

## TOUCH SCREEN JUSTICE AND CONSUMER VULNERABILITY – A MIXED BLESSING?<sup>\*</sup>

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### **ABSTRACT**

*Digitalization is the future and the future is now. New commercial possibilities in the digital market are constantly being explored and exploited. Phenomena such as ecommerce automation and the impact of big data use on transformation of retailer-consumer relationship are increasingly present and more familiar by the day. With them, new perspectives to render consumers vulnerable arise. The digital vulnerability, unlike other types of consumer vulnerability is a state typical of every consumer in the digital market. This notion challenges the existing consumer law and policy's ability to address the issues that arise in relation to such vulnerability with the traditional perspective. It also questions whether the redesign in the architecture of digital marketplaces is making the traditional architecture of dispute resolution obsolete. With these issues as a starting point, the paper assesses the current trend of streamlining consumer dispute resolution to AI tools and touch screen justice. We argue that under the current set up, instead of providing access to justice that is more available to consumers, this trend has a potential to generate a systemic vulnerability in itself.*

**Keywords:** access to justice, consumer, consumer vulnerability, digital market, dispute resolution

### **1. DIGITALIZATION OF THE INTERNAL MARKET – THE RAISE OF THE DIGITAL MARKET**

The fast pace of the technological progress allowed for a new dimension of the Internal market – the Digital market to become a reality of today's consumers. Online marketplaces offer more in terms of choice, convenience and even innovation in comparison to the classic retail shopping experience. With online shops virtu-

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ally transforming our smart devices into a department store or a high street allowing us to choose everything we could possibly need or want under our own roof and delivering it to us within days, it comes as no surprise that the Digital market is rapidly growing. As the recent survey of the Eurostat shows, online shopping is very popular in the EU and consumers appreciate the convenience of being able to shop anytime anywhere, having access to a broader range of products, comparing prices and sharing their opinion on goods with other consumers.<sup>1</sup> The proportion of individuals aged 16-74 having shopped online in the 12 months prior to the 2021 survey stood at 67 %. In the 12 months prior to the survey, 90 % of individuals aged 16 to 74 in the EU had used the internet, 74 % of whom had bought or ordered goods or services for private use. Online purchases by internet users increased by 20 percentage points compared with 2011.<sup>2</sup> However, due to the new commercial possibilities in the digital market, which are constantly being explored and exploited, phenomena such as ecommerce automation and the impact of big data use on transformation of retailer-consumer relationship are increasingly present and more familiar by the day. These practices aim at making consumers receptive to digital marketing strategies that use digital technologies to optimize commercial practices which can enhance the consumer experience, help the consumer to find the goods and services they are looking for, and intensify and personalize the relationship between trader and consumer. However, they can also be the source of new power imbalances between consumers and traders, and new forms of unfair commercial practices.<sup>3</sup> Hence, navigating the complex environment which the technology constantly redesigns and reshapes makes the relationships between consumers and traders challenging and requires consumers to acquire new knowledge and adapt to this swift-paced, evolving systems. In this sense, the search for means of empowering and protecting consumers in this new marketplace must go beyond the borders of already established framework of consumer protection under EU law. We argue that traditional understanding of the consumer should be reassessed in order to ensure that consumers are afforded a comparable level of protection *online* as they are *offline*. The New consumer agenda<sup>4</sup> (hereinafter: the Agenda) recognizes that the practices that accompanied the digitization of consumer markets disregard consumers' right to make an informed

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<sup>1</sup> Eurostat, *E-commerce statistics for individuals*, [[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=E-commerce\\_statistics\\_for\\_individuals#General\\_overview](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=E-commerce_statistics_for_individuals#General_overview)], Accessed 18 January 2023.

<sup>2</sup> *Ibid.*

<sup>3</sup> Helberger, N.; Sax, M.; Strycharz, J.; Micklitz, H.-W., *Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability Consumer vulnerability*, *Journal of Consumer Policy*, 45, 2022, p. 176.

<sup>4</sup> Communication from the Commission to the European Parliament and the Council New Consumer Agenda Strengthening consumer resilience for sustainable recovery, COM/2020/696 final.

choice, abuse their behavioural biases and distort their decision-making processes. Although the Agenda suggests that such practices would require additional guidance on the applicability of consumer law instruments such as the Unfair Commercial Practices Directive<sup>5</sup> (hereinafter: UCPD) and Consumer Rights Directive<sup>6</sup> (hereinafter: CRD), it offers no explicit mention on the scope or content of such interventions.

Hence, the paper challenges the existing notion of consumer and vulnerable consumer under the relevant consumer law and policy and its ability to address the issues that arise in relation to digital market practices. It also questions whether the redesign in the architecture of digital marketplaces is making the traditional architecture of dispute resolution obsolete. With these issues as a starting point, the paper assesses the current trend of streamlining consumer dispute resolution to AI tools and touch screen justice.

## 2. THE NOTION OF CONSUMER AND CONSUMER VULNERABILITY IN THE LIGHT OF DIGITAL TRANSFORMATION

The infrastructure of consumer protection in both EU consumer protection legislation and CJEU case law has been built upon the notion of consumer as reasonably well-informed and reasonably observant and circumspect, that is - an average consumer (Recital 18 UCPD). It starts from the presumption that a consumer who is well informed makes rational and reasonable decisions at the market, with no social or emotional influence.<sup>7</sup> This approach was criticized repeatedly already from the perspective of the traditional market functioning<sup>8</sup>,

<sup>5</sup> 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 Commercial Practices Directive') [2005] OJ L 149, pp. 22–39.

<sup>6</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance [2011] OJ L 304, pp. 64–88.

<sup>7</sup> Incardona, R.; Poncibo, C., *The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution*, Journal of Consumer Policy Issue, Vol. 30, No. 1, 2007, pp. 21–38, pp. 31–36. See also Szilágyi, D., *A Challenge for the EU's Average Consumer Concept*, MTA–DE Public Service Research Group, 2020, [[https://publicgoods.eu/challenge-eus-average-consumer-concept#\\_ftn11](https://publicgoods.eu/challenge-eus-average-consumer-concept#_ftn11)], Accessed 20 January 2023.

<sup>8</sup> See Mišćenić, E., *Protection of consumers on the eu digital single market: virtual or real one?*, in: Viglianisi Ferraro, A.; Jagielska, M.; Selucká, M. (eds.), *The influence of the European legislation on national legal systems in the field of consumer protection*, Wolters Kluwer, 2018, p. 224.

but in the context of the digital market, it seems obsolete. Namely, digital consumer markets and electronic transactions use personalized persuasion strategies that discover, and build on emotions, biases, weaknesses and preferences of consumers precisely in order to affect their ability to make decisions rationally.<sup>9</sup> In this sense, both the notion of the average consumer and with it, the connected notion of the vulnerable consumer, need revisiting. Namely, these notions form together a benchmark from which commercial practices are assessed as accommodating for protecting users as the weaker party in commercial dealings and enabling consumers to play their role as active and autonomous market participants.<sup>10</sup>

When conceptualizing the new approach towards the understanding of the average and vulnerable consumer, the legal literature starts from the idea that the vulnerable consumer is no longer the exception, nor is the ordinary or average consumer the rule.<sup>11</sup> Quite the contrary, it seems that the digitalization of consumer market is making vulnerability a universal characteristic inherent to all consumers. In this sense, it seems appropriate to start from the changes in the understanding of consumer vulnerability and then circle back to the effect it had on the growing demands for changes in the existing definitions of average and vulnerable consumer.<sup>12</sup>

According to Article 5 para 3 UCPD vulnerable consumers are defined as: (i) a clearly identifiable group, (ii) vulnerable because of mental or physical infirmity, age or credulity, and (iii) a trader can be reasonably expected to ‘foresee their vulnerability’.

The narrow approach towards defining vulnerability of consumers, as seen from the definition offered in the UCPD, clearly does not take into account the fact that vulnerability takes on different forms, depending on the situations or circumstances in which consumers find themselves. This is obvious from the results of the European Commission’s 2018 consumer survey according to which 43 % of EU citizens believed themselves to be vulnerable as consumers. Digitalization of the market, with increase in the use of e-commerce and artificial intelligence is seen as one of the main triggers for making all consumers potentially vulnerable.<sup>13</sup> In this

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<sup>9</sup> Helberger; Sax; Strycharz; Micklitz, *op. cit.*, note 3, p. 180.

<sup>10</sup> *Ibid.*, p. 178.

<sup>11</sup> *Ibid.*, p. 180.

<sup>12</sup> See the Vulnerable consumers, Briefing, European Parliament, 2021.; Helberger; Sax; Strycharz; Micklitz, *op. cit.*, note 3, p. 182.

<sup>13</sup> “Dark patterns” and the EU consumer law acquis, Recommendations for better enforcement and reform surveys and submissions, BEUC, Brussels, 2022, p. 4.

sense, a wider notion of consumer vulnerability should have, among other, a potential to embrace all dimensions of so-called ‘permanent vulnerability’ or ‘vulnerability by default’<sup>14</sup> created by the architecture built on constant monitoring and manipulation of consumer behaviour and choices and exploitation of occurred or created vulnerabilities.

Building on this paradigm shift in understanding of who a consumer is and what constitutes a benchmark from which the unfair practice should be assessed within a changing digital market, the notion of the average consumer that describes the individual consumer is also in need of rethinking. The legal theory suggests a reversal of the positions in the relationship between the average and the vulnerable consumer. In this sense, it substitutes the reality of an average consumer - as an individual consumer - a relevant market player driven by information and choice, with a (dispositionally) vulnerable consumer.<sup>15</sup>

However, such a shift indicates a structural change in our perspective on the private law relationship between the consumer and the trader at the market. It also suggests that EU private law rules on consumer protection that governed that relationship cannot be transferred unambiguously to the digital market. Namely, the concept of consumer protection in the EU relied for the most part on the inherent tension between protecting users as the weaker party in commercial dealings and enabling consumers to play their role as active and autonomous market participants.<sup>16</sup> Nevertheless, with the use of AI and digital tools that predict what we are willing to pay for a product and streamline our choices towards it, consumers become essentially powerless and become vulnerable.<sup>17</sup> This erodes the role of (average) consumers who are now essentially vulnerable as active or autonomous participants in the market. Even more so, it distorts the very idea of regulated private autonomy as a tool necessary for supporting market integration.

The transformation of the consumer-trader relationship through digitalization and mainstreaming consumer vulnerability brings to the forefront the need to

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<sup>14</sup> *Regulating AI to protect the consumer, Position Paper on the AI Act*, BEUC, Brussels, 2021, pp. 22-23.

<sup>15</sup> Helberger; Sax; Strycharz; Micklitz, *op. cit.*, note 3, p. 185.

<sup>16</sup> *Ibid.*, p. 178.

<sup>17</sup> An inclusive approach would require making vulnerability a core value of consumer protection policies and regulatory reforms rather than an afterthought as is currently the case. It requires a change of direction in the way consumer law has so far been created, away from neo-liberal economic concepts and the realisation of the internal market at EU level, to turn towards social concerns and protection. It is therefore regrettable that the only direct mention of ‘vulnerable consumers’ in the New deal appears with a commitment from the Commission to continue its efforts in consumer education. Riefa, C.; Saintier, S., *In search of (access to) justice for vulnerable consumers*, in: Riefa, C.; Saintier, S. (eds.), *Vulnerable consumers and the law*, Routledge, New York, 2021, p. 247.

discuss the adequacy of other elements essential for the functioning of the internal market. As one of these elements is administration of justice in consumer disputes, the perspective of its redesign will be discussed in the next chapter.

### **3. DIGITALIZED OR ‘TOUCH SCREEN’ JUSTICE**

There are two alternatives available to Member States for providing access to justice to consumers, by way of private and public enforcement. On the private side, the possibility to resort to court or ADR entity existed long before the challenges to provide consumers substantive justice in case of infringements in the digital marketplace occurred. Moreover, pathways to private enforcement were developed without or with very little notion of practices that traders may employ in order to create digital asymmetries, which affect the decision-making autonomy of consumers. Even then, the possibilities for consumers to realize their rights before court or ADR entity were not without obstacles and limitations. As the legal literature rightly points out, they turn out to be insufficient and inappropriate to provide an adequate protection to the consumers, especially in situation of increasing number of cross-border breaches of consumer law.

Approaching the problem of providing justice to potentially vulnerable consumers in the digital era, by relying on the same procedural mechanisms and a slightly adjusted substantive framework, as suggested in latest EU consumer policy document, is rightfully criticised. In this sense, the central issue that should be discussed is the choice of mechanisms appropriate to provide justice to vulnerable consumers in a dispute arising from digital commercial practices.

#### **3.1. Before ADR entities?**

The traditional approach to providing access to justice to consumers starts from the basic private law principle of freedom of contract. Available private law mechanisms are put in place to ensure that courts or other competent authorities (such as ADR) provide remedy in case of an infringement of rights and obligations, arising out of the private law relationship entered into by consumer with a trader. Until now, both policy and implementing documents, whether on digitalization of justice<sup>18</sup> in the EU or enforcement of consumer protection<sup>19</sup> suggested that,

<sup>18</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Digitalisation of justice in the European Union A toolbox of opportunities, COM(2020) 710 final.

<sup>19</sup> Communication from the Commission to the European Parliament and the Council New Consumer Agenda Strengthening consumer resilience for sustainable recovery, COM/2020/696 final. Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dis-

in terms of access, it is less complicated, more cost-effective, overall rational and natural to provide an online dispute resolution mechanism to consumers who have chosen to make online transactions. Such transfer of the dispute resolution forum for disputes arising online from the physical to the online environment seems as a rather straightforward, but also a quite mechanic response. Namely, from the perspective of universal consumer vulnerability this shift fails to take into account the problem that can be best described as “double digitalization” problem. The first part of this problem concerns the question, whether the characteristics of online dispute resolution mechanisms, which are advertised as facilitators of a more ‘accessible’ path to dispute resolution for consumers affected by digital commercial practices, hide the risk of exacerbating the existing vulnerability issues, due to the use of AI and digital tools. The second part of the problem concerns the very quality of the substantive justice delivered to consumers in such novel and complex disputes, not only by judges or ADR entities, but also by employment of algorithmic platforms and other similar smart solutions.

In order to assess the first problem, it is necessary to look at the accessibility of existing models of online justice for vulnerable consumers. Taking the online route in order to resolve a dispute for an EU consumer may mean that he will be approaching the online platform for alternative dispute resolution (hereinafter: ODR platform) put in place to offer a contact point which connects him with the traders who accept alternative dispute resolution (hereinafter: ADR).<sup>20</sup> The idea of introducing an ODR platform was again, mainly driven by the aim of supporting the single market and with no particular consumer vulnerability in mind. Its construction did not start from the presumption of potential vulnerability inherent to all consumers when exposed to the digital tools or content. It was focused en-

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pute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L 165, pp. 63–79, Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L 165, pp. 1–12.

<sup>20</sup> The platform itself has been developed as an interactive and multilingual webinterface offering a single point of entry to consumers and traders seeking to resolve disputes arising from online transactions without going to court. The platform, which is free of charge, can only be used by consumers and traders who are based in an EU country (including Norway, Iceland or Liechtenstein) and only for purchases made online either domestically or cross-border. The platform is not a complaint-handling tool in itself but it facilitates the transfer of cases to relevant ADR bodies. The platform helps consumers to find a route to the available ADR entities by connecting them with alternative (i.e. out-of-court) dispute resolution bodies, which can deal with their disputes. In this sense, the ODR Platform functions as a directory of available ADR services depending upon the type of complaint being pursued via the platform. Sciallis, E., *ODR and access to justice for vulnerable consumers, The case of the EU ODR Platform*, in: Riefa, C.; Saintier, S. (eds.), *Vulnerable consumers and the law*, Routledge, New York, 2021, p. 182.

tirely on features, which cater for more procedural economy, in terms of allowing consumers to contact the trader and initiate dispute resolution online, instead of appearing before court.

When compared to the access to court, which implies a lawyer representation, court fees and physical presence in proceedings of uncertain duration and outcome, ODR seems as proportionately more accessible solution. However, this assumption neglects the universal vulnerability perspective of all consumers and the obvious difficulties that might arise due to their inability to navigate a complex digital platform. This was further intensified recently, when a multi-level authentication for accessing the platform was introduced. Its complexity is based described by the fact that there is an elaborate guide on how to authenticate via mobile phone, a smart phone or a safety key.<sup>21</sup> There are several additional issues concerning accessibility. It is not uncommon for the consumers to confuse the link for accessing the platform that is displayed at the webpage of the trader with the trader's customer service. In terms of clarity of the information on the ODR platform, there is a system of self-help tabs, which are only accessible as a user progresses through the process. In addition, legal theory warns of several other issues, such as cross-platform support, accessibility for the disabled and interoperability with interfaces, especially for those using specialist keyboards or audio and reading aids that may create barriers in access.<sup>22</sup> It goes on to conclude that such a system cannot be considered as supportive enough for all users, especially the vulnerable ones.

In this sense, potential complexity of language, inaccessible pages for all insufficiently digitally literate or with disabilities, availability of different formats and presentations of communication and minutes of the meetings impair the available mechanisms in providing justice to vulnerable consumers.

The interface of the platform requires the consumer to present in detail all facts relevant for the dispute, including evidence. This can be confusing, as it does not suggest that the platform is a pre-access point for subsequent initiation of dispute before an ADR entity, which in the end might not even occur. All of the above can have a dissuasive effect for the average consumer. For a vulnerable consumer, depending on their type of vulnerability, it would be more likely for him to give up pursuing his claim all together.

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<sup>21</sup> For more on the Platform see European Commission, *Online Dispute Resolution*, [<https://ec.europa.eu/consumers/odr/main/?event=main.home.selfTest>], Accessed 25 January 2023. See the Guide at *EU Login*, European Commission, [[https://webgate.ec.europa.eu/cas/manuals/EU\\_Login\\_Tutorial.pdf](https://webgate.ec.europa.eu/cas/manuals/EU_Login_Tutorial.pdf)], Accessed 25 January 2023.

<sup>22</sup> Sciallis, *op. cit.*, note 20, pp. 189-191.



Moreover, cases are recorded where traders used digital tools to discourage consumer from resolving the dispute before an ADR entity. However, legal theory warns that by renouncing the protection available through ADR mechanisms, consumers no longer have access to the record of their interactions with a trader, recorded in an accessible and transparent way either on the ODR platform or on the ADR systems.<sup>23</sup> This further complicates and prolongs the process of obtaining redress for vulnerable consumers and pushes them towards court proceedings as the only available, but hardly attainable recourse in practice.

The ODR system is obviously not equipped with solutions that recognize the problems of vulnerable consumers accessing and navigating the online site, understanding the online forms necessary to initiate procedures or participating in online proceedings without the assistance of lawyers. It is thus apparent that instead of facilitating access to justice to vulnerable consumers, the ODR can even add an additional layer of vulnerability and intensify the existing distrust in the system, in a moment when they need it most. This clearly highlights a need for revision of the ODR process in the light of a new understanding of roles and position of the various parties involved.

However, the major concern in connection to available national solutions on ADR connected to the ODR platform should be the fact that some of the mechanisms offered through the platform are actually offline (analogue) mechanisms that require the presence of parties. Unlike other characteristics of ODR discussed here, this one in fact undermines the idea of the ODR platform as a provider of online dispute resolution routes for consumers.

The procedural issues that touch upon “digitalized” justice, concern the appropriateness of using digital tools to resolve consumer, especially vulnerable consumer disputes, online. A separate issue is the quality of substantive justice that is delivered to consumers by relying on AI. The current development of ODR in EU, as explained, does not imply adjudication via the ODR platform. The ODR platform is merely a contact point that connects parties to the dispute and an ADR entity competent to resolve it. However, since the available legal tech tools could be used in future to digitalize the ADR mechanisms to which the ODR platform streamlines the consumer - trader disputes, it would be useful to try to project the potential advantages and disadvantages of such interventions for protection of universally vulnerable consumers. The mechanisms that inspired the solutions examined further are already applied around the world.

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<sup>23</sup> Sciallis, *op. cit.*, note 20, p. 190.

The application of legal tech arguably opens up the possibility for flexibilization and simplification of dispute resolution provided to consumers by way of ADR mechanisms. The use of AI, smart contracts and blockchain is particularly convenient in case of consecutive, systemic infringements, because they allow categorisation and use of smart patterns, as in the case of miscalculated utility bills. Although it might appear that the use of algorithmic assessment, which substitutes active participation of parties to the dispute, transforms ADR mechanisms into an even more accessible, effective, and less expensive means of providing access to justice to consumers, in reality there are issues concerning the use of AI in ADR that should not be overseen.

The use of smart patterns and systemic algorithmic solutions do not provide for a protective mechanism in terms of a virtual advisor who would help consumers, if they fail to understand the course of the procedure or have trouble navigating it. The mechanisms that rely on AI therefore often preselect only disputes that can be resolved by applying automated processes. Consumer whose disputes cannot be categorized as such are denied access.

Due to the use of sophisticated solutions, the technical legal vocabulary and on-line environment may cause consumers, especially the vulnerable to seek legal assistance, which is actually contrary to the idea of ADR as a dispute resolution without the participation of lawyers. Even the lawyers' assistance might still be of very limited effect, since they are not proficient in representing parties before advanced algorithmic systems as providers of AI-led ODR. Namely, their knowledge and skill in applying traditional procedural rules, including the rules on service of documents, taking of evidence or delivery of decisions might not be useful at all in such disputes.

Another issue arises in connection to the suitability of the consumer legislation for machine interpretation and application by AI, because the contemporary consumer law does not consist of precise and straightforward rules. There is also a question whether the AI is capable of understanding the limitations and vulnerability of consumers, which might have influenced their decision making-process. Namely, flexibility in the approach of rendering a decision that separates ADR from judicial procedure is not a given with AI-based ODR. Will AI be intelligible to the sensibility and skills acquired by legal practitioners in order to be able to recognize the readiness of parties to settle their dispute amicably? Or will the uniformity, speed and efficiency be sole considerations, which might ultimately result in developing a system that instead of facilitating, might be actually creating obstacles that exacerbate the problem of access to justice for the less affluent? Is in terms of ensuring the quality of provided justice to consumers the AI-based ODR system

able to produce decisions that will be recognized under national law of Member States? Obviously, many issues need unambiguous and unequivocal answers in order to assert whether AI is beneficial or detrimental to enhancing access to justice for universally vulnerable consumers of today's market.

### 3.2. Before court?

According to CEPEJ report from 2022, there are several significant and noticeable tendencies in the European judicial area, such as decrease in the number of courts, specialization in certain fields of law and a more pronounced reliance on ADR and the increased use of legal tech in the working processes of judiciary.<sup>24</sup> The common denominators to all of them, according to CEPEJ is the pursuit to foster the quality of justice. However, from the perspective of providing consumer protection, especially to the vulnerable, the tendency to consolidate courts might influence the accessibility of justice, regardless how high quality it strives to be. In addition, streamlining consumers from judicial procedures towards ODR, as manifested, may actually result in systemic creation of new forms of consumer vulnerability. The accelerated trend of digitalization of judiciary should also be reconsidered in this context. Since digitalization of ADR is obviously not without issues, it is interesting to try to examine whether in regard to court procedure it could hide a different potential.

The *New consumer agenda*, among other, emphasized that the revised legal framework for consumer protection consisting of a 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<sup>25</sup> (hereinafter: Directive on better enforcement and modernisation of Union consumer protection rules) and Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC<sup>26</sup> (hereinafter: RAD) should substantially strengthen consumer rights, in particular by providing for

<sup>24</sup> *European judicial systems - CEPEJ Evaluation report - 2022 Evaluation cycle*, Council of Europe, 2022.

<sup>25</sup> 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 [2019] OJ L 328, pp. 7–28.

<sup>26</sup> Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L 409, pp. 1–27.

more digital fairness, stronger sanctions and an effective mechanism for collective redress.<sup>27</sup> It is evident that regardless of facilitating individual protection being a priority at EU level, which is aimed to be achieved by modernising ECCs, ADR mechanisms and online dispute resolution, court procedures as still considered as the primary path to achieving consumer protection. Unlike digitalization of ADR, in the context of influence of digitalization on court procedure the debate is focused much more on building capacities for achieving a certain level of quality of provided justice. However, it seems that the efforts are mostly revolving around revising the substantive consumer law in order to disable traders to use advance technology to consumer detriment.

The Directive on better enforcement and modernisation of Union consumer protection rules provides measures such as an online entry point to be developed by the Commission should, as far as possible, be user-friendly, mobile-responsive, easily accessible and usable by all, including persons with disabilities ('design for all')<sup>28</sup> to be introduced in order to enhance ODR. In regard to judicial procedures, however it detects the remaining gaps in national law regarding truly effective and proportionate penalties to deter and sanction intra-Union infringements, insufficient individual remedies for consumers harmed by breaches of national legislation transposing Directive 2005/29/EC of the European Parliament and of the Council and shortcomings with regard to the injunction procedure under Directive 2009/22/EC of the European Parliament and of the Council, which the revised rules aim to eliminate. Revision of the injunction procedure is suggested to be addressed by a separate instrument amending and replacing Directive 2009/22/EC, which was achieved with the introduction of the RAD.<sup>29</sup>

However, the question of the intensified influence of digital technologies on delivering justice before court and the effect it might have on building or deteriorating the capacities of courts to apply the novel and complex legal concepts introduced within the substantive legal framework remains open. It is not clear if the digi-

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<sup>27</sup> Communication from the Commission to the European Parliament and the Council New Consumer Agenda Strengthening consumer resilience for sustainable recovery, COM/2020/696 final, p. 15.

<sup>28</sup> Recital 58 Preamble of the 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 (Text with EEA relevance), PE/83/2019/REV/1 [2019] OJ L 328, pp. 7–28.

<sup>29</sup> Recital 3 Preamble of the 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 (Text with EEA relevance), PE/83/2019/REV/1 [2019] OJ L 328, p. 7–28.

talized judicial proceedings are adequately equipped to subordinate technology to the principles of justice. Will the principles of oral and public hearings be upheld? Is there a capacity for ensuring that the taking of evidence complies with the standards of a fair trial? Finally, will digitalization eventually result in eliminating the current parallelism of digital and 'analogue' systems of access to justice?

The general requirements connected to digitalization of judiciary are the respect for fundamental rights, such as the right to protection of personal information, fair trial and an effective legal remedy, as well as the principles of proportionality and subsidiarity. The European legislator also addresses the needs of the vulnerable groups. Regardless of the enhanced accessibility and affordability of digital technologies, there should be institutional, organisational and technical measures in place to provide the vulnerable groups, without the necessary means or digital skills, a complete access to justice. The potential of AI tools in collecting and processing of data used to resolve a dispute is undeniable, in terms of both simplifying and reducing the duration of the procedure. Nevertheless, care must be taken that because there is a built-in potential of lack of transparency or partiality in some AI tools, there is a risk of undermined guarantees of the right to access to the judge and the right to a fair trial (equality of arms and respect for the adversarial process).<sup>30</sup> The design of machine learning models could hide a grave risk of racial, ethnic, socio-economic, political and religious, or sexual orientation biases, which should be minimized. Special attention should be given to the quality of learning data and patterns, including their representativity and relevance in regard to the purpose and context of the specific AI tool. Lack of transparency of AI tools could be problematic, due to the requirements of the right to a fair trial, including the equality of arms concerning parties in a dispute, right to a reasoned decision and other principles. Appropriate safeguards should be put in place in order to guarantee the protection of fundamental rights, including the equal treatment and data protection and to ensure the responsible, human-centric development and use of AI tools where their use is in principle appropriate. Building on these findings, the European legislator finds that the final decision-making must remain a human-driven activity and decision. Only a judge can guarantee genuine respect for fundamental rights, balance conflicting interests and reflect the constant changes in society in the analysis of a case. At the same time, it leaves room for the application and influence of the AI, but at the same time warns that such influence should not

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<sup>30</sup> These questions were presented in the European Ethical Charter of the Council of Europe on the use of AI in judicial systems. The Charter also contains guidelines on addressing the challenges and the use of AI technology in a manner that equally respects the rights of all parties included. See more Council of Europe, *European Ethical Charter on the use of artificial intelligence (AI) in judicial systems and their environment*, [<https://www.coe.int/en/web/cepej/cepej-european-ethical-charter-on-the-use-of-artificial-intelligence-ai-in-judicial-systems-and-their-environment>], Accessed 1 February 2023.

be exercised when judges give an explanation of their decisions. The proficiency and training of judges on the use of AI tools should therefore be provided as a protective measure against any potential misuse.<sup>31</sup>

Despite the risks, it is obvious that the digitalization of justice is increasingly relying on the AI. Therefore, the question whether in the context of the universally vulnerable consumers there are appropriate safeguards that the AI will recognize situations in which digital technologies are used to single consumers out, to make them dispositionally vulnerable through the choice architecture and (ab)use the inherent vulnerabilities of consumers to make them take decisions that we would otherwise not have taken should be discussed.<sup>32</sup> Will the court procedure under the influence of AI be able to offer consumers the possibility to fight lock-ins and data monopolies and ensure abolishing of unfair practices in the digital market?<sup>33</sup> Another valid issue arises in connection to the cognitive influence and the inability of humans (both vulnerable consumers and legal practitioners) to understand and process information at the same level as their digital counterparts. Namely, the legal literature suggests, that it is more difficult for technologies to recognise the more subtle signs of vulnerability, meaning that without human intervention, many clients will be railroaded down a tech-centred path when this may not be wholly appropriate.<sup>34</sup> How will consumers provide evidence on their lack of actual consent because, either they failed to understand privacy notices, or they considered it time-consuming to read the terms or all the same, because they cannot actually influence any of them? Will it be possible to require that in the case of the trader passively participating in an online marketplace and benefiting from its algorithmic environment, the burden of argumentation is on the provider of this environment to prove that the digital asymmetry, if present, is not used to materially distort the decision-making autonomy of the consumer, as the legal literature suggests?<sup>35</sup> It should be borne in mind that all of these challenges to realizing digital access to court and the digitalized court procedure should be tackled by consumers who often either rely on digital assistance, because they lack the basic digital skills or digital confidence, or they do not possess a device or internet connection, which enables them such access.

<sup>31</sup> COM(2020) 713 at p. 11. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Digitalisation of justice in the European Union A toolbox of opportunities, COM(2020) 710 final.

<sup>32</sup> Helberger; Sax; Strycharz; Micklitz, *op. cit.*, note 3, p. 185.

<sup>33</sup> *Ibid.*, p. 196.

<sup>34</sup> *Simplifying access to justice for vulnerable consumers*, The Association of Consumer Support Organisations (ACSO), 2021, p. 8.

<sup>35</sup> Helberger; Sax; Strycharz; Micklitz, *op. cit.*, note 3, p. 178.

Another possible path that would ensure private enforcement and, at the same time, relieve individual vulnerable consumers of the need to confront the challenges just mentioned, especially in connection to the use of AI, is by way of collective redress. It is undisputable that consumers may mandate consumer organisations (or other civil society organisations where relevant) to represent them individually.<sup>36</sup> However, they tend not to. Although RAD enables consumers to use a representative action in order to defend their rights at least collectively, there is strong criticism against introducing such possibility. Some critics consider representative actions to be complex, due to multiple plaintiffs and quantifications of damages, and overburdensome for the consumers.<sup>37</sup> Others suggest that the AI Act<sup>38</sup> is not pure consumer protection legislation and therefore, the representative actions as offered in RAD, could not be used as mechanisms for protection of consumer rights under the Act.<sup>39</sup> This position fails to take into account that AI Act is one of the strategic consumer protection measures included in the Commission's Consumer Agenda of 2020.<sup>40</sup> Advocating for introduction of the AI Act to the RAD Annex I or the RAD in the proposal for an AI Act means requesting that consumer organisations are allowed to initiate a claim against illegal commercial practices or for obtaining compensation in case consumers suffered harm by a non-compliant AI system and its practice. It would also mean that the full effectiveness of the AI Act is not only envisaged, but also granted to consumers.<sup>41</sup>

#### 4. CONCLUSION

Just as the digital market provides consumers with countless possibilities to enter trader – consumer relationships, that do not necessarily end with the purchase or delivery of the product or service, its architecture leaves ample room for using the existing and creating new consumer vulnerabilities to the benefit of the traders. Namely, the use of digital tools allows traders to influence consumer decisions profoundly, leaving them without actual autonomy in their decision-making process. This essentially puts all consumers in an equally vulnerable position, for some adding an additional layer to already existing situations of vulnerability. The

<sup>36</sup> *Reasons to Add the AI Act to the Representative Actions Directive*, BEUC, Brussels, 2022.

<sup>37</sup> *Ibid.*, p. 2.

<sup>38</sup> Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM/2021/206 final.

<sup>39</sup> *Reasons to Add...op. cit.*, note 36, p. 3.

<sup>40</sup> *Ibid.*, p. 3.

<sup>41</sup> Micklitz, H-W.; Helberger, N.; Rott, P., *The Regulatory Gap: Consumer Protection in the Digital Economy, Addendum to the report 'Structural asymmetries in digital consumer markets*, BEUC, Brussels, 2021, p. 23.

creation of such universal consumer vulnerability challenges the private autonomy regulated by way of consumer protection law, which the internal market relies on. However, it also gives rise to concerns whether the traditional *ex post* private law mechanisms of dispute resolution that perceive that autonomy as inherent to the relationships from which the disputes arise are sufficient and appropriate to enable access to justice to universally vulnerable consumers. The starting point of the efforts in digitalization of traditional dispute resolution mechanisms to date was the desire to speed up the dispute resolution procedures, facilitate the exchange of information and documents with parties and lawyers, and provide continuous and simple access to justice. This resulted in an increase in the use of information and communication technology (ICT) tools and the promotion of the use of secure and high-quality technology for remote communication (video conferencing).<sup>42</sup> However, the measures taken in the sphere of designing procedural mechanisms do not take into account that the influence of digitization results in a power imbalance between the transacting parties and allows procedural exploitation in contract law, which ultimately causes an erosion of private autonomy. In this sense, as the analysis of the observed mechanisms showed, they are often inappropriate and not adapted to the requirements on ensuring access to justice to universally vulnerable consumers, creating additional, systemic vulnerability.

In this sense, as the analysis of the observed mechanisms showed, they are often inappropriate and not adapted to the needs of ensuring access to justice to universally vulnerable consumers, creating additional, systemic vulnerability. This can even be partially attributed to the disparity between the goals of digital transformation policies aimed at improving the judiciary, on the one hand, and consumer protection, on the other. In this context, it is not negligible that the policy of consumer protection is increasingly growing, from a policy of technical harmonization of standards to support the internal market, into a vital part of efforts to advance the goal of establishing a “Europe of Citizens”.<sup>43</sup> However, to the disappointment of many legal theorists, the relatively recent creation of a representative action and the adoption of the AI Act within the framework of consumer protection policy was not seen as an opportunity for an important step towards achieving that goal. In this sense, in the period ahead, it will be crucial to move away from the idea of digital transformation of administration of justice as merely an introduction of software and hardware solutions as main ‘deliverers of justice’.

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<sup>42</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Digitalisation of justice in the European Union A toolbox of opportunities, COM(2020) 710 final.

<sup>43</sup> See more European Parliament, *Consumer policy: principles and instruments*, [<https://www.europarl.europa.eu/factsheets/hr/sheet/46/politika-zastite-potrosaca-nacela-i-instrumenti>], Accessed 4 February 2023.



Improving routes to redress via access to dispute for universally vulnerable consumers requires a more coherent approach. The measures taken should be based on a profound understanding of each pattern of consumer law infringements at the digital market and the appropriateness of a specific mechanism for achieving policy objectives of consumer protection. Only this can be a guarantee that digital market practices, which create systemic vulnerability that erodes the private autonomy of EU citizens and has deeper societal implications will be removed from the market.

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