Addressing Vulnerabilities in Online Dispute Resolution

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A. Introduction

'Vulnerability,' or maybe better 'vulnerabilities,' has become a catchword in the current debate on an appropriate legal design to handle the pros and cons of the digital economy.[1] It is also mentioned in the many regulations and draft regulations the EU has already adopted or is about to adopt in the current term of the European Parliament and the European Commission.[2] When linking 'vulnerabilities' to 'online dispute resolution (ODR),' three different strands of discourse come together:

– *Facilitating access to justice with out-of-court mechanisms which are more easily accessible by inexperienced citizens.*

1 Krupiy, T. (2020) 'A Vulnerability Analysis: Theorising the Impact of Artificial Intelligence Decision-Making Processes on Individuals, Society and Human Diversity from a Social Justice Perspective' 38 Computer Law & Security Review 105429; Malgieri, G. (2023) 'Assessing (and Mitigating) Layers of Data Subjects' Vulnerability: Using the DPIA as a Model' in Malgieri, G. *Vulnerability and Data Protection Law*; Calo, R. (2018) 'Privacy, Vulnerability, and Affordance' in Selinger, E., Polonetsky, J., and Tene. O. (eds), *The Cambridge Handbook of Consumer Privacy*; Albertson Fineman, M. (ed.), (2010) 'The Vulnerable Subject: Anchoring Equality in the Human Condition', *Transcending the Boundaries of Law*; Ippolito, F. (2021) 'Vulnerability and Fundamental Rights in the Area of Freedom, Security and Justice' in Iglesias Sánchez, S., and González Pascual. M. (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice*.

2 See the recent Regulation (EU) 2023/988 of the European Parliament and of the Council of 10 May 2023 on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council and Directive (EU) 2020/1828 of the European Parliament and the Council, and repealing Directive 2001/95/EC of the European Parliament and of the Council and Council Directive 87/357/EEC, OJ L 135, 23.5.2023, 1; Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC, OJ L, 2023/2225, 30.10.2023; Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act), OJ L, 2023/2854, 22.12.2023.

– *Protecting the weaker party in a contractual relationship with appropriate legal tools at the substantive level.*
– *Developing an appropriate design for vulnerable persons enables 'normal citizens,' and particularly vulnerable persons, to benefit from digitalisation and enjoy protection against possible risks.*

Only a holistic perspective taking the three strands into account – access to justice and out-of-court mechanisms, protection of the weaker party in the industrial economy and due consideration of potential vulnerabilities in the digital economy – allows identification of the central elements which must be considered when developing new online dispute resolution mechanisms. This contribution addresses the development of ODR mechanisms as tools to enhance access to justice and shows how this principle has shaped policy choices at the European level in legislative interventions. This requires including these legislative acts in the industrial and digital economy. In this field, the contribution focuses on the Digital Services Act, the Artificial Intelligence Act (AIA), and the Data Act.[3]

B. Access to justice, ADR and ODR

Alternative dispute resolution (ADR) has gained the attention of legislators and investments by developers as a faster, cheaper and easier way to solve disputes.[4] An evolution of ADR, online dispute resolution (ODR), includes all the alternative dispute resolution processes that allow the parties and

3 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance) OJ L 277, 27.10.2022, 1-102; Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act) OJ L, 2023/2854, 22.12.2023 and the Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828, OJ L, 2024/1689, 12.7.2024.

4 Regulation (EU) No. 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR). OJ L 165, at 1, part. Recital 8. See also Schmitz, A.J. & Rule, C. (2017) The New Handshake: Online Dispute Resolution and the Future of Consumer Protection. American Bar Association.

a third party to interact at a distance using internet infrastructure. When parties find themselves in a dispute that has emerged online, they are more likely to accept online techniques to solve it and follow the internal procedure.[5] Moreover, parties appreciate the greater flexibility provided by online tools, which allows them to participate in a place and at a time that is convenient for them. Therefore, the use of the ODR process has been considered one of the tools that enhance access to justice and allow citizens to exercise their rights before a judicial court and alternative fora.[6]

It must be underlined that moving the dispute resolution process from in-person to videoconferencing by means of software applications available online may not be perceived as a substantial change that qualifies ADR as ODR. However, using such technology requires additional efforts in terms of experience and knowledge not only by the parties but, most importantly, by a potential third party involved in conflict resolution (e.g. a mediator or an arbitrator) who should master the technology to fully exploit its potential. Therefore, the technology in the ODR framework becomes a 'fourth party' that can play a proactive role and help the parties and the mediator/arbitrator to reach a fair solution.[7] Although the examples available in the market are limited and do not yet envisage all the most innovative solutions,[8] developments in ODR are already underway, and the technical and regulatory framework applicable to them will have to consider the needs of vulnerable people and the accommodation required for them.

5 See the results of a study developed in 2000 on the, at the time, first internal complaint mechanism based on mediation adopted by the e-Bay platform: Katsh, E., Rifkin, J., and Gaitenby, A., 'E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "eBay Law"' (2000) 15 Ohio State Journal on Dispute Resolution 705.

6 This wider interpretation is also used to justify other developments of 'digital' justice such as predictive justice systems. See Longo, E. (2023) *Giustizia digitale e Costituzione*; de Souza, S. and Spohr, M. (2021) Introduction. Making Access to Justice Count: Debating the Future of Law in de Souza, S. and Spohr, M. (eds) *Technology, Innovation and Access to Justice*, 1-16.

7 Rifkin, J. (2001) 'Online Dispute Resolution: Theory and Practice of the Fourth Party' 19 Conflict Resolution Quarterly 117; Rule, C. (2002) *Online Dispute Resolution for Business: B2B, e-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*.

8 Loebl, Z. and Rezabkova, T. (2023) 'Forward-Looking Approach to Online Dispute Resolution (ODR) in Light of the Current and Forthcoming EU Digital Legislation' 10 International Journal of Online Dispute Resolution 42.

I. Access to justice

Access to Justice is not only a political slogan; it is a movement that arose in Western democracies in the heyday of welfarism in whatever shape in the 1960s and 1970s. In the United States, law and litigation played vital roles in the equal treatment of black people, and later in the development of collective rights to pursue common interests in courts.[9] There was a rising political awareness of the need to look after groups in society which were excluded from the blossoming economy, excluded from legal systems – perhaps not formally but in practice – and unable to defend the rights attributed to them in courts. The movement for access to justice has many facets and political and economic implications. In the US, it cannot be disconnected from the civil rights movement. In Europe, it was much more closely linked to welfarism and the growing role that states/governments were playing in setting boundaries to free market capitalism with statutory regulations to increase equal treatment and social justice.

The connection between previous research and the current political attention to the 'societally and socially excluded' has allowed socio-legal studies to develop appropriate means to integrate such categories in society. Sociology and law have been coming together in the US and Europe, at Madison, Berkely, Harvard, Yale and Stanford universities, at the Max-Planck Institute für Ausländisches und Internationales Privatrecht in Hamburg and, later at the Centre for European Legal Policy in Bremen, all of which are united in the 'Access to Justice' project run by Mauro Cappelletti at the European University Institute in Florence.[10] Research on potential barriers to courts has constituted one of the critical elements in this empirical research.

Looking at the analysis by Cappelletti on access to justice, it emerges that there have been three waves of enhancement of access to justice for citizens outside judicial proceedings, all of which can be covered by the definition of 'co-existential justice.' The first wave involved legal aid for people experiencing poverty, the second concerned enhancing public interest litigation and the third concerned the need to reform judicial systems by inviting more substance-oriented justice. In this last wave, Cappelletti's premise is

9 Handler, J. (1978) Social Movements and the Legal System: Theory of Law Reform and Social Change.

10 Cappelletti, M. and Garth, B. (1981) Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective, in 27 Buffalo. L. Review 181.

that some types of conflicts are more prone to 'receive' justice through alternative methods rather than through the traditional path before courts. In these cases, there is not a need to define – and eventually sanction – who is wrong and who is right, thanks to the *jus dicere* by the judge, but instead, a need to provide the means for the parties in conflict to find their own (self-determined and therefore creative) solution to the dispute. Therefore, the solution can 'mend' the relationship so that it can continue in the future. Although the idea of 'mending justice'[11] cannot be applied generally, it is more efficient when the litigation occurs as an episodic (albeit conflictual) interruption of the relationship between the parties rather than a fatal and definitive fracture. In these cases, the sword of the court's decision, which inexorably 'separates' the wrong from the right, cannot provide effective remedies. In contrast, the conflict can be overcome more effectively by creating a solution shared between the parties, allowing them to 'co-exist' while continuing the relationship.

The central insights of this research lose none of their significance when it comes to the reasons why people do not pursue their rights in court – a perception of courts as institutions that are not there to pursue the interests of the 'little people,' as is politically expressed in the formula of class justice. These countless minor barriers can be traced back to differences in education but, above all, to the barriers of domination that the judicial system itself creates – the written nature of the proceedings, the language, the distribution of roles in court and the lack of legal aid for those who cannot express themselves. There is empirical research on almost all these problems in the USA and Europe, which has not lost its relevance to the design of courts.

II. ADR in the European legal framework

Out-of-court dispute resolution has been seen as one possible way to lower the threshold to get access to justice by de-formalising the procedure, giving it a more human touch through the choice of location, the involvement of laypersons, the search for a different language and the downgrading

11 Cappelletti, M., Garth, B. and Trocker, N. (1982). Access to Justice, Variations and Continuity of a World-Wide Movement, Rabels Zeitschrift für ausländisches und internationales Privatrecht/The Rabel Journal of Comparative and International Private Law 46. Jahrg., H. 4., 664-707.

(if not exclusion) of attorneys, at least in the initial phase. Out-of-court dispute settlement, or alternative dispute settlement, covers a broad range of institutions, which vary considerably in their public or private nature, governance structure, composition, procedure, and particularly the legal effect of the decisions made in such fora, which may range across all the nuances between binding and non-binding.[12]

The rise of out-of-court dispute resolution in EU law has come together with the rise of consumer policy in the EU Member States. It started with the development of the first EC policy programmes in 1976 and 1981. It was then strengthened with the amendment of Art. 114 TFEU in 1986, which mirrored the rise, if not explosion, of EU consumer law, which was used to frame the legal completion of the envisaged internal market.[13] Although the treaty did not grant the EU the power to deal directly with law enforcement, Art. 81 TFEU sets developing judicial cooperation in civil matters with cross-border implications as one of the EU competencies. Most importantly, this includes the adoption of alternative methods of dispute settlement (part. Art. 81(2)(g) TFUE).[14]

In addition, the CJEU has generously accepted that the EU enjoys an annex competence[15] that allows it to combine the harmonisation of substantive consumer law with appropriate enforcement tools, one of which is ADR mechanisms. First, ADR was connected to the type of consumer contract. Later, a genuine European layer for outside court dispute settlements was introduced by Directive 2013/11 on consumer ADR.[16] There is no other field

12 Ortolani, P. (2021) 'Digital Dispute Resolution: Blurring the Boundaries of ADR' in DiMatteo, L. et al. (eds.), *The Cambridge Handbook of Lawyering in the Digital Age*.

13 Casarosa, F. (2023) 'The Inactive Integration Clause: Can Art. 12 TFEU Shape Future Sustainable Consumer Policies?' 7 European Papers – A Journal on Law and Integration 14311446.

14 Note that the legislative interventions on alternative dispute resolution are only one of the three sets of interventions based on Art. 81 TFEU, which include on the one hand the European small claim procedure (Regulation 861/2007) and the European payment order (Regulation 1896/2006) and on the other Directive 2008/52 on mediation. See Berto, R. (2020) 'Alternative Dispute Resolution in the Digital Sector: A Dejurisdictionalization Process?' 7 International Journal of Online Dispute Resolution 103.

15 CJEU C-359/92 Germany v. European Commission, ECLI:EU:C:1994:306 in a conflict on the enforcement tools in the directive on consumer safety.

16 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) OJ L 165, 18.6.2013, 63-79.

in EU law in which the EU legislature has devoted so much attention to developing out-of-court dispute settlement mechanisms.[17]

The consumer ADR Directive is under review: [18] the European Commission has used its reporting obligation to evaluate the Member States' ADR systems and proposed the means to improve their effectiveness, which considerably differ across the EU.[19] The proposal employs the minimum harmonisation approach, leaving broad discretion on governance to the Member States. This might contradict the expectations of consumers who favour a less heterogeneous design. The European Commission has counted 430 ADR bodies in the EU and the EEC Member States.[20] The proposed amendment has two primary objectives: the first is to downgrade the burden on companies, in particular SMEs, by reducing their reporting requirements, and the second is to broaden the scope of application, which will include individual complaints by consumers about unfair commercial practices in the digital economy. The proposed amendment must be read together with the Omnibus Directive,[21] which granted consumers

17 Compared with the very laconic interventions in Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services, in which Art. 13 requires "providers of online intermediation services and organisations and associations representing them to, individually or jointly, set up one or more organisations providing mediation services […] for the specific purpose of facilitating the out-of-court settlement of disputes with business users arising in relation to the provision of those services." Similarly, Art. 17(9) of Directive 2019/790 on copyright and related rights in the digital single market specifies that online content-sharing service providers must provide an effective and expeditious complaint and redress mechanism, which is qualified as an out-of-court redress mechanism in cases of disputes between rightsholders asking for content removal from platforms. Another example is Directive 2018/1808 amending the Audiovisual Media Services Directive, of which Art. 28b provides out-of-court redress for settling disputes between users and video-sharing platform providers.

18 Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, and Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828 Brussels, 17.10.2023 COM (2023) 649 final.

19 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes Brussels, 17.10.2023, COM (2023) 648 final.

20 See the full list at https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2.

21 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,

individual rights under the Unfair Commercial Practices Directive 2005/29 (UCPD).[22] The proposal does not include complaints about the pre-contractual obligations of traders and does not foresee the possibility of ADR bodies bringing cases to courts if they realise that a particular legal problem needs to be clarified by the courts instead of leaving its ongoing resolution to ADR bodies.[23]

III. The notion of ODR in the European legal framework

In 2013, the EU adopted the Regulation on Online Dispute Resolution.[24] The name is misleading as the purpose was not to create an independent European ODR mechanism to directly resolve European citizens' disputes. Instead, the aim was to create a platform ('ODR platform') that lists the available (national) ADR and ODR providers. Consumers should use the platform to select and contact ADR/ODR providers and initiate a resolution procedure. According to the EU legislator, the ODR platform would facilitate independent, impartial, transparent, effective, fast and fair out-of-court resolution of online disputes between consumers and traders. The Commission was responsible for developing and operating the ODR platform,[25] including all the translation functions necessary for this regulation and its maintenance, funding and data protection. The ODR platform was to be a multilingual interactive website allowing consumers to contact

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) OJ L 328, 18.12.2019, 7-28.

22 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') (Text with EEA relevance), OJ L 149, 11.6.2005, 22–39.

23 BEUC Report, Modernising Consumer ADR in the EU. The revision of Directive 2013/11/EU on consumer Alternative Dispute Resolution, 15 December 2023 https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-164_Modernising_Consumer_ADR_in_the_EU.pdf.

24 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) OJ L 165, 18.6.2013, 1–12.

25 https://ec.europa.eu/consumers/odr/main/?event=main.home2.show.

traders to open an ADR procedure online. The ODR platform was regarded as a complement to the blossoming online business. The EU made great strides in the online platform and above all in handling cross-border conflicts. The Consumer Advice Centres, which the EU set up and financed for this purpose, were intended to play a unique role.[26] However, the project did not fly. This is why insiders were not surprised when the 2019 review of the ODR Regulation revealed its somewhat limited importance.[27] Despite a high number of visits, there was limited consumer interest in requesting an ADR procedure from the traders concerned, who, in most cases, either remained silent or offered to settle the case outside of the platform. As a result, about 2% of the requests for an ADR process were sent to an ADR entity. The situation has not improved, as the 2023 report demonstrates.[28]

In its proposal to withdraw the ODR Regulation,[29] the European Commission explains:

> Once a request is made by the consumer, the trader has 30 days to agree to launch the ADR process. Only 2% agree to do so, about 40% of the traders contact the consumers directly outside the platform to settle the matter while the majority of traders simply remain silent as participation is not compulsory. ADR bodies perform a test of eligibility on the cases reaching them (about 400 per year) and on average keep only half of the requests. The poor results of the ODR platform are therefore the result of a succession of facts linked to the lack of prior information of visitors on how ADR works, the very limited interest of traders and the

26 https://www.eccnet.eu/consumer-rights/exercising-your-consumer-rights/online-dispute-resolution-platform.

27 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes, COM(2019) 425 final.

28 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes Brussels, 17.10.2023, COM (2023) 648 final, 7.

29 Proposal for a Regulation of the European Parliament and of the Council repealing Regulation (EU) No 524/2013 and amending Regulations (EU) 2017/2394 and (EU) 2018/1724 with regard to the discontinuation of the European ODR Platform, COM/2023/647 final.

uneven completeness or relevance of the consumer complaints about the eligibility criteria set by ADR entities.

If we compare these results with the statistics available for the European market, the results are not that different, but the importance of ADR/ODR is still far-reaching.[30] This is not because there are few disputes occurring in the online context but instead the opposite, as at least a quarter of the 71.2% of citizens who have purchased goods and services online have experienced problems regarding such purchases. However, only two-thirds have decided to react, and among the available options for redress selected ADR in 6.2% of the cases. Although this is a low percentage, it is still the second option after complaining before a public authority.[31] It is interesting to verify the reasons for this lack of reaction, as they may indicate the problems citizens encounter when deciding to pursue a claim concerning an online purchase. The problems acknowledged include not only the well-known challenges, namely the length of the procedure and the fact that the sums involved were small. The lack of knowledge regarding the complaint mechanisms available also reveals that the process would be too complex or would require filling in many documents or using complicated language. This last element is perceived as a barrier for 24.9% of the citizens who decided not to exercise their rights. This element reveals one of the more problematic aspects of achieving access to justice: when looking at the advantages of digitalisation, the benchmark used is the average online user, who is not only able to reap the benefits of digital markets, i.e. buying goods or services online, but is also able to exercise their rights when a violation occurs, if necessary in English as a lingua franca. Limited or no attention is given to online users with less knowledge or less confidence to exercise their rights.[32]

On the same day, together with the proposal to amend the ADR Directive and withdraw the ODR regulation, the European Commission adopted a

30 See the results of the 2022 Consumer conditions survey – standard survey, available at https://commission.europa.eu/document/download/0cdcc170-e877-4b3b-b4eb-404f47596896_en?filename=Consumer%20Conditions%20Survey%20-%20standard%20survey.xlsx.

31 Note that the first option selected by (81% of) the users is to complain about the retailer or service provider (or manufacturer). However, this is a preliminary step that in the case of dissatisfaction may lead to selecting a conflict resolution path.

32 This problem has already been acknowledged. See Schmitz, A.J. (2012), Access to Consumer Remedies in the Squeaky Wheel System.

recommendation on quality requirements for dispute resolution procedures offered by online marketplaces and Union trade associations.[33] The recommendation addresses in-house complaint-handling procedures between businesses and consumers and defines some basic expertise, independence, impartiality, effectiveness and fairness requirements. It reads like a slim version of the proposed amended ADR Directive, which it refers to throughout the text. In this sense, the recommendation is to be regarded as the functional equivalent of Art. 20 of the Digital Services Act (DSA), which lays down the mandatory requirement "*to lodge complaints, electronically and free of charge, against the decision taken by the provider of the online platform upon the receipt of a notice or against the following decisions (listed in Art. 20 (1) a)-d)) taken by the provider of the online platform because the information provided by the recipients constitutes illegal content or is incompatible with its terms and conditions*."[34]

The choice of a recommendation brings back a memory of the predecessors of the ADR Directive, namely the two Recommendations 98/257 and 2001/310.[35] Here, the CJEU gave the recommendations legal weight by turning the non-binding recommendations into quasi-binding law.[36]

33 Commission Recommendation (EU) 2023/2211 of 17 October 2023 on quality requirements for dispute resolution procedures offered by online marketplaces and Union trade associations (notified under document C/2023/7019, OJ L, 2023/2211, 19.10.2023.

34 According to Art. 3 b) DSA, "'*recipient of the service*' *means any natural or legal person who uses an intermediary service, in particular for the purposes of seeking information or making it accessible.*" The definition includes consumers in the variety of interactions they initiate with online platforms or search engines. These are tied to a particular activity – information seeking or information supply, provided the activity reaches beyond information seeking and providing they become 'active recipients' in the meaning of Art 3 (p) and (q), which again encompasses the consumer. Content moderation includes the guarantee of a "*high level of consumer protection in Art. 38 of the Charter* (Art. 34 (1) b) DSA)" more generally and the interests of children/minors and handicapped people more specifically (Art. 34 (1) b) and d) DSA). For a detailed analysis, see Micklitz, H.-W. (2024), The Dissolution of the EU Consumer Law Acquis through Fragmentation and Privatisation, forthcoming.

35 See Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJ L 115, 17 April 1998, 31 and Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, C(2001) 1016, OJ L 109, 19 April 2001, 56.

36 CJEU Case C-317/08 Alassini, ECLI:EU:C:2010:14.

C. Regulation of vulnerabilities in the industrial economy

The rise of national, EU and worldwide consumer law is inherently connected to the understanding that consumers need protection, that they are weaker than businesses, and that regulatory means are necessary to compensate for the imbalance of power and information asymmetry. There was previously no distinction between the different classes of consumers, as all consumers were perceived as being in a weaker position vis-à-vis professionals and traders. In the 1970s and 1980s, speaking of a 'weak consumer' would have been a pleonasm. The wind turned with the EU taking over consumer protection after the Single European Act. The previous "consumer protection law" gradually became a "consumer law without protection."[37] In the CJEU's case law, understanding national advertising laws as restricting market freedoms was the game changer. The Court developed the concept of the average consumer – an informed, circumspect and responsible consumer – as the one against which national advertising laws had to be balanced. This yardstick allowed the CJEU to eliminate national advertising laws to protect SMEs against new upcoming marketing strategies in the name of consumer protection.[38] This does not mean the CJEU used the same yardstick outside the legal context. The average consumer in advertising law has to be delineated from the weak consumer to whom the CJEU refers when monitoring unfair terms.[39]

The last two decades have seen a revival of the weak consumer as opposed to the average one, now redefined with the more neutral definition of *vulnerable* consumer. This development is gaining pace at the EU and Member State levels, but not only there.[40] The vulnerability concept is often used to identify users or groups of users that require regulatory/policy attention because of their lack of bargaining power, structural inequalities

37 Micklitz, H.-W. (2012), The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law. A Bittersweet Polemic. 35 Journal of Consumer Policy 283-296.

38 Unberath, H. and Johnston, A. (2007), 'The double-headed approach of the ECJ concerning consumer protection. 44 Common Market Law Review 1237-1284.

39 Ginestri, M. (2023), Equality of Superiority of the Weak Party? Consumer Protection and the Issues at Stake, ECRL 375; Micklitz, H.-W. and Reich, N. (2014), The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD). 51 Common Market Law Review 771-808.

40 N Helberger et al. (2022) 'Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability' 45 Journal of Consumer Policy 175.

and other market or social conditions that make them more susceptible to harm, for example, in the form of discrimination or unequal treatment. At times it is also used as a concept to allow differentiation in situations in which uniform treatment of all would lead to unfairness for some. Peroni and Timmers show that, in the case law of the European Court of Human Rights, acknowledgement of the vulnerability status of particular groups, such as Roma, people with mental disabilities, people living with HIV and asylum seekers, led the ECtHR to find special positive obligations on the part of the state, increase the weight of harm in proportionality analysis and reduce states' margin of appreciation.[41] Malgieri and Niklas also trace the development of vulnerability as a concept in data protection law.[42] In this legal area, however, the concept has mostly been confined to the protection of minors, who are less aware of the potential risks and consequences of data protection and who, therefore, warrant a higher level of protection concerning the right to transparency, profiling, and informed consent.[43]

Seen through the lens of consumer policy, three different strands are coming together, and they are described in the following paragraphs.

I. Vulnerabilities in universal service obligations

The first strand addresses liberalisation, and partly privatisation, of formerly state-owned finance, telecom (today electronic communication), energy and transport companies, which has made it necessary to distinguish between 'customers' who can pay the market price and those who cannot. The latter need access at an affordable price. So far, there is not much clarity on what an affordable price means and what exactly has to be done to fight energy poverty, grant everybody access to an affordable bank account and provide affordable prices in public transport and electronic communication. The uncertainty is increased by a debate on what exactly belongs

41 Peroni, L. and Timmer, A. (2013). Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law. International Journal of Constitutional Law 11 (4): 1056-85. See also Chapman, A. and Carbonetti, B. (2011), Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights. Human Rights Quarterly 33 (3): 682-732.

42 Malgieri, G. and Niklas, J. (2020), Vulnerable Data Subjects. Computer Law & Security Review 37: 10541.

43 Recitals 38, 58, 65 and 75 GDPR.

to universal services.[44] Here, vulnerability focuses on a lack of economic resources.

II. Vulnerabilities in the UCPD

The second strand results from the harmonisation of unfair commercial practice law in the UCPD, as agreement on a full harmonisation approach could only be reached once the notion of the average consumer was complemented with the newly introduced vulnerable consumer in Art. 5 (3).[45] Protection is limited to a "clearly defined group" (sic!) who are vulnerable due to their "*mental or physical infirmity, age or credulity.*" Legal scholarship has spent much ink on concretising the four categories.[46] As a rule, commercial practices must be assessed from the perspective of the average consumer, the prototype of the European consumer, who is "reasonably well-informed and reasonably observant and circumspect," as defined in Recital 18 UCPD. It is the perspective of the average consumer that is relevant when assessing the fairness of a particular practice. Art. 5 (3) defines the exception to the rule.[47] However, Art. 5 (3) has not gained much importance in practice, maybe because of the barriers to identifying the group. The EC Guidance on Interpretation of the UCPD demonstrates the lack of case law. Member State courts and the CJEU are seeking a solution to lower the average consumer standard.[48] Outside the field of

44 Bartl, M. (2010), The Affordability of Energy: How much protection for the vulnerable consumer? 33 Journal of Consumer Policy 225-245; Johnston, A. (2016), Seeking the EU 'Consumer' in Services of General Economic Interest, in D. Leczykiewicz and St. Weatherill (eds.), The Images of the Consumer in EU Law. Legislation, Free Movement and Competition Law., 93-138.

45 Wilhelmsson, T. (2006), Chapter 3 Scope of the Directive, in Howells, G., Micklitz, H.-W. and Wilhelmsson, T. European Fair Trading Law. The Unfair Commercial Practices Directive, 49.

46 Leczykiewicz D. and Weatherill S. (eds.) (2016), The Images of the Consumer in EU Law. Legislation, Free Movement and Competition Law; Casarosa, F. (2020) The Rights of People with Disabilities in EU Consumer Law in D. Ferri and A. Broderick (eds.), Research Handbook on EU Disability Law.

47 Concerning the UCPD, this is common sense. Peroni and Timmer (2013, 1061) show that a similar dichotomy characterises the dominant stance in the treatment of vulnerability in human rights law.

48 Schebesta, H. and Purnhagen, K.P. (2016), The Behaviour of the Average Consumer: A Little Less Normativity and a Little More Reality in the Court's Case Law? Reflections on Teekanne (6 June 2016). 41 European Law Review 590.

unfair commercial practices in the core area of consumer contract law, the notion of the vulnerable consumer did not gain much ground when the consumer acquis was revised along the lines of the consumer REFIT programme. Only timid efforts were made to re-introduce the vulnerable consumer in the EU consumer contract acquis. An example is Recital 34 of the Consumer Rights Directive,[49] which obliges traders to take the different capacities of consumers to process information into account. It is worth quoting:

> *The trader should give the consumer clear and comprehensible information before the consumer is bound by a distance or off-premises contract, a contract other than a distance or an off-premises contract, or any corresponding offer. In providing that information, the trader should consider the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way that the trader could reasonably be expected to foresee. However, considering such specific needs should not lead to different levels of consumer protection.*

The recital demonstrates the ambiguity of the legislation. How should it be possible to distinguish between the average and the vulnerable consumer without imposing a different level of protection? The distinction between the two implies what the recital wants to exclude. This might explain why the recital is still waiting to be awakened to life by the enforcement authorities and maybe even national legislatures.[50] In consumer policy and research, there is vibrant discussion on the potential need to revise the average consumer benchmark and shape the vulnerable consumer concept.[51]

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49 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. OJ L 304, 22.11.2011, 64-88.

50 Sachverständigenrat für Verbraucherfragen, Personalisierte Verbraucherinformation: Ein Werkstattbericht, Dokumentation einer Veranstaltung des SVRV, Veröffentlichungen des Sachverständigenrats für Verbraucherfragen, 2022, https://www.conpolicy.de/aktuell/personalisierte-verbraucherinformation-ein-werkstattbericht.

51 Grochowski, M. (2021), Does European contract law need a new concept of vulnerability? 4 EuCML 133.

III. Vulnerabilities in ADR and ODR

The consumer ADR Directive and the ODR Regulation were adopted in 2013 when vulnerability in universal services and commercial practices had long become an issue in political discourse. Therefore, one might have expected that both EU measures address vulnerabilities. However, the consumer ADR Directive does not mention vulnerabilities at all. In contrast, Art. 5 ODR Regulation addresses the European Commission: "*The development, operation and maintenance of the ODR platform shall ensure that the privacy of its users is respected from the design stage ('privacy by design') and that the ODR platform is accessible and usable by all, including vulnerable users ('design for all'), as far as possible*." Who the vulnerable users are, however, is nowhere defined.

The 17 October 2023 proposal to amend the ADR Directive looks more promising as it refers to barriers resulting from digital literacy and barriers other than language.

> Recital (2): There are additional barriers in cross-border ADR, like language, lack of knowledge of the applicable law, and specific access difficulties for vulnerable consumers.
> Recital (10): Member States should ensure that ADR enables consumers to initiate and follow ADR procedures offline if requested. It should also be ensured that when digital tools are provided, they can be used by all consumers, including vulnerable consumers or those with varying levels of digital literacy. Members States should ensure that, upon request, parties to the disputes always have access to a review of automated procedures by a natural person.

The recitals, however, have been watered down in the proposed revision of Art. 5 (2) ADR. The language remains vague and leaves much room for interpretation if not for disregarding vulnerabilities.

> "(a) ensure that consumers can submit complaints and the requisite supporting documents online in a traceable manner and ensure that consumers may also submit and access these documents in a non-digital format upon request;
> (b) offer digital ADR procedures through easily accessible and inclusive tools;"

It remains to be seen whether and to what extent the current proposal will undergo revision in the ongoing trialogue.

D. Regulation of vulnerabilities in the digital economy

The third strand is deeply connected to EU digital policy legislation. While the various regulations, particularly the AIA, the DSA and the Data Act, heavily affect consumers as defined in the EU consumer law acquis, neither regulation explicitly addresses consumers and their rights. The horizontal character of the regulations, which concern the digital economy and digital society, might nevertheless explain why already well-known vulnerabilities in the two previous strands of development are now mixed up with discriminatory practices and vulnerabilities of disabled people and minors.[52] One might therefore break down vulnerabilities in the EU digital policy legislation into the *societally discriminated* – those who come under the EU non-discrimination law acquis, the *economically discriminated* – those who are potential customers of universal services (although it is unclear whether and to what extent the proposal of the EP will make it into the official version) and *disabled persons* and *children/minors*. [53]

I. Vulnerabilities in the AIA, the DSA and the Data Act

The AIA and the DSA stress the risk of being discriminated against and the critical role of the right not to be discriminated against in the EU Charter of Fundamental Rights (EU Charter), but without going into detail about the various forms of prohibited discriminatory practices and how they might affect the various groups mentioned in the EU non-discrimination law acquis. The emphasis is on eliminating discriminatory practices, not specifying the vulnerabilities of the people affected. Economic vulnerability remains equally underdefined. The Data Act instead repeatedly refers to non-discriminatory and fair behaviour. However, it applies in the context of contractual agreements with parties with different market powers, showing that imbalances among traders can result in a need for additional monitoring.

52 This contribution refers to the provisional agreement resulting from interinstitutional negotiations: Proposal for a regulation laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts 2021/0106(COD), 2 February 2024.

53 Micklitz, H.-W. (2018), The Politics of Justice in European Private Law.

International standards seem to be more detailed. ISO Standard 22458:2022 on consumer vulnerability and providing requirements and guidelines for the design and delivery of inclusive service is the only document pointing to some concept.[54] The ISO approach is to be taken as a serious effort to conceptualise 'vulnerability' very differently and far more forward-looking than the EU legislation, be it the consumer acquis or the digital policy legislation. Two constitutive elements of the ISO concept of vulnerability are worth highlighting. First, vulnerability is regarded as an individual personal characteristic – everybody can be vulnerable; the second is the broad set of impact factors which may trigger vulnerability: they can be (1) *personal* factors resulting from limitations in individual capacities; (2) *situational* factors resulting from managing information, getting access to or choosing suitable services, having difficulties in making decisions in one's best interests, understanding one's particular rights or pursuing one's rights, or (3) factors coming from the *market environment* – a criterion which is mentioned but seems relatively underdeveloped at least in the previously mentioned EU legislation. These explanations and interpretations are then translated into a definition of consumer vulnerability and vulnerable situations, which can be temporary, sporadic or permanent.[55] The distinction between these three vulnerability indicators: personal, situational and market environment seems promising.

The AIA and the DSA devote particular attention to concretising the potential vulnerabilities of people with disabilities and children/minors. Both regulations explicitly refer to the UN Convention on the Rights of Persons with Disabilities (CRPD), but without imposing a binding obligation on providers and deployers to design the AI system in line with the rights concretised in the UNCRPD and later in Directives 2016/2102[56] and 2019/882.[57] Instead, the approach adopted in the DSA looks like a blueprint for the AIA. Recital 105 DSA sets the tone for the level of regulatory intervention: non-binding action. However, not even online platforms are addressed; they are only very large platforms and search engines. Art. 47

54 https://www.iso.org/standard/73261.html.

55 https://www.iso.org/obp/ui/en/#iso:std:iso:22458:ed-1:v1:en.

56 Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies, OJ L 327, 2.12.2016, 1.

57 Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services, OJ L 151, 7.6.2019, 70-115, European Accessibility Act.

DSA details how a code of conduct to increase the accessibility, inter alia, of persons with disabilities should look. The AIA postpones protection by design to the future. Recital 142 requires the Member States to promote research "*including but not limited to development of AI-based solutions to increase accessibility for persons with disabilities [and] tackle socioeconomic inequalities*". [58] The only concrete measure increasing the protection of persons with disabilities is in the minimum criteria the codes of conduct must meet. Art. 95 refers to "*assessing and preventing the negative impact of AI systems on vulnerable persons or groups of persons, including accessibility for persons with a disability, as well as on gender equality.*"

The second category is children/minors. Art. 1 CRPD defines every human being below the age of eighteen as a child.[59] EU law does not have a definition of minors or children, not even in Art. 24 of the EU Charter. It does not even use the word 'minors.' However, neither the AIA nor the DSA closes the definitional gap with reference to the CRPD. Where the CRPD is mentioned, both acts speak of the rights mentioned, deliberately avoiding clarification.[60]

Throughout the text, the DSA mentions the need to protect minors in the platform economy. The website where the EU presents the DSA devotes a paragraph to the envisaged "strong protection of minors." The language sounds like marketing: "*platforms will have to redesign their systems to ensure a high level of privacy, security, and safety of minors; targeted advertising based on profiling towards children is no longer permitted; special risk assessments including for negative effects on mental health will have to be provided to the Commission 4 months after designation and made public at*

58 It is interesting to note that the amendments presented by the European Parliament were not included in the final text. The proposed text of Art. 84 on the evaluation and review of AIA included the "the effect of AI systems on health and safety, fundamental rights, the environment, equality, and accessibility for persons with disabilities (emphasis added), democracy and the rule of law and in the light of the state of progress in the information society."

59 Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990, in accordance with Art. 49, https://www.ohchr.org/sites/default/files/crc.pdf.

60 See Art. 9 AIA. Also in this case, the amendments of the European Parliament were disregarded. Art. 52 b) (3) AIA-EP required that AI providers and deployers should consider children's information capabilities when drafting the transparency requirements. Similar amendments concerned the minimum criteria codes of conduct must meet.

the latest a year later; platforms will have to redesign their services, including their interfaces, recommender systems, terms and conditions, to mitigate these risks."[61] The prohibition on profiling children for marketing purposes is by far the most critical ruling.

The many references to 'minors,' not to children, in particular in the recitals, unfold an impressive language on the comprehensibility of terms and conditions (recital 46), on an appropriate design of the interface (recitals 71 and 81), on accessibility of notice and action, on complaint mechanisms (recital 89) and on content impairing their physical, mental or moral development (recital 89). These overall purposes are reflected in two provisions. Art. 14 of the DSA on terms and conditions introduces a ruling that opens a new page in the control of standard terms, which raises the question of the interaction between the DSA and the Unfair Contractual Terms Directive (UCTD). One may understand Art. 14 DSA as an integral part of the transparency requirement in Art. 4 UCTD, which would imply that consumer agencies and consumer organisations enjoy standing, a reading which is indirectly supported by the integration of the DSA in the Annex of Directive 1828/2018 on Representative Action,[62] pursuant to Art. 90 DSA. In addition, DSA Art. 28 is devoted to the "online protection of minors." The high level of privacy, safety and security in connection with the recitals calls for an appropriate algorithmic design. Again, the question arises of how to qualify this obligation. Is it an obligation to unfold effects between platforms and consumers/minors or only between platforms and enforcement authorities? In the first variant, Art. 28 (1) DSA may be integrated in the broad concepts of transparency and fairness in the UCTD. These somewhat promising tendencies in Articles 14 and 28 DSA are thwarted when confronted with how the DSA seeks a solution to promote the rather ambitiously worded protection of minors. Recital 102 and Art. 44 DSA deal with "standards," which are all voluntary, not semi-binding harmonised European standards. The protection of minors is reduced to the least stringent regulatory measure: voluntary standards.

Art. 34 (1) b) DSA requires respect for children's rights, as is enshrined in Art. 24 of the EU Charter, and a high level of consumer protection, as is enshrined in Art. 38 of the EU Charter. One might have expected that

61 Website of the European Union: https://www.eu-digital-services-act.com.

62 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, OJ L 409, 4.12.2020, at 1.

the EU legislature would have imposed clear obligations on what platforms would have to do, not least in the light of the experience of monitoring and surveillance of TikTok.[63] In its assessment, the European Commission regards the different safeguards enshrined in the DSA as a significant success.[64]

This is not all. The EU digital policy legislation refers to vulnerabilities of AI systems, conquering the concept and giving it a twist, which points in a very different direction, away from personal vulnerability for whatever reason to system vulnerability, to the risk of cyber-attacks and the like (recital 76 AIA). The parallel with the European Convention on Human Rights springs to mind when plaintiffs – businesses and citizens/consumers – discovered the potential to turn economic rights into human rights.[65] In sum, there does not seem to be a clear perspective underpinning the AIA and the DSA. The term is used randomly, perhaps with an inclination to equate vulnerabilities with societal discrimination. There is an urgent need to conceptualise vulnerability, a task that goes beyond the scope of this contribution. [66]

II. Dispute resolution in the AIA, the DSA and the Data Act

The AIA, does not contain rules on complaint handling and dispute resolution, unlike the DSA, which deals with both, and the Data Act, which at least addresses dispute resolution. The strange mismatch between mandatory requirements on complaint handling in the scope of the DSA and non-

63 Cantero Gamito, M. and Micklitz, H.-W. (2023), Too much or too little? Assessing the Consumer Protection Cooperation (CPC) Network in the protection of consumers and children on TikTok. https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-018_Assessing_CPC_Network_in_the_protection_of_consumers_and_children_on_TikTok-Report.pdf.

64 See the stocktaking in Brussels, 11.5.2022 COM(2022) 212 final, A Digital Decade for children and youth: the new European strategy for a better internet for kids (BIK+) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0212&from=EN.

65 Abrisketa, J. and Churruca, C. , de la Cruz, C., García, L., Márquez, C., Morondo, D., Nagore, M., Sosa, L. and Timmer, A. (2015), Human rights priorities in the European Union's external and internal policies: an assessment of consistency with a special focus on vulnerable groups, European Commission.

66 Malgieri, G. (2023) 'The Notion of the Data Subject: An Average Individual?' in Gianclaudio Malgieri, *Vulnerability and Data Protection Law*.

binding Recommendation 2023/2211 has already been addressed.[67] What remains to be analysed is the relationship between the consumer ADR Directive, together with the proposed revisions and the rules on dispute resolution in Art. 21 DSA. In its proposal, the European Commission starts with the compatibility of the two,[68] affirming that

> Art. 21 Digital Services Act on out-of-court dispute settlement is without prejudice to the ADR Directive (Art. 21(9)). Furthermore, it regulates how users of intermediary services can complain about the intermediary's content moderation decisions about illegal or harmful content, including where the service provider decides not to take action following a notice. Even if such illegal content or content that is otherwise incompatible with the intermediary terms and conditions may concern a third-party trader's bad commercial practices, the dispute pursuant to Art. 21 DSA will be settled between the intermediary and the recipient concerned by the content moderation decision and is limited to the restrictions applicable to the content or account in question. The ADR Directive will remain applicable for consumer disputes with the third-party trader that generally concern how to get money back, how to get a faulty product repaired, how to stop a contract that was based on unfair terms, etc.

According to the Commission, the consumer ADR Directive provides for dispute resolution addressing illegal commercial practices by traders, which is complementary to that provided for disputes addressing content moderation performed by intermediaries. The implications of such a formalistic understanding are far-reaching. A consumer who complains about content moderation may use the dispute settlement procedure in Art. 21 DSA; the same consumer who complains about deficiencies in the online sales transaction is referred to in the revised ADR Directive. Seen through the lens of the EU approach, the distinction sounds self-explanatory. Turning the perspective upside down, seen through the lens of a – vulnerable – consumer, the differentiation looks like a deterrent to the prosecution of consumer rights.

67 See Under II.3.

68 See at page 5 of the Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, and Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828 Brussels, 17.10.2023 COM (2023) 649 final.

Moreover, Art. 21 (3) DSA requires a different certification mechanism than that in the revised consumer ADR directive. The latter relies on each Member State deciding to set up a system to certify the ADR bodies in the DSA. The EU legislator is more detailed and explicitly asks for the list of requirements defined in the regulation to be evaluated by the Digital Services Coordinator of the Member State in which the out-of-court dispute settlement body is established.[69] However, the certification mechanism in the DSA is incomplete. It lacks any additional specification regarding the definition of applicable standards, the type of evaluation, the geographical scope of the certification scheme and the duration of the certification appraisal. This is a lost opportunity that a lack of knowledge or expertise cannot justify, as in many other legislative interventions, the Commission has engaged in a more structured description of the certification mechanism.[70] Generally, a certification scheme should involve at least two phases: a conformity assessment and an attestation of conformity, the latter being a statement that the underlying process, product or person complies with a set of pre-defined requirements based on the objectives and scope of each certification scheme. A detailed description of the procedure is absent in the DSA. On the one hand, the legislation relies on the resources and expertise of the digital services coordinator at the national level. Art. 39 DSA provides a safety net. The provision acknowledges that digital services coordinators should carry out their tasks independently and that the Member States should ensure that they have adequate technical, financial and human resources. On the other hand, nothing is stated about the powers of the body regarding evaluating certification schemes. There is no help in Art. 41 DSA. No mention is made of the supervision, investigation and sanctioning powers of out-of-court dispute settlement bodies.

Other interesting elements are the validity of certifications and their geographical scope. The out-of-court dispute settlement body can only be certified in the country in which it is established. Although Art. 21(3) DSA acknowledges that the out-of-court dispute settlement body can provide its services in other EU languages, it does not expressly state whether the certification should be recognised in other countries. This is an evident lack

69 The Digital Service Coordinator is defined in Art. 49 DSA as the national authority with the competence to verify the application and enforcement of the DSA in each Member State.

70 Casarosa, F. (2023) 'Out-of-Court Dispute Settlement Mechanisms for Failures in Content Moderation' 14 JIPITEC, http://www.jipitec.eu/issues/jipitec-14-3-2023/5844.

of foresight as the attestation of conformity provided by the certifying body should allow services to be provided across Europe. It will be difficult for an out-of-court dispute settlement body to only provide its services in one country. Instead, it will aim to specialise in disputes emerging on certain platforms to provide service to users regardless of their nationality and language.

The dispute resolution in Art. 10 of the Data Act follows the DSA. It has similar requirements for the certification of the potential dispute settlement bodies. However, it does not allocate the certification task to a specific authority as the DSA does; instead, it refers in general to Member States. In this case, more leeway for the organisation of the certification procedure is provided, yet this can trigger greater differences at the national level. This approach can be understood if we acknowledge that the cases to be solved by the dispute resolution bodies are at the intersection between data protection and contract law, and most probably between traders who are interested in accessing data to develop novel digital products. Therefore, neither the consumer nor the data protection authority would have the comprehensive knowledge and expertise to set up such a certification scheme.

One additional element that emerges from the DSA concerns the reporting obligations to ensure compliance with the transparency requirement in Art. 24 DSA. As mentioned above, Art. 17 DSA requires all hosting service providers to inform users whenever they remove or otherwise restrict access to their content (statement of reason). Then, according to Art. 24 (5) DSA, providers of online platforms send all their statements of reasons to the Commission's DSA Transparency Database for collection.[71] Given that the number of decisions has already surpassed three million, it is reasonable to think that online platforms will adapt their statements to the technical requirements that must be met for the transparency database. In other words, the API (application programming interface) set up by the Commission in the transparency database may affect both the structure and the content of decisions by the online platform. Given that the same obligation is applicable to dispute settlement providers, pursuant to Art. 21 (4) DSA,[72] the type of data that digital services coordinators will require may

71 The DSA transparency database is available at https://transparency.dsa.ec.europa.eu/.

72 The dispute settlement provider should report annually to the digital services coordinator on their functioning, specifying at least the number of disputes it received,

affect the content and the structure of decisions by the dispute settlement provider.

III. The EC digital fairness initiative

Since the launch of the various draft regulations in the summer of 2020, consumer advocates have criticised the European Commission for downplaying possible tension between the consumer law acquis and the EU digital policy legislation and for neglecting the need to study the potential impact of the digital economy on consumers more particularly to find out whether and to what extent the current consumer law acquis provides an adequate level of consumer protection.[73] Under intense pressure from consumer advocates, which gained support from the European Parliament, the European Commission launched the Digital Fairness Fitness Check in spring 2022.[74] The evaluation will look at the UCPD, the Consumer Rights Directive 2011/83/EU and the UCTD to determine whether they ensure a high level of protection in the digital environment. In the envisaged schedule, the Commission is expected to provide a report before the closure of the current term which will concretise the direction in which the European Commission intends to go after the election in June 2024 and after the European Commission and the European Parliament have been re-established. The report is expected to be published in the second quarter of 2024.

The EC initiative triggered a debate in academic studies on what needs to be done to adapt the consumer law acquis. It is commonly agreed that the scope is too narrow as it excludes the GDPR, and more generally law enforcement, individually or collectively, in courts or with ADR and ODR mechanisms. 'Digital vulnerabilities' are centre stage. One of the authors was involved in preparing the Consumer Law 2.0. The study was commissioned by BEUC and published in 2021.[75] The report argues that digital vulnerability is structural, architectural and relational. Below is a summary

information about the outcomes of these disputes, the average time taken to resolve them and any shortcomings or difficulties encountered, pursuant Art. 21(4) DSA.

73 See the BEUC website and the various reports BEUC published on the DMA, the DSA, the AIA etc. and the various reports by national consumer organisations.

74 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law_en.

75 Helberger, N., Lynskey, O., Micklitz, H.-W., Rott, P., Sax, M. and Strycharz, J. (2021), EU Consumer Protection 2.0: Structural asymmetries in digital consumer markets, a

of the arguments in the form of recitals for a potential amendment to the UCPD.

(1) Digital vulnerability can be condensed in the distinction between the external structural impact on consumers and their internal dispositional capabilities to make informed autonomous decisions regarding commercial practices that use digital strategies such as profiling, data-driven targeting and the design of defaults in digital choice environments. The external structural impact covers the digitally mediated relationship, the chosen architecture, the technical infrastructure of a digital marketplace, data collection, the trust relationship that consumers build with the provider of the chosen architecture over time and information asymmetries. All these have in common that they are external to the consumer in that they result from how technology is used and applied. Each consumer is confronted with the external structural impact and is therefore dispositionally vulnerable. Internal dispositional vulnerability refers to variations in individual capacities to make informed and autonomous choices in the external structure. They may be situational, informational, or source-bound.
(2) The distinction between external-structural and internal-situation impact needs to be integrated in the conceptual and regulatory toolbox. Non-legal literature uses the notion of 'digital vulnerability.' In the consumer law acquis, vulnerability is a loaded term, like weakness. This is why the legal concept has to do justice to both dimensions of digital vulnerability, the external-structural and the internal-dispositional ones. The notion of digital asymmetry avoids those pitfalls and emphasises the structure and architecture of data exploitation strategies, thereby leaving room for the internal situational impact. Regulatory attention should move towards tackling the sources of digital vulnerability, as is enshrined in the formula of digital asymmetry.
(3) The consumer's capacity to make autonomous decisions in data-driven commercial choice environments cannot be properly addressed if ensuring consumer autonomy is only understood as a) preventing direct interference with the mental/deliberative processes of consumers at the precise moment they make a transactional decision, b) ensuring the formal availability of different choices and c) being limited to the act

joint report from research conducted under the EUCP 2.0 project, BEUC, https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-018_eu_consumer_protection_2.0.pdf.

of buying and selling itself. Ensuring consumer autonomy in the digital economy requires a wider understanding of what true autonomous decision-making entails and also of a transactional decision. Consumers are not only paying with money; they are also paying with their data and their relational commitment.

(4) To ensure consumer autonomy in the digital economy, more attention needs to be paid to the difference between the formal availability of alternative choices and the material circumstances that enable consumers to actually see, understand, and exercise their capacity to make different choices. In this context, moreover, special attention should be given to the fact that data-driven commercial services try to build ongoing commercial relationships with consumers. The (personal) user data that are collected over time put the trader in a position of power to understand the behavioural patterns of users and their cognitive and behavioural biases and tendencies. This position of power can be used to subtly 'shape' consumers' preferences, motivations and behaviour more generally over time in the interests of traders without benefiting consumers or even harming consumers' true informed interests. Because such processes happen over time, they do not always constitute *direct* interference with the decision-making capacities of consumers and they do not always formally remove choice options. Nevertheless, such data-driven commercial practices can threaten consumer autonomy in the wider sense outlined here if they indirectly interfere with consumers' autonomous choices.

(5) Situations in which data-driven commercial environments use their position of power to build ongoing commercial relationships with users and keep consumers tied to their platform or service can in certain circumstances constitute situational monopolies. Situational monopolies can undermine consumers' capacity for autonomous decision-making and the exercise of free choice. Similarly, data-driven commercial environments that engage in algorithmic manipulation should be understood as undermining consumers' capacity for autonomous decision-making. 'Algorithmic manipulation' should be understood as a hidden use of data-driven targeting strategies, personalisation strategies or any other type of strategy which is aimed at influencing the autonomous decisions of consumers in ways that primarily benefit the trader, for example by identifying personal or population characteristics or circumstances that can be leveraged to increase the chances of changing the behaviour of consumers.

The potential consequence would be to reverse the burden of proof to the benefit of consumers.[76] Another proposal, which has been promoted by B.B. Duivenvoorde,[77] aims to merge the average and vulnerable consumer in the UCPD into a new concept that would *de facto* and *de jure* lead to a revision of the average consumer standard. The same author proposes introducing a new article on 'manipulation' to deal with what the author of the BEUC study calls digital vulnerability.

E. Challenges for further research

Given that statistics show that it is not uncommon for online users to feel less confident about exercising their rights, efforts should be made to introduce accommodations to enhance access to justice for vulnerable people. However, in the EU law acquis there is no clearly defined concept of 'vulnerabilities.' The category covers most prominently children/minors and disabled people, those who are protected by EU non-discrimination law and, last but not least, vulnerable groups as specified in the UCPD, Art. 5 (3). There are some loose ends – economic vulnerabilities and digital literacy – but there is no overarching approach, neither in the EU consumer law acquis – substantive law and procedural law (ADR/ODR) – nor in the upcoming EU digital law acquis to guide what kind of measures the EU, the European Commission or the Member States should employ to adequately protect those claimed to be vulnerable.

Particularly striking is, if any, the focus on substantive law, whereas the well-known vulnerabilities in dispute resolution are just left out. One might argue that it is not for the EU to tackle the issue as it does not have genuine competence for law enforcement. In light of the competence creep and the willingness of the majority of Member States to accept an ever-stronger Europeanisation of law enforcement, this argument does not sound convincing. The omission is even more striking as the barriers in law enforcement, particularly for the 'vulnerable groups' in society, are well-researched and well-known to everybody who studies the access to justice movement and in well-documented empirical research.

76 On the burden of proof, but also far beyond in reply to the fairness deficit of the EU digital policy legislation, see Micklitz, HW, Helberger N., Namyslowska N., Naudts L., Rott P., Sax M. and Veale M. (2024), Towards Digital Fairness, EuCML, 24.

77 Duivenvoorde, B.B. (2023), Redesigning the UCPD for the Age of Personalised Marketing. EuCML 177.

Academic research[78] has gone beyond the current acquis and developed a more comprehensive understanding of 'vulnerabilities.' Provided one takes the concept of the structural, architectural and universal character of digital vulnerabilities seriously, the following challenges emerge:

Any online dispute resolution mechanism should have an architecture implementing diversity by design, a structure that the average customer can understand.

If it is successfully established and used in practice, the architecture might build a long-term relationship between the provider and the customer, thus strengthening their dependence in the same way that other platforms are doing (or other services, as we are not developing a platform). Whether the potential choice between different providers in different Member States may avoid building long-term relations will depend on whether there is competition and whether the customer can handle the competition. If the assumption is correct that there will be a blossoming market of providers offering different services under different conditions, customers might find themselves in a situation similar to the messy field of labels, in which they may easily get lost.

Development of the architecture, so far, is in the hands of computer scientists, software developers and, in the most comprehensive case, lawyers. Precautionary measures are needed to involve potential customers and civil society organisations.

78 See the Deliverable 5.1 - e-Justice ODR scheme, drafted in the framework of the DG Justice-supported project 'e-Justice ODR scheme' (GA n. 101046468), available at https://cjc.eui.eu/projects/odr-scheme/.