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16 June 2021

1407th meeting, 16 June 2021

10 Legal questions

10.1 European Committee on Legal Co-operation (CDCJ)

Guidelines of the Committee of Ministers of the Council of Europe on online dispute resolution mechanisms in civil and administrative court proceedings

Preamble

The Committee of Ministers,

Considering that the aim of the Council of Europe is to achieve a greater unity between the member States, in particular by promoting the adoption of common rules in legal matters;

Considering the necessity to provide practical guidance for policy makers responsible for designing online dispute resolution (ODR) mechanisms in the member States, with a view to ensuring that such mechanisms are compatible with Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, the "European Convention on Human Rights");

Considering that these guidelines should aim at establishing a common framework and not at harmonising the national legislations of the member States;

Considering the need to respect the diversity of the legal systems of the member States;

Acknowledging the progress made by the member States in introducing online dispute resolution mechanisms in their legal systems;

Noting that developers of online dispute resolution mechanisms (whether public or private) may not be sufficiently aware that such mechanisms should be accompanied by robust human rights safeguards;

Highlighting the need for member States to ensure that such mechanisms are compatible with the key principles of a fair trial and effective remedy set out in the case law of the European Court of Human Rights, including the principles of oral hearing and equality of arms,

Adopts the following guidelines to serve as a practical tool for the member States, to assist them in adapting the operation of their online dispute resolution mechanisms to the provisions of Articles 6 and 13 of the European Convention on Human Rights and the principles developed thereto in the case law of the European Court of Human Rights, and invites the member States to disseminate these guidelines widely with a view to their implementation by those responsible for designing and implementing online dispute resolution mechanisms.

Purpose and scope

The guidelines apply to online dispute resolution (ODR) mechanisms used by courts. They provide guidance in relation to fair procedure, transparency in the use of ODR and requirements for hearings, special issues related to the ICT nature of ODR techniques and other issues not stemming from the jurisprudence of the European Court of Human Rights. They do not cover internal management of electronic case files by the courts or alternative dispute resolution (ADR) mechanisms, such as mediation and conciliation. However, member States may wish to extend their application to ADR if and where appropriate.

Definitions

For the purpose of these guidelines, the terms below have the meanings indicated:

Court

"Court" refers to a body within the concept of a "tribunal" under Article 6 of the European Convention on Human Rights, that is a body which:

- is established by law;
- is governed by a procedure prescribed by law;
- determines matters within its competence by issuing binding decisions;
- has full jurisdiction over the case;
- is independent and impartial.

Online dispute resolution (ODR)

"Online dispute resolution (ODR)" refers to any online information technology (IT) used by a court to resolve or assist in resolving a dispute.

Artificial intelligence (AI)

"Artificial intelligence (AI)" refers to a set of scientific methods, theories and techniques the aim of which is to reproduce, by a machine, the cognitive abilities of a human being.

Information and communication technology (ICT)

"Information and communication technology (ICT)" refers to technology that provides access to information through telecommunications.

Fundamental principles

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

The guidelines

Fair procedure

Access to justice

1. ODR should be easily understood, affordable and user friendly so that it can be used comfortably by as many people as possible.
2. Parties should be informed about how ODR operates, how to file an application, how to monitor progress of the proceedings and how to access decisions.
3. Use of ODR should not be disadvantageous to the parties or give unfair advantage to one of the parties.
4. ODR should be designed and implemented in accordance with internationally recognised technical standards, in order to allow its use by as many people as possible with as much autonomy as possible.
5. The cost of court proceedings involving ODR should not be higher than those not involving an ODR element.
6. Parties should be notified when it is intended that their case will be processed with the involvement of an AI mechanism.

Equality of arms

7. Participation in ODR proceedings should not prejudice an individual's right to participate effectively in the proceedings or their right to an effective remedy.
8. ODR proceedings should ensure an independent and impartial adjudicative process.
9. Parties to proceedings involving ODR should have knowledge of the materials in the case file, including those submitted by the other parties; they should have access to these materials and sufficient time and means to acquaint themselves with their contents.

Evidence

10. Fairness requires that parties to proceedings involving ODR should be permitted to present evidence in a manner that does not place them at a disadvantage vis-à-vis other parties.
11. Parties should have the opportunity to present their case and to contest evidence submitted by other parties.
12. ODR should respect the principles of legal certainty and protection of the legitimate expectations of the parties.

Effective proceedings

13. Implementation of ODR should aim to improve the effectiveness of the proceedings by allowing parties to participate without being physically present in court and by streamlining the whole process as far as possible.
14. Technical difficulties in the functioning of ODR should not prevent the courts, even for short periods, from examining cases and performing appropriate procedural steps.
15. Where national law provides that ADR constitutes a prerequisite for instituting court proceedings, including those involving ODR, this should not protract the dispute resolution process unnecessarily or result in a substantial increase in costs for the parties.

Delivery of the decision

16. The outcomes of the proceedings involving ODR should be transparent.
17. Any final decision reached using ODR should be made public in accordance with the jurisprudence of the European Court of Human Rights.

Right to a reasoned decision

18. Sufficient reasons should be given for decisions reached using ODR or with the assistance of ODR, in particular the decisions reached with the involvement of AI mechanisms.

Enforcement of the decision

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

Right to judicial review in cases involving purely automated decisions

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

Transparency in the use of ODR and requirements for hearings

Transparency in the design and operation of ODR mechanisms

21. The design and operation of ODR mechanisms should be made transparent and explained in an intelligible manner using clear and plain language.

Public and oral hearings

22. The use of ODR mechanisms should guarantee appropriate ways to ensure public scrutiny of proceedings.
23. The use of ODR in courts should not in itself deprive parties of a right to request an oral hearing before at least one level of jurisdiction.

Other issues of transparency, including public scrutiny

24. Parties to proceedings involving ODR should be informed about any potential conflicts of interest related to the operation of an ODR mechanism.
25. ODR should be designed in such a way that all documents generated, including the final judgment and other decisions or notifications, are written in clear and plain language.
26. Procedural rules applicable to ODR should be transparent.
27. Parties to proceedings involving ODR should be aware of and have the ability to access information concerning the procedural rules applicable to ODR.

Special issues related to the ICT nature of ODR techniques

Cybersecurity

28. An appropriate level of cybersecurity of ICT products, services and processes facilitating ODR should be ensured in order to meet the requirements in Articles 6 and 13 of the European Convention on Human Rights and to ensure the necessary trust and confidence in ODR mechanisms.
29. The level of cybersecurity of ICT products, services and processes facilitating ODR should be considered appropriate when safeguards are provided against:
- unauthorised access to confidential data;
 - the unwanted alteration or deletion of data;
 - the technical impossibility to access the system and the data contained therein for those who should have access;
 - uncertainty over the identity of the judge and other professionals involved in ODR proceedings;
 - identity fraud by parties.

Human rights protection, including personal data protection

30. Member States should assess the impact of ODR use, throughout its entire life cycle, on individuals and social groups, and identify the specific requirements for ethical and fair use of ODR and respect for human rights as part of the development and operation of any ODR mechanism.
31. The use of ODR mechanisms should not infringe data protection rights, including, where applicable, the right to information, the right to access data, the right to object to processing data and the right to erasure.
32. Technical and organisational measures should be implemented to ensure that rules on personal data protection are respected, both when determining the means of processing and during data processing.
33. ODR mechanisms should be designed and developed by applying the principles of personal data protection by default and by design, in particular by:
- implementing technical and organisational measures to ensure that personal data are protected by the application of, in particular, anonymisation or pseudonymisation techniques;
 - introducing access and reuse restrictions by the competent authorities who maintain control of the data.
34. Outsourcing the technology used in ODR should not lead to processing of personal data for commercial purposes.

Other issues (not stemming from the jurisprudence of the European Court of Human Rights)

Testing, monitoring, upgrading, research and development

35. Member States are encouraged to allocate appropriate public funding for the development of ODR mechanisms to be used in court proceedings, including relevant research.
36. The ease of use of ODR mechanisms should be sufficiently tested before implementing the latter.
37. The judiciary, lawyers and other relevant stakeholders should be actively involved in designing ODR mechanisms.
38. Continuous monitoring and timely upgrading of ODR mechanisms, ensuring safety, fairness, efficiency and other quality standards, should be included into the life cycle of all such systems.


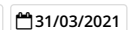


Awareness raising, training and education

39. Member States should encourage individuals and legal entities to use ODR mechanisms, in particular by informing them about the existence of such an option, its reliability and its compatibility with the requirements of the European Convention on Human Rights.
40. Judges, legal practitioners and all those involved in court proceedings should be made aware of the benefits and value of ODR mechanisms and their compliance with the European Convention on Human Rights as well as with other relevant laws.
41. Judges and legal practitioners as well as court staff should have access to appropriate training on ODR, delivered by legal and IT professionals. The training should be as practical as possible and tailored to the needs of specific target groups.
42. As ODR mechanisms should not compromise parties' procedural rights, judges should be able to identify risks that might result from using ICT and to eliminate such risks.
43. Legal education should include modules on the use of ICT tools in courts.

Related documents


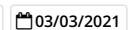


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European Committee on Legal Co-operation (CDCJ) - c. Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law

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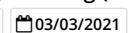


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European Committee on Legal Co-operation (CDCJ) - b. Study on the feasibility of a new, binding or non-binding, European legal instrument on the profession of lawyer - possible added-value and effectiveness

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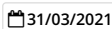
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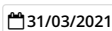


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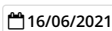


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[1400/10.2c] European Committee on Legal Co-operation (CDCJ) - Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law - Explanatory Memorandum

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Guidelines of the Committee of Ministers of the Council of Europe on online dispute resolution mechanisms in civil and administrative court proceedings - Explanatory Memorandum

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