

10. Consumers and digital conflict resolution: considering dimensions of access to justice

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1. INTRODUCTION

This edited volume has the ambition to understand the modern consumer market, influenced by digitalisation, platformisation, and sustainability, and demands a reassessment of existing consumer law and policy. This chapter responds to the ambition by turning its attention to access to justice. I focus on what different dimensions of access to justice can tell us about consumers in the digital marketplace and how this lens can help properly assess and design appropriate online dispute resolution systems. I draw on 52 semi-structured interviews, collected in a recent research project, to support my argument.² I discuss this mainly in the UK context; however, the findings can be translated to other jurisdictions, for example, in relation to the latest proposals at the EU level on alternative dispute resolution (ADR) and online dispute resolution (ODR).³

¹ Huge thanks to the editors of this volume for their helpful and constructive feedback on an earlier version of this chapter. <https://orcid.org/>.

² Naomi Creutzfeldt, Arabella Kyprianides, Ben Bradford, and Jonathan Jackson, *Delivering Administrative Justice after the Pandemic* (2023) <https://www.nuffieldfoundation.org/project/delivering-administrative-justice-after-the-pandemic> accessed 9 June 2025.

³ EC (2023) *Alternative Dispute Resolution for Consumers* https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/alternative-dispute-resolution-consumers_en accessed 2 March 2024; the DSA contains a dispute resolution provision: <https://dsa-observatory.eu/2024/01/22/consumer-odr-redefining-pathways-to-dispute-settlement-in-a-post-consumer-society/> accessed 2 March 2024.

I argue that existing consumer protection must evolve to respond to the challenges of a growing digital marketplace. This means that consumer protection needs to adapt to the needs of consumers in their marketplace of choice. Most of us are increasingly active and at ease, with purchasing our goods and services online. The digital transformation has opened many options for consumers to compare prices, access a wider range of products, and purchase goods from outside of their country of residence, all with the click of a button and in their own time. The wider the marketplaces spread, the more complicated it is to create effective protection for consumers when transactions go wrong.

Within the UK, the Consumer Rights Act 2015 sets out the rights a consumer has when purchasing products, services, and digital content. The Act stands alongside Regulations to create a greatly simplified body of consumer law (more detail in the next part). Taken together, they set out the basic rules which govern how consumers buy and how businesses sell to them in the UK.⁴ The UK government's advice to consumers, when encountering a problem, is to seek advice from different providers (e.g. Citizens Advice (E&W), Advice Direct Scotland⁵ (Scotland), Consumerline⁶ (NI), Which?,⁷ an Ombuds,⁸ money advice,⁹ and Consumer Centre UK¹⁰ for goods and services bought outside of the UK). A complaint can also be referred to a local Trading Standards Officer.¹¹ However, it is not always clear to a consumer which provider to approach and this can create a barrier to effective consumer redress.

Despite these laws and regulations being in place, it is not always straightforward for a consumer to bring a complaint about a faulty good or service. There are various additional barriers to consumer redress in the digital marketplace. For example, consumer problems – like their purchases – can go

⁴ Citizens Advice, 'The Consumer Rights Act 2015' <https://www.citizensadvice.org.uk/about-us/our-work/citizens-advice-consumer-work/the-consumer-rights-act-2015/#:~:text=The%20Act%20gives%20consumers%20a,music%20downloads%20and%20e%2Dbooks> accessed January 2024.

⁵ Advice.scot <https://www.advice.scot/> accessed January 2024.

⁶ NI Consumerline <https://www.nidirect.gov.uk/contacts/contacts-az/consumerline> accessed January 2024.

⁷ Which? <http://www.which.co.uk/consumer-rights/action> accessed January 2024.

⁸ Ombudsman Association <https://www.ombudsmanassociation.org> accessed December 2023.

⁹ MoneyHelper <https://www.moneyhelper.org.uk/> accessed December 2023.

¹⁰ UK International Consumer Centre <https://www.ukecc.net> accessed December 2023.

¹¹ Trading Standards <https://www.tradingstandards.uk/consumer-help/> accessed December 2023.

beyond borders, so solutions need to match this in cross-border cooperation.¹² Additionally, accessing dispute resolution pathways has proven to be a challenge. A few developments are underway to remedy this: a policy brief to enhance consumer rights,¹³ the Digital Markets, Competition, and Consumer's Bill,¹⁴ and a recommendation on quality standards for a dispute resolution process.¹⁵

As I will illustrate, legal efforts by the EU and national legislators to make the digital marketplace a safe environment to purchase goods and services are not sufficient. New regulations need to adapt to the marketplace and the potential problems it creates for consumers. I argue that, when creating new legislation for consumer protection in the growing digital marketplace, we need to consider consumers' capabilities through dimensions of access to justice that can inform how to best design redress and support to meet consumers' needs. This chapter does this in four parts. First, I discuss access to justice and consumers in the digital marketplace to frame the context and the focus of this chapter. Second, I present empirical findings from a recent research project to provide an evidence base for my argument to better understand and critically examine digitalised dispute resolution. Third, I offer a discussion about how the lens of dimensions of access to justice can be helpful when thinking about consumer protection in the digital marketplace. Section 4 concludes the chapter.

2. ACCESS TO JUSTICE AND CONSUMERS IN THE DIGITAL MARKETPLACE

Access to justice is a widely debated concept. It casts its net through different schools of thought and can be understood from different perspectives. In this

¹² For example, the EU Collective Proceedings Directive <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020L1828&from=EN> accessed 25 January 2024.

¹³ Enhancing Consumer Rights (2023) <https://www.gov.uk/government/publications/digital-markets-competition-and-consumers-bill-supporting-documentation/enhancing-consumer-rights-policy-summary-brief> accessed December 2023.

¹⁴ Oles Andriychuk, 'Analysing UK Digital Markets, Competition and Consumers Bill through The Prism of EU Digital Markets Act' *Concurrences*, 3–2023; <https://bills.parliament.uk/bills/3453>.

¹⁵ EC Commission Recommendation on quality requirements for dispute resolution procedures offered by online marketplaces and Union trade associations C (2023) 7019 final https://commission.europa.eu/system/files/2023-10/C_2023_7019_1_EN_ACT_part1_v4.pdf accessed 28 January 2024.

chapter, building on previous work,¹⁶ I consider access to justice best understood and operationalised as a holistic concept. In other words, access to justice in practice needs to be recognised beyond access to legal institutions to include access to assistance, non-legal advice provision, alternative forms of dispute resolution, internal complaint-handling arrangements, and a broader range of social and community actors. This approach allows us to start to think about access to justice in a way that reflects people's access problems and can offer better-informed solutions.

I propose to think about access to justice along the lines of Sandefur:

Today, access to justice is restricted: only some people, and only some kinds of justice problems, receive lawful resolution. Access is also systematically unequal: some groups – wealthy people and white people, for example – get more access than other groups, like poor people and racial minorities ... justice is about just resolution, not legal services.¹⁷

Sandefur's point is helpful in focussing attention on the types of problems and inequalities that are important when discussing access to justice. This broad understanding of access to justice allows us to think about access to *advice*, *support*, and *technology*.¹⁸ However, in the online marketplace, the focus shifts from advice and support to *technology*. In a face-to-face marketplace, consumers have the option to seek *advice* and *support*, either from the company complained about, an advice provider, or a complaints procedure. In the online context, this is not a service usually provided by a human – if it is available at all. Therefore, in the context of consumer protection in the digital marketplace, the law has to take into consideration people's digital capabilities to access these complaint paths and thereby adapt to the new digital space.¹⁹

For those people who do not know whom to turn to for help when encountering a legal problem, access to advice is a fundamental aspect of promoting access to justice.²⁰ In the evolving landscape of online transactions, *access*

¹⁶ Naomi Creutzfeldt, Chris Gill, Rachel McPherson, and Marine Cornelis, *Access to Justice for Vulnerable and Energy-Poor Consumers* (Hart Publishing 2021) Chapter 2.

¹⁷ Ibid 52.

¹⁸ Naomi Creutzfeldt, Arabella Kyprianides, Ben Bradford, and Jonathan Jackson, *Access to Justice, Digitalisation, and Vulnerability: Exploring Trust in Justice* (BUP 2024).

¹⁹ Naomi Creutzfeldt, 'Towards a Digital Legal Consciousness?' (2021) 12(3) *European Journal of Law and Technology* <https://ejlt.org/index.php/ejlt/article/view/816>.

²⁰ Naomi Creutzfeldt and Diane Sechi, 'Social Welfare [Law] Advice Provision During the Pandemic in England and Wales: A Conceptual Framework' (2021)

to technology is a fundamental determinant of equitable participation in the online dispute resolution process.²¹ The ability of individuals to engage with the online system (e.g., uploading documents, seeking legal information)²² is contingent on their access to appropriate technological resources. This includes a reliable internet connection, access to digital devices, and a level of digital literacy that enables effective interaction with online platforms.

A disparity in technological access creates barriers, limiting a certain demographic from fully participate in and benefiting from the online marketplace and dispute resolution pathways. The digital divide creates a barrier to online access. In other words, even if the online marketplace is readily accessible for purchasing goods, those who are unhappy with those goods need to possess digital skills to access and navigate their rights.

2.1 Consumer Rights in the Growing Digital Marketplace

Consumer behaviour has been impacted by the digital transformation of the marketplace.²³ Technology has enabled a massive expansion of consumer choice and purchasing options. However, the pace at which the digital market expands has not been matched by new laws to protect consumers. In the UK, as mentioned, retailers are held to account through the Consumer Rights Act 2015²⁴ and Contractual Regulations 2013²⁵ (information, cancellation, and additional charges regulations) that protect online purchases.²⁶ Additionally,

43(2) *Journal of Social Welfare and Family Law* 153–74.

²¹ Naomi Creutzfeldt, 'The Digitalisation of Tribunals and Vulnerability' (2024) 2 *Public Law* 211.

²² Examples from Canada could serve as a blueprint. Also, e.g., Emma van Gelder, 'The EU Approach to Consumer ODR' (2019) 6 *IJODR* 219; XE Kramer, E van Gelder, and E Themeli, 'e-Justice in the Netherlands: the Rocky Road to Digitised Justice' in M Weller and M Wendland (eds), *Digital Single Market: Bausteine eines Rechts in der Digitalen Welt* (Mohr Siebeck 2018) 209–35.

²³ Lisette Kruizinga and Lisan Lesscher, 'How digital transformation impacts consumer behaviour' (2022) Groningen Digital Business Centre <https://www.rug.nl/gdbc/partners/whitepaper-digital-transformation-and-consumer-behaviour.pdf> accessed 25 January 2024.

²⁴ Consumers Rights Act 2015 <https://www.legislation.gov.uk/ukpga/2015/15/contents/enacted>.

²⁵ Consumer Contracts Regulations 2023 <https://www.legislation.gov.uk/uksi/2013/3134/contents/made>.

²⁶ Lucy Brown, 'Consumer Rights When Shopping Online' (20 August 2022). <https://www.choose.co.uk/money/guide/consumer-rights-online-shopping/> accessed 27 January 2024.

UK eIDAS Regulations²⁷ and Alternative Dispute Resolution for Consumer Disputes.²⁸

Overall, the development of UK consumer protection has been driven by the EU through longstanding directives and regulations. For example, the Consumer Rights Act 2015, the cornerstone of the UK consumer protection regime, is a mix of EU-derived and domestic law. Two Brexit statutory instruments (SIs) deal specifically with retained EU consumer law: (1) Consumer Protection (Amendment etc) (EU Exit) Regulations 2018/1326 (known as the ‘Protection Regulations’); and (2) Consumer Protection (Enforcement) (Amendment etc) (EU Exit) Regulations 2019/203 (known as the ‘Enforcement Regulations’). In 2023, the EC put forward a proposal to amend the ADR directive. The proposal is to maintain the current minimum harmonisation approach and make it fit modern consumer markets better.²⁹

The UK Government has identified consumer law enforcement as a key weakness in the consumer protection regime. In a recent effort to rectify this, the Digital Markets, Competition and Consumers Bill [Bill 294, 2022–23]³⁰ was introduced in the House of Commons on 25 April 2023. At the point of writing this chapter, it is at the report stage, awaiting the third reading.³¹ The motivation and framing of this bill is a post-Brexit opportunity to deliver growth and innovation and to protect consumers – explicitly within the UK.

The research leading up to the bill identified the weaknesses in current consumer protection that undermine ‘consumer confidence and expose traders to unfair competition. These weaknesses covered procedural difficulties for enforcers, weak sanctions for breaching the law, and low uptake of alternative dispute resolution services’ (p. 13).³² Further reasons to strengthen consumer

²⁷ Electronic Identification and Trust Services for Electronic Transactions Regulations 2016, as amended by the Electronic Identification and Trust Services for Electronic Transactions (Amendment etc.) (EU Exit) Regulations 2019 (known collectively as the UK eIDAS Regulations).

²⁸ (Competent Authorities and Information) Regulations 2015, as amended by the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018).

²⁹ Available at: <https://www.regjeringen.no/contentassets/dc20674c5c8d4da1955a224652efe46f/adr-engelsk.pdf> accessed on 2 March 2024.

³⁰ Lorraine Conway, ‘Digital Markets, Competition, and Consumers Bill 2022–23: Consumer Provisions’ (House of Commons Library 2022) <https://research-briefings.files.parliament.uk/documents/CBP-9796/CBP-9796.pdf> accessed 27 January 2024.

³¹ Parliamentary Bills, ‘Digital Markets, Competition, and Consumers Bill 2022–23’ (2023) <https://bills.parliament.uk/bills/3453> accessed 6 March 2024.

³² <https://researchbriefings.files.parliament.uk/documents/CBP-9796/CBP-9796.pdf>. Lorraine Conway, ‘Digital Markets, Competition, and Consumers Bill

rights in the digital marketplace are to support digital transformation³³ and empower consumers.³⁴

In the digital marketplace, consumers have the option to take their complaint to a recognised online dispute resolution (ODR) provider. As mentioned above, the European Commission issued a recommendation in October 2023 on quality requirements for dispute resolution processes offered by online marketplaces and Union trade associations.³⁵ They recognised that the dispute resolution procedures available for consumers purchasing in the digital marketplace were not regulated by Directive 2013/11/EU and thus their fairness was not assured. The quality criteria set out in the Directive are recommended to be adopted by the providers of dispute resolution. These criteria are: expertise, independence, impartiality, effectiveness, and fairness. Many academics have argued that these do not go far enough.³⁶ With the recent attempt to recommend all ODR providers to subscribe to these EC standards, practical suggestions have been made on how ODR providers ought to achieve the quality that is required. Part of this is to publish self-assessment reports showing how the quality criteria have been implemented; to share the procedural rules (language, possible costs, average duration, documents needed) with the parties – as well as the grounds on which they cannot deal with a complaint.

In other words, there are no shared standards of ODR in online marketplaces, which means that the quality will vary and with it, the experience of consumers. Setting minimum standards and recommendations has not been

2022–2023: consumer provisions (12 May 2023) <https://researchbriefings.files.parliament.uk/documents/CBP-9796/CBP-9796.pdf> accessed 27 January 2024.

³³ Rhea Subramanya, 'How Can Consumer Rights Accelerate Digital Transformation in 2022?' (2022) <https://www.institute.global/insights/tech-and-digitalisation/how-can-consumer-rights-accelerate-digital-transformation-2022> accessed on 27 January 2024.

³⁴ OECD, 'The role of online marketplaces in protecting and empowering consumers: Country and business survey findings' (*OECD Digital Economy Papers*, No. 329, OECD Publishing 2022) <https://doi.org/10.1787/9d8cc586-en> accessed 28 January 2024.

³⁵ EC Commission Recommendation on quality requirements for dispute resolution procedures offered by online marketplaces and Union trade associations C (2023) 7019 final https://commission.europa.eu/system/files/2023-10/C_2023_7019_1_EN_ACT_part1_v4.pdf accessed 28 January 2024.

³⁶ Anja Rösner, Justus Haucap, and Ulrich Heimeshoff, 'The Impact of Consumer Protection in the Digital Age: Evidence from the European Union' (2020) 73 *International Journal of Industrial Organization* 102585; Natali Helberger, Hans Micklitz, and Peter Rott, 'EU consumer protection 2.0. Structural asymmetries in digital consumer markets', *Joint Report from EUCP2.0 Project BEUC* (2021).

successful in the consumer ADR directive and ODR regulation – they both have both got substantive flaws.³⁷ The European Commission announced on 17 October 2023 that it intends to amend the ADR Directive with a view to modernising it and making it better suited to digital markets. In addition, guidelines for online marketplaces were proposed.³⁸ Sadly, the opportunity was missed here to provide a dependable relationship to ODR for consumers in the digital marketplace. The ODR Regulation will be repealed. It will be interesting to observe these developments at a European level.

2.2 Appropriate Dispute Resolution

A way to empower consumers, besides knowing their rights, is to put in place easily identifiable and accessible dispute resolution pathways. We can think about this through appropriate dispute resolution.³⁹ We know that disputes between consumers and online sellers can be a challenge to resolve, especially when dealing with international transactions.⁴⁰ Also, the lack of standardised and efficient dispute resolution processes can undermine consumer

³⁷ Cosmo Graham, ‘Some Failings of Consumer ADR Policy (2021) *Series 2 Vol. 4 Amicus Curiae* 412; Nicola Scannicchio, ‘The Fake Implementation of a Fake Consumers’ ADR Directive: A Case Study on Rights’ Enforcement by Regulatory Powers in Italy’ (2019) 5 *Italian LJ* 323; Joasia Luzak, ‘The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice’ (2016) 24(1) *European Review of Private Law* 81–101; Alexandre Biard, ‘Impact of Directive 2013/11/EU on Consumer ADR quality: evidence from France and the UK’ (2016) 42(1) *Journal of Consumer Policy* 109–47; Naomi Creutzfeldt, ‘Implementation of the Consumer ADR Directive’ (2016) 5 *J. Eur. Consumer & Mkt. L.* 169; Maria Jose Schmidt-Kessen, Rafaela Nogueira, and Marta Cantero Gamito, ‘Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU’ (2020) 43(3) *Journal of Consumer Policy* 659.

³⁸ The EU Digital Services Act (will apply to all platforms from 17 February 2024) contains provisions on ADR in Arts. 19 and 20.

³⁹ Carrie Menkel-Meadow, ‘Alternative and Appropriate Dispute Resolution in Context: Formal, Informal, and Semiformal Legal Processes’ in P T Coleman, M Deutsch and E C Marcus, *The Handbook of Conflict Resolution: Theory and Practice, Chapter, 50* (Wiley 2015) 1–28; Carrie Menkel-Meadow, *Dispute Processing and Conflict Resolution: Theory, Practice and Policy* (Ashgate Press 2003).

⁴⁰ Julia Hörnle, ‘Encouraging Online Dispute Resolution in the EU and Beyond-Keeping Costs Low or Standards High?’ (2012) *Queen Mary School of Law Legal Studies Research Paper*, 122.

confidence.⁴¹ When thinking about the best design for these dispute resolution mechanisms, we have to return to the question of access to justice.

Here, appropriate dispute resolution is a lens through which to approach consumer protection in the online space. The main premise of this approach is to find the *appropriate* means to resolve a complaint or dispute.

The most significant change now is emerging from the melting pot of various ADR methodologies is not a particular programme, method, or approach. Rather, an essential paradigm shift from the acceptance of adversarial litigation as the dominant form of dispute resolution driven by what is appropriate to the given scenario has emerged, grounded upon a rights-based system of law.⁴²

The argument in support of appropriate dispute resolution has been made in relation to the formal legal system. It suggests there are some problems that do not need a court hearing but are better suited to ADR. In the spirit of saving time and cost, ODR does just this in the online marketplace, as it can offer dispute resolution that is appropriate to the type of complaint and to the consumer.

3. DIGITALISED DISPUTE RESOLUTION FROM AN EMPIRICAL PERSPECTIVE: FITTING THE FORUM TO THE FUSS

One requirement to create laws that provide appropriate protection for consumers in the digital marketplace is to know the scale (and areas) of consumer complaints received by authorities.⁴³ Existing data shows misleading marketing, scams, and dispute resolution (or lack thereof) as the main consumer protection concerns. Another consideration for the creation of new laws and appropriate dispute resolution options is the diversity of people who might need to access them. Although we are talking about the online marketplace, which might suggest that consumers are confident in the use of the internet, there also needs to be a provision for those who are not as online savvy to access redress pathways.

⁴¹ Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2011) 266.

⁴² Jeffrey Scott Wolfe, 'Across the Ripple of Time: The Future of Alternative (or, is it appropriate) Dispute Resolution' (2013) 36 *Tulsa L.J.* 785, at 795.

⁴³ OECD (n 34) at 9.

3.1 How to Accommodate Different Consumer Needs in Online Dispute Resolution

A very basic answer to the question of how to accommodate different needs in the provision of online dispute resolution is to think about the appropriate *forum for the fuss*. Sander and Goldberg provided a guide to choosing ADR procedures,⁴⁴ against the backdrop of freeing judicial dispute system designers to think about what type of design would best meet the needs of an individual case rather than a one-size-fits-all approach. Although the authors proposed different types of ADR in relation to the formal legal process, the same logic can be applied to the online setting. They suggest two lines of inquiry to *fit the forum to the fuss*: (1) what are the disputants' goals in making a forum choice; and (2) if disputants are amenable to settlement, what are the obstacles to settlement, and in what form might they be overcome?⁴⁵ It is here where empirical findings might provide vital information.

In an online consumer dispute resolution process, the answer to the first question is to get a fast and straightforward refund for the problem they encountered. The answer to the second question is more complicated. Usually, in a consumer dispute, the consumer requests their money back or a replacement for faulty goods. A settlement might be negotiated between the buyer and the seller, and this typically would involve financial remedies. What then, in the online consumer market, is an appropriate level of protection? Part of these considerations includes thinking about how the design of a dispute resolution system can provide protection for consumers as well as a process that is easy to understand and operate. ODR has the potential to enable efficiency through processes that are faster and cheaper, a difference in degree relative to traditional face-to-face processes.

In 2015, Rule⁴⁶ offered technology as the future of dispute resolution and set out how, with society embracing technology, next steps could be taken to improve access to justice, speedier and better outcomes, and to maintain relevance in the lives of consumers.⁴⁷ He also added that ODR is simultaneously the biggest opportunity and the biggest challenge for the practice of dispute

⁴⁴ Frank Sander and Stephen Goldberg, 'Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure' (1994) 10 *Negotiation Journal* 49.

⁴⁵ *Ibid*, 66.

⁴⁶ Colin Rule, 'Technology and the Future of Dispute Resolution' *Dispute Resolution Magazine* (2015) <https://law.scu.edu/wp-content/uploads/Rule-Technology-and-the-Future-of-Dispute-Resolution-copy.pdf> accessed 28 January 2024.

⁴⁷ *Ibid*, 7.

resolution. Martinez provides a comprehensive overview of the developments in the design of online dispute resolution, including its challenges.⁴⁸

3.2 Appropriate Dispute Resolution and Design

To design an online dispute resolution process that is appropriate and accessible to those who need it, we have to take the human dimensions into consideration. In a recent research project on access to justice during the pandemic,⁴⁹ we proposed a framework through which to understand the complex needs of people when accessing online pathways to seek redress. Our data exposed recurring patterns of access to justice in digital journeys, and I propose these dimensions can be useful when considering appropriate consumer protection in the online marketplace.

Our research project looked at how people engaged with online tribunals and ombuds processes during the COVID-19 pandemic.⁵⁰ Whereas ombuds processes are usually online, the tribunals are in a process of reform to be digitalised. This reform, aimed at modernising the justice system to make it more straightforward, accessible, and efficient, started in 2016.⁵¹ Our project sought to understand how the digitalisation of the process worked for its users. We applied a mixed-methods approach to empirically understand access to and trust in administrative justice. The data I am drawing on for this chapter are the interviews with professionals who administer the online process, and users who have been through an online process. The focus of the study was on housing disputes and disputes around special educational needs and disabilities (SEND). These procedures were all offered online during the pandemic and provided rich empirical data. The respondents were selected both randomly and purposefully. In a survey, as a quantitative part of the study, we invited people to put themselves forward to be interviewed by us. We also approached judges, caseworkers, and ombuds that were part of the housing and SEND dispute resolution pathways. In total, we conducted 52 semi-structured

⁴⁸ Janet Martinez, 'Designing Online Dispute Resolution' (2020) *J. Disp. Resol.* 135.

⁴⁹ Naomi Creutzfeldt, Arabella Kyprianides, Ben Bradford, Heidi Bancroft, and Jonathan Jackson, *Delivering Administrative Justice After the Pandemic* (2023) <https://www.nuffieldfoundation.org/project/delivering-administrative-justice-after-the-pandemic>; Creutzfeldt et al. (2024) (n 18).

⁵⁰ Ibid; a comparative study on how the pandemic has influenced civil proceedings, including digital proceedings: Bart Krans and Anna Nylund, *Civil Courts with Covid-19* (Eleven 2021).

⁵¹ HMCTS Reform Programme <https://www.gov.uk/guidance/modernising-courts-and-tribunals-benefits-of-digital-services> accessed 28 January 2024.

interviews, 34 of which were with professionals (nine judges; five ombuds; seven advice providers; seven staff members at the institutions, and six other stakeholders) and 18 user interviews. The themes emerged inductively from the data and formed part of a larger exploration.⁵² The limitations with this approach, like with most qualitative endeavours, are that the results are not representative of a whole country. Having said that, they provide snapshots of encounters with the digital justice system from the perspective of the judge/ombuds as well as the consumer.

From our interview data, we saw themes emerging that we grouped into dimensions in relation to people's experiences with access to the online dispute resolution system. These dimensions pay attention to the lived experience of an online process and are helpful to focus our minds on issues that might otherwise get lost in the design of digital dispute resolution processes. The three dimensions are digital (online and offline experiences), affective (emotions and communication), and compound (complex needs).

Digital dimension (online and offline experiences): Our data showed that the digital dimension of a dispute resolution process can add extra layers of complexity. The creators of the online dispute resolution system need to ask themselves if the consumer has the digital skills to navigate the system. People need more assurance about the online process, which means that they need more procedural justice (to experience a process to be fair).⁵³ Consumers need a set of capabilities to use online dispute resolution services, but service providers must also have the capabilities to deliver these services effectively. For example, in the digital marketplace, the dispute resolution processes can include steps to ensure that a consumer has a sense of procedural justice. This can be achieved by receiving regular updates (text message or email) on the progress of their case; by receiving any information in plain language; and by being responsive, ideally offering a human at some stage of the process.

In this context, the need for procedural justice is even greater, as service users want assurance that they will be treated fairly. Our data showed that no matter how digitally capable a person is, when technology did not work, it added tension to an already fraught setting.⁵⁴ In other words, digital systems can create their own difficulties and anxieties, so even people who prefer digital interactions for various reasons, or who are otherwise capable, are susceptible to these difficulties.

⁵² For more information see: Creutzfeldt et al. (2024) (n 18).

⁵³ Tom Tyler, *Why People Obey The Law* (Princeton University Press 2006); Creutzfeldt et al. (2024) (n 18).

⁵⁴ For an in-depth analysis of procedural justice expectations and the three dimensions, see Creutzfeldt et al. (2024) (n 18).

Affective dimension (emotions and communication): Even if a person is digitally capable, when technology fails, anxiety is added to an already tense setting. In other words, digital systems can create their own difficulties and anxieties (distinct from, and in combination with, the legal aspect), so even people who prefer digital interactions for various reasons, or who are otherwise capable, are susceptible to these difficulties.⁵⁵ Emotions play an important role in people's perceptions of accessing justice online. Negative perceptions of services can create a lack of trust in the legal system or a belief that legal services are not accessible or affordable. Positive perceptions of legal services can be promoted and can lead to increased access to justice and improved outcome acceptance.⁵⁶

Compound dimension (vulnerabilities): We found that access to online justice can have an impact on consumers' emotions in various ways. For example, online systems can help to alleviate negative emotions by providing a more accessible, efficient, and cost-effective means of resolving disputes.⁵⁷ In British Columbia, for example, user-centred design was applied to reimagine how to resolve disputes and to create an online dispute resolution system.⁵⁸ One of the main points is that one needs to focus on the 'entire service journey of a person going through the legal system'.⁵⁹ This relates directly to a wider concept of access to justice; it is about assisting the consumer through a series of multiple tasks. In a recent article, Denvir and Selvarajah discussed a survey that measured digital capability with regard to access to justice of lay people.⁶⁰ They found, similar to our study, that it is impossible to explore the full extent of people's digital capabilities and that maintaining access to non-electronic alternatives and providing support to users remains necessary.

⁵⁵ Ibid, 197.

⁵⁶ Ibid, 197.

⁵⁷ Lord Justice Briggs, 'Civil Courts Structure Review: Final Review' (Judiciary of England and Wales, July 2016) <https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> accessed 28 January 2024.

⁵⁸ Shannon Salter and Darin Thompson, 'Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (April 20, 2017) 3 *McGill Journal of Dispute Resolution* 2016–2017, Osgoode Legal Studies Research Paper No. 44, Available at SSRN: <https://ssrn.com/abstract=2955796>.

⁵⁹ Margaret Hagan, 'A Human Centred Design Approach to Access to Justice: Generating New Prototypes and Hypotheses for Intervention to Make Courts User-friendly' 6(2) *Indiana Journal of Law and Social Equality* 2018 237.

⁶⁰ C Denvir and AD Selvarajah, 'Safeguarding Access to Justice in the Age of the Online Court' (2022) 85(1) *Modern Law Review* 27.

These dimensions, I argue, have to be taken into consideration when consumers interact in the digital market space, especially when something goes wrong. They need to inform the design and availability of dispute resolution pathways for them to be used and for consumer protection to be effective.

4. DIMENSIONS OF ACCESS TO JUSTICE AND CONSUMER PROTECTION IN THE DIGITAL MARKETPLACE

The Consumer Rights Act 2015⁶¹ protects consumers in almost all purchases and states that all products must be of satisfactory quality and fit for purpose as described. This extends to digital content: both physical and digital products must meet these standards. The Consumer Rights Act gives consumers the legal right to a refund (up to 30 days),⁶² replacement or repair (30 days–six months, and more than six months).⁶³ If a consumer has received a faulty good or bad service, and the business or individual they bought it from is not willing to remedy this, then they can access redress pathways. These are an ADR procedure (e.g., ombudsman) or the small claims court (for a value up to £10,000).

Both dispute resolution pathways are mainly online. There is, however, a possibility within an ombuds procedure, as well as in a small claims procedure, to contact a person or fill out a form and mail it, if necessary.⁶⁴ Usually, when purchasing goods or services online, people possess the skills to navigate websites to make their purchases. Going through a dispute resolution process can be emotionally challenging. Although most of us engage in some form of online interactions, and we have learnt new ways of communication, technology has redefined interpersonal contact through social networks and other forms of communication that do not depend on face-to-face interactions.⁶⁵ The authors predicted a ‘catch-up’ of digital processes to provide some form of

⁶¹ The Consumer Rights Act 2015 <https://www.legislation.gov.uk/ukpga/2015/15/contents/enacted> accessed 28 January 2024.

⁶² Consumer Rights Act 2015 chapter 3 (digital content) 45.

⁶³ Consumer Rights Act 2015 chapter 2 (goods), 23; chapter 3 (digital content), 43.

⁶⁴ This option is not taken up frequently and takes more time than pursuing the claim online; see: Naomi Creutzfeldt, *Ombudsmen and ADR: A Comparative Study of Informal Justice in Europe* (Palgrave Macmillan 2018).

⁶⁵ L Wing and D Rainey, ‘Online Dispute Resolution and the Development of Theory’ in Mohammed Wahab, Ethan Katchm and Daniel Rainie (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven Publishing 2021) 35, 41.

communication and social interaction.⁶⁶ However, as human beings, we (still) value the chance to talk to a person and explain our problem, especially if the online system is not responsive or easy to navigate.⁶⁷ As our data confirmed, this is something we need to take into consideration when offering and designing dispute resolution processes online, especially for those who are less digitally capable.

Rule sets out how technology has changed the way in which humans interact.⁶⁸ ‘Technology has flattened the limitations of time and space, and we will never go back to the way it was before’.⁶⁹ He further claims that we need a justice system that works the way the Internet works: adjusting to the growing demands for speed and efficiency (in process and outcomes). Ecommerce marketplaces like eBay and Amazon were attuned to the demand and created fast and fair ways to resolve online complaints and thus helped consumers trust online purchases.⁷⁰ By 2010, ecommerce companies were resolving tens of millions of these kinds of cases each year with ODR software.⁷¹ In an attempt to promote customer loyalty, the ODR processes grew fast in areas that served online communities.⁷² With this in mind, Larson claims that at a time when machine learning and artificial intelligence are more and more combined into ODR systems, the measurement of outcomes will take a bigger role.⁷³ He claims this to be the case as the pathways of an algorithm are too complicated for humans to evaluate for procedural justice.

⁶⁶ Ibid.

⁶⁷ Jessica Mant, Daniel Newman, and Danielle O’Shea, *Blended Advice and Access to Justice* (MoJ 2023) <https://assets.publishing.service.gov.uk/media/642569452fa8480013ec0fac/blended-advice-access-justice.pdf> accessed 28 January 2024.

⁶⁸ Colin Rule, ‘Online Dispute Resolution and the Future of Justice’ (2020) 16 *Annual Review of Law and Social Science* 277–92.

⁶⁹ Ibid, 278.

⁷⁰ N Ebner, ‘ODR and Interpersonal Trust’ in MSA Wahab, E Katsch, D Rainey (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven 2012) 215–48.

⁷¹ Amy Schmitz, ‘Building Trust in Ecommerce through Online Dispute Resolution’ in JA Rothchild (ed), *Research Handbook on Electronic Commerce Law* (Edward Elgar 2016) 307–36.

⁷² Colin Rule, ‘ODR and the Future of Justice’ (2020) 16 *Annu. Rev Law Soc. Sci.* 277–92.

⁷³ D Larson, ‘Artificial Intelligence: Robots, Avatars, and the Demise of the Human Mediator’ (2010) 25 *Ohio State J. Disp. Resol.* 105–64.

The importance of procedural justice,⁷⁴ well studied in the area of policing, has been empirically demonstrated to matter also in ADR⁷⁵ and ODR procedures.⁷⁶ As part of the same research project mentioned above, we conducted an experiment to test vignettes about the experiences with the tribunal process online.⁷⁷ Our experimental data suggested that procedural justice seems to be especially important in online interactions. We hypothesised that this might be because an online dispute resolution process is generally not something we do every day and therefore comes with process unfamiliarity. Here, experiencing a fair process (e.g., voice, being heard, neutrality, and trust) is especially important. How can this be achieved in an online (mostly automated) process? A possibility would be to include chat functions, and potentially the option to get in touch with a person, during the process, if required by the consumer. These options would, however, increase the cost of setting them up and add a human element to the process which does not usually exist.

For other areas of dispute resolution, the development of platforms has proven successful in offering a variety of options. For example, the Dutch *Rechtwijzer* divorce platform combines great computer design and human interfaces.⁷⁸ Another frequently cited a lot as a success story is the Civil Resolution Tribunal in British Columbia (see section 3 above).⁷⁹ To date, platforms that have been developed for a specific type of dispute or a specific group of users show great promise and success in both perceived processes and outcomes. Interestingly, the European Commission's proposal for amendment of the ADR Directive includes a proposition for the development of digital dispute resolution tools.⁸⁰

⁷⁴ Tom Tyler, *Why People Obey the Law* (Princeton University Press 2006).

⁷⁵ Naomi Creutzfeldt and Ben Bradford, 'Dispute Resolution Outside of Courts: Procedural Justice and Decision Acceptance Among Users of Ombuds Services in the UK' (2016) 50(4) *Law & Society Review* 985.

⁷⁶ Creutzfeldt et al. (2024) (n 18).

⁷⁷ Available on our project website: https://www.ucl.ac.uk/jill-dando-institute/sites/jill_dando_institute/files/access_to_justice_and_pandemic_-_mar_2023.pdf accessed 28 January 2024.

⁷⁸ Carrie Menkel-Meadow, 'Is ODR ADR? Reflections of an ADR Founder from 15th ODR Conference, the Hague, the Netherlands, 22–23 May 2016' (2016) 3(1) *International Journal of Online Dispute Resolution* 4–7, 2016, UC Irvine School of Law Research Paper No. 2017–01, Available at , accessed December 2023.

⁷⁹ S Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34(1) *Windsor Yearbook of Access to Justice / Recueil annuel de Windsor d'accès à la justice* 112–29; Tribunal website: <https://civilresolutionbc.ca> accessed 28 January 2024.

⁸⁰ European Commission COM(2023)649 final <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023PC0649> accessed on 6 March 2024.

When thinking about the creation of appropriate dispute resolution pathways and enhancing consumer protection in an online marketplace, it is crucial to take into consideration the people these systems are designed for. To do this, the different dimensions we found in our dataset form an organising structure.

4.1 Digital Dimension: Online Dispute Resolution

To be active in the online marketplace, consumers need to possess the capabilities to navigate the digital space. Most of us interact with the digital marketplace in our everyday transactions. If something goes wrong, however, it might not be as straightforward to find where to complain and how to handle this process. A particular skill set is needed to engage in the complaints process online. As with an offline complaint, the consumer has to contact the business they purchased the faulty service or good from first and try to resolve the issue with them. After a few weeks (see above) and an unsatisfactory response from the seller, the consumer can start the online dispute resolution process.

People who access online dispute resolution processes expect them to be fast, efficient, and satisfactory in their outcome, just like the process they are used to when purchasing online. As an outcome, they expect a refund or a replacement of their goods. As mentioned above, consumer protection laws are designed to cover these possibilities and to protect the consumer in the online marketplace. However, if the seller does not comply with these regulations, or if there is a more entrenched dispute, then the online dispute resolution procedure can be started. At this stage, the consumer is already likely to be frustrated as they did not receive the outcome they had hoped for from the seller.

Usually, if a complaint cannot be resolved between the buyer and seller, a case can be filed, including the upload of any evidence and more information. The complaint will then be investigated, and a decision, based on the information provided, will be made. Once this is complete, the parties will be informed of the outcome, and this will trigger a refund, replacement, or cancelling a transaction. These processes need to be easy to access, navigate, and to understand. This can be achieved through effective communication, expectations management, and transparency of the process.⁸¹

However, the architects (and financiers) of dispute resolution processes have different opinions about what a fair and transparent process looks like to the people that experience these processes. Here is where empirical evidence of people using these systems is needed to inform the design of the processes.

⁸¹ Naomi Creutzfeldt, *Ombudsmen and ADR: A Comparative Study of Informal Justice in Europe* (Palgrave Macmillan 2018).

4.2 Affective Dimension: Emotions

Even for those consumers who are versed in navigating the online space, going through a complaints process will inevitably stir emotions.⁸² These emotions can cause barriers between the consumer and the process and potentially exacerbate the whole experience. McKeever⁸³ has shown in her work that practical and intellectual barriers are created by emotions that then directly affect the dispute resolution process. Although she conducted her research on litigants in person, arguably there are parallels with the situation consumers find themselves in when embarking on an online dispute resolution process. They are usually alone (without a lawyer) in the process that might not be straightforward to navigate.

The interactions between a consumer and a digital process are designed to follow patterns of engagement that humans are used to. Thompson described online dispute resolution as systems capable of serving disputants without the immediate need for human support.⁸⁴ They can also be programmed to address emotional aspects in the process. People ‘follow social rules and treat computers as if they are autonomous agents with their own thoughts and feelings’.⁸⁵ In other words, social responses to computers involve unconscious reliance on patterns of human interactions.⁸⁶

Expectation management about how the complaints process will work, what the consumer can expect, and what the process cannot do is an important part of the consumer experience. With this in mind, it is necessary to pay attention to communication patterns and build them into the dispute resolution processes. For example, if a consumer needs more explanation about a procedure or which information to upload, a chat(bot) function could be offered to assist the consumer in managing the process.

Emotional responses can lead to vulnerability; therefore, it is best to try to address potential pitfalls in the dispute resolution process and to be responsive to consumer needs. This means that, in the design of appropriate online

⁸² Creutzfeldt et al. 2024 (n 18).

⁸³ Grainne McKeever, ‘A Ladder of Legal Participation for Tribunal Users’ [2013] *Public Law* 573.

⁸⁴ Darin Thompson, ‘Interacting with Disputants’ Emotions in Online Dispute Resolution’, *Canadian Legal Information Institute* (2019) CanLIIDocs 24, <https://canlii.ca/t/2fc3>, accessed 28 January 2024.

⁸⁵ Mishra Punyasholke, Michael Nickolson, and Steven Wojcikiewics, ‘Seeing Ourselves in the Computer: Who We Relate to Technologies’ (2001) 44 *Journal of Adolescent and Adult Literacy* 636.

⁸⁶ Clifford Nass and Youngme Moon, ‘Machines and Mindlessness: Social Responses to Computers’ (2000) 56 *Journal of Social Issues* 81, 83.

dispute resolution procedures, the emotional dimension needs to be taken into special consideration as it interlocks with the other two dimensions.

4.3 Compound Dimension: Vulnerabilities

As discussed above, an online dispute resolution process needs to be accessible, easy to navigate, and make use of clear language to manage users' expectations. This is especially important for those users who are less able to understand and navigate the online dispute resolution process. We know that consumers in lower socioeconomic groups often become accustomed to poor treatment and thus have lower expectations regarding the ability to obtain remedies for problems.⁸⁷ Also, those consumers are likely to have less confidence, fewer resources to tackle the online complaints process, and are less likely to file a complaint at all – possibly also due to limitations in their interactions by restricted language proficiency.⁸⁸

Those consumers who know their rights and who are confident in navigating the online complaints process have an advantage over those who are less able. Here, an online dispute resolution process needs to provide adequate solutions to protect and support these consumers. The lack of regulation of the quality of an online dispute resolution process that is provided in the digital marketplace leaves many consumers without a remedy for their complaint and creates a lack of trust in the process. In turn, this is likely to cause mistrust in the marketplace. The disgruntled consumers who are digitally savvy will have the tools to use of social media to complain about the lack of service, for example.⁸⁹ However, those consumers who are digitally less able are more likely to shy away and not pursue the complaint pathway. These are the consumers that complaint systems need to be designed to help as well. Some companies are fully aware that consumers will not bring a claim against them to a court.⁹⁰

⁸⁷ See Bård Tronvoll, 'Complainer Characteristics When Exit is Closed' (2007) 18 *Int'l J. Service Industry MGMT* 25, 26–35.

⁸⁸ U.S. gov't Accountability Office, GAO-10-518, 'Factors affecting the financial literacy of individuals with limited English proficiency' 7–18 (2010) <https://www.gao.gov/products/gao-10-518> accessed 27 January 2024 (reporting the extent to which limited English proficiency – along with income and education – impacts financial literacy, and the ability to make informed judgments and take effective actions regarding contracts and money management).

⁸⁹ Pete Blackshaw, *Satisfied Customers Tell Three Friends, Angry Customers Tell 3,000: Running a Business in Today's Consumer-Driven World* (Tantor Media 2008).

⁹⁰ Arthur Best and Alan R Andreassen, 'Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining

Schmitz has described this imbalance of power within a complaints setting as the ‘squeaky wheel gets the grease’ phenomenon.⁹¹ The ‘squeaky wheels’ – those who are proactive in pursuing their needs and complaints – are most likely to get the assistance, remedies, and other benefits they seek.⁹² And on the other hand, those who do not make noise will not receive the same treatment. She argues that this analogy thrives in the business-to-consumer context. Most people do not have the capabilities or resources to be a *squeaky wheel* – as a consequence, their complaints remain unresolved. Conversely, this means that appropriate dispute resolution pathways must provide the grease for everyone to pursue their complaints. Herein lies the challenge: to offer an online dispute resolution process that caters to consumers’ varying capabilities and provides a process that is efficient and fair.

4.4 Avenues for further empirical research

The development of the digital marketplace comes with exciting opportunities for empirical research. Some of these avenues could include looking at (1) the ways in which a consumer navigates different platforms and what the pinch-points are; (2) how consumers decide which pathway to choose, and why; (3) how an online platform can best serve a wide range of consumers with different needs; and (4) what types of consumer complaints do not lend themselves to an online resolution, and why.

5. CONCLUSION

In order to respond to consumer demands in an online marketplace, there needs to be a reliable and adaptable dispute resolution process in place. This process must be appropriate to match the type of complaint and the type of consumer filing it. Disputes and complaints usually happen as a result of miscommunication, unmet expectations, delivery issues, poor customer service, payment issues, and problems with returns and refunds.⁹³

A business seeking consumer satisfaction and retention ought to have a complaints process in place that is responsive to consumer concerns and communicates effectively. A business that does this well will not need an external complaints procedure. However, not all businesses prioritise keeping their

Redress’ (1977) 11 *Law & Soc’y Rev.* 701, 702.

⁹¹ Amy Schmitz, ‘Access to Consumer Remedies in the Squeaky Wheel System’ (2012) 39(2) *Pepp. L. Rev.* 279.

⁹² *Ibid.*, 280.

⁹³ Code23, ‘Marketplace disputes: A guide to dispute resolution’ (2023) <https://www.code23.com/marketplace-disputes-a-guide-to-dispute-resolution/> accessed 27 January 2024.

consumers happy. Therefore, the online marketplace needs to offer appropriate consumer protection.

As discussed, consumer dispute resolution processes need to be designed in a way that responds to be able to respond to consumer's digital abilities to help them navigate the system. Empirical insights about dimensions of access (digital, affective, and compound) can be helpful to inform the design of new regulations for online dispute resolution processes. Also, these dimensions might occur at different levels of intensity at different stages of a consumer's journey through the dispute resolution process. If a consumer can feel confident in purchasing and also returning goods and services in the digital marketplace, then trust in the system will be generated.

In sum, what the empirical data presented in this chapter exposed was that consumers who use the online system have different levels of capabilities. The dispute resolution processes are not designed to serve consumers with different capabilities. This is where the intentions of the policy maker and the law are at disparity with the consumer that the dispute resolution system is made for. The process does not accommodate different types of consumer needs and therefore feeds into the existing inequalities. The online dispute resolution processes need to be more realistic in matching consumers' abilities and be more responsive to their digital needs.