

## ONLINE DISPUTE RESOLUTION: QUO VADIS, EUROPE?

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**Abstract.** This article discusses potential issues of current European Union regulations in regard to the online dispute resolution, together with potential reasons for low popularity of this way of resolving disputes. The author analyses Her Majesty's Courts and Tribunals Service (HMCTS) reform programme in England and Wales and compares the online dispute resolution systems as integral parts of courts to the ones functioning independently in the private sector. The article examines the potential for new legal framework promoting the development of online dispute resolution systems in either the private or public sector or in both of them.

**Keywords:** online dispute resolution; ODR; rule of law; HMCTS reform; alternative dispute resolution; courts.

### INTRODUCTION

According to Věra Jourová, European Commissioner for Justice, Consumers and Gender Equality, there are too many European Union citizens who don't trust their justice systems and wait too long for justice to be served (The 2019 EU Justice Scoreboard). Courts have huge backlogs dealing with many minor cases and usually it takes an unproportionable amount of time before decisions in courts are made. It is a legal maxim that justice delayed is justice denied, hence a change in the traditional dispute resolution system is demanded. In addition, technologies are developing rapidly – growth in the use of texting, electronic mail and videoconferencing melts borders between states and reduces distances between people to a minimum. Accordingly, it is creating a perfect environment for dispute resolution to evolve in online platforms. The world is shifting towards an internet-oriented routine where everything is within a reach of a gadget, hence clumsy court systems no longer keep up with current society as such. To sum up, current court systems are inefficient and inconvenient to respond to ever rising disputes.

Online dispute resolution has proven to be a time and cost-efficient method to resolve and contain disputes, however, although it has a vast potential, low implementation of this method shows that there are certain problems why this area does not develop as rapidly as it could. It should be emphasized that dispute resolution is a sensitive area - it directly correlates with peoples' trust in institutions and the rule of law as such. Bearing that in mind, further implementation and popularity of online dispute resolution systems in the private sector raise a question of what kind of opportunities and challenges it could bring.

Online dispute resolution is considered a global phenomenon that requires due consideration of cultural practices, global and local norms, technical and technological standards, and regulatory

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initiatives (Abdel, WMS et al., 2012, p. 8). Current European Union regulations in this regard is poor and demands initiatives and consequently changes.

The HMCTS reform programme in England and Wales' court systems presents new opportunities for online dispute resolution implementation in the public sector and is reshaping the current perception of such way to resolve disputes. Considering the new perspective, Europe has to make a choice whether there is an urge to customise current European regulations respectively.

The goal of this article is to review European Union regulations on online dispute resolution and identify the legal gaps that impede on wider recognition of initiatives in the private sector and potential legal risks of current regulation. This goal is achieved by identifying the issues of a jurisdiction of online dispute resolution and its correlation to the rule of law, recognizing regulatory gaps and reasons why society does not entrust their disputes to systems promoted in the private sector as well as discussing the perspectives of further European Union regulations on further development of online dispute resolution systems.

The author identifies the following problems and perspectives related to the online dispute resolution sub-institute. Firstly, the ambiguity of online dispute resolution definition in legal doctrine. Secondly, the scope of this sub-institute and potential risks to the rule of law. Furthermore, regulatory issues to be resolved in order for private initiatives in online dispute resolution to be further accepted and promoted by society. Finally, the rising potential of transferring online dispute resolution functions from a private sector to a public one.

#### WHAT DO WE MEAN BY ONLINE DISPUTE RESOLUTION?

There is no one definition to Online dispute resolution (ODR) – it varies according to numerous factors. Currently in legal doctrine the term online dispute resolution is being used to describe two distinctive conceptions. The first one – the broader one – indicates that ODR is deemed to be any type of dispute resolution that is mainly organised in the internet platform. For example, if a traditional court was transferred to an online platform, we would think of it as of ODR.

However, historically the idea behind the foundation of ODR suggests a much narrower definition where ODR is a sub-institute of alternative dispute resolution. More precisely, it is a traditional alternative dispute resolution form, such as mediation or arbitration, transferred online, and thus becoming e-mediation, e-arbitration and so forth. Nevertheless, it is worth mentioning that even though most of current ODR systems are on internet-based systems conducted more sophisticated forms of ADR, there are several hybrids or even nothing of the kind systems that are deemed to be ODR systems as well (for example, blind bidding or automated negotiation assistance). Accordingly, it should be emphasized that ODR belongs in the private sector, while online courts are a public service (Susskind, R. 2019, p. 63). For the purposes of this article, a narrow definition of ODR is preferred to avoid confusion in legal sphere.

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## DEFINING THE JURISDICTION OF ODR

The most obvious force driving online dispute resolution during what might be called its early childhood, has been the need to respond to growing numbers of disputes arising out of online activities and involving parties who, because of distance or cost, cannot use the courts (Katsh, 2007). The idea of transferring disputes arising exclusively on the internet to ODR was the core of this then new way of resolving disputes. The European Union support of this idea can be found in Regulation 524/2013 that came into force on 9 January 2016, where it is stated that ODR offers a simple, efficient, fast and low-cost out-of-court solution to disputes arising from online transactions (European Commission's ODR Regulation (No. 524/ 2013)). However, as the system evolved, it went beyond solving disputes that arise online and successfully addressed disputes that originated offline too. Hence, it would be inaccurate to say that ODR can be used or is used for resolving disputes arising exclusively online. On the contrary, ODR is not limited to e-commerce disputes. ODR is particularly useful for all forms of disputes that involve small amounts of money and large distances. In this sense, ODR is an answer to some effects of globalization (Shultz, 2004, p. 73) and accordingly, ODR uses the opportunities provided by the Internet not only to employ these processes in the online environment but also to enhance the processes when they are used to resolve conflicts in offline environments (Prins et al., 2002, p. 278; Katsch, Rifkin, 2001, p. 2). As Graham Ross indicates, there is no reason to limit the application of ODR services to online disputes or to close one's eyes to the value benefits ODR can bring generally to other disputes, or indeed, to assist in the development of dispute resolution generally outside of the court system (Ross, 2003). Nonetheless, the question to what extent should we expand the scope of ODR systems in dispute resolution arises.

There is no reason to disagree with the position of The European Committee on Legal Co-operation that in addition to classifying disputes as 'online' vs 'offline', it may also be useful to develop a typology of disputes, in which it can be ascertained what types of disputes could be resolved through ODR mechanisms and what type of disputes might still require the traditional court process (Technical study on online dispute resolution mechanisms, 2018, p. 13). Nevertheless, it should be noted that to do so can be harder than it seems. A popular opinion is that low value claims should define the scope of ODR (Braeutigam, 2006; Shultz, 2004, p. 73). However, Article 2 of the Regulation 524/2013 expands the scope by indicating that the regulation shall apply to the out-of-court resolution of disputes concerning contractual obligations stemming from online sales or service contracts between a consumer resident and a trader, where both of them are based in the EU, Norway, Iceland or Liechtenstein (European Commission's ODR Regulation (No. 524/ 2013)), meaning that low value requirement is no longer relevant as long as a dispute is in relation to certain contractual obligations. In addition to that, worldwide ODR systems are used to resolve such a wide scope of disputes, that it is practically impossible to group them into one all-encompassing definition. Here are some of them: matrimonial disputes (including divorce), work-related or rent-related disputes (<https://rechtwijzer.nl/>), motor vehicle injury related disputes up to \$50,000, societies and cooperative associations disputes (<https://civilresolutionbc.ca/>), private parking tickets (<https://www.resolver.co.uk/>) and

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others. To conclude, currently there are no boundaries to ODR jurisdiction – where the technological abilities are possible, ODR can be used to resolve basically any kind of dispute. As long as there are no boundaries, the principle of party-disposition and technical abilities allow people the freedom to choose ODR systems rather than traditional courts to resolve basically any kind of disputes. But is this the right approach?

#### IS OUR RULE OF LAW IN JEOPARDY?

Article 2 of the Treaty on European Union states that the union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Accordingly, the preamble of the aforementioned document indicates that member states are confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law (Treaty on European Union and the Treaty on the Functioning of the European Union, 2007). Evidently, rule of law is one of the core principles of the European Union. Yet, there is no one precise definition to the rule of law – the meaning varies between different legal systems – thus, it is important to look a little deeper into what is behind this rule of law in the European Union system. Undoubtedly, one of the most important aspects of the rule of law are legality, legal certainty, prevention of abuse of powers, equality before the law and non-discrimination and access to justice (The Rule of Law checklist, 2016). Rule of law as such, controls the operation of courts – it imposes *inter alia*, that judges must always safeguard the fundamental rights of individuals, the law must be respected and effectively implemented by judges and the judiciary has to be independent.

In the light of these most important rule of law features effective in the European Union, certain concerns regarding the ODR and rule of law should be discussed. Back in 2001 it was remarked that one could ask to what degree online processes, even when led by in-person third parties, can address parties' expectations and needs from a procedural justice perspective (Welsh, 2001). As Richard Susskind observed, if private sector service were to be routinely preferred to public courts, we would be in danger of being governed less by the law of the land than by compromise, unpredictable social norms, and the market itself, none of which seek directly and publicly to uphold justice (Susskind, R. 2019, p. 22). Indeed, as to this day decision-making process of ODR systems in the private sector is usually based on algorithms, psychological aspects, dispute-solving strategies and other means rather than on law. And it is logical – if, on the contrary, decisions in ODR systems were based on law it would deny the whole idea behind this sub-institute to be an alternative to traditional courts and being conducted mostly online, because only judges in traditional courts have an exclusive right (and duty as well) to administer justice. In accordance to the just-mentioned rule of law standards, only judges have a duty to respect the law and make decisions based on applicable law accordingly. Given the above, we must ask ourselves, whether further development in ODR systems is a step forward or a step back? If eventually ODR systems become more popular than traditional courts, are we going to live in the world that is based on compromises rather than based on what is lawful and just? Are we gradually shifting back to the anarchy and sombre times before courts?

On the other hand, it should be noted, that *laissez-faire* allows people to choose where and how they want their disputes to be resolved. Moreover, it wouldn't even be objectively possible to regulate all existing ways to resolve disputes, since some of them are rather untraditional – for example, flipping a coin, numeration or even spells. Another important factor is that such alternative dispute resolution measures formed over time, meaning they became traditional and were accepted by the society.

To conclude, it is not possible for traditional courts to usurp the field of dispute resolution, however we have to find a way so that this freedom to choose ODR systems to resolve any kind of disputes won't eventually lead us to, in Thomas Hobbes's words, *bellum omnium contra omnes* (war of all against all) (Hobbes, 2018).

#### THE HMCTS REFORM PROGRAMME

Before moving forward to the final segment of this article concentrating on what is awaiting in this regard in Europe, let's briefly overview a new court reform project being implemented in England and Wales. Even though United Kingdom is no longer a member state of the European Union as of 1<sup>st</sup> February earlier this year, I believe that United Kingdom has and will continue to have a huge impact on the development of the European Union. Given that £ 1 billion is being invested to transform the court system of England and Wales, there are some weighty arguments to look a little deeper into what is happening there.

According to the Online Dispute Resolution Advisory Group, set up on 25th April 2014 to find ways to increase the use of online dispute resolution within the United Kingdom's justice system, in addition to ensuring that judges in courts are affordable and available to resolve disputes, it is also vital to help prevent disagreements that have arisen from escalating excessively and, furthermore to find ways of preventing legal problems from arising in the first place to improve access to justice (Online Dispute Resolution for Low Value Civil Claims, 2015). In order to do so, it is suggested to establish an Internet-based court service with extended court functions. The main idea is that court system is not simply dispute resolution by judges whether or not online, but to extend this concept to help contain and avoid disputes through a 3-level-system as well. Here level 1 is called online evaluation of the problems, it aims to help people evaluate their problems and understand options available to them. If problems are not resolved through initial online evaluation in level 1, then users proceed to a second stage – level 2, called online facilitation where case facilitators will be working to contain the disputes. They will review papers and statements from parties, and then help them by mediating, advising, or encouraging them to negotiate - a mix of alternative dispute resolution and advisory techniques will be used. If parties are willing to proceed to online judges making decisions, level 3 – called dispute resolution – will be reached. Here dispute resolution will be conducted by judges in an online platform. Accordingly, such decisions will be binding and enforceable and will have the same status as decisions made by judges in traditional courts nowadays.

The reason why this reform programme is important to ODR system lies behind the level 2. The spirit of level 2 is that disputes are contained instead of allowing them to escalate via mediation and/

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or arbitration. Basically, dispute containment is the core of alternative dispute resolution, meaning it is the core of the online dispute resolution as well. Considering what was mentioned above, the first impression might be that private initiatives in the field of ODR will be welcome to help judges in level 3 to reduce their backlog. However, as Richard Susskind indicates, level 2 should be an integral part of the 'extended court', rather than a private sector helping courts (Susskind, R. 2019, p. 117, 136, 140). To conclude, dispute containment as a service shall no longer be an alternative to the public court system, but it would rather become an integral part of it.

#### WHAT'S NEXT IN EUROPE?

On 21 May 2013 the European Union adopted two legal instruments regarding alternative dispute resolution: Directive on consumer ADR (came into force 9 July 2015) and Regulation on consumer ODR (came into force on 9 January 2016). The Directive on consumer ADR regulates the implementation and functioning of consumer ADR systems and applies only if the ADR procedure is initiated by a consumer, whereas the Regulation on consumer ODR implements an EU ODR platform for consumers and businesses trading electronically and regulates aspects related to the platform. On 10 November 2015 the Committee of Legal Affairs and Human Rights of the Council of Europe adopted a resolution, where member states were encouraged 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 (Resolution of the Committee of Legal Affairs and Human Rights of the Council of Europe, 2015). On 25 April 2018 European Commission issued a communication "Artificial Intelligence for Europe" where it was announced that the Commission will support AI technologies both in basic and industrial research. This includes investments in projects within key application areas such as <...> public administrations (including justice) (Communication from the Commission, 2018). In December 2018 the European Ethical Charter on the use of artificial intelligence in judicial systems and their environment was adopted, where it was indicated that artificial intelligence can be used to resolve disputes online as well (European Ethical Charter, 2018). These cornerstone provisions adopted in the European Union legal system show that the European Union is supporting ODR initiatives and further development of ODR. However, it should be noted that the following two issues have to be resolved in order for private initiatives in ODR to be further accepted and promoted by society.

Firstly, the enforcement of decisions made using ODR systems has to be ensured. No system of dispute resolution can function effectively if the outcome of the procedure is not enforceable. Accordingly, it is necessary to implement systems of self-enforcement of outcomes of ODR procedures: cost-effective channels of private enforcement must be established, so as to ensure the efficiency of ODR without relying on the support of state courts and enforcement authorities (Ortolani, 2016, p. 595). If the enforcement of decisions made in ODR platforms is not ensured, for example, if the defendant is refusing to pay "amount X" owed to the claimant according to a decision made by the ODR system, the claimant has to go to a traditional court to have this decision enforced. In such way,

the whole idea of ODR – to ease the backlog of courts and provide faster and cheaper services is nullified. It is considered to be one of the main aspects why ODR systems are currently not as popular as they could or potentially should be.

Secondly, main standards of ODR systems have to be set. ODR requires governmental intervention to develop fully, to lessen the gap between its potential and its actual use - a gap that is vast. The argument for this assertion follows a simple path: ODR is in need of trust, trust can be provided through architectures of control, and such control should be in the hands of government in order to induce trust (Schultz, 2004, p. 72). Online dispute resolution in all its many forms must establish a set of standards in order to gain further acceptance of society. It is said that confidentiality and security are the most obvious standards to be implemented – it is thought at present, a great deal of unfamiliarity and it is an area which needs a set of standards, in particular reassurance to be given to potential litigants about the security and confidentiality of their communications (Online Dispute Resolution for Low Value Civil Claims, 2015). Accordingly, another problematic aspect that could be escalated – whether each state must ensure the reliability of ODR systems before promoting them as alternatives to traditional courts? It should be noted that before such standards are available, links to private ODR systems shouldn't be provided by the governments and consequently it is understandable why society does not trust such systems and accordingly they do not explore their potential. For the time being, Council for Online Dispute Resolution has prepared global standards for ODR programs (<https://icodr.org/standards/>), however, as mentioned, such standards are still required at the European Union level as well.

The issue of legal certainty connects to our present problem because legal certainty is about predictability and expectations. Predictability and expectations constitute the bedrock of confidence. This implies that, among dispute resolvers, only courts are able to increase predictability and thus confidence in a field they have jurisdiction over because they establish precedents that others and they themselves will follow. By setting rules, they increase their own predictability and thus the confidence in them, and they increase predictability in a given field and thus the confidence in this field (Schultz, 2004). One may also argue that government is the ideal host for dispute resolution, because government has a strong incentive to resolve disputes to keep society functioning smoothly and it usually has no vested interest in the outcome of most of the matters it is in charge of deciding (Rule, 2002, p. 174). To sum up, once some basic standards for ODR are in place, it is likely that society will trust their disputes to this perspective way of resolving them better.

To conclude, we are on a crossroad and have some serious decisions to make on how ODR should evolve in the European Union legal system – whether we continue to support private initiatives in the ODR section (hence, accordingly we need to adopt ODR standards and ensure enforcement of such decisions) or do we accept the England and Wales model and transfer ODR systems' functions to courts in the public sector? On one hand, ODR systems provided by the private sector offer less costly and faster services while developing and adapting new technological solutions more efficiently. On the other hand, providing justice in a form of enforceable decisions made by independent judges with a certain legal background is an exclusive right granted by the states to courts only. Both courts

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and ODR exist to resolve disputes, however, courts go further – they provide legal certainty and have the power to create rules, whereas ODR systems don't have such powers (Schultz, 2004, p. 85), at least not currently. Finally, Europe can support both private and public initiatives in the ODR section, the main idea is to get out of the stagnation and adopt regulations respectively.

## CONCLUSIONS

1. There are no restrictions in the European Union legal system in relation to what kind of disputes can be entrusted to ODR systems to resolve. Regulation 524/2013 only regulates out-of-court resolution of disputes concerning contractual obligations originating from online sales or service contracts, however, it is not asserted anywhere whether there are any kinds of disputes that cannot be settled in this manner. Accordingly, on the basis of the principle of party-disposition, any kind of dispute can be resolved using ODR systems. Such regulation may lead to the following potential issues. Firstly, current ODR systems in the private sector are generally based on algorithms, psychological aspects, dispute-solving strategies and other rules rather than on law - decision-makers are not obliged to follow the legal norms when making a decision. Consequently, people using this method are at risk of their dispute is being resolved in an unjust manner. Secondly, if gradually ODR services provided in the private sector become more popular than public courts a potential issue of living in a system based on compromises rather than on what is just and legal arises and rule of law might be in danger.
2. Current European Union regulations are not sufficient to promote a wider use of ODR systems in the private sector due to requiring the enforcement of ODR decisions to be ensured and secondly, standards of ODR systems having to be set. It is believed that implementing these previously mentioned regulations should encourage people to use alternative dispute resolution systems online.
3. A new approach in relation to the functions of ODR systems was presented with The HMCTS reform programme. Europe has to decide whether to take-over this model and target its regulation to promote ODR initiatives in the public sector, the private sector or in both and adopt related regulations respectively.

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