

Access to justice and *Consumidor.gov.br* case¹

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SURIANI, Fernanda. Access to justice and *Consumidor.gov.br* case. In: In: WOLKART, Erik; LAUX, Francisco; RAVAGNANI, Giovani; LUCON, Paulo (coord.). *Direito, processo e tecnologia*. 2ed., São Paulo: Thomson Reuters Brasil, 2022, p. 239-263.

Keywords:

Summary: 1. Introduction; 2. Access to justice and ODR; 3. Consumer-related conflicts in Brazil; 3.1. Administrative process; 3.2. Courts; 3.3. *Consumidor.gov.br*; 4. *Consumidor.gov.br* and access to justice: comparing data; 5. Conclusions

Introduction

The advent of the internet and the fast-paced shift from local commercial relations to e-commerce³ has also expanded conflicts from the offline to the online environment, raising the need for effective mechanisms to solve them. Considering that information and communication technologies (ICT) made cross-border transactions possible and that they occur with the convenience of a “click”, neither formal judicial processes, nor the alternative dispute resolution mechanisms (ADR), which despite being cheaper and more informal, still demand face-to-face encounters, do not seem equipped to handle this kind of conflict in an appropriate way.

According to Katsh and Rifkin, when e-mail use became widespread in the first half of the 1990’s in the United States, the first online conflicts arose (misuse of mailing lists). During this period, disputes emerged and were settled informally and within the specific contexts in which they occurred. From 1995 to 1998, the growing use of the Internet brought about the need for online institutions prepared to receive and resolve the most frequently emerging conflicts. During this period, several experimental projects were developed by universities and foundations. The online dispute resolution (ODR) industry

¹ This paper is the revised version of the one that was presented in “Brazil Japan Litigation and Society Seminar 2 - Cultural Diversity and Global Changes”, held on 16th and 17th of September 2019 at University of São Paulo, Brazil.

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³ In 2018 the total e-commerce growth rate was 66,4%, and the global Business-to-consumer sales reached U\$ 2,1 trillion. Available at: <https://www.ecommercewiki.org/reports/752/global-b2c-ecommerce-country-report-2018-free>

really came into being in 1998. Companies have shown an interest in investing in online solutions to conflicts emerging in the virtual environment. It soon became clear that ODR should be the first choice for disputes arising from online activities as well as used for offline disputes. From the 2000s onward, there has been a period of extraordinarily fast change that has seen new institutions and technologies emerge as rapidly as they become obsolete.⁴

Cortés calls the phases described by Katsh and Rifkin as: a) hobbyist phase (from the creation of the internet until 1995), b) experimental phase (from 1995 to 1998), c) entrepreneurial phase (1998 to 2002), d) institutional phase (from 2002); the latter being described as the stage at which governments and public institutions began to adopt ODR programs such as Online Money Claim in England and Wales and Online Small Claims in Ireland.⁵ In 2020, due to the COVID-19 pandemic, the courts' buildings had to shut down, turning the use of technology from an already important discussion into a critical and urgent matter and accelerating the courts' digital transformation. It is possible to say that we already are in the jurisdictional phase.

In Brazil, the government launched an online platform in 2014 as an extra door, aside from the courts, for disputes that occur between consumers and companies. The platform mainly provides a public cyber space for direct negotiation between consumers and vendors and creates a public database with settlement results (solved/not solved) and a satisfaction rank.

On 20th May 2019, a technical cooperation agreement was signed to incorporate the “*Consumidor.gov.br*” to the platform of electronic judicial process (PJe).

The aim of this paper is to discuss if *Consumidor.gov.br* is being effective in increasing access to justice and how it could be improved. For this purpose, I will start by presenting how ODR mechanisms affect the concept of access to justice. Then I will provide context on how consumer-related conflicts are handled by the three main channels in Brazil: (i) Administrative process, (ii) Courts and (iii) *Consumidor.gov.br*. Finally, I will analyze the outcome of those channels and show whether *Consumidor.gov.br* has been able to broaden access to justice and ways to further improve it.

⁴ KATSH, Ethan; RIFKIN, Janet. *Online Dispute Resolution: resolving conflicts in cyberspace*, San Francisco: Jossey-bass, 2001, PP.45-70.

⁵ CORTÉS, Pablo. *Online Dispute Resolution for consumers in the European Union*, New York: Routledge, 2011, p. 55.

1. Access to justice and ODR

The rise of alternative dispute resolution (ADR) represents an effort to increase access to justice in a reality of time-consuming and increasing costs and complexity of our court systems. More recently, the spread of online dispute resolution (ODR) demonstrates the understanding that different types of disputes often require different procedural avenues for addressing them.⁶

ODR first emerged from the need for building trust in virtual environment to enhance e-commerce. It was developed to fill a gap in access to justice on commercial relations that took place in cyberspace among people geographically separated. Considering the excessive costs and complexity that accessing courts for parties in cross-border activities involving small disputes would generate, means that the parties involved simply will not have any other alternative to address their conflicts.

It seems natural that conflicts originating from online commercial relations might be directed to online dispute resolution mechanisms.

ODR has been conceptualized by Hörnle as “dispute resolution outside the courts, based on information and communications technology and in particular, based on the power of computers to efficiently process enormous amounts of data, store and organize such data and communicate it across the internet on a global basis and with speed.”⁷

However, for Cortés, the incorporation of information and communication technologies (ICT) in any dispute resolution mechanism, including courts, has grown to the extent that the difference between offline dispute resolution and ODR is increasingly blurred. In this sense, Cortés affirms that ODR is not a fixed concept, instead, it is in constant evolution, and the public sector has a growing interest in using it.⁸

Kaufmann-Kohler and Schultz agree and sustain that the definition of ODR must cover non-alternative dispute resolution methods, namely cybercourts. ODR has been developed to overcome deficiencies that face all offline dispute resolution methods, ADR and courts.⁹ For this purpose, it is important to have the best platform design, according

⁶ KATSH, Ethan; RABINOVICH-EINY, Orna. *The new new courts*, 67, American University Law Review, 165, 2017.

⁷ HÖRNLE, Julia. *Encouraging Online Dispute Resolution in the EU and Beyond- Keeping Costs Low or Standards High?* Queen Mary University of London, School of Law and Legal Studies Research. Paper n. 122/2012, 2012.

⁸ CORTÉS, Pablo. Op. Cit., p. 55.

⁹ KAUFMANN-KOHLER, Gabrielle e SCHULTZ, Thomas. *Online Dispute Resolution: challenges for contemporary Justice*, The Hague: Kluwer Law International, 2004, pp. 5-7.

to the problem it is created to solve. The design of ODR platforms is based on three major elements that must be tailored to the type of conflict and parties of the dispute: convenience, trust, and expertise. In other words, ODR must facilitate access and participation, have legitimacy, and provide value.¹⁰

The online platforms have focused on the use of four main institutes: *i*) automated and/or assisted negotiation, *ii*) online mediation, *iii*) online arbitration, and *iv*) online ombudsman.¹¹ There is an intense debate about their efficacy, but it seems that the earlier the dispute is solved through negotiation, with little third-party intervention, the more financially viable the platform will be. To achieve great adherence to direct negotiation it is desirable to have binding adjudication as the ultimate dispute resolution, and great transparency, especially in respecting the decisions reached as well as what the likely outcome would be if their case went to adjudication.¹²

This reasoning leads us to think of ODR as a pre-litigation mechanism of dispute resolution. However, we must consider that information management is the core of any dispute resolution mechanism and it can be an important asset for a post-litigation moment, in order to develop dispute prevention.

As asserted by Katsh and Rabinovich-Einy, ODR expands access to justice through three main shifts in dispute resolution practices: *i*) from physical to virtual setting, especially providing asynchronously communication overcoming space and time barriers; *ii*) from human intervention and decision making to software-supported processes, which means the use of algorithms and machine learning to assist human intervention and to process the information rather than only facilitates communication; *iii*) from emphasis on the value of confidentiality to an emphasis on collecting, using and reusing data in order to *prevent disputes*¹³.

For them, the most significant contribution of ODR has to do with overcoming the trade-off between efficiency and fairness. Thus, “the combination of data collection, communication, and ODR software opens up the possibility of increasing *both* efficiency *and* fairness, which can be translated into an increase in both ‘access’ *and* ‘justice’.” To

¹⁰ KATSH, Ethan; RIFKIN, Janet. Op. Cit., p. 73.

¹¹ PORTO, Antônio José Maristrello; NOGUEIRA, Rafaela; QUIRINO, Carina de Castro. *Resolução de conflitos on-line no Brasil: um mecanismo em construção*. Revista de Direito do Consumidor. vol. 114. ano 26. p. 295-318. São Paulo: Ed. RT, nov.-dez. 2017.

¹² HÖRNLE, Julia. Op. Cit.

¹³ The authors are aware of the necessity for monitoring the data collection and use and affirm that there is a real concern that opaque algorithms with biases built in will detract from the fairness of dispute resolution processes. KATSH, Ethan; RABINOVICH-EINY, Orna. Op. Cit., p. 49.

achieve this goal its essential to care about the design of the software, the criteria for the evaluation of ODR processes and the nature of dispute prevention activities. Dispute prevention relies on tracing patterns of disputes and addressing them, and, although it might not increase access of justice in a direct sense, it could reduce occurrences of injustice and barriers to justice.¹⁴

Using similar reasoning, Susskind proposes that access to justice cannot be focused solely on dispute resolution, but also to what he calls dispute containment, dispute avoidance and legal health promotion, which are elements for dispute prevention, and ODR technologies play an important role to achieve it.¹⁵

Considering that ODR can be provided by governments (including courts) to solve offline conflicts, and that information collected by ODR platforms can be used to prevent disputes to promote access to justice, I will investigate if *Consumidor.gov.br* can contribute to increase access to justice as a dispute resolution and dispute prevention mechanism.

2. Consumer-related conflicts in Brazil

The public system for consumer protection in Brazil has three main channels for addressing conflicts: administrative process (PROCON), the courts and *Consumidor.gov.br*.¹⁶

I will examine the data available for those mechanisms to find out if *Consumidor.gov.br* is being effective in promoting access to justice.

2.1. Administrative process

PROCON, which stands for *Program for Consumer Protection and Defense*, is a public agency that performs at the local level. Its activities include collecting complaints,

¹⁴ KATSH, Ethan; RABINOVICH-EINY, Orna. *Digital Justice: technology and the internet of disputes*, Oxford University Press, 2017, p. 51.

¹⁵ According to Susskind: “dispute containment concentrates on preventing disagreements that have arisen from escalating excessively, and it is lawyers as well as the parties themselves who need to be contained. Dispute avoidance is a theme that in-house lawyers often raise with me: they speak of legal risk management, or as I put it, putting a fence at the top of a cliff rather than an ambulance at the bottom. I have yet to meet a regular human being, whether a chief executive or a consumer, who would prefer a large dispute neatly resolved by lawyers to not having one in the first place. Legal health promotion extends beyond the preventative lawyering of dispute avoidance to ensuring that people are aware of and able to take advantage of the many benefits, improvements, and advantages that the law can confer, even if no problem has arise.” SUSSKIND, Richard. *Tomorrow’s lawyers: an introduction to your future*, 2ed. Oxford: Oxford University Press, 2017, p. 95.

¹⁶ There are also private means to resolve disputes, like the companies’ consumer attendance service, and private platforms of disputes resolution, but the aim of this paper is to discuss mechanisms of consumerist dispute resolution by the point of view of the State.

investigating and resolving them through mediation and providing legal information to educate consumers and vendors about their rights and duties. The agency is also responsible for monitoring relations between vendors and consumers and applying penalties, when necessary, after an administrative process.¹⁷

The consumer can register a complaint through PROCON either in person, by phone or by internet. First, PROCON contacts the company and tries to settle. If it is not possible to solve the problem immediately, a notification is sent to the company reporting the problem and the documents provided by the consumer (CIP – *Carta de Informações Preliminares* – Letter of Preliminary Information). If the company's answer is not enough to resolve the conflict, the agency files a Complaint Term and schedules a conciliation hearing to try to settle. Otherwise, PROCON can issue an administrative decision, and the company may suffer sanctions, such as fine or suspension of commercial activities.¹⁸

Moreover, the agency has the power to supervise and intervene in the market when there is a violation of consumer rights, to prevent further damage. PROCON exists to ensure that consumer rights are respected by service and product providers, thus maintaining the balance of consumer relations B2C (business to consumer).¹⁹

According to official statistics presented by SINDEC (Information National System of Consumer Defense), the PROCON system have received around 2,4 million consumer complaints/enquiries per year between 2014 and 2019.²⁰ In 2020, the Coronavirus pandemic impacted the system, and the registers dropped to 2,1 million.

Problems with telecommunication companies (telephone, internet, cable TV) and financial institutions (banks, financial and card administrators) are the major subject matter of the registers. The complaints related to telecom services represent an average of 31% of the total along the years while financial-institutions-related are 19%, which means that together they reflect around 50% of all demanded subject matters. The average of solving complaints in the preliminary stage (CIP) is 74,7%.²¹

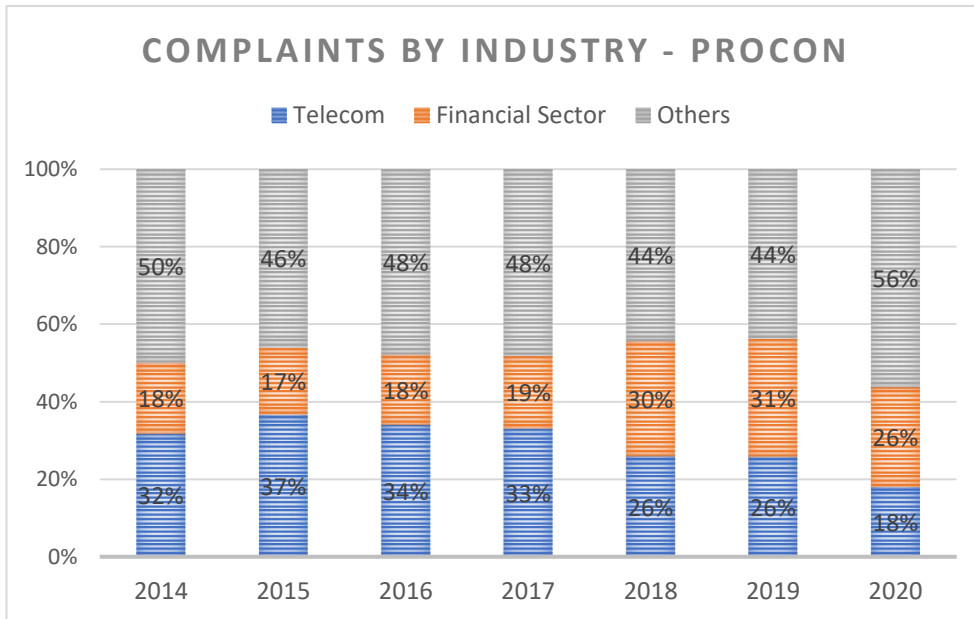
¹⁷ Information provided by PROCON. Available at: <http://www.procon.mt.gov.br/como-funciona>

¹⁸ Information provided by PROCON. Available at: <http://www.procon.mt.gov.br/como-funciona>

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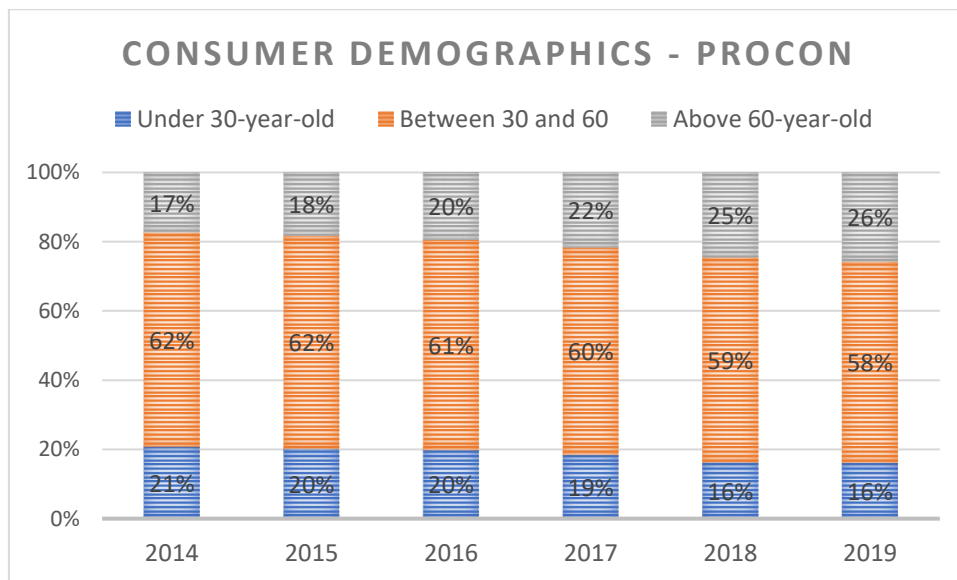
²⁰ SINDEC integrates information of 596 PROCONs, that represent all 27 Brazilian Federate States, and it was launched in 2004. The data shown in the paper comes from SINDEC official site: https://sindecnacional.mj.gov.br/pentaho/api/repos/%3Apublic%3ASindec%3AAtendimento%3ASINDEC_Atendimento.wcdf/generatedContent?, accessed on 07/11/2021.

²¹ These rates are available in the official SINDEC Reports from 2014 to 2020. Available at: <https://justica.gov.br/seus-direitos/consumidor/sindec/anexos/boletim-sindec-2018.pdf/view>, accessed on 07/11/2021.



Source: created by the author using data from the Sindec Reports.

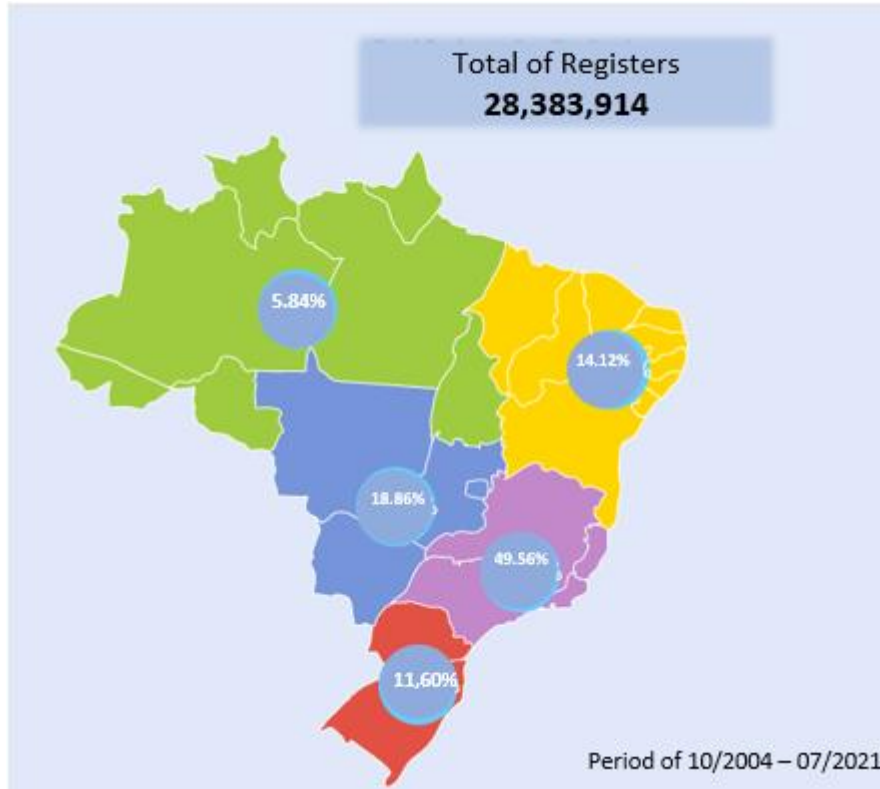
Looking at demographics, there are few young consumers who direct their complaints to PROCON, since close to 16% are under 30 years old. On the other hand, there is a great percentual of elderly people accessing the administrative system, with 26% consumers being above 61 years old.



Source: created by the author using data from the Sindec Reports.²²

²² The 2020 Report information was omitted by the author because it was inaccurate (the sum of all age groups did not total 100%).

Considering the geographic distribution, it is possible to note that around 64% of the registers come from the wealthier Brazilian regions (South and Southeast). The poorest region, North, represents only 5.84% of total registers.



Source: elaborated by the author using data from Sindec's dashboards, available at <https://sindecnacional.mj.gov.br>, accessed on July 11th 2021.

There is no data available in SINDEC about the average time companies take to reply to consumers or how much time local PROCONs take to finish the whole procedure and, since it is a decentralized system, each local PROCON has a different reality.

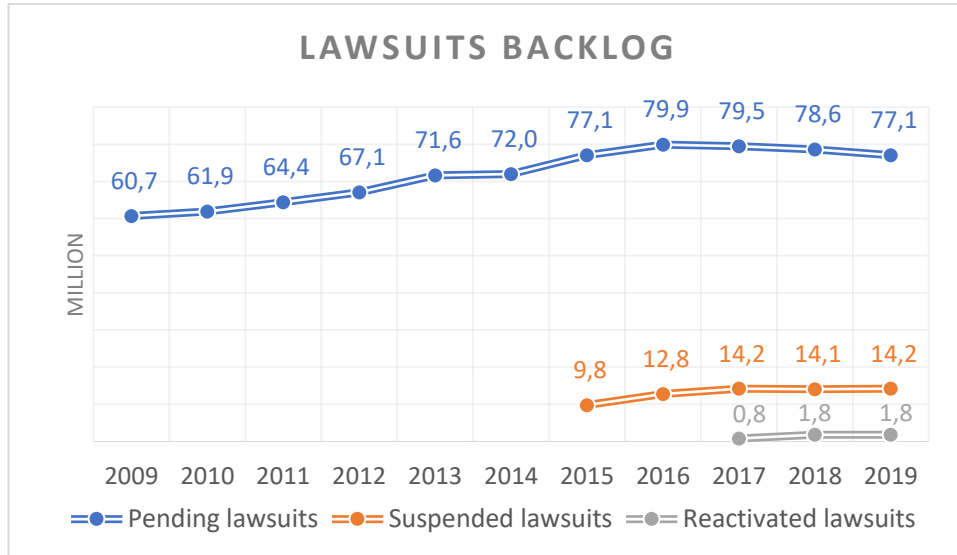
2.2. Courts

The next mechanism to solve consumer problems to be analyzed is adjudication. The context of litigation in Brazilian courts is as follow.

Every year, the National Council of Justice (CNJ)²³ promotes statistical research about the Brazilian Courts dockets. This report is called “Justice by numbers” (*Justiça*

²³ The National Council of Justice (CNJ) is a public institution that aims to improve the work of the Brazilian judicial system, especially regarding administrative and procedural control and transparency.. The Reports called *Justiça em números* (Justice by numbers) are available at: <https://www.cnj.jus.br/pesquisas-judiciarias/justica-em-numeros/>, accessed on July 11th 2021.

em Números), and according to this survey there were 77,1 million of cases waiting for judgment in Brazil in 2020, and the cost of the Judicial system on that moment was of R\$ 100,2 billion (around US\$ 20 billion), which correspond to 1,5% of Brazilian GDP (Gross Domestic Product).



Source: Adapted by the author from the Report “Justiça em Números/2020”.

Refosco points out that the expansion of consumption and credit seem to be the main factor for the growth of caseloads over time. Other relevant factors were the population growth, higher schooling rates, greater awareness of rights, democratization, the increasing number of lawyers and the emergence of new rights.²⁴

The creation of the Small Claim Courts, to judge cases below 40 times the minimum wage (around US\$ 5.000,00), which are accessible with no cost and no need for attorney representation, has also been a major factor for the increment of adjudication. The idea of the Small Claims Courts in Brazil was to broaden access to justice, offering a faster, cheaper, and more informal option for simple and low value disputes.²⁵

The average time to conclude a case in State Courts, which use a traditional procedure track, is 4 years, and in State Small Claim Courts, which use a fast procedure track, it is 2 years.

Consumerist conflicts are the number one subject matter judged in Small Claim Courts (around 70%).²⁶ They also correspond to the top five case types of new lawsuits

²⁴ REFOSCO, Helena Campos. Ação Coletiva e democratização do acesso à justiça. São Paulo: Quartier Latin, 2018, p. 147.

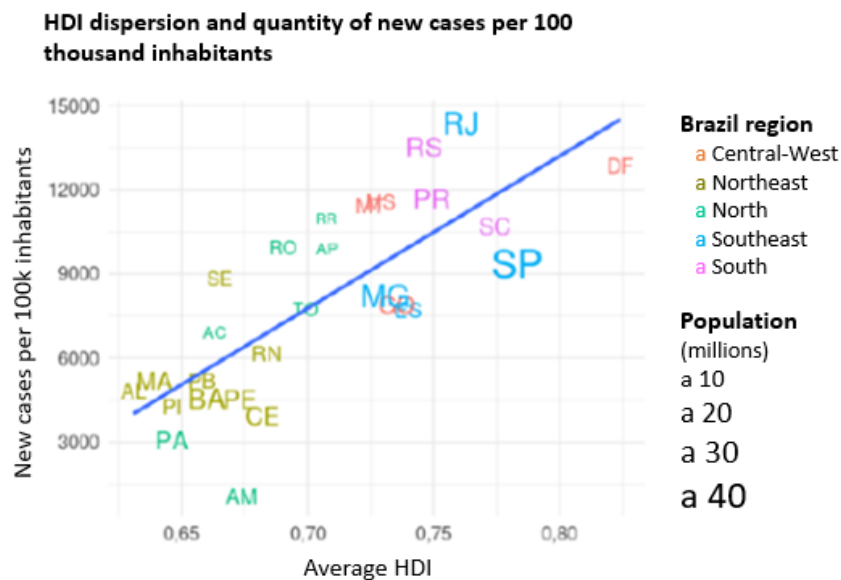
²⁵ CARNEIRO, Paulo Cezar Pinheiro. Acesso à Justiça, Juizados Especiais Cíveis e Ação Civil Pública. 2ª ed. Rio de Janeiro: Forense, 1999, p. 46.

²⁶ Report “CNJ Série Justiça Pesquisa, Perfil do acesso à justiça nos juizados especiais cíveis”, 2015, p. 54.

considering all the Justice System, representing the greatest low-value high-volume cases in Brazil. In 2020, there were around 3,5 million new consumerist lawsuits in both State and Small Claim Courts²⁷ Important to notice that a major part of the conflicts include the request for moral compensation.²⁸

In 2017 a survey was conducted to investigate consumption litigation in Brazil in B2C relations²⁹. The results show that telecommunication operators and financial sector are on the top of the list, representing more than 40% of the caseload. In poorer states some basic services companies are also among the repeat players (water and energy suppliers). There is no available age-specific data about consumers.

In regards to geographic distribution, the survey found a correlation between the number of new cases/inhabitants and the Human Development Index (HDI) of states based on PNUD Program, and the result shows that access to the courts is higher in the most developed regions, as seen below:



Source: ABJ survey “Os maiores litigantes em ações consumeristas: mapeamento e proposições.”

²⁷ Source: CNJ dashboards, available at:

https://paineis.cnj.jus.br/QvAJXZfc/opendoc.htm?document=qvw_l%2FPainelCNJ.qvw&host=QVS%40neodimio03&anonymous=true&sheet=shResumoDespFT, accessed on 07/11/2021.

²⁸ Justiça em números 2020, p.241. Available at: <https://www.cnj.jus.br/pesquisas-judiciarias/justica-em-numeros/>, accessed on 07/11/2021.

²⁹ The survey is called “Os maiores litigantes em ações consumeristas: mapeamento e proposições”, (The biggest litigants in consumer judicial cases: mapping and propositions) and is available at: <https://abj.org.br/cases/maiores-litigantes-2/>, accessed on 07/11/2021.

In the face of this huge amount of cases, the CNJ³⁰ has established in Resolution nº 125/2010, that Alternative Dispute Resolution (ADR) mechanisms should be broadly adopted as annexed systems of the Courts, and that mediation and conciliation must be considered a public policy in order to substitute the “litigation legal culture” by a “social peace legal culture”.³¹

Trying to resolve conflicts in a pre-litigation stage using mechanisms that has the objective of a consensus outcome, seems to be an important tool to promote the welfare of the parties involved on high volume disputes, which are mass claims not involving complex factual or legal issues. Moreover, it also reduces the judicial caseload.

The use of Alternative Dispute Resolution (ADR) or Online Dispute Resolution (ODR) to solve consumer disputes has been placed as a desirable policy objective on policy makers’ agendas all around the world.³²

In Brazil, mediation and conciliation were already promoted in Small Claim Courts procedures and in Conciliation and Mediation Centers, specially created for this purpose. *Consumidor.gov.br* arose from the necessity of providing an online door for consumers and it is presented as a third channel besides PROCON and courts.

2.3. *Consumidor.gov.br*

The platform *Consumidor.gov.br* was created as a public space for private settlement via direct negotiation. It does not replace the administrative process of PROCON. According to the National Consumer Secretariat (SENACON)³³, the objectives of *Consumidor.gov.br* are *i*) to expand customer service, *ii*) to encourage competitiveness by improving the quality of products, services and the relationship between consumers and companies, *iii*) to improve policies to prevent conducts that

³⁰ The Resolution nº 125/2010 from CNJ provides the regulation of the National Judicial Policy for the alternative dispute resolution in Brazil, focusing especially in mediation and conciliation. Available at <https://www.cnj.jus.br/busca-atos-adm?documento=2579>

³¹ WATABANE, Kazuo. *Acesso à ordem jurídica justa*, Belo Horizonte: Del Rey, 2019, p. 3.

³² SCHMIDT-KESSEN, Maria José; NOGUEIRA, Rafalea; CANTERO, Marta. *Success or Failure? - Effectiveness of Consumer ODR Platforms in Brazil and in the EU*, Copenhagen Business School Law Research Paper Series No. 19-17, 2019, Electronic copy available at: <https://ssrn.com/abstract=3374964>.

³³ SENACON at the Ministry of Justice is in charge of developing consumerist public policies in Brazil. According to the information on its own site: “Senacon's activities focus on the planning, elaboration, coordination and execution of the National Consumer Relations Policy, with the objectives of: (i) guaranteeing the protection and exercise of consumer rights; (ii) promote harmonization in consumer relations; (iii) encourage the integration and joint action of National Consumer Defense Secretariat (SNDC) members; and (iv) participate in national and international bodies, forums, commissions or committees dealing with consumer protection and matters of interest to consumers, among others.” <https://www.justica.gov.br/seus-direitos/consumidor/o-que-e-senacon>

violate consumer rights, and *iv*) to strengthen the promotion of transparency in consumer relations.³⁴

Another goal of the platform is to reduce consumerist conflicts. On 20th May 2019, a technical cooperation agreement was signed to incorporate “*Consumidor.gov.br*” to the electronic platform of judicial process (PJe). This agreement was based on the consumerist litigation survey conducted in 2017³⁵ that suggests that, when a consumer starts a case at the court, the possibility of using *Consumidor.gov.br* should be opened to try to solve the conflict in this early stage of the process. If a settlement is reached, the case is dismissed. There is still no data available about this agreement, and it is not possible to know at this moment if and how it influences the justice outcomes.

It seems that there is an intentional effort to make *Consumidor.gov.br* the main mechanism to address consumerist conflicts in Brazil, bypassing PROCON and reducing the courts caseload.

In order to access the platform, both the consumer and the company need to be registered - currently there are already more than 2,7 million consumers and around 965 companies registered at *Consumidor.gov.br*, including the repeat players of the most demanded subject matters (Telecom and Financial companies)³⁶. It is also important to highlight that companies are invited to register in the system, since consent is one of the core principles of negotiation. In 2020, due to the Coronavirus Pandemic, some companies that operate in sensible sectors of the economy were required to register.

The procedure starts when a consumer files a complaint, using predetermined categories, but there is also free space to voice the problem. Some categorized information is collected at this point, like type of problem being submitted, if the consumer tried to solve the problem with the vendor in the first place, and demographic information about the consumer.

The company then receives the complaint and has up to ten days to answer it. After receiving the answer, consumers may respond to the vendor and have up to twenty days to report if the problem was solved or not (solved/not solved). They may also indicate their level of satisfaction (from 1 to 5, with 1 being the lowest satisfaction level

³⁴ All data mentioned in the paper about *Consumidor.gov* is available at: <https://www.consumidor.gov.br/pages/conteudo/publico/1>

³⁵ The survey is called “*Os maiores litigantes em ações consumeristas: mapeamento e proposições*”, (The biggest litigants in consumer judicial cases: mapping and propositions) and is available at: <https://abj.org.br/wp-content/uploads/2018/02/28383cca082cb68ac79144e7b40f5568.pdf>

³⁶ Source: “Boletim Consumidor.gov.br – 2020”, available at: <https://www.defesadoconsumidor.gov.br/portal/biblioteca/100-boletins>, accessed on 07/08/2021.

and 5 being the highest) and add additional comments. After this point the complaint is considered terminated, and it will not be possible for the parties to interact or change the registered evaluation.

Transparency is a major characteristic of the platform. The complaint data feeds a public database with information such as: companies with best solution ratings, client satisfaction, and fastest turnaround time, among others. Companies' responses and final consumer comments can also be assessed and searched by keyword, market segment, company name, geographic data, area, subject, problem, period, settle rating (solved/unsolved) and satisfaction score, among other filters.

Statistics shows that the number of complaints is constantly increasing every year, reaching almost 1,2 million in 2020. Around 99% of them were responded to in an average time of 8 days. Also, the average satisfaction rank is 3,3 and the yearly cost of running *Consumidor.gov.br* is around 1 million Reals (approximately U\$ 250.000).

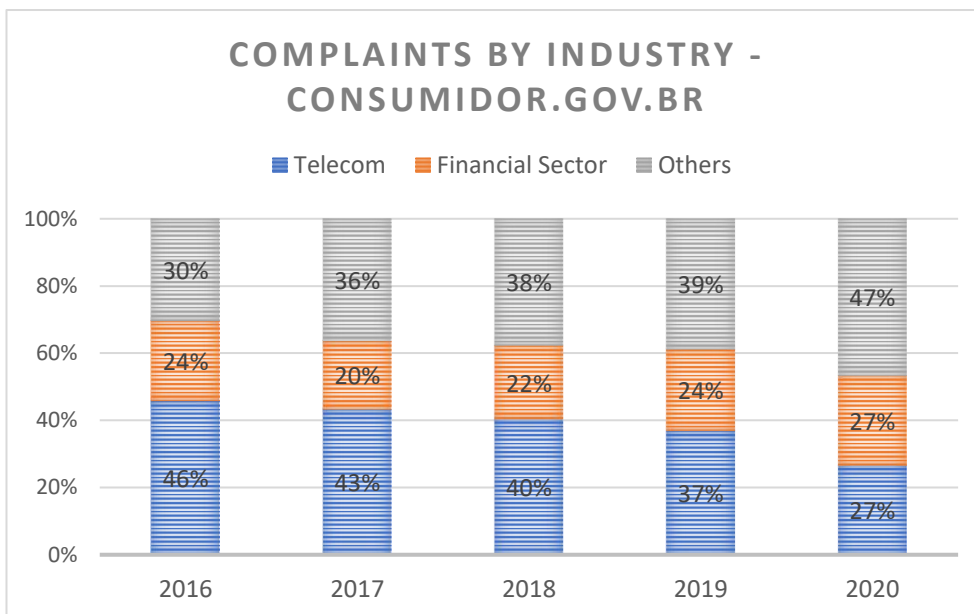
Around 40% of consumers responded that the conflict was solved and around 19% answered that it was not solved. The remaining 41% have not answered and it is not possible to infer what happened, although the platform, for methodological reasons consider the unanswered as solved, which is inaccurate.³⁷ It is also worth mentioning that 23% of consumers reach out to the platform before attempting to solve the problem with the company in a first moment, according to the 2018 Report.

Answered complaints		Solved Complaints		Contacted the company before	
Yes	99,30%	Solved	40%	Yes	77%
No	0,70%	Not solved	19%	No	23%
		Not answered	41%		

Source: created by the author using data from the report "Balanço Consumidor.gov.br 2018."

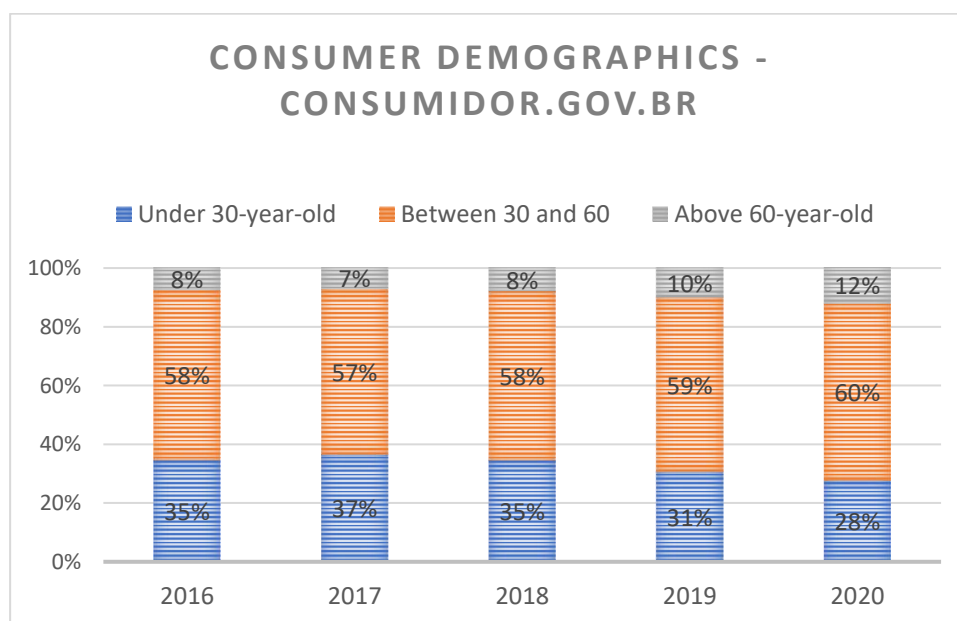
In 2020, complaints related to telecommunication operators corresponded to 26,6% of the total complaints while financial-related ones account for 26,8%. Together they reach more than 52% of all complaints, which is a constant along the years, having a slight decrease during the pandemic year of 2020, when complaints related to the tourism sector increased, as we can see in the next chart.

³⁷ Against the methodology: DIAS, Daniel; QUIRINO, Carina and RODRIGUES, Eduarda. *O balanço do Consumidor.gov.br merece reclamação no próprio Consumidor.gov.br ?*, Jota, Opinião&análise, 05/04/2018. Available in: <https://www.jota.info/opiniao-e-analise/artigos/o-balanco-do-consumidor-gov-br-merece-reclamacao-no-proprio-consumidor-gov-br-05042018>.



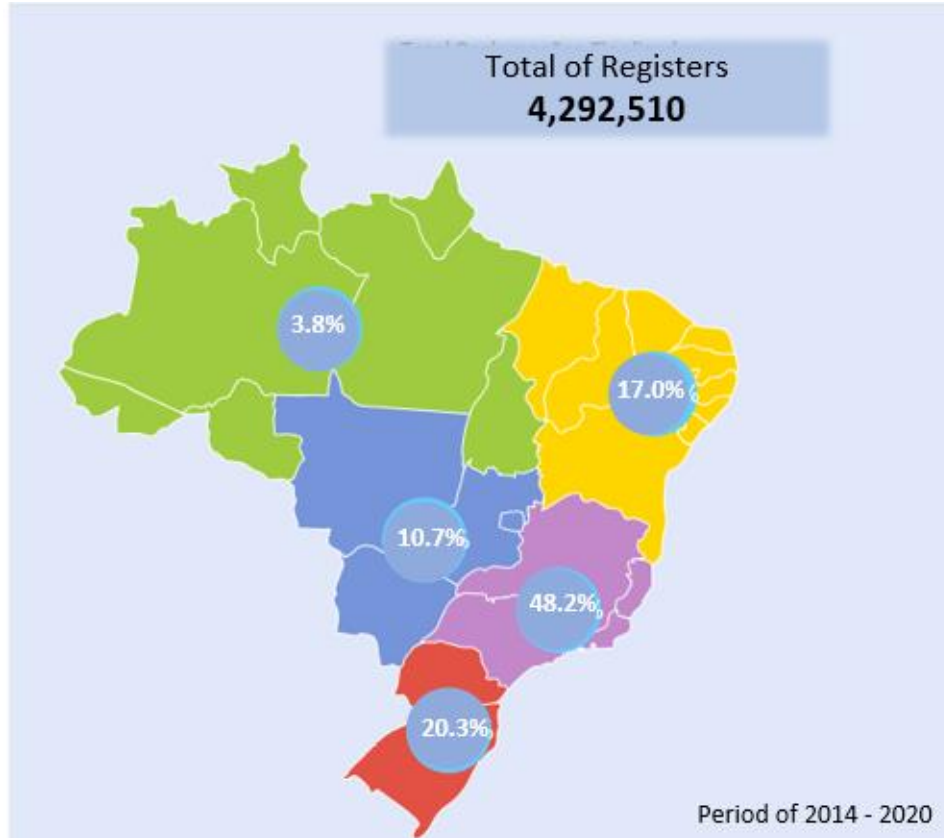
Source: created by the author using data from the reports “Balço Consumidor.gov.br” from 2016 to 2020.

Looking at the user demographics, consumers who access *Consumidor.gov.br* are mostly between 31 and 60 years old, around 58%. There is a great number of young consumers 30 and below, reaching an average across the years of 33%. The percentage of elderly people accessing the platform is low, with an average across the years of 9%, although it is possible to see at the chart below an upward trend.



Source: created by the author using data from the reports “Balço Consumidor.gov.br” from 2016 to 2020.

About the geographical distribution, the access to *Consumidor.gov.br* indicates a correlation between wealthier states and higher access to the platform. The richer regions, South and Southeast, are responsible for almost 70% of registers.

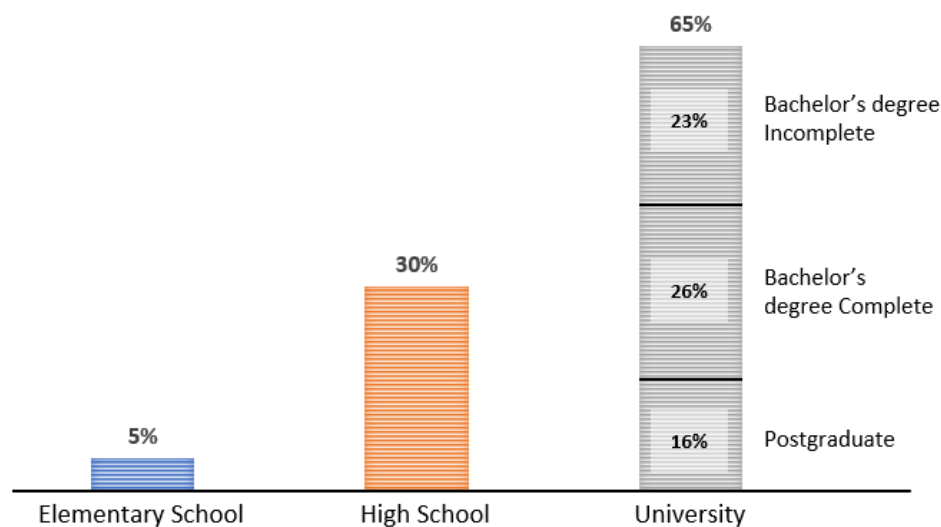


Source: Dashboard available at <https://consumidor.gov.br/pages/indicador/infografico/abrir>, accessed on 07/11/2021.

Finally, research on satisfaction published in 2019 shows that more than 65% of the platform users have completed higher education (at least a college degree), which demonstrates a distinct profile of users.³⁸

³⁸ Report "Pesquisa de Satisfação" from SENACON about *Consumidor.gov.br*, available at <https://www.consumidor.gov.br/pages/publicacao/externo/>, accessed on 10/22/2020.

USER EDUCATION LEVEL



Source: created by the author using data from the report “SENACOM - Pesquisa de Satisfação”.

3. *Consumidor.gov.br* and access to justice: comparing data

Before comparing the three channels for dispute resolution described above, it is important to consider some more information about Brazilian consumers.

In 2012, Oliveira and Wada conducted a survey with consumers between 25 and 40 years old belonging to Brazilian middle class.³⁹ They found out that when consumers identify a violation of a right, they usually try to solve the issue directly with the company. If it does not work, they do nothing or look for help at PROCON, and most of them do not go to the courts. Exceptions are made to telecommunication companies. For the interviewees, the inefficacy of their customer services is notorious, and because of this, customers prefer to go directly to PROCON or to the courts, bypassing the company.

According to *Consumidor.gov.br* data, around 23% of consumers do not try to contact the company before accessing the platform. It is important to note that since 2017, the number of smart phones (220 million) in Brazil has surpassed the number of inhabitants (210 million)⁴⁰ which helps understand why telecom companies are within the main repeat players in Brazil.

Oliveira and Wada also found out that PROCON has a high awareness and respect of the citizens, and also that consumers who have already accessed the Courts have done

³⁹ WADA, R.; OLIVEIRA, F. L. *O Comportamento da nova classe média brasileira nas relações de consumo*. In: LUCI, F. O.; WADA, Ricardo M.. (Org.). *Direito do Consumidor: os 22 anos de vigência do CDC*, 1ed. São Paulo: Campus Elsevier, 2012, v. 1, p. 31-49.

⁴⁰ Information available in the survey realized by FGV: <https://link.estadao.com.br/noticias/geral,brasil-ja-tem-mais-de-um-smartphone-ativo-por-habitante-diz-estudo-da-fgv,70002275238>

it motivated by feelings of punishment, and they ask for moral damage compensation, which is not provided by PROCON. Moreover, the value of the product or service must be high in their perspective⁴¹ to compensate the effort (in terms of time and costs) for pursuing their rights at the Courts. The general feeling is that courts are too formal and take too much time to solve the problems, even the Small Claim Courts.

It is important to notice that this survey was conducted in 2012, before the launch of *Consumidor.gov.br*. It seems that the platform overcame some of the barriers claimed by consumers about PROCON and the courts, since it is fast, informal, very convenient and has no subject matter limitation.

Considering the number of complaints reached in *Consumidor.gov.br* in 2020 (around 1.1 million) and comparing it to PROCON (around 2.1 million), that had its first agency created in the 70's⁴², we can conclude that *Consumidor.gov.br* is very successful. In only a few years it already represents 58% of the total amount of complaints in the administrative branch. As time goes by, *Consumidor.gov.br* should further increase awareness, possibly becoming larger than PROCON and, consequently, turn itself into the main public channel for pre-litigation conflict resolution.

The number of companies enrolled at *Consumidor.gov.br*, especially considering that the main repeat players in courts are among them (telecommunication and financial sector), may indicate that the platform is perceived as a valuable one.

Companies seem to be interested in participating in *Consumidor.gov.br* firstly because there is no cost to solve the conflict and because they know that the complaint might be addressed by courts. As Hörnle said, to achieve adherence to negotiation it is important to have adjudication as an ultimate resource, and for companies, the possibility of taking care of the problem with no court costs is much better.

Considering that 40% of complaints are settled in *Consumidor.gov.br*, it is possible to conclude that it is an efficient mechanism to reduce caseloads, at least potentially (there is not enough data to infer cause-effect relation). It is already possible that consumer cases presented at the court (TJDFT), have the option to be redirected to *Consumidor.gov.br* to try to settle. Therefore, when data about the agreement that incorporates the platform with the electronic judicial process (PJe) is made publicly

⁴¹ The consumers interviewed pursued their rights in Small Claim Courts in Brazil, which is responsible for cases until 40 times the minimum wage (around US\$ 3.600).

⁴² The first PROCON was created in São Paulo in 1976, according to information available on its site: <http://www.procon.sp.gov.br/texto.asp?id=1146>

available it will be possible to infer how much of the caseload are being reduced. So, it might be a good strategy to increase the number of settled cases, without the need for adjudication.

However, it must be considered that *Consumidor.gov.br* cannot be used as a filter to access the courts as a *mandatory* prior condition. One of the essential elements of an adequate resolution of conflicts by negotiation, mediation or conciliation is precisely the free will to participate and to consent. The high rate of litigation in Brazil is based, among other factors, on the expansion of mass relations and the damages that mass contracts can cause to multiple citizens (e.g. illegal clauses). Implementing filters to access the courts in order to reduce litigation rates may not be the best way to deal with the origin of the conflict. Nevertheless, the redirection of the litigants to the platform as an *option*, is a good strategy to increase the use of *Consumidor.gov.br* and, consequently, promote earlier resolution of conflicts.

The creation of a public database with solved/not solved information and the satisfaction rank can further enhance good practices. Companies need to protect their reputation and, therefore, want to show to the market that they care about their clients, making an effort to achieve good rates on the platform. This is probably one of the reasons why there is a discrepancy between the number of consumers that did not try prior contact with the company (23%) and the number of consumers that inform that the disputes were solved (39%).

Also, there is evidence that *Consumidor.gov.br* is indeed increasing access to the younger population (average of 33% for those 30 and under), compared to PROCON (average of 19% 30 and under). Of course, it is also important to consider that access to an online platform is more challenging for the elderly, and that is probably why the number of consumers above 61 years old is larger in PROCON (average of 21% compared to 9% at *Consumidor.gov.br*). However, since they are not excluding channels, we can still conclude that *Consumidor.gov.br* promotes the growth of access to justice.

The use of *Consumidor.gov.br* seems to increase faster among richer parts of the population, as almost 70% of the complaints come from the wealthier regions of Brazil (South and Southeast), and more than 65% of users have high level of education. That is an important data area for policy makers to investigate.

The convenience of the platform is evident, first because it is online, with all the advantages of asynchronous communication and without the need for face-to-face encounters, and second because it has no cost at all for both consumers and companies.

From the point of view of the government, courts cost 1,5% of Brazilian GDP (around US\$ 20 billion), while the annual cost of running *Consumidor.gov.br* is around R\$ 1 million (US\$ 200.000). Finally, because it is much faster (8 days) compared to the average turnaround time of courts (2 years).

It seems that *Consumidor.gov.br* expands access to justice through the first shift proposed by Katsh and Rabinovich-Einy, which is the shift from physical to virtual setting, overcoming space and time barriers.

It is interesting to note that, because the design of the platform was elaborated for direct negotiation, it cuts human intervention costs. Moreover, Schmidt-Kessen, Nogueira and Cantero compared *Consumidor.gov.br* to the European Union ODR platform and concluded that one of the most salient differences between the design of the two platforms is that *Consumidor.gov.br* has no third-party intermediary to help settle a consumer complaint, while the EU ODR platform is designed to have the problem settled by a certified ADR body. The lack of a third party other than the software is one of the reasons why the number of settled cases is higher comparing to EU ODR platform.⁴³

Then, it can also be said that *Consumidor.gov.br* expands access to justice through the second shift proposed by Katsh and Rabinovich-Einy, which is the shift from human intervention and decision making to software-supported processes, since it does not use third-party intervention, only the platform stand between consumers and vendors. It also produces qualified data, although, from the information available, algorithms and learning machines are not yet being used. That would be an important and powerful improvement of the system.

The platform data is generated by consumer assessments that, like any self-reported data, is subject to bias that could be based on the ignorance of the consumer about their own rights. This possibility could even explain the difference between the number of company answers (99%), which could be legally satisfactory, versus the number of “not solved” (around 20%) or not answered (around 40%) rates. If the platform would have provided, since the beginning of the process, information for consumers and vendors about their duties and rights and would have given information about previews settlements, it would be possible to avoid frivolous complaints and to stimulate consumers to answer about the conclusion of the process (solved/not solved and satisfaction rank).⁴⁴

⁴³ SCHMIDT-KESSEN, Maria José; NOGUEIRA, Rafalea; CANTERO, Marta. Op. Cit.

⁴⁴ PORTO, Antônio José Maristrello; NOGUEIRA, Rafaela; QUIRINO, Carina de Castro. Op. Cit.

Also, it must be considered that B2C relations have parties with unequal power. For instance, telecommunication operators and financial institutions enjoy the advantages of the repeat player against the one-shooter. Repeat players have a deep familiarity with the system and can use the system to create rules that play to their advantage in future cases.⁴⁵ In terms of outcomes and repeat player's advantages, because direct negotiation relies on interests rather than rights, it confers "benefits on those who have more power to shape legal endowments, have prior experience, and are expected to have future dealings with the legal system".⁴⁶

Considering that there is not a third party involved in the process to manage information between unequal parties, it seems necessary to implement measures to provide more information to consumers, as a minimum due process guarantee. *Consumidor.gov.br* is a public institution and has the possibility to overcome the criticism that exist referring to settlement outside the courts as a "second class" justice.⁴⁷

Providing information about preview settlements and Consumer Law in a simple way and in the context of the complaint will empower consumers, give them more confidence to decide on the solution proposed by the vendor, and could raise the satisfaction rate.

Overall, *Consumidor.gov.br* seems to have achieved its goals of expanding customer service, encouraging competitiveness by improving the quality of products, services and the relationship between consumers and companies, and strengthening the promotion of transparency in consumer relations.

However, there is no data available about the last objective, which is to improve policies to prevent behavior that violates consumer rights, that is related to the third shift proposed by Katsh and Rabinovich-Einy, which is the shift from emphasis on the value of confidentiality to an emphasis on collecting, using and reusing data in order to *prevent disputes*.

As previously stated, one of the main characteristics of *Consumidor.gov.br* is transparency, which is desirable to achieve the third shift. However, there is yet no evidence of the use of the collected data to prevent disputes.

⁴⁵ GALANTER, Marc. Why the "haves" come out ahead: speculations on the limits of legal change. Volume 9:1 Law and Society Review, 1974, Repúblicaçã (com correções), In: Law and Society. Dartmouth, Aldershot: Cotterrell, 1994.

⁴⁶ KATSH, Ethan; RABINOVICH-EINY, Orna. *The new new courts*. Op. Cit.

⁴⁷ FISS, Owen M. Against Settlement, 93 YALE L.J. 1073, 1075, 1984.

The geographic information shows that the poorer regions of Brazil still do not have great representation in the complaints. Actually, in *Consumidor.gov.br* the rate of access by richer regions is even higher (70%) than in PROCON (64%), and access to the courts is higher in the most developed regions. Since wealthier people have more possibilities of consumption, this isolated data may only reflect inequalities in society, and further research is needed to relate it to access to justice barriers.

The demographic data related to education level combined to the geographic data may show that, despite the effort to expand access to justice, there is still part of the population that is kept apart from the consumerist protection system. However, data also indicates that the repeat players are the same in the whole country, and even the poorer citizens face similar problems as the wealthier ones in major consumer matters.

Katsh and Rabinovich-Einy assert that the prevention of disputes based on ODR make a transformation of the dispute pyramid possible, opening the sides of the pyramid towards a rectangular shape in which a larger proportion of disputes are addressed through dispute resolution and prevention activities.⁴⁸ This means that even those that are not capable of recognizing an injury, or of pursuing a remedy, can benefit from this proactive dispute prevention, providing access to justice. Companies have the feeling that there is an “industry” of moral damages claims, since those are the majority of cases they have to deal with at courts. However, adjudication is at the top of the dispute pyramid, and we can notice by the geographical distribution data, that most of consumer damages are not “named, blamed or claimed”⁴⁹. Therefore, the proactive prevention of disputes is the best way to truly promote access to justice, even if indirectly, since even the consumer that has no understanding of his/her rights will benefit from it.

If data collected by *Consumidor.gov.br* was processed by algorithms or learning machines, patterns of conduct that violate consumer rights could be found. With this processed information, the agencies responsible to regulate the specific market, or even

⁴⁸ KATSH, Ethan; RABINOVICH-EINY, Orna. *Digital Justice: technology and the internet of disputes*. Op. Cit., p. 52.

⁴⁹ According to Felstiner, Abel and Sarat studies, the figure of a pyramid represents the transformation processes by which unperceived injurious experiences are-or are not-perceived (naming), do or do not become grievances (blaming) and ultimately disputes (claiming). The base of the pyramid is formed by unperceived injurious, going up there are the “naming”, “blaming” and “claiming” transformations in this order, which means that formal litigation and even disputing within unofficial fora account for a tiny fraction of the antecedent events that could mature into disputes. FELSTINER, William L. F.; ABEL, Richard; SARAT, Austin. *The emergence and transformation of disputes: naming, blaming, claiming...*, Law & Society Review, Vol. 15, No. 3/4, Special Issue on Dispute Processing and Civil Litigation (1980 - 1981), pp. 631- 654.

PROCON, can take measures to guarantee lawful activities. That would configure litigation prevention, provoking the enlargement of access to justice, as proposed by Katsh and Rabinovich-Einy and Susskind.

The fact that *Consumidor.gov.br* is managed by a public agency in charge of developing consumerist public policies in Brazil is a distinguished characteristic that provides real possibility for developing access to justice by prevention. The platform already collects important data about consumer conflicts. Inserting algorithms capable of processing the information and disclosing patterns gives a powerful tool in promoting fairness in the market. The punctual intervention to avoid fraud and unlawful vendor behavior increases trust and a fair competitive landscape, which is desirable for companies and for consumers.

4. Conclusions

The institutionalization of online dispute resolution mechanisms is seen as a desirable policy for consumer conflicts at the lower value end, which represent high volume disputes, most of them mass claims, not involving complex factual or legal issues.

In Brazil, the government launched the *Consumidor.gov.br* platform with the objectives of *i*) expanding customer service, *ii*) encouraging competitiveness by improving the quality of products, services and the relationship between consumers and companies, *iii*) improving policies to prevent conducts that violate consumer rights, *iv*) strengthening the promotion of transparency in consumer relations, and as an implicit goal *v*) reduce consumerist conflicts.

From the point of view of ODR as a tool for promoting access to justice, the paper discussed whether *Consumidor.gov.br* is being successful to achieve its objectives and increase access to justice.

The examined data shows that it has been fruitful to accomplish objectives “*i*”, “*ii*”, “*iv*”, and has expanded access to justice through the first shift proposed by Katsh and Rabinovich-Einy, which is the shift from physical to virtual setting, and partially the second shift, which is the shift from human intervention and decision making to software-supported processes. It appears to lack tools to better process the information rather than simply facilitating communication.

There is not enough available data to assert that the use of the platform reduces caseloads, but the redirection of plaintiffs to the platform when a case is started might

generate this data and it would be possible to measure the decrease of courts consumerist docket in the future.

On the other hand, it is proposed that processed information must be provided to the parties, especially for consumers, since the B2C relation represents litigants with unequal power.

Finally, to achieve the objective of improving policies aimed at preventing behavior that violates consumer rights, the platform must incorporate more sophisticated technology, process information existing in its database, and make it public and easy to access.

That will support the third shift to expand access to justice, which is the shift from emphasis on the value of confidentiality to an emphasis on collecting, using and reusing data in order to *prevent disputes*.

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