conformity (paragraph 8.4), and other consumer rights and the commercial guarantee (paragraph 8.5), and the ways of regulation (paragraph 8.6).

8.2 RIGHT TO BE INFORMED

The right to information is an important consumer right that needs to be more aligned with the sales-based level of consumer protection because full information empowers consumers by ensuring they have access to accurate, relevant, and understandable information. This is justified by the consideration that the need for a right to be informed is no different for sales-based consumers than for mobility usership consumers.⁴ An important step towards more equivalent protection for mobility usership consumers can be made regarding the current information obligations. The key information components on which improvement can be made and how this improvement could be manifested are discussed below.

The Consumer Rights Directive, the Consumer Credit Directive, and the Unfair Contract Terms Directive stipulate the conditions of clarity and comprehensibility in relation to the right to be informed.⁵ In fact, these conditions are met by most providers in their general terms and conditions (Table 25, Table 30 and Table 35). Only in cases where the general terms and conditions are not made available to consumers in (one of) the official language(s) of the Member State do providers fall below the minimum level of protection that follows from the directives, because the requirements of clarity conciseness, and comprehensibility are not met (paragraph 5.5.1, 6.4.1.3, 7.2.1.3 and 7.3.1.3).

8.2.1 *Information on an early repayment*

Inequivalent protection exists on the information obligation regarding whether a consumer is entitled to an early repayment.⁶ This early repayment option includes the right to reduce the total cost of the contract, which reduces the instalment costs, lowering the consumer's periodic payment obligation. This inequivalence in protection is not problematic for most of the mobility usership models. Mobility sharing involves one-off

4 The fact that the need for a right to be informed is no different for sales-based consumers than for mobility usership consumers still means that the content of the right may differ for different business models.

5 Article 5(1), 6(1) Consumer Rights Directive; Recital of the Unfair Contract Terms Directive; Recital 31 Consumer Credit Directive 2008; paragraph 5.2.1 and 5.4.

6 Article 5(1)(p), 16(1) Consumer Credit Directive 2008; paragraph 5.5.1, 6.4.1.3, 7.2.1.3 and 7.3.1.3.

payments that are (often) paid in advance (or immediately after using the mobility). The interest of an early repayment for shared mobility use is therefore not due simply because there is no reduction of periodic payments. This means that there is no need or necessity to implement information duties for this aspect of the information requirement.

8.2.2 Information on the existence or absence of the right of withdrawal

The Consumer Credit Directive requires that the provider informs about the existence or absence of the right of withdrawal. Equivalent protection on this matter is necessary; the consumer needs to be well informed about the existence or absence of this important right of withdrawal as this need does not diverge from scenarios where the examined consumer directives do apply (paragraph 5.5.1, 6.4.1.3, 7.2.1.3 and 7.3.1.3).

It is important that providers inform their consumers well about the existence of the right of withdrawal as this does not diverge from scenarios where the examined consumer directives apply. The Dutch private lease quality mark follows the same line as the Consumer Rights Directive. The consumer should be informed by the provider about their right of withdrawal. The discussion of the substantive right of withdrawal, and therefore the assessment of the extent to which the right of withdrawal for mobility usership exists and should exist, is covered in paragraph 8.3.

8.2.3 Information on the procedure to terminate

Inequivalent protection exists regarding the information about the procedure that applies when the consumer wants to terminate the agreement.⁷ Equivalent protection compared to article 10(2)(s) of the Consumer Credit Directive is particularly important in cases of exclusive mobility use because it involves a predetermined, long-term contract with a monthly payment obligation for the consumer. Early termination of such long-term contract is therefore relevant. In case the exclusive use consumer wants to terminate the lease contract, it is important that the consumer is informed about the procedure of termination by offering full information to enhance consumer confidence and contribute to equivalent protection. Consumers have to know his rights and the consequences thereof.

The importance of the right to terminate is not relevant in short-term shared mobility and collaborative platform sharing. In these mobility usership models the consumer

⁷ Article 10(2)(s) Consumer Credit Directive 2008; paragraph 5.5.1, 6.4.1.3, 7.2.1.3 and 7.3.1.3.

determines the duration of mobility use and can, in principle, terminate the use whenever the consumer wishes.⁸ This would only be different if the ride cannot be ended due to, for example, a technical defect in the mobile application that makes termination of the ride impossible, or in the case of a station-based system, if a defect makes it impossible to bring the vehicle to a station and then end the ride.

Protection equivalent to article 10(2)(s) of the Consumer Credit Directive is in my view necessary because the consumer needs to be well informed about his rights. In order to offer equivalent protection compared to the Consumer Credit Directive, the mobility usership consumer should be informed about (1) when termination is allowed, and (2) what the consumer must do to terminate (e.g. a written notification). In the case of exclusive use of mobility, information must also be provided about (3) any obligation to pay a termination fee, including information on the way the fee should be calculated, a representative calculation example of the fee, and the maximum termination fee.

A termination fee should not apply to shared mobility use, because the provider is not exposed to additional risk when the shared mobility use is terminated by the consumer because, due to the nature of shared mobility, the vehicle immediately becomes available for a subsequent user.⁹ In addition, the risk for the provider is limited by the (low) price per ride, which means that a termination fee would in my view be disproportionate. Therefore, this information obligation is not essential for providers of shared mobility use to offer equivalent protection. In some cases, a prior reservation is required for collaborative platform sharing. If a consumer decides not to use the mobility after reservation, a fee could be charged because the individual provider runs the risk of missing other consumers using their mobility due to the reservation.

8.2.4 *Information on changes in the borrowing rate*

Another inequivalence in protection that appears for mobility usership contracts compared to article 10(2)(f) of the Consumer Credit Directive is the information on any changes in the price or cost structure (paragraph 5.5.1, 6.4.1.3, 7.2.1.3 and 7.3.1.3). It is important that the mobility usership consumer is informed about this issue because it prevents the consumer from being overtaken by contract changes that has financial consequences and puts pressure on the consumer's creditworthiness. In addition, consumers need to be well

8 For collaborative platform sharing, this is often within a certain (reserved) time frame.

9 Unless, for example, the consumer reserves the vehicle, where the consumer is given 10 minutes to start the use of the vehicle. However, the vehicle was only unavailable for other consumers for 10 minutes. The risk for the provider therefore remains limited.

informed about their right and their contract terms. As elaborated on in paragraph 4.4.4, the borrowing rate does not fit mobility usership; therefore it is examined whether information is provided on changes in the price or cost structure of mobility usership as this is in line with the rationale of this information obligation.

The ability of exclusive mobility providers to change the price or cost structure (during the term of the contract) should only be possible under certain circumstances. This possibility should exist when taxes or charges related to the ownership or use of the vehicle are changed or introduced after signing the contract.¹⁰ Examples are the motor vehicle tax, VAT, and insurance tax. A change in the price may also be implemented by the provider if the purchase price of the vehicle is increased between conclusion of the contract and delivery of the vehicle. If the instalment amount is increased on this basis, the consumer should have the option of ending the lease agreement without further costs.

In case of shared mobility use, the provider must not have the opportunity to change the price or cost structure during the term of the contract because the duration of use is short. In principle, it must be clear in advance which (price) conditions the consumer agrees to; an interim price change would lead to disproportionate results and uncertainty because the consumer is not given the opportunity to consider the possible (financial) obligations. In addition, the possibility of ending the shared mobility in case the consumer does not agree with the change is not proportional as opposed to this solution for exclusive use. After all, this would mean that the consumer would have to end the ride halfway through.

The consumer must know prior to the use what costs the consumer can expect as the consumer cannot be informed in advance in the event of interim price changes due to the short duration of the agreement. This line of thought also applies to collaborative mobility sharing, because of their corresponding core features. This option should therefore be waived in shared mobility and collaborative platform sharing as this right would not contribute to an equivalent level of consumer protection due to its rationale.

8.2.5 Information on the standardised information form

The specific SECCI form or an equivalent information form is currently not provided by providers through the examined directives or self-regulation.¹¹ The purpose of such

¹⁰ This maintains the line of the Dutch private lease quality mark as a minimum, equivalent protection is thereby achieved.

¹¹ Article 5(1) Consumer Credit Directive 2008; paragraph 5.5.1, 6.4.1.3, 7.2.1.3 and 7.3.1.3.

a standardised form is to facilitate the comparison between the offers of the different providers and contributes to accessible, reliable, and verifiable information, enabling easy and practical choices by consumers. This should also be possible for mobility usership consumers by applying a standard form since there is no reason to treat this type of consumer differently and the goal of having consistent information by using a uniform form applies also here. For exclusive use, the SECCI form can be applied with minor adjustments since the business model is comparable to consumer credit and the SECCI form is in my view fit for purpose. The elements that should be addressed in the standard form are the identity and contact details of the provider, a description of the main features of the agreement, the costs of the use and other important legal aspects such as the right of withdrawal, the consultation of a database to assess creditworthiness, and the right to a draft agreement. For shared mobility use, such a standard form can only work if it is so concise that it does not oppose the ephemerality of the contract and does not interfere with the pillars of availability and accessibility that define shared mobility. Giving a description of the key features of the agreement and the costs of the use would suffice for shared mobility contracts. In addition, the standard form for shared mobility should indicate where information about the identity and contact details of the provider and other important legal aspects can be found if the consumer would like to consult them. Such a concise information form could also contribute to equivalent protection for collaborative platform sharing. The platform could (and should) make such a form available.

8.2.6 *Information on the cost structure*

The information provisions in the Consumer Credit Directive on the cost structure does not apply to mobility usership models. Moreover, in the studied general terms and conditions (and model contracts) of the mobility usership providers, the consumer is not informed about the cost structure, resulting in inequivalent protection compared to the Consumer Credit Directive (paragraph 5.5.1, 6.4.1.3, 7.2.1.3 and 7.3.1.3). Nevertheless, to contribute to consumer knowledge, it is important that mobility usership consumers are informed about the cost structure of the mobility. The right to know the cost structure is not different for mobility usership consumers compared to sales-based consumers because a different business model does not influence whatsoever the need for transparency.

Although cost structures vary for different mobility usership models and providers, all mobility usership agreements consist of a use component and a service component. The provider should therefore inform about the aggregate of the various types of costs, fixed and variable, which make up the overall price for the consumer. This means that the mobility usership provider should inform the consumer that the price they pay consists of

a price for use and a price for services. Consequently, not only does informing about the existence of these components fulfil this information obligation, but also the ratio between these components should be specified. The use component can be elaborated even further in application to shared mobility use because it often depends on (1) the duration of use and (2) the distance travelled during that use (plus a starting fee).

In collaborative platform sharing, the individual provider regularly determines the price. The collaborative platform could provide the consumer with insight into the costs to which he (possibly) agrees by giving the individual provider the opportunity to specify the costs. However, this will often be burdensome for the individual provider. In practice, the individual provider often offers an all-inclusive daily price for the mobility, which is in my view proportional because collaborative use rarely concerns a profit motive. Rather, it concerns simple compensation for the (sporadic) use of the vehicle.¹²

8.2.7 Information on the database consultation

A significant inequivalence in consumer protection also exists for the information obligation for consumers to be informed on any assessment of creditworthiness, an obligation that the provider should also include in the SECCI form (paragraph 8.2.5).¹³ The consumer must receive transparent information about a possible creditworthiness assessment. This obligation is particularly important for exclusive use, especially of cars, because creditworthiness problems are more likely to occur due to longer-term payment obligations entered by the consumer and the amount of periodic payment obligations is higher. For the mobility usership models for which a creditworthiness assessment should exist, there should also be a provider's obligation to offer information about that assessment. In paragraph 8.5.2, this is discussed further.

8.2.8 Right to a copy of the draft agreement

Another inequivalence in protection that appears for mobility usership contracts is the information obligation of the consumer's right to a copy of a draft agreement.¹⁴ This draft agreement should enable the consumer to compare proposals upon the consumer's request. The promotion of the comparability of agreements is important for all mobility

¹² This does not mean, however, that the individual provider would not be able to aim at breaking even of the income for providing the mobility and the costs for his vehicle ownership.

¹³ Article 5(1)(q) Consumer Credit Directive 2008, paragraph 5.5.1, 6.4.1.3, 7.2.1.3 and 7.3.1.3.

¹⁴ Article 5(1)(r) Consumer Credit Directive 2008, paragraph 5.5.1, 6.4.1.3, 7.2.1.3 and 7.3.1.3.

usership models but this comparison becomes more necessary (and likely) when the amount and risks involved in the agreement are higher. Therefore, this information will be more relevant for exclusive use as opposed to shared use. Nevertheless, a consumer should in all cases be able to request a draft agreement from the provider to compare proposals. These drafts can of course be provided online. The fact that it concerns a mobility usership model does not make it different as compared to the cases where the consumer directives apply.

8.2.9 *Other consumer information rights*

The mobility usership sector often provides information about the consumer obligation to take out ancillary services,¹⁵ and required sureties and insurances;¹⁶ however, these obligations from the Consumer Credit Directive do not apply to mobility usership consumers. It is important to inform the consumer of additional (payment) obligations that exist when the consumer concludes a mobility usership contract, so that the mobility usership consumer can make a holistic consideration. This also applies to the information obligation on the consequences of late payments,¹⁷ where the majority of mobility usership providers comply with the obligation, although the Consumer Credit Directive does not require this for mobility usership consumers (Table 26, Table 31 and Table 36). Here too this information would contribute to the possibility of making a fully informed assessment, enabling equivalent consumer protection.

8.3 RIGHT TO CHANGE YOUR MIND

The Consumer Rights Directive and the Consumer Credit Directive both contain provisions concerning the right of withdrawal. The Consumer Rights Directive excludes exclusive mobility use if classified as a distance or off-premises service contract, whereas the Consumer Credit Directive excludes all forms of mobility usership. The right of withdrawal under the Consumer Credit Directive is examined as it is slightly stricter (paragraph 4.4.4, 5.2.2 and 5.5.2). The information to be provided about the right of withdrawal was discussed in paragraph 8.2.2.

15 Article 5(1)(k) Consumer Credit Directive 2008, paragraph 5.5.1, 6.4.1.3, 7.2.1.3 and 7.3.1.3.

16 Article 5(1)(n), 10(2)(o) Consumer Credit Directive 2008, paragraph 5.5.1, 6.4.1.3, 7.2.1.3 and 7.3.1.3.

17 Article 5(1)(l), 10(2)(l) Consumer Credit Directive 2008. See for an elaboration on why I consider the consequences of late payments (instead of the interest rate applicable in the case of late payments and the arrangements for its adjustment, and, where applicable, any charges payable for default). Paragraph 5.5.1, 6.4.1.3, 7.2.1.3 and 7.3.1.3.

The right of withdrawal is the 14-day cooling-off period that applies to all distance and off-premises agreements and all shared mobility falls within the *ratione materiae* scope of this right because it concerns a distance contract. The short-term nature of shared mobility opposes the 14-day term of this right. The exception of sub (a) of the right of withdrawal under the Consumer Rights Directive is a solid solution to achieve equivalent protection. The right of withdrawal does not apply to collaborative sharing due to the *ratione personae* scope of the directives because it constitutes a C2C relationship.¹⁸ As a result, there is no imbalance or rigorous information asymmetry between the contracting parties which means that there is no need to apply the right of withdrawal to collaborative sharing. The non-applicability of this right is therefore justified in my view and no inequivalent protection exists for collaborative sharing.

The application of the right of withdrawal as follows from the Consumer Rights Directive depends on the way the agreement is concluded (*ratione materiae* scope). The right of withdrawal does not exist in cases where an exclusive use agreement is concluded due to the exception of article 16 (1) of the Consumer Rights Directive. It is important to find an appropriate method to implement the right of withdrawal, as it is currently incomprehensible that this right is excluded for exclusive mobility when the contract classifies as a distance or off-premises service contract.

8.4 THE RIGHT TO CONFORMITY

The right to a conform product is eminently a consumer right that is linked to consumer sales and follows from the Consumer Sales Directive. Defects must in principle be remedied by the provider of the product. Although the right to a conform product is a sales concept and the *ratio legis* of this provision (being legal certainty and consistency) also applies to mobility usership, the provision itself does not apply. Nevertheless, a part of the mobility usership sector provides to some extent primary remedies in their general terms and conditions, such as repair and replacement.¹⁹ The so-called secondary remedies, such as a price reduction and the right to terminate, are hardly contractually provided by the sector.²⁰

For most mobility usership consumers, neither the examined directives nor the self-regulation provides a solution for defects.²¹ In the majority of the sector, service packages

18 Table 6 and Table 8.

19 Article 13, 14 Consumer Sales Directive; Table 15, Table 28, Table 33 and Table 38.

20 Article 13, 15, 16 Consumer Sales Directive; Table 15, Table 28, Table 33 and Table 38.

21 Other than general legal remedies because of a breach of contract; compensation, termination of the contract.

can be purchased, giving the consumer the right to replacement or repair in the event of a defect.²² However, purchasing additional remedies does not provide equivalent protection. The remedies in a consumer sale are always available (regardless of the price) because a minimum level of protection and legal certainty are key. The option of purchasing remedies as an add-on (with a certain magnitude) offered by one provider but not by another (or with a different magnitude) highlights the volatility and uncertainty associated with leaving these issues to self-regulation.

No remedies are provided in cases of collaborative sharing, either through an add-on or in the terms and conditions of the model contract.²³ There seems to be no need to apply the sales-based remedies because the use is facilitated from individual provider to consumer (C2C).²⁴ In C2C relationships, the mutual relationship is inherently more equal, so the need to compensate inequality is neutralised, unlike in B2C relationships. Due to the equal nature of C2C relationships, the application of the rules regarding the remedies puts a heavy burden on the individual provider. This would cause an evident imbalance between the contracting parties. In my opinion, the rules regarding the remedies should not apply to this type of business model.

When applying the remedies of the Consumer Sales Directive, the first step is to examine to what extent replacement and/or repair is possible when a defect occurs.²⁵ This is possible if defects can be remedied within a reasonable period or without serious inconvenience to the consumer.²⁶ Repair and replacement, aiming at the continuation of mobility, should in principle be possible for exclusive use.²⁷ If repair of the vehicle is, for example, disproportionately expensive or takes a long time, the continuation of mobility should prevail, namely the replacement of mobility must be made available. Repair of a vehicle in use by the consumer is too time-consuming for the shared mobility use model. Since defects should be remedied within a reasonable period or without serious inconvenience to the consumer, this remedy fails for the consumer of shared use. Replacement is only possible within a reasonable period or without serious inconvenience to the consumer if another vehicle is available on site. Although this chance is higher for station-based

22 While mobility usership contracts theoretically consist of a use component and a service component, in practice many exclusive use providers seem to opt for a minimalist mobility usership contract in which the consumer chiefly pays for the use of the mobility and repair and replacement can be added on against additional payment.

23 Table 15, Table 28, Table 33 and Table 38.

24 C2C does not fall under the *ratione personae* scope of consumer law. See for an elucidation on the matter paragraph 2.5 and 2.6.

25 Article 13(2) Consumer Sales Directive.

26 Article 14(1) Consumer Sales Directive.

27 As elaborated on in paragraph 4.3.2.

models than for free-float models, availability of a replacement cannot be guaranteed by either of the models, while such a guarantee is important for equivalent protection and legal certainty. Only when replacement on site (or in close proximity) is possible, the defect can be remedied. In other cases, the primary remedies do not provide solace as mobility cannot be continued. Any responsibility for the provider in such cases would be disproportionate.

When replacement and repair are impossible, according to the hierarchy of remedies, the secondary remedies of price reduction and the right to terminate apply (article 13(4) of the Consumer Sales Directive). The examined national contract laws offer consumers the option to terminate the contract in case of a non-performance.²⁸ As a result, these national rules offer equivalent protection for this remedy. Furthermore, none of the mobility usership providers include in their general terms and conditions a price reduction as a remedy in the event of a defect. This is remarkable because the remedy cannot only be a valuable enrichment to the other sales-based remedies for both contract parties but can also induce equivalent protection regarding the right to a price reduction. This is also a valuable enrichment to the secondary remedies for the provider because otherwise there would only be a possibility of termination for the consumer. Due to the price reduction, an agreement does not have to be terminated immediately, but can still partly generate income for the provider if mobility usership is (or can)not offered fully effectively. The right to a price reduction is a remedy that has less far-reaching consequences than the right to terminate the agreement and could therefore complement that latter remedy. After all, if a marginal defect would occur in the vehicle, for example the lack of a bicycle bell or a luggage carrier, a price reduction would provide an interim solution with less far-reaching consequences that complements the all-or-nothing solution. This also ensures a more equal balance between the contracting parties. The remedy of price reduction especially fits in case of a marginal defect of the used vehicle because the continuation of mobility will not (directly) be endangered, and consumers could complete the ride without the optimal functions of the vehicle. With shared mobility, such a proportional price reduction would also enrich current remedies and induce equivalent protection regarding the right to a price reduction in comparison to sales. In case of shared mobility, a price reduction should be based on the elimination of the starting fee if the ride is completed as the costs associated with the distance and duration of the ride should in principle remain due.

To promote equivalent protection compared to the Consumer Sales Directive, the hierarchy of remedies from the directive should be applied to mobility usership agreements because the hierarchy ensures that the current remedies for usership consumers are enriched. The

28 Paragraph 6.4.3.4, 7.2.3.2 and 7.3.3.2.

mobility usership provider cannot always guarantee the primary remedies (especially with shared use), so there may be scenarios where there are no remedies for the consumer in the event of non-compliance. This is an undesirable situation because the consumer has the right to use a good that is in order and functions well (paragraph 4.3.2). By offering the full range of sales-based remedies, the consumer has various ways to remedy non-conformity – just as with sales-based consumers – leaving the remediation less to chance. The character of the mobility usership models should be considered with a focus on continuation of the mobility.²⁹ No reason exists to withhold the consumer in mobility usership models the right to use a well-functioning good and the remedies attached thereto. This means that there is currently inequivalent protection for mobility usership consumers regarding the right to conformity.

8.5 OTHER CONSUMER RIGHTS AND COMMERCIAL GUARANTEES

Under this subheading the creditworthiness assessment and the consumer's entitlement to an early repayment will be discussed successively.³⁰ These parts are discussed because an enhancement can be made there in the equivalence of protection and the other rights are not seen as a spearhead for this enhancement.³¹

8.5.1 *The consumer's entitlement to an early repayment*

The consumer should in my view be informed about the possibilities of an early repayment, which is currently not the case (paragraph 8.2.1). For mobility usership consumers, article 16 of the Consumer Credit Directive also includes the substantive right of the consumer's entitlement to early repayment.³² There is *stricto sensu* inequivalent protection for mobility usership consumers. However, for shared mobility use this right is

29 As elaborated on in paragraph 4.3.2.

30 Also see paragraph 4.4.5, 5.5.4, 6.4.4.2, 7.3.4.2 and 7.2.4.2.

31 Article 8, 16 Consumer Credit Directive 2008; paragraph 4.4.5, 5.5.4, 6.4.4.2, 7.3.4.2 and 7.2.4.2. This means that the commercial guarantee is not discussed because it does not relate to equivalent protection because the commercial guarantee concerns rights/guarantees beyond the law and are the magnitude of a guarantee is to be determined by the guarantor (Article 17 Consumer Sales Directive; paragraph 4.4.5, 5.5.4, 6.4.4.1, 7.2.4.1 and 7.3.4.1. Moreover, the calculation method for the annual percentage rate of charge is not discussed. Although a translation must be made here if the rules of the Consumer Credit Directive 2008 were to be applied to mobility usership, this does not entail a significant improvement in equivalent consumer protection (Article 19 Consumer Credit Directive 2008; paragraph 4.4.5, 5.5.4, 6.4.4.2, 7.3.4.2 and 7.2.4.2).

32 Article 16 Consumer Credit Directive 2008; paragraph 4.4.5, 5.5.4, 6.4.4.2, 7.3.4.2 and 7.2.4.2.

not relevant, since the payments are one-off and are often paid in advance or immediately after use, which means that the option of an early repayment is irrelevant.³³

For exclusive use, payments are also made in advance, but the agreement concerns periodic payments. The inequality in protection is problematic for the exclusive use of mobility. The rationale of this provision allows consumers to safeguard themselves from any changeable payment obligations and this also applies to exclusive use.³⁴ This mainly follows from the similarities of the characteristics between a consumer credit contract of the Consumer Credit Directive and a contract of exclusive use. Nevertheless, the protection strongly deviates.³⁵ In addition, the main difference is the transfer of ownership, which does transfer in case of consumer credit contracts but not in the case of exclusive use. Its comparability also follows from the periodic (often monthly) payment obligation entered by the consumer with the provider.³⁶ As a result, the rationale behind the consumer's entitlement to an early payment therefore does not differ for the exclusive use consumers compared to sales-based consumers.

To create equivalent protection, an example could be taken of the Dutch providers who have implemented and supplemented the Dutch private lease quality mark in their conditions. First, obligatory payment in advance by providers is prohibited. In addition, the consumer has the option to make a one-off prepayment prior to the lease term. As a result, the prepayment is deducted from the sum of the monthly instalments of the lease contract to be paid. The advance payment proportionally reduces the monthly instalment. Furthermore, the Dutch private lease quality mark states that the consumer is not allowed to pay more in advance than half of all lease instalments combined. However, this maximum does not seem important to adopt because, one way or another, the consumer meets the payment obligation. In addition, this maximum does not rise from the Consumer Credit Directive. As a result, adopting the rule without the maximum contributes to an equivalent level of protection.

A more extensive level of protection could possibly be pursued because the exclusive consumer might have an even greater disadvantage compared to the consumer of credit.

33 Paragraph 8.2.1.

34 Paragraph 4.4.4.

35 Paragraph 4.4.5, 5.5.4, 6.4.4.2, 7.3.4.2 and 7.2.4.2.

36 J. de Vogel (2020) 'Private Lease: Consumer Credit in Disguise?' *Journal of European Consumer and Market Law* (9)2, p. 53; V. Mak (2019) 'Consumentenbescherming bij servitization' *Preadviezen Vereniging voor de vergelijkende studie van het recht* 2019-1, pp. 69-98; S.E. Machiels and T.M. Penninks (2015) 'Private lease' *Tijdschrift voor Financieel Recht* (5), pp. 165-169; N. Hoefsloot, P. Risseeuw, L. Tilburgs, C. de Jager (2021) 'Marktonderzoek Private Lease' <<https://www.tweedekamer.nl/downloads/document?id=2021D28435>> accessed 19 October 2023.

After all, the consumer of credit acquires the vehicle in ownership and will enjoy this good for the remainder of the product life and benefits from any residual value of the vehicle in case the consumer were to dispose of the vehicle. However, the consumer of exclusive use is the sole user of the vehicle, while making (similar) monthly payments but these monthly payments do not offer the same (future) benefit of ownership. At the same time, the rights of the consumer of exclusive use are more extensive than just the use of the vehicle, as for example a right to repair and maintenance is often obtained, while in the case of ownership the costs and risks are of course borne by the consumer.³⁷ In any case, the exclusive mobility consumer should have equivalent protection by the option to make a one-off prepayment prior to the lease term, where the advance payment proportionally reduces the monthly instalment.

8.5.2 Creditworthiness assessment

Inequivalence in consumer protection exists regarding the obligation for providers to assess the consumer's creditworthiness.³⁸ To offer equivalent protection compared to the Consumer Credit Directive, the mobility usership provider must verify whether the consumer is expected to be able to meet the payment obligations arising from the intended mobility usership agreement. Based on this creditworthiness assessment, the mobility usership provider decides whether it is responsible to provide the credit to prevent over-indebtedness. Dutch lease providers affiliated with the Dutch private lease quality mark do a similar financial assessment before concluding a lease contract with the consumer. This contract is also registered with the Dutch Credit Registration Office.

The comparability of consumer credit and private lease emphasises the necessity to apply a creditworthiness assessment to mobility usership because *inter alia* the private lease consumer has – at minimum – an equally disadvantageous position in comparison to the credit consumer (paragraph 4.4.2).³⁹ After all, the aim of a creditworthiness assessment of the Consumer Credit Directive is to assess the consumer's ability to make repayments in a sustainable manner, without incurring financial difficulties or experiencing significant adverse consequences to protect the consumer against over-crediting (and the provider

37 J. de Vogel (2020) 'Private Lease: Consumer Credit in Disguise?' *Journal of European Consumer and Market Law* (9)2, p. 53.

38 Article 8 Consumer Credit Directive 2008; paragraph 4.4.5, 5.5.4, 6.4.4.2, 7.3.4.2 and 7.2.4.2.

39 Also see for example: J. de Vogel (2020) 'Private Lease: Consumer Credit in Disguise?' *Journal of European Consumer and Market Law* (9)2, p. 53; S.E. Machiels and T.M. Penninks (2015) 'Private lease' *Tijdschrift voor Financieel Recht* (5), pp. 165-169; N. Hoefsloot, P. Risseeuw, L. Tilburgs, C. de Jager (2021) 'Marktonderzoek Private Lease' <<https://www.tweedekamer.nl/downloads/document?id=2021D28435>> accessed 19 October 2023.

against payment delays or non-payment) by offering responsible practices. This aim as well as the affiliated risks are no different for exclusive mobility consumers.⁴⁰ This is also confirmed by a recent change in Dutch credit registration, influencing the Dutch quality mark private lease. First, the quality mark (in cooperation with the Dutch Credit Registration Office) only registered the financing function of the lease (the costs for use), which is claimed to be 65 percent of the monthly costs. The remaining 35 percent is the services function of the lease (costs for tax, maintenance, repair, and insurance) and was not registered.⁴¹

As of April 2022, the Dutch Credit Registration Office has come to other insights and adjusted its regulations; now the total lease amount is registered by the participants of the quality mark. To induce equivalent protection, this insight should in my view be followed for the exclusive use sector since the entire lease amount affects the creditworthiness of the consumer, as its entirety is a mandatory payment. However, the relevance and the burden of a creditworthiness assessment for the contracting parties must be feasible and balanced. Therefore, objective criteria should in my view be used to determine when the assessment should be mandatory for the mobility usership provider. The quality mark (based on the Dutch Credit Registration Office) offers a clear and objective benchmark for this and could easily be followed. This results in the requirement of a credit assessment for mobility usership usage in case the contract value exceeds €250, and the contract runs for more than one month. As a result, providers of shared mobility use and collaborative platform sharing are excluded from this obligatory assessment, while the obligation would apply to exclusive use provided that the contract value exceeds the minimum amount. In practice, this will often mean that providers of cars must assess creditworthiness, while providers of two-wheelers (usually) do not. For the two-wheelers, this is relevant to the fact that the monthly amounts are below that objective benchmark, and contracts can usually be terminated monthly.⁴² In my opinion, the benchmark of the quality mark makes a proportionate and justified distinction here based on objectifiable criteria.

40 J. de Vogel (2020) 'Private Lease: Consumer Credit in Disguise?' *Journal of European Consumer and Market Law* (9)2, p. 53; S.E. Machiels and T.M. Penninks (2015) 'Private lease' *Tijdschrift voor Financieel Recht* (5), pp. 165-169; N. Hoefsloot, P. Risseeuw, L. Tilburgs, C. de Jager (2021) 'Marktonderzoek Private Lease' <<https://www.tweedekamer.nl/downloads/document?id=2021D28435>> accessed 19 October 2023.

41 J. de Vogel (2020) 'Private Lease: Consumer Credit in Disguise?' *Journal of European Consumer and Market Law* (9)2, p. 53; S.E. Machiels and T.M. Penninks (2015) 'Private lease' *Tijdschrift voor Financieel Recht* (5), pp. 165-169; N. Hoefsloot, P. Risseeuw, L. Tilburgs, C. de Jager (2021) 'Marktonderzoek Private Lease' <<https://www.tweedekamer.nl/downloads/document?id=2021D28435>> accessed 19 October 2023.

42 For two-wheelers, the obligation would only apply if for example the consumer concludes a contract for a bicycle for two years (with no possibility of monthly termination) for a monthly amount of €15 per month. The total contract costs amount to €360, which is above €250.

8.6 IMPLEMENTATION OF KEY IMPROVEMENTS: GOVERNMENT OR SELF-REGULATION?

In some areas, equivalent consumer protection could be offered to mobility usership consumers through amendment or development of rules. This section considers which means can best be used to achieve equivalent consumer protection where this is necessary (paragraph 8.2 up until 8.5); an amendment or development of the EU law (government regulation) or by means of, for example, a quality mark (self-regulation). Government regulation may concern European legislation or national legislation. Various parameters must be weighed when choosing between European legislation and national legislation. These parameters were formulated by the European Commission and strive to achieve better regulation.⁴³ Better regulation is a means of guaranteeing that European legislation has the broad support of its citizens and remains fit for purpose, future-proof and open to innovative solutions in a context of ever more rapid technological, societal, and environmental change.⁴⁴

First of all, the *effectiveness* of new EU regulation needs to be considered, which concerns the fulfilment of expectations and goals that the regulation has.⁴⁵ Here, a connection can be made with the current policy targets of consumer law, especially the importance of a well-functioning internal EU market and the pursuit to legal certainty (paragraph 2.3).⁴⁶ Additionally the aim of encouraging more sustainable consumption (through an equivalent high level of consumer protection) is also an important goal that the regulation has.⁴⁷ These factors advocate in my view an EU approach in regulation.

43 European Commission, 'Better Regulation Guidelines' (Brussels, 3 November 2021) SWD(2021) 305 final, pp. 3-6.

44 European Commission, 'Better Regulation Guidelines' (Brussels, 3 November 2021) SWD(2021) 305 final, pp. 5, 26.

45 European Commission, 'Better Regulation Guidelines' (Brussels, 3 November 2021) SWD(2021) 305 final, pp. 23, 26.

46 Recital 5, 24, 37, 47, 71 Consumer Sales Directive; Recital 7, 41 Consumer Rights Directive; Recital 5, 12, 17 Unfair Commercial Practices Directive; European Commission 'Commission staff working document: Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices' (Brussels, 25 May 2016) COM(2016) 320 final, pp. 5, 11 *et seq.* Also see: V. Mak (2015) 'The character of European private law' (Tilburg University: Inaugural speech), pp. 9-35; S. Weatherill, *EU Consumer Law and Policy* (Second Edition, Edward Elgar Publishing Ltd, 2014), pp. 150, 230-235.

47 Paragraph 2.2, 2.3; European Commission 'New Consumer Agenda: Strengthening consumer resilience for sustainable recovery' (Brussels, 13 November 2020) COM(2020) 696 final, pp. 16-19; European Commission 'A new Circular Economy Action Plan For a cleaner and more competitive Europe' (Brussels, 11 March 2020) COM(2020) 98 final; European Parliament, 'Consumer Policy: Principles and Instruments' <https://www.europarl.europa.eu/ftu/pdf/en/FTU_2.2.1.pdf> accessed 3 May 2020; European Parliament, 'Study 'Contribution to Growth of Consumer Protection' prepared for IMCO, Policy Department A, 2019, <[https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631066/IPOL_STU\(2019\)631066_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631066/IPOL_STU(2019)631066_EN.pdf)> accessed 3 May 2020; European Parliament, 'Study on consumer protection aspects of financial

In addition, *efficiency* is important, which mainly concerns the cost-effectiveness and proportionality of actual costs to benefits. In any case, there seems to be an economy of scale for EU regulation; developing legislation at the EU level ensures that Member States do not have to separately consider EU-wide issues, which may entail a cost-effectiveness advantage.⁴⁸ The *relevance* of EU regulation also needs to be taken into account, focussing on current and emerging needs.⁴⁹ An EU approach is needed because the goals of new regulation cross Member State borders. After all, the EU aims at an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.⁵⁰ On top of that, mobility usership is a development that extends beyond national borders and aims at a solution to cross-border problems (e.g. scarcity of resources and climate change) by offering sustainable mobility solutions (paragraph 1.3). It is also important to take *coherence* into account, which means that EU regulation cannot be adopted in isolation but must be viewed in conjunction with other regulatory initiatives and the high-level and long-term policy objectives.⁵¹ Since the EU chose a European approach for consumer law,⁵² it is reasonable and coherent to choose a European approach here too. At the same time, such a European approach also ensures coherence with the policy targets.⁵³ Finally, it must be considered whether EU regulation achieves results that go further than was the case by Member States alone, the *EU added value*.⁵⁴ In my view, the abovementioned considerations advocate the necessity and added value of EU regulation given the reasons for EU regulation and the fact that this also applies to mobility usership. Therefore, the pursuit of equivalent protection should be sought within European law. This justifies choosing a focus on EU legislation

services, prepared for the Committee on the Internal Market and Consumer Protection (IMCO), Policy Department A, 2014, <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/507463/IPOL-IMCO_ET\(2014\)507463_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/507463/IPOL-IMCO_ET(2014)507463_EN.pdf)> accessed 3 May 2020; European Commission 'Commission Staff Working Paper: Consumer Empowerment in the EU' (Brussels, 7 April 2011) SEC(2011) 469 final.

48 European Commission, 'Better Regulation Guidelines' (Brussels, 3 November 2021) SWD(2021) 305 final, pp. 23, 26.

49 European Commission, 'Better Regulation Guidelines' (Brussels, 3 November 2021) SWD(2021) 305 final, pp. 23, 26.

50 Paragraph 2.2, 2.3; M. Maciejewski, I. Ozolina, J. Ferger, C. Piaguet, J. Apap, M. Desomer, A. Gronbech Jorgensen, B. Hardt, B. Lefort, B. Matic, and S. Vanhoucke 'EU Mapping: Overview of Internal Market and Consumer Protection related legislation' Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy (April 2015) IP/A/IMCO/2014-08, PE 536.317, pp. 27-39; The Single European Act (1987) L 169/1; V. Mak (2015) 'The character of European private law' (Tilburg University: Inaugural speech), pp. 9-35; S. Weatherill, *EU Consumer Law and Policy* (Second Edition, Edward Elgar Publishing Ltd, 2014), pp. 62-91, 188-203; K. Lenaerts and P. van Nuffel 'Hoofdstuk 3 – De interne markt' in: *Europees recht* (7^e editie, Brussels: Intersentia, 2023), pp. 143-232.

51 European Commission, 'Better Regulation Guidelines' (Brussels, 3 November 2021) SWD(2021) 305 final, pp. 5, 6, 23, 26.

52 Article 114, 169 TFEU.

53 Paragraph 2.3 for an extensive discussion of these policy targets.

54 European Commission, 'Better Regulation Guidelines' (Brussels, 3 November 2021) SWD(2021) 305 final, pp. 23, 26.

for new consumer law. This of course does not mean that national regulations cannot provide any relief, but that an EU approach is a better choice in view of the parameters of the European Commission.⁵⁵

Subsequently, there are various EU instruments to adopt EU legislation. Most legislative initiatives on consumer law are (maximum harmonisation) directives, whereas regulations are also sometimes considered. Unlike regulations, which are directly applicable in Member States after entry into force, directives are not directly applicable in Member States. They must first be transposed into national law before they apply in each Member State.⁵⁶ In the case of maximum harmonisation, Member States must introduce rules with minimum and maximum standards set in the directive, so that the mutual deviation in implementation is nil. The necessary transposition into national law when implementing a directive may at the same time offer the opportunity to ensure that the rules are closely aligned with national law without the Member States having to make compromises on the content. The rules in a regulation apply directly which means that in case Member States cannot agree on all rules, parts might not be included. This also applies to directives, but due to the necessary national implementation, the member states have more freedom of application than with the regulation. Although both instruments may be suitable, the directive is a more promising instrument.

This section starts with explaining the concept of self-regulation and how it relates to government regulation (paragraph 8.6.1). Subsequently, the advantages and disadvantages of the means will be weighed for the mobility usership model although a trade-off between the means is to be made by policy makers with attention to a possible race to the bottom (or top) (paragraph 8.6.2). Research shows that in general, self-regulation does not entail fewer costs or more benefits than legislation, because the total effects are case-specific.⁵⁷ The assessment of these means will also depend on *inter alia* the level of knowledge of the sector, the support within the sector, a sufficient degree of organisation, and the degree of enforcement (possibilities).⁵⁸

55 Consider, for example, article 6:214 Dutch Civil Code, which makes a standard arrangement possible. It is an arrangement between interest groups, a bottom-up instrument for the industry, which should be approved by the Minister of Justice. It is a form of legislation and applies by operation of law with the aim to supplement general contract law for specific situations with mandatory rules. In my opinion, a disadvantage is that this standard arrangement only works nationally. There is also the risk that a standard scheme will conflict with European law.

56 Article 288 TFEU.

57 B. Baarsma, C. Koopmans, J. Mulder, M. de Nooij and C. Zijdeveld (2004) 'Goed(koop) geregeld: Een kosten-baten analyse van wetgeving en zelfregulering' SEO-rapport (Amsterdam, 2004), nr. 720, p. 101.

58 B. Baarsma, C. Koopmans, J. Mulder, M. de Nooij and C. Zijdeveld (2004) 'Goed(koop) geregeld: Een kosten-baten analyse van wetgeving en zelfregulering' SEO-rapport (Amsterdam, 2004), nr. 720, p. 101.

8.6.1 Self-regulation and government regulation

Self-regulation (or alternative regulation, or private regulation) means that social parties such as trade associations or contracting parties, take responsibility to a certain extent for drawing up and/or implementing and/or enforcing rules.⁵⁹ An example of self-regulation is the Dutch private lease quality mark, part of the Private lease quality mark foundation, which aims to protect consumers and inform consumers about where they can responsibly lease a car. The counterpart of self-regulation is government regulation, known as legislation. In that case, the government sets a goal and determines the means to achieve the set goal and ensures supervision and enforcement. Literature mentions that there is in practise a sliding scale between legislation and self-regulation because the government can also set a goal to stimulate the means of self-regulation. This arises when the government consciously allows or encourages forms of self-regulation, but at the same time attaches certain conditions to it. An example is when a government is involved in drawing up a code of conduct. This is also referred to in the literature as conditioned self-regulation.⁶⁰ An advantage is that the government's infringement is minimised, and the sector's freedom of action is greater, faster and there is a greater ability to act and adapt compared to pure government regulation, but the government can monitor the progress of its objective.⁶¹ As a result, law and self-regulation are not mutually exclusive. The policy of the European Commission also pays attention to self-regulation

59 B. Baarsma, F. Felsö, S. van Geffen, J. Mulder and A. Oostdijk (2003) 'Zelf doen? Inventarisatie van de zelfregulerings-instrumenten' SEO-rapport (Amsterdam, 2003), nr. 664; B. Baarsma, C. Koopmans, J. Mulder, M. de Nooij and C. Zijdeveld (2004) 'Goed(koop) geregeld: Een kosten-baten analyse van wetgeving en zelfregulering' SEO-rapport (Amsterdam, 2004), nr. 720; J.A.H. Maks, N.J. Phillipsen (2001) 'De economische beginselen van zelfregulering' Maastricht University School of Business and Economics; I. Giesen, *Alternatieve regelgeving en privaatrecht* (Monografieën Privaatrecht 8) (Deventer: Wolters Kluwer, 2007), p. 16; T. van Mierlo, 'Self-regulation in the consumer field: the Dutch approach' in: J. Rutgers (ed.), *European Contract Law and the Welfare State* (Groningen: Europa Law Publishing, 2011); M.W. Scheltema, *Effectiviteit van privaatrechtelijke regulering: is dat meetbaar?* (Den Haag: Boom Juridische uitgevers, 2012); Europees Economisch en Sociaal Comité 'Advies van het Europees Economisch en Sociaal Comité over Zelfregulering en coregulering in het EU-wetgevingskader' (4 September 2015) C291/29.

60 B.E. Baarsma (2010) 'Afwegingskader bij het gebruik van zelfreguleringsinstrumenten' *Tijdschrift voor Toezicht* 1(3), pp. 12-15; W. Van Boom, N. Huls, N. Philipsen, and M. Faure, 'Handelspraktijken, reclama en zelfregulering: Pilotstudy Maatschappelijke Reguleringsinstrumenten' (Den Haag: Wetenschappelijk Onderzoek- en Documentatiecentrum, projectnummer 1535, April 2009); A.J. Hoekema and N.F. van Manen, *Typen van legaliteit: ontwikkelingen in recht en maatschappij* (Deventer: Wolters Kluwer, 2000); F.J. van Ommereen' 5.6.5.2 Wettelijk geconditioneerde zelfregulering' in: S.E. Zijlstra e.a. (red.), *Wetgeven. Handboek voor de centrale en decentrale overheid (Handboeken staats- en bestuursrecht)* (Deventer: Kluwer, 2012); P. Eijlander and W. Voermans, *Wetgevingsleer* (Den Haag: Boom juridisch, 2018), p. 71; B. Baarsma (2003) 'Maatschappelijk bungeejumpen of gerichte zelfsturing? Essay over zelfsturing in de publieke sector' (Stichting voor Economisch onderzoek der Universiteit van Amsterdam, Amsterdam, 2003), pp. 2-14.

61 B. Baarsma (2003) 'Maatschappelijk bungeejumpen of gerichte zelfsturing? Essay over zelfsturing in de publieke sector' (Stichting voor Economisch onderzoek der Universiteit van Amsterdam, Amsterdam, 2003), pp. 2-14.

and explicitly recognises that self-regulation must be regarded as an important instrument to supplement or complete governmental regulation, but can never replace it, unless there are fundamental standards that could provide a basis of authorisation for this kind of self-regulation.⁶²

8.6.2 A trade-off: Regulation by the legislator or the mobility usership sector?

The most important considerations on self-regulation versus legislation for the mobility usership consumer aiming at equivalent protection are weighted in this section. This is a follow-up to chapter 6 and 7 in which the degree of self-regulation of the sector was examined. Self-regulation does seem to work in some areas, such as in the case of the Dutch private lease quality mark, where the sector largely equates the protection of the private lease consumer with the protection provided by the Consumer Credit Directive.⁶³ The quality mark could be perceived as a best practice for exclusive mobility use as it provides clear guidance to offer protection and could be used as a starting point for legislation. At the same time, self-regulation by the sector does not always reach the level necessary to achieve equivalent protection. This is the case for the right to conformity, for example, and the remedies available to consumers in the event of non-conformity.⁶⁴

A significant advantage of self-regulation over legislation is that the sector has more knowledge and better information that enables the creation of well-equipped rules.⁶⁵ This is specifically true for the mobility usership sector as the providers in this sector are the most knowledgeable and experienced in regard to the needs it addresses and can easily gather essential information about their own services. Although there are now also many government initiatives to obtain information about (parts of) the mobility usership sector, the sector remains the expert, enabling the sector to construct rules.⁶⁶ After all, mobility

62 There are examples of European consumer rights directives in which self-regulation can be found, such as the Unfair Commercial Practices Directive, see: A.G.D. Overmars, *Codes en convenanten: (zelf)regulering van studentenmigratie naar Europa (Staat en Recht nr. 20)* (Diss., Nijmegen, Deventer: Kluwer, 2014), nr. 2.2; Europees Economisch en Sociaal Comité 'Advies van het Europees Economisch en Sociaal Comité over Zelfregulering en coregulering in het EU-wetgevingskader' (4 September 2015) C291/29; L.A.J. Senden, 'Alternatieve normering in de EU' in: P.C. Westerman, and A.R. Mackor (eds.), *Vormen van (de?) regulering*. (Den Haag: Boom juridisch, 2008), pp. 125-156.

63 See Table 25, Table 30 and Table 35.

64 See paragraph 8.4.

65 B.E. Baarsma (2010) 'Afwegingskader bij het gebruik van zelfreguleringsinstrumenten' *Tijdschrift voor Toezicht* 1(3), pp. 12-15; M.W. Scheltema, *Effectiviteit van privaatrechtelijke regulering: is dat meetbaar?* (Den Haag: Boom Juridische uitgevers, 2012).

66 For example: European Commission, 'A European agenda for the collaborative economy' (Brussels, 2 June 2016) COM(2016) 356 final; P. Ypma, M. Chaves, K. Kazmierska, M. Domínguez Gaitán, P. McNally (2018) 'Study on the assessment of the regulatory aspects affecting the collaborative economy in the tourism

usership is a rapidly developing sector of which the sector remains abreast because it is often the initiator (or at least implementer) of the developments. This knowledge can be used to design regulations that contribute to providing protection to mobility usership consumers that is suitable considering the specific issues of the sector. Although the mobility usership sector is an expert in the field of mobility usership, the question also arises to what extent the providers can be seen as experts in the field of consumer protection. In addition, it is uncertain whether providers voluntarily offer a high level of consumer protection because self-regulation remains based on willingness (as contractual coercion only exists to a very limited extent).⁶⁷

When rules are drawn up by the sector, more willingness and incentive to comply with self-regulation will exist; the self-designed rules are considered reasonable. In addition, self-regulation restricts market parties less than government regulation and does not hinder choosing the most efficient solution.⁶⁸ Self-regulation can therefore have an inkblot effect that makes it more effective than government regulation, which has an involuntary character (which of course also entails the vulnerability of self-regulation).⁶⁹ An example of this is the Dutch private lease quality mark. At the same time, the question here is whether the interests of mobility usership consumers will not be suppressed by the interests of the mobility usership providers if only the mobility usership sector is responsible for achieving equivalent consumer protection where this proves to be necessary. Rebalancing the power between the contracting parties is not an objective for the sector. This would only be different if the sector could, for example, polish its image through self-regulation. Although this is not the main goal,

accommodation sector in the 28 Member States' (European Commission, 2018), DOI: 10.2873/428928; M. Naumanen, L. Rabuel, K. Karanikolova, R. Juskevicius, L. Porsch (2018) 'Study to monitor the business and regulatory environment affecting the collaborative economy in the EU: final report' (European Commission, 2018); M. Alonso Raposo, B. Ciuffo, P. Alves Dias, F. Ardente, J. Aurambout, G. Baldini, C. Baranzelli, D. Blagoeva, S. Bobba, R. Braun, L. Cassio, P. Chawdhry, P. Christidis, A. Christodoulou, S. Corrado, A. Duboz, N. Duch Brown, S. Felici, E. Fernandez Macias, J. Ferragut Martinez Vara De Rey, G. Fulli, M. Galassi, A. Georgakaki, K. Gkoumas, M. Grosso, J. Gomez Vilchez, M. Hajdu, M. Iglesias Portela, A. Julea, J. Krause, A. Kriston, C. Lavalle, L. Lonza, A. Rocha Pinto Lucas, M. Makridis, A. Marinopoulos, A. Marmier, F. Marques Dos Santos, B. Martens, K. Mattas, F. Mathieux, G. Menzel, F. Minarini, S. Mondello, P. Moretto, B. Mortara, E. Navajas Cawood, E. Paffumi, F. Pasimeni, C. Pavel, F. Pekar, E. Pisoni, I. Raileanu, S. Sala, B. Saveyn, H. Scholz, N. Serra, M. Tamba, C. Thiel, G. Trentadue, P. Tecchio, A. Tsakalidis, A. Uihlein, M. Van Balen, and I Vandecasteele (2019) 'The future of road transport: implications of automated, connected, low-carbon and shared mobility', EUR 29748 EN (Luxembourg, 2019), DOI:10.2760/524662, JRC116644.

67 See on coercion e.g., B.E. Baarsma (2010) 'Afwegingskader bij het gebruik van zelfreguleringsinstrumenten' *Tijdschrift voor Toezicht* 1(3), pp. 12-13.

68 This results in lower hidden policy costs in case of self-regulation. B.E. Baarsma (2010) 'Afwegingskader bij het gebruik van zelfreguleringsinstrumenten' *Tijdschrift voor Toezicht* 1(3), pp. 12-15; M.W. Scheltema, *Effectiviteit van privaatrechtelijke regulering: is dat meetbaar?* (Den Haag: Boom Juridische uitgevers, 2012).

69 C. Scott, F. Cafaggi, and L. Senden (2011) 'The conceptual and constitutional challenge of transnational private regulation' *Journal of Law and Society* 38(1), p. 10; J.G. Koppell, *World rule: Accountability, legitimacy, and the design of global governance* (Chicago: University of Chicago Press, 2010), pp. 61.

this factor should be considered by the mobility usership sector. Especially shared mobility providers regularly receive negative publicity because their vehicles cause a nuisance, for example due to improper parking, antisocial driving behaviour, or shared vehicles becoming the target of vandalism. Therefore, social pressure also plays a role here. With the ‘voluntary’ design of rules, the sector can portray an image of benevolence.⁷⁰ As a result, their reputation could potentially be polished by proactive action within the sector itself.

The predominant need for consensus in the design of self-regulatory measures weakens self-regulation, often compromising on quality and on a high quality of protection for consumers. At the same time, the Dutch private lease quality mark shows that a fundamental elevation towards equivalent consumer protection is possible. The success of the quality mark stems from the cooperation of the Dutch private lease quality mark foundation with the Dutch Consumers’ Association in designing the rules. This resulted in consumer interest being well represented in the design process of the self-regulatory quality mark. A quality mark for the mobility usership sector of the European Member States, for example, could be established through conditioned self-regulation through the involvement of the European Commission and the European Bureau of Consumer Unions, which would remove the concerns about limited enforcement and authority of self-regulatory measures and the representation of consumer interests. In this way, a consensus can be found for the various interests to be represented and at the same time contributions can be made to equivalent consumer protection. An absence of consensus in self-regulation can also devalue or undermine legal certainty.⁷¹ Some self-regulatory agreements are difficult to enforce, and different conditions may apply to different parties depending on *inter alia* their dominant position and relationship with the regulator. This would cause a so-called ‘race to the bottom’. Simultaneously, in case of a quality mark, a legal certainty also emanates from the providers affiliated with the quality mark, because these providers offer a minimum level of protection to – in this case – consumers. In other words, the standardised rules of a quality mark with a good image can contribute to legal certainty and consumer confidence and cause a ‘race to the top’.

An argument that favours self-regulation is that self-regulation has the ability to realise and address sector needs more rapidly and with more flexibility in comparison to legislation. The drafting and implementation of self-regulatory measures takes less time than lengthy

70 P.C. Westerman, and A.R. Mackor (eds.), *Vormen van (de?) regulering* (Den Haag: Boom Juridische uitgevers, 2008); B.E. Baarsma (2010) ‘Afwegingskader bij het gebruik van zelfreguleringsinstrumenten’ *Tijdschrift voor Toezicht* 1(3), pp. 12-15.

71 B.E. Baarsma (2010) ‘Afwegingskader bij het gebruik van zelfreguleringsinstrumenten’ *Tijdschrift voor Toezicht* 1(3), pp. 12-15; B. Baarsma, C. Koopmans, J. Mulder, M. de Nooij and C. Zijdeveld (2004) ‘Goed(koop) geregeld: Een kosten-baten analyse van wetgeving en zelfregulering’ SEO-rapport (Amsterdam, 2004), nr. 720.

legislative processes because *inter alia* self-regulatory bodies are often less bureaucratic than the government.⁷² This quickness also contributes to the flexibility. Flexibility seems particularly important in relation to ongoing developments such as mobility usership. Although the development of exclusive mobility use is marginally more established compared to shared mobility use, the uncertainty associated with these developments can use the regulatory flexibility to keep up with these ongoing developments.⁷³ For example, there has been a rapid development in the types and variety of transport modalities offered, the number and variety of mobility usership providers and rules that have been imposed by the public sector that influence the manoeuvrability of mobility usership providers.⁷⁴ While evaluating the means to implement the solutions promoting equivalent protection for mobility usership consumers, a cost assessment must also be made. The flexibility of self-regulation also decreases the affiliated costs of creation, compliance, and adjustment in comparison to legislation. The governmental supervision and monitoring of the mobility usership sector in case of self-regulation also induces costs for the government, which should be carefully considered. Supervision and monitoring are especially important in this matter, because the public interests of consumer protection are at stake.⁷⁵

The limited enforceability of self-regulation compared to legislation should also be considered. In theory, legislation is stricter than self-regulation as it often regulates a wider range of aspects and requires full compliance on all these aspects. Limited enforceability of self-regulation is also related to the weaker moral authority of self-regulation compared to legislation. The options for legislation to sanction infringements are as extensive as the legislator wants, while these options are limited in the case of self-regulation.⁷⁶ However,

72 B.E. Baarsma (2010) 'Afwegingskader bij het gebruik van zelfreguleringsinstrumenten' *Tijdschrift voor Toezicht* 1(3); M.W. Scheltema, *Effectiviteit van privaatrechtelijke regulering: is dat meetbaar?* (Den Haag: Boom Juridische uitgevers, 2012).

73 F. Zoll 'From a Product-based Economy to Services? Legal Aspects of an Economy in transition' in: B. Keirsbilck and E. Terryn (eds.), *Consumer Protection in a Circular Economy* (Cambridge: Intersentia, 2019), pp. 149-158; F. Cafaggi (2011) 'New foundations of transnational private regulation' *Journal of Law and Society* 38(1), pp. 25-29; C. Scott, F. Cafaggi, and L. Senden (2011) 'The conceptual and constitutional challenge of transnational private regulation' *Journal of Law and Society* 38(1), p. 4; M.W. Scheltema, *Effectiviteit van privaatrechtelijke regulering: is dat meetbaar?* (Den Haag: Boom Juridische uitgevers, 2012); M.W. Scheltema (2016) 'Balancing public and private regulation' *Utrecht Law Review* 12, p. 16.

74 For example, credit registration, a permit requirement, a restriction on the number of vehicles that may be offered in a city or mandatory parking spaces where the vehicles must be parked.

75 In case of legislation, the government is directly involved and there is less need for such alertness on the part of the government. A.G.D. Overmars, *Codes en convenanten: (zelf)regulering van studentenmigratie naar Europa (Staat en Recht nr. 20)* (Diss., Nijmegen, Deventer: Kluwer, 2014), nr. 2.2; B. Baarsma, C. Koopmans, J. Mulder, M. de Nooij and C. Zijdeveld (2004) '*Goed(koop) geregeld: Een kosten-baten analyse van wetgeving en zelfregulering*' SEO-rapport (Amsterdam, 2004), nr. 720, p. 101.

76 J.M. Emaus and A.L.M. Keirse (2011) 'EVRM en Privaatrecht: Een bespreking van de preadviezen 2011 uitgebracht voor de Vereniging voor Burgerlijk Recht' *Nederlands Tijdschrift voor Burgerlijk Recht* 2011/70, p. 502.

this assumption cannot always be confirmed in practise in the field of consumer protection. For example, when it comes to preventing misleading practices in the form of misleading information in the Netherlands, self-regulation can be enforced by administrative options, such as imposing administrative fines.⁷⁷

Especially with the rise and extension of various mobility usership providers and the competition among them, regulation can influence competition, accomplishing either a ‘race to the top’ or a ‘race to the bottom’. Enhanced consumer protection can be offered by (a part of) the mobility usership sector as a competitive advantage with other providers by offering more advantageous contract terms. As a result, self-regulation can also restrict competition, for example by setting excessively high standards in the mobility usership sector. This high level of protection could complicate market competition for other providers (by increasing the entry threshold). On the other hand, maintaining increased consumer protection also results in higher costs for the services that are delivered. Mobility usership providers might also be tempted to offer fewer protections to economise mobility usership, potentially encouraging a ‘race to the bottom’.⁷⁸ In addition, self-regulation does not have the democratic basis as often only a few (market) parties are involved and therefore lack the democratic legitimacy that is assured through legislation.⁷⁹ As a result, the risk of introducing inefficient regulation for the benefit of a small group of stakeholders and/or lobbyists is greater with self-regulation than with legislation because the support within the sector is large, but the broader public support is often limited. This risk can be partly mitigated by the involvement of, for example, consumer associations or policy makers which can contribute to greater societal support for the rules; still, there is a risk that self-regulation is dynamic and might erode.

Alertness is required regarding the pre-emptive effect of self-regulation. This means that the government has less control over the outcome in the case of self-regulation because it can sway the content of the standards in the industry’s favour rather than toward public interests. In case the mobility usership sector would choose a certain direction regarding

77 Provided that it falls within the competence of the ACM, see the Dutch Fine Policy Rule ACM 2014. Article 2.8, 2.9 Dutch Consumer Protection Enforcement Act. The Dutch Authority for Consumers and Markets can impose an order subject to periodic penalty payments or an administrative fine on the provider. E.S. van Nimwegen (2010) ‘Handhaving door de Consumentenautoriteit: een goed samenspel met het burgerlijk wetboek en Europese regelgeving?’ *Contracteren 2*, p. 55; C.A. Hage ‘De ACM als toezichthouder in consumentenzaken’ in: E.H. Hondius, V. Mak, *Handboek Consumentenrecht* (5th edition, Zutphen: Uitgeverij Paris, 2020), pp. 644-645.

78 J. de Vogel (2020) ‘Private Lease: Consumer Credit in Disguise?’ *Journal of European Consumer and Market Law* (9)2, p. 60; M. Westphal ‘The EU financial Services Policy and its Effect on Consumer Law’ in: M. Kelly-Louw, J.P. Nehf and P. Rott (eds.), *The Future of Consumer Credit Regulation: Creative Approaches to Emerging Problems* (London: Routledge, 2008), p. 87.

79 M.W. Scheltema (2016) ‘Balancing public and private regulation’ *Utrecht Law Review* 12, p. 16.

the level of consumer protection with self-regulation, the legislator is faced with a *fait accompli* if the legislator wants to consider stricter rules or a higher level of protection in the future.⁸⁰ The risk of this can be reduced by involving consumer interest groups or the legislator to serve the consumers' interests. There are clear advantages and disadvantages for both self-regulation and legislation. Insight is offered on the disadvantages and risks of both ways of regulation and how these disadvantages and risks could be obviated in case of mobility usership. Although a careful assessment of opportunities, risks, and consequences of both avenues of regulation is needed, in my opinion, it is best to opt for government regulation due to the risk of self-regulation that protection is dynamic and might erode.⁸¹ Government regulation contributes to coherence and effectiveness, offers greater legal certainty, and handles enforcement more effectively. A new EU directive can not only achieve this, but (as outlined in more detail above) also aligns with the current trends in (EU) consumer law. At the same time, Member States retain some freedom of implementation, allowing new rules to seamlessly integrate into the national systems. Furthermore, I believe that such a new European directive should not only focus on mobility usership but should also address the overall trend of the transition from ownership to usership.⁸² After all, if the transition from ownership to usership continues for other products, it is logical to include this in a regulatory process because the mobility sector does not significantly differ from other sectors, and the Consumer Sales Directive does also not, in principle, distinguish between products.

8.7 CONCLUSION

This chapter discusses the major improvements for equivalent protections and the means that can be chosen to implement these improvements. The assessment of whether a *ratio legis* of the examined provisions apply to mobility usership is the core justification for the application for equivalent protection. For the right to information, the *ratio legis* applies for exclusive usership and inequivalent protection currently exists. An important improvement should be made regarding the right to be informed. This largely applies to shared mobility as well. However, not all information obligations are relevant to shared

80 B.E. Baarsma (2010) 'Afwegingskader bij het gebruik van zelfreguleringsinstrumenten' *Tijdschrift voor Toezicht* 1(3), pp. 12-15.

81 J. de Vogel (2020) 'Private Lease: Consumer Credit in Disguise?' *Journal of European Consumer and Market Law* (9)2, pp. 51-60.

82 European Commission 'A new Circular Economy Action Plan For a cleaner and more competitive Europe' (Brussels, 11 March 2020) COM(2020) 98 final; European Commission, 'A New Deal for Consumers' (Brussels, 11 April 2018) COM (2018) 183 final; European Commission 'Sustainable and Smart Mobility Strategy – putting European transport on track for the future' (Brussels, 9 December 2020) COM(2020) 789) final.

mobility. When relevance lacks, no intervention is required for these equivalences. The right of conformity and the application of a creditworthiness assessment could and should in my opinion apply to mobility usership agreements to contribute to equivalent protection. The *ratio legis* of these provisions largely applies to mobility usership, although currently inequivalent protection exists. This can be eliminated by *mutatis mutandis* application of the provisions. For both provisions, this will pose no problems for exclusive use. The complexities in the application of the provision to shared use obviated in the legal provision itself.⁸³

The Dutch private lease quality mark largely follows sales-based legislation, with necessary adjustments for the mobility usership business model. Especially for exclusive mobility use, the quality mark could be perceived as a best practice as it provides clear guidance to offer equivalent protection and could be used as a starting point for legislation. More far-reaching adjustment to the quality mark are required for the application of the sales-based rules to shared mobility, because the rationale to apply sales-based rights sometimes lapses. Equivalent consumer protection could be offered through amendment or development of rules either by government regulation or self-regulation. Although the advantages and disadvantages of both ways of regulation exist. In my opinion, it is plausible that the non-binding nature of self-regulation may lead to insufficient coherence, effectiveness, and legal certainty. By implementing legislation, enforcement can be handled more effectively. It is crucial to emphasize that national law does not suffice; it is imperative to opt for European legislation. Therefore, a new European directive should be designed to address the overall trend from ownership to usership. This directive should not only provide suitable protection to consumers of mobility usership considering the specific issues of the sector, but should also offer a legal framework which is resilient to future expansion of the usership trend.

83 The Consumer Sales Directive offers secondary remedies that could apply for shared use when repair or replacement is not possible. The Consumer Credit Directive 2008 excludes credits in their *ratione materiae* scope with a low contract value. This means that the directive itself would already exclude shared use, based on the contract value.

9 SUMMARY AND CONCLUSION

9.1 EQUIVALENT CONSUMER PROTECTION FOR MOBILITY USERSHIP IN THE EU

In recent years, a paradigm shift in consumer behaviour has emerged, challenging the traditional concept of ownership due to an increasing concern for ecological, societal, and developmental impact. Policy makers have argued that the age of traditional ownership, where the consumer pays for a vehicle in one upfront lump sum, is becoming more obsolete and being more and more replaced by use-based mobility models which prioritise access over ownership, fostering a more sustainable and resource-efficient approach to consumption (paragraph 1.1). The necessity of a redefinition of the relationship between consumers and products is broadly acknowledged and strategies to support a transition to the circular economy from ownership to usership is also politically encouraged to contribute to the EU's sustainability agenda. The protection of the consumer in B2C sales agreements has been of vital importance for years, given their vulnerable position in this important type of contract. However, that protection is not self-evident for consumers of B2C mobility usership, while the position of the mobility usership consumer usually does not differ much from the position with a consumer sale. There is in most cases no good reason for an inequivalent approach or protection for these consumers. Additionally, in view of the sustainability developments and considering the EU's efforts to stimulate a transition from mobility ownership to usership, mobility usership needs to be constructed in a way that equivalently protects the consumer and safeguards his position. Therefore, this research aims to examine the equivalence of consumer protection for consumers of mobility usership compared to a consumer who concludes a sales contract in a B2C relationship. On top of that, a solid private law framework may be a catalyst for circular models such as mobility usership, while the absence thereof can have the opposite effect. For this research, the main research question is:

‘To what extent does consumer protection apply to the mobility usership consumer, and if it does not, should the EU legal framework on the protection of the sales-based consumer be amended to offer equivalent protection to the new consumer of mobility usership in the context of a circular economy?’

Equivalent does mean the *mutatis mutandis* application of the selected EU legal framework and should be understood as equivalent in view of its qualities, assets, performance, and other modalities of the mobility usership model. Equivalent protection explicitly not

equals identical protection, because the business models (sale versus use) have a different nature. These conditions are taken into consideration while assessing equivalent consumer protection for mobility usership.¹ Therefore, these circumstances of mobility usership are taken into consideration while assessing equivalent consumer protection.

The approach taken while conducting this research involves a doctrinal analysis of fundamental EU consumer protection instruments and its applicability to mobility usership models (paragraph 1.4.3). The selected directives are the Consumer Sales Directive, the Consumer Rights Directive, the Consumer Credit Directive, the Unfair Commercial Practices Directive, and the Unfair Terms Directive (paragraph 1.4.2). In addition, an empirical study is conducted on the mobility usership sector regulation in order to explore and understand whether the providers in the mobility usership sector give consumers equivalent protection in practice with the application of general terms and conditions compared to traditional sales-based consumers (paragraph 1.4.4). Both approaches include a comparative analysis by incorporating the Netherlands, Belgium, Germany, and France (paragraph 1.4.1). Moreover, this is examined for various identified mobility usership models, namely exclusive B2C usership of cars and two-wheelers ((a) and (b)), shared B2C usership of cars and two-wheelers ((c) and (d)), and collaborative vehicle sharing ((e), (f), (g) and (h)) (paragraph 1.2, Table 1). Collaborative vehicle sharing exists as collaborative platform sharing (e), formal C2C collaborative sharing (f), informal C2C collaborative sharing (g), and collaborative sharing as cooperative (Figure 2).

The doctrinal analysis was split into four parts. In the first two parts, the analysis focussed on whether the contracting parties and the mobility usership agreement fall within the scopes of the examined directives (paragraph 9.2 and 9.3). The next two parts of the research focus on the discussion of the substantive legal framework, whereby a distinction is made between the applicable rights and non-applicable rights based on exemplary case studies that represent various mobility usership models (paragraph 9.4). The empirical portion of the study consisted of two parts. Both parts of the study aim to explore and understand sector self-regulation and the (increased) level of protection they provide, to assess the urgency of a legal intervention. The first part focusses on exclusive mobility

1 The equal protection of consumers is an important spearhead of the EU consumer policy, and this concerns equal protection in equal cases. In this study, the term equivalent was deliberately chosen because the research examines equivalent protection vis-à-vis consumers who purchase a product. This concerns a comparison of dissimilar cases, so the research must expressly focus on equivalent protection. After all, an ownership right entails far-reaching rights and obligations, going beyond use. See paragraph 1.3 on an elucidation of the terminology. On equal protection, see for example: BEUC, 'The Consumer Voice in Europe: Proposal for a Better Enforcement and Modernisation of EU Consumer Protection Rules: BEUC response to the Commission ex-post consultation' (31 May 2018) BEUC-X-2018-041, pp. 2.

(paragraph 9.5.1), whereas the second part focusses on shared mobility, including collaborative mobility sharing (paragraph 9.5.2).

9.2 *RATIONE PERSONAE* SCOPE: WHO IS WHO?

Traditionally, EU consumer law is applied to transactions where there is a weaker party, the consumer who concludes a contract with a professional party (B2C). The consumer needs in this situation in the eyes of the European legislator, protection (paragraph 2.1). To enjoy the protection of current consumer law, the contract must be concluded between a professional party on the one hand and a consumer on the other. Therefore, the identification of the various contracting parties is crystalised.

In some cases, analysing whether contracting parties for mobility usership fall under the *ratione personae* scope is not ambiguous at all. Private companies offering their own fleet of cars simply qualify as professional parties and the individual making use of the mobility simply qualifies as a consumer. Also, the collaborative as a cooperative is considered a professional party. It gets more complicated with C2C mobility usership in which consumers share mobility among themselves with or without the intervention of a platform because the consumer starts to acquire characteristics of a professional party (such as a profit motive and participation in commercial transactions). There are important factors that facilitate distinguishing between the self-employed person and the prosumer and to determine the capacity of these parties. The individual provider can be a self-employed person or a prosumer. When the self-employed person acts in the performance of their own business, trade, or profession, they are a professional party, whereas the prosumer is not a professional party because they lack a certain degree of professionalism. In addition, the necessity to improve the balance between the contract parties lacks because the contract parties are equal (paragraph 2.5).

The other side of the *ratione personae* scope considers whether contracting parties can or should be considered consumers. It is unequivocal that the mobility usership consumer simply qualifies as a consumer according to the EU definition of the consumer. Legal entities such as businesses *stricto sensu* do not qualify as a consumer under EU law since EU law departs from the idea that a consumer must be a natural person. Nevertheless, consumer law sometimes (in part) applies to professional parties, especially in small and medium-sized companies. Although Germany applies a strict approach and under no circumstances applies consumer protection to professional parties, other Member States do so under different circumstances. Only the consumer of mobility usership qualifies as

a consumer considering the definition, excluding private companies, cooperations and associations (paragraph 2.6).

9.3 *RATIONE MATERIAE* SCOPE: HOW DOES THE MOBILITY USERSHIP AGREEMENT QUALIFY?

Various types of mobility usership agreements exist. To enjoy the protection of current consumer law, the mobility usership contract must not only comply with the consumer rules in regard to the types of parties that are involved (i.e. B2C), but the model must also fall within the *rationae materiae* scope of the EU directives (paragraph 3.1). None of the mobility usership consumers falls within this scope and no business model is therefore covered by the protection of the Consumer Sales Directive and its national implementations because there is no transfer of ownership in mobility usership (paragraph 3.2). Regarding the Consumer Credit Directive, the mobility agreement does not fall within the scope of the Dutch, Belgian, and French implementation of this directive, whereas the German implementation distinguishes between exclusive mobility use contracts and shared use contracts and covers exclusive use contracts (paragraph 3.3). The Consumer Rights Directive on the other hand applies different rules to different contracts, and mobility usership contracts are not excluded entirely from its scope. This means that for B2C relations in mobility usership models are partly covered by the Consumer Rights Directive. A part of this directive solely applies to service contracts, which also by definition cover mobility usership contracts. This is more complex for distance and off-premises contracts. The shared mobility contract falls under this *ratione materiae* scope because it concerns a contract without the simultaneous physical presence of the contract parties, with the exclusive use of one or more means of distance communication up to and including the time at which the contract has been concluded. For exclusive use, on the other hand, it will depend on the circumstances under which the contract was concluded, because both ways are conceivable (paragraph 3.4). The *ratione materiae* scope of the Unfair Commercial Practices Directive and the Unfair Contract Terms Directive extends to commercial practices and all contracts, respectively (paragraph 3.5 and 3.6). This results in the applicability of these directives to mobility usership contracts. The implementation of the Unfair Contract Terms Directive only deviates in France because contrary to other Member States, French law does include individually negotiated terms too in the regulation on unfair commercial practices (paragraph 3.6.1).

Table 40 shows an overview of the *ratione personae* scope versus *ratione materiae* scope and the circumstances under which the mobility usership consumer is and is not protected.

Table 40: Overview of *ratione personae* scope versus *ratione materiae* scope

<i>Ratione personae</i> scope versus <i>ratione materiae</i> scope					
	<i>Private company</i>	<i>Co-owner</i>	<i>Sole consumer</i>	<i>Self-employed person</i>	<i>Prosumer</i>
<i>Sales contract</i>	No	Yes	No	No	No, as neither of the directives covers C2C contracts.
<i>Consumer credit agreement</i>	No, for all MU contracts in the NL BE, and FR. Yes, for exclusive MU in GER.	Yes	No, for all MU contracts in the NL BE, and FR. Yes, for exclusive MU in GER.	No, for all MU contracts in the NL BE, and FR. Yes, for exclusive MU in GER.	
<i>Any contract</i>	Yes	Yes	Yes	Yes	
<i>Service contract</i>	Yes	Yes	Yes	Yes	
<i>Distance contract</i>	Exclusive use on case-by-case basis. Yes for shared MU.	Yes	Exclusive use on case-by-case basis. Yes for shared MU.	Exclusive use on case-by-case basis. Yes for shared MU.	
<i>Off-premises</i>	In theory possible but goes against the MU rationale.				
<i>Sales contract</i>	No	Yes	No	No	
<i>Commercial practices in UCPD</i>	Yes	Yes	Yes	Yes	
<i>All contracts in UCTD</i>	Yes, FR also covers individually negotiated terms.	Yes	Yes, FR also covers individually negotiated terms.	Yes, FR also covers individually negotiated terms.	

9.4 DE FACTO INEQUIVALENCES IN LEGISLATIVE FRAMEWORK

Due to the limitations in the scope of the directives examined, mobility usership largely falls outside their scopes. Therefore, it was subsequently investigated which substantive rights arise from the examined directives and to what extent these provisions should apply on the basis of the *ratio legis*, to what extent the application of the provisions would be proportional and practically possible. The substantive rights are discussed based on exemplary case studies that represent various mobility usership models (paragraph 4.2). To explore the inequivalences in EU consumer protection for mobility usership consumers, the overlap of the applicable and non-applicable rights is also examined (Figure 6). Table 41 below offers an excerpt overview of the inequivalences in consumer protection following from the selected legislation. Regarding the right to be informed, differences exist in the standard information to be included in advertising because this obligation does not apply to mobility usership providers. Inequalities in protection also

exist for the pre-contractual information obligations that follow from the Consumer Credit Directive. This *inter alia* concerns providing information in accordance with formal requirements and specific information requirements for the *ratione materiae* scope of the contract. Likewise, there are inequivalences in the contractual information obligations (paragraph 5.5.1).

The right of withdrawal is follows from the Consumer Rights Directive and the Consumer Credit Directive. The Consumer Rights Directive identifies two important exceptions that exclude or limit the right of withdrawal for mobility use.

The Consumer Credit Directive does offer an extensive right of withdrawal, but that does not provide an equivalent protection for the mobility usership consumer because this directive does not apply to them. The sales-based legal framework also offers a longer period to undo the agreement, namely a period of 30 days, whereas the mobility usership consumer has by law a period of only 14 days (paragraph 5.5.2). Therefore, it is important that, in light of the *ratio legis* of this right, a suitable way to apply the right of withdrawal to mobility usership is considered.

In the event of a lack of conformity, the consumer in a sales contract would be entitled to performance, i.e., to claim that the goods will be brought into conformity (primary remedies) or to receive a proportionate reduction in the price, or to terminate the contract (secondary remedies). However, the right to conformity does not exist for mobility usership consumers, since no ownership is transferred, and consequently the remedies do not apply either (paragraph 5.5.3). In addition, the rules regarding commercial guarantee concern rights and information obligations for the consumers who have been offered by the provider a commercial guarantee. Furthermore, the consumer should be entitled to fully or partially discharge the (payment) obligations under the agreement, the consumer should be informed about the manner used to calculate the annual percentage rate of charge, and the provider should have the obligation to assess the creditworthiness of the consumers (paragraph 5.5.4).

Currently, there are significant differences in the applicability of consumer protection provisions between mobility usership and sales-based models. However, given the *ratio legis* of the European directives, there is no good reason for this difference. This means that the consumer of mobility usership is often erroneously unprotected (or have limited protection), which means that EU consumer law pushes the brakes in the transition from mobility ownership to mobility usership as a part of the circular economy.

Table 41: Overview of the inequivalences of consumer protection as a result of selected law

Right to be informed	
	Inequivalent protection exists in:
<i>Standard information to be included in advertising</i>	Article 4 CCD.
<i>Pre-contractual information</i>	Article 5(1)I, (f), (g), (j), (k), (l), (m), (n), (p), (q), I, and (s) CCD.
<i>Contractual information</i>	Article 10(1) CCD.
	Article 10(2)(a)-(i), (l), (m)I CCD.
	Article 10(2)(j), (k), (n), (o), (p), (q), (s), and (u) CCD; Article 11 CCD.
Right to change your mind	
	Inequivalent protection exists in:
<i>Right of withdrawal</i>	Article 14(1) CCD.
	Article 14(3) CCD.
	Article 9(2)(b) CRD; also see (i), (ii) and (iii) under article 9(2)(b) CRD.
	Article 13(3) CRD.
Right to conformity	
	Inequivalent protection exists in:
<i>Right to a conform product</i>	Article 5, 6, 7, 8, 10, 11, 12 CSD.
<i>Right to remedies</i>	Article 13, 14 CSD.
	Article 15 CSD.
	Article 16 CSD.
	Article 18(2) CSD.
Consumer rights and commercial guarantees	
	Inequivalent protection exists in:
<i>Commercial guarantees</i>	Article 17 CSD.
<i>Other consumer rights</i>	Article 16 CCD.
	Article 19 CCD.
	Article 20 CCD.
	Article 21 CCD.
<i>Creditworthiness assessment</i>	Article 8 CCD.
	Article 9 CCD.

**9.5 AN EMPIRICAL APPROACH TO REGULATION OF THE MOBILITY
USERSHIP SECTOR IN THE EU**

This study aimed to explore and understand sector self-regulation and the increased level of protection to assess the urgency of a legal intervention by performing a qualitative document analysis. It is examined whether inequivalences are levelled out by general terms and conditions of mobility usership providers, platforms, and/or model contracts of the different Member States by studying the inequivalences identified in consumer legislation. This is done to explore and understand whether the providers in the mobility usership sector give consumers equivalent protection in practice with the application of general terms and conditions compared to traditional sales-based consumers. The document analysis shows the extent to which mobility usership providers or platforms facilitate a higher level of protection to their consumers compared to the situation where sales-based directives lack applicability. The empirical study covers both exclusive use and shared use of mobility, and several research results follow from the study on mobility usership in general.

The study of the terms and conditions of the mobility usership providers in the Member States shows that protection for consumers often involves restricted use, which means that the provider imposes restrictions on how the vehicle may be used. This restriction may cover a territorial restriction or a restriction of action or choice. Although there is certainly self-regulation that increases the level of consumer protection, the inequivalence in protection is also caused by these restrictions which are inherent to the absence of ownership, as ownership involves complete freedom of action. In addition, there is also a notable difference in the degree of contract standardisation per mode of transport, which is generated by the maturity of the industry. Car lease contracts are further synchronised and standardised with fewer mutual deviations of the consumer rights compared to the two-wheeler industry (paragraph 6.5). On the contrary, shared two-wheeler contracts show a higher level of synchronisation and standardisation compared to the carsharing industry. The collaborative platforms and model contracts also seem to be subject to a degree of contract standardisation with minimal mutual deviations (paragraph 7.4). Furthermore, mobility usership contracts basically consist of a use component and a service component. However, many providers seem to opt for a minimalist contract in which the consumer only pays for the use of the mobility and any additional services may be purchased separately. It is important for the involved actors to be aware that this results in consumers paying for equivalent protection, which highlights the volatility and uncertainty associated with leaving these issues to be addressed by self-regulation.

9.5.1 Exclusive mobility use

The empirical study of the exclusive mobility providers specifically shows that the Dutch private lease quality mark contributes to an improvement of largely – in my view – equivalent protection of the exclusive mobility consumers of cars. This applies for the right to information (paragraph 6.4.1), the right to change your mind (paragraph 6.4.2), the right to conformity (paragraph 6.4.3), and the creditworthiness assessment (paragraph 6.4.4.2). Although providers from other Member States also occasionally provide more consumer protection than the necessary minimum, the private lease quality mark plays a pioneering role in the transition to mobility usership by offering a highly standardised set of rules that contributes to both equivalence of consumer protection compared to other more sales-based business models and legal certainty. Such a quality mark does not exist for the two-wheeler sector, resulting in only a limited increase in protection in all Member States. However, this possibility should be explored by the two-wheeler sector because this could be an opportunity for this actor if they manage to unite. After all, this may impact the wider adoption of a transition to mobility use.

Differences in means of transport regarding consumer protection mainly lie in the purchase/contract value and therefore the (financial) risks for the providers differ considerably, such as their creditworthiness assessment. Moreover, German exclusive car providers transfer their ownership rights (and obligations) to their consumer. This means that consumers do have equivalent protection regarding remedies in case of a defect, for example, but that the consumer also carries the obligation to enforce a right naturally connected to ownership while the consumer does not obtain equivalent ownership rights over the vehicle. This is an additional burden for the consumer, and the obligation opposes the nature of the service component of mobility usership (paragraph 6.4.2 and 6.4.3). Furthermore, providers offer the right to repair and maintenance in their general terms and conditions, in line with the rationale behind the sales-based models and the transition from ownership to usership. As the provider retains ownership of the vehicle and the consumer only uses the mobility, the vehicle remains at the risk and expense of the provider. This gives the provider the incentive to repair and maintain the vehicle in a sustainable manner to prolong the lifecycle of the vehicle as much as possible, thereby contributing to any sustainability benefits. Although first and foremost the protection of mobility usership consumers is inequivalent and this inequivalence is not justified given the *ratio legis* of EU consumer law, retaining a maintenance incentive for providers could possibly contribute to the transition from ownership to use as part of the circular economy (paragraph 6.4.3.5 and 6.4.3.6). The car providers of the Dutch Private Lease Quality Mark especially embed the right to repair and maintenance in their contracts compared to providers of two-wheelers. Moreover, the analysis also showed that especially providers of

lease cars that offer their services in multiple Member States regularly apply (substantially) different general terms and conditions in each Member State. In part, this could be caused by the Dutch private lease quality mark because this quality mark increases the level of protection for Dutch providers, which they follow voluntarily; however, this increased protection is not necessarily adopted by providers of other Member States as this is costly and not mandatory. In any case, this point is one that requires attention from both the government and the sector. By aligning the rules as a provider for the various branches, legal certainty can be improved in the light of the internal market (paragraph 6.4.3.7).

9.5.2 Shared mobility use

The empirical study of mobility use includes shared mobility usership providers of cars and two-wheelers, and collaborative mobility sharing through platforms and formal C2C mobility sharing. Due to the lack of available data, (informal) C2C mobility sharing and collaborative sharing as a cooperative are not examined.

The shared mobility consumer is missing out on focal information components that would help the consumer to gather knowledge about any contract they consider concluding (paragraph 7.2.1).

Although it deviates in a few cases, both shared mobility providers as collaborative mobility sharing portrays a diverse landscape of the protection offered by shared providers on *inter alia* the right to information and conformity, possibly impacting legal certainty (paragraph 7.2.1, 7.2.3, 7.3.1 and 7.3.3). Moreover, the sales-based remedies seem to act against the nature of shared mobility use, which is why the focus lies in the examined general terms and conditions on the continuation of mobility. As a result, shared mobility providers offer replacement by referring to an option to exchange the vehicle on the spot, but availability of a replacement vehicle cannot be guaranteed by the provider (paragraph 7.2.3.1). Furthermore, in the general terms and conditions, no replacement vehicle is offered in collaborative sharing situations, presumably because the prosumer, through a platform or by any other means, offers a vehicle that they own privately and only shares sporadically with others (paragraph 7.3.3.1). Some shared mobility providers offer a right to maintain the vehicle, which should normally be the responsibility of the owner-provider of the vehicle. Here too, the provider retains the incentive to maintain the vehicle to prolong its lifecycle.

Only a few carsharing providers and collaborative sharing platforms reserve the right to assess the creditworthiness of a consumer. Evidently, such an assessment is not

customary when offering shared mobility because the costs for use are considerably lower and often entail one-off payments. Therefore, a creditworthiness assessment is of less importance since creditworthiness problems are not likely to occur given the limited financial scope in collaborative sharing models (paragraph 7.2.4.2 and 7.3.4.2). Additionally, the analysis includes providers and platforms offering their services in several Member States. These shared mobility providers do not apply the same general terms and conditions in all Member States. Contrary to the fundamental deviations with exclusive use, this involves minimalist deviations with shared mobility use (paragraph 7.4).

While examining the model contracts of formal C2C collaborative mobility sharing, considerably less protection is offered to the consumer compared to the sales-based consumer and other B2C shared mobility. This originates from the *ratione personae* scope because the agreement is not a consumer agreement but an agreement between a prosumer and a consumer: the relative bargaining power and knowledge is in these C2C relations more in balance compared to B2C relations (paragraph 2.5.3). Therefore, the premise should be that there is no need to level out any imbalance between these contracting parties (paragraph 7.4). This also applies to collaborative platform sharing, where sharing also takes place between C2C through a platform. Although the platform often absolves itself of any responsibility by declaring to merely facilitate supply and demand between prosumers and consumers, there may lie some responsibilities here for the platform or the government (in sense of legislation) in view of the platform's knowledge and bargaining power. Moreover, differences in means of transport regarding consumer protection mainly occur due to differences in the purchase/contract value and therefore the (financial) risks for the providers. This does not equally apply to collaborative shared mobility because the prosumer is the owner and does not share their vehicle for business purposes (paragraph 7.4).

The preceding considerations show that the examined EU directives are partially not applicable to mobility usership. In addition, self-regulation through the general terms and conditions offers an increased level of protection in some areas, but this does *mutatis mutandis* lead to inequivalent protection with sales-based models. In my opinion, there is no justification for this inequivalence because the *ratio legis* for the provisions in the directives largely also apply to mobility usership consumers. This means that in the situations that emerge from this study show that equivalent protection must be achieved (paragraph 9.5.1, paragraph 9.5.2 and Table 41). This unjustified inequivalence provides in my view grounds for intervention. The question, however, is how this intervention should take place.

9.6 LAW OR SELF-REGULATION?

To create a level playing field between sales-based contracts and use-based contracts, mobility usership needs to be constructed in a way that safeguards consumers' rights. The fact that there is inequivalent protection for a significant number of rights results in the absence of a level playing field as this inequivalence is not justified by the different nature of the business model. As a side effect, it may slow down development of the EU's sustainability agenda and the transition from ownership to usership (paragraph 8.1).

Two elements contribute to the improvement of inequivalences in consumer protection, namely the actual amendment or development of rules and the means to achieve equivalent consumer protection by either legislation or self-regulation. Important improvements can be made regarding equivalent protection. For exclusive use of mobility, (equivalents of) sales-based rights should apply to mobility usership consumers, reinforced by the comparability of the contract with consumer credit. The necessity to provide these sales-based rights does not exist in its entirety for shared mobility use because these rights do not always bring about equivalent protection due to the ephemeral nature of the contract. Therefore, shared mobility requires an additional adaptation to the rationale of consumer law considering the nature of the contract. For the rules on conformity, the continuation of mobility should be central (paragraph 8.4). At the same time, this additional adaptation is not always necessary. The creditworthiness assessment as it now ensues from the sales-based law should apply to all mobility usership contracts for the sake of uniformity and legal certainty because the scope of the rule is in principle adequate as it already excludes shared mobility use (paragraph 8.5.2).

Both government regulation and self-regulation are considered as methods to achieve equivalent consumer protection for mobility usership consumers through amendment or development of rules. Important factors that assist in deciding on the method of regulation are the level of knowledge and support of the mobility usership sector, the degree of organisation, enforcement (possibilities) and the awareness amongst consumers about self-regulation schemes. Moreover, there is a risk in case of self-regulation that this level of protection is dynamic and might erode; the 'race to the bottom' (paragraph 8.6). Therefore, a new European directive should be designed to tackle the overarching shift from ownership to usership. This directive should not only safeguard consumers engaged in mobility usership but also establish a legal framework capable of withstanding the future expansion of the usership trend (paragraph 8.6.2).

9.7 FURTHER RESEARCH AND REMARKS

The present research demonstrates that inequivalences in consumer protection exist between sales-based consumers and mobility usership consumers, and, with equivalent protection, the transition to sustainable mobility might be accelerated. This research focusses on EU consumer law and its implementations into four north-western Member States, whereas the study of other (groups of) Member States subsidizes a broader (EU-wide) understanding of the level of consumer protection for mobility usership and its relationship with current EU consumer law. However, it is not likely that this will yield very different insights as all provision originate from EU consumer law. Ongoing research could focus on other consumer law or private law instruments, but also property law may offer solace to issues related to the transition from ownership to usership.²

As this research revolves around the important topic of mobility, researching other disciplines where the transition from ownership to usership occurs would contribute to the question of whether the research results can also be applied more broadly. Relevant subjects are, for example, housing, electronics, clothing, and lighting. While adaptation of the legal framework facilitates a transition of mobility, other factors could help take the foot off the legislative brake pedal. These factors still stand in the way of development of the EU's sustainability agenda, and the transition to the circular economy. Future studies into social problems associated with the transition to mobility use could contribute to the widespread adoption of the model. Inhibiting factors for a broader adoption now concern for example the accessibility issues for minorities (accessibility for the elderly or people with less financial means) in shared transport.³ In addition, the empirical part of the study looks at the terms and conditions or standard contracts of different types of mobility usership providers. Although the documents are not produced for research purposes, the documents have an important legal reality which simultaneously leaves out other contextual information such as the consumer's perceived protection in mobility usership contracts. This could provide valuable contextual information that can contribute

2 For example, R. Westrik (2023) 'Circulariteit, appartementsgebouwen en het opstalrecht (I)' *Weekblad voor Privaatrecht, Notariaat en Registratie* 7429, pp. 713-719; A. Onnekink, N. Al-Khaledi, E. Bajema, Z. Bazzi, P. den Drijver, D. 't Hart, J. Heller, *Recht en Energie: Loopt het recht achter de feiten aan?* (Deventer: Wolters Kluwer 2023), 12; E.F. Verheul and T.T. van Zanten (red.), *Overeenkomst en Zekerheid (Recht & Praktijk, nr. InsR20)* (Deventer: Wolters Kluwer 2023), 10.

3 For example, the dissertation of Ü. Tanriverdi on *The Smart Transition of Urban Mobility Towards Sustainable, Accessible, Inclusive, and Safe Mobility: Developing Models for Regulation, Policy, and Governance, 2021-2025* (Working title), completion expected in 2025 and the dissertation of H.A. Le on *Towards a Resilient Framework of High Level Passenger Rights Protection: Adaptations for Platform-based Mobility Solutions and the Future of Sustainable Urban Mobility* (Working title), completion expected in 2026.

to the assessment of necessity for legal amendment and the question whether perceived consumer protection influences the adoption of mobility usership models.

9.8 FINAL

This study explored the extent to which equivalent consumer protection applies to the mobility usership consumer based on the selected EU Directives. To a large extent, inequivalent protection exists for mobility usership consumers due to the *ratione personae* or *ratione materiae* scope of the directives. Some selected EU directives (or parts thereof) do apply, which may result in an overlap of the rules and on balance, no inequivalent protection exists because the applicable instrument eliminates part of the inequivalence. The remaining inequivalences are in my opinion not always problematic. Therefore, a *mutatis mutandis* assessment of the rules is important as equivalent protection should respect the rationale of the legal rule, be proportional and practically possible. To some extent, the sector increases protection to the sales-based level of protection. In my view, however, self-regulation is not a silver lining due to the risk that self-regulatory protection is dynamic and might erode. This risk can be limited in a case where the sector focusses on non-individual self-regulation, or even more so in a case of government regulation as this contributes to the uniformity of the rights. While current EU consumer law acts to some extent as a foot on the brake pedal to the transition from ownership to usership, future EU consumer law can also act as an accelerator pedal. Legal intervention lends urgency to provide a degree of legal certainty that simultaneously facilitates (and potentially stimulates) the smooth transition from ownership to usership and considers the underlying rationales of EU consumer law.

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11 APPENDICES

The appendices referred to in the text are shown hereafter.

Appendix 1: Consumer information obligations distance/off-premises contracts versus other contracts

Consumer information for contracts other than distance or off-premises contracts Article 5(1) Consumer Rights Directive	Consumer information and right of withdrawal for distance and off-premises contracts Article 6(1) Consumer Rights Directive
(a) the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services;	(a) the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services;
(b) the identity of the trader, such as his trading name, [...]	(b) the identity of the trader, such as his trading name;
[...] the geographical address at which he is established and his telephone number;	(c) the geographical address at which the trader is established and the trader's telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he is acting;
	(d) if different from the address provided in accordance with point (c), the geographical address of the place of business of the trader, and, where applicable, that of the trader on whose behalf he is acting, where the consumer can address any complaints;
(c) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;	(e) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable. In the case study of a contract of indeterminate duration or a contract containing a subscription, the total price shall include the total costs per billing period. Where such contracts are charged at a fixed rate, the total price shall also mean the total monthly costs. Where the total costs cannot be reasonably calculated in advance, the manner in which the price is to be calculated shall be provided;

Consumer information for contracts other than distance or off-premises contracts	Consumer information and right of withdrawal for distance and off-premises contracts
Article 5(1) Consumer Rights Directive	Article 6(1) Consumer Rights Directive
	(f) the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate;
(d) where applicable, the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the service, and the trader's complaint handling policy;	(g) the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the services and, where applicable, the trader's complaint handling policy;
	(h) where a right of withdrawal exists, the conditions, time limit and procedures for exercising that right in accordance with Article 11(1), as well as the model withdrawal form set out in Annex I(B);
	(i) where applicable, that the consumer will have to bear the cost of returning the goods in case study of withdrawal and, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods;
	(j) that, if the consumer exercises the right of withdrawal after having made a request in accordance with Article 7(3) or Article 8(8), the consumer shall be liable to pay the trader reasonable costs in accordance with Article 14(3); <i>Note: Article 6(1)(j) of the Consumer Rights Directive refers to the supply of water, gas and electricity and is therefore not discussed in the main text of chapter 5 as this is beyond the scope of the study.</i>
	(k) where a right of withdrawal is not provided for in accordance with Article 16, the information that the consumer will not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses his right of withdrawal;
(e) in addition to a reminder of the existence of a legal guarantee of conformity for goods, [...]	(l) a reminder of the existence of a legal guarantee of conformity for goods;
[...]the existence and the conditions of after-sales services and commercial guarantees, where applicable;	(m) where applicable, the existence and the conditions of after sale customer assistance, after-sales services and commercial guarantees;

Consumer information for contracts other than distance or off-premises contracts	Consumer information and right of withdrawal for distance and off-premises contracts
Article 5(1) Consumer Rights Directive	Article 6(1) Consumer Rights Directive
	(n) the existence of relevant codes of conduct, as defined in point (f) of Article 2 of Directive 2005/29/EC, and how copies of them can be obtained, where applicable;
(f) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;	(o) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;
	(p) where applicable, the minimum duration of the consumer's obligations under the contract;
	(q) where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;
(g) where applicable, the functionality, including applicable technical protection measures, of digital content;	(r) where applicable, the functionality, including applicable technical protection measures, of digital content;
(h) where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.	(s) where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of;
	(t) where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.

Appendix 2: Annex I(B) Consumer Rights Directive

B. Model withdrawal form

(complete and return this form only if you wish to withdraw from the contract)

- To [here the trader's name, geographical address and, where available, his fax number and e-mail address are to be inserted by the trader]:
- I/We (*) hereby give notice that I/We (*) withdraw from my/our (*) contract of sale of the following goods (*)/for the provision of the following service (*),
- Ordered on (*)/received on (*),
- Name of consumer(s),
- Address of consumer(s),
- Signature of consumer(s) (only if this form is notified on paper),
- Date

Appendix 3: Misleading commercial practices, in all circumstances considered unfair

Misleading commercial practices
1. Claiming to be a signatory to a code of conduct when the trader is not.
2. Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.
3. Claiming that a code of conduct has an endorsement from a public or other body which it does not have.
4. Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation.
5. Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising).
6. Making an invitation to purchase products at a specified price and then: (a) refusing to show the advertised item to consumers; or (b) refusing to take orders for it or deliver it within a reasonable time; or (c) demonstrating a defective sample of it, with the intention of promoting a different product (bait and switch)
7. Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.
8. Undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction.
9. Stating or otherwise creating the impression that a product can legally be sold when it cannot.
10. Presenting rights given to consumers in law as a distinctive feature of the trader's offer.
11. Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial). This is without prejudice to Council Directive 89/552/EEC (1).
12. Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product.
13. Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.
14. Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.
15. Claiming that the trader is about to cease trading or move premises when he is not.

Misleading commercial practices
16. Claiming that products are able to facilitate winning in games of chance.
17. Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.
18. Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions.
19. Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.
20. Describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.
21. Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not.
22. Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.
23. Creating the false impression that after-sales service in relation to a product is available in a Member State other than the one in which the product is sold.

Appendix 4: Aggressive commercial practices in all circumstances considered unfair

Aggressive commercial practices
1. Creating the impression that the consumer cannot leave the premises until a contract is formed.
2. Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation.
3. Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation. This is without prejudice to Article 10 of Directive 97/7/EC and Directives 95/46/EC (1) and 2002/58/EC.
4. Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.
5. Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.
6. Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with Article 7(3) of Directive 97/7/EC (inertia selling).
7. Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy.
8. Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either: – there is no prize or other equivalent benefit, or – taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

Appendix 5: List of terms which may be regarded as unfair

Terms which have the object or effect of:
(a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
(b) inappropriately excluding or limiting the legal rights of the consumer vis-a-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
(c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;
(d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
(f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
(g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so; <i>Note: Subparagraph (g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately. See: annex(2)(a) Unfair Contract Terms Directive.</i>
(h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;
(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; <i>Note: Subparagraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately. Subparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract. See: annex(2)(b) Unfair Contract Terms Directive.</i>

Terms which have the object or effect of:
(k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded; <i>Note: Subparagraph (1) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described. See: annex(2)(d) Unfair Contract Terms Directive.</i>
(m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
(n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;
(o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;
(p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;
(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him, or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

Appendix 6: List of codes used for qualitative analysis

Codes
Right to be informed
Right to change your mind
Right to conformity
Formal requirements
Other consumer rights
• Advance payment
• Ancillary service
• Applicable law
• B2B
• Ban on carsharing
• Termination fee
• Change in the contract
• Code of conduct
• Conformity
• Copy of agreement
• Cost structure
• Creditworthiness assessment
• Database consultation
• Definitions
• Delivery
• Deposit / Sureties
• Dispute resolution
• Duration of the agreement
• End of the agreement
• Exemplary calculation
• Exclusion (of liability)
• Failure of payment / Late payment
• Guarantee(s)
• Handling personal data
• Identity of the provider
• Insurance
• Limitation of use
• Main characteristics of the agreement
• Maintenance and repair

Codes
• Ownership of the vehicle
• Payment obligation
• Platform responsibilities
• Positive deviation of Dutch quality mark
• Price
• Price reduction
• Remedy: Repair
• Remedy: Replacement vehicle or replacement transport
• Restriction of use
• Right of withdrawal
• Right to terminate
• Right to information
• Roadside assistance
• Settlement more (or less) kilometres
• Start of the agreement
• Subscription
• Territorial limitation
• Transfer of ownership (rights)
• Use of the vehicle

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