

Forward-Looking Approach to Online Dispute Resolution (ODR) in Light of the Current and Forthcoming EU Digital Legislation*

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Abstract

The article delves into the intricate process of establishing effective Online Dispute Resolution (ODR) systems within the evolving landscape of EU digital legislation. In this era, we are witnessing a surge in cross-border, multi-lingual disputes in the digital domain, necessitating swift and cost-effective solutions. An ethical, data-driven ODR system, underscoring the significance of open-source solutions is a possible solution to these challenges. Such ODR systems are built upon five essential components: ethical design, dispute resolution rules, enforcement mechanisms, ODR service providers, and technical infrastructure. Furthermore, the article explores the integration of Artificial Intelligence (AI) in ODR systems, clarifying how AI can enhance the resolution of disputes and aid parties in negotiations, court proceedings, and arbitration. An IT architecture that supports decentralized collaboration, data exchange and economic efficiency is vital in the ODR environment. In conclusion, the article offers a forward-looking perspective on the construction of an ethical, data-driven ODR environment that can adapt to the ever-shifting dynamics of digital legal frameworks.

Keywords: EU digital legislation, cross-border disputes, data-driven ODR, dispute resolution rules, enforcement mechanisms, ODR providers, IT architecture, self-governance, Artificial , artificial intelligence (AI), Online Dispute Resolution (ODR), ethical design.

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1 Introductory Notes

It will be challenging to design and implement a successful dispute resolution framework for disputes arising out of or in relation to Digital Platform Regulation¹ and other existing and forthcoming EU legislation, such as the Digital Services Act² or the AI Act.³ These disputes will be increasingly cross-border and multilingual and their resolution needs to be time- and cost-efficient. The issues range broadly from unfair competition to issues related to ensuring fair access to data and data sharing, contract fulfilment, consumer rights and many others. Resolving these disputes requires specialized sector-specific know-how in addition to procedural regulations.

In addition, it can be expected that there will be more and more EU pieces of legislation with provisions on ODR, as a consequence of the gradual implementation of the EU Digital Policy.⁴ The reason for increased legislative efforts on resolving issues online is very obvious – there are increasing types of dissatisfactions and disputes online which at the moment do not have an efficient resolution – online defamation, consumer issues, spam and unlawful online ads, privacy profiling to name just a few, in addition to B-B disputes. On top of that, a number of EU countries have started their preparations for the introduction of online courts or e-justice. This means that resolving dissatisfactions and disputes online will be a growing field in the upcoming years.

These developments in the EU will probably be followed by more or less similar pieces of digital legislation elsewhere in the world. For this reason, in this article, we try to look at e-justice/ODR from the general point of view of civil disputes and dissatisfactions appearing online, using the current provisions of the EU digital legislation as mere examples. Rather, we take a look at e-justice/ODR globally from a mid-to-long-term perspective.

For the sake of simplicity, the term ‘ODR’ is used in the article to describe both e-justice and ODR in the broadest sense. For the same reason, we use the term ‘disputes’ for both dissatisfactions and disputes.

The way to succeed in efficiently resolving these various issues is through designing and building ODR systems. ODR can be time and cost-efficient for the parties; it can address the multilingual needs in a better way than traditional offline dispute resolution and it can be interconnected online with other ODR platforms as well as with the complaint handling systems of parties or vendors so that the user experience is smooth and friendly.

In addition, the need for extensive variability and flexibility combined with increased security and reliability for lower costs than at present demands, in our view, open-source solutions. Open-source solutions based on published

1 Regulation (EU) 2019/1150 of the European Parliament and of the Council for promoting fairness and transparency for business users of online intermediation services (Digital Platforms Regulation).

2 Regulation (EU) on a Single Market For Digital Services (Digital Services Act).

3 Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence.

4 COM(2021) 118 final, 2030 Digital Compass: the European way for the Digital Decade.

specifications that are available for free to interested developers and service providers will be the main trend in ODR in the near future.

In this article, we first provide an illustration of the new legislation on ODR and e-justice, using the EU legislation as an example and secondly, we describe how to address new obligations in practice and the need for a generally new open approach to ODR with the forthcoming growing use of Artificial Intelligence.

2 Two Basic Illustrations of the Current EU Legislation on ODR and e-Justice

As mentioned earlier, under notable EU legislation on ODR and e-justice belong the Digital Platform Regulation and Digital Services Act.

2.1 Digital Platform Regulation

The Digital Platform Regulation⁵ protects companies that depend on online platforms for reaching consumers while safeguarding the innovation potential of platforms. Not unlike in the relationship between businesses and service providers, in relationships between business users and online intermediation service providers, business users might find themselves at a disadvantage. This is especially true for the resolution of disputes arising from actions taken by the service providers who often do not have an effective internal complaint-handling system. Additionally, certain alternative dispute resolution mechanisms might prove to be ineffective. Articles focusing on dispute resolution between business users and online intermediation service providers are Article 11 (Internal complaint-handling system), Article 12 (Mediation), Article 13 (Specialized mediators) and Article 14 (Judicial proceedings by representative organizations or associations and by public bodies).

2.1.1 Article 11 (Internal Complaint-Handling System)

For a prompt rectification of business users' dissatisfactions, an appropriate option would be an internal-complaint handling system with core principles of transparency and equal treatment. In an internal-complaint handling system, business users should be given the ability to resolve the dispute without the involvement of any third parties, without renouncing their right to seek resolution within judicial proceedings. Transparency should be enhanced by publishing information about the system's operations and effectiveness. Nonetheless, the providers of online intermediation services will be allowed versatility in the system creation and concrete handling of dissatisfactions, and they will not be prevented from contracting the system from a third-party service provider. With regard to the substantial costs the providers of online intermediation services will need to bear to set up the compliant internal-complaint handling system, small enterprises,

5 Reg (EU) 2019/1150.

such as Commission Recommendation 2003/361/EC (9),⁶ will be excluded from this obligation.

2.1.2 Article 12 (Mediation)

Another possible means of dispute resolution is mediation, which, despite involving a third party, is less expensive and drawn out. As such, the providers of online intermediation services will need to identify in their ‘Terms and Conditions of Use’ two or more mediators that they would be willing to use. Offering more than one possible mediator will ensure their impartiality. Equally, providers of online intermediation services and business users can choose the mediator only after a dispute has arisen. However, any mediator chosen from outside of the EU needs to ensure that all safeguards laid down in the law of the EU or the applicable Member States are applied.

2.1.3 Article 13 (Specialized Mediators)

To assist with the use of mediation, the Commission, along with the Member States, will promote the establishment of specialized mediation organizations. This will allow the parties to involve a mediator that will have a specialization in the sector at hand in addition to online intermediation services.

2.1.4 Article 14 (Judicial Proceedings by Representative Organizations or Associations and by Public Bodies)

Because business users can often be limited in their ability to represent themselves during judicial proceedings, organizations and associations representing business users, and certain public bodies where the Member State has set them up, can be allowed to represent business users and take action against providers of online intermediation services before a national court to stop non-compliance with obligations imposed on them in this Regulation. Yet, any representative must be an impartial non-profit organization set up under the laws of the appropriate Member State that has its objective in favour of whoever they are representing. Each Member State needs to assess the eligibility of each organization and refer those that can be used to the Commission which will then publish a list including eligible organizations from all Member States and thus allow courts to refrain from examining legal capacity of organizations, associations and public bodies every time.

2.2 Digital Services Act

The Digital Services Act⁷ is aimed to create a safer digital space where the fundamental rights of users are protected and to establish a level playing field for businesses. Contrary to the Digital Platform Regulation, here dispute resolution is aimed only on disputes arising from display and removal content, rather than the

6 Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (2003/361/EC).

7 Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act).

general contractual relationships. Articles of the regulation concerning the dispute resolution are Article 14 (Notice and action mechanism), Article 17 (Internal complaint-handling system) and Article 18 (Out-of-court dispute settlement).

2.2.1 *Article 14 (Notice and Action Mechanism)*

The content displayed by hosting service providers as provided or sought by its users can be sometimes of an illegal nature. Accordingly, digital service providers need to play an active role in preventing the display of illegal content online. A measure to facilitate this is the notice and action mechanism allowing users to notify the digital service provider about content they consider to be illegal based on which the service provider will be able to evaluate the content and potentially remove or disable it.

2.2.2 *Article 17 (Internal Complaint-Handling System)*

The decision to remove or disable access to certain information could be contested. For the resolution of complaints to be accessible and timely, digital service providers will be required to put in place an internal complaint-handling system.

2.2.3 *Article 18 (Out-of-Court Dispute Settlement)*

Additionally, digital service providers should make provision for out-of-court dispute resolution when it is preferred or when the dissatisfaction cannot be resolved through the internal complaint-handling system. Under Directive 2013/11/EU of the European Parliament and of the Council⁸ there is a provision that Union consumers and businesses shall have access to quality alternative dispute resolution bodies for disputes arising from the purchase of goods and services. This directive can also be used for digital services.

3 Principal Components of an ODR System

There are usually five principal components of any ODR system:

- Ethical design;
- Dispute resolution rules;
- Enforcement mechanism;
- ODR provider(s); and
- Technical solution.

3.1 *Ethical Design*

The ethical design has key importance for all other elements of ODR systems which we briefly describe in the following text. Adherence to ethical principles is key to the success of any dispute resolution system, including ODR platforms. The most important ethical principles are those of fair trial – all these principles fully apply to online processes also. In addition, other more specific ethical principles are

8 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution (ADR) for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L 165.

being discussed which apply specifically to the online environment. Digital ethics include several concrete criteria that the designers and developers of ODR systems will need to bear in mind continuously.

For example, recently published ODR ethical standard of the International Council for Online Dispute Resolution (ICODR)⁹ require that ODR platforms and processes must be:

- Accessible
- Accountable
- Competent
- Confidential
- Equal
- Fair and impartial
- Legal
- Secure
- Transparent

Probably the most discussed topic related to the application of digital ethics for the last few years is access to justice (or A2J). There are a number of approaches to the access to justice. We like the description by the U.K. Traffic Penalty Tribunal, an online court that decides appeals from decisions of local authorities in civil travel violation cases:

Accessibility is the word used to describe whether a product or service (for example, a website) can be used by people of all abilities and disabilities. We aim to make our service as easy as possible, whether you are contacting the tribunal prior to registering an appeal, during an appeal, requesting a telephone hearing or following an adjudicator's decision.¹⁰

Of increasing importance are and will be the ethical principles of AI. They are being discussed by many experts and they are beginning to be applied in practice in the first AI tools. In addition to the ethical principles which we have mentioned and reflect in the AI environment, the principle we would like to specifically include is the principle called 'Under User Control'. This principle means that the following concrete rights of individuals are affected by AI tools and services:

- to know (meaning to be able to explain and to understand the explanation);
- to opt out (*e.g.* from being subject to consideration by a robo-judge); and
- to challenge (always have a right to appeal to a human judge).

Ethical principles should be implemented in every step of the ODR design process. There are first attempts being made to propose an ethics by design methodology which should be followed.¹¹

9 <https://icodr.org/standards/>.

10 UK Traffic Penalty Tribunal, www.trafficpenaltytribunal.gov.uk.

11 For example, as outcomes of the EC funded H2020 projects are SIENNA and SHERPA.

3.2 *Dispute Resolution Rules*

Rules describe one or more set of legal processes for case resolution. For example, it might be advisable that the ODR system for disputes under Digital Platform Regulation contains at least two processes – for example, one quick and cheap (such as a system issuing just an expert recommendation or delivering a single remedy in simple enough cases) and the other one more complex and expensive for more complicated cases. There might be a combination of bilateral negotiation or mediation via the complaint handling system of the platform provider followed by mediation or alternatively ADR/online arbitration resulting in a decision binding on the parties.

Rules should be discussed and adopted by associations of both the platform providers and their individual or business users to get more credibility. Rules can be applied to all disputes arising out of the Digital Platform Regulation¹² or only to certain types of disputes. As an example, there might be specific rules for disputes related to the access to and sharing of data. Such rules might be adopted, for example, by the International Data Spaces Association (IDSA)¹³ regarding data shared via the Data Spaces concept or similar entities.

3.3 *Enforcement*

Efficient enforcement is key to any dispute resolution system. In principle, there are three options:

- Enforcement of outcome of a case by law;
- Enforcement through contracts; or
- In some types of cases, there might be ‘hybrid’ enforcement methods combining technical remedies, self-regulation through codes of conduct and regulatory options, for example, issuing ‘warning’ notices in certain cases of clear infringement of duties followed by actions of sector association and national regulatory bodies.

3.4 *ODR Providers*

Again, as an illustrative example, under the Digital Platform Regulation, platform providers are obligated to offer at least two mediators or mediation providers who would be willing to engage in dispute resolution. The establishment of specialized mediation organizations is to be encouraged by the Member States and supported by the European Commission. Offering more than one possible mediation provider provides better choice for the other party and should support the impartiality of the ODR providers. Equally, providers of online intermediation services and business users can together confirm a particular mediation service for their issue only after the dispute has arisen.

Although there will most likely be a low number of large ODR institutions capable of resolving a broad range of potential disputes under the requirements of the Digital Platform Regulation¹⁴ including cross-border issues, a larger number of

12 Reg (EU) 2019/1150.

13 <https://www.internationaldataspaces.org>.

14 *Ibid.*

national and cross-border ODR entities and individual online mediators dealing with specific types of cases can be gradually expected.

Preferably, many of the ODR providers will adhere to similar quality standards which may happen if there is relatively quickly a reputable ODR institution with broadly acceptable rules both for platform providers and their business users and a pool of adequately qualified mediators and panellists.

There are many types of mediation and out of that there are approximately 50 possible types of online mediation.¹⁵ All this suggests that it will be very useful for the parties if there is something like a standard disclosure protocol for each mediation service. Such a disclosure protocol might be recommended by associations (e.g. the IDSA mentioned earlier). It follows that there might be a need for accreditation of the ODR providers and an accreditation body – again this role might be played, regarding the disputes arising in connection with the Digital Platform Regulation,¹⁶ by a reputable cross-border association representing both platform providers and their users. As mentioned in more details in the following text regarding disputes related to the Digital Services Act,¹⁷ there will be a mandatory certification process of ODR providers mandated by the European Commission.

3.5 Technical Solution

Ideally, there will be open solutions available for ODR platforms soon so that designing and building quality ODR platforms is not too expensive and lengthy. At the moment, unfortunately this is not the case but this might change soon. Any technical solution should take into account the gradually growing multilingual needs of online dispute handling. Technical solutions must be secure and must be able to flexibly interconnect with the (online) systems of the parties. Therefore, it will need to deal with secure data sharing and communication between the apps of the parties and itself.

4 Data as a Gamechanger

The design of any new ODR system with an ambition to reach the state of the art must focus on mathematical modelling and AI (mainly in the form of machine learning) because data-driven processes will be a game changer in ODR similarly as in other areas. Data-driven processes have started to significantly change all five components mentioned earlier. At the same time, for a design of a successful data-driven ODR system, it is key to design all these five components together. For example, advances in only AI-assisted ODR processes might not deliver the required best practice results without parallel significant changes in applied online ethics, in rules for ODR providers and in IT architecture.

15 According to Dan Rainey, leading ODR expert from the United States, during ODR Forum conference in Dublin, Ireland in April 2022.

16 Reg (EU) 2019/1150.

17 Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act).

Here lies a fundamental argument we would like to make.

Data and AI will soon start to help more and more ODR providers to substantially improve their processes (*e.g.* introduce targeted AI-assisted negotiation in areas where it will lead to substantially increased settlements among parties or provide early signals of potential discrimination of some parties, help in decision-making whether a new procedural step should be introduced). Data and AI are already helping large vendors to improve their customer processes and also in negotiation. To be very clear, we strongly believe in the decisive role of people in ultimately resolving our dissatisfactions and disputes, and, for example, the Digital Services Act does not even allow fully automated decision-making to happen on their internal complaint-handling systems.

Nevertheless, even smaller parties than the large international online companies – meaning mid-size firms, SMEs and individual EU citizens – including those who are currently digitally excluded or disadvantaged for some reasons – must have adequate access to benefits from data-driven innovations in ODR. At present, there is a huge and rapidly growing imbalance of power between the few largest online players who aggregate data with large AI engines in the cloud and everybody else, including us – people. To feel safe and equal in the future ODR processes, people must have access to similarly potent online platforms and data modelling algorithms as the largest online players. Without this goal, there is not much sense to design and discuss ethical access to justice solutions, smart user interfaces assisting vulnerable persons and so on.

This objective is achievable by collaborating between all those who generate data – the parties, that is, people, private and public entities as well as ODR institutions. They can voluntarily share data they generate in anonymized form for the purposes of new data-driven services which help them to resolve their dissatisfactions more easily. We argue that this approach will substantially change ODR processes and will significantly influence other fields than ODR, for example, retail.

For example, the current most advanced operators of online negotiation platforms¹⁸ offer to their customers risk assessments comparing negotiation with court litigation or consistency checks of proposed moves with the party's stated preferences and other services related to negotiation strategy. These services can be significantly improved, and new innovative services can be added if the service providers have access to a pool of shared anonymized data related to dissatisfactions for what their services target.

A key requirement for the envisaged collaboration between people and AI services will be efficient control of data by data generators, not just by regulation (GDPR)¹⁹ but also supported by technology and system organization or self-governance. For example, we predict that there will need to be new types of

18 For example NextLevel Mediation from the United States and other similar services.

19 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) [2016] OJ L 119.

online platforms for people and SMEs alongside existing platforms of vendors/providers and e-justice/ODR institutions. It means mass decentralization of ODR. Such new (customer) online platforms will have data-driven functions assisting in dispute resolution and other fields (e.g. e-tail, e-health, e-finance).

This key requirement of the future fair data-driven ODR is going to bring substantial changes in ODR processes, technology, ethics and self-governance and also in other fields and areas.

5 AI in ODR Systems

The main role of the AI is to support, facilitate and automate the interaction between ODR participants. The best current online courts and ADR institutions include a wide range of ODR processes, not just traditional court processes (filing a complaint, response, hearing, issue of decision, etc.) but also online negotiation, mediation and detailed assistance to the parties guiding them through various options of resolving their dissatisfactions online (e.g. smart chat boxes answering questions of the parties, guidelines what steps to try before court filing, sample documents).

All these current processes can be significantly enhanced with the use of AI. AI services fuelled by a common pool of shared anonymized data will be a decentralized game changer levelling the online playing field for people and enabling diversity by design in this field. AI services in an ODR environment will:

- i assist the parties directly by making available to them an ethically required basic minimum of AI services that all or at least most e-justice/ODR systems should have; and
- ii assist third-party service providers (e.g. operators of online negotiation platforms or online state courts) to develop and provide better services to the parties, for example, to provide them with enhanced negotiation strategies in a particular sector.

An important question regarding points (i) and (ii) is what such a minimum set of AI services should be. We provide in the following text our initial view nevertheless – there will need to be a public consultation process (e.g. a public participatory workshop with representatives of the judiciary in several EU member states, CEPEJ [European Commission for the Efficiency of Justice], NGOs representing citizens, especially those with disadvantages and the digitally excluded, the private sector).

The AI services based on statistical (structured) as well as non-structured anonymized data may include the following main services:

5.1 Negotiation

During negotiations, the service providers will be enabled to introduce their customers to AI services regarding risk assessments, consistency checks of proposed steps with party preferences and proposed strategies in sector-specific situations, among others. The initial proposal of a minimum set of AI services that should be directly available to the parties includes an evaluation of the online

negotiation service based on transparent open criteria; if possible, explaining how AI is used in the online negotiation service; general (not sector specific) risk assessments; general (not sector specific) consistency checks in reasoning and argumentation; and general monitoring of adherence of the service providers and parties to self-regulatory user terms; for governance, see more in the section titled *The Need for New Governance*.

5.2 Court/Arbitration/Mediation Proceedings

In the area of court, arbitration and mediation proceedings, AI services should enable service providers to introduce their customers to assistance in selecting the most convenient type of action and forum for a party's dispute, smart guides for the parties navigating them through the e-justice/ODR proceedings at the selected forum, proposing and checking arguments and so on as well as explaining outcomes to the parties. Public AI services should gradually introduce personalized e-justice/ODR forms which a party will understand and trust more than the 'one size fits all' current ODR forms.

E-justice/ ODR institutions will be offered AI facilitations in managing procedural options (e.g. to implement or not to change a procedure) based on parties' behaviour (e.g. to strengthen negotiation by assisted mediation in certain types of disputes), early detection of issues in decision-making that warrants attention (e.g. potential bias or inconsistency in rendered decisions) and early detection of a potentially new line of arguing that warrants further exploration.

The initial proposal of a minimum set of AI services that should be directly available to the parties: evaluation of the e-justice/ODR system based on transparent open criteria; if possible, explaining how AI is used in the e-justice/ODR system or informing otherwise; assistance in selecting the most convenient type of action and forum for the party; explaining outcomes; assisting a party in preparing and using its own forms in its language and responding to its abilities and disabilities or disadvantages and general monitoring of adherence of the service providers and parties to self-regulatory user terms.

5.3 Digital Mapping of ODR Processes

Digital mapping of ODR processes is a key prerequisite for the wider application of AI services in ODR. Digital mapping will include the following parts: a template for describing any ODR process or sub-process (e.g. in the form of a BPMN or Business Process Management template); more detailed meta-model of composite parts of ODR procedural steps which can be used for the preparation of specifications of various ODR systems with data-driven processes; addressing and messaging conventions for exchange of dispute-related data as well as sharing of anonymous data among platforms; and editing guidelines for developers to design and develop a digital mapping of new processes and their parts.

6 New IT Architecture

AI services will require new IT architecture which should support the open decentralized collaboration and data exchange among the stakeholders. In a brief summary, such IT architecture will need to enable the separation of dispute data/structure and resolution processes; this means that every party will be able to run its own algorithms on its own data and make use of the AI services fuelled by shared data, independently on the algorithms provided by the ODR platform. New IT architecture will also need to achieve economic efficiency on a mass scale while enabling increased security and reliability. This can be achieved by a combination of separation of general-purpose infrastructure from e-justice-related services (so-called federated infrastructure), applying asynchronous infrastructure, using a uniform way (conventions) to communicate with other parties via the infrastructure and using existing protocols and technologies.

7 Need for New Governance

The open decentralized ODR environment will probably need new self-governance in addition to various applicable laws and regulations. We believe that the key part of such self-governance will be service providers.

Service providers will be entities/persons who will provide services to ODR platforms and persons who will operate them – from individual users to ODR institutions. The services might include maintenance, development, quality monitoring and so on. Service providers may also be providers of ODR modules which will use the anonymized data shared voluntarily by the parties to provide better dispute resolution services to their customers. Service providers may also be self-provided which means that they will provide the services to themselves. It means that online courts also can be service providers to themselves or other courts interested in their services.

Service providers might be authenticated through DNS records and the web of trust. We consider also that there is an option (not obligation) of receiving ‘certification’, for example, from an association or specialized online marketplace.

Service providers (and their customers) will need to adhere to the rules of the ‘common/public’ online space where shared data will be automatically processed for the purposes of AI Services. Every party should have a right to report suspected misuse of these common rules by anybody. Will every party report its findings to a randomly chosen service provider offering compliance monitoring services or will findings (if the complaint is proven substantiated) be reported to responsible state authorities or to specially designed ODR? Would the ODR then publish the resolution and would the environment automatically enforce and publish it?

8 Final Notes

There are many open questions that will be discussed and the first steps will be made. We the authors look forward to such a time. One of the first steps towards

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ethical data driven ODR is a project in which the authors participate – the project is called ‘E-Justice ODR Scheme’ (Scheme) and is funded by the EC in the JUST 2021 Call. Scheme project has started the open digital mapping of standard ODR processes which is a prerequisite to further steps we have tried to describe in this chapter.

We expect there will soon be more projects, both public and private, headed in the same or similar direction.

