

Access to justice and *Consumidor.gov* case

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INTRODUCTION

The advent of internet and the fast-paced shift from the local commercial relations to the e-commerce¹ also expanded conflicts from the offline to the online environment, raising the need for effective mechanisms to solve them. Considering that information and communication technologies (ICT) made possible

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

cross-border transactions and that they occur with the convenience of a "click formal judicial process doesn't seem able to handle this kind of conflict in an appropriate way, neither the alternative dispute resolution mechanisms (ADR) which despite of being cheaper and more informal, demand face-to-face encounter.

According to Katsh and Rifkin in the first half of the 1990s in the United States, when the use of e-mail began, the first online conflicts arose (misuse of mailing lists). During this period disputes emerge and were settled informally and within the specific contexts in which they occurred. From 1995 to 1998, the growing use of the Internet brought the need for online institutions prepared to receive and resolve the most frequently emerging conflicts. During this period several experimental projects were developed by universities and foundations. From 1998 the online dispute resolution (ODR) industry really began to penetrate. Companies have shown an interest in investing in online solutions to conflicts emerging in the virtual environment. It soon became clear that ODR should be the first choice for disputes arising from online activities as well as used for offline disputes. From the 2000s onwards began a period of extraordinarily fast change in new institutions and technologies emerge as rapidly as they become obsolete.

Cortés calls the phases described by Katsh and Rifkin as: a) hobbyist phase (from the creation of the internet until 1995), b) experimental phase (from 1995 to 1998), c) entrepreneurial phase (1998 to 2002), d) institutional phase (from 2002), the latter being described as the stage at which governments and public institutions began to adopt ODR programs such as Online Money Claims in England and Wales and Online Small Claims in Ireland.³

In Brazil, the government created an online platform in 2014 as an extension, aside the courts, for disputes that occur between consumers and companies. The platform mainly provides a public cyberspace for direct negotiation between consumers and traders and creates a public database with settlement results (solved/not solved) and a satisfaction rank.

In 20th May 2019 a technical cooperation agreement was signed to incorporate the ODR mechanism "Consumidor.gov" to the electronic platform of judicial process (PJe).

The aim of this paper is to discuss if *Consumidor.gov* is being effective to increase access to justice and how it could be improved. For this purpose, I will

start presenting how ODR mechanisms affect the concept of access to justice. Then I will bring the context on how consumer-related conflicts are handled by the three main channels in Brazil: (i) Administrative process, (ii) Courts and (iii) *Consumidor.gov*. Finally, I will analyze the outcome of those channels and show whether *Consumidor.gov* has been able to broaden access to justice and show further improve it.

1. ACCESS TO JUSTICE AND ODR

The rise of alternative dispute resolution (ADR) represents an effort to increase access to justice in a reality of time-consuming and increasing cost and complexity of our court systems. More recently, the spread of online dispute resolution (ODR) demonstrates the understanding that different types of disputes often require different procedural avenues for addressing them.⁴

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

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

ODR has been conceptualized by Hörnle as "dispute resolution outside the courts, based on information and communications technology and in particular, based on the power of computers to efficiently process enormous amounts of data, store and organize such data and communicate it across the internet on a global basis and with speed."⁵

However, for Cortés, the incorporation of information and communication technologies (ICT) in any dispute resolution mechanism, including courts, has grown to the extent that the difference between offline dispute resolution and ODR is increasingly becoming blurred. In this sense, Cortés affirms that

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

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

4. KATSH, Ehan; RABINOVICH-EINY, Orna. The new new courts, 67, American University Law Review, 165, 2017.

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

Handwritten notes: "New institutions class" and "OK" with a checkmark.

ODR is not a fixed concept, instead, it is in constant evolution, and the public sector has a growing interest in using it.⁶

Kaufmann-Kohler and Schultz agree and sustain that the definition of ODR must cover non-alternative dispute resolution methods, namely cyber courts. ODR has been developed to overcome deficiencies that face all offline dispute resolution methods, ADR and courts.⁷ For this purpose, it is important to have the best platform design, according to the problem it is created to solve. The design of ODR platforms are based on three major elements that must be tailored to the type of conflict and parties of the dispute: convenience, transparency and expertise. In other words, ODR must facilitate access and participation, legitimize and provide value.⁸

The online platforms have focused on the use of four main institutes: i) automated and/or assisted negotiation, ii) online mediation, iii) online arbitration, and iv) online ombudsman.⁹ There is an intense debate about their efficacy, but it seems that the earlier the dispute is solved through negotiation, with little third-party intervention, the more financially viable will be the platform. To achieve great adherence to direct negotiation it is desirable to have binding adjudication as the ultimate dispute resolution, and to have great transparency, especially in respect of the decisions reached, and what the likely outcome would be if their case went to adjudication.¹⁰

This reasoning leads us to think of ODR as pre-processual or processual mechanism of dispute resolution. But we must consider that information management is the core of any dispute resolution mechanism and it can be an important asset for a post-process moment, in order to develop dispute prevention. As asserted by Katsh and Rabinovich-Einy, ODR expands access to justice through three main shifts in dispute resolution practices: i) first is the shift from physical to virtual setting, especially providing asynchronously communication overcoming space and time barriers; ii) the second is the shift from human

6. CORTÉS, Pablo. Op. Cit., p. 55.

7. KAUFMANN-KOHLER, Gabrielle e SCHULTZ, Thomas. *Online Dispute Resolution challenges for contemporary Justice*, The Hague: Kluwer Law International, 2011, pp. 5-7.

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

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

10. HÖRNIE, Julia. Op. Cit.

intervention and decision making to software-supported processes, which means the use of algorithms and learning machines to assist human intervention and to process the information rather than only facilitates communication. iii) third is the shift from emphasis on the value of confidentiality to an emphasis on collecting, using and reusing data in order to prevent disputes.¹¹

For them, the most significant contribution of ODR has to do with overcoming the trade-off between efficiency and fairness. Thus, "the combination of data collection, communication, and ODR software opens up the possibility of increasing both efficiency and fairness, which can be translated into an increase in both 'access' and 'justice'." To achieve this goal its essential to care about the design of the software, the criteria for the evaluation of ODR processes and the nature of dispute prevention activities. Dispute prevention relies on tracing patterns of disputes and addressing them, and, although it might not increase access of justice in a direct sense, it could reduce occurrences of injustice and barriers to justice.¹²

Using similar reasoning, Susskind proposes that access to justice cannot be only focused on dispute resolution, but also to what he calls dispute containment, dispute avoidance and legal health promotion, which are elements for dispute prevention, and ODR technologies play an important role to achieve it.¹³ Considering that ODR can be provided by governments (including courts) to solve offline conflicts, and that information collected by ODR platforms can

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

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

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

be used to prevent disputes to promote access to justice, I will investigate if *Consumidor.gov* can contribute to increase access to justice as a dispute resolution and dispute prevention mechanism.

2. CONSUMER-RELATED CONFLICTS IN BRAZIL

The public system for consumer protection in Brazil has three main channels for addressing conflicts: administrative process (PROCON), courts and *Consumidor.gov*.¹⁴

I will examine the data available of those mechanisms in 2018, which is the most recent complete year, to find out if *Consumidor.gov* is being effective to promote access to justice.

2.1. Administrative process

PROCON, means *Program for Consumer Protection and Defense*, and it is a public agency that perform in local level. Its activities include collecting complaints, investigating and resolving them through mediation and providing legal information to educate consumers and traders about their rights and duties. The agency is also responsible for monitoring relations between traders and consumers and applying penalties, when necessary, after an administrative process.¹⁵

The consumer can register a complaint in PROCON either in person, by phone or by internet. First, PROCON contacts the company and try to settle it. If it is not possible to solve the problem immediately, a notification is sent to the company reporting the problem and the documents provided by the consumer (CIP - *Carta de Informaões Preliminares* - Letter of Preliminary Information). If the answer of the company is not enough to resolve the conflict, the agent files a Complaint Term and schedule a Conciliation Hearing to try to settle. Otherwise, PROCON can issue an administrative decision, and the company may suffer sanctions, such as fine or suspension of commercial activities.¹⁶

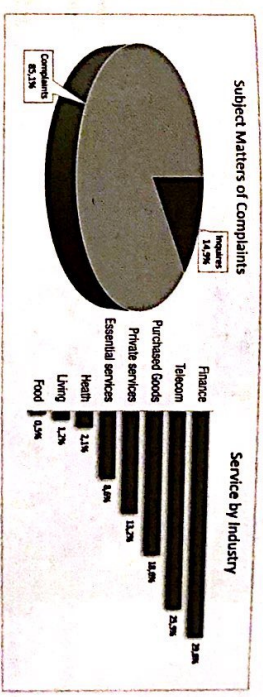
- 14. There are also private means to resolve disputes, like the companies' consumer assistance service, and private platforms of disputes resolution, but the aim of this paper is to discuss mechanisms of consumerist dispute resolution by the point of view of the State.
- 15. Information provided by PROCON. Available at: <http://www.procon.mt.gov.br/mo-funciona>
- 16. Information provided by PROCON. Available at: <http://www.procon.mt.gov.br/mo-funciona>

Moreover, the agency has the power to supervise and intervene in the market when there is consumer right violation, in order to prevent further damage. PROCON exists to ensure that consumer rights are respected by service and product providers, thus maintaining the balance of consumer relations B2C (business to consumer).¹⁷

According to official statistics presented by SINDEC (Information National System of Consumer Defense), in 2018, the PROCON system received 2.274.191 consumer registers, being 85,11% consumers complaints (1.935.737), and 14,89% enquiries (338.657).¹⁸

Problems with telecommunication companies (telephony, internet, cable TV) and financial institutions (Banks, financial and card administrators) are the major subject matter of the registers. The complaints related to telecom services represent 25,9% of the total while financial-institutions-related are 29,8%, which means that together they reflect 55,7% of all demanded subject matters.¹⁹

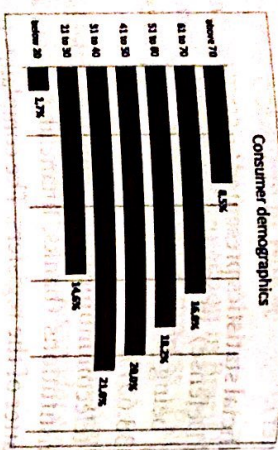
The average of solving complaints in the preliminary stage (CIP) is 76,5%. The rate of solved complaints against telecommunication companies is 85,8%, and against financial sector companies is 77,1%.²⁰



Source: <https://sindicnacional.mj.gov.br>

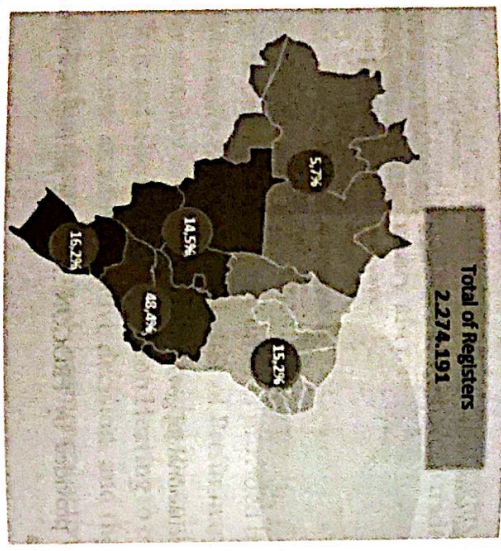
- 17. Information provided by PROCON. Available at: <http://www.procon.mt.gov.br/mo-funciona>
- 18. SINDEC integrates information of 596 PROCONs, that represent all 27 Brazilian Federal States, and it was launched in 2004. The data shown in the paper comes from SINDEC official site: https://sindicnacional.mj.gov.br/pentaho/api/repos/%3Aapublic%3ASindic%3AAtdendimento%3ASINDEC_Atendimento_wcdf/generatedContent?radio%20Usps/Projeto%20doutorador/Resquisa%20biolog%3%20A1fical/CNJ%20-%20pesquisas/boletim-sindic-2018.pdf
- 19. Information provided by the official report of SINDEC file://F:/Droptbox/01%20Doutorado%20Usps/Projeto%20doutorador/Resquisa%20biolog%3%20A1fical/CNJ%20-%20pesquisas/boletim-sindic-2018.pdf
- 20. These rates are available in the official SINDEC Report of 2018. Available at: <https://justica.gov.br/sens-direitos/consumidor/sindic/anexo/boletim-sindic-2018.pdf/view>

Looking at demographics, close to 21% of consumers who direct their complaints to PROCON are between 31 and 40 years old. Also, there is a great percentage of elderly people accessing the administrative system, with 24.5% being above 61 years old.



Source: <https://sindicatonacional.mj.gov.br>

Considering the geographic distribution, it is possible to note that 94.6% of the registers come from the wealthier Brazilian regions (South and South-east). The poorest region, North, represents only 5.7% of total registers.



Source: elaborated by the author based on <https://sindicatonacional.mj.gov.br>

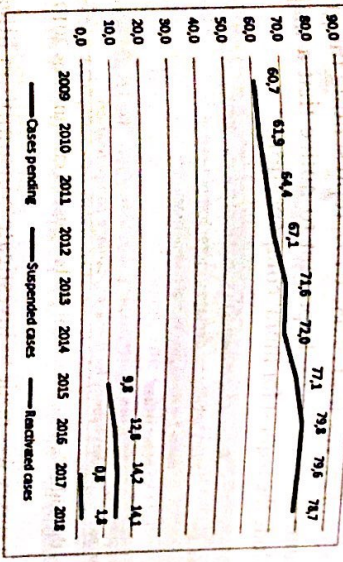
*Imagem disponível para melhor visualização no Proview: www.livrariart.com.br/proview

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

2.2. Courts

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

Every year, the National Council of Justice (CNJ)²¹ promotes statistical researches about the Brazilian Courts dockets. This report is called "Justice by numbers" (*Justiça em Números*), and according to this survey there were 78.7 million of cases waiting for judgment in Brazil in 2018, and the cost of the judicial system on that moment was of R\$ 93.725.289.276 (around US\$ 23.430.000.000), which correspond to 1,3% of Brazilian GDP (Gross Domestic Product).



Source: www.cnj.jus.br - Justiça em números 2019

*Imagem disponível para melhor visualização no Proview: www.livrariart.com.br/proview

Relosco points out that the expansion of consumption and credit seem to be the main factor for the growth of caseloads over time. Other relevant factors were the population growth, higher schooling rates, greater awareness of rights, democratization, the increasing number of lawyers and the emergence of new rights.²²

21. The National Council of Justice (CNJ) is a public institution that aims to improve the work of the Brazilian judicial system, especially regarding administrative and procedural control and transparency: <http://www.cnj.jus.br/sobre-o-cnj/quem-somos-visitas-e-contatos>. The 2019 Report called *Justiça em números* (Justice by numbers) is available at: <http://www.cnj.jus.br/files/contendo/arquivo/2019/08/4668014d24c1825e7187383564e71a3.pdf>
22. REFOSSCO, Helena Campos. *Ação Coletiva e democratização do acesso à justiça*. São Paulo: Quartier Latin, 2018, p. 147.

The creation of the Small Claim Courts, to judge cases below 40 times the minimum wage (around US\$ 3,600.00), which are accessible with no cost and no need for attorney representation, has also been a major factor for the increment of adjudication. The idea of the Small Claim Courts in Brazil was to broaden access to justice, offering a faster, cheaper and more informal option for simple and low value disputes.²³

The average time to conclude a case in State Courts, which use a traditional procedure track, is 7 years and 6 months, and in State Small Claim Courts which use a fast procedure track, is 2 years.

Nowadays, consumerist conflicts are mostly judged in Small Claim Courts. They correspond to the subject matter in the first place of those courts, responsible for 16,83% of the caseload (9.682.013), representing the greatest low-volume high-volume cases in Brazil. Important to notice that a major part of the conflicts include the request for moral compensation.²⁴

Major subject matter in State Small Courts - 2018	
1. Consumer Law	Traders liability for damages/moral compensation
2. Civil Law	Liability for damages/ moral compensation
3. Civil Law	Contract issues
4. Civil Law	Credit issues
5. Consumer Law	Traders liability for damages/damage compensation

Source: made by the Author based on www.cnj.jus.br - Justiça em números 2019

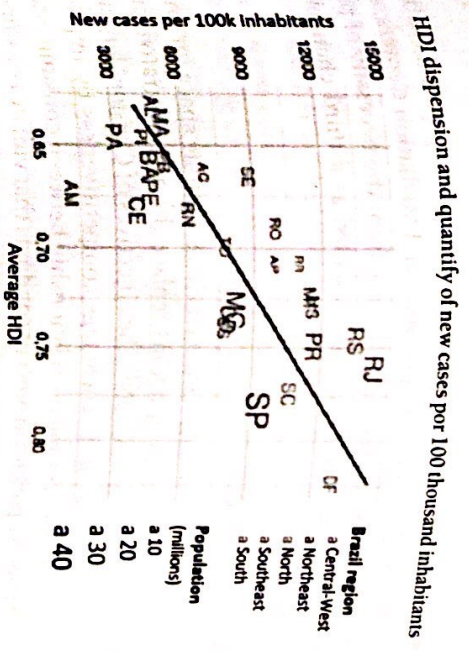
In 2017 a survey was made to investigate consumption litigation in Brazil in the B2C relations²⁵. The results show that telecommunication operators and financial sector are on the top of the list, representing more than 40% of the caseload. In poorer States some basic services companies are also among the repeat players (water and energy suppliers). There is no available age-specific data about consumers.

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

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

24. Justiça em números 2019, p.208. Available at: http://www.cnj.jus.br/files/contido_arquivo/2019/08/4668014d24c4825e7187383564e71a3.pdf

25. The survey is called "Os maiores litígios em ações consumeristas: mapeamento e propostas", (The biggest litigations in consumer judicial cases: mapping and propositions) and is available at: <https://abj.org.br/cases/maiores-litigantes-2/>



Source: <https://abj.org.br/cases/maiores-litigantes-2/>
 *imagem disponibil para melhor visualização no ProView: www.livrariatart.com.br/proview.

In face of this huge amount of cases, the CNJ²⁶ has established in Resolution n° 125/2010, that Alternative Dispute Resolution (ADR) mechanisms should be broadly adopted as annexed systems of the Courts, and that mediation and conciliation must be considered a public policy in order to substitute the "litigation legal culture" by a "social peace legal culture".²⁷

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

The use of Alternative Dispute Resolution (ADR) or Online Dispute Resolution (ODR) to solve consumer disputes has been placed as a desirable policy objective on policy makers agendas all around the world.²⁸

26. The Resolution n° 125/2010 from CNJ provides the regulation of the National Judicial Policy for the alternative dispute resolution in Brazil, focusing especially in mediation and conciliation. Available at <https://www.cnj.jus.br/busca-atos-adm?documento=2379>

27. WAITABANE, Kazuo. *Acesso à ordem jurídica justa*. Belo Horizonte: Del Rey, 2019, p. 34.

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

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

2.3. *Consumidor.gov*

The platform *Consumidor.gov* was created as a public space for private settlement via direct negotiation. It doesn't replace the administrative process of PROCON. According to SENACON²⁹, the objectives of *Consumidor.gov* are: i) to expand customer service, ii) to encourage competitiveness by improving the quality of products, services and the relationship between consumers and companies, iii) to improve policies to prevent conducts that violate consumer rights and iv) to strengthen the promotion of transparency in consumer relations.

Another goal of the platform is to reduce consumerist conflicts. In July May 2019, a technical cooperation agreement was signed to incorporate "*Consumidor.gov*" to the electronic platform of judicial process (PJe). This agreement was based on the consumerist litigation survey made in 2017³⁰ that suggests that, when a consumer start a case at the court, it should be opened the possibility for using *Consumidor.gov* to try to solve the conflict in this early stage of the process. If a settlement is reached, the case is dismissed. But since the incorporation has not being launched yet, it is not possible to know at this moment what the design will be, and if it will influence the access to the courts.

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

In order to access the platform both the consumer and the company need to be registered - currently there are already 1.2 million consumers and 494 companies registered at *Consumidor.gov*, including the repeat players of the most demanded subject matters³¹. It's also important to highlight that the companies are invited

29. All data mentioned in the paper about *Consumidor.gov* is available at: <https://www.consumidor.gov.br/pages/contendo/publicov1>

30. The survey is called "Os maiores litigantes em ações consumeristas: mapeamento e perfis dos litigantes", (The biggest litigants in consumer judicial cases: mapping and profiles) and is available at: <https://bj.org.br/wp-content/uploads/2018/02/283835ca08c6b68ac79144e7b40f55568.pdf>

31. Telecom and Financial companies, as seen by the courts' docket statistics.

to register in the system, since consent is one of the core principles of negotiation. The procedure starts when a consumer file a complaint, using predetermined categories, but there is also free space to voice their problem. Some categorized information is collected at this point, like type of problem being submitted and if the consumer tried to solve the problem with the trader in the first place.

The company receives the complaint and has up to ten days to answer the consumer. After receiving the answer, consumers may respond to the trader and have up to twenty days to report if the problem was solved or not (solved/not solved). Consumers may also indicate their level of satisfaction (from 1 to 5, with 1 being the lowest satisfaction level and 5 being the highest) and add additional comments. After this point the complaint is considered terminated, and it won't be possible for the parties to interact or change the registered evaluation.

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

Statistics shows that 609,644 complaints were filled in 2018, and that 99,3% of them were responded in an average time of 6,5 days. Also, the average satisfaction rank is 3,3 and the yearly cost of running *Consumidor.gov* is around 1 million Reals (approximately US\$ 250.000).

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

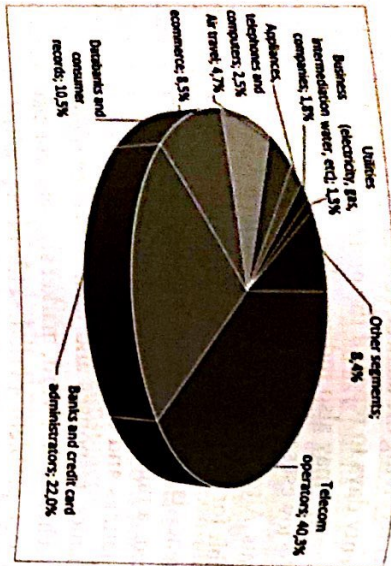
Answered complaints		Solved Complaints		Contacted the company before	
Yes	99,30%	Solved	40%	Yes	7%
No	0,70%	Not solved	19%	No	23%
		Not answered	41%		

Source: made by the Author based on *consumidor.gov*

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

Complaints related to telecommunication operators correspond to 40.3% of the total complaints while financial-related ones account for 22%. Together they reach 62.3% of all complaints. The rate of solved complaints against telecommunication companies is 68% and not solved 8%. For the financial services communication companies the solved rate is 26% while not solved accounts for 23%. Companies the solved rate is 26% while not solved accounts for 23%.

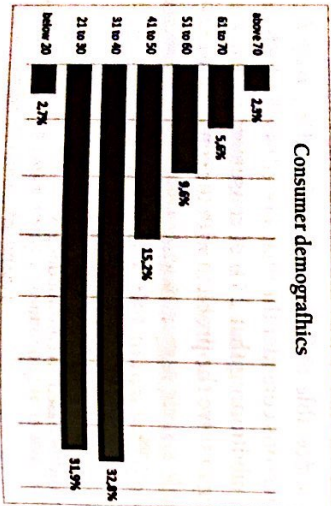
Complaints by segment - 2018



Source: consumidor.gov

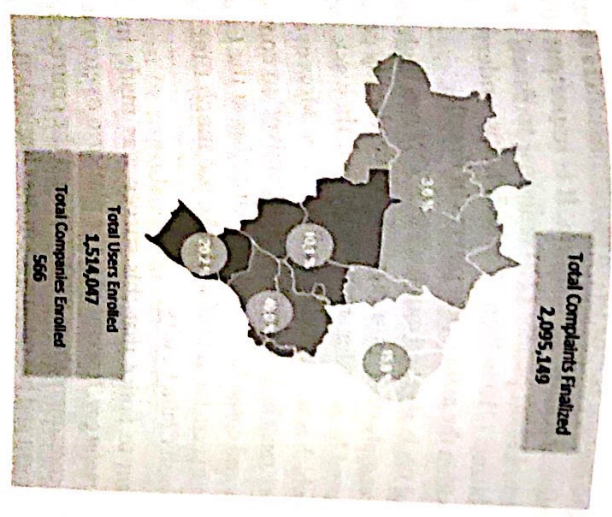
*Imagem disponível para melhor visualização no Proview: www.livrariart.com.br/proview.

Looking at the user demographics, consumers who access *Consumidor.gov* are mostly between 31 and 40 years old, corresponding to 32.8%. Adding consumers between 21 to 30 years (31.9%) we reach 64%. The percentage of elderly people accessing the platform is low, with only 7.9% of consumers above 61 years old.



Source: consumidor.gov

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



Source: consumidor.gov

*Imagem disponível para melhor visualização no Proview: www.livrariart.com.br/proview.

3. CONSUMIDOR.GOV AND ACCESS TO JUSTICE: COMPARING DATA

Before comparing the three channels for dispute resolution described above, some more information about Brazilian consumers are important to be considered.

In 2012 Oliveira and Wada made a survey with consumers between 25 and 40 years old belonging to Brazilian middle class.³³ They found out that when consumers identify a violation of a right, they usually try to solve the issue directly with the company. If it doesn't work, they do nothing or look for help at PROCON, and most of them don't go to the courts. Exception is made to telecommunication companies. For the interviewees, its notorious the inefficacy of their customer services, and because of this, customers prefer to go directly to PROCON or to the courts, bypassing the company.

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

According to *consumidor.gov* data, 23% of consumers don't try to contact the company before accessing the platform. It is important to note that since 2017, the number of smart phones (220 millions) in Brazil has surpassed the number of inhabitants (210 millions)³⁴ which helps understand why telephone companies are within the main repeat players in Brazil.

Olivera and Wada also find out that PROCON has high awareness and respect of the citizens, also that consumers who have already accessed the Courts have done it moved by punishment feelings, and they ask for moral damage compensation, which is not provided by PROCON. Moreover, the value of the product or service must be high, in their perspective³⁵ to compensate the effort (in terms of time and costs) for pursuing their rights at the Courts. The general feeling is that courts are too formal and take too much time to solve the problems, even the Small Claim Courts.

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

Considering the number of complaints in *Consumidor.gov* in 2018 (609,644), after four years of activities, and comparing it to PROCON (1,935,737), that had its first agency created in the 70's³⁶, we can conclude that *Consumidor.gov* is very successful. In such few years it already represents 30% of the total amount of PROCON complaints. As time goes by, *Consumidor.gov* should further increase awareness, possibly becoming larger than PROCON and, consequently, turning itself into the main channel for pre-processual conflict resolution.

The number of companies enrolled at *Consumidor.gov*, especially considering that the main repeat players in courts are among them (telecommunication and financial sector), may indicate that the platform is perceived as a valuable one. Companies seem to be interested in participating in *Consumidor.gov*, first because there is no cost to solve the conflict and because they know that the

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

35. The consumers interviewed pursued their rights in Small Claim Courts in Brazil, that is responsible for cases until 40 times the minimum wage (around US\$ 3,600).

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

complaint might be addressed by courts. As Hornle said, to achieve adherence to negotiation, it is important to have adjudication as an ultimate resource, and for companies, the possibility of taking care of the problem with no court costs is much better.

Considering that 40% of the complaints are settled in *Consumidor.gov*, it is possible to conclude that it is an efficient mechanism to reduce caseloads, at least potentially (there is not enough data to inform cause-effect relation). Soon, consumer cases presented at the court, will have the possibility to be redirected to *Consumidor.gov* to try to settle. Therefore, it will be possible to infer how much of the caseload are being reduced by the *Consumidor.gov*, since 23% of consumers access *Consumidor.gov* directly. So, it might be a good strategy to increase the number of settled cases, without the need for adjudication.

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

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

Also, there is evidence that *Consumidor.gov* is indeed increasing access to the younger population (21-30 year old: 31,9%), comparing to PROCON (21-30 year old: 14,6%). Of course, it also important to consider that access to an online platform is more challenging for the elderly people, and that's probably why the number of consumers above 61 years old are bigger in PROCON (24,5% compared to 7,9% at *Consumidor.gov*). However, since they are not excluding channels, we can still conclude that *Consumidor.gov* promotes the growth of access to justice.

The use of *Consumidor.gov* seems to increase faster among richer parts of the population, as almost 70% of the complaints come from the wealthiest regions of Brazil (South and Southeast). That is an important data for policy makers to investigate.

The convenience of the platform is evident, first because it is online with all the advantages of asynchronous communication, and no need for face-to-face encounters, and second because it has no cost at all for both consumers and companies. From the point of view of the government, courts cost 1.3% of Brazilian GDP (around US\$ 23.430.000.000), while the annual cost of running *Consumidor.gov* is around 1 million Reals (US\$ 250.000). Finally, because it is much faster (6,5 days) compared to the average turnaround time of courts (2 years).

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

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

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

The platform data is generated by consumer assessments that, like any self-reported data, is subject to bias, that could be based on the ignorance of consumer about its own rights. This possibility could even explain the difference between the number of company answers (99,3%), which could be legally satisfactory, versus the number of "not solved" (19%) or not answered (4%).

37. SCHMIDT-KESSEN, Maria José; NOGUEIRA, Rafaela; CANTERO, Maria. Op. Cit.

If the platform would have provided, since the beginning of the process, information for consumers and traders about their duties and rights and would have given information about previews settlements, it would be possible to avoid frivolous complaints, and to stimulate consumers to answer about the conclusion of the process (solved/not solved and satisfaction rank).³⁸

Also, it must be considered that B2C relations has parties with unequal powers. For instance, telecommunication operators and financial institutions enjoy the advantages of the repeat player against the one-shotter. Repeat players have a deep familiarity with the system and can use the system to create rules that play to their advantage in future cases.³⁹ In terms of outcomes and repeat player's advantages, because direct negotiation relies on interests rather than rights, it confers "benefits on those who have more power to shape legal endowments, have prior experience, and are expected to have future dealings with the legal system."⁴⁰

Considering that there is not a third party involved in the process to manage information between unequal parties, it seems to be necessary to implement measures to provide more information to consumers, as a minimum due process guarantee. *Consumidor.gov* is a public institution and has the possibility to overcome the criticism that exist referring to settlement outside the courts as a "second class" justice.⁴¹

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

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

However, there is no data available about the last objective, which is to improve policies to prevent conducts that violate consumer rights, that is related

38. PORTO, Antonio José Maristrello; NOGUEIRA, Rafaela; QUIRINO, Carina de Castro. Op. Cit.

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

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

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

to the third shift proposed by Katsh and Rabinovich-Einy, which is the shift from emphasis on the value of confidentiality to an emphasis on collecting, using and reusing data in order to prevent disputes.

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

The geographic information shows that the poorer regions of Brazil, still don't have great representation in the complaints. Actually, in *Consumidor.gov* the rate of access by richer regions is even higher (70%) than in PROCON (64%), and access to the courts is higher in the most developed regions.

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

Katsh and Rabinovich-Einy assert that the prevention of disputes based on ODR makes possible to transform the dispute pyramid, opening the sides of the pyramid towards a rectangular shape in which a larger proportion of disputes are addressed through dispute resolution and prevention activities.⁴² This means that even those that are not capable of recognizing an injury, or to pursue a remedy can benefit from this proactive dispute prevention, providing access to justice. Companies have the feeling that there is an "industry" of financial damages claims, since those are the majority of cases they have to deal with in courts. However, adjudication is at the top of the dispute pyramid, and we can actually notice, by the geographical distribution data, that most of consumer damages are not "named, blamed or claimed".⁴³ Therefore, the proactive pre-

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

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

vention of disputes is the best way to truly promote access to justice, even if indirectly, since even the consumer that has no understanding of his/her rights, will benefit from it.

If data collected by *Consumidor.gov* was processed by algorithms or learning machines, patterns of conducts that violate consumer rights could be found. With this processed information, the agencies responsible to regulate the specific market, or even PROCON, can take measures to guarantee lawful activities. That would configure the litigation prevention provoking the enlargement of access to justice, as proposed by Katsh and Rabinovich-Einy and Susskind.

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

4. CONCLUSIONS

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

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

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

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

There is not enough data available to assert that the use of the platform reduces caseloads, but the redirection of plaintiffs to the platform when a case is started, might generate this data and it would be possible to measure the decrease of courts consumerist docket in the future.

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

Finally, to achieve the objective of improving policies to prevent conducts that violate consumer rights, the platform must incorporate more sophisticated technology, process information existing in its database, and make it public and of easy access.

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