

## Article

# New Trends of Digital Justice: The Online Mediation—Between a Challenge and a Reality (The Portuguese Legal Framework)

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**Abstract:** The Directive 2008/52/EU of the European Parliament and Council of 21 May 2008, regarding certain aspects of mediation in civil and commercial matters, does not seem to have been designed for online mediation since it does not expressly include rules in this regard, though it does not prohibit it either. The Portuguese legislator, through Law 29/2013, of 19 April 2013 regulated mediation in an autonomous and systematic way in Portugal, covering internal and cross-border conflicts, and went beyond the EU requirements prescribed by the 2008 Directive, which only specified regulation to cross-border conflict mediation. Like the EU Directive, the Portuguese law does not explicitly address online mediation, but it neither prohibits nor excludes its application. In this article, we intend to present and conceptualize online mediation within the scope of Online Dispute Resolution (ODR) procedures. We will present the specific features and principles of online mediation, thus enhancing the main challenges and potentialities of its use as an adequate means of resolving conflicts.

**Keywords:** ADR; ODR; mediation; online mediation



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## 1. Introduction: Context and Methodology

Technology is booming and is now totally integrated in the world. Technology is connected with innovation and invention, and it is disrupting various sectors of our daily lives, namely the legal sector and thus the way we resolve our disputes (Khivsara et al. 2021, p. 1172; Verdonschot 2016).

As Jeremy Barnett and Philip Treleaven state “[t]he Legal sector has witnessed a growth in the use of ‘LawTech’ or ‘LegalTech’ technology both in the office and in courts. LawTech refers to the use of technology and software to provide legal services where advice is given both before the transaction commences and after disputes break out. This refers to the application of technology and software to help law firms with practice management, documents, storage, billing, accounting and electronic discovery. It also includes connecting people with lawyers more efficiently through online marketplaces and lawyer-matching websites” (Barnett and Treleaven 2018, p. 399).

Regarding the resolution of conflicts, Online Dispute Resolution (ODR) encompasses various means of using information and communication technology to assist or to facilitate the resolution of disputes between parties, avoiding the necessity of issuing proceedings in a court. It includes facilitative methods like online mediation, advisory methods such as online case appraisal, and determinative procedures like online arbitration or adjudication or, even, a combination of all three. It can be fully automated, or it can involve human intervention. “In ODR, automation is used both in the process of bringing the parties together for a ‘neutral’ decision or to propose a settlement; in the resolution i.e., as the ‘Fourth Party’; or can be mandatory” (Barnett and Treleaven 2018, p. 400).

ODR serves as a versatile platform for addressing both synchronous and asynchronous disputes. Synchronous ODR allows for real-time communication between parties, often using tools like Skype, Zoom, or other systems for videoconferencing. Asynchronous ODR, on the other hand, enables discussions to occur at different times, as seen in email-based dispute resolutions where parties engage at varying intervals. Beyond conventional ODR tools, there have been emerging technologies employing artificial intelligence (AI) to simulate the role of traditional ADR practitioners. These AI systems can conduct fully automated cyber negotiations and offer a neutral space for exchanging settlement offers without requiring a mediator's involvement. These AI systems can function in either synchronous or asynchronous ODR settings.

Nonetheless, there is controversy regarding the precise meaning of the term ODR (Mania 2015). Many scholars associate ODR with Alternative Dispute Resolution (ADR), given that the most common ODR methods, such as negotiation and arbitration, align with well-known ADR practices. Essentially, Online Dispute Resolution is seen as a modernized form of traditional ADR, enhanced by contemporary information and communication tools like email, VoIP, smart messengers, and videoconferencing (Cole and Blankley 2006).

Simultaneously, some scholars state that ODR has an independent status. According to Julia Hörnle, ODR is not merely a transplant of ADR into the online environment, emphasizing the transformative power of technology (2009). In ODR, technology plays an active role beyond being a communication medium, assisting the third party in resolving disputes and occasionally even assuming its role. Pioneers in the ODR movement, like Ethan Katsh and Janet Rifkin, presented the term 'fourth party' to describe the unique status of technology (Katsh and Rifkin 2001, p. 9). Computer tools not only facilitate communication but also actively organize sessions, collect and analyze data, present relevant materials to parties at convenient times, remind of sessions and document submission deadlines, analyze previous practices, and propose solutions based on that analysis (Velicogna 2022). In essence, programs can perform tasks beyond human capabilities, functioning autonomously and undertaking separate and unique responsibilities (Katsh and Rabinovich-Einy 2017). Another perspective draws a distinction between popular technologies (such as email or Skype) created for various tasks and sectoral technologies, which are more sophisticated and specifically designed for dispute resolution purposes. The use of the latter is considered true ODR, while traditional web instruments are viewed as technically facilitated dispute resolution without significant added value, not representing ODR in its pure form but rather a technically assisted form of dispute resolution (Mania 2015).

With this article, we intend to present and conceptualize online mediation within the scope of Online Dispute Resolution (ODR) procedures, shedding some light on the profound and dynamic changes occurring within legal and justice systems throughout the world. We will focus on the specific features and principles of online mediation, thus enhancing the main challenges and potentialities of its use as an adequate means of resolving conflicts, taking into consideration the Portuguese legal system.

This research is a legal study, characterized as qualitative, involving a content analysis of bibliography resulting from a narrative review.

Once the theme was defined, a preliminary bibliographic survey was conducted to map the available material on the topic (Sampaio 2022; Carmo and Ferreira 2008). Subsequently, the problem was formulated, and a work plan was elaborated. After revising the bibliography, the material was thoroughly read, the theme logically organized, and the final text written (Gil 2002).

To gain greater familiarity with the topic and provide a comprehensive literature review, bibliographic research was conducted using books, scientific articles, journal articles, and official legislative/regulatory documents (Gil 2002; Sampaio 2022).

Following these methodological guidelines, doctrinal legal research of an analytical nature was undertaken. This type of legal research involves a critical evaluation of the existing laws on the subject matter under review, namely on Alternative Dispute Resolution (ADR) methods, mediation, Online Dispute Resolution (ODR) methods, and online mediation.

It is a qualitative inquiry requiring intensive thinking and fact appraisal, aimed at exposing legal concepts by analyzing their sources, interconnections, and societal recognition. Analytical research focuses on addressing gaps in laws, determining their hierarchy, and generating new reform ideas. While advantageous for its stress-free nature, accessibility, and quick problem-solving ability, it has been criticized for its theoretical and subjective approach, overlooking societal factors, and failing to bridge the gap between legal norms and social behavior. Nevertheless, analytical research remains pivotal in legal scholarship, paving the way for new perspectives and reforms (Ngwoke et al. 2023).

## 2. Online Mediation: A Brief Legal Framework of the Portuguese Law

Law 29/2013 of 19 April (ML) “regulates mediation in Portugal autonomously and systematically, enshrining in a single legal instrument the basic normative framework of this non-adversarial method of conflict resolution” (Monteiro and Carvalho 2019, p. 385). According to Cátia Cebola (2015), the adoption of the Mediation Law reveals the intention of the Portuguese legislator to “in a single legal document encompass several aspects involved in the resolution of conflicts by mediation (...) [thus deserving,] an autonomous and systematic treatment, concretizing the basic normative framework of this method in our legal system” (p. 57). Its normative prescriptions are divided into four essential parts: the general principles of mediation (articles 3 to 9), civil and commercial mediation (articles 10 to 22), the legal status of mediators (articles 23 to 29), and public mediation systems (articles 30 to 44).

According to article 3 of the Portuguese Mediation Law, the general principles set out in Chapter II are “applicable to all mediations carried out in Portugal, regardless of the nature of the dispute that is the subject of the mediation”. It is then assumed “(...) the universal application of the guiding principles of mediation” (Lopes and Patrão 2016, p. 29); therefore, online mediation is also covered. On the other hand, the abovementioned law intends to apply to both internal and cross-border conflicts, going beyond the requirements prescribed by Directive 2008/52/EC<sup>1</sup>, which only addressed the regulation of mediation regarding cross-border conflicts<sup>2</sup>. As Lorenzo Bujosa Vadell and Diego Palomo Vélez state, “this standard, which binds the national legislators of the Member States to regulate, through the means they deem appropriate, the subject matter it contains, presents a significant limitation: it is true that it promotes the use of mediation for achieving an efficient and swift resolution of conflicts in the area of private law—in areas where rights are freely disposable. However, it is limited to cross-border disputes, that is, those with a corresponding element in another distinct Member State. It is not mandatory for the domestic regulation of mediation in the States that are part of the European judicial area” (Bujosa Vadell and Palomo Vélez 2017, p. 60).

Portugal does not have any specific regulations of online mediation. Law 144/2015 of 8 September (which transposed into the legal Portuguese order the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on the alternative resolution of consumer disputes—Directive on consumer ADR) limits its regulation to consumer conflicts and does not create any general regulation for online mediation.

This reality does not imply, however, that online mediation is not allowed in Portugal or even that it is completely excluded from the existing legal framework.

### 2.1. Online Mediation: Conceptualization

Online mediation is commonly viewed as an integral component of the Online Dispute Resolution (ODR) movement, leveraging technology to facilitate dispute resolution outside the traditional courtroom setting.

<sup>1</sup> 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 (EU Mediation Directive), OJ L 136, 24 May 2008, 3–8.

<sup>2</sup> For further analysis on the implementation of the Directive 2008/52/EC, see European Parliament (2016).

First and foremost, it is important to stress that online mediation is mediation, “mirror[ing] its traditional offline counterpart (. . .). [I]t is just the same process empowered and supported by modern technology (. . .) the only difference seemingly lies in the device used to connect the participants” (Terekhov 2019, p. 37). The European Union Mediation Directive defines mediation as a “structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator”<sup>3</sup>.

Considering the reality in Portugal, online mediation is restricted to the use of digital means such as videoconferencing or email to carry out the conflict resolution process (Gonçalves 2016, pp. 139–45). This practice has become more common, particularly in public family mediation systems and in the Peace Courts during the COVID-19 pandemic, but there are currently no practices with a higher level of digitalization or online platforms for resolving conflicts through mediation.

Online mediation can be generally considered an alternative dispute resolution (ADR) method in which an impartial, independent, neutral, competent, and responsible party with a non-adjudicatory role (the mediator) assists the conflicting parties to reach, by their own free will, throughout a flexible and informal procedure, a settlement agreement, using digital channels. Thus, in the mediation procedure, “[a]ll mutual relations between the two parties and parties with their mediator are normally referred to as the «mediation triangle»” (Terekhov 2019, p. 35).

It is, therefore, a structured procedure in which two or more parties, by themselves and voluntarily, using an online platform or electronic tools<sup>4</sup>, try to reach an agreement that puts an end to the conflict, with the assistance of a mediator. This third party, designated as the online mediator, must independently, impartially, and competently conduct the online mediation procedure. The mediator does not have an adjudicatory role in the mediation procedure. Thus, depending on the mediation model used, the mediator is either a facilitator of the communication between parties or a provider of some proposals of a draft settlement agreement. Nonetheless, it is always upon the parties to accept and sign the agreement, or not. Bearing in mind the Portuguese reality, the virtual environment where online mediation is carried out may consist of an interactive website that provides a set of electronic conflict resolution tools that allow the mediator and the parties to participate in an online mediation procedure. But the procedure can take place through a written system such as chat or other virtual formats and involve audiovisual communication.

## 2.2. Online Mediation: Some Specifics Regarding the Principles of Mediation

The voluntary nature of mediation, set in article 4 of the Portuguese Mediation Law as a core principle of mediation, must also be ensured in an online mediation procedure. This means that the decision to participate, to remain, to leave the mediation procedure, and/or reach an agreement relies solely on the will of the parties. Thus, they will not be punished or made accountable for their lack of cooperation for not reaching an agreement or for not signing the agreement. Even so, the content of the settlement agreement is also entirely up to the parties, despite the intervention of the mediator on its writing. Therefore, and in order to guarantee the free consent of the parties, an online mediation platform shall provide all the necessary information on the procedure, as well as on the rights and duties of the parties, so that their consent is provided in an informed manner as it is legally required.

Another basic principle of mediation is its confidentiality. This is a feature “essential for the mediated to feel the trust and the will necessary to, in an informal environment and in good faith, reveal their real interests, often hidden behind expressed and assumed positions” (Monteiro and Carvalho 2019).

<sup>3</sup> Article 3.º, (a) of the Directive 2008/52/EC.

<sup>4</sup> For further developments on electronic online conflict resolution tools, see Katsh and Rabinovich-Einy (2017) and Wahab et al. (2012).

In the specific case of online mediation, it is imperative to ensure protection and keep all information and documents submitted or made available by the parties on the platform confidential. Moreover, the information regarding the access of the parties to the platform to attempt to resolve their conflict must be kept confidential. In addition, mediators must “maintain in secrecy all the information that come to [their] knowledge during the mediation and cannot use them for [their] own purposes or for others’ purposes” (article 5 of the Portuguese Mediation Law), regardless of how mediators became aware of them (videoconference or email, chats, etc.). There are, nonetheless, some legal exceptions. On article 5, n.º 3, “[t]he duty of confidentiality over the information regarding the contents of the mediation can only cease by reasons of public policy, namely in order to secure the protection of a child’s superior interest, when the protection of the physical or mental integrity of any person is at stake or when that is necessary in order to apply or enforce the agreement obtained in mediation, in the strict measure of what is necessary, in each case, to protect these interests”.

On the other hand, online mediation must also ensure the transparency of the procedure, so the online mediation platform used by the mediator or by any entity providing electronic mediation services must provide all information concerning the following: the procedural rules adopted; the costs and the effects of the mediation agreement; electronic communication and mediation tools; the language or languages in which the mediation procedure may take place; the rights and duties of the parties; some information regarding the mediator(s), in particular those related to their qualifications and the code of ethics adopted; as well as the entity that manages the platform in which the procedure will be held.

In an online mediation, parties should be treated fairly throughout the procedure. For that purpose, all parties must be guaranteed the right of (online) access to all documents, evidence, and statements made or provided by the other party, as well as the right to be duly informed and clarified about their rights and duties regarding the procedure and inclusively regarding the effectiveness of the mediation agreement. The (online) mediator should treat all parties equally, granting them the same opportunities for participation. This requirement may raise compliance difficulties on an online procedure, either because the parties can summon/communicate with the mediator directly or even because the physical conditions of access to the electronic tools may be different.

Both the (online) mediator and the entities that promote online mediation must act with independence, neutrality, and impartiality. It is up to them to ensure that they have no interest in reaching the final agreement; are not remunerated and do not have any personal, institutional, or professional relationship with any of the parties; and do not receive instructions from the parties, directly or through an intermediary, regarding the development of the procedure. Once again, it is absolutely crucial for the mediator to be transparent while conducting the procedure since the absence of simultaneous physical contact with the parties can raise doubts and mistrusts that should and must be avoided since they will undermine the trust and confidence in the procedure and in its outcome.

### *2.3. The (Online) Mediation Platforms*

Online mediation may use a wide range of web-based technologies such as text-based solutions like email and messenger, audio dynamic tools like phone calls and video (e.g., skype, zoom, teams), or more advanced procedures relating to artificial intelligence (AI).

The online mediation platforms or websites must ensure scrupulous compliance with the principles of transparency, confidentiality, and voluntariness, as well as the rules on data protection, according to the law in force. Any breach or violation of data protection rules must be the responsibility of the managing entities of the online platform.

If an online platform uses the services of contracted mediators, it is responsible for ensuring that they are competent for exercising their activity and that they fulfill their duties in scrupulous compliance with the code of conduct adopted by the managing body of the platform or website. It must be stressed that, from our point of view, the managing

bodies of the online mediation platform must apply for authorization to operate in the state where they are based. Platforms for resolving conflicts through online mediation should also enable the participation of several parties in multi-party disputes.

#### 2.4. *The (Online) Mediator*

In Portugal, the legal status of a mediator is based on the application of three legal regulations: Law 29/2013 of 19 April 2013 that establishes the general principles applicable to the activity of the mediator and the rights (article 25) and duties (article 26) of this professional; Order 344/2013 27 November 2013 that prescribes the registration of conflict mediators in Portugal; and Order 345/2013 of 27 November that regulates the certification of the entities that promote conflict mediation courses.

None of the abovementioned statutes specify online mediation and thus the online mediator. Despite that, those regulations do not exclude its application to an online mediation, so the same rules that apply to the mediator who conducts a face-to face procedure must be applied to the mediator that develops an online mediation. We even question the need and the pertinence for the adoption of specific regulations to the mediator that conducts the procedure through the use of modern technologies such as an online platform or some electronic tools. Nonetheless, we believe that there are some specificities on online mediation that must be addressed, namely (1) the contractual relationship of the (online) mediators with the administrator of the mediation platform: should the (online) mediators be associated with the administrator or can their intervention be sporadic?; (2) specialized training in online mediation: should the mediators receive complementary training and in what specific content should this be taught?; (3) the requirements for the exercise of the profession and certification of mediators: which entity may have competence for the certification of mediators?; (4) the disciplinary regime: which rules should be applied, taking into consideration that the mediators can be anywhere in the world during an online mediation?; and (5) the supervision of mediators: which entities will be able to supervise and apply disciplinary sanctions and/if there should be set up at the European level, such as a general supervisory body?.

Bearing this in mind, we will now present some of the necessary specificities that, from our point of view, must be considered regarding online mediators.

Regarding the legal requirements for exercising mediation, the specific nature of online mediation justifies that the initial training of any mediator must be complemented by the learning of specific techniques, strategies, and tools in online mediation (Vilalta Nicuesa 2016, pp. 193–201). It is important for the (online) mediators to learn how to gain parties' trust without them being physical present in the same space; to develop and to promote an open dialogue between all parties through an online environment, mainly when the conditions for electronic communication are not the ideal ones and/or are interrupted; and to learn how to communicate not only verbally but also through writing if that is the way the procedure is held (Herrero and Masip 2016, pp. 130–33). The (online) mediators must be aware not only of the way they write but also of how they interpret what the parties write (for instance, if one of the parties uses capital letters in a given sentence, it is essential for the mediators to understand if they are trying to emphasize the message conveyed or if it was just an error).

The selection of (online) mediators should involve the establishment of an accreditation system (Cebola 2016, pp. 161–64). Thus, a European Register of online mediators should be created and set up. This registry should address issues such as the following: the entity responsible for the certification of mediators (which must be an external and reputable entity); the requirements that must be fulfilled for the certification of the mediators (in terms of their personal and training qualifications); and the certified training for the practice of this activity (profession).

The quality of mediation and its establishment as a profession equally require the existence of ethical codes of practice to guide the activity of any mediator, including the online mediator (Wing 2016). This is aimed at promoting professional accountability

among mediators in their practice, aiding in the definition of their legal status, and asserting mediation as an effective means of conflict resolution.

In the matter at hand, we believe there is no need for an entirely innovative code of ethics for the online mediator. Indeed, ethical rules should apply to any mediator regardless of the method through which they carry out their work. On the other hand, the practice of online mediation itself demonstrates the possibility of resorting to different systems, making it challenging to establish an ethical code uniformly applicable to all online mediators (Gonçalves and Rainey 2018). If a particular system entails the provision of a specific ethical rule, it may be established only within that context. Nevertheless, we consider important for each online mediator (or platform providing online mediation services) to clearly indicate the adopted ethical and deontological rules.

We believe that for the professional recognition of the online mediator, it is essential to define and establish an entity responsible not just for the supervision and the overseeing of the mediator's activities but also for the provision of a set of sanctions the mediators may be subject to. In both face-to-face and online mediation, responsibility revolves around sanctioning for violations of the duties to which mediators are bound. Therefore, while different rules or ethical obligations may apply, there seems to be no justification for establishing a specific or significantly distinct disciplinary responsibility regime for the online mediator.

Greater challenges may arise, however, concerning the oversight entity for online mediators. Given the possibility that an online mediator may be registered in a different country than the one where the parties are located (or the electronic platform through which mediation takes place is situated in a different state from the online mediator's registration), and due to the absence of a geographically defined location for online mediation, the question arises as to who will oversee a particular online mediator procedure and which rules shall be applied. Therefore, it seems necessary to create a national and international registration of certified mediators (able to develop an online procedure). Such an entity should also be responsible for implementing a set of rules regarding the accountability and the supervision of the activity of (online) mediators. A solution could be the application of the rules in force in the state where the mediator is registered or where the electronic platform is based.

Whenever the violation of any rule or misconduct should be attributed to an electronic platform using artificial intelligence-based systems, the responsibility should be attributed to the entity that manages the platform.

### *2.5. Online Mediation: Competence and Procedure*

In online mediation, preparation is the key to success. As Ana Maria Maia Gonçalves (2023) summarized, there are some key aspects that the mediator must bear in mind when conducting an online mediation via web video. First, it is important to schedule a pre-meeting that will work as a test session with no real issues on the table and explain to the participants the importance of looking at the camera; check and double check the quality of the camera and of the audio and make sure that each of the functions that might be needed are tested and working; create a participant spreadsheet with the participants' affiliation, name, role, email address, and telephone number; and prepare a document such as an agreement to participate or a process agreement that covers a description of the process, as well as the technology that will be used. It is also important to bear in mind the necessity of slowing down the process and being a bit more direct when talking to the parties as they can focus on short-term goals; provide prompt feedback and summarize more often than in a face-to-face session; provide some guidance in terms of time management; and do not forget to build in the process with checks and breaks to obtain feedback, not about the issue on the table but rather about the process itself. Finally, Ana Maria Maia Gonçalves points out the importance of having a plan B (regarding what to do if technology fails) as well as a crisis plan (to deal with situations like crying, yelling, and an End Game), thinking ahead of time how to wrap up the sessions.

Regarding the subject matter jurisdiction, online mediation may address any type of conflict in accordance with the legal framework applicable to each matter and within each legal system. Nonetheless, the online mediation procedure will have to comply with a set of specific rules that could be exemplified as the following.

Each platform or website must provide a form so that the parties can initiate the procedure. The procedure can be put into motion by both parties simultaneously or by just one of the parties. In this last case, it is up to the managing body of the platform to get in touch, electronically, with the other party to obtain his/her consent to participate in the procedure and try to schedule a pre-mediation session. In this electronic communication, the opposing party shall be informed of the subject matter of the dispute and also of the parties who have requested the online mediation. A time limit for the reply must be established, after which it should be considered that the request for mediation has been declined. In the reply, the party must indicate his or her willingness to participate in the mediation and the language chosen for the procedure. If parties do not agree over the language chosen to develop the procedure, mediation shall be deemed not possible.

If the party consents to the procedure, the mediation sessions must be initiated, either in writing or in real time through videoconference, depending on the means adopted by the platform. The whole procedure must be explained to the parties in such a way that there is no doubt regarding the development of the mediation, mainly the way the sessions will be conducted, the way the communication between them will be held (in writing in deferral or in real time by videoconference), if the mediation sessions will be joint or in caucus (separate sessions), if the parties will be accompanied by lawyers, lawyers, trainees, or solicitors, or even if they could be represented by others.

If the parties reach a settlement agreement, it must be formalized in writing. It is up to the mediator in conjunction with both parties and even lawyers, trainees, or solicitors to draft the agreement. The agreement must be available on the platform so that it can be signed through a digital signature or other digital form of acceptance of its contractual content.

This agreement shall be recognized and enforceable in all Member States, unless it infringes mandatory rules or criteria of public policy of the State in which its implementation has been requested.

### 3. Online Mediation: Advantages and Main Challenges

Besides all the advantages and benefits associated with mediation in general, such as the flexibility of the procedure and the confidentiality that it ensures, mediation is a conflict resolution mechanism that enhances individual and social wellbeing, contributing to the amicable resolution of conflicts and thus to social pacification. It is a mechanism based on the responsibility and accountability of those who, as active and participatory citizens, demand a bigger and more effective intervention in the edification of a peaceful solution to their present conflicts, projecting their relations into the future.

The advantages of online mediation for the resolution of ecommerce conflicts and/or cross-border conflicts seem obvious and well documented ([Hornle 2009](#)). Moreover within a global market, distances decrease in the inverse proportion in which information and communication technology (ICT) stimulates the establishment of new relationships, both personal and commercial, and potentiates new types of conflicts. It is therefore necessary to promote and develop new forms of conflict resolution that enable the participation of citizens from different States.

We also highlight that within the Area of Freedom, Security and Justice, promoted by the European Union and today converted into an area of shared competence between the Union and the Member States (article 4 of the TFEU), it is intended to build a space of citizenship in which people have their rights recognized and within which they benefit from more freedom, more security, and better justice ([Piçarra 2017](#); [Martins 2019](#); [Quadros 2018](#); [Gorjão-Henriques 2014](#)). It is then crucial to develop a new model of administration of justice, one that does not necessarily involve access to the courts but that promotes

and stimulates the use of more appropriate forms of conflict resolution, such as online mediation (Zeleznikow 2017).

Online mediation allows a greater “space and time” flexibility since it is not dependent on the (face-to-face) meeting of the parties in the same space and time. This is, in fact, one of the great virtues of online mediation: the promotion of interaction at a distance, without the imposition of limitations or restrictions of geographical nature. This would definitely enable direct access to the mediation sessions, thereby preventing participants from having to wait for their respective call to enter mediation in a public waiting room. Its flexibility allows the mediator to conduct immediate private sessions in chat rooms without having to conduct private caucuses at a different time. Conducting an online mediation procedure could be useful, for instance, for people with limited availability of time, those who are apprehensive about encountering the other participant, or those who experience some difficulty in managing social anxiety. Connected to this issue, it allows individuals to stay in a more comfortable or familiar space, which might encourage participation in the procedure, especially of those who may be reluctant to attend due to the novelty of the process. Online mediation also allows for a cost reduction for all parties involved, even by avoiding the inherent displacements or physical spaces.

But, nevertheless, it is undeniable that mediation using digital platforms entails some operational difficulties<sup>5</sup> (Verdonschot 2016). On the one hand, it widens the gap between those who have access to ICT and those who are excluded from the use of these services and have not mastered these skills. As mediation is only possible if the actors (mediator and parties) have access to a computer and the internet, but even more so if they have the necessary competence and are “comfortable” with the use of these means and platforms, this may constitute an added difficulty for some of the parties who may not feel comfortable with this particular procedure, and which may make the respective procedure unfeasible. In this specific situation, the capacity, ability, and specific competence of the mediator in detecting these cases and transforming this difficulty into a potentiality must stand out.

We also highlight the language barriers that do not disappear with the introduction of ICT, especially if the parties and the mediator speak different languages, as well as the legal difficulties arising, *inter alia*, from determining the professional requirements of which country the mediator must respect; how to enforce the agreement in the event of non-compliance; and the law to be applied to mediation when the parties and the mediator are in different States. As mediation is a procedure that relies on trust and on confidence (between parties, parties with the mediator, and on the procedure itself), the use of technology to develop a mediation procedure may add another meaning to trust, that being trust in the technology used for the procedure. It is also important to stress the problem connected to the private and personal data of the participants that might be collected and retained.

Since confidentiality is one of the main features of mediation, regarding online mediation, there are some added challenges and/or difficulties. We find it relevant to stress the importance of assuring that all the information shared is kept secret. By conducting the mediation through an online platform and at a distance, it must be assured that only the parties involved in the procedure are the ones that take part in the session and that there is no one else in the room besides those authorized. Moreover, there will probably be some shared documents and text messages that will be stored somewhere on the server, leaving a digital trail.

Finally, we must address the human and relational factor. Mediation is a conflict resolution procedure that is based on people and is intended for people, to help them, in a warm and friendly environment, to resolve their conflict. In online mediation, the human factor is, at the very least, diffuse. Mediation is a procedure that is based on communication, and the mediator is the manager of this communication: verbal, non-verbal, and para-verbal. Taking the mediation in a virtual procedure, we cannot fail to highlight that part

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<sup>5</sup> For an overview of the issues that artificial intelligence raises in the field of law, see Rocha and Pereira (2020).

of this communication is lost or is seriously compromised, namely the non-verbal part. As stated by Victor Terekhov (2019, p. 38) “[n]o longer will it be possible to rely on facial expressions, gestures, and body language of the clients. The atmosphere of interaction, its pace, emotions of the participants, worries and fears they encounter—everything will be slightly different”. Despite this, conducting an online mediation procedure through videoconference allows the mediators to see both parties at the same time without having to move their head from one side to the other. Nonetheless, it is just their faces and not the entire body.

#### 4. Conclusions

Online mediation is on a path of increasing expansion. Nonetheless, it is an imperative posed by the need to effectively resolve some of the conflicts that arise in modern society and that the law will have to regulate to ensure the results of its application. Indeed, globalization and the increasing mobility of people and goods have meant that current legal relations involve parties based in different countries. On the other hand, if relationships, such as commercial or consumer relations, are established by electronic means, it can only be ensured that the resolution of conflicts at this level also operates electronically.

This new reality, however, is a challenge in the online resolution of conflicts and in the professional practice of the (online) mediator.

The implementation of mediation in the European space is a path that has been followed gradually, but with firm steps. The regulation of online mediation is another step in acknowledge this as an effective way to resolve some of the conflicts of European citizens.

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