


## Critical evaluation of new Council of Europe guidelines concerning digital courts

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**Abstract:** Digitalisation of courts plays an increasingly important role in dispute resolution. It has the ability to improve access to justice by facilitating faster and less costly access to courts, thereby making dispute resolution more effective and efficient. However, wide use of digital courts also has the potential to restrict access to justice. Attention needs to be given to issues of authentication and identification of the parties, digital divide, cybersecurity and personal data protection. This paper concerns recent guidelines of the Council of Europe that aim to fully address these issues and assist member States in ensuring that implemented digital techniques in the courts do not undermine human dignity, human rights and fundamental freedoms. The author answers and critically evaluates the specific questions and doubts relating to the content of the guidelines. The author's recommendations can be taken into consideration by the Council of Europe in future updates of the guidelines.

## 1. Introduction

Digitalisation of courts plays an increasingly important role in dispute resolution. It has the ability to improve access to justice by facilitating faster and less costly access to courts, thereby making dispute resolution more effective and efficient<sup>1</sup>. The concept follows from the ongoing transformation of na-

<sup>1</sup> Alan Uzelac and Cornelis Hendrik (Remco) van Rhee, “The Metamorphoses of Civil Justice and Civil Procedure: The Challenges of New Paradigms – Unity and Diversity,” in

tional judicial systems allowing remote access for the parties<sup>2</sup>. It is mainly designed to facilitate electronic communications with the courts<sup>3</sup>.

Accelerating development of cyber justice in the European countries is due to the COVID-19 pandemic crisis. It has forced the implementation of new forms of communication in legal proceedings<sup>4</sup>. In Lithuania online filing, online payment of court fees and digital cases materials with online access are available in all civil and administrative cases using the centralised e-justice system LITEKO. In France it is possible to initiate administrative and commercial proceedings online on dedicated portals and to submit court documents in an electronic way<sup>5</sup>. Ireland has an online court platform for certain small claims<sup>6</sup>. In Poland the procedure for payment orders is fully electronic<sup>7</sup>. The claim is submitted through an individual

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*Transformation of Civil Justice, Ius Gentium: Comparative Perspectives on Law and Justice*, ed. Alan Uzelac and Cornelis Hendrik (Remco) van Rhee (Cham: Springer, 2018); See further Julia Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge: University Press, 2009); In Polish literature: Kinga Flaga-Gieruszyńska, "Nowe oblicza prawa i informacji o prawie w dobie informatyzacji," in *Informatyzacja postępowania cywilnego. Teoria i praktyka*, ed. Kinga Flaga-Gieruszyńska, Jacek Gołaczyński, and Dariusz Szostek (Warszawa: C.H. Beck, 2016), 1.

<sup>2</sup> Lack of significant improvement in the functioning of the common courts is caused by incorrect and short-sighted definition of the objectives of the application of modern information technologies in the justice systems – see Jacek Gołaczyński, "e-Sąd przyszłości," *Monitor Prawniczy* 2 (2019): 96.

<sup>3</sup> In this regard, UNCITRAL Technical Notes on Online Dispute Resolution, New York 2017, speaks about "mechanism for resolving disputes through the use of electronic communications and other information and communication technology".

<sup>4</sup> Beata Gessel-Kalinowska vel Kalisz, "Wyrok arbitrażowy w czasie pandemii – dopuszczalność współczesnych form elektronicznych," *Przegląd Prawa Handlowego* 7 (2020): 24–31.

<sup>5</sup> Online Dispute Resolution and Compliance with the Right to a Fair Trial and the Right to an Effective Remedy (Article 6 and 13 of the European Convention of Human Rights). Technical Study on Online Dispute Resolution Mechanisms. Prepared by Prof. Julia Hörnle, CCLS, Queen Mary University of London, Matthew Hewitson (South Africa) and Illia Chernohorenko (Ukraine), Strasbourg, 1 August 2018, CDCJ(2018)5 (hereinafter "Hörnle's Report"), p. 23.

<sup>6</sup> "Hörnle's Report," 28–30.

<sup>7</sup> "Hörnle's Report," 35–36. Since 1.1.2010, cases in the electronic proceedings by writ of payment have been examined by one e-court for the whole of Poland ([www.e-sad.gov.pl](http://www.e-sad.gov.pl)). A plaintiff wishing to bring a case by writ of payment in the electronic proceedings by writ of payment must register on the website provided, download an ineligible certificate

account created on a dedicated IT platform. All acts and documents are available online. Belgium introduced the Central Solvency Register ('Reg-Sol'), a digital platform enabling creditors, authorised agents and interested parties to commence, access or follow up pending insolvency files administered by the Business court<sup>8</sup>. It is expected that the process of courts digitalisation will continue after the recovery phase<sup>9</sup>.

However, wide use of digital courts also has the potential to restrict access to justice by setting up technological barriers to all those who do not have the capacity to use technology. Moreover, attention needs to be given to issues of authentication of data and identification of the parties to the legal dispute, the problem of digital divide, cybersecurity and personal data protection<sup>10</sup>.

To ensure that disputes are resolved fairly, appropriate and adequate international regulations are needed. In Europe such regulations have to follow the judicial guarantees enshrined in the European Convention on Human Rights (hereinafter "the Convention")<sup>11</sup>, especially those pro-

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for verification of the electronic signature, and then send the statement of claim, i.e. a form completed on the Internet. See Gołaczyński, "e-Sąd przyszości," 96.

<sup>8</sup> "Hörnle's Report," 16.

<sup>9</sup> In Polish literature see further: Sławomir Cieślak, "Elektroniczne czynności sądowe – perspektywy rozwoju," in *Informatyzacja postępowania cywilnego. Teoria i praktyka*, ed. Kinga Flaga-Gieruszyńska, Jacek Gołaczyński, and Dariusz Szostek (Warszawa: C.H. Beck, 2016), 13–28; Jan Gąsiorowski, "Ograniczenia, możliwości i funkcjonowanie sądownictwa powszechnego i stałych sądów polubownych w sprawach cywilnych podczas trwania epidemii w Polsce," *ADR Arbitraż i Mediacja* 2 (2020); Jacek Gołaczyński and Dariusz Szostek, *Informatyzacja postępowania cywilnego. Komentarz* (Warszawa: C.H. Beck, 2016); Jacek Gołaczyński and Anna Zalesińska, "Kierunki informatyzacji postępowania cywilnego po nowelizacji kodeksu postępowania cywilnego z 4.7.2019 r.," *Monitor Prawniczy* 7 (2020); Jacek Gołaczyński and Anna Zalesińska, "Nowe technologie w sądach na przykładzie wideokonferencji i składania pism procesowych i doręczeń elektronicznych w dobie pandemii COVID-19," *Monitor Prawniczy* 7 (2020).

<sup>10</sup> Maurizio Arcari, "New Technologies in International (and European) Law – Contemporary Challenges and Returning Issues," in *Use and Misuse of New Technologies Contemporary Challenges in International and European Law*, ed. Elena Carpanelli and Nicole Lazzerini (Cham: Springer, 2019), 357.

<sup>11</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force in 1953, <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c>, accessed September 15, 2021.

vided in Articles 6 and 13 of the Convention<sup>12</sup>. Such regulations recently take the form of guidelines prepared by the European Committee on Legal Co-operation (CDCJ). The final guidelines were finally adopted by the Committee of Ministers on 16 June 2021<sup>13</sup>.

In this paper I'm going to answer the following questions:

- 1) What is the purpose of the guidelines?
- 2) Is the use of the term “ODR” in the title and the content of the guidelines correct?
- 3) What are the fundamental principles of the guidelines?
- 4) Do the guidelines sufficiently address the problem of the use of artificial intelligence algorithms in judicial systems?

The recommendations can be taken into consideration by the Council of Europe in future updates of the guidelines.

## 2. The purpose and character of the guidelines in view of the ECHR Convention

The guidelines largely follow the structure of principles developed in the jurisprudence of the European Court of Human Rights under Articles 6 and 13 of the Convention<sup>14</sup>. The choice of problems addressed in the guidelines are in line with the principle that the provisions of the Convention must

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<sup>12</sup> Article 6 (1) of the Convention reads: “In the determination of his civil rights and obligations (...) everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”, Article 13 of the ECHR reads: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

<sup>13</sup> Available at <https://www.coe.int/en/web/cdcj/online-dispute-resolution-mechanisms>, accessed September 15, 2021.

<sup>14</sup> Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb), updated on 31 August 2019, Council of Europe/European Court of Human Rights, 2019. See also Dovydas Vitkauskas and Grigoriy Dikov, *Protecting the right to a fair trial under the European Convention on Human Rights: A handbook for legal practitioners* (Strasbourg: Council of Europe Press, 2017), available from: <https://rm.coe.int/>

be interpreted in the light of present-day conditions, while taking into account the prevalent economic and social conditions<sup>15</sup>. Currently, accelerating digitalisation of courts have crucial importance for the people's access to the justice.

In the guidelines we see baseline measures that governments, legislators, courts, developers and manufacturers, as well as service providers should follow in order to ensure that implemented digital techniques do not undermine human dignity, human rights and fundamental freedoms. The guidelines aim to assist member States in ensuring that such techniques are compatible with Articles 6 and 13 of the Convention without compromising the benefits.

It must be underlined that the guidelines represent not a “hard” but a “soft” law instrument. Its purpose is not to establish binding legal standards. It serves as a practical “toolbox” for member states to ensure that the practice of their digital courts comply with the requirements of Articles 6 and 13 of the Convention. The courts may assume that fulfilling the requirements set out in the guidelines ensures alignment with the principles developed in the jurisprudence of the European Court of Human Rights<sup>16</sup>. What is most important the guidelines are not only a declaration of principles but aspire to give practical advice and guidance. They address, in particular, key principles of a fair trial and effective remedy as interpreted by the European Court of Human Rights in its case-law.

To sum up the guidelines represent a modern approach to the regulation of digital modern tools in judicial systems. The Council of Europe offers a flexible legal instrument for the courts. The instrument is optional but gives the perspective of human rights and real assistance for the members states. No less important is that the guidelines are based on collaborative work and experience following from various states. It follows good practices and lessons from more experienced member states. Both the successes

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protecting-the-right-to-a-fair-trial-under-the-european-convention-on-/168075a4dd, accessed September 15, 2021.

<sup>15</sup> Marckx v. Belgium, 13 June 1979, §41, Series A no. 31; Tyrer v. the United Kingdom, 25 April 1978, §31, Series A no. 26.

<sup>16</sup> Bernadette Rainey, Elizabeth Wicks, and Claire Ovey, in *Jacobs, White and Ovey: the European Convention on Human Rights* (Oxford: Oxford University Press, 2017).

and failures of particular digital court implementation were taken into consideration during the preparatory works.

### 3. Problematic use of the term “ODR” in the title and content of the guidelines

The guidelines use the term of “ODR” (Online Dispute Resolution) both in their title and the content. In my opinion this can be misleading for the users, especially judges. ODR is frequently understood as the electronic variant of the alternative dispute resolution (ADR) solutions, typically organized outside the court or not court-related<sup>17</sup>. An example is the unsuccessful and rarely used EU Online Dispute Resolution Platform<sup>18</sup>. The term “ODR” first appeared in the late 1990s and has developed over two decades in line with the expansion of the Internet and, particularly, online shopping and other transactions<sup>19</sup>. ODR was and is still widely used as a synonym of electronic alternative dispute resolution (eADR)<sup>20</sup>. But in opposition to the ADR tools, the guidelines analyzed in this paper are intended to cover use of new technologies in existing in-court proceedings conducted in front of the common

<sup>17</sup> Julia Hörnle, “Encouraging Online Alternative Dispute Resolution (ADR) in the EU and Beyond,” *European Law Review* 38 (2) (2013): 187–208; Maxime Hanriot, “Online dispute resolution (ODR) as a solution to cross border consumer disputes: the enforcement of outcomes,” *McGill journal of dispute resolution* 2 (2015): 1–22.

<sup>18</sup> See Regulation No. 524/2013 of the European Parliament And of the Council, of 21 May 2013 concerning the “out-of-court resolution of disputes concerning contractual obligations stemming from online sales or service contracts between a consumer resident in the Union and a trader established in the Union”.

<sup>19</sup> In this respect, UNCITRAL Technical Notes on Online Dispute Resolution, New York 2017, define ODR as a “mechanism for resolving disputes through the use of electronic communications and other information and communication technology”. See UNCITRAL Working Group III (Online dispute resolution) Thirty-third session, New York, 2016, Online dispute resolution for cross-border electronic commerce transactions, A/CN.9/WG.III/WP.140, [http://www.uncitral.org/uncitral/en/commission/working\\_groups/3Online\\_Dispute\\_Resolution.html](http://www.uncitral.org/uncitral/en/commission/working_groups/3Online_Dispute_Resolution.html), accessed September 15, 2021. On ODR as a special arbitration system, in the context of Internet domain registration, see: Andrzej Szumański, ed., *System prawa handlowego*, vol. 8, *Arbitraż handlowy* (Warszawa: C.H. Beck, 2015), 1138–1139.

<sup>20</sup> Julia Hörnle, “Encouraging Online Alternative Dispute Resolution (ADR) in the EU and Beyond,” 187–208; Alicja Mól, “Alternatywne rozwiązywanie sporów w Internecie,” *Przeegląd Prawa Handlowego* 10 (2005): 48–52; Karolina Mania, “ODR (Online Dispute Resolution) – podstawowe zagadnienia,” *ADR Arbitraż i Mediacja* 1 (2010): 73.

(state) courts. They are not directly destined for the ADR proceedings, such as mediation or arbitration.

As already explained, the main focus of the guidelines is to deal with the question how the guarantees referring to court procedures contained in Articles 6 and 13 of the ECHR can be secured in traditional (common) courts when electronic mechanisms for resolving disputes are being used. Although the guidelines expressly allow member states to extend application of these guidelines to ADR proceedings, this may not be fully practical. The problem is that the guidelines were drafted and aligned to existing in-court proceedings and not to ADR proceedings. A number of particular guidelines are not relevant to ADR and need far reaching adjustments to be used within specific ADR mechanisms (e.g. guidelines no. 17 and 20).

The authors of explanatory memorandum to the guidelines took considerable effort to justify the use of ODR term but in my opinion this will not help in the proper application of the guidelines in court practice. The explanatory memorandum only supplements the guidelines and judges may not be fully aware of its existence and importance. There is a risk that judges will not even bother to read the guidelines assuming that it is not applicable to their practice.

This confusion is not solved by the definition of ODR contained in the guidelines. It explains that ODR concept refers to a technique or mechanism used for dispute resolution that is carried out remotely through the use of computers, including mobile devices, and the internet. Such definition is quite general and vague. The additional explanation can be found only in the explanatory memorandum. It provides that ODR is not in itself a form of dispute resolution but rather a technique or mechanism that is used in existing in-court proceedings. This is not a new type of proceedings and not an alternative to any such in-court proceedings. ODR only provides new ways of access to existing types of in-court proceedings<sup>21</sup>. Therefore, it does not create a special model or channel of proceedings. Such extended

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<sup>21</sup> Pavel Loutocký, “Online dispute resolution and the latest development of UNCITRAL model law,” in *Cofola International 2015: current challenges to resolution of international (cross-border) disputes: conference proceedings*, ed. Klára Drlíčková (Brno: Muni Press, 2015), 243–256.

explanation seems to be satisfactory but also underlines the unclearness of the definition contained in the main document (the guidelines themselves).

In fact the confusion around the term ODR resulted in the necessity to include even the definition of “the court” in the guidelines. It now covers all authorities with competences to adjudicate legal disputes using ODR in civil and administrative proceedings. We may notice that a direct reference is made to the concept of a “tribunal” in the meaning of Article 6 of the Convention<sup>22</sup>. In result the guidelines cover proceedings before bodies entrusted with decision making functions and only those proceedings which are of a judicial nature. This delimitation is important because other activities carried out by such bodies may be of non-judicial nature. This means the guidelines do not apply to non-contentious and unilateral procedures which do not involve opposing parties and which are available where there is no dispute over rights<sup>23</sup>. The problem is, however, that we can determine the scope of the guidelines only by combined interpretation of the ODR and court definitions, taking into consideration the elaborated wording of the explanatory memorandum. This confuses the scope of the guidelines. Use of the unclear ODR term caused additional problems, like the necessity for explaining what types of proceedings are not covered by the guidelines.

For the sake of consistency with the final wording of the guidelines, I will use the term of ODR in next sections of this paper in the meaning adopted in the guidelines.

#### **4. Does the Council of Europe provide appropriate fundamental principles for the guidelines?**

The typical structure of the Council of Europe guidelines includes list of instructions for the member states, with the most important key principles presented before the main body of the detailed guidelines. One should

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<sup>22</sup> In its judgements the European Court of Human Rights set out the criteria for the court to be recognized as tribunal in the meaning of Article 6 of the ECHR and the guidelines try to reflect those criteria.

<sup>23</sup> See *Alaverdyan v. Armenia*, application no. 4523/04, decision on admissibility of 24 August 2010, § 35; *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV).



consider if the final principles were properly chosen and fully address the main challenges resulting from digitalisation of the courts.

In the guidelines we see the following four key 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 apply to ODR, unless the specific nature of a particular ODR mechanism requires otherwise,
- 4) Parties to proceedings involving ODR should be identified using secure mechanisms.

I fully agree with the idea that the very first principle of the guidelines should address trust and confidence in ODR. Indeed, it is crucial for the proper use of digital technologies in the courts. It is still the case that court participants, including judges, have fears and doubts regarding use of new technologies, in particular if it contains artificial intelligence components. The crucial issue would be to explain how member states can build and enhance trust and confidence in ODR. The explanatory memorandum only provides that this can be done only by applying the same key principles of a fair trial and effective remedy as interpreted by the European Court of Human Rights in its case-law in the context of existing in-court proceedings<sup>24</sup>. These basic principles need to be further explained and transposed into the digital context. The particular challenges arising from the application of these principles in the ODR context need to be analysed and addressed. The guidelines are too vague in this regard.

In my opinion the main practical problems are related to legal ignorance and lack of information on effective ODR techniques<sup>25</sup>. Transparent explanation for the public of their design and use is needed. ODR is to be fast, uncomplicated, inexpensive and effective. Cost reduction, speed of solutions, no need for direct meeting of parties are undeniable advantages of this approach<sup>26</sup>. The following three main features of ODR need

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<sup>24</sup> Vitkauskas and Dikov, *Protecting the right to a fair trial under the European Convention on Human Rights*.

<sup>25</sup> Comp. Hörnle, *Cross-border Internet Dispute Resolution*.

<sup>26</sup> Mania, "ODR (Online Dispute Resolution) – podstawowe zagadnienia," 20.

to be promoted: transparency, fairness and accountability<sup>27</sup>. Such simple messages should be directed to the public in order to create trust and confidence and in my opinion the guidelines fails to explain necessity of such an approach. Additionally, I'm of the opinion that a digital dispute resolution system may work especially in those states where the justice system does not work effectively and consumer rights are not effectively enforced. ODR methods will then actually provide an important alternative to protracted court proceedings and judgments of dubious quality<sup>28</sup>. It seems that Council of Europe is too careful and reluctant to provide such additional argument for the ODR use in court practice.

The guidelines also lack emphasis on international dimension of dispute resolutions. Thanks to ODR it is possible to resolve disputes arising from cross-border transactions quickly, efficiently and effectively online. Moreover, ODR regulations should allow for free circulation between countries of ODR decisions so that enforcement proceedings can be initiated in different jurisdictions in order to settle a claim<sup>29</sup>.

The second principle contained in the guidelines address problems of possible substantial barriers for access to justice due to the ODR implementation. One should notice that it refers to substantial barriers and not just any barriers. This means that some limitations are allowed, in particular those that follow from the nature of ODR, such as necessity of using electronic communication and having skills to operate digital devices. I believe that we all agree that especially in times of the pandemic crisis ODR could really contribute to more effective and efficient access to justice. However, the main obstacle to much wider use of ODR is access to technology. Some people do not have the necessary skills or facilities to use ODR and have a dispute resolved online. This problem is called the "digital divide". That is why courts should develop ODR techniques in such a way that the digital divide is adequately addressed. As it is correctly explained further in the guidelines, ODR mechanisms should have a simple

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<sup>27</sup> *Ibidem*.

<sup>28</sup> *Ibidem*.

<sup>29</sup> Piotr Rodziejewicz, "Czy istnieje potrzeba wprowadzenia instrumentu prawnego dotyczącego Online Dispute Resolution (ODR) w zakresie rozstrzygania sporów wynikłych z transgranicznych transakcji handlu elektronicznego?," *Prawo Mediów Elektronicznych* 1 (2012): 43.

and user-friendly interface to enable as many people as possible to use the technology. The lesson from the pandemic crisis is that the switch to new technologies is possible for a major part of society and can be executed really fast. Many people have learned quickly how to use the technology. To sum up, in my opinion it is fully justified that the guidelines include such fundamental principle in the guidelines, but it does not mean that it can be used as an excuse for not introducing ODR techniques into existing civil and administrative proceedings.

I have doubts regarding the third fundamental principle following from the guidelines. It seems to be too vague. It reads that “procedural rules which apply to court proceedings in general should apply to ODR”. What we need here, however, is a reservation that where the specific nature of a particular ODR mechanism so requires some adjustments to particular (existing – traditional) procedural rules may be required (provided they do not undermine the principle of a fair trial or of an effective remedy). The current principle is over - simplified in this respect. The gravity centre of the principle should be laid on the particularities that stem from the specific use of ODR and its potential impact on procedural issues. It is an obvious statement that ODR can and should be subject to the same due process standards that apply to court procedure in an offline context, in particular independence, neutrality and impartiality. What we rather in the guidelines need is to clearly state what this means in practice in the context of the ODR use by the courts.

The last principle referring to identification of the parties seems to be redundant. This is more a technical issue and is obvious in case of electronic communication. In the EU this problem is already fully addressed by the eIDAS Regulation<sup>30</sup>. Moreover, these issues are also sufficiently explained in the other CoE guidelines, which are guidelines on electronic evidence previously adopted by the Council of Europe on January 30, 2019<sup>31</sup>. We know that separation of the digital identity from the physical one may

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<sup>30</sup> Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, p. 73–114).

<sup>31</sup> Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings (Adopted by the Committee of Ministers on 30 January 2019, at the 1335th meeting of the Ministers’ Deputies), CM(2018)169-add1final.

create problems related to the identification of the persons<sup>32</sup>. But there are many well known and used secure mechanisms for identification, such as certificates to electronic signatures (the “digital ID” of a person), confirmation of identity by a payment system operator that has been used for paying court fees online or public trust services providing technological mechanisms that ensure proper identification (e.g. ePUAP in Poland).

Instead of the fourth principle one should rather include in the fundamental principles the problem of the rapid development of artificial intelligence (AI) algorithms in the courts<sup>33</sup>. The use of AI algorithms makes it possible to draft the most probable judicial decision (on the basis of past practice). This does not mean that a judge will no longer be needed because the judicial recognition, which is an expression of the so-called discretionary power of the judiciary is of crucial importance for justice systems<sup>34</sup>. The advanced instruments of data processing and analysis only make it possible to present to the judge a non-binding decision, but based on the analysis of regulations and case-law of the facts of the case, a proposal for a decision (even with a draft justification). This approach could benefit greater predictability of judgments in similar or even identical facts<sup>35</sup>. In my opinion an additional fundamental principle could address the risk

<sup>32</sup> The following monographs present in-depth analysis on the issue of electronic evidence and identification in the digital courts: George L. Paul, *Foundations of Digital Evidence* (American Bar Association, 2008); Paul R. Rice, *Electronic Evidence – Law and Practice* (American Bar Association, 2009), Allison Stanfield, *Computer Forensics, Electronic Discovery & Electronic Evidence* (Chatswood, LexisNexis Butterworths, 2009); Stephen Mason, ed., *Electronic Evidence* (London: LexisNexis Butterworths, 2017), Stephen Mason, ed., *International Electronic Evidence* (London: British Institute of International and Comparative Law, 2008).

<sup>33</sup> See further: *A study of the implications of advanced digital technologies (including AI systems) for the concept of responsibility within a human rights framework*. Prepared by the Expert Committee on human rights dimensions of automated data processing and different forms of artificial intelligence (MSI-AUT). Rapporteur: Karen Yeung, DGI(2019)05. See also Ephraim Nissan, “Digital technologies and artificial intelligence’s present and foreseeable impact on lawyering, judging, policing and law enforcement,” *AI & Society* 32 (2017): 539–574; Maxi Scherer, “Artificial Intelligence and Legal Decision-Making: The Wide Open?,” *Journal of International Arbitration* 36 (2019): 539–574.

<sup>34</sup> Such power is not only based on the law, but also on the social context of a case. See further Gołaczyński, “e-Sąd przyszłości,” 97.

<sup>35</sup> The predictability of court rulings is often demanded by the people – *Ibidem*.

of dehumanisation of the courts. As rightly pointed out by the consultative Council of European Judges in Opinion No. 14 of 2011: “The introduction of IT in courts in Europe should not compromise the human and symbolic faces of justice. (...) Justice is and should remain humane as it deals primarily with people and their disputes”. To conclude, I recommend that the fourth principle of the guidelines should have the following wording: “Introduction of AI components should not compromise the human and symbolic faces of justice”.

Another lesson from pandemic crisis is that cybersecurity matters a lot in current court practice. Cyber threats are and will be a real danger for justice systems<sup>36</sup>. High risks exist that court documents and evidence can be subject to manipulation and attack. A breach in security could result in forgery, or the disclosure of confidential information. Therefore, courts must consider mechanisms for enhancing data security. It is crucial that an appropriate level of cybersecurity in the ODR systems and their integrity are ensured. This requires secure authentication and access control. Indeed, we see that the guidelines already extensively address cybersecurity. Therefore, it is fully justified in my opinion to address this problem in the fundamental principles, as well. The wording of the potential fifth principle could be the following: “Members states should create mechanisms focused on cybersecurity”.

## **5. Specific guidelines relating to use of artificial intelligence (AI) tools in judicial proceedings**

The digitalisation of courts is an ongoing process that started more than 20 years ago in the European Union, in parallel with the expansion of the Internet<sup>37</sup>. Therefore, one may say, that the real reason for creating the guidelines by the Council of Europe now is the rapid development of more elaborated IT tools that can be used in the courts, such as those based on artificial intelligence algorithms. This is not just the problem of using the video-conferencing or standard communication techniques in the courts or even how to organize remote hearing or submit electronic

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<sup>36</sup> Mania, “ODR (Online Dispute Resolution) – podstawowe zagadnienia,” 74.

<sup>37</sup> See further Richard Susskind, *The Future of Law, Facing Challenges of Information Technology* (Oxford: Oxford University Press, 1998).

evidence<sup>38</sup>. Most of the European states already allow for video-conferencing in their courts with persons situated at a remote location, to ensure, for example, an appearance of witnesses and experts.

What we experience now is the introduction of automated decisions, involving more complex AI components<sup>39</sup>. ODR mechanisms leading to purely automated decisions use could be extended from minor simple cases (e.g. dispute over unpaid invoices), to more complex cases<sup>40</sup>. In some proceedings, with a significant reconstruction of the national civil procedure, it is even being considered to replace a judge with an IT system used for data processing and analysis<sup>41</sup>.

Indeed, introduction of ODR mechanisms based on AI components create the potential for making automated decisions, recommendations and forecasts and thus can make civil and administrative proceedings more effective, accessible and affordable<sup>42</sup>. AI may contribute to fairer, more equal and more predictable outcomes. Some European states already use AI tools for anonymisation of the court decisions or translation services. Due to use of the AI components the work of a court may be significantly improved. The use of AI components may improve procedure and may allow for a more accurate and complete analysis of the case.

<sup>38</sup> Maria Biasiotti, Joseph Cannataci, Jeanne Bonnici, and Fabrizio Turchi, "Introduction: Opportunities and Challenges for Electronic Evidence," in *Handling and Exchanging Electronic Evidence Across Europe*, ed. Maria Biasiotti, Joseph Cannataci, Jeanne Bonnici, and Fabrizio Turchi (Cham: Springer, 2018), 4. In Polish literature see further Łukasz Goździaszek, "Normy informatyczne w prawie postępowania cywilnego," *Przegląd Sądowy* 2 (2017); Anna Kościółek, "Elektroniczne czynności procesowe w świetle nowelizacji z 10.7.2015 r.," *Prawo Mediów Elektronicznych* 1 (2017); Anna Kościółek, *Elektroniczne czynności procesowe w sądowym postępowaniu cywilnym* (Warszawa: C.H. Beck, 2012); Lucyna Łuczak-Noworolnik and Anna Żebrowska, "Przeprowadzenie rozprawy i postępowania dowodowego drogą elektroniczną – założenia, cele, przyjęte rozwiązania," *Polski Proces Cywilny* 3 (2018).

<sup>39</sup> Davide Carneiro, Paulo Novais, Francisco Andrade, John Zeleznikow, and José Neves, "ODR: an Artificial Intelligence Perspective," *Artificial Intelligence Review* 41 (2014): 211–240.

<sup>40</sup> Sofia Samoil, Montserrat López-Cobo, Emilia Gómez, Giuditta de Prato, Fernando Martínez-Plumed, and Blagoj Delipetrev, *AI Watch. Defining Artificial Intelligence. Towards an operational definition and taxonomy of artificial intelligence*, EUR 30117 EN, Publications Office of the European Union, JRC118163, Luxembourg, 2020, 7–8.

<sup>41</sup> Gołaczynski, "e-Sąd przyszłości," 97.

<sup>42</sup> Scherer, "Artificial Intelligence and Legal Decision-Making: The Wide Open?," 539–574.

But there are also negative aspects of AI technologies, such as “black box” problem<sup>43</sup>. As rightly explained in point 41 of the Conclusions of the Council of the European Union: Access to justice – seizing the opportunities of digitalisation (2020/C 342 I/01): “outcomes of artificial intelligence systems based on machine learning cannot be retraced, leading to a black-box-effect that prevents adequate and necessary responsibility and makes it impossible to check how the result was reached and whether it complies with relevant regulations. This lack of transparency could undermine the possibility of effectively challenging decisions based on such outcomes and may thereby infringe the right to a fair trial and an effective remedy, and limits the areas in which these systems can be legally used”. The European Commission emphasizes in the White Paper on AI that “the specific characteristics of many AI technologies, including opacity (‘black box-effect’), complexity, unpredictability and partially autonomous behaviour, may make it hard to verify compliance with, and may hamper the effective enforcement of, rules of existing EU law meant to protect fundamental rights”<sup>44</sup>.

The work of the Council of Europe concerning AI is already significant<sup>45</sup>. There are policies, recommendations, declarations, guidelines and other legal instruments that were issued by Council of Europe bodies. Even a special committee – which is called CAHAI (Ad hoc Committee on Artificial Intelligence)<sup>46</sup> – had been created recently. And as we see, the Council reasonably regulates AI using mostly soft legal instruments (in opposition to hard law instruments, such as convention). These soft instruments can be easily updated in line with technological development.

For the purposes of the guidelines, the definition of AI is based on the European Ethical Charter on the use of artificial intelligence in judicial systems and their environment adopted by the European Commission

<sup>43</sup> Rosario Girasa, *Artificial Intelligence as a Disruptive Technology. Economic Transformation and Government Regulation* (Pleasantville: Springer, 2020), 4.

<sup>44</sup> White Paper On Artificial Intelligence – A European approach to excellence and trust. European Commission, Brussels, 19.2.2020 COM(2020) 65 final: 12

<sup>45</sup> <https://www.coe.int/en/web/artificial-intelligence/home>, accessed September 15, 2021.

<sup>46</sup> <https://www.coe.int/en/web/artificial-intelligence/cahai>, accessed September 15, 2021.

for the Efficiency of Justice (CEPEJ) on 3–4 December 2018 (the Charter)<sup>47</sup>. It reads that: “Artificial intelligence or “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”. Such definition has advantage over much more complicated definitions proposed by European Union so far.

It is however important to stress that ODR is not the same as artificial intelligence and not all ODR techniques involve AI components. ODR is a wider concept covering all kinds of online mechanisms for dispute resolution, including tools for automation that do not necessarily include an element of AI<sup>48</sup>. This distinction between ODR and AI is correctly kept throughout the guidelines. However, while the requirements to meet the judicial guarantees stemming from the Convention apply to all ODR techniques, certain questions in this context bear increased significance with regard to AI components. This is particularly true for questions referring to automated decision-making without human intervention and the possibility for reviewing those decisions. We see it fully reflected in the guidelines.

Firstly, according to the guidelines, the parties should be notified when it is intended that their case will be processed with an ODR tool that involves an AI mechanism (guideline no 6). In particular, litigants have a right to obtain information on the reasoning underlying AI data processing operations applied to them. This includes the consequences of such reasoning<sup>49</sup>. Such transparency requirement is also confirmed by all existing recommendations, ethical codes and guidelines establishing ethical standards for designing, deployment and use of artificial intelligence, as established by the Council of Europe, the United Nations bodies, EU, OECD and other international institutions.

<sup>47</sup> European Commission for the Efficiency of Justice (CEPEJ). European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment, Adopted at the 31st plenary meeting of the CEPEJ (Strasbourg, 3–4 December 2018).

<sup>48</sup> Carneiro, Novais, Andrade, Zeleznikow, and Neves, “ODR: an Artificial Intelligence Perspective,” 211–240.

<sup>49</sup> Jenna Burrell, “How the Machine ‘Thinks’: Understanding Opacity in Machine Learning Algorithms,” *Big Data & Society* 3 (2016), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2660674](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2660674), accessed September 15, 2021.



Secondly, guideline no 18 provides that sufficient reasons should be given for decisions reached using ODR or with the assistance of ODR and, in particular, the decisions reached with the involvement of AI mechanisms. We clearly see that the Council of Europe does not stand against any use of AI in the justice systems, it just wants to set the limits for its use in accordance with the principles stemming from the Convention and other human rights legal instruments. The guideline in question aims to promote transparent decision-making for the parties and public. Decisions which prevent anyone to check how the result was reached pose the same threat to transparency and fair trial principle as decisions with no reasons included<sup>50</sup>. Litigants have a right to obtain information on the reasoning underlying AI data processing operations applied to them. This should include the consequences of such reasoning. When no information could be presented due to the nature of AI, courts should refrain from issuing decisions reached with the involvement of AI whose outcomes cannot be retraced.

Thirdly, guideline no 20 provides right to review in cases involving an ODR element, including cases involving AI mechanisms. This issue requires further analysis. As we know, EU institutions already have issued resolutions, in which they have firmly stood against implementation of purely automated decision-making. In the Conclusions of the Council of the European Union: Access to justice – seizing the opportunities of digitalisation (2020/C 342 I/01), the Council of the European Union we read in point 39, that “the use of artificial intelligence tools must not interfere with the decision-making power of judges or judicial independence. A court decision must always be made by a human being and cannot be delegated to an artificial intelligence tool”. Additionally, the Council of Europe has adopted the Ethical Charter on the use of artificial intelligence in judicial systems that, among other principles, emphasizes the relevance of “under user control” principle i.e., “precluding a prescriptive approach and ensuring that users are informed actors and in control of their choices”<sup>51</sup>.

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<sup>50</sup> Wojciech Samek, Thomas Wiegand, and Klaus-Robert Müller, “Explainable Artificial Intelligence: Understanding, Visualizing and Interpreting Deep Learning Models,” *ITU Journal: ICT Discoveries: Special Issue 1* (2017): 1–10.

<sup>51</sup> See European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment.

It does not mean that the guidelines, by indirectly allowing for purely automatic decisions, are in breach of the EU Institutions recent documents. Firstly, one should say that it is the internal decision of the member state of the Council of Europe to allow purely automatic decisions and only in such case the aforementioned guideline no 20 can be applied. Secondly, not all member states of the Council of Europe are member states of the European Union and are required to follow opinions presented by the EU authorities. Thirdly, these opinions are not binding EU regulations yet. In my opinion we should rather follow a flexible approach presented by the Council of Europe and the more rigid one presented recently by EU institutions.

The main problem is how the review of purely automated decisions should be made. The guidelines fail to provide required solution to this problem. This question becomes crucial when ODR instruments take the shape of tools for purely automated decision-making. In this context Article 13 of the Convention comes into play. Article 13 provides that everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority. In result parties should be allowed not only to contest purely automated decisions but also to request that such review is to be made by a human judge. The European Court of Human Rights does not specify on what level this remedy is to take place.

The use of ODR can open up new avenues of redress for infringements in the national judicial systems. In view of the unique character of the ODR I believe that the member state could decide, irrespective of existing review mechanisms, to establish an additional human review process on the same level as the one, on which the automated decision was made. Alternatively, the member state can leave the review by a human judge to its existing appeal level. In any case, this guideline should not require all automated decisions to be automatically subject to human review or to change the existing review model.

Another problem is that the guidelines do not fully addresses the design of ODR involving AI components. Such systems require more input from the stakeholders. I'm of opinion that the judiciary should be involved in the testing and piloting phases as it is important to ensure that the design of ODR do not deprive judges of their decision-making capacity. AI technology developers should also 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<sup>52</sup>.

To sum up, the guidelines could be more focused on the more elaborated ODR mechanisms based on the data collected and processed in the judicial process, in particular using AI components rather than simple techniques of electronic communication<sup>53</sup>. An important condition for the creation of such modern mechanisms is to make as much data as possible available and to allow the creation of digital data by the court as a result of evidence proceedings (including e-protocols, digitalization of all documents)<sup>54</sup>. It is also important to decide whether the AI system should only prepare a draft ruling with a justification and be subject to the final decision to be taken by the judge, or whether it should, in cases with simple factual states, fully replace the adjudicator. The latter solution requires an analysis of whether, in such case, we will still be dealing with a court within the meaning of the guidelines and the applicable laws (including the Human Rights Convention).

## 6. Summary and conclusions

New Council of Europe guidelines properly follow the structure of principles developed in the jurisprudence of the European Court of Human Rights under Articles 6 and 13 of the Convention. The time of its adoption is correct as the digitalisation of courts have now crucial importance for access to the justice. The guidelines have the nature of a soft legal instrument. It serves as a practical toolbox for member states to ensure that the practice of their digital courts comply with the requirements of Articles 6 and 13 of the Convention.

Answers to the questions presented in the introduction and proposed solutions can be taken into consideration by the Council of Europe in the future update of the guidelines.

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<sup>52</sup> In this respect see Guidelines on how to drive change towards Cyber justice [Stock-taking of tools deployed and summary of good practices] of 7 December 2016, / European Commission for the Efficiency of Justice, CEPEJ(2016)13.

<sup>53</sup> Gołaczyński, "e-Sąd przyszłości," 98.

<sup>54</sup> *Ibidem*.

Firstly, the used term ODR (Online Dispute Resolution) is misleading. Risk exists that the judges will not even try to familiarize themselves with the guidelines assuming that the document concerns only ADR proceedings. I'd rather recommend to replace the term of "ODR" with other terms, such as "cyberjustice" or "digital courts".

Secondly, some of the fundamental principles of the guidelines are misplaced. The gravity centre of the third principle should be laid on the particularities that stem from the specific use of ODR and its potential impact on procedural issues. Instead of the fourth principle (identification of the parties), directly addressed should be the development of artificial intelligence (AI) algorithms in the courts, as well the cybersecurity threats for justice systems. In this paper I recommended introduction of two additional fundamental principles to the guidelines: "Introduction of AI components should not compromise the human and symbolic faces of justice" and "Members states should implement mechanisms enhancing cyber security".

Thirdly, guidelines related to artificial intelligence should be further elaborated and explained. This includes both the review of the purely automatic decisions and its justification. Another problem that needs to be elaborated in the updated guidelines is the design of ODR systems including AI components. In this respect the guidelines could be also aligned with the new EU instruments that deals with the AI legal aspects (such as new draft resolution).

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