

20 ODR IN EUROPE

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1 INTRODUCTION

A decade has passed since the first online dispute resolution initiatives were launched in Europe. Undoubtedly, the European contribution to the initial phase of ODR deployments has been significant: of the forty-six ODR sites reported by Conley Tyler in 2003, twenty were based in European countries.¹ As with any new technology, the boom of ODR services in Europe over the past decade has nevertheless been accompanied by some delay in achieving its full potential, possibly as a result of an underestimation by its original pioneers of the marketing effort and investment required to attract adequate numbers of early adopters. While ODR services rose to thirty-eight sites in 2004, some of them were no longer, even at that time, providing services.² In addition, it has to be borne in mind that a review of the list shows that many were well established, and still continuing, ADR organizations or business associations who were at that time simply engaged in initiatives to examine the future that technology could offer rather than launching a committed and specific ODR service. Since 2004, Europe has, notwithstanding, continued to be not only at the forefront of ODR development and usage but also a leading centre for ODR research and discussion. At present, the current state of the art of ODR in Europe constitutes an opportunity to instill realism into the enthusiastic forecasts whilst still making significant progress with making ODR services the default systems to resolve online disputes as well as colonizing off-line domains. This paper offers an overview of the present situation of ODR in Europe and discusses effective development of ODR deployments to handle online, offline, national and cross-border disputes in Europe. To do so, we proceed by first defining the scope of ODR and reviewing existing services. We then continue by analyzing the major challenges faced by ODR in Europe and finally conclude by suggesting some future scenarios.

1 M. Conley Tyler, "Seventy-six and Counting: An Analysis of ODR Sites", in E. Katsh & D. Choi (eds.), *Online Dispute Resolution: Technology as the "Fourth Party"*, Proceedings of the UNECE Second Forum on Online Dispute Resolution. UNECE. Center for Information Technology and Dispute Resolution, University of Massachusetts, 2003. Available at <www.odr.info/unece2003/pdf/Tyler.pdf>.

2 M. Conley Tyler, "115 and Counting: The State of ODR 200", in M. Conley Tyler, E. Katsh & D. Choi. (eds.), *Proceedings of the Third Annual Forum on Online Dispute Resolution*, Melbourne, Australia, 5-6 July 2004. Available at <www.odr.info/unforum2004/ConleyTyler.htm>.

2 DEFINING THE SCOPE OF ODR

Since Katsh and Rifkin first referred to technology as the “Fourth Party” in ODR schemes there have been successive proposals on how to define the scope of ODR.³ That same year, a research team at the University Geneva published a first report as part of a small colloquium of experts (“ODR: Where Are We And Where Are We Going?”) which put on the table the main technical and legal issues raised by the emerging ODR services that proliferated in a market where e-commerce transactions were gaining a significant volume.⁴ These and other documents proposed different definitions of ODR.⁵ Schultz, for example, raised the question of whether the term ODR was synonymous to the online provision of traditional ADR procedures or a sui generis method of dispute resolution.⁶ Other issues were also addressed: would it be the case that to qualify the service as ODR would require all phases of the process to be online, or would a combination of online and offline phases suffice? (*Ibid.*); did ODR have to deal with disputes generated online or could it also include those that originate outside the domain?; are the different terms that have been used throughout this decade – Internet Dispute Resolution (iDR), Electronic Dispute Resolution (eDR) electronic ADR (eADR), online ADR (oADR) – interchangeable? These questions remain open to discussion.

In this chapter we adopt a flexible notion of Online Dispute Resolution (ODR) in which a dispute resolution service may qualify as ODR if it fulfills at least one of the two following conditions: (i) online technology providing assistance to the different parties – e.g., disputing parties, mediator, adjudicator, arbitrator, facilitator, etc. – throughout the process; or (ii) the subject matter is defined by being either a grievance, complaint or dispute. In this

3 See E. Katsh & J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, San Francisco, Jossey-Bass 2001.

4 T. Schultz, G. Kaufmann-Kohler, D. Langer & V. Bonnet, “Online Dispute Resolution: The State of the Art and the Issues”, E-Com Research Project of the University of Geneva, Geneva 2001.

5 E.g. Consumers International, “Disputes in Cyberspace 2001: Update of Online Dispute Resolution for Consumers in Cross-border Disputes”, Consumers International Office for Developed and Transition Economies. Available at: <www.consumersinternational.org>; T. Schultz, “Online Dispute Resolution: an Overview and Selected Issues”, United Nations Economic Commission for Europe Forum on Online Dispute Resolution, Geneva, 6-7 June 2002. Available at <<http://ssrn.com/abstract=898821>>; T. Schultz, V. Bonnet, K. Boudaoud, G. Kaufmann-Kohler, J. Harms & D. Langer, “Electronic Communication Issues Related to Online Dispute Resolution Systems”, Proceedings of the Eleventh International World Wide Web Conference – Alternate Track CFP: Web Engineering, Honolulu, Hawaii, 7-11 May, 2002. Available at <www2002.org/globaltrack.html>; A.G. Hammond, “How Do You Write ‘Yes’?: A Study on the Effectiveness of Online Dispute Resolution”, *Conflict Resolution Quarterly*, (2003) Vol. 20(3), pp. 261-286; Conley Tyler (2003), Conley Tyler (2004); V. Bonnet, K. Boudaoud, M. Gagnebin, J. Harms & T. Schultz, “Online Dispute Resolution Systems as Web Services”, *ICFAI Journal of Alternative Dispute Resolution*, (2004) Vol. 3. Available at <<http://ssrn.com/abstract=899107>>; A.R. Lodder & J. Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology*, Cambridge, Cambridge University Press 2010.

6 Schultz (2002).

perspective, therefore, a pure forum (not necessarily an ODR specific technology) can qualify as ODR if it meets condition number ii, but if it is dealing with a subject that is neither a grievance, nor a complaint or a dispute, then it should not be considered as ODR. These basic conditions notwithstanding, there are different degrees of sophistication of ODR services, ranging from those integrating basic technologies (*i.e.* email, chat, voice IP, etc.) to those which have developed, or have taken a license of, ODR-specific software.

3 ODR IN EUROPE: THE NORMATIVE BACKGROUND

An important background context to ODR in Europe is that the European Commission has over recent years taken steps to actively encourage the use of ADR for the settlement of cross-border disputes. For some years now the European Commission has acknowledged the necessity of an adequate legal framework in which ADR programs can thrive. In this regard, the protection of European consumers constituted one of the main priorities of the legislative work. As early as 1993, the Green Paper on Consumer Access to Justice in the Internal Market,⁷ aiming at safeguarding the effectiveness of the legal framework providing consumer protection, already noted the proliferation of ADR services in European Countries dealing with consumer disputes, and notably arbitration schemes. These considerations led the Commission to adopt the “Action plan on consumer access to justice and the settlement of consumer disputes in the internal market”, which represented a clear step in favor of the use of ADR.⁸ This communication affirmed that “consumer access to justice” was being achieved with a variety of instruments, but it also concluded that this access did not always imply access to the courts and that it was possible to consider the available alternatives.

Similarly, the Commission Recommendation of 30 March 1998 on the out-of-court settlement of consumer disputes⁹ sought to find a standard among the different types of ADR that the Member States had created over the years, laying down the principles applicable to out-of-court procedures for the settlement of consumer disputes. The Recommendation noted, for instance, the difference between the Scandinavian preference for an ombudsman and Spain’s consumer arbitration scheme with a third-party arbitrator. This Recommendation was followed in 2001 by another Commission Recommendation on the principles

7 Commission’s Green Paper, 16 November 1993, on access of consumers to justice and the settlement of consumer disputes in the single market – COM(93) 576 Final, p. 76.

8 Communication by the Commission on 14 February 1996, COM(96) 13 Final, “Action plan on consumer access to justice and the settlement of consumer disputes in the internal market”.

9 Commission recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, COM(1998) 198 Final, <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=1998&nu_doc=198>.

for out-of-court bodies involved in the consensual resolution of consumer disputes.¹⁰ This second Recommendation applies to procedures that involve an attempt to bring the parties together to convince them to find a solution by common consent (an aspect not being covered by the former Recommendation).

In a similar vein, two important ADR normative initiatives have crystallized in the last few years as regards civil and commercial matters:¹¹ the establishment of the European Small Claims Procedure¹² and the adoption of the Directive on Mediation in Civil and Commercial Matters.¹³ As regards the Regulation, its aim is to simplify, speed up and reduce the litigation costs of small claims that do not exceed € 2,000 in cross-border cases. Importantly for ODR, Article 8 of the Regulation states that “The court or tribunal may hold an oral hearing through video conference or other communication technology if the technical means are available”. Secondly, in 2008, the European Directive on Mediation in Civil and Commercial Matters (Directive 2008/52/EC) was issued to facilitate access to mediation in cross-border civil or commercial disputes. It requires Member States to ensure that mediation training and provision is positively encouraged and that agreements resulting from mediation can be rendered enforceable. An important element is that the Directive requires that, when parties engage in mediation, any limitation period within which legal proceedings would ordinarily, under the laws of a Member State, have to be issued will be suspended to avoid parties not agreeing to mediation purely in order to preserve their legal remedies. Both these provisions provide an environment more conducive to the development and adoption of ODR solutions and services in cross-border disputes.

As for the transposition of the Mediation Directive, it is worth mentioning here that the Spanish Government is still working with a draft Bill which requires all civil and commercial disputes under € 300 be handled by electronic means “unless some of the parties cannot use them” (Article 29). This exception (otherwise reasonable in terms of access to the mediation process), coupled with the exclusion of consumer disputes from the scope of

10 Commission Recommendation on 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer dispute, <http://ec.europa.eu/consumers/redress/out_of_court/adr/acce_just12_en.pdf>.

11 This work was preceded by the 2002 EC Green Paper on alternative dispute resolution in civil and commercial law initiating a broad-based consultation, <http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0196en01.pdf>.

12 Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure, <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Regulation&an_doc=2007&nu_doc=861>.

13 Directive 2008/52/EC of The European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF>>.

the law, may nevertheless notably reduce the real impact of applying ODR technologies to mediation.

In the UK a new Civil Procedure Rule (Part 78) was put in place in April 2011 to implement the Directive. Part 78.24 enables parties to disputes coming within the scope of the Directive, and who have settled the matter by mediation, to obtain a Mediation Settlement Enforcement Order, which will enable the terms of the agreement to be enforced through the courts. An Order will only be made if applied for either by both parties or by one party presenting evidence of explicit consent of the other to making such an application. Since only mediations in disputes covered by the Directive have the benefit of this provision, and as all such disputes will be cross-border, which are more appropriate for being conducted online, this Rule effectively supports and encourages ODR itself.

4 ODR IN EUROPE: THE EARLY AND RECENT STORY

4.1 *Institutional Initiatives*

Europe was the birthplace of the International Forum on ODR which began in 2002 with its first Forum at the Palais des Nations in Geneva. This had resulted from discussions between Daewon Choi of the United Nations Economic and Social Commission for Europe (UNECE) and Professor Ethan Katsh of the University of Massachusetts, and founder of the main ODR space on the web, <www.odr.info>. The Forum, referenced elsewhere in this book, also held its second Forum in Geneva in 2003. Although it no longer is associated with its institutional host, UNECE, this initial launch has resulted in the Forum becoming the main annual gathering point for all involved in the development of ODR. The Forum returned briefly to Europe in 2007, when it was held in Liverpool, and will return once again to Europe in 2012 when it is to be held in Prague. Professor Richard Susskind, IT Adviser to successive Lords Chief Justice in England and Wales since 1998 and a prolific and highly respected writer on the application of technology to the practice of law¹⁴ gave a keynote speech at the Liverpool Forum in which he said “ODR has the potential to fundamentally change the way litigators function and to become mainstream”.¹⁵ He advised that progress would require not just the continuing activities of ODR advocates, practitioners, developers and commentators but, importantly, action by those in positions of influence

14 See e.g., R. Susskind, *Transforming The Law*, Oxford, Oxford University Press 2000. R. Susskind, *The Future of Law*, Oxford, Oxford University Press 2006; R. Susskind *The End of Lawyers? Rethinking the Nature of Legal Services*, Oxford, Oxford University Press, 2008.

15 As stated in a keynote speech given on the 20 April 2007 at the 5th International Forum on Online Dispute Resolution held at the University of Liverpool.

who may have a more traditional approach and who do not readily see technology as an obvious contributor to the delivery of justice. Bringing those people “on board”, through focusing on how technology can help meet the wider needs of justice systems to cope with growing demand was key to future uptake.

Another major initiative has been the formation of the European Extra-Judicial Network (EEJ-Net). This was set up by the European Commission on the 16 October 2001, with the aim “[t]o establish a network of national bodies for the extra-judicial settlement of disputes in order to resolve cross-border consumer disputes quickly and effectively, making use of the new means of communication, particularly the Internet”. EEJ-Net comprised primarily, of the Trading Standards agencies (local government run consumer services) and retail and utility industry associations throughout Europe. The rationale of the initiative is that in order for the European Commission to operate a true single market, consumers should have similar redress no matter from which member country they purchase the goods and services. Currently the different legal jurisdictions present a heavy barrier for consumers purchasing across borders and thus the need to focus on extra-judicial solutions. Whilst ODR itself was not the declared subject, it inevitably encompasses all of the processes discussed at the EEJ-Net meetings. There has over the years been much development of what is referred to as “clearing houses” which essentially are services set up within particular industries and service groups to handle consumer complaints/disputes. All of these have over the years notified themselves to the EEJ Net.

The network became part of a wider network, the European Consumer Centres network (ECC-Net), with a broader remit covering information provision to the public on law and regulation in cross-border shopping as well as advice on ADR. One specific ODR activity that the ECC centres in Ireland and the UK engaged in was The Internet Ombudsman project with TheMediationRoom¹⁶ for consumers with complaints concerning products or services provided through the Internet.

Whilst EEJ-Net initiatives focused on consumer disputes, a significant development, with wider impact, took place in Vienna on the 29 and 30 March 2010, when the United Nations Commission on International Trade Law (UNCITRAL), in collaboration with Pace Institute of International Commercial Law, and Penn State Dickinson School of Law, hosted a Colloquium entitled “A Fresh Look at Online Dispute Resolution and Global E-Commerce: Toward a Practical and Fair Redress System for the 21st Century Trader (Consumer and Merchant)”. In an unfortunate clash of dates, those were the very same days that the Centre for Legal Informatics at the Faculty of Law at the University of Vienna hosted the

16 See <www.theinternetombudsman.com>.

annual conference of BILETA 2010 with the title of “Globalisation, Internet and the Law”.¹⁷ This event focused on the ways in which law and technology can contribute to a better legal system in the era of globalisation and included a presentation by Graham Ross specifically on ODR.

The outcome of the UNCITRAL Colloquium was that a proposal from the Pace Institute of International Commercial Law was presented to the 43rd session of UNCITRAL held in New York, from 29 June – 9 July 2010 and which resulted in the unanimous decision of UNCITRAL to form a Working Group on ODR.¹⁸ The Working Group held its first meeting in Vienna on the 13th to the 17th December 2010. In yet another clash of dates, the first Working Group meeting in Vienna in December 2010 coincided with an ODR Workshop held on the 15 December 2010 at the University of Liverpool as part of 2010 Conference of Jurix (the Foundation for Legal Knowledge Based Systems) itself a forum for research in the field of Law and Computer Science.¹⁹

Finally, it is worth mentioning work done on ODR within the CEN framework. CEN is the Brussels based organisation that produces standards for products and services that are adopted by all EU member countries. Throughout 2008, a CEN Workshop committee met to produce recommended standards for ODR for adoption through a CEN Workshop Agreement. The CWA was published in 2009. The following paraphrases the Foreword to explain the intention:

The objective of the CWA is to maintain the processes of ODR and offline dispute resolution in as close a synergy as may be practicable and to encourage and facilitate their future evolution in parallel to the maximum practicable extent. While these tools are becoming more and more important at international level for the out-of-court settlement of disputes, it is important to promote them in a proper way, using clear, simple and homogeneous rules on a pan-European basis. Without these rules, the heterogeneous procedures of the various ODR systems would create confusion among potential users. Moreover, ODR systems offer different user interfaces, and are unable to exchange information each other, preventing potential users from using their features within a multilanguage and cross-country business environments. This problem

17 See <www.univie.ac.at/RI/BILETA2010>.

18 See <www.cisg.law.pace.edu/cisg/ODR/Institute_ODR_paper.pdf>.

19 See <<http://idt.uab.es/workshops/ODR2010>>.

represents a barrier to the development of European e-business both from the consumers and the business perspectives.²⁰

The existence of this CWA, and the recognition at CEN of the need to set standards, is further evidence of the significance that technology and ODR is being seen to play in dispute resolution. With the clashes of dates for ODR related events mentioned earlier, if there is one lesson that comes out of the European experience over the first ten years of this century, it is the need for some pan-European co-ordination of all those involved in the development of ODR. By way of another relevant example, on the 10 and 11 June 2003 both the EEJ-Net and the CCForm projects (see next section) held important meetings on the subject in the same city, Brussels.

4.2 *Publicly Funded Research Projects*

The European contribution to ODR has been significantly assisted through European Commission funding support in one form or another. The e-Arbitration-t project²¹ was a multi-partner collaborative project to develop the regulatory structure and the dynamic and intelligent infrastructure needed to allow simple and efficient distributed processes in electronic out-of-court dispute settlement systems.²² More specifically a model was designed as an online arbitration service for disputes involving small to medium sized businesses. Public funding by the European Commission was significant (€ 860,000). However, the platform was never completed and the project disbanded at an advanced stage.

Similar vicissitudes affected the CC Form project. This project was funded under the EU's Information Society Technology program (IST-2001-38248) to support online customer complaint management. The project was set up to consider the foundation of a central European customer complaint portal, on which any consumer could, on one website, register a complaint against any party, and about any problem, and in any official EU language. All ODR and dispute handling services could register and the site would inform complainants and signpost solutions. The general view was that on completion of the online form by a complainant, the provider of the service complained of would be encouraged to participate in online dispute resolution on the basis this would significantly increase consumer confidence. The project was a collaboration of various partners led by

20 CEN, Workshop Agreement on Standardisation of Online Dispute Resolution Tools). CWA 16026, November 2009. Available at <ftp://cenftp1.cenorm.be/PUBLIC/CWAs/STAND-ODR/CWA16026_STANDODR.pdf>.

21 See <www.e-arbitration-t.com>.

22 See <http://cordis.europa.eu/fetch?CALLER=PROJ_ICT&ACTION=D&CAT=PROJ&RCN=54082>.

FEDMA (The Federation of European Direct and Interactive Marketing). CCForm held its final workshop in Brussels in June 2003. Whilst an ontology was developed for customer complaint handling²³ it is not clear why no central website as the destination for all complainants as planned was put into place, but a contributory factor may have been the untimely death in a road accident of the project team leader, Peter Scoggins, shortly before the final conference.

Another initiative in Europe that received public funding was ECODIR. This initiative was a commissioned research project²⁴ of the Faculties of Law at the University of Namur, Belgium, the University of Montreal, Canada, and, latterly, University College Dublin, Ireland in the pilot phase, supported by the European Commission and the Irish Department of Enterprise, Trade and Employment. ECODIR is restricted to disputes in relation to online consumer transactions. It involves a three-step process of inter-party negotiation followed by mediation and then, if the mediation does not itself succeed, a non-binding recommendation of a solution is provided by the allocated mediator. In providing the recommendation, the mediator offers a solution based on the facts as presented by the parties, the rights and obligations of the parties in law and the principle of good faith. If the parties accept the recommendation, it may then be formalized in a settlement. It has handled to date 200 cases most with a value no more than € 350. ECODIR's formal pilot project commenced in 2001 and ended in June 2003, although the organisers have since kept the service active. Ecodir Ltd, an Irish Registered Company, is responsible for organising and managing the commercial operation of ECODIR. It is co-ordinated by the Faculty of Law at University College Dublin under the leadership of Professor Brian Hutchinson. "The ECODIR pilot project has shown that a real need exists for a low-cost mechanism for the resolution of low-value cross-border disputes."²⁵

The Mediation Room²⁶ carried out a 25 case pilot funded by the Ministry of Justice in England in which two mediators employed by the court used a dedicated online mediation platform to undertake a selection of cases that were awaiting final hearing in the Small Claims Court. The Court handles cases with a value of no more than GBP 5,000. The parties are offered free mediation from mediators employed by the court. The platform replicates face to face mediation by providing discussion areas for open discussion between all parties and private discussion between each party and the mediator.

23 See <www.jarrar.info/CContology/index.htm>.

24 See <www.ecodir.org>.

25 Caplin (2003).

26 See <www.themediationroom.com>.

Finally, another recently EU funded initiative is the eMCOD project with the stated aim of broadening access to justice through the use of ODR.²⁷ With this aim in mind, eMCOD is building an open source software module to enable providers and users of ODR to measure comparatively, and make transparent, the user experience, the costs and the quality of the dispute resolution processes within the context of universal norms of accessible justice. Participating providers will receive feedback of user experience and benchmarking data that it is anticipated will help direct further advances in ODR. A pilot will be launched in five EU countries (UK, Poland, Bulgaria, the Netherlands and Spain) and a Handbook published. The project partners are TISCO (the Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems), the Institute of Advanced Legal Studies, The Mediation Room.com, the Bulgarian Institute for Legal Development, the Autonomous University of Barcelona, the Research Centre for Legal and Economic Issues of Electronic Communications (CBKE) of the Faculty of Law at the University of Wrocław, and the University of Haifa.

4.3 *Private Initiatives*

The new millennium saw the launch of the first UK based ODR services: InterSettle, e-Settle and We Can Settle, all in 2000. They were all blind bidding sites using privately developed software. They were all also founded by lawyers. InterSettle was run by Scottish solicitor, Stephen Moore, backed by eight of Scotland's leading litigation practices; We Can Settle was set up and run by two English solicitors, Anne Irving and Graham Ross; and e-Settle was set up by a consortium of barristers and solicitors who had secured significant investment funding of GBP 1.3 million.²⁸ All three services quickly found themselves in real case mode with separate pilots for insurance companies in respect of road traffic accident cases. The co-author's experience in We Can Settle was that it was difficult attracting the support of claimant lawyers to participate in a novel game-like service at the request of the insurer. This was an issue not so much of trust in the "Fourth Party" but of trust in the insurer and the motive for making the request. The claimant lawyers were being asked to move out of their comfort zone into a form of negotiation with which they were totally unfamiliar. Many may have questioned their professional competence to do so. As a result, none of the pilots succeeded in changing practices. Following the US company, Cybersettle Inc, obtaining UK patent rights to their version of blind bidding, (29 January 2003) and issuing "cease and desist" letters, all three companies closed down their operations. None of the three exist today, although The Mediation Room did develop, but has not marketed, its own blind bidding engine.

²⁷ See <www.emcod.net>.

²⁸ See A. Gould, "Blind Bidding Site On Trial", *Post Magazine*, 14 December 2000.

This early history of blind bidding in the UK contributes generally to the controversial issue of patents in software. The argument runs that whilst, on the one hand, patents encourage investment to better facilitate creative development in software, on the negative side, in restricting rights to one rights holder and its own commercial policies, they prevent wider development. None of the three UK companies would have relished extensive litigation with Cybersettle, itself then owned by a major insurer and thus feared to have a “deep pocket” so far as litigation was concerned. Cybersettle itself faced professional and cultural barriers current for any development in the legal arena that threatened to reduce legal cost through its impact, by speeding up the time to conclusion, on chargeable hours (unlike in the USA where claimant costs are more often based on the amount of the compensation awarded than time spent). The impact of such barriers became apparent subsequently when Cybersettle made two separate attempts to expand into the UK market, both of which resulted in failure. They initially set up a UK company in 2002, and promoted the service in the insurance industry press but, despite success in the USA, it failed to take a hold in the UK. In 2004, they entered into a marketing partnership with a UK firm of solicitors, Steeles,²⁹ but this terminated the following year. In 2007, Cybersettle announced, at the 5th International Forum on ODR held in Liverpool, a new European initiative being a strategic alliance with the Ireland based International Centre for Dispute Resolution (ICDR) of the American Arbitration Association. A year later at the 7th International Forum held in Victoria, British Columbia, Charles Brofman, CEO of Cybersettle Inc, gave a presentation announcing an ODR project that the Cybersettle/ICDR collaboration had launched in Italy for the GE Oil and Gas Company. This was an online med-arb process (a period of online mediation and, if that failed, an arbitral award would be made and declared on the online file) for disputes with suppliers in the oil and gas industry. A panel of Italian engineers was created to provide the arbitrators. In 2010 use of the system became included as a term of purchase in contracts by GE Oil and Gas.³⁰

In 2008, one of the leading providers of ODR in Europe, Juripax,³¹ was asked by the Dutch Legal Aid Board to create an Internet application for online mediation in divorce cases. The aim of the research project was to verify whether online mediation is a good way to settle divorce cases. In total, twelve mediators were involved in the research project, all trained in the use of online mediation and the Juripax technology. A total of 126 parties filled out the evaluation questionnaire, comprising 56 couples and 14 individual respondents. Reactions to the project show significant gender differences. Women indicated, more than men that they would use an online tool again in the future. The data also showed

29 See <www.lawgazette.co.uk/news/steeles-targets-pi>.

30 A presentation is available at <www.pace.edu/lawschool/files/iicl/odr/Mcllwraith.ppt>.

31 See <www.juripax.com>.

that the online tool provided women with a (better) sense of “justice” by giving them a voice and answers to important questions. Juripax, founded in 2003, provides an online platform for asynchronous discussion and has offices in the United States, Germany and the Netherlands. In 2011, it announced a pay-as-you-go service whereby mediators can take out a license for individual cases as well as an enterprise edition for organisations working with large numbers of cases.

5 THE CURRENT EUROPEAN LANDSCAPE

A broader overview of European ODR service providers can be extracted from research undertaken by the ODR group within the framework of the White Book on Mediation in Catalonia.³² Desktop research of ODR websites was combined with interviews and electronic mail communications with experts on the field. The results are synthesized in Table 7 below.

The table summarizes the basic features of some of the main EU ODR providers.³³ As shown in the table, mediation is the most frequent service being offered online. In a few cases, services provide recommendations, arbitration, assisted mediation, and early neutral evaluation. Similarly, in some other cases there are ODR services providing ancillary services such as lists of mediators, training, or trustmarks. As regards functionalities, it is usual for these EU ODR services to have automated flows and, to some degree, structured forms, automated messages alerting on the different ODR steps, and confidential registers of cases. Almost unanimously, all ODR in the table rely on asynchronous communication between all parties, while some of them also include synchronous methods (*i.e.* videoconference or chat). As for the service models provided, the table also distinguishes: (i) basic ODR, using state-of-the-art Internet tools; (ii) ODR services using proprietary technology; (iii) ODR services that also sell their software licences and (iv) ODR services that provide software on demand (SAAS).

It needs to be noted that this research excluded internal complaint management systems for aggrieved customers that were not including ADR mechanisms or, while having one, only provided a form to initiate the complaint, domain name dispute resolution systems, and online courts (also known as cybercourts).

³² Poblet *et al.* (2010).

³³ The original table reports roughly 40 ODR services from all over the world. See M. Poblet, P. Noriega, J. Suquet, S. Gabarró & J. Redorta, “Tecnologías para la mediación en línea, estado del arte, usos y propuestas”, in P. Casanovas, J. Magre, M^a.E. Lauroba (eds.), *Libro Blanco de la Mediación en Catalunya*, Departament de Justícia, Generalitat de Catalunya, Barcelona 2010, pp. 943-1008.

The table does not show either ODR websites providing services for domain name disputes, present in a large number of European countries. However, this constitutes a relevant ODR domain that should deserve specific research. To mention just one case, the Czech Arbitration Court was appointed in 2005 to provide a resolution service for .eu domain name disputes.³⁴ Rather than just applying a form exchange type service, with forms sent by post or attached to emails, adr.eu created an online arbitration platform able to handle disputes in all EU languages except Maltese.³⁵

Similarly, the table does not report Negotiation Support Systems (NSS) that are closely related to some EU ODR services. Relying on previous research, Kersten and Lai state that “a negotiation support system (NSS) is a software system which implements models and procedures, has communication and coordination facilities, and is designed to support two or more parties and/or a third party in their negotiation activities”.³⁶

In this regard, two relevant cases can be quoted. One consists of the jointly developed Family_Winner and AssetDivider NSS tools.³⁷ Family_Winner and AssetDivider assist mediators in helping parties to better identify settlement packages more likely to be acceptable to both parties in family cases. At the outset the mediator, in discussion with the parties, identifies the set of issues to be included in a settlement, such as maintenance financial settlement and property division. It can also extend to cover child access arrangements and other issues. In the next phase, the parties are asked to allocate 100 points over the issues. They are asked to allocate more points to the issues that are more important to them. In this way the process helps the parties to focus on what it is that they themselves really want rather than seeking to deprive the other party of what they want and, as such, it encourages a less confrontational negotiation. As the number of points is finite, it also forces the parties to consider making trade-offs rather than just arguing for as much as they can obtain and in this way it more accurately assesses their priorities. The system then works through stages allocating one issue at a time to whoever awarded it the more points. After each stage the remaining points are reallocated on a formula intended to create a fair balance in the overall settlement between the interests of both parties. So, for example, if one party loses an issue of importance to them, *i.e.*, one to which they allocated a significant number of points, then the remaining points are incremented at the

34 See <www.adr.eu/>.

35 Under Article 22, paragraph 13 of the Commission Regulation ((EC) No 874/2004) the arbitration rulings are binding on the parties unless any party issues legal proceedings on the matter within thirty days of the issue of the ruling. Cases take about three to four months to complete.

36 Kersten & Lai (2007), p. 555.

37 FamilyWinner and AssetDivider were developed by John Zeleznikow of the School of Management and Information Systems at Victoria University, Melbourne, Australia and Dr Emilia Bellucci of the School of Information Systems at Deakin University, Melbourne, Australia.

higher rate than for their opponents. They may also receive a higher allocation if they win an issue that is not of great importance to either of the parties but which they won on a low scoring basis. The system goes through all the items in the sequence in a series of rounds. AssetDivider is a later version which applies actual monetary values to some of the items where appropriate. Although developed in Australia, these tools are mentioned here because they have recently been brought into the European context by a collaboration between its inventors, Professor John Zeleznikow and Dr Emilia Bellucci and The Mediation Room. Following two meetings with the Ministry of Justice, the Mediation Room have been requested to set up a pilot of AssetDivider for family cases in England. Interest at the Ministry has coincided with the recent decision of the UK coalition government to bring to an end the Legal Aid funding of representation in litigation in most family cases and the introduction of a form of compulsory consideration of mediation.

A second example of NSS is Negoisst that is currently being developed at the University of Hohenheim (Germany).³⁸ The main purpose of Negoisst is “to provide optimal support for negotiators in complex, multi-attributive, bilateral negotiations”, making it clear that the main objective is “not to automate negotiation tasks but to optimise them with regard to different qualitative and quantitative goals like traceability, unambiguousness, comprehensibility or mutual utility”.³⁹

38 See <www.wi1.uni-hohenheim.de/negoisst.html>.

39 *Id.*

Table 7 European ODR Service Providers

Product	Aggi Solutions	Agència Catalana de Consum	Concilia Online	Confianza Online	Conciliazione On-Line	Der Internet Ombudsman	ECODR	eMediation.N	Jurpax	Mediar Online	Alllegro	Mediation Room	Risovi Online
Provider	Centre de Médiation et Arbitrage de Paris	Agència Catalana de Consum	Camera di Commercio di Firenze	ASEBA CONTROL Bedus	Camera di Commercio di Ancona	Der Internet Ombudsman	International consortium	Emmediation & Resolink	Jurpax	Individuals and legal persons	Alllegro	Mediation Room	Camera di Commercio di Milano
Country	France	Catalonia	Italy	Spain	Italy	Austria	Europe	Netherlands	Netherlands	Spain-Argentina	Poland	UK	Italy
Web	www.meditatione-labirinto.com	http://www.consumcat.net	http://www.conciliaonline.net/conciliaonline/la/	http://www.confianzaonline.es	http://www.conciliazione.com/it/index.php	http://www.ombudsman.at	http://www.ecodir.org	http://www.emmediation.nl	www.jurpax.com	http://www.mediaronline.com	http://allegro.onet.pl	www.mediationroom.com	http://www.risovi.com/online/
Domain	G	G (B2C)	G	G	e-T (B2B, B2C)	e-T (B2C, C2C)	e-T (B2C)	G	G	G	e-T (B2C, C2C)	G	e-T (B2B, B2C, C2C)
ODR Mechanisms													
Assisted negotiation													
Automated negotiation							X				X		
Mediation		X	X	X	X	X	X	X	X			X	X
Arbitration													
Adjudication													
Consumer mediation	X												
Early neutral evaluator	X												
Other services													
Mediators' list										X		X	X
Trustmark				X									
Training													
Channelling									Premediato				
Functionalities													
Automated workflow			X				X		X	X	X	X	X
Registry of Cases	X		X						X	X	X	X	X
Structured forms				X	X		X		X	X	X	X	X
Automated messages	X		X				X		X	X	X	X	X
Online dispute resolution	X		X		X		X		X	X	X	X	X
Database													
Communication													
Asynchronous	X	X	X	X	X	X	X	X	X	X	X	X	X
Synchronous		X	X	X	X			X	X	X	X	X	X
Algorithm													
Optimisation algorithm													
Cross-offers algorithm									X				
Service models													
Proprietary													
Proprietary technology	X	X	X	X	X	X	X	X			X	X	X
ODR licensee seller													
SAAS Provider			X							X			

[G: general; e-T: electronic transactions]

Source: Adapted from Poblet *et al.* (2010)

6 CONCLUSIONS

It is safe to conclude from the preceding pages that Europe has played a major role to date in the development of ODR, starting with the emergence of the first entrepreneurial launches – chiefly with private blind biddings sites – and, on the institutional side, with the launch of the International Forum on ODR, the annual event providing a privileged space for the emergence of a heterogeneous, international ODR community.

The EU public funding initiatives have also constituted a major driver for the development of ODR. A case in point is ECODIR, a service which has been in place for a decade now. However, some other projects ended with no conclusive results in terms of prototypes or proofs of concept. In this line, some lessons could be also extracted at this point on how to adequately fill the gap between initial prototypes – raising high expectations – and the effective provision of ODR services to customers.

One minor, but nevertheless helpful lesson that comes out of the European experience over the first ten years of the 21st century is the need for some pan-European co-ordination of all those involved in the development of ODR.

Whilst ODR specific events suffer from an element of “preaching to the converted” rather than spreading the message, the first signs that the message was beginning to have impact beyond the principle advocates was seen in 2008 when, in recognition of the growing awareness and practice of the use of technology in dispute resolution generally, a major three day mediation conference, the European Mediation Conference, included, for the first time, a workshop on online mediation with presentations by Graham Ross of The Mediation Room and Paul Randolph, a UK barrister and mediator. The Conference was hosted by the Scottish Mediation Network and Mediation Northern Ireland in Belfast to coincide with the 10th anniversary of the signing of the Good Friday Agreement, the event which brought an end to the long standing civil and political unrest of that country.

Collaboration between service providers is also an indicator of advancement beyond the first rounds of innovation in any field, and Europe has seen two examples to date. The Chamber of Arbitration of Milan, a section of the Milan Chamber of Commerce, was an early ODR provider when it commissioned the development of RisolviOnline. In 2010 the Chamber invited The MediationRoom (<www.themediationroom.com>) of the UK, a competing online mediation platform, to build a version of its distance training course in ODR (<www.odrtraining.com>) adapted for its panel of 31 arbitrators. The course comprised a reading section followed by a live role-play conducted on the RisolviOnline platform.

On the negative side, the impact of the Cybersettle patent led to the early termination of the first entrepreneurial developments. Whilst blind bidding has not to date yet found favour with personal injury lawyers in Europe, one cannot say the patent itself delayed ODR development. A forthcoming change in the UK will likely be of significance. Whilst the precise details are not yet clear and some of the proposals will meet severe challenge from the legal profession, the UK government, confirmed by an announcement on the 29 March 2011,⁴⁰ that lawyers will in future be able to charge a fee based on an agreed percentage of the damages awarded rather than have their fees assessed by the time spent on a case. Giving an opportunity to remove a direct correlation between the length of time to settlement and the size of the claimant lawyers fee could dismantle one of the barriers to participation in any system that speeds up settlement. The same announcement also included a commitment to introduce online technology into the dispute resolution process as well as including the UK in the growing number of European countries who have introduced a form of compulsory mediation. Requiring any form of ADR within the judicial process must itself help increase the demand for, and awareness of, technology assisted ADR. It is believed, for the reasons set out in this paper, that not only has Europe made a substantial contribution in the past to ODR, but will continue to do so at an increasing pace in the future.

40 See <www.justice.gov.uk/news/newsrelease290311a.htm>.

