

# Europe's Coordinated Approach to ODR

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## Abstract

*While court administrations/justice departments were not among the early adopters of online dispute resolution (ODR) they can clearly, as gatekeepers to the majority of civil disputes, have an enormous influence on ODR and, in particular, the speed at which ODR is adopted as a widely accepted practice in dispute resolution.*

*Systems being rolled out by or for courts have been piecemeal as individual administrations pursue research into their own future. Early systems tend to be in either case management and/or e-filing but little in the way of e-negotiation or aids to resolution. What is shared is the existing challenges to the courts from rising costs, process delay and growth in the numbers of citizens unable, owing to cost, to pursue or defend litigation.*

*In Europe what is bringing court administrations together in their development of ODR has been the issue of human rights and access to justice, which explains why an overall influence in the sharing of knowledge and experience in ODR has been the Council of Europe. This was a body set up in the immediate aftermath of World War II with a view to encouraging European states to work together in advancing and protecting human rights. Its greatest creation has been the European Convention on Human Rights and, of particular relevance, Article 6, which secures the right to a "public hearing within a reasonable time by an independent and impartial tribunal established by law".*

*This article tracks various developments from bodies within the structure of the Council of Europe with regard to the application of ODR to the judicial system. These developments extend from research and debate on whether the overall impact on human rights and, in particular, access to justice, of ODR could be seen as a threat, and thus something to be protected against, or in a more positive light and, therefore, to be encouraged. This article tracks the formation of various bodies within the Council of Europe, such as the European Commission for the Efficiency of Justice ,*

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*The Working Group on Cyberjustice and Artificial Intelligence and, most recently, the European Cyberjustice Network. This article also notes outcomes such as the Report on the impact of ODR on Human Rights produced by the Committee of Legal Affairs and Human Rights of the Council of Europe and the European Ethical Guidelines on the use of AI in judicial systems produced by The Working Group on Cyberjustice and Artificial Intelligence of the European Commission for the Efficiency of Justice.*

**Keywords:** Online Dispute Resolution (ODR), AI, lawtech, justice systems, human rights, Council of Europe, access to justice, European Cyberjustice Network, European Commission for the Efficiency of Justice.

## 1 Introduction

When online dispute resolution (ODR) first began to be investigated, researched, written about and discussed, it was exclusively in the field of alternative dispute resolution. In other words, it focused on the management and resolution of civil disputes outside of litigation. Gradually over the years, government justice departments and court administrations, concerned with rising costs and delays, as well as increasing evidence in some countries that a large percentage of citizens are being priced out of pursuing their rights in a court of law, have begun to show interest in and introduce elements of ODR, albeit largely restricted to case management and the benefits of e-filing, as an element of access to justice.

These developments, however, have largely been piecemeal and have resulted from the enthusiasm of individuals within justice departments and the marketing carried out by technology companies, leading to a mixture of varying approaches. While there has been much sharing of information and opinion within existing networks, and, of course, the International Forum of Online Dispute Resolution has been a strong driver of that influence, there has not been any significant resource to directly aid the courts and justice departments specifically on ODR, human rights and the rule of law.

On 26 November 2021 there was, however, what one might hope to be able to refer to as a milestone, namely, the launch, at a webinar meeting of more than 100 experts in the field, of the European Cyberjustice Network (ECN). This was launched specifically by a committee of the Council of Europe, called The Working Group on Cyberjustice and Artificial Intelligence, itself an entity within the European Commission for the Efficiency of Justice (CEPEJ). All three bodies derive from the Council of Europe, a body whose members represent the governments of 46<sup>1</sup> European countries.

1 The number of member countries of the CoE was reduced in March 2022 to 46 following the expulsion of Russia in response to its invasion of Ukraine.

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## 2 The Council of Europe

It is important to understand the purpose and objectives of the Council of Europe (CoE) as the organization that has now given birth to the ECN. The CoE was formed in May 1949, following World War II, and was intended as a body to help support human rights and the rule of law within Europe. It is the body responsible for the creation and enforcement of the European Convention on Human Rights, including, of course, the right to access to justice. It is not to be confused with the European Union which, compared with the CoE's current membership of 46 countries, comprises only 27. In particular, the United Kingdom, while not a member of the European Union, is a member of the CoE. The CoE represents a population of approximately 675 million citizens and has an annual budget of approximately 500 million Euros.

The CoE does not make law but promotes the enforcement of agreements reached by its member countries. For example, it runs The European Court of Human Rights, the body that enforces The European Convention of Human Rights, which, importantly, includes the right (under Article 6) of access to justice.

## 3 The Council of Europe and ODR – The Report

So far as its impact on developments in ODR is concerned, the CoE has history. On 30 October 2014, I, along with Professor Arno Lodder, Professor of Internet Governance and Regulation at Vrije Universiteit Amsterdam, was invited to a hearing of the Committee on Legal Affairs and Human Rights of the CoE. The hearing was intended to gather information to assist Mr Jordi Xucla, Rapporteur with the CoE, in his preparation of a Report on the impact of ODR on Human Rights. The Report was published on 10 November 2015.<sup>2</sup> Given the creation of the ECN, the content of this key report is likely to exert a significant influence on its work. It is worth noting the conclusions and recommendations.

Mr Xucla's conclusions, now adopted by the CoE, are as follows:

both ODR and ICT, though not by any means panaceas, can help provide greater access to the judicial system by offering solutions to the problems of judicial inefficiency, the high cost of litigation, and geographical barriers. ODR and ICT nevertheless have some drawbacks, and member States should continue to invest in the development of safer, more effective, and more accessible ODR and ICT.

The Report recommended a draft resolution to be adopted by the parliamentary assembly of the CoE. (This was subsequently adopted.) The following were the key messages:

- that the 47 member states be encouraged to promote awareness of, and further develop, mechanisms for ODR;

<sup>2</sup> <https://tinyurl.com/COEODRREPORT>.

- that the extrajudicial enforcement of ODR decisions be promoted;
- that there be recognition of various challenges, including inequalities in access to online resources, privacy and enforcement;
- that ODR procedures should contain safeguards compliant with Articles 6 and 13 (right to an effective remedy, particularly against authority) of the ECHR;
- that parties engaging in ODR procedures should, subsequently, retain the right to access a judicial appeals procedure satisfying the requirements of a fair trial pursuant to Article 6 of the Convention;
- that standards be developed for ODR, including ensuring that the process does not unfairly favour repeat players over one-time users, and that a system of accreditation be established for ODR providers.
- that technological developments be monitored in order to promote the use of ICT within courts.

The Report also addressed the Article 6 issue, noting that

there would be no violation of Article 6 rights so long as the ODR process is subject to subsequent control by a judicial body that has full jurisdiction.

The Report recognizes the concern of some commentators that diverting disputes away from a public forum and into private ODR may curtail the development of the law. Mr Xucla argued that ODR processes can, in fact,

go beyond an individualistic resolution of isolated disputes. As mentioned above, ODR providers use their experience from earlier settlement agreements in similar cases to give recommendations on possible remedies, by using technology to identify recurring patterns of disputes and categorising complaints. Seen from this angle, ODR may not only be a means for resolving disputes, but possibly also an opportunity for preventing them, including by way of changing the behaviour of traders.

#### **4 The European Committee on Legal Cooperation – The Guidelines**

Another CoE initiative in ODR was taken in 2016 when the European Committee on Legal Cooperation (CDCJ), a body that had been set up in 1963 by the CoE to encourage research on justice systems that, while respecting the independence of individual justice systems of member states, aimed at reducing the negative impact of justice processes on human rights, conducted a study on the feasibility of drafting guidelines on ODR. These guidelines were to be designed to ensure compatibility with Article 6 (right to a fair trial) and Article 13 (Right to an effective remedy) of the European Convention on Human Rights (ECHR). The guidelines were adopted by the committee of ministers of the CoE on 16 June 2021.<sup>3</sup>

3 [www.tinyurl.com/coeguidelines](http://www.tinyurl.com/coeguidelines).

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## 5 The European Commission for the Efficiency of Justice

Before I deal in more detail with the ECN, let me present the complete ‘family tree’ that led to its birth in November 2021. In 2000 the ministers of justice in CoE member states met in London and decided to establish an innovative body to improve the quality and efficiency of the European judicial systems and strengthen the court users’ confidence in such systems. This body was set up in 2002 under the name of the European Commission for the Efficiency of Justice (CEPEJ).

As part of its wish to connect, it encourages the participation of the European Union in its work and also extends *de facto* membership to certain non-European countries that hold observer status to the CoE itself. These include

- The Holy See
- Canada
- Japan
- Mexico
- United States of America

Furthermore, the committee of ministers have decided to grant the observer status to the following countries:

- Guatemala
- Israel
- Kazakhstan
- Morocco
- Tunisia

The following international organizations, institutions representing judicial professionals and partners are observers to the CEPEJ:

- European Union (UE)
- Council of the Bars and Law Societies of Europe (CCBE)
- Council of the Notariat of the European Union (CNUE)
- European Union of Rechtspfleger and Court Clerks (EUR)
- European Networks of Councils for the Judiciary (ENCJ)
- European Association of Judges (EAJ)
- Association of European Administrative Judges (AEAJ)
- European Judicial Training Network (EJTN)
- European Expertise and Expert Institute (EEEI)
- International Union of Judicial Officers (UIHJ)
- Organisation for Economic Cooperation and Development (OECD)
- Magistrats européens pour la Démocratie et les Libertés (MEDEL)
- The World Bank

The CEPEJ acknowledges the ability of technology to improve justice yet appreciates the challenges to human rights, the rule of law and the impartiality of the judicial process presented by developments in the field of digital justice. It poses the question ‘how do we balance the two?’

## 6 The European Ethical Charter

In December 2018, the CEPEJ launched the European Ethical Charter on the use of artificial intelligence in judicial processes.<sup>4</sup> The Charter drawn up by the CEPEJ Working Group on quality of justice, sets out basic principles for the development of AI tools in judicial systems.

The Charter lists five principles of the Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment as follows:

- 1 Principle of respect for fundamental rights: ensure that the design and implementation of artificial intelligence tools and services are compatible with fundamental rights.
- 2 Principle of non-discrimination: specifically prevent the development or intensification of any discrimination between individuals or groups of individuals.
- 3 Principle of quality and security: with regard to the processing of judicial decisions and data, use certified sources and intangible data with models elaborated in a multi-disciplinary manner, in a secure technological environment.
- 4 Principle of transparency, impartiality and fairness: make data processing methods accessible and understandable, authorise external audits.
- 5 Principle 'under user control': preclude a prescriptive approach and ensure that users are informed actors and in control of the choices made.

## 7 The Working Group on Cyberjustice and Artificial Intelligence

Retaining its focus on promoting the positive use of AI, undergirded by respect for basic human rights and ethical principles, the CEPEJ decided, at a meeting in December 2019, to set up a new working group that would be tasked to consider the matter in more detail. This led to the formation of The Working Group on Cyberjustice and Artificial Intelligence (CEPEJ-GT-CYBERJUST), which was entrusted by the CEPEJ with

developing tools with a view to offering a framework and guarantees to member States and legal professionals wishing to create or use Information and Communication Technologies and/or artificial intelligence mechanisms in judicial systems in order to improve the efficiency and quality of justice.<sup>5</sup>

This work should be implemented in coordination with the work of other CoE bodies in this field, specifically the CDCJ and the Ad hoc Committee on Artificial Intelligence (CAHAI), recently set up by the committee of ministers, with a view to examining much more generally the feasibility and potential elements of a legal framework for the development, design and application of artificial intelligence.

4 <https://tinyurl.com/CEPEJETHICAL>.

5 <https://tinyurl.com/CYBERJUST>.

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The tools to be developed by this new working group should concern topics as varied as quality criteria for videoconferencing, artificial intelligence used in alternative methods of dispute resolution or enforcement of court decisions or court proceedings in a digital context.

Furthermore, the CEPEJ-GT-CYBERJUST should develop training programmes concerning the utilization of CEPEJ tools in the field of cyberjustice and artificial intelligence.

## 8 The European Cyberjustice Network

The CEPEJ-GT-CYBERJUST decided, in 2020, to create the European Cyberjustice Network (ECN). On 16 November 2021, the ECN was officially launched in an online event attended by more than 100 experts appointed by their governments. The keynote speech was delivered by Professor Richard Susskind, a well-known and prolific author on the subject of the impact of technology on the justice system, long-term IT Adviser to the Lord Chief Justice of England and Wales and a Fellow of the National Center for Technology and Dispute Resolution at the University of Massachusetts (Amherst). The present author has been appointed an official observer to the ECN on behalf of the International Council for Online Dispute Resolution and will report developments to ICODR and to this journal.

The network will serve as a platform for interdisciplinary exchange of good practices in the field of cyberjustice and artificial intelligence as well as for the exchange of views about challenges in implementing IT and artificial intelligence solutions in judicial systems. The network should also contribute to and support the initiation of new tools, actions and cooperation projects.

In anticipation of the launch event, it is hoped that the ECN will distinguish itself in being an active and practical facility for courts and practitioners. In particular, one would perhaps want to see a focus not merely on tools for case management and e-filing, important as they are in reducing public cost, court fee levels and increasing access to the courts, but more strongly on e-negotiation tools that improve the rate of resolution of disputes.

From the launch meeting one welcomes the declared objectives of an exchange of good practices and resources concerning cyberjustice and AI, including emphasis on a two-way communication between the various working groups in CEPEJ and, importantly, training. On a practical level there will be up to three contact points from each member state, each representing a different field of expertise. Observers will be welcome from associations and research and academic institutions, whether or not from within Europe. The topics to be investigated will be determined by ECN members, CEPEJ Working Groups and member states. They also plan to have a biannual conference as well as online workshops, meet ups and webinars. The ECN intends to develop a repository of good practice as well as a resource centre on cyberjustice and AI.

It is tempting to presume that all these committees and working groups are in danger of becoming 'talking shops', presenting little by way of concrete developments and outcomes. I am concerned, for example, about the excessive

emphasis that has been placed on case management, e-filing and video hearings with hardly any substance in the field of e-negotiation and e-mediation. Helping parties to speedily resolve their disputes without litigation would arguably have a greater impact on reducing the cost of running courts than e-filing and video hearings. While all these areas of ODR are important, no less so is focusing more on technology's assistance to resolution itself than ever before. The answer is to share thoughts and knowledge with the ECN, thereby helping to contribute to the journey towards improved access to justice.