10

Online Dispute Resolution

A Viable Avenue for Redressing Fundamental Rights Violations?

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10.1 INTRODUCTION

This chapter looks beyond established mechanisms that could be used (creatively) to seek redress and explores if and how a new mechanism in the form of an EU online dispute resolution system could potentially improve access to redress for victims of fundamental rights violations by the EU. Online dispute resolution (ODR) systems are defined as 'mechanism[s] for resolving disputes through the use of electronic communications and other information and communication technology'.[1] In very basic terms, ODR is a form of alternative dispute resolution (ADR) that relies on a technology-based intermediary, or an ODR platform, to organise communication between the parties and, ultimately, to settle the parties' dispute. ODR systems have emerged together with the rise of the Internet and e-commerce to facilitate the settlement of cross-border disputes. Well-known examples of ODR platforms are eBay's Resolution Center[2] and the domain name dispute resolution system of the Internet Corporation for Assigned Names and Numbers (ICANN).[3]

The EU legal system is no stranger to ADR and ODR. ADR and ODR systems were first introduced as a form of redress mechanism in the field of consumer law. Now, ADR and ODR mechanisms can be found in a variety of

[1] UNCITRAL, *Technical Note on Online Dispute Resolution* (13 December 2016), pt. 24.

[2] Amy Schmitz and Colin Rule, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection* (American Bar Association 2017).

[3] ICANN Domain Name Dispute Resolution Policies <www.icann.org/resources/pages/dndr-2012-02-25-en>.

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fields of EU law, including telecommunications law[4] and the recently passed Digital Services Act (DSA).[5] They have become a go-to tool for the EU legislator whenever there is a problem with the underenforcement of legal provisions protecting consumers and when access to justice and redress cannot be adequately provided through traditional court proceedings via the judicial system.

This raises the question of whether ODR mechanisms can be transferred outside the realm of private law. Could an ODR mechanism also be used in disputes where one of the parties is a public entity, like the EU, and the other is a victim of a (serious) fundamental rights violation? This chapter sheds light on this question by laying out the basic elements of ODR systems in Section 10.2 and by looking for inspiration among some examples of existing ODR mechanisms in Section 10.3. Finally, Section 10.4 of the chapter discusses design options for an EU ODR system that could function as a redress mechanism for fundamental rights violations by the EU and engages with possible benefits and shortcomings of such a system.

10.2 A BRIEF HISTORY AND BASIC ELEMENTS OF ODR

10.2.1 *A Brief History of ODR: From Private Actors to Public Sector*

To better understand the nature and capabilities of ODR, it is worth starting with a short history of ODR. ODR emerged in the mid-1990s as a response to the Internet becoming more widely available and accessible for commercial and private use. During this early period of the Web, the first online marketplaces like Amazon and eBay launched, and projects of collective content creation by internet users like Wikipedia emerged. With more and more online interactions and commercial transactions taking place around the globe, the number of conflicts originating from these interactions rose.

[4] In the event of B2C dispute settlement in the telecoms sector, see Article 25 of Directive 2018/1972 establishing the European Electronic Communications Code, which obliges national telecoms regulators to offer ADR services to consumers. Many national regulators implement this obligation in the form of an ODR mechanism, see, e.g., the Austrian ADR Body for Electronic Communications Services where the entire procedure takes place electronically. Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code [2018] OJ L321/36, art 25; Austrian ADR Body for Electronic Communications Services <www.rtr.at/TKP/service/schlichtung_telekom/Webformular.de.html>.

[5] Regulation (EU) 2022/2065 of the European Parliament and of the Council on a Single Market For Digital Services and amending Directive 2000/31/EC [2022] OJ L211/1 (Digital Services Act), art 21.

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It quickly became apparent that traditional court systems were not best suited to deal with conflicts originating from interactions on the Web. First, online transactions often had a cross-border dimension, which created a host of jurisdictional questions for national courts.[6] Second, the disputes were often of low value, making recourse to the traditional court system disproportionately costly.

Online intermediaries soon understood that they would have to find solutions for solving disputes between users if their business model were to succeed. In the case of online marketplaces, for example, promises of cheaper prices and greater convenience were insufficient to attract buyers and gain their loyalty. Buyers had to trust the platform. To build trust and prevent sham offers and fraudulent practices by buyers or sellers, platforms introduced rating and feedback mechanisms. These mechanisms, however, did not eliminate disputes between buyers and sellers. This is how eBay, for example, entered into a collaboration with researchers from the Massachusetts Amherst Center for Information Technology and Dispute Resolution to design an online dispute resolution system to settle disputes between buyers and sellers in 1999.[7] By 2010, eBay's dispute resolution system handled sixty million claims per year.[8] The eBay example is useful to highlight two features of ODR. First, ODR initially developed and grew in the private sector, for business reasons. Second, the early history of ODR and its handling of extremely large numbers of complaints have given ODR a reputation of being a fast, cheap, and effective mechanism for settling disputes.

Another example of an early ODR mechanism is ICANN's Uniform Domain Name Dispute Resolution Policy. In contrast to e-commerce platforms, ICANN performs a global internet governance function: it is a private, not-for-profit organisation that administers, among others, the Internet's global domain name system.[9] ICANN's ODR system is administered by various accredited arbitrators and deals in most part with claims from trademark owners that oppose the registration of domain names that use their trademarks without authorisation. As with e-commerce and other internet platforms, ICANN's ODR system allows the settling of disputes in the place where they originate: on the Internet.

[6] Ethan Katsh, 'ODR: A Look at History' in Mohamed S Abdel Wahab, Ethan Katsh, and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice* (Eleven 2011) 24.

[7] Ibid 27.

[8] Pablo Cortes, 'Online Dispute Resolution Services: A Selected Number of Case Studies' (2014) 6 Computer and Telecommunications Law Review 172.

[9] ICANN also administers a global repository of IP addresses and helps remove any clashes or repetitions in this system and 13 root servers.

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While ODR was initially conceived as a dispute resolution mechanism for disputes that arose *online*, its benefits like speed, accessibility, convenience, and expertise, as well as its trust-building function soon inspired various actors to pilot ODR mechanisms for *offline* disputes. The New York City Government, for example, started using the private ODR provider Cybersettle to allow individuals to settle their claims against the city relating to sidewalks, personal injury, or traffic vehicles.[10] Cybersettle was used in cases where the city's liability was not disputed and only the amount of monetary compensation had to be determined. The Cybersettle ODR tool is an automated negotiation process, which offers a blind-bidding process where software determines a negotiated outcome based on secret offers made by the parties. It should be noted, though, that automated negotiation processes are only useful if the only outstanding issue between the parties to a dispute is the amount of monetary compensation.[11]

The potential of ODR for offline disputes, however, goes further. Courts and administrative agencies have found various opportunities for using ODR in the public sector for disputes that go beyond the mere settlement of the amount of compensation. States and provinces in the United States and Canada, for example, have introduced ODR systems to decide appeals against property tax claims.[12] The ODR system for property tax appeals introduced in 2012 in British Columbia, for example, yielded an amicable solution in 75% of appeals submitted.[13] Overall, users of the system reported high satisfaction rates regarding the accessibility and convenience of the system.[14]

ODR has also been implemented in various jurisdictions at a pre-trial stage for a variety of civil law disputes. In the Netherlands, for example, the platform *Rechtwijzer* started operating in 2014 as an ODR tool for family separation and divorce disputes, which allowed the parties to engage in a structured dialogue to reach a divorce settlement agreement.[15] Agreements reached through the platform can be subsequently presented before court to make the settlement binding.

[10] Cortes (n 8) 172.
[11] Ibid.
[12] Ethan Katsh and Colin Rule, 'What We Know and Need to Know about Online Dispute Resolution' (2016), 67 South Carolina Law Review 329.
[13] Ibid.
[14] Ibid.
[15] Due to lack of continued public funding, the Rechtwijzer platform was wound down in 2017 and reopened as the platform Uitelkaar.nl in 2017 by a private for-profit entity. For more details, see Laura Kistemaker, 'Rechtwijzer and Uitelkaar.nl. Dutch Experiences with ODR for Divorce' (2021) 59 Family Court Review 232.

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One of the most ambitious implementations of ODR systems connected to the judiciary is the English Civil Online Court (Online Civil Money Claims). The original plan for the English Civil Online Court was to handle most civil claims for sums below £25,000 through a three-stage process: at the first stage, software would assist parties in filling out claims and responses. At the second stage, online or telephone facilitation by court-provided case officers would be offered to the parties to reach a settlement. Lastly, if no settlement was reached at the second stage, the claim could be taken at a third stage to a judge who would decide the case based on the documents submitted during the prior stages. If required by the circumstances of specific cases, the judge could conduct hearings online, by telephone, or face-to-face. The Online Civil Money Claims project launched a pilot in 2017 for claims brought before County Courts for money claims of up to £10,000 brought by individuals or up to £25,000 brought by represented individuals.[16] More than 100,000 claims were issued in the first eighteen months of operation of the pilot.[17] Furthermore, the pilot was expanded during the Covid-19 pandemic due to increased demand.[18]

10.2.2 *The Technological Component of ODR*

To understand the potential of ODR, it is useful to start from its basic elements and various possible design choices. At the most basic level, ODR adds a 'fourth party'[19] to dispute resolution. Traditional dispute resolution involves three parties: applicant, defendant, and a neutral third party (a judge, a mediator, an arbiter). ODR adds to these three parties a fourth party: technology. In ODR, technology comes in the form of software, user interfaces, databases, electronic communication, etc. In contrast to offline ADR, which, in principle, only requires a neutral individual acting as third party and

[16] See UK Government Justice, Practice Direction 51R – Online Civil Money Claims Pilot <www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51r-online-court-pilot>.

[17] UK Government Press Release, 'More than 100,000 Civil Money Claims Issued Online' (Gov.uk, 3 July 2020) <www.gov.uk/government/news/more-than-10000-civil-money-claims-issued-online#full-publication-update-history>.

[18] Practical Law Dispute Resolution, 'COVID-19: 119th Practice Direction Update on the Online Civil Money Claims Pilot (PD 51R)' (Practical Law UK, 15 April 2020) <https://uk.practicallaw.thomsonreuters.com/w-025-0230?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&ppcid=b7c79252b7b54220b6dd90e1b27d8ecd&comp=pluk>.

[19] The term was coined by Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass 2001).

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can be set up ad hoc, ODR requires a more permanent infrastructure. It requires at least an electronic system or platform for 'generating, sending, receiving, storing, exchanging or otherwise processing communications in a manner that ensures data security'.[20] Technology can have an important role at the initiation, resolution, and enforcement stages of ODR procedures.

When initiating an ODR procedure, technology can enable a variety of functions. It can allow for asynchronous communication between parties and alert parties whenever a party has submitted a new communication. Technology can also streamline the completion of forms and documents, so that all relevant arguments and evidence are presented and structured in a way that allows the settlement to be conducted more smoothly. This is one of the important functions of the technological solutions in the examples of *Rechtwijzer* and the first stage of the UK Online Civil Money Claims. In a more sophisticated version, for example, with the help of Artificial Intelligence (AI) tools, technology can help to identify and name a legal issue for parties in the first place. In a pilot programme funded by PEW Charitable Trust, researchers from Stanford and Suffolk University, for example, are developing and testing natural language processing (NLP) algorithms to help ODR users identify and frame their legal issues.[21]

Software tools can also help in providing options for solving conflicts at the settlement stage of the procedure. At a very basic level, ODR can simply offer video conferencing and other communication tools that enable parties to negotiate or a third party to hear parties and to propose solutions. But technology itself can also help in guiding parties to find a solution. As the example of Cybersettle above shows, automated blind bidding can help parties to find common ground to agree on monetary compensation. In the context of e-commerce, some platforms have experimented with software solutions that enable crowd-judging. On Alibaba's Taobao platform, for example, disputes between buyers and sellers are solved by authorised users voting on the most appropriate solution for the dispute.[22] With the lightning speed at which AI solutions are developing, we can probably expect more and more automation of the solution of disputes with ever more complex questions involved, which

[20] UNCITRAL (n 1) 26.

[21] Amy Schmitz and Janet Martinez, 'ODR and Innovation in the United States' in Mohamed S. Abdel Wahab, Ethan Katsh, and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice* (2nd edn, Eleven 2021).

[22] Alan Kwan, Alex S Yang, and Angela Huyue Zhang, 'Crowd-judging on Two-sided Platforms: An Analysis of In-group Bias', Management Science, published online in *Articles in Advance* 7 June 2023.

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will be available not only to ODR mechanisms but to traditional ADR and court systems, too.

Lastly, technology solutions embedded in an ODR system can ensure the enforcement of settlements. In the case of online platforms that also control payments (e.g., through collaboration with a payment service provider), the outcomes of dispute resolution between buyers and sellers, or service providers and recipients, can be enforced through charge-back functions.[23] If the outcome of a dispute settlement between buyer and seller is that the buyer should have their money back, the chargeback mechanism will take care of implementing the remedy by reversing the payment transaction. In the case of transactions occurring via distributed ledger technologies (DLTs), like the Bitcoin blockchain, the software protocols used to record transactions could also implement automatic enforcement mechanisms for dispute settlement procedures.[24] This would be possible, for example, through the operation of smart contracts that have a pre-authorisation or escrow function, which only transfer the amount of a transaction after a human or algorithmic arbiter has verified that there is no dispute or once a dispute has been resolved in favour of the recipient.

10.2.3 *Designing ODR Mechanisms*

The design of ODR mechanisms, including technological choices, ultimately depends on several different factors. The UNCITRAL Technical Notes on Online Dispute Resolution suggest that ODR mechanisms can comprise one or more of the following three stages: a first stage of technology-enabled negotiation between the parties, a second stage of facilitated settlement by appointing a neutral third party that mediates between the parties, and a third stage that could be, for example, binding arbitration. The difference between the stages is the level of involvement of a third party in mediating the dispute and the bindingness of the outcome. This three-stage model is followed by the English Online Civil Money Claims platform. Other ODR mechanisms comprise only the first stage, as, for example, the Brazilian consumer ODR platform Consumidor.gov.br,[25] which enables consumers to file complaints against companies and companies to respond.[26]

[23] Schmitz and Martinez (n 21); Pietro Ortolani, 'Self-Enforcing Online Dispute Resolution: Lessons from Bitcoin' (2016) 36 Oxford Journal of Legal Studies 595.

[24] Ortolani, 'Self-Enforcing Online Dispute Resolution' (n 23).

[25] Accessible via <https://consumidor.gov.br/pages/principal/?1683090534811>.

[26] For a more detailed discussion of the establishment of Consumidor.gov.br, see Maria José Schmidt-Kessen, Rafaela Nogueira, and Marta Cantero Gamito, 'Success or Failure? –

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Blomgren Amsler, Martinez, and Smith provide a more elaborate framework with six criteria to guide the design of dispute settlement systems,[27] which also apply to ODR mechanisms.[28] The six criteria are (i) goals, (ii) stakeholders, (iii) context and culture, (iv) structures and processes, (v) resources, and (vi) accountability. Before developing an ODR system, its goal(s) should be determined. At the most abstract level, the goal of an ODR system is to deliver justice in some of its normative forms, including justice in terms of outcome (substantive, distributive, utilitarian, social), process (access, voice, participation, accuracy, transparency, due process), and/or community (restorative, corrective, transitional, retributive, deterrent). In narrower terms, the goals of a specific ODR system will be tailored to a specific type of conflict that the system seeks to address. In e-commerce ODR systems, for example, such goals can be to enhance consumer trust or to encourage traders' participation by providing speedy settlements. In pre-trial ODR systems, the goal can be to unburden the court's docket while ensuring a fair and fast settlement of smaller claims between parties.

The second factor in designing an ODR system considers the stakeholders that create, use, and are affected by the ODR system, their background, power constellations, and respective resources. In the case of the EU ODR platform, for example, the stakeholders are consumers, companies, and national ODR bodies. Stakeholders should be consulted and actively involved in the process of designing an ODR system.

The third factor is context and culture. An ODR system has to be responsive to the context and culture in which it operates. An online marketplace's ODR system, for example, needs to consider that it might be used regularly for handling cross-border disputes, among anonymous parties, at a high volume, and for a low value. Family ODR systems will need to consider that they are dealing with conflicts usually taking place in geographic proximity, between parties that know each other well, with a strong emotional component, and with a life-altering impact of the outcome on the parties and their affected children.

Effectiveness of Consumer ODR Platforms in Brazil and in the EU' (2020) 43 Journal of Consumer Policy 659.

[27] Lisa Blomgren Amsler, Janet Martinez, and Stephanie E Smith, *Dispute System Design* (Stanford University Press 2020).

[28] Schmitz and Martinez (n 21). Along very similar lines to the six criteria for dispute system design, the International Council for Online Dispute Resolution (ICODR) has published a list to guide ODR platforms, systems, and tools. The principles are accessibility, accountability, competency, confidentiality, equality, fairness and impartiality, legality, security, and transparency. They are accessible via <https://icodr.org/standards/>.

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The fourth factor, process and structure, refers to the ODR's procedural design to prevent, manage, and resolve disputes. They can involve one or more of the UNCITRAL ODR stages (negotiation, mediation, arbitration) mentioned above. The procedures should identify the ODR participants' interests (including their fundamental rights, economic, social, and political interests) and be designed so as to ensure that these interests are recognised and furthered in the procedure.[29]

The fifth factor is resources. For an ODR system, these resources refer to the expenditures for running the system and individual procedures, personnel costs and training, and, importantly, maintenance of the IT infrastructure of the ODR platform. In this context, it is also of central importance who pays for these costs. Depending on who finances the system, it might be perceived as biased.[30]

Lastly, the sixth factor of accountability refers to periodic evaluations as to the ODR system's functioning. Since an ODR system runs on an IT infrastructure, it will automatically generate a large volume of digital data that can be used for subsequent evaluation purposes if there are sufficient resources, cybersecurity, and privacy safeguards in place. The evaluation also entails asking whether stakeholders are actually making use of the system, whether neutral third parties (human or AI-based) involved are delivering unbiased and accurate services, and whether users of the system are satisfied with it. If the ODR system is sufficiently transparent, external parties will also be able to monitor and report on the effectiveness of the ODR system.

The six design criteria of Blomgren Amsler, Martinez, and Smith remain silent on how the remedies of dispute settlement systems or ODR should be designed, especially if procedures are not binding. Section 10.3 will present some examples of existing ODR systems to exemplify the choices made in relation to the six criteria as well as the types of remedies and redress that these various systems award.

[29] It is important to note that this interest-based design differs from a rights-based or power-based design, which are considered as less desirable by Blomgren Amsler et al. See Blomgren Amsler, Martinez, and Smith (n 27). The original distinction between interest-, rights-, and power-based dispute resolution was made in the context of solving employment conflicts by Ury, Brett and Goldberg. See William L Ury, Jeanne M Brett, and Stephen B Goldberg, *Getting Disputes Resolved* (Jossey-Bass 1988).

[30] This has been a critique levelled against ICANN's dispute resolution system, which appears to be biased towards trademark owners. See Michael Geist, 'Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP' (2002) 27 Brooklyn Journal of International Law 903.

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10.3 EXAMPLES OF ODR MECHANISMS

To date, there is no ODR mechanism to enable redress for victims of fundamental rights violations by EU institutions. Yet a panoply of ODR mechanisms exist that could each provide elements and ideas for such a mechanism. This section gives examples of three types of ODR mechanisms that offer insights and learnings for the design of an EU ODR mechanism to redress fundamental rights violations. First, the chapter looks at examples of ODR mechanisms set up by the judiciary, which perform court-like tasks within the judicial or administrative system of their respective jurisdictions when it comes to civil claims. Second, the chapter looks at a precedent of an ODR mechanism set up by the EU itself: the EU consumer ODR platform. Third, the chapter looks at ODR mechanisms that have been created to address fundamental rights violations occurring on the Internet. These are the out-of-court dispute settlement bodies to be set up in the framework of the Digital Services Act (DSA)[31] and the Oversight Board set up by the large US-based technology company Meta (formerly Facebook).[32] None of these ODR mechanisms offers a ready-to-copy precedent for an ODR mechanism to be used by the EU to redress fundamental rights violations, but each of the types of example can offer lessons for the design of an EU fundamental rights ODR mechanism.

10.3.1 *ODR Mechanisms Set up by the Judiciary*

As mentioned in the brief history of ODR above, one of the main examples of ODR mechanisms within the public sector is pre-trial ODR implemented by national judicial systems and administrative agencies. One of the most salient examples is the previously mentioned UK Online Civil Money Claims (OCMC) pilot, which is scheduled to run until November 2023.[33] The pilot was launched after Lord Justice Briggs set out his vision for an online court in his 2016 Report,[34] which followed the conclusion of the Civil Courts Structure Review. Given that accessing the justice system in the United Kingdom is unaffordable for many, the online court project aims at making litigation for small claims more accessible by reducing costs. Cost reductions

[31] DSA, arts 20–21.

[32] <www.oversightboard.com/>.

[33] Practice Direction 51R (n 18) section 2.1(1).

[34] Michael Briggs, 'Civil Courts Structure Review' (Judiciary of England and Wales, July 2016)< www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>.

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are achieved through eliminating mandatory representation and the use of ADR before a claim is heard by a judge. The goals of the OCMC pilot are, on the one hand, to enhance access to justice[35] and, on the other hand, to help in the modernisation of the English civil court system.[36]

One of the notable features of the OCMC pilot is its extensive stakeholder consultation and piloting phase. Lord Justice Briggs had already conducted several consultations with the general public, judges, and other stakeholders in the process of writing his final report.[37] The first phase of the OCMC pilot (August 2017 until March 2018)[38] was conducted with only 1,400 selected participants before opening it to the general public. Furthermore, OCMC users are polled after submitting their claims to understand their level of satisfaction[39] and to generate feedback for further improving the system.

As explained above, the OCMC platform offers in a first step an online interface to fill in the details of the claim, which can then be submitted via the platform. The fees for submitting a claim depend on the amount of the claim (between 4 to 8% of the amount claimed),[40] and there is the possibility for applying for legal aid to cover the fees for low-income claimants. It also allows the respondent to file a response via the platform. So far, 378,000 claims have been submitted.[41] In a second stage, the platform offers mediation, which has been used in 9,560 cases to date and has led to a settlement at this stage in 50.4% of cases within 24 days on average. Settlements reached through mediation result in an agreement between the parties that is legally binding. At any point in the procedure, the claim can be referred to a judge. Overall, the OCMC has yielded positive results in the form of faster settlements, higher

[35] Michael Briggs, 'The Civil Online Court in England', in Rabeea Assy and Andrew Higgins (eds), *Principles, Procedure, and Justice: Essays in Honour of Adrian Zuckerman* (Oxford University Press 2020) 135–152; Mahar Abbasy, 'The Online Civil Money Claim: Litigation, ADR and ODR in One Single Dispute Resolution Process' (2020) 7 International Journal of Online Dispute Resolution 4.

[36] Briggs, 'The Civil Online Court in England' (n 34).

[37] Ibid.

[38] HM Courts & Tribunals Service, 'Fact Sheet: New Online Civil Claims Pilot Rolled Out' (UK Parliament, 2018) <www.parliament.uk/globalassets/documents/commons-committees/Justice/correspondence/Lucy-Frazer-HMCTS-online-civil-claims-pilot.pdf>.

[39] The HM Courts and Tribunals Service published a fact sheet that reports that the OCMC service achieved a 95% user satisfaction rating – however, without explaining specifically what users were satisfied with or which kinds of users answered the survey. See UK Government, 'Fact Sheet: Online Civil Money Claims' <www.gov.uk/government/publications/hmcts-reform-civil-fact-sheets/fact-sheet-online-civil-money-claims>.

[40] HM Courts & Tribunals Service, 'Fact Sheet: New Online Civil Claims Pilot Rolled Out' (n 38)

[41] These figures are as of 20 March 2023. See UK Government, 'Fact Sheet: Online Civil Money Claims' (n 39).

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rates of mediation, and a faster procedure for judges to issue orders based on the digital file.[42]

The growth of pre-trial ODR has not only affected the United Kingdom but also other European states. In reaction to these developments, the Council of Europe issued a set of guidelines on online dispute resolution mechanisms in civil and administrative court proceedings in 2021.[43] The guidelines are not binding but give guidance to states on how to design national pre-trial ODR proceedings that are in line with Article 6 (right to a fair trial) and Article 13 (right to a remedy) of the European Convention on Human Rights.[44] The guidelines address a variety of issues around ODR procedures, including accessibility, due process, transparency, and cybersecurity. The guidelines would be a good reference for any potential ODR mechanism to offer redress to victims of fundamental rights violations by the EU.

10.3.2 *The EU Consumer ODR Platform*

When it comes to consumer law, the EU legislator has put a lot of emphasis on ADR and ODR as a solution to the widespread underenforcement of consumer law. The EU ODR Regulation,[45] which came into effect in 2016, sets out the rules for setting up a European online platform that offers easy and low-cost dispute resolution through electronic means to achieve a higher level of consumer protection in the EU.

The procedure via the ODR platform is set by EU law, and the ODR platform itself is financed by the EU. The ODR platform is only a first step that allows consumers to submit a complaint and a trader to react. Subsequently, the procedure foresees that consumer and trader will agree on an accredited ADR body that will ultimately settle the dispute. Under the EU ADR Directive, accredited ADR bodies must be able to provide comparable remedies to consumers as those provided by courts.[46] The goals of the EU

[42] UK Government, 'Fact Sheet: Online Civil Money Claims' (n 39).

[43] Council of Europe, 'Guidelines of the Committee of Ministers of the Council of Europe on online dispute resolution mechanisms in civil and administrative court proceedings – Explanatory Memorandum' (2021) CM(2021)36-add5-final <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a2cf97>.

[44] Ibid.

[45] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/1 (ODR Regulation).

[46] Directive (EU) 2013/11 of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/63 (Directive on Consumer ADR), art 11.

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ODR platform are to achieve a high level of consumer protection and to boost growth and integration of the EU's digital single market.[47] The ODR procedure is available to any consumer regarding complaints in respect of online purchases from a trader established in the EU.[48] It thus follows the logic of early ODR that disputes arising online would be best resolved online.

The initial years of operation suggest that the vision for the ODR platform did not materialise as expected. Traders rarely responded to consumer complaints via the platform (80% of complaints were closed thirty days after submission due to no response from the trader)[49] and only around 2% of claims submitted eventually reached an ADR body.[50] This suggests that consumers and especially traders were insufficiently involved in the process of designing the platform to achieve the desired goals.[51]

The Commission has published annual reports on the functioning of the ODR platforms and has run surveys among users of the platform. It eventually responded with a change to the platform's design in July 2019, which now first offers consumers a self-test.[52] The self-test allows consumers various options to proceed with their complaints: either bilaterally contacting a trader (and negotiating), contacting a European Consumer Center, or contacting an ADR body through the platform. As a result, actual complaints submitted to the platform decreased significantly – the procedure offered by the platform was simply not the preferred option for consumers. In 2020, again, only 1% of complaints submitted via the platform reached an ADR body, while 20% managed to resolve their complaint in bilateral talks with traders.[53] The EU Commission did react to the lack of engagement with the formal procedure offered by the ODR platform. It completely revised the design of the ODR platform and turned it more into an information portal that explains to consumers various options to proceed with their complaints. The ODR offer is now only a secondary feature of the website. This is an important example of

[47] ODR Regulation, recs 1–4 and 8.
[48] Ibid art 2.
[49] EU Commission, '1st Report on the Functioning of the Online Dispute Resolution Platform' (2017) COM(2017) 744 final; EU Commission, '2nd Report on the Functioning of the Online Dispute Resolution Platform', (Commission, 6 December 2018) < https://commission.europa.eu/system/files/2018-12/2nd_report_on_the_functioning_of_the_odr_platform_3.pdf>.
[50] Ibid.
[51] Schmidt-Kessen, Nogueira, and Cantero Gamito (n 26).
[52] EU Commission '3rd Report on the Functioning of the Online Dispute Resolution Platform' (Commission, 17 December 2020) <https://commission.europa.eu/system/files/2020-12/odr_report_2020_clean_final.pdf>.
[53] EU Commission, '4th Report on the Functioning of the Online Dispute Resolution Platform' (Commission, 20 December 2021) <https://commission.europa.eu/system/files/2021-12/2021-report-final.pdf>.

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an ODR mechanism that did not deliver on its promises. A more extensive stakeholder consultation, like that carried out for the OCMC, as well as a piloting phase could probably have helped design the EU consumer ODR platform in a more effective manner.

10.3.3 *ODR Mechanisms to Redress Fundamental Rights Violations*

The previous examples have shown that ODR has been used beyond a purely commercial setting: ODR has gained prominence in the judicial system and administrative agencies in various jurisdictions within and beyond the EU. Furthermore, the example of the EU ODR consumer platform is a precedent for an ODR platform that was set up by EU law. In both contexts, ODR has been used to settle small claims. In this section, I discuss two examples of ODR mechanisms that have been set up to address potential fundamental rights violations. One of these is mandated by EU law: the out-of-court dispute settlement systems to be set up in the framework of the DSA. The other has been set up as a self-regulatory measure: the Meta Oversight Board. Both deal with disputes that arise from fundamental rights violations occurring on the Internet, in particular in relation to freedom of speech.

The DSA is a regulatory framework that aims at reducing a variety of risks from illegal online content, including fundamental rights violations. It also regulates the procedures by which online platforms[54] themselves remove illegal online content, referred to as online content moderation.[55] The DSA foresees that online platforms should implement internal complaint mechanisms and allows for appeals to external dispute settlement bodies. The idea behind these mechanisms is that users will be better protected, and online platforms will have to take due regard of the rights and legitimate interests of users in their content moderation practices, including users' fundamental

[54] Online platforms are defined in Article 2(h) DSA as 'a provider of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation'.

[55] The activity of content moderation has been framed by prior scholarship as a quasi-judicial activity by private actors, see Catalina Goanta and Pietro Ortolani, 'Unpacking Content Moderation: The Rise of Social Media Platforms as Online Civil Courts' in Xandra Kramer, Jos Hoevenaars, Betül Kas, and Erlis Themeli (eds), *Frontiers in Civil Justice* (Edward Elgar 2022). De Gregorio equates content moderation to an activity that, due to the power of dominant platforms, has an important constitutional dimension because of the inroads into fundamental rights it can have. See Giovanni de Gregorio, 'Democratising online content moderation: A constitutional framework' (2020) 36 Computer Law & Security Review 1.

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rights. In particular, online platforms must explain how they will take due regard of the rights and legitimate interests of all parties in their content moderation activity, including users' fundamental rights 'such as the freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms as enshrined in the Charter'.[56]

When a platform takes a decision to remove the content of a user, or refuses to remove content reported by a user, users must have access to an internal complaints mechanism to complain about the platform's decision.[57] In addition, users must have the possibility to appeal decisions made by a platform's internal complaint handling system to a certified out-of-court dispute settlement body or online mediation instance.[58] This can enhance access to justice, given that national court systems would be overburdened if they had to hear an appeal against every single content moderation decision and given that it might be too costly for most users to access a court in these cases.[59] The Digital Services Coordinators of each Member State will have the power to certify dispute settlement bodies.[60] In principle, these bodies will not have the power to impose binding solutions on the parties.[61]

The certified dispute settlement bodies need to be independent from platform providers, and members should be remunerated in ways that are not linked to the outcome of the procedure.[62] The members should have the necessary expertise in relation to one or more areas of illegal online content or in relation to the application or enforcement of the terms of service of one or more platforms.[63] This will likely also include expertise on fundamental rights, given that freedom of expression is often one interest at stake in content moderation decisions, and careful balancing against other interests is necessary. In terms of costs, the service of the out-of-court dispute settlement bodies should be free of charge for users.[64]

While the DSA out-of-court dispute settlement bodies are still in the process of being set up at the time of writing, there are some national precedents that show that such independent dispute settlement bodies can function without being perceived as biased towards platforms. In Germany, a similar ODR

[56] DSA, art 14(4).
[57] Ibid art 20.
[58] Ibid art 21.
[59] Pietro Ortolani, 'If You Build it, They will Come' (Verfassungsblog, 7 November 2022) <https://verfassungsblog.de/dsa-build-it/>.
[60] DSA, art 21(2).
[61] Ibid.
[62] Ibid art 21(3)(c).
[63] Ibid art 21(3)(b).
[64] This applies unless the user was in bad faith, see DSA, art 21(4).

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process was set up under the national law on illegal online content (Netzwerkdurchsetzungsgesetz – NetzDG) and is administered by an NGO, Freiwillige Selbstkontrolle Multimedia-Diensteanbieter (FSM). It is financed by a range of media and IT industry players, yet it has not been perceived as biased towards media players or online platforms.[65]

There is another example of an already functioning appeals body to review online content moderation by social media platforms: the Meta Oversight Board. In 2018 and 2019, Meta conducted a global consultation for setting up an independent appeals body, which would decide the most difficult issues and questions regarding its content moderation practices.[66] In 2019, the charter of the Oversight Board was published,[67] which lays down the relationship between Meta, the Oversight Board, and an independent trust that deals with the financing and staffing of the Oversight Board. Members are to be elected for a three-time renewable term of three years, and the trust decides on the compensation of the board members without the outcome of the decisions having an influence on the compensation. Furthermore, the charter of the Oversight Board lays down two procedures for appeals. On the one hand, the Board selects cases from appeals launched by users and. on the other, Meta can refer cases to the Board.[68] When taking decisions, the Board should review the content in light of Facebook's values and policies, as well as fundamental rights norms.[69] Lastly, the Board's decisions in relation to a specific piece of content are binding, while any policy recommendations are not binding on Facebook.[70]

According to the Charter of the Oversight Board, the size of the Board should be at least eleven members (likely to reach forty once fully staffed).[71] Article 1(2) of the Charter also specifies that members must have 'a broad range of knowledge, competencies, diversity, and expertise'. They should have no conflicts of interest and must have demonstrated 'experience at deliberating thoughtfully and as an open-minded contributor to a team'.[72] They should

[65] Daniel Holznagel, 'A Self-Regulatory Race to the Bottom through Out-of-Court Dispute Settlement in the Digital Services Act' (Verfassungsblog, 16 March 2022) <https://verfassungsblog.de/a-self-regulatory-race-to-the-bottom-through-art-18-digital-services-act/>.

[66] Kate Klonick, 'The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression' (2020) 129 Yale Law Journal 2420.

[67] Charter of the Oversight Board (Oversight Board, February 2023) <www.oversightboard.com/governance/>.

[68] Ibid art 2(1).

[69] Ibid art 2(2).

[70] Ibid art 4.

[71] Ibid art 1(1).

[72] Ibid art 2.

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also have the skills to deliver reasoned opinions on the application of rules or policies, and they need to have familiarity with matters relating to digital content and governance, including 'free expression, civic discourse, safety, privacy and technology'.[73] When looking at professional background, two-thirds of the members are lawyers.[74] Furthermore, two-thirds of the members have expertise in fundamental rights in general or in relation to specific fundamental rights fields (e.g., women's rights or freedom of speech). In its decision practice, the Meta Oversight Board regularly goes beyond analysing Meta's content moderation terms and uses international fundamental rights instruments in its interpretation.[75]

In June 2022, the Board published its first Annual Report, which gives insights into the kinds of fundamental rights violations that users seek remedy for or that pose particular challenges to content moderators.[76] According to the report, the Board received more than 1.1 million appeals submitted by users. Most of these related to the Community Standards on Bullying and Harassment (32.4%), Violence and Incitement (28.9%), and Hate Speech (24.8%).

10.4 ODR AS A REDRESS MECHANISM FOR FUNDAMENTAL RIGHTS VIOLATIONS BY THE EU

This section explores possible avenues to establish an ODR mechanism to redress fundamental rights violations by EU institutions. It starts by exploring which legal basis in the EU Treaties could potentially be used to establish such a mechanism. It then discusses possible design options for this ODR mechanism based on the examples discussed in Section 10.3.

10.4.1 *Legal Basis*

To discuss the possibility of establishing an ODR mechanism to provide some form of redress requires first establishing whether there would be any legal

[73] Ibid.

[74] Sixteen out of twenty-three members at the time of writing.

[75] Lorenzo Gradoni, 'Constitutional Review via Facebook's Oversight Board: How platform governance had its Marbury v Madison' (Verfassungsblog, 10 February 2021) <https://verfassungsblog.de/fob-marbury-v-madison/>. See also the First Annual Report of the Oversight Board that gives examples of its references to international fundamental rights instruments in its decisional practice, Oversight Board, 'Oversight Board Publishes First Annual Report' (June 2022) <www.oversightboard.com/news/322324590080612-oversight-board-publishes-first-annual-report/>.

[76] Oversight Board (n 75).

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basis in the EU Treaties for having such an ODR mechanism. The legal basis for the two legal instruments that most prominently support the establishment of ODR mechanisms, the ODR Regulation and the DSA, both have Article 114 of the Treaty on the Functioning of the European Union (TFEU) as their legal basis.[77] Article 114 in conjunction with Article 26 TFEU gives the EU legislature the powers to enact legislation to further the function of the EU internal market. An ODR mechanism to redress the fundamental rights violations by EU bodies and agencies, however, would not have an internal market rationale. This means that Article 114 would not be an appropriate legal basis for establishing such a mechanism.

In general, there is no specific legal basis that would allow the EU to enact legislation to establish an ODR mechanism for addressing fundamental rights violations by its institutions. There are, however, some legal bases in the TFEU that could be used creatively to establish an ODR mechanism for violations of specific fundamental rights. One legal basis, for example, would be Article 19 TFEU, which allows the EU to enact legislation combatting discrimination. Another would be Article 16 TFEU on the right to data protection, which allows the EU to enact legislation regarding the processing of personal data by EU institutions. Such legislation could, in theory, also include a redress mechanism for victims of data protection violations. If we think about the type of fundamental rights violations by EU institutions that seem to be of most relevance at present, Article 78 TFEU might also be a starting point to initiate a legislative proposal. Article 78 TFEU is the legal basis for the EU's common asylum policy and protection of third country nationals in need of protection. Under Article 78 (2) (d) TFEU, the European Parliament and Council acting by ordinary legislative procedure can adopt measures on 'common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status'. Potentially, an ODR mechanism could be implemented as a form of mechanism to address complaints by persons whose fundamental rights have been violated by the EU Agency for Asylum. As Schramm discusses in this volume,[78] there is already a complaints mechanism in place under the European Asylum Policy Regulation implemented by the Agency's Fundamental Rights Office.[79] A similar mechanism

[77] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47.

[78] See Moritz Schramm in this volume, Chapter 5.

[79] Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 [2021] OJ L468/1, art 51.

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exists under the Frontex Regulation.[80] Neither of these mechanisms has been particularly visible or effective so far[81] but could potentially be enhanced through turning them into ODR mechanisms.

As an alternative, it could be possible to subsume a potential ODR mechanism under the umbrella of the European Ombudsman. Article 228 TFEU is the legal basis for the office of the Ombudsman and allows the Ombudsman to conduct inquiries into fundamental rights violations by EU institutions, bodies, and agencies upon her own motion or a complaint submitted to her. This would allow for one central ODR mechanism to complain about fundamental rights violations by any EU body, institution, or agency. The problem with Article 228 TFEU, however, is that only natural or legal persons residing in Europe can submit complaints. One would thus have to think of a network of NGOs that could submit complaints on behalf of third country citizens that have been victims of fundamental rights violations by EU bodies and agencies to the Ombudsman.

10.4.2 *Design Options for an EU ODR Fundamental Rights Redress Mechanism*

If the obstacles relating to the legal basis could be overcome, the process of designing an ODR mechanism subsumed under the Ombudsman's office or other specialised EU agencies could fruitfully draw on the six design criteria for dispute settlement systems and existing ODR mechanisms.

The first step would be to establish the goals of the ODR mechanism. These seem relatively clear: to enable some form of access to redress for victims of fundamental rights violations by EU agencies and bodies, as well as fostering and demonstrating the EU's commitment to international fundamental rights regimes.

The second step to establish such a mechanism would be to extensively engage with stakeholders. This could take the form of a stakeholder consultation, which involves victims of fundamental rights violations by the EU, as well as the organisations that give these individuals a voice, like civil society organisations. As seen in the examples above of the English OCMC and the Meta Oversight Board, several rounds of consultations with a variety of stakeholders helped to establish ODR mechanisms that

[80] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1, art 111.

[81] See Schramm (n 78).

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are being used by stakeholders and that enjoy a necessary level of trust to function.

Third, it is essential to consider the context and culture of an EU ODR mechanism to redress fundamental rights violations. One important part of context and culture would be to set up the ODR mechanism in a truly accessible way for victims. Especially when thinking about victims outside the EU borders, access becomes a challenge due to physical, economic, and language barriers. As a starting point, the ODR platform would need to be available in more languages than the current EU languages.[82] Furthermore, it should have a user interface that can be easily accessed through all types of electronic devices, including mobile devices. Especially when testing prototypes of the ODR mechanism, it should be ensured that the users that are involved in tests are in a comparable situation in terms of IT literacy,[83] literacy in general, language, and socio-economic background. This would avoid similar pitfalls as with the EU consumer ODR platform, which was not designed in a sufficiently user-centric manner to successfully take off.

Fourth, decisions regarding the structure and procedure of the ODR mechanism will need to be made. The procedural rules could be guided by the principles that can be found in the 2021 guidelines by the Council of Europe. In principle, the procedure would commence with the submission of a complaint – the simple registration of these complaints could already create a very important database on alleged fundamental rights violations by the EU bodies and agencies. In a second stage, a committee of members appointed by the Ombudsman or Fundamental Rights Officers could decide on the complaint and whether there has indeed been a fundamental rights violation attributable to EU agencies or bodies. This committee should be staffed by individuals that have a professional or academic background in fundamental rights law. The example of selection criteria for members sitting on the

[82] For innovative ways of limiting language barriers for access to justice, see Margaret Hagan and Others, 'Design Report: Language Access Innovations in Court: How Can Courts Use Technology & Design to Support People in Court When They're Not Proficient in English?' (Stanford University Legal Design Lab, February 2019), <www.srln.org/system/files/attachments/Language_Access_Innovations_in_Court__design_report_from_Legal_Design_Lab__5_.pdf>.

[83] There are some promising pilot programmes from the United States in the area of accessing social benefits, which showed how the user interface can really make a difference for people that come from a background where IT literacy and literacy in general can pose significant obstacles in accessing social benefits, see for example, Zack Quaintance 'Michigan Scales Back Massive Applications Process with Human-Centric Design' (Government Technology, 31 January 2018) <www.govtech.com/health/michigan-scales-back-massive-applications-process-with-human-centric-design.html>.

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Article 21 DSA dispute settlement bodies and the Meta Oversight Board show that such criteria can be tailored to the specific context in which the ODR platform operates. Once a decision has been taken by the committee, the Ombudsman or Fundamental Rights Officers could resort to the forms of redress they can award, which are, admittedly, limited.

The complaints mechanisms administered by the Fundamental Rights Officers at the EU Asylum Agency and Frontex do not have any effective remedies available other than forwarding the message that there has been a fundamental rights violation to the executive director or national authorities.[84] The Ombudsman seems at least to have political influence to persuade other EU institutions.[85] She could address the agency or body that has committed the fundamental rights violation and ask for one of the internationally recognised forms of redress (cessation of the violation, damages, reparation, acceptance of responsibility, and preventing future violations) or try to influence the political process.[86]

As neither the Ombudsman nor the Fundamental Rights Officers have any enforcement powers, the entire ODR procedure would not be binding. The fact that the procedure is not binding, however, does not completely eliminate its effectiveness. In the case of the Meta Oversight Board, for example, decisions do not bind Meta regarding its overall policies but only in respect of the specific case. Nonetheless, the Oversight Board can make recommendations and has used its Annual Report to show whether Meta has made any progress on its recommendations. In this sense, even a non-binding mechanism can establish some form of accountability through transparency and reporting.

Fifth, there is the question of the resources for funding the ODR procedure. In the examples given in this chapter, all ODR platforms are funded by the fees paid by one or both parties. In the case of an EU ODR mechanism to address fundamental rights violations by EU Institutions, the mechanism would likely have to be funded by the EU. After all, it would be an accountability mechanism for its own institutions and agencies. Placing fees on the victims would not be equitable. As in several other ODR systems discussed above, the weaker party usually gets access for free to the ODR system. If the mechanism were to be administered by the Ombudsman's Office or the Fundamental Rights Officers, they should receive an additional budget for it.[87]

[84] Schramm (n 78).
[85] For a more detailed analysis of the Ombudsman's political soft power, see ibid.
[86] See also ibid.
[87] Ibid.

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Lastly, to create a sustainable and well-functioning ODR system, periodic evaluations would be necessary. Periodic evaluations could be facilitated by the publication of an annual report by the Ombudsman or Fundamental Rights Officers, similar to the reports published by the EU Commission in relation to the consumer ODR platform, the Meta Oversight Board, or the future DSA out-of-court dispute settlement bodies. This would allow for public scrutiny and for drawing lessons from the operation of the mechanism and improving it in the future.

10.5 CONCLUSION

If the EU is to have any integrity regarding its commitment to fundamental rights, it will sooner or later have to find a way to hold its institutions, bodies, and agencies that violate fundamental rights accountable and to award redress to victims of these fundamental rights violations. As the current institutional set up does not yet allow for effective redress for victims of fundamental rights violations by the EU, this chapter explores the possibility of establishing an EU ODR mechanism to this effect.

While ODR was born in a private and commercial context, it has spread into the public realm and is used in the framework of judicial and administrative procedures at national level. Furthermore, ODR is being increasingly seen as a solution to help in preventing and solving disputes around fundamental rights violations by private actors, such as online platforms, for example, in the case of the DSA dispute settlement bodies and the Meta Oversight Board.

One of the most significant obstacles to establishing an EU ODR mechanism addressing complaints about fundamental rights violations by EU agencies and bodies is that we lack a clear legal basis that would allow for instituting such a mechanism. Nonetheless, as a starting point, this chapter explores the option to implement such a system under the EU Ombudsman's office or under the Fundamental Rights Officers of the EU Asylum Agency or Frontex. When it comes to the possibility of filing complaints, however, victims of fundamental rights violations would likely have to act with the help of EU-based NGOs or individuals to submit claims to an ODR mechanism administered by the Ombudsman, which is far from ideal but a pragmatic solution to the limitations imposed by Article 228 TFEU.

Furthermore, the design of an EU fundamental rights ODR mechanism could fruitfully draw from experiences of existing ODR mechanisms, as well as Guidelines by the Council of Europe on ODR. While the remedies or redress that such an ODR system could award at this point in time would not

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be extensive, the mechanism would at least allow for establishing an EU-wide database recording complaints and decisions on whether there was a fundamental rights violation in specific cases. Furthermore, the Ombudsman could use the advocacy powers she has to influence EU agencies and bodies to change their processes and working modes that lead to fundamental rights violations.

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