

Guiding Principles for ODR platform

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I.- Background

II.- Framework of e-mediation and e-negotiation

III.- Guiding principles

Guiding Principle 1: Legal certainty ODR.

As general rule, knowing the consequences of choosing ODR over any other means to access to justice. Substantive legal principles for deciding cases

Law compliance is the first Guiding Principle in establishing an enabling legal regime for the use of ODR in any dispute that can be solved out-of-court.

Requiring that the functioning and the decision of the ODR complies with the applicable laws seems a basic and implied principle. Nevertheless, the acknowledgement of the law-compliance principle is vital to foster the use of ODR without compromising the protection of interests and rights of litigants. Therefore, legal certainty is instrumental to provide a flexible and future-proof legal regime for ODR.

ODR mechanisms are designed in order to facilitate electronic communications and to obtain an outcome without the need for the physical presentation of documents or for physical presence at a court meeting or hearing.

In this respect, parties may be allowed by their national legal system to rely on previous decisions made by an ODR body in similar or identical cases.

ODR does not differ very much from the offline procedures, except from the fact that other forms of communication are used in a face-to-face procedure.

As a result of these alternative methods, access to justice is no longer restricted to access to physical courts. The law-compliance principle plays a two-fold role.

On the one hand, it plays a limiting or negative role in deciding when the use of ODR is permitted and to which extent. On the other hand, this principle provides guidance both to the legislator, where a general rule in a specific sector is to be adopted, and to the operator, who will conduct a case-by-case assessment to decide when and whether to utilize ODR.

Illustration A. In **Lithuania**, online filing, online payment of court fees and materials for digital cases with online access are available in all civil and administrative cases using the centralized e-justice system LITEKO; courts normally issue digital official documents (orders, decisions, judgments, rulings, notifications, summons, etc.) that are authenticated by qualified electronic signatures and having the same legal value as analogous paper documents; in 2019 about 74% of court case files in civil and administrative matters were digital, other files were mixed (digital and physical paper); property sale auctions in enforcement proceedings are held only electronically; video- conferencing can be used in civil and administrative procedures as almost each court is equipped with at least one set of videoconference equipment or may use mobile videoconferencing equipment and every court room is equipped with equipment for digital audio recording. As a response to the Covid-19 outbreak all judges of the Lithuanian courts were provided with the possibility to work from their homes with remote access to the e-justice system LITEKO. Steps were taken to start more active use of video and teleconferencing with widespread private tools (such as videoconferencing) for conversion of oral

hearings into virtual digital meetings. Additional cybersecurity measures were implemented to ensure the safety and stability of the e-justice system.

Guiding Principle 2: Competence ODR.

As a general rule, ODR shall not be denied legal effect, validity or enforceability

ODR shall not be denied legal effect, validity or enforceability. The law-compliance principle enables the use of ODR without the need of specific recognition by the law¹.

ODR should be designed and implemented in accordance with internationally recognised technical standards and legal instruments, in order to allow its use by as many people as possible with as much autonomy as possible.

In order to ensure cross-border enforceability of ODR results, it has been adopted the Singapore Convention², which aims to facilitate the cross-border enforcement of mediated solutions. This is in parallel with the New York Convention on the International Recognition of Arbitral Awards.

Illustration A. With an encouraging initial appeal (53 signatory states and 6 ratifying states), the Singapore Convention is an important step towards promoting mediation on a global scale. Its actual impact, however, remains to be seen. At present, 52 countries have signed up to the Convention, including the USA, China and India, to name a few. On 12 March 2020, Qatar became the third country to ratify the Convention, after Singapore and Fiji. According to the Convention (Art. 14), on 12 September 2020 (i.e. 6 months after the deposit of the third instrument of ratification) the Convention will enter into force with respect to these first three countries. Currently, after Saudi Arabia's ratification on 5 May 2020, 4 countries have acceded. The Convention will enter into force in each signatory country 6 months after it has ratified its accession.

Guiding Principle 3: Scope and Application

ODR platform favours a set of basic measures that Member States' governments, legislators, courts, as well as ODR's developers, manufacturers and service providers should follow in order to guarantee that ODR procedures respect human dignity, human rights and fundamental freedoms.

The scope of these guidelines is to furnish a practical tool to Member States in order to ensure that their ODR techniques and mechanisms comply with the requirements of Art. 47 European Charter of

¹ This principle was already enshrined in the Guidelines, adopted by the Committee of Ministers of the Council of Europe, on online dispute resolution mechanisms in civil and administrative court proceedings, on 16 June 2021.

Fundamental principles:

1. Member States should seek to ensure trust and confidence in ODR.
2. ODR should not create substantial barriers for access to justice.
3. Procedural rules which apply to court proceedings in general should also apply to court proceedings involving ODR, unless the specific nature of a particular ODR mechanism requires otherwise.
4. Parties to proceedings involving the use of ODR should be identified using secure mechanisms.

² The Singapore Convention was adopted by the UN General Assembly in December 2018 and signed by the U.S. and 45 other countries the following August. So far, 55 nations across the world have signed the Convention.

Although it has not been formally clarified whose competence it is to sign, whether it is the EU or the individual member states. The solution to this question depends on the political will, expressed by the states in the EU Council. Indeed, Article 12 of the Singapore Convention provides for the possibility of accession by "a regional economic integration organisation" in addition to its member states that are already signatories. Therefore, at least on a formal level, it would be admissible for the Convention to be signed both by individual member states and by the EU itself. It is singular to note, among other things, that the EU itself, in its Resolution of 12 September 2017, states that further measures need to be taken to ensure the enforceability of foreign mediation agreements in a swift and accessible manner. This is why it is to be hoped that the issue of competence to conclude does not deprive Europe of a means that could help, not only to develop "harmonious economic relations", as stated in the preamble of the Convention, but also to concretely support economic growth by safeguarding trade relations.

This is a fundamental objective, especially in the event of extraordinary and unforeseeable events, such as Covid-19, which it is feared may occur with some frequency in the near future and which make it necessary to renegotiate contractual terms or negotiate the application of any force majeure clauses, which are mainly present in international trade contracts.

Fundamental Rights, Art. 6 European Convention on Human Rights and the principles developed in the jurisprudence of the European Court of justice and of the European Court of Human Rights.

ODR should improve the administration of justice, facilitate the user's access to the courts and reinforce the safeguards laid down in Article 6 of the European Convention of Human Rights: access to justice, impartiality and independence of the judge, fairness and reasonable length of proceedings.

Guiding Principle 4: Transparency

Since participants in the ODR process do not have the physical possibility of verifying compliance with privacy regulations, such security must be conveyed and guaranteed by ODR bodies where the online procedure is activated and by the operator who will participate in video connection to the meetings. A responsible approach shall be given to online procedures.

The functioning and the procedure of ODR mechanisms should be made transparent and explained in an intelligible manner using clear and plain language.

Parties to proceedings involving ODR should be informed about any potential conflicts of interest related to the operation of an ODR mechanism.

ODR should be designed in such a way that all documents generated, including the final judgment and other decisions or notifications, are written in clear and plain language.

Procedural rules applicable to ODR should be transparent.

Parties to proceedings involving ODR should be aware of and have the ability to access information concerning the procedural rules applicable to ODR. It is relevant to give appropriate assistance, information and feedback to users.

Tutorials on how to submit a claim and receive information about the progress of the case shall be prepared.

Illustration A. European Court of Human Rights' case law. When the relevant law provides individuals with a possibility of lodging a complaint without being represented by a lawyer, domestic courts should advise applicants on how to remedy the formal deficiencies of their complaints (*Wende and Kukówka v. Poland*, Application No. 56026/00, judgment of 10 May 2007, paragraph 54).

Illustration B. Magna Carta of Judges

The "Magna Carta of Judges" adopted by the Consultative Council of European Judges (CCJE) in 2010 emphasizes in paragraph 14 on "access to justice and transparency" that "justice shall be transparent and information shall be published on the operation of the judicial system".

Illustration C. National example: Poland

In Poland, applicants are provided with the possibility to find all relevant information on necessary formal requirements and technical issues on the e-court's website (general information on the e-court, information for applicants, for defendants, examples of correct and incorrect applications, FAQs, regulations on online payments, etc.).

Guiding Principle 5: Respect for the principle of cross-examination

Respect for the alternation of speaking time (on videoconferencing platforms there are functions that allow for the regulation of speaking turns) and respect for listening to the party's narrative or the lawyer's exposition of the facts (if any)

ODR proceedings should not prejudice an individual's right to participate effectively in the proceedings or their right to an effective remedy.

ODR proceedings should ensure an independent and impartial adjudicative process.

Parties to proceedings involving ODR should have knowledge of the materials in the case file, including those submitted by other parties; they should have access to these materials and sufficient time and means to acquaint themselves with their contents.

Fairness requires that parties to proceedings involving ODR should be permitted to present evidence in a manner that does not place them at a disadvantage vis-à-vis other party.

Parties should have the opportunity to present their case and to contest evidence submitted by other parties.

ODR should respect the principles of legal certainty and protection of the legitimate expectations of the parties.

Each party must be given a fair and equal opportunity to argue the case as to both matters of fact and law and each party should have a right to react to and rebut the submissions of the other party. Evidence and relevant material must be disclosed to both parties in an accessible and adequate way. ODR speeds up processes, but also risks increasing information overload (which slows down information processing). Because of that, while disputes should be dealt with within a reasonable time, parties should be granted reasonable time periods for reaction.

Illustration A. European Court of Human Rights' case law. The principle of the equality of arms "implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent" (Letinčić v. Croatia, Application No. 7183/11, judgment of 3 May 2016, paragraph 48).

Guiding Principle 6: Reasoned decisions

ODR should render reasoned, founded and not arbitrary decisions.

Every legal results/decisions reached using ODR has to allow people involved in the procedure to understand why it has been reached a certain result, as stated with reference to judicial decisions in *Seryavin and Others v. Ukraine*, Application No. 4909/04, judgment of 10 February 2011 (paragraphs 55-62). As for judicial cases, ODR implies the right to obtain an explanation for the adopted solution.

Sufficient detailed reasons shall be given, in connection with the nature of the result and the circumstances of the dispute.

Main arguments of parties are to be examined and require a specific and explicit response.

A reasoned decision can reassure the parties that their respective arguments have been taken into account and to assist them in deciding whether or not there are sufficient grounds to ask for review.

The mere fact that the decision is a result of an ODR mechanism should not prevent it from being enforceable.

Where national law allows for purely automated decisions, such decisions should be open to review before a judge.

Guiding Principle 7: Privacy and data protection

Telematics platform cannot and must not disrupt the respect of the criteria of confidentiality and data protection. The use of the personal data of the parties that make use of the mediation and of any other protagonists involved in the procedure, even of a sensitive and judicial nature, must always take place in compliance with Privacy regulations (EU Reg. 2016/679, Legislative Decree 196/2003, Legislative Decree

101/2018 and subsequent amendments and additions) starting from the moment of the introduction of the mediation with the filing of the application also, in telematics.

Legal systems are vulnerable because of the increase of sophisticated and numerous cyberattacks.

A breach in security could result in forgery or the disclosure of confidential information.

The level of cybersecurity of ICT products, services and processes facilitating ODR should be considered appropriate when safeguards are provided against:

- – unauthorized access to confidential data;
- – the unwanted alteration or deletion of data;
- – the technical impossibility to access the system and the data contained therein for those who should have access;
- – uncertainty over the identity of the judge and other professionals involved in ODR proceedings;
- – identity fraud by parties.

Certification makes a crucial role in increasing trust and security in electronic legal results/decisions.

This includes a comprehensive set of rules, technical requirements and standards.

Member States should assess the impact of ODR use, throughout its entire life cycle, on individuals and social groups, and identify the specific requirements for ethical and fair use of ODR and respect for human rights as part of the development and operation of any ODR mechanism.

The use of ODR mechanisms should not infringe data protection rights, including, where applicable, the right to information, the right to access data, the right to object to processing data and the right to erasure.

Technical and organizational measures should be implemented to ensure that rules on personal data protection are respected, both when determining the means of processing and during data processing.

ODR mechanisms should be designed and developed by applying the principles of personal data protection by default and by design, in particular by:

- implementing technical and organizational measures to ensure that personal data are protected by the application of, in particular, anonymization or pseudonymization techniques;
- introducing access and reuse restrictions by the competent authorities who maintain control of the data.

Outsourcing the technology used in ODR should not lead to processing of personal data for commercial purposes.

An appropriate level of cybersecurity of Information and Communication Technology (ICT)³ products, services and processes facilitating ODR should be ensured in order to meet the requirements in Articles 6 and 13 of the European Convention on Human Rights and to ensure the necessary trust and confidence in ODR mechanisms.

Illustration A. The appendix to the explanatory memorandum, adopted by the Committee of Ministers of the Council of Europe, contains a cybersecurity checklist for Member States.

Member States should implement the following in designing ODR.

1. Protection of stored, transmitted or otherwise processed data:

a. against accidental or unauthorized storage, processing, access or disclosure during the entire life cycle of the ICT product, service or process facilitating ODR;

b. against accidental or unauthorized destruction, loss or alteration or lack of availability during the entire life cycle of the ICT product, service or process facilitating ODR.

2. User access management through secure authentication: Authorized persons, programs or machines should only be able to access the data, services or functions to which their access rights refer.

3. Identification and documentation of known dependencies and vulnerabilities: Modern ICT products and systems often integrate and rely on one or more third-party technologies and components such as software modules, libraries or application programming interfaces. This reliance, which is referred to as a

³ Information and Communication Technology refers to technology that provides access to information through telecommunications.

“dependency”, could pose additional cybersecurity risks as vulnerabilities found in third-party components could also affect the security of the ICT products, services and processes facilitating ODR. In many cases, identifying and documenting such dependencies enables end users of ICT products, services and processes to improve their cybersecurity risk management activities by improving, for example, users’ cybersecurity vulnerability management and remediation procedures.

- Additionally, such dependencies and vulnerabilities could to a certain degree be avoided by providing, to the extent possible, the necessary means for in-house design and development.

4. Logging of data accession, use and processing: to record which data, services and functions have been accessed, used or otherwise processed, at what times and by whom.

5. Allowing consultation of the log files: to make it possible to check which data, services or functions have been accessed, used or otherwise processed, at what times and by whom.

6. Vulnerability testing: verifying that ICT products, services and processes facilitating ODR do not contain known vulnerabilities.

Logging of data accession, use and processing: to record which data, services or functions have been accessed, used or otherwise processed, at what times and by whom.

7. Vulnerability testing may necessitate the existence of a national legal framework allowing and regulating testing and ethical hacking of (government) ICT systems.

Providing back-up facilities and technical support: to restore the availability and access to data, services and functions in a timely manner in the event of a physical or technical incident.

8. Security by design and security by default: that ICT products, services and processes facilitating ODR are secure by-design and by-default.

9. Up-to-date hard- and software: to ensure that ICT products, services and processes facilitating ODR are provided with both the most up-to-date software and hardware that do not contain publicly known vulnerabilities, and with mechanisms for secure updates.

Cybersecurity certification of ICT products, services and processes facilitating ODR could be sought in order to minimize cybersecurity risks and to maximize trust and confidence⁴.

Illustration B. Ireland has an online court platform for certain small claims. As well as this, the following services are also available: an online e-licensing system to process licensing applications including alcohol-related licences and gaming and lottery applications, etc., the legal costs adjudication system which allows claims to be made online, the court fines online system that allows for electronic payment of fines imposed by the District Court, and the Supreme Court online system that allows for application for leave to appeal to the Supreme Court to be made online. Additional measures have also been introduced to provide for remote hearings in civil proceedings, the electronic submission of documents to courts in advance of proceedings known as “eFiling”, the remote submission of “statements of truth” as an alternative to sworn affidavits, and for bodies conducting hearings or appeals to do so via remote means.

Guiding Principle 8: Risks and Impact Assessment

The risks that ODR may cause any harm or damage shall be allocated on the operator. New opportunities can rise to reorient the justice system (e.g., procedural barriers of synchronous justice processes can disappear, as well as language barriers)

As a specific application of Guiding Principle 1, this principle focuses on the risk that the exercise of rights by the affected person and the effective access to justice may be prevented, hampered or limited.

Opportunities offered by Online mediation:

⁴ For EU countries, for example: certification could be sought in the framework of Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No. 526/2013 (European Union Cybersecurity Act).

- a) Online mediation offers a more flexible, convenient, and expedited dispute resolution mechanism compared to the Offline methods.
- b) In an Offline dispute resolution setting, physical distance between the parties is an issue that escalates the costs of mediation. Most importantly, this distance can be a probable excuse for the party who is not willing to attend the mediation session. Online mediation has diminished the costs also the excuses of the parties.
- c) The information and communication technology (ICT) mediums that are used to carry out Online mediation facilitate the data storage. These tools also increase the data accessibility for parties and their lawyers enabling them to use this data in any future court proceeding.
- d) The use of advanced ICT tools – particularly in the smart e-mediation systems – facilitates the process by offering automated transcription and translation of the data, as well as using indexes for analysing non-verbal languages of the parties. Further, the parties and mediator can simultaneously work in a shared digital environment to exchange documents and texts in addition to drafting the final settlement.
- e) In specific jurisdictions – i.e., Italy – conducting Online mediation tackles the legal challenges of judicial competency.

It is, however, critical to note that there are also some drawbacks that need to be weighted against the advantages of implementing Online mediation:

- a) The advanced ICT infrastructures that are used in the process of Online mediation can be very costly. There is an additional need for procuring a secure and well-established Internet connection that escalates the costs of this process.
- b) The lack of direct physical communication has been considered as a fundamental issue with Online mediation. In this model of dispute resolution – as part of the general ODR regime – parties communicate through ICT tools. Therefore, the direct human communication is absent. In addition, it has been argued that to be able to provide more effective facilitation and evaluation to the case, it is necessary for mediators to understand parties' feelings and emotions during the mediation meetings. Nevertheless, Online mediation is a filter that computers create to communications among disputants where the real intentions can be easily hidden behind the screens. As the result, it is difficult for the mediator to concentrate on the faces of the parties, read their body language, and eventually understand their real feelings on the subject matter.
- c) In an Online mediation, the mediator does not have sufficient time and opportunity to create a peaceful environment if any tension arises between the parties in the session.
- d) The lack of 'trust' and 'confidence' in the parties is referred to as one of the main issues with effective implementation of an Online mediation process. Many individuals do not feel confident to talk in front of a computer also to be recorded specifically in the events that the exchanged information is confidential.

Guiding Principle 9: Review

ODR shall ensure reasonable and proportionate review/appeal

A mechanism of review shall take into consideration the risks and the rights involved.

ODR shall not prevent, hamper, or render unfeasible the exercise of rights and access to justice by the affected persons. A mean to appeal or review the decisions taken shall be given in order to make parties react and rebut the submissions of the other party.

Article 13 of the European Convention on Human Rights comes into play whenever a decision is given by an ODR body. Parties should be allowed to contest decisions and to request that such a review can be made by a judge.

Illustration A. European Court of Human Rights' case law

"... Article 13, giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights" (*Kudła v. Poland* [GC], Application No. 30210/96, judgment of 26 October 2000, paragraph 152, ECHR -2000XI).

Illustration B. Consultative Council of European Judges – Opinion No. (2011) 14

"...The introduction of IT in courts in Europe should not compromise the human and symbolic faces of justice ... Justice is and should remain humane as it deals primarily with people and their disputes."

About Artificial Intelligence decisions, human review mechanisms can be required by law in specific sectors or as regards certain types of decisions, and/or can be implemented by operators on a voluntary basis and, therefore, in the conditions and with the extent established by the operator.

Illustration C. A mobility-as-a-service platform supervises the performance of the drivers on the basis of the data provided automatically by their phones installed in the car and upon being connected to the app. Pursuant to the platform internal policy, if a driver fails to complete at least five rides per week, the driver's account is immediately disabled and that constitutes a cause of dismissal. The decision to terminate the account and dismiss the worker should be subject to human review upon request of the driver. Justified reasons (malfunction of the phone, mistake, inaccurate data, failed connection, work leave) not to have completed the required minimum number of rides per week might be duly put forward by the affected driver to stop or reverse the dismissal.

Guiding Principle 10: Risk-based approach for ADM

These Guiding Principles shall be applied on a risk-based approach.

These Guiding Principles apply to a wide variety of ODR as defined.

As noted throughout the text in the explanatory comments of each Guiding Principle, the application of these principles has to be based on a risk approach. The intensity and the extent of the proposed principles to be followed by the legislator as policy goals, as well as the conditions under which the implementation has to be carried out by the operator do fully depend upon the assessment of potential risks.

Therefore, these Guiding Principles provide guidance to formulate rules and implement operator-driven effective solutions based on a risk approach. Risks entailed by the use and the operation of the ODR will be the measure to calibrate the crystallization of the principles in form of legal rules and the implementation by the operator.

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