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Access to justice and the Internet: potential and challenges

Report[1]
Committee on Legal Affairs and Human Rights
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Summary

The Committee on Legal Affairs and Human Rights underscores the importance of overcoming existing barriers to individuals' access to justice. It recognises that innovative use of modern information and communications technology (ICT) within courts on the one hand, and online dispute resolution (ODR) procedures on the other, can play a role in this endeavour.

The committee acknowledges that the use of ICT tools can simplify and expedite judicial proceedings and contribute to enhancing the consistency and predictability of outcomes. It also recognises the potential of online dispute resolution to facilitate individuals' access to justice, by helping to settle disputes more rapidly, at a lower cost and in a less conflictual manner than conventional litigation, whilst potentially affording more flexibility in the choice of procedures used and solutions offered. Member States are thus encouraged to promote and further develop ODR mechanisms.

Nevertheless, the committee notes that ODR procedures and the use of ICT in courts may come with certain challenges, including technical issues, inequalities in individuals' access to online resources, privacy issues and problems regarding enforcement of decisions. It therefore stresses the need to safeguard the rights enshrined in the European Convention on Human Rights, and in particular the right to a fair trial (Article 6) and the right to an effective remedy (Article 13).

1. Reference to committee: Doc. 13318, Reference 4007 of 22 November 2013.

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A. Draft resolution[2]

1. The Parliamentary Assembly reiterates that access to justice is a cornerstone of any democratic State based on the rule of law, and a prerequisite for citizens' effective enjoyment of their human rights. It notes, however, that accessing the justice system often entails high costs in terms of time and money and may be impeded by the courts' limited resources.

2. Efforts are being made in a number of States to reform court processes in order to accelerate procedures and make them more affordable, in particular through the use of modern forms of information and communications technology (ICT).

3. The Assembly welcomes the increased use of ICT tools, such as electronic case files, Intranet portals, videoconferencing, case management systems and databases facilitating information sharing, which not only have the potential to simplify and expedite procedures, but also to enhance the consistency and predictability of outcomes.

4. The Assembly further observes that ICT has paved the way for pursuing alternative dispute resolution (ADR) via the Internet, by means of so-called online dispute resolution (ODR) procedures. The use of the Internet to resolve disputes appears likely to grow, given the notable rise of e-commerce and e-governance, which are simplifying interaction between individuals, businesses and governments.

5. The Assembly encourages member States to promote and further develop ODR mechanisms, acknowledging the potential of ODR procedures for settling disputes more speedily, cheaply and in a less conflictual manner than through litigation. ODR mechanisms can provide more flexibility in terms of procedures employed and remedies prescribed.

6. While considering that ODR procedures and ICT can contribute to facilitating access to the justice system, the Assembly also recognises the various challenges involved in ODR procedures and the use of ICT in dispute settlement, including technical issues, inequalities in individuals' access to online resources, privacy issues and problems regarding the enforcement of decisions. It therefore stresses the need to safeguard the rights enshrined in the European Convention on Human Rights (ETS No. 5), and in particular the right to a fair trial (Article 6) and the right to an effective remedy (Article 13).

7. In light of the above, the Assembly calls on the Council of Europe member States to:

7.1. make voluntary ODR procedures available to citizens in appropriate cases; raise public awareness of the availability of, and create incentives for the participation in such procedures, including by promoting the extrajudicial enforcement of ODR decisions and by enhancing the knowledge of legal professionals about ODR;

7.2. ensure that existing and future ODR procedures contain safeguards compliant with Articles 6 and 13 of the European Convention on Human Rights, which may include access to legal advice;

7.3. ensure that parties engaging in ODR procedures retain the right to access a judicial appeal procedure satisfying the requirements of a fair trial pursuant to Article 6 of the Convention;

7.4. undertake to develop common minimum standards that ODR providers will have to comply with, *inter alia* in order to ensure that their procedures do not unfairly favour regular users over one-time users, and strive to establish a common system of accrediting ODR providers satisfying these standards;

7.5. continue to monitor technological developments in order to promote the use of ICT within courts to improve judicial efficiency, while guaranteeing fair and transparent proceedings, data security, privacy, as well as the adequate and continuous training of court staff and lawyers on the lawful and effective use of ICT in judicial proceedings.

2. Draft resolution adopted unanimously by the committee on 2 November 2015.

B. Explanatory memorandum by Mr Xuclà, rapporteur

1. Procedure

1. At its meeting on 12 December 2013, the Committee on Legal Affairs and Human Rights appointed me rapporteur on "Access to justice through online instruments". According to the motion[3] at the origin of the report, my mandate was to consider the potential benefits that online instruments may offer for alleviating the difficulties European citizens encounter in exercising their right of access to justice. I thus address two broad topics in the present report: online dispute resolution (ODR) and the use of information and communications technology (ICT) in the judiciary.

2. For the sake of greater clarity, and upon my proposal, the committee, at its meeting in Strasbourg on 29 September 2014, agreed to change the title of the report to "Access to justice and the Internet: potential and challenges". I prefer this title since I believe the term "online instruments" does not adequately reflect the key human rights challenges arising in the context of access to justice in the Internet age.

3. On 30 October 2014, the committee held a hearing to gather testimony regarding the present report, with the participation of Mr Arno Lodder, Professor of Internet Governance and Regulation at Vrije Universiteit Amsterdam, and Mr Graham Ross, Founder and President of TheMediationRoom.com and member of the Advisory Group on Online Dispute Resolution appointed by the Civil Justice Council of England and Wales. On 23 June 2015, the Legal Affairs Committee held another hearing, with the participation of Ms Iveta Havlova, Strategic Alliances Director for the ODR provider Youstice. I should like to thank these three experts for their insightful and enlightening observations and comments.

2. "Access to justice" in the Internet age: innovations and challenges

4. Access to justice is the cornerstone of any democratic State based on the rule of law. Yet, there continue to exist various constraints to European citizens' effective enjoyment of this right, evidenced for example by the staggering number of cases in which the European Court of Human Rights ('the Court') finds a violation of the European Convention on Human Rights (ETS No. 5, "the Convention") on account of the excessive length of domestic judicial proceedings.[4] Surveys and academic research appear to confirm that accessing the justice system often entails high costs, not only in terms of time but also of money.[5]

5. At least partly in response to these limitations, efforts are being made in a number of States to reform court processes in order to accelerate procedures and make them more affordable. In particular, the use of modern forms of ICT is on the rise.

6. At the same time, one may observe that – both in the practice of several European States as well as in academic discussions – courts are no longer considered as the only fora of justice. Quasi-judicial and alternative dispute resolution (ADR) procedures,[6] that is mechanisms of dispute settlement outside the courts, are being used with increased frequency, with some (mostly European Union member) States even requiring that parties first seek to resolve particular types of disputes by means of mediation before resorting to the courts.

7. This diversification of dispute resolution systems has been influenced by Internet-age developments. The growing use of the Internet has impacted the ways in which individuals purchase goods, receive information and communicate. Both private- and public-sector bodies are increasing their Internet presence and fuelling the rise of e-commerce, e-governance and e-justice. These initiatives have simplified and

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3. Parliamentary Assembly Doc. 13318, motion tabled by Ms Alina Ştefania Gorghiu and other members of the Assembly.

4. A search on the Court's case law database HUDOC reveals that, between January and July 2015, the Court found a violation of Article 6.1 of the Convention in 69 cases due to excessive delays in domestic judicial proceedings. Systemic violations of the "reasonable time" requirement have also been the subject of a number of pilot judgments; see below footnote 12 and the accompanying text.

5. These costs vary from country to country. Detailed information on the costs of judicial proceedings in EU member States are available from the European Commission's website. For an overview, see the Commission's Study on the Transparency of Costs of Civil Judicial Proceedings in the EU (December 2007), as well as its Annex.

6. The most common forms of ADR procedures are mediation – dispute settlement by means of negotiations facilitated by a neutral third party – and arbitration – a procedure by way of which a neutral third party issues a binding decision upon having heard both parties' arguments. For more comprehensive definitions, see Black's Law Dictionary (2nd ed.), at the law dictionary.org/mediation/ and the law dictionary.org/arbitration/ respectively.

improved interaction between individuals and businesses, governments and the courts and created wider opportunities for accessing information. In light of this, it may not be surprising that ADR providers have also begun to use the Internet, giving rise to online dispute resolution (ODR) procedures.

8. It is against this background that I seek to examine in the report how the innovative use of technology within courts on the one hand, and ODR on the other can help individuals overcome impediments to accessing justice.

2.1. Defining "access to justice" by reference to the legal framework provided by the Council of Europe

9. A principal difficulty when discussing this issue appears to be the prevailing uncertainty as regards the definition of the notion of "justice". For the purposes of this report, and in line with Opinion No. 7 on "justice and society" of the Consultative Council of European Judges (CCEJ), I understand "justice" broadly, as a process aiming to resolve disputes between parties and serving as an essential element of democratic societies.

10. My understanding of "access to justice" – which "is a descriptive expression rather than a legal concept"[7] – is informed by the case law of the European Court of Human Rights in respect of Articles 6.1 (right to a fair trial) and 13 (right to an effective remedy) of the European Convention on Human Rights. These provisions protect the right of access to an independent and impartial body providing (judicial) protection of fundamental rights, the right to a fair trial and to effective remedies, and fair and equitable outcomes of proceedings providing redress for violations suffered. I should like to recall, in this connection, Parliamentary Assembly Resolution 2054 (2015) on equality and non-discrimination in the access to justice, which pointed out that:

> *"Both of these rights are encompassed by the broader concept of access to justice, which refers to the various elements leading to appropriate redress against the violation of a right, such as information on rights and procedures, legal aid, legal representation, legal standing or general access to courts."*

11. The Court's earliest commentary on access to justice can be traced back to the case of Golder v. the United Kingdom,[8] in which the Court established that Article 6.1 confers on individuals not merely the right to a fair trial in proceedings already pending against them, but also a right to access the courts to commence an action.

12. Since then, the Court has repeatedly emphasised the detrimental effect that practical barriers can have on an individual's access to justice. According to the Court's well-established case law, the rights enshrined in the Convention must not be "theoretical or illusory", but "practical and effective".[9] This conception of Article 6 has led the Court to find violations of the Convention in cases where such practical obstacles, for example the inability to afford legal counsel, impeded applicants' access to the justice system. The emphasis on the effective exercise of rights has also resulted in a number of cases on the provision of legal aid in civil cases in order to foster equality of arms in dispute resolution.[10]

13. The Court has further acknowledged the impact of time-consuming judicial procedures on access to justice. Article 6.1 of the Convention embraces the concept of expeditious justice, stating that everyone is entitled to a fair hearing "within a reasonable time". Reasonableness is assessed in light of the circumstances of each individual case.[11] Tackling the excessive length of judicial proceedings has become a priority for the Court, which has identified the problem as systemic in a number of recent pilot judgments in respect of several High Contracting Parties.[12]

14. In the same vein, Committee of Ministers Recommendation CM/Rec(2010)3 on "effective remedies for excessive length of proceedings" highlights that "excessive delays in the administration of justice constitute a grave danger, in particular for respect for the rule of law and access to justice".

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7. "Equality and non-discrimination in the access to justice", Doc. 13740, report of the Committee on Equality and Non-Discrimination (rapporteur: Mr Viorel Riceard Badea, Romania, EPP/CD), paragraph 1.
8. Application No. 4451/70, judgment of 21 February 1975, paragraph 36.
9. Airey v. Ireland, Application No. 6289/73, judgment of 9 October 1979, paragraph 24.
10. A prominent example is Steel and Morris v. the United Kingdom, Application No. 68416/01, judgment of 15 May 2005.
11. Erkner and Hofauer v. Austria, Application No. 9616/81, judgment of 23 April 1987, paragraph 66.
12. Rumpf v. Germany, Application No. 46344/06, judgment of 2 December 2010; Athanasiou and Others v. Greece, Application No. 50973/08, judgment of 21 March 2011; Glykantzi v. Greece, Application No. 40150/09, judgment of 30 January 2013.

15. Similarly, the CCJE's Magna Carta of Judges, which codifies the main conclusions of opinions adopted by the CCJE and identifies access to justice as one of its fundamental principles, stresses the importance of "swift, efficient and affordable dispute resolution". It is interesting to note that the Magna Carta of Judges does not have an exclusive focus on judicial proceedings. This corresponds to my own approach and that of my colleague Mr Badea, whose above-mentioned report unequivocally described the notion of "access to justice" as including ADR mechanisms (paragraph 10) such as mediation, conciliation or arbitration.

16. While not providing a clear definition of "access to justice", the Court's case law and the aforementioned texts by other bodies of the Council of Europe provide some guidance. I believe they constitute an adequate basis for assessing ODR procedures and the use of ICT in court proceedings in this context.

2.2. Online dispute resolution – out-of-court settlement of disputes

17. Online dispute resolution is a form of alternative dispute resolution which utilises ICT and the Internet to simplify and expedite the resolution of disputes. Today, it is most commonly (but not exclusively) used to settle disputes arising from online commercial transactions, for instance on e-commerce platforms such as eBay, but also domain name disputes or disputes involving other intellectual property issues. Like offline alternative dispute resolution (ADR) procedures, ODR systems can be structured in various ways, depending on the nature of the disputes concerned. ODR systems can include a human intermediary or may only feature the two parties engaging in an entirely automated procedure. One commonly differentiates between three categories of ODR, for each of which I will provide an example below: automated and assisted negotiation, online mediation and online arbitration.[13]

18. The increase in ODR procedures raises a number of legal and human rights-related questions that I will seek to answer in this section:

– What advantages do ODR procedures have when compared to traditional litigation; Are there any empirical studies exploring whether any potential benefits are being realised in practice?

– What risks and challenges exist?

– What types of disputes and areas of law would be most suited to ODR procedures?

– Conversely, are there any disputes that should never be resolved by ODR?

– Will the appropriateness of the use of ODR be dependent on whether it is voluntary or mandatory, both as regards the initiation of the process and the compliance with its outcome?

– Is the mandatory use of ODR procedures to resolve certain types of disputes before resorting to the courts compatible with the rights enshrined in the Convention? In particular, is such a(n initial) denial of access to a court legitimate and proportionate under Article 6.1 of the Convention?

– What procedural safeguards does an ODR procedure have to contain in order to comply with Article 6 of the Convention, especially in terms of equality of arms between the parties?

– Does the level of safeguards vary depending on whether the ODR procedure culminates in a binding or non-binding decision?

2.2.1. Online negotiation (or e-negotiation)

19. Online negotiation is often used for the online settlement of financial claims. One of the first experiments with ODR began in 1996 with the creation of Cybersettle, a website facilitating the negotiation of damages in a civil trial between two parties. Cybersettle was created mainly for cases where liability had already been established and the parties only had to consent to a damage figure – an issue for which litigation is often not cost-effective. Parties using Cybersettle each enter three blind bids. If the two bids in any of the rounds come close enough to one another (within a previously agreed percentage), the midpoint figure will be deemed accepted. If the parties come close to such a solution, a facilitator will contact both parties to suggest another round of bidding.

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13. Orna Rabinovich-Einy, Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age, 7(4) *Virginia Journal of Law and Technology* 1 (2002), p. 27; and Julia Hörnle, *Cross-Border Internet Dispute Resolution* (Cambridge: Cambridge University Press, 2009), p. 75. Some scholars and practitioners view online resolution of consumer complaints by email as a separate, fourth category. I decided to focus on the three examples that are undisputed for mainly two reasons. First, the focus of my paper is not primarily on consumers' rights, and, second, many examples of online mediation (and some forms of online arbitration) examined in my report include some type of structured email-based resolution process prior to going to the mediation (or arbitration) phase.

20. Whereas the "blind-bidding" model employed by Cybersettle and other providers is also known as "automated negotiation", other platforms (including eBay and PayPal) offer so-called "assisted negotiation", by outlining, based on prior experience from similar cases, a number of possible remedies to the parties to a dispute.[14]

2.2.2. Online mediation (or e-mediation)

21. This form of negotiation is often coupled with a mediation stage. An oft-cited example of online mediation is that of eBay, which, in conjunction with the Internet start-up SquareTrade, introduced an online dispute resolution system which allowed buyers and sellers to settle various contentious issues in a structured format.[15] Parties are asked to answer questions on a customised complaint form and provide supporting documentation for their claim. SquareTrade will transmit the form to the other party and encourage that party to respond. If the parties fail to reach a compromise, either party can initiate mediation. The dispute resolution mechanism established by Wikipedia works in a similar fashion and is another prominent example of online mediation.[16]

2.2.3. Online arbitration

22. Finally, one may observe that ODR, though originally conceived as a mechanism for resolving disputes occurring purely in the online (commercial) space, is increasingly moving into settling offline disputes as well.[17] A number of countries have begun to harness the potential of the Internet in order to expedite and simplify the dispute resolution process for ordinary citizens – a trend that should be welcomed, in my view. A noteworthy example is that of British Columbia, a province of Canada (Canada enjoys observer status with the Council of Europe). British Columbia is in the process of setting up a Civil Resolution Tribunal, expected to begin operation by the end of the year.[18] The tribunal represents North America's first online tribunal for small claims and aims to utilise the Internet throughout all stages of the dispute resolution process. The procedures before the Tribunal go beyond the above-mentioned examples in that, if no settlement is reached at either the initial ('self-help') stage or by pursuing a mediation-like approach, parties may choose to move to the adjudication stage, at which an adjudicator discusses with the parties online, by phone, or through videoconferencing, collects evidence online and issues a binding decision on the case.

2.2.4. Recent ODR developments in Europe

23. Espousing a more limited model of ODR, the European Union, in 2013, adopted Directive 2013/11/EU on alternative dispute resolution for consumer disputes (the "ADR Directive") and Regulation 524/2013 on online dispute resolution for consumer disputes (the "ODR Regulation").

24. Acknowledging the barriers to cross-border e-commerce – and thus the internal market – arising from the lack of fast and low-cost dispute resolution mechanisms, the ADR Directive stipulates that member States ought to ensure the availability of quality ADR mechanisms for consumer complaints relating to the provision of goods and services. Each country is required to set up a competent authority for monitoring the functioning of certified ADR providers.

25. In accordance with the provisions of the ODR Regulation, the European Union is currently in the process of creating an ODR platform, aimed at enhancing the accessibility of ADR schemes online.[19] This platform will become operational in January 2016. It will serve as a single connection point for EU-based traders, consumers and ADR entities and will apply strictly to online transactions between these parties, both domestic and cross-border.

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14. See, *inter alia*, Pablo Cortés, A new regulatory framework for extra-judicial consumer redress: where we are and how to move forward, University of Leicester School of Law Research Paper No. 13-02 (2013), p. 19.
15. See the information on eBay's website, available at ebay.com/services/buyandsell/disputeres, as well as Steve Abernethy, Building Large-Scale Online Dispute Resolution & Trustmark Systems, Proceedings of the United Nations Economic Commission for Europe (UNECE) Forum on "Online Dispute Resolution (ODR)" (Geneva, Switzerland, 30 June-1 July 2003), pp. 11-14.
16. Orna Rabinovich-Einy and Ethan Katsh, Digital Justice, Reshaping Boundaries in an Online Dispute Resolution Environment, 1(1) *International Journal of Online Dispute Resolution* (2014) 5, p. 24.
17. Ibid., p. 22. The authors further stress, in this connection, that the "boundaries that shape online and offline activities, relationships, concepts and values are … eroding as growing numbers of conflicts are being addressed through digital tools", p. 6.
18. Ministry of Justice, British Columbia, Dispute Resolution Model for the Proposed Civil Resolution Tribunal. See also Civil Resolution Tribunal, 9 Things to Know About the Civil Resolution Tribunal Act (CRTA) Changes; as well as the Civil Resolution Tribunal Act.

26. It will allow both consumers and traders to file an electronic complaint form in any of the European Union's official languages, attach relevant documents, and choose an ADR entity competent to handle the dispute. The platform will then transmit the form to the other party. Subject to the latter's agreement to resolve the dispute through ADR and with the help of the chosen ADR entity, the platform will transmit the information to that entity. ADR providers may, but are not required to, conduct the dispute resolution procedure through the ODR platform. Importantly, any ADR entity wishing to be included in the ODR platform must become accredited with their respective national competent authority, which presupposes that the provider comply with European legal standards pertaining to: i) their independence and impartiality; ii) transparency; iii) effectiveness; iv) fairness; v) liberty; and vi) legality.[20]

27. Like many scholars and practitioners, I regard these two pieces of legislation as an important step towards guaranteeing minimum quality standards for ADR providers. They also promise to contribute to raising people's awareness of the availability of ADR/ODR mechanisms, and to make these procedures more accessible. I therefore encourage those member States that are also members of the European Union to contribute to the swift and successful implementation of the ODR Regulation.

28. Another noteworthy development is the establishment of Working Group III on Online Dispute Resolution by the United Nations Commission on International Trade Law (UNCITRAL). This working group is tasked with creating a model legal framework for the use of ODR in business-to-business and business-to-consumer disputes for low-value, high-volume disputes. The group's draft procedural rules on ODR for cross-border electronic commerce transactions may be incorporated into parties' contractual agreements but will apply only to the extent the terms are enforceable by the applicable national law. The proposed rules embrace a two-track procedure: the process begins with online negotiation between the two parties, moves on to a facilitated settlement stage, and then switches either to track I (binding online arbitration) or track II (non-binding adjudication).[21] The two tracks reflect a lack of consensus within the Working Group (as well as within national jurisdictions) on whether ODR procedures should culminate in a binding process, and the fact that not all countries allow pre-dispute arbitration agreements to be binding for consumers.[22]

2.2.5. The Council of Europe's work on (online forms of) alternative dispute resolution

29. To date, the Council of Europe has mainly focused its work pertaining to alternative dispute resolution on offline procedures. Yet, since a lot of the features of ODR, including potential benefits and disadvantages, resemble those of offline ADR procedures, the work undertaken on ADR is certainly instructive in determining the potential value of ODR in facilitating individuals' access to justice.

30. Most notably, the CCJE's Magna Carta of Judges calls on judges to facilitate the use of ADR and utilise appropriate case management methods. The European Commission for the Efficiency of Justice (CEPEJ), too, has analysed the connection between ADR and access to justice, most recently in a report on "Access to Justice in Europe". In addition, the Committee of Ministers has addressed matters relating to alternative forms of dispute resolution in a number of recommendations. Recommendation No. R (81) 7 on "Measures facilitating access to justice" called, in its appendix, for measures to encourage the use of conciliation and mediation. Recommendation No. R (98) 1 on "Family mediation" states that, in light of the particular problems posed by family disputes, family mediation may promote consensual solutions and lower the social and economic costs associated with divorce and separation. In its Recommendation Rec(2001)9 on "Alternatives to litigation between administrative authorities and private parties", the Committee of Ministers welcomed the use of alternative means of resolving administrative disputes, considering that it might bring administrative authorities closer to the public and allow for speedier and less expensive dispute settlements. At the same time, it emphasised that "alternative means to litigation must respect the principles of equality and impartiality and the rights of the parties". In the same vein, Recommendation Rec(2002)10 on "Mediation in civil matters"

19. For a summary of the key provisions of these texts, see Pablo Cortés, A new regulatory framework for extra-judicial consumer redress: where we are and how to move forward, supra note 14, pp. 4-11.

20. See also Pablo Cortés and Arno R. Lodder, Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress, 21(1) *Maastricht Journal of European and Comparative Law* 14 (2014), pp. 25-26.

21. For the latest drafts, see respectively United Nations documents A/CN.9/WG.III/WP.133/Add.1 on Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track I), and A/CN.9/WG.III/WP.130 on Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track II).

22. Vikki Rogers, Are We Meeting the Needs of Merchants and Consumers Looking to Buy and Sell Cross-Border? Thoughts on UNCITRAL's Working Group III on Online Dispute Resolution, July 2012.

underscored the importance of an efficient, fair and easily accessible judicial system, noting that parties using mediation should remain free to avail themselves of the courts, since "access to the court … constitutes the ultimate guarantee for the protection of the rights of the parties".

31. The most relevant judgment issued by a European court in the context of ODR did not emanate from the European Court of Human Rights, but from the Court of Justice of the European Union (CJEU). But the latter referred to the Strasbourg Court's case law when determining, in the 2010 Rosalba Alassini case,[23] that the mandatory use of mediation in certain disputes between providers and end users prior to engaging the courts was permissible and did not violate the principle of effective judicial protection enshrined in Articles 6 and 13 of the European Convention on Human Rights and Article 47 of the European Union Charter of Fundamental Rights (2000/C 364/01). It may be important to stress, in this context, that the time limit for completion of the out-of-court settlement procedure was only 30 days, after which the parties were free to bring court proceedings. In arriving at its conclusion, the CJEU acknowledged that the requirement to first pursue ODR was aimed at "the quicker and less expensive settlement of disputes relating to electronic communications and a lightening of the burden on the court system" (paragraph 64). At the same time, the CJEU noted that the exercise of particular rights "might be rendered in practice impossible or excessively difficult for certain individuals – in particular, those without access to the Internet – if the settlement procedure could be accessed only by electronic means".[24] The CJEU concluded that effective judicial protection was secured as long as electronic means were not the sole means for accessing the settlement procedure.[25] I cannot but congratulate the CJEU on its very nuanced reasoning.

32. Pronouncements by the European Court of Human Rights on ADR/ODR are to date rather scarce. A positive comment on ADR can be found in Judge Malinverni's concurring opinion in Stempfer v. Austria[26] concerning the question of whether preventive or compensatory remedies should be favoured in cases pertaining to excessively lengthy proceedings. He argued that preventive measures, including offering alternative dispute resolution in private-law cases, should be prioritised over compensatory remedies. However, the Court has to date not had the opportunity to clarify its position on the adequacy of ADR or ODR procedures in light of the fair trial guarantees enshrined in Article 6 of the Convention. Still, some guidance may be derived from its case law, especially if one differentiates between voluntary and mandatory participation in ADR/ODR.

33. If individuals voluntarily decide to use (online or offline) ADR, the Court's statements in a number of waiver cases appear to be instructive. The Court has stated that a waiver of the right to have access to a court does not in principle violate the Convention in light of the individual and public advantages it entails.[27] Given the importance of the right to a fair trial, consent to a waiver must be freely given and not be "tainted by constraint".[28] Crucially, the Court stressed that an ADR procedure must contain certain procedural safeguards in order to comply with Article 6 of the Convention. Moreover, a waiver may not be permissible for all Article 6 rights, such as the right to an impartial judge.[29]

34. When it comes to States requiring individuals to first use ADR/ODR before resorting to the courts, the key question revolves around whether such a restriction on access to a court is legitimate and proportionate under Article 6.1 of the Convention. In this context, the Court's case law on the compatibility of decisions of administrative authorities with Article 6.1 guarantees may serve as an indicator of what is likely to be permissible. Acknowledging that "[d]emands of flexibility and efficiency … may justify the prior intervention of administrative or professional bodies and, a fortiori, of judicial bodies which do not satisfy the said requirements [set out in Article 6.1] in every respect",[30] the Court has consistently stated that no violation of this provision will be found if the proceedings before bodies which do not satisfy the requirements of Article 6.1 of the Convention are "subject to subsequent control by a judicial body that has full jurisdiction".[31]

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23. CJEU, Rosalba Alassini and Filomena Califano v. Wind SpA, Lucia Anna Giorgia Iacono v. Telecom Italia SpA, Multiservice Srl v. Telecom Italia SpA, Joined Cases, C-317/08 to C-320/08, judgment of 8 March 2010.
24. Ibid., paragraph 58.
25. Ibid., paragraph 60.
26. Application No. 18294/03, judgment of 26 October 2007.
27. Deweer v. Belgium, Application No. 6903/75, judgment of 27 February 1980, paragraph 49.
28. Ibid., paragraph 54.
29. Suovaniemi and Others v. Finland (dec.), Application No. 31737/96, decision of 23 February 1999.
30. Le Compte, Van Leuven and De Meyere v. Belgium, Applications Nos. 6878/75 and 7238/75, judgment of 23 June 1981, paragraph 51(a).
31. See Zumtobel v. Austria, Application No. 12235/86, judgment of 21 September 1993, paragraphs 29-32; Bryan v. the United Kingdom, Application No. 19178/91, judgment of 22 November 1995, paragraph 40; and Ortenberg v. Austria, Application No. 12884/87, judgment of 25 November 1994, paragraph 31.

2.2.6. Potential benefits of ODR

35. The question is thus whether ODR procedures are in fact more flexible and efficient than court proceedings. More generally: what are the potential benefits of ODR?

36. First of all, ODR has the potential to lower economic barriers to access to justice. Pursuing traditional litigation can be costly, particularly due to lawyers' and court fees and travel expenses (especially for cross-border disputes). The cost of litigation often discourages individuals from attempting to resolve disputes or enforce their rights, leaving many without access to effective remedies capable of providing redress. This is particularly common in low-value disputes such as those arising from many e-commerce transactions, where ODR procedures may represent an important mechanism of consumer protection.

37. Access to justice is influenced not only by socioeconomic status but also by geography, and geographical access to justice threatens to become increasingly difficult because of a trend towards reducing the number of courts.[32] Technology has the ability to improve access to dispute resolution mechanisms especially for individuals residing in rural areas. The Australian Government has been particularly keen on harnessing the power of ODR in facilitating access to justice for individuals residing in outlying areas of the country.[33] I believe that European States, too, should step up their efforts in exploring such possibilities.

38. Depending on the nature of the disputes, the use of ODR tools may also lower the costs associated with legal advice and representation, although this is certainly not to suggest that parties participating in ODR procedures may not require such legal services. It would be a fallacy to assume that the comparably low value of most claims dealt with through ODR today necessarily correlates with legal simplicity.[34] In light of the importance that the Council of Europe attaches to legal aid,[35] I regard it as essential that governments play an active role in promoting and safeguarding minimum standards of justice in terms of equality of arms, including, if need be, by providing legal aid or representation.[36]

39. The length of judicial proceedings, increased by resource limitations within court systems, represents another hurdle for access to justice. ODR may serve as an important tool for increasing the availability of expeditious dispute resolution mechanisms while easing the courts' caseload. ODR permits parties to resolve disputes quickly and flexibly. Because the process can be conducted asynchronously, parties may participate in negotiation at their convenience. This benefit is particularly salient for cross-border disputes, especially those involving parties situated in different time zones.

40. When discussing potential benefits of ODR, it must be stressed that online dispute resolution goes beyond simply moving traditional dispute settlement into cyberspace. Rather, the principles and values upon which ODR procedures are based differ from those of litigation in courts:[37] the ODR/ADR model aims at achieving social harmony through consensual solutions. Unlike traditional judicial dispute resolution mechanisms that tend to be more adversarial and end with an authoritative, top-down judgment, ODR/ADR procedures can emphasise compromise and mutually agreeable outcomes or "win-win" situations. This can be particularly important for parties wishing to preserve their (commercial or other) relationship (as well as, in the commercial field, their reputation in the relevant market) in the future.[38] As I noted above with reference to

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32. See CEPEJ, Report on "European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice", pp. 476-477; and *SPIEGEL Online* (Germany): "Gerichtsschließungen in Mecklenburg-Vorpommern: Willst du Recht, musst du reisen" (4 September 2015).

33. Australian Government, Harnessing the benefits of technology to improve access to justice, 2012.

34. Hazel Glenn, What is Civil Justice For? Reform, ADR and Access to Justice, 24 *Yale Journal of Law and Humanities* 397 (2012), p. 401.

35. Like the Court, the CEPEJ has highlighted the connection between legal aid and equal access to justice. In its 2012 report on "European judicial systems", CEPEJ defined legal aid broadly, as including not only traditional elements of legal aid such as representation during a trial, but also information, legal advice and aid for alternatives to judicial proceedings (such as ADR). Moreover, the Committee of Ministers has adopted a number of texts on the topic of legal aid in civil matters, such as Resolution No. R (93) 1 on "Effective access to the law and to justice for the very poor" and Resolution 78 (8) on "Legal aid and advice". While the latter highlights the connection between legal aid and access to justice for the poor, the former expands the definition of legal aid to include "quasi-judicial methods of conflict resolution", such as mediation, and calls for increased support for such methods of dispute resolution.

36. The importance of such minimum standards and hence the greater institutionalisation of ADR processes has been stressed by scholars; see *inter alia* Lorna McGregor, Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR, 26(3) *European Journal of International Law* (2015) (forthcoming).

37. Orna Rabinovich-Einy and Ethan Katsh, Orna Rabinovich-Einy and Ethan Katsh, Digital Justice, Reshaping Boundaries in an Online Dispute Resolution Environment, *supra* note 16, p. 6.

Recommendation No. R (98) 1 on "Family mediation", family law disputes tend to call for consensual solutions. Conceivably, this greater variety of possible remedies (including, in particular, remedies of a non-financial nature) may also enhance parties' satisfaction with the dispute resolution procedure.[39]

41. Against this backdrop, it is not surprising that additional benefits of ODR procedures largely correspond to the advantages of traditional, offline ADR procedures when compared with conventional litigation before courts of law. Like ADR procedures, ODR may offer more flexibility for parties vis-à-vis traditional legal mechanisms,[40] both in terms of the procedures employed and the remedies prescribed.[41] ODR structures are often created for narrow categories of disputes (such as online settlement of financial claims). They may hence be modified to accommodate the specific characteristics of the dispute and permit a greater variety of procedures, outcomes and evidentiary requirements. Moreover, the system might be more tailored to the needs of the parties because, whereas litigants often feel they lack control over courtroom proceedings, the informal nature offered by online mediation may facilitate the parties' autonomy, self-empowerment and ownership of the dispute resolution process.[42]

2.2.7. Limitations and drawbacks of ODR, and possible ways to overcome them

42. Although the above observations suggest that the integration of the Internet into dispute resolution processes has the potential to increase access to justice, empirical studies confirming the positive implications of ODR in terms of efficiency, costs, party satisfaction, etc. are still lacking.[43] Moreover, over-reliance on online instruments may entail disadvantages and risks for some individuals.

43. Traditional mediators saliently criticise online mediation as impersonal. Customarily, mediation is considered as a process which inherently relies on personal connections and understanding for achieving successful, mutually agreeable results.[44] Email-based mediation limits the ability of mediators to build a personal relationship with the parties. However, I am of the opinion that the integration of other technological tools into ODR procedures – in particular videoconferencing technology – may, to a certain extent, mitigate this apparent disadvantage.

44. Moreover, Internet users may encounter technical difficulties when using self-directed online instruments, and ODR processes may not reach the most vulnerable populations at all.[45] While the process itself may be simple and mostly self-explanatory, I regard it as critical to bear in mind that dispute resolution often entails questions of law beyond the grasp of persons lacking legal training. ODR procedures should therefore not generally exclude the possibility for individuals to avail themselves of legal advice. The possibility to consult with a legal professional should exist as a safeguard in order to ensure the continued protection of Article 6 fair trial rights for individuals who choose to engage in ODR procedures.

45. Relatedly, it should be noted that, even today, the Internet is not accessible to everyone. Thus, potential benefits in terms of access to justice flowing from ODR may not be shared evenly. This is illustrated by the 2012 E-communication Household Survey published by the European Commission, which shows that, while 64% of EU households have Internet access and access continues to grow each year, country-specific

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38. Commission of the European Communities, Green paper on alternative dispute resolution in civil and commercial law, COM(2002)196 final, 19 April 2002, paragraph 10. See also Erhard Blankenburg, Access to justice and alternatives to courts, 14 *Civil Justice Quarterly* 176 (1995), as cited in Dory Reiling, Doing Justice with Information Technology, 15(2) *Information and Communications Technology Law* 189 (2006), p. 192.

39. Donna Shestowsky, Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea, 10 *Psychology, Public Policy, and Law* (2004), pp. 211-249, at p. 212.

40. Orna Rabinovich-Einy, Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age, *supra* note 13, paragraph 50 (with further references).

41. Lisa Bernstein, Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs, 141 *University of Pennsylvania Law Review* (1993), pp. 2169-2259, at p. 2239, as cited in Lorna McGregor, Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR, *supra* note 36.

42. Orna Rabinovich-Einy, Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age, *supra* note 13, paragraph 50. See also Dominique Allen, Against Settlement? Owen Fiss, ADR and Australian Discrimination Law, 10(4) *International Journal of Discrimination and the Law* (2009), p. 195.

43. Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties* (Cambridge: Cambridge University Press, 2011), p. 4, as referenced in Lorna McGregor, Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR, *supra* note 36.

44. Joseph W. Goodman, The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites, 2 *Duke Law and Technology Review* (2003), pp. 10-11.

45. Kathryn E. Thomson, Are Online Dispute Resolution Processes Necessarily Access to Justice Strategies?, April 2014.

percentages range from 93% (Netherlands) to 42% (Greece). I would expect that similar, if not greater differences exist among Council of Europe member States. The Assembly, in Recommendation 1586 (2002) on the digital divide and education, acknowledged the risk of digitalisation creating a digital divide and stressed the importance of ensuring fair access to digital material.

46. The European Commission's survey also revealed that a digital divide tends to exist across socio-demographic lines. Lower levels of Internet access have been observed among rural populations and the elderly, as well as poorer segments of societies. While the actual extent of the digital divide may be less drastic than figures suggest because some people may be secondary or proxy users of the Internet – that is indirect beneficiaries of the Internet through the assistance of other individuals[46] or capable of using online services at work or school[47] – its existence tends to suggest that at least at the present time, ODR cannot be a substitute, but only a supplement for a fair and efficient court system. I therefore suggest that there should be opportunities for introducing ODR alongside other, more traditional dispute resolution instruments in order to avoid placing parties without access to the Internet at an unfair disadvantage.[48]

47. Linked to the risk of inequalities in access to ODR procedures is the issue of equality of arms.[49] ODR systems may favour repeat players, namely parties that often utilise the same dispute resolution provider.[50] By establishing a relationship with mediators, such parties (usually businesses, large institutions and government agencies) may gain an advantage vis-à-vis one-time users (specifically consumers); the latter "may feel pressurized to settle on less favourable terms than the case merits because of financial need, the leveraging of access [to children] and/or a lack of resources to proceed to litigation where legal aid is unavailable".[51] This risk of inequality of bargaining powers putting one party in a disadvantageous position may be mitigated through proper structuring of the mediation process to exclude biases as much as possible. ODR providers should take adequate steps to safeguard the impartiality of the dispute resolution process.

48. One possible way to ensure independence and impartiality would be to provide a preselected list of ODR providers from which the consumer can choose so as to guarantee that neither the consumer nor the retailer relate directly to that organisation. This should be combined with a unified system of trustmarks, that is a common label that only certified providers may display on their respective websites in order to enhance individuals' trust in the process. Governments can and should play a crucial role in this respect, namely that of certifying such providers and continuously monitoring their activities and rights compliance.

49. Critiques of ODR (or ADR more generally) further caution that diverting disputes away from the public (i.e. courts of law) and into the confidential or private (ODR) sphere may curtail the development of the law and undermine the precedent-setting role of courts.[52] While I believe that some disputes should not be dealt with by means of ADR/ODR as doing so would undermine the social function of adjudication,[53] I would argue 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. This has prompted commentators to conclude that "ODR has particular appeal when investigations involve systemic events, or when there are multiple complaints on a file".[54] 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.[55]

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46. Legal Services Institute, Improving Access to Justice: Scope of the Regulatory Objective, December 2012.
47. European Commission, E-communication Household Survey, June 2012.
48. The coexistence of online and traditional instruments comports with the above-mentioned Rosalba Alassini CJEU case.
49. In the case law of the European Court of Human Rights, the doctrine requires States Parties to guarantee that "everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him/her at a substantial disadvantage vis-à-vis his/her opponent". See, *inter alia*, De Haes and Gijsels v. Belgium, Application No. 19983/92, judgment of 24 February 1997, paragraph 53.
50. Carrie Menkel-Meadow, Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR", 15 *Ohio State Journal on Dispute Resolution* 19 (1999); and Jean R. Sternlight, Creeping Mandatory Arbitration: Is It Just?, 57 *Stanford law Review* 1631 (2005), p. 1651.
51. Lorna McGregor, Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR, *supra* note 36.
52. See, for example, Owen M. Fiss, Against Settlement, 93(6) *Yale Law Journal* (1984), p. 1073.
53. See also paragraph 59 below.
54. Frank Fowlie, Colin Rule and David Bilinsky, Online Dispute Resolution: The Future of ADR, 22(1) *Canadian Arbitration and Mediation Journal* (2013), p. 53.

50. Another concern is that respondents may refuse to participate in ODR when invited by the initiating party. Still, there was consensus among the experts testifying before our committee that the engagement in ODR should continue to be voluntary. ODR providers can be expected to design their systems and provide their services in a manner that will enhance potential users' trust in their fairness and efficiency. It appears logical to assume that if the parties are not satisfied with the handling and resolution of their complaint – which does not necessarily depend on whether they "won" their case or not[56] – they will stop using it. Nevertheless, I am convinced, as noted above, that governments can play a key role in promoting this trust, thus creating incentives for the use of ODR procedures.

51. Further, even when a party does agree to participate voluntarily, there is a risk that the losing side may fail to comply with the outcome, giving rise to the question of how ODR decisions can be enforced. Here again, a trustmark system might provide a solution: it could be envisaged, for instance, that if a company wants to bear an official trustmark, it must undertake to implement a certain percentage (namely 98%, as in the case of Youstice, the company of one of our experts) of the decisions made by the adjudicator. In this vein, I tend to agree with what Ms Havlova suggested during the committee's second hearing, namely that ODR should be binding on the stronger party (i.e. the retailer or trader) but not on the weaker party (i.e. the consumer or customer), at which point the latter may then initiate a new proceeding in court if dissatisfied with the outcome of ODR. Importantly, in my view, there must either be a clear time limit for the ODR process so that the party does not forfeit the right of access to court because the statute of limitation period has expired, or it must be ensured that this limitation period be suspended while the ODR procedure is underway.

52. While being a proponent of the right to a judicial appeals procedure, I am conscious that it is inherent in the nature of ODR decisions that instituting an appeal procedure within the ordinary court system may be impractical, notably since the reasons that prompted the parties to engage in ODR in the first place may prevent them from availing themselves of the court system for the appeals procedure. I therefore see a need for developing practical and effective methods of out-of-court enforcement.[57] In the future, I would envisage that "cyber-courts" that are either supervised or provided by State authorities and that satisfy all the requirements of Article 6 of the European Convention on Human Rights could carry out this function.[58]

53. There may be additional challenges to designing ODR procedures in such a way as to ensure respect for the basic rights of its users. For example, ODR providers, probably to an even larger extent than courts, must pay acute attention to safeguarding the privacy and authenticity of communications. ODR users will send documents, forms, and identifying information over the Internet to the other party and possibly also to mediators or arbitrators, which opens up the possibility of tampering with records containing confidential or sensitive personal information. It would appear that one possible solution for ensuring data security is encryption. Similarly, in online arbitration and mediation, ensuring the confidentiality of the neutral third party will generally be crucial.[59] In order to promote participation in ODR procedures, potential participants need to feel reassured that there is low risk involved with respect to violations of privacy.[60] ODR providers should inform users up front of the ways in which their information is stored, used and disposed of.[61]

54. Finally, and having regard to the Court's case law outlined above (in paragraphs 32 to 34), it is clear that the essence of the rights enshrined in the Convention, such as the right to an independent and impartial third party and the right to have a dispute settled within a reasonable period of time, must not be sacrificed.[62]

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55. See Christopher Hodges et al., *Consumer ADR in Europe. Civil Justice Systems* (Oxford: C.H. Beck/Hart/Nomos, 2012), pp. 199-200; Pablo Cortés, *A new regulatory framework for extra-judicial consumer redress: where we are and how to move forward*, *supra* note 14, pp. 17-18 (with further references); and Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford: Oxford University Press, 2008), p. 224.

56. See the research referred to in Orna Rabinovich-Einy and Ethan Katsh, Digital Justice, Reshaping Boundaries in an Online Dispute Resolution Environment, *supra* note 16, pp. 16-17, showing that the decisive factor in parties' assessment of a dispute resolution process relates to the latter's perceived procedural fairness.

57. See Pablo Cortés, A new regulatory framework for extra-judicial consumer redress: where we are and how to move forward, supra note 14, p. 23 (arguing that "[o]ut-of-court enforcement is also indispensable for a consumer redress system that is speedy and cost effective").

58. See also Thomas Schultz, An Essay on the Role of Government for ODR: Theoretical Considerations about the Future of ODR**,** Proceedings of the United Nations Economic Commission for Europe (UNECE) Forum on "Online Dispute Resolution (ODR)" (Geneva, Switzerland, 30 June-1 July 2003), pp. 5 and 8.

59. Often it is precisely the assurance of confidentiality which accounts for the popularity of ODR and ADR and results in high success rates due to the openness of the parties.Commission of the European Communities, Green paper on alternative dispute resolution in civil and commercial law, *supra* note 38, paragraph 79.

60. Ethan Katsh, Online Dispute Resolution: Some Implications for the Emergency of Law in Cyberspace. 10(3) *Lex Electronica* (2006), p. 7.

61. See, in this connection, Esther van den Heuvel, Online Dispute Resolution as a Solution to Cross-border E-disputes: An Introduction to ODR, August 2000, www.oecd.org/internet/consumer/1878940.pdf.

But the level of safeguards in online out-of-court dispute settlement procedures will vary with the specifics of the ODR system in question. The different levels of procedural safeguards within the ODR process must be set by the State, which must also ensure minimal procedural protections.

55. Aside from these risks, there exist practical obstacles to further expanding the use of ODR procedures: first and foremost, potential users' lack of awareness of the benefits of ODR and trust in the system. Scholars as well as the experts before our committee have pointed to the significant role that governments can play in spreading information about ODR and encouraging potential users to trust in the process. Governments can – and I would encourage them to – accredit ODR facilities and continuously monitor their compliance with European standards of due process, transparency, fairness, impartiality and consistency. They can establish clearing houses like the EU system described above, and provide for online appeals procedures.[63] The Council of Europe can contribute to the promotion of ODR by continuing to take stock of ODR procedures utilised by member States to ensure that the procedures and practices promote judicial efficiency while continuing to protect the rights of their users.

56. Another potential impediment to the development of ODR relates to translation needs. An integral element of ODR systems which aim to tackle cross-border disputes will have to be translation support. The EU ODR portal places significant emphasis on translation by making complaint forms available in all official languages of the European Union, translating the complaint form into the respondent's language and translating information necessary for the resolution of the dispute. One limitation of the EU system is that, although the portal itself is offered in all EU languages, the actual dispute resolution process will be conducted in the language chosen by the ADR entity.[64] Further development of, and emphasis on, multilingual mediation may facilitate the creation of a process of more seamless and comfortable communication between mediators and parties to the disputes.[65] I invite member States to reinforce their efforts in this respect.

2.2.8. Some concluding remarks on ODR

57. ODR procedures involve complex legal and human rights considerations. In this respect, some types of disputes may lend themselves well to ODR, whereas for others, resorting to online forms of dispute settlement may be inappropriate for reasons related, for instance, to a potential risk of creating, perpetuating or even deepening inequalities of arms.

58. Typical disputes for which ODR may be well suited are evidenced by the types of disputes dealt with by existing ODR systems, and could include: commercial disputes between a buyer and a seller; disputes involving debts or damages where liability is not challenged; recovery of personal property; specific performance of an agreement on services or personal property; landlord-tenant disputes and certain family law cases in which the family members are separated by great geographical distance.

59. Conversely, there may be cases for which online dispute resolution would be inappropriate. Here, I would distinguish disputes that could be appropriate for face-to-face ADR but not ODR, from disputes which would be inappropriate for ADR generally. As to the former, and taking up the last example just given, one may argue that offline mediation should be favoured to court proceedings in child custody disputes, for it bears the potential of preserving existing relationships. Conducting such proceedings online may unduly depersonalise these highly personal matters, thus undercutting the very objective of out-of-court settlement. Also, most criminal cases, in particular those involving a large amount of physical evidence are ill-suited for online dispute resolution. An example of the latter relates to Article 48.1 of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210), which prohibits mandatory alternative dispute resolution processes in domestic violence cases. I fully endorse both the approach taken in the convention and the assessment thereof made in Mr Badea's above-mentioned report. A non-adversarial setting is not adequate for cases involving allegations of violence.

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62. Susan Schiavetta, The Relationship Between e-ADR and Article 6 of the European Convention of Human Rights Pursuant to the Case Law of the European Court of Human Rights, 1 *Journal of Information, Law and Technology* (2004). See also Committee of Ministers Recommendation Rec(2001)9, which stresses that "alternative means to litigation must respect the principles of equality and impartiality and the rights of the parties".

63. Thomas Schultz, An Essay on the Role of Government for ODR: Theoretical Considerations about the Future of ODR, *supra* note 58, pp. 3-5.

64. Pablo Cortes and Arno R. Lodder, Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress, *supra* note 20, p. 34-36.

65. Demand for multilingual mediators is expanding and in the long run mediators can be expected to transition from simple knowledge of the language to more extensive understanding of the parties' culture and traditions. Orna Rabinovich-Einy, Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age, *supra* note 13, paragraph 107.

60. On a more general note, I agree with the view expressed by the three experts who testified before the committee that engaging in ODR should not be mandatory.[66] ODR processes should be voluntary in nature and employed in situations where their advantages best come to bear.

61. Besides, I would argue that there should always be a possibility for judicial review of ODR outcomes. I believe it would not only promote people's trust in online out-of-court settlement, but also ensure that the fair trial guarantees enshrined in the convention are upheld, if ODR mechanisms were supplemented with procedural safeguards that include an opportunity for judicial review by a body capable of reviewing both the facts and the law underlying the ODR decision, and of overturning the latter for failure to comply with minimum standards of due process.[67]

62. It can also be concluded that ODR, while potentially able to help many persons to resolve their disputes, is certainly not a panacea. It is true that one of the advantages of ODR vis-à-vis conventional litigation seems to be ODR's lower cost. But the promotion of alternative forms of dispute resolution, whether online or offline, cannot be the sole response to cost-related challenges in the courts. The judicial system itself can and should be made more efficient (and cost-effective). This leads me to the last point in my report, namely the integration of information and communications technology (ICT) in the courtroom, which could help make conventional courts more accessible.

2.3. Integrating information and communications technology in the courtroom

2.3.1. The use of ICT in court proceedings

63. Integrating ICT in judicial proceedings is not a novel issue for the Council of Europe. In Resolution 2054 (2015) on equality and non-discrimination in the access to justice, the Assembly called on member States to "promote and improve legal awareness by exploring and implementing specific information mechanisms and innovative communication strategies" (paragraph 4.1). CEPEJ, in its 2013 Revised Guidelines on the creation of judicial maps to support access to justice within a quality judicial system, and the CCJE, in its Opinion No. 14 on "Justice and information technologies (IT)", have advocated the increased use of ICT in the courts. Whereas the former examines whether ICT may alleviate the negative effects of the above-mentioned recent trend towards court consolidation (merger of local courts) on access to justice, the latter explores the role of ICT in reinforcing the safeguards enshrined in Article 6 of the Convention and concludes that ICT may improve access to justice and decrease the length of judicial proceedings.

64. ICT can be integrated into the judicial system in two different ways. First, courts may utilise ICT in their external communication, which includes, but is not limited to, the use of videoconferences for remote witness testimony, paperless procedures and audio and/or video recording of hearings. Videoconferencing allows a witness to testify from a distant or undisclosed location or from a room adjoining the courtroom to avoid directly facing the accused; this is considered a useful tool for protecting witnesses.[68] The Assembly welcomed the increased use of video-link technology for witness testimony in Resolution 1784 (2011) on the protection of witnesses as a cornerstone for justice and reconciliation in the Balkans. Paperless procedures refer to the use of electronic summons, filings and signatures. The use of paperless procedures is growing within national court systems around Europe. The European Union has also encouraged the use of e-filing through the recently created European Small Claims Procedure, a written procedure for resolving cross-border claims under 2 000 euros in national courts. The procedure allows claimants to transfer information and evidence to the court online to the extent permitted by the member State with jurisdiction over the claim. However, attempts to promote e-filing and electronic submissions are currently limited to a few countries only, whilst most member States continue to require documents to be sent by mail.

65. The second category of ICT usage, namely in courts' internal communication, *inter alia* entails the incorporation of automated case management systems, electronic case law databases and sentencing support. Automated case management systems allow court employees to schedule hearings, assign cases to

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66. Mr Lodder argued that mandatory use of ODR was problematic and that individuals should have the option of going to court; Mr Ross stated that he did not see a need to make the use of ODR mandatory and Ms Havlova asserted that it would be neither possible nor probable to make the use of ODR mandatory.

67. On the availability of a judicial appeal, see also Lorna McGregor, Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR, *supra* note 36. The author also points out that the Court may declare an application admissible if the case follows on from a settlement agreement reached through e-mediation or non-binding e-arbitration; see ibid.

68. Karen Kramer, Witness Protection as a Key Tool in Addressing Serious and Organized Crime, paper presented at the Fourth Regional Seminar on Good Governance for Southeast Asian Countries on "Securing protection of witnesses and whistle-blowers" (Manila, 6-9 December 2010), p. 7.

judges and carry out other functions electronically, expediting these tasks when compared to paper-based case management. Electronic case law databases assist judges and (where applicable) staff lawyers in researching case law. Sentencing support systems provide judges responsible for sentencing decisions with easy access to sentencing information on similar cases, whilst not restricting the judges' judicial discretion,[69] with the aim of ensuring greater consistency in the practice of different courts and thus fostering equal treatment and legal certainty.

2.3.2. Maximising the benefits of ICT in court proceedings

66. The aforementioned examples suggest that the incorporation of ICT into judicial systems can increase public knowledge about individuals' rights and court proceedings. Besides simplifying access to the justice system and to information on the progress of pending procedures, ICT also has the potential to improve communication between courts and the public. For instance, automated case management systems could speed up court proceedings. Technologies such as electronic case law databases and sentencing support systems may contribute to fairer, more equal and more predictable outcomes.

67. Still, there are some obstacles. In many countries, integrating ICT within the judicial system runs into resource constraints. In the short term, introducing such technologies and training court personnel in their use requires significant investments.[70] Specific figures regarding costs versus savings of courtroom technology are elusive, and governments should continue to monitor technological developments in order to determine the most cost-effective and efficient methods of digitalising courtroom procedures while ensuring that due process guarantees are not negatively affected. Relatedly, the fact that the risk of short-run productivity declines after ICT is introduced highlights the importance of phasing in new technologies. Courts should be aware of the learning curve associated with the integration of new technologies, particularly given the fact that short-term declines in efficiency can limit future investments in ICT. The advanced IT-based case management system of the European Court of Human Rights could serve as an example for the administration of justice in member States.

68. Another factor impeding a greater use of ICT in court proceedings is the potential prejudice to parties unfamiliar with information technology. As mentioned before, many persons still lack access to the Internet. Thus, it may be necessary for some time to preserve traditional means of communication with the courts while offering, though not requiring, paperless procedures.[71]

69. In order to be successful, the use of ICT requires the active involvement and support of judges. As ICT becomes further embedded within the judicial system, judges will likely have an important role to play in identifying and limiting potential risks to parties' procedural rights flowing from ICT.[72] The CCJE's Opinion No. 14 stresses the positive role judges can play in limiting possible prejudice to parties from the integration of ICT and addressing the current needs of the judicial system. I would argue that technology developers should strive to better understand the justice system and collaborate with judges and court staff to ensure that ICT architecture meets the needs of both the courts and the public.

70. Achieving openness and efficiency through the integration of ICT also comes with certain risks regarding data privacy and security. A breach in security could result in forgery, or the disclosure of confidential information (which constitute only two among a number of problems regarding the admissibility of electronic evidence). Against this background, courts must consider mechanisms for enhancing data security and possibilities for creating paperless procedures with a level of safety equivalent to that of traditional paper-based procedures, having regard, in particular, to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108). Courts should consider the use of encryption for non-public court records, as mentioned above with respect to ODR.

71. An example of both the risks and opportunities involved in ICT is witness testimony by videoconference. The growing use of videoconferencing may reduce barriers to participation in trials, particularly for individuals with disabilities restricting their mobility, i.e. their physical access to the courtroom, or their ability to communicate in person;[73] those residing in remote areas; and witnesses taking part in certain sensitive

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69. See, for example, Marco Velicogna, Justice systems and ICT: What can be learned from Europe?, 3(1) *Utrecht Law Review* (2007), p. 137.
70. Consultative Council of European Judges, Council of Europe, Opinion No. 14, 9 November 2011, CCJE(2011)2 Final, paragraph 9.
71. Ibid., paragraph 9.
72. Ibid., paragraph 7.
73. In this respect, see also Frank Fowlie, Colin Rule and David Bilinsky, *Online Dispute Resolution: The Future of ADR*, *supra* note 54, p. 54.

cases. Videoconferencing can potentially broaden opportunities for hearing relevant testimony in cross-border cases. It permits the judge, defence counsel, defendant, prosecution and others present in the courtroom to hear and see the witness in real-time transmission. The location of the witness may be protected through encryption.[74]

72. National courts have already begun to use videoconferencing technology in respect of certain categories of witnesses.[75] Although a number of countries permit videoconferencing for witnesses having to travel long distances within a country, videoconferencing is generally limited to vulnerable witnesses (such as children), anonymous (protected) witnesses and witnesses living abroad. Videoconferencing is not common for witnesses who do not fall within these narrow categories. At the international level, the International Criminal Court and the International Criminal Tribunal for Rwanda are increasingly relying on videoconferencing.[76]

73. However, I am aware that one important limitation of videoconferencing is the inability to benefit from face-to-face interaction. Although video technology provides high-quality transmission and continues to improve, certain key aspects of face-to-face interrogation – including aspects of body language – may be lost. Additionally, transmissions may be intercepted, and the location or identity of the witness may be revealed. Finally, certain types of evidence that a witness may be called upon to identify during his or her testimony may be difficult to authenticate by videoconference.[77]

74. Against this backdrop, courts that use videoconferencing should continue to explore ways to mitigate these disadvantages, such as pursuing technological advances that would improve the quality of the videoconference and encrypting the video signal to protect against interception. Lawyers, judges and court staff should also familiarise themselves with common differences between in-person testimony and videoconference testimony in order to increase their awareness of how these differences may have certain implications for videoconference testimony. For example, persons testifying via videoconference tend to look at the screen to see the other person rather than into the camera, therefore eliminating the appearance of direct eye contact with the people in the courtroom.[78] Understanding this and other differences can help lawyers, judges and courtroom staff to modify their expectations of videoconference testimony, as opposed to in-person testimony.

75. The same is true for other information and communications technologies in court proceedings: if used properly, and if there is a concerted effort of all actors involved to overcome the challenges involved in their introduction and use, ICT can make court proceedings more predictable and more time- and cost-efficient.

3. Conclusions

76. I wish to conclude by stating that 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.

77. The Assembly and its members should recognise and utilise their crucial roles in encouraging the development of ODR and ICT procedures within the Council of Europe and its member States. The Council of Europe and its member States should continue to assess the successes and potential risks of ODR and ICT in terms of access to justice, and keep an eye on developing technologies and their use in ODR and courtroom procedures.

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74. Karen Kramer, Witness Protection as a Key Tool in Addressing Serious and Organized Crime, *supra* note 68, p. 7.
75. European Network of Councils for the Judiciary, Judicial Reform in Europe: Report 2011-2012, 2012, p. 13.
76. United Nations Office of Drugs and Crime, Expert Group Meeting on the Technical and Legal Obstacles to the Use of Videoconferencing: Report of the Secretariat, CTOC/COP/2010/CRP.8, 20 October 2010.
77. Ibid.
78. See, *inter alia,* Eric T. Bellone, Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom, 8(1) *Journal of International Commercial Law and Technology* 24 (2013), pp. 30-31.