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The European Case Law Identifier Search Engine and Multilingualism: A Legal Certainty Perspective on Business-to-Consumer Situations

Abstract: This paper focuses on the European Case Law Identifier Search Engine, which the European Commission launched in May 2016 as a central gateway to national and EU case law. At the centre of the project stands the wish to improve the accessibility and transparency of case law to stimulate cross-border trade. The study links these considerations to the pluralistic legal certainty concepts introduced by Canaris and Bydlinski and by doing so aims to evaluate the search engine potential from the viewpoint of multilingualism of its implications for legal predictability, the practicability of the application of law and legal accessibility. The focus is put on the relevance for cross-border business-to-consumer situations, which constitute one of the most essential challenges for strengthening the internal market.

Keywords: European Union, legal certainty, consumer law, ECLI, European Case Law Identifier search engine, linguistic diversity

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1 Introduction

In May 2016 the European Commission (Commission) launched the European Case Law Identifier Search Engine (ECLI-SE) on the e-Justice Portal.¹ According to accompanying Commission press releases, the ECLI-SE aims to facilitate European access to justice by providing a user-friendly instrument to search for case law from the EU Member States (Member States) and some supra-/international courts centrally with the help of one single interface (European Commission, 2016a; European Commission, 2016b). All relevant stakeholders, i.e., the judiciary and other representatives from the legal profession, legal

¹ https://e-justice.europa.eu/content_ecli_search_engine-430-en.do.

academics, businesses and consumers should, so the Commission, be able to benefit from this new gateway. If that were true, the ECLI-SE could eventually contribute to the strengthening of EU cross-border trade and the internal market in general.

With this paper I would like to take a closer look at the impact of the ECLI-SE. More precisely, I intend to comment on the ECLI-SE from a legal certainty perspective. In this context I will primarily focus on cross-border B2C situations and try to answer the question as to whether (and to what extent) the ECLI-SE will meet the requirements of enhancing the accessibility and simplifying the understandability of foreign case law (as defined by the Commission and other EU stakeholders).

The paper will commence with background information on the ECLI before outlining the ECLI-SE and its most relevant features. It will then continue with a look at legal certainty in general and legal certainty in the EU and the Member States in particular. Comments on the ECLI-SE from a legal certainty perspective with a special focus on B2C transactions in the EU and recommendations for further steps will round off this paper.

2 The European Case Law Identifier (ECLI) and consumer law

Over the last roughly four and a half decades initiatives to enhance EU cross-border trade and the internal market have resulted in various instruments with the aim to simplify transactions within the EU. With respect to EU consumer law, the development of more general rules on the one hand and more specific B2C concepts on the other have run more or less parallel ever since.

From a private international law point of view, for example, the Rome I Regulation and its predecessor, the 1980 Rome Convention, deserve extra mentioning. Rules on international civil procedure, in particular the Brussels regime and the Lugano Convention add important procedural frameworks. All of them contain special consumer provisions. In the context of B2C transactions numerous more specific directives and regulations have introduced tailor-made, to some extent harmonised specific substantive and procedural law norms and standards. At a different occasion I already dealt with the latter group, i.e., special B2C instruments in more detail and tried to identify what kind of substantive and procedural law framework(s) would be most suitable to stimulate cross-border B2C transactions in the EU (Wrbka 2015). My observations there as well as a development at the EU level which has not gained a degree of attention comparable to the discussions in the fields of substantive and procedural consumer law yet—the creation of the European Case Law Identifier (ECLI)—have added one more interesting layer to the Europeanisation debate of consumer law in the EU. In the following I would like to outline and discuss the ECLI and the recently introduced accompanying search engine—the ECLI-SE—with a special focus on consumer law.

The first question that needs to be answered is a quite obvious one: “What is the

ECLI?”. Over the years a mix of several factors has shown the need to introduce a mechanism that would allow for an easier identification of case law in the EU. Policymakers at the EU level had intensified their endeavours to standardize B2C law in the Member States. Although they have partially accomplished this goal, national policymakers have successfully managed to reserve a considerable degree of legislative self-determination by limiting the extent of full harmonisation and keeping the material scope of EU legislation under control. Most recent EU legislation in the field of consumer law follows full targeted harmonisation (at best) and regularly takes a narrower approach than originally envisaged by the Commission. Overall, one can justifiably argue that attempts to extend EU consumer legislation have come to a certain standstill.

At the same time, however, the wish to enhance cross-border transactions in the EU has further gained momentum. The Commission started to shift its priorities in the B2C sector to electronic sales and services—e-commerce seems to rank high on the legislative agenda. Online Dispute Resolution (ODR) and the Digital Single Market (DSM) initiative can be listed as examples. In addition to the e-commerce debate, substantive (consumer) lawmaking has generally and increasingly been accompanied by stronger procedural law efforts to simplify and speed up dispute resolution. Initiatives that include specially crafted injunctions, shortened procedures for small claims as well as alternative means of dispute resolution (including the just mentioned ODR) illustrate this. The Europeanisation debate has transcended the substantive law border and has constantly been extended to procedural law. Another recent project, the e-CODEX initiative constitutes an additional pillar of strong practical relevance, as it aims to facilitate cross-border information exchange in procedural matters. Most of these examples show that EU stakeholders have increasingly taken account of new technologies, most notably the internet.

In the midst of attempts to take the consumer *acquis* to the next level, additional considerations emerged. It had become obvious that a growing cross-border market would—in addition to advanced substantive and procedural law rules to regulate cross-border situations—necessitate an easier identification and enhanced research of case law. Initiatives of a more technical nature were considered as being the most suitable supplementary tool. Several pertinent online projects have been launched. Some of the more prominent examples include Caselex, Dec.Net, Jurifast and JURE. The EUPILLAR database, launched in early 2017, is one of the latest additions to this list. Collections by academic research groups should not be left unmentioned. With respect to consumer law, for example, the case law database installed in the framework of the EC Consumer Law Compendium has to be pointed out. Admittedly, most of these projects were quite ambitious and—within a relatively narrow scope—useful. But none of them was sophisticated and comprehensive enough to offer a system that could significantly improve the accessibility of case law.

In 2008 initiatives to take the issue of simplified case law identification to the pan-EU

level reached their first “official” peak. EU and Member State protagonists stressed the need to enhance the knowledge of case law throughout the EU in the European Parliament (Parliament) and at workshops (co-)initiated by the EU (European Parliament, 2008; Van Opijnen, 2008a; Van Opijnen, 2008b). Ultimately it might have been a report of the Working Party on Legal Data Processing (e-Law WG) (installed by the by the Council of the EU [Council]) that convinced EU stakeholders to take more concrete action.² The e-Law WG deliberated on and elaborated a possible framework for an enhanced case law identification mechanism. Based on the research work of the e-Law WG, the Council published a statement in early 2011 (ECLI Council conclusions)—the idea to introduce and institutionalise the ECLI as an alternative tool to improve access to justice was born (Council 2011).³ Not only the Council, but also the Commission stressed the importance of the ECLI from an accessibility perspective and—after the launch of the ECLI—explained that the ECLI was introduced “to facilitate easy access to ... national, foreign and European case law.”⁴ The “Building on ECLI” project (BO-ECLI), initiated by the EU to enhance the ECLI (and its accessibility), adds that the ECLI serves the function of increasing the overall transparency of case law and links both ideas—improved accessibility and transparency—to the pivotal rule of law concept. In the words of BO-ECLI this sounds as follows:

In the light of article 6 of the European Convention on Human Rights, accessibility of case law is necessary to ensure scrutiny of the judiciary by the public. By improving this accessibility, both in qualitative and quantitative sense, transparency of the judiciary will be reinforced and the rule of law strengthened.⁵

Summarising these statements one should note that the ECLI aims to strengthen both the transparency of and accessibility to case law and by doing so should—as will be explained briefly—contribute to legal certainty at a pan-EU and inter-Member State level.

Without going into technical details—this is not the intention of this paper and should be reserved for legal informatics commentators—the instrument, i.e., ECLI, can be described as a code that identifies case law, in principle, at the Member State and EU levels. The ECLI code consists of a set of five components:

- (1) The term “ECLI” (to identify the label as a ECLI-reference);
- (2) A code to link the decision to a certain country, the EU or an international organization (country code);
- (3) A code to identify the court that issued the decision (court code);
- (4) The year of the ruling;

² <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2017377%202009%20INIT>.

³ On the issue of accessing case law see, in particular, its § I.2, § I.3 and § 4.2.(d) of its Annex.

⁴ https://e-justice.europa.eu/content_european_case_law_identifier_ecli-175-en.do?init=true.

⁵ <http://bo-ecli.eu/ecli/benefits>.

(5) An intelligible ordinal number to distinguish the decision from other decisions of the same court and published in the same year (ordinal number).

The five components are separated by colons as follows: [ECLI]:[country code]:[court code]:[year]:[ordinal number]. A judgment by the General Court of the Court of Justice of the European Union (CJEU) could, for example, look as follows: ECLI:EU:T:2013:257. This ECLI would refer to the 257th document of the General Court (abbreviated with “T”) of the CJEU published in 2013.

With respect to items 3 (court code) and 5 (ordinal number) above, the participating Member States and institutions enjoy—within a predefined range—certain freedom. Although the use of the ECLI clearly identifies court decisions, the court code and ordinal number components are not fully standardized in a way that national, international and supranational stakeholders (ECLI-users) would have to fundamentally align their traditional approaches to the identification of case law. Stakeholders are free to abbreviate their courts in any unambiguous way and to apply ordinal numbers of their choice (only limited by some outer ECLI parameters that most notably relate to the maximum number of digits to be used for the ordinal number).

As a supplement to the ECLI code, ECLI-users are further asked to introduce a set of metadata. This standardized metadata aims to facilitate the search- and accessibility of ECLI case law in particular by supporting the introduction of a searchable online database that is fed with ECLI data (Council 2011, § 2 Annex).

Applying the ECLI is not mandatory. Recent data of 2015 shows that (only) approximately half of the Member States are either already actively using the code or at least preparing its launch at the national level. At an supra-/international level, the Court of Justice of the EU (CJEU) as well as the European Patent Office and the European Court of Human Rights have already introduced the ECLI (Van Opijnen and Ivantchev, 2015: 166).

3 The European Case Law Identifier search engine (ECLI-SE) in brief

The ECLI project would not have been complete without the possibility of finding case law easily, fast and without costs. In this respect the ECLI Council conclusions—in §§ 3 and 4 of their Annex—set the basis for potentially important ECLI supplements. To increase the viability of the ECLI the Council asked to set up both an ECLI website (§ 3) and an ECLI search interface / engine, i.e., the ECLI-SE (§ 4). While the first shall aim to disseminate knowledge about the ECLI in general (including a link to the ECLI-SE on the ECLI website), the ECLI-SE had to be designed to offer a user-friendly gateway to ECLI case law to guarantee that the end-users (ECLI-SE end-users) had an actual chance to access ECLI data easily. By aiming to improve the access to case law the ECLI-SE has to be considered as a key factor in improving the level of legal certainty throughout the EU. I will return to this

concept at a later point.

The ECLI-SE, presented to the public on 4 May 2016, is crafted as a search interface that is supplied with ECLI data by the ECLI-users. Being a centrally accessible database, the ECLI-SE intends to offer the ECLI-SE end-users a one-stop shop when looking for case law from the EU, its Member States and some additional institutions (as shown in the previous chapter). To maximize the operability of the ECLI and the ECLI-SE, the Commission (the central institution in charge of the functionality of the ECLI-SE) and the Court of Justice of the EU (the ECLI coordinator) were chosen to monitor and—if and where found necessary—enhance the project.

The Commission decided to embed the ECLI-SE into the e-Justice portal, an interface that had been developed as an electronic tool to facilitate the involvement of EU citizens in EU-related topics offering information on selected substantive and procedural law issues. The actual launch of the ECLI-SE benefitted from preparatory work that was carried out by authorities in a handful of Member States and some institutions. Spain, the Netherlands, Slovenia, the Czech Republic, Germany as well as the CJEU and the European Patent Office took the leading role, contributing the vast majority of ECLI data to the ECLI-SE. One month after its launch the ECLI-SE offered already more than 3.5 million links to ECLI case law. The total number of published links has been increasing ever since and—at the time of writing this article—stands at more than 5.2 million results.⁶ The ECLI-SE is free of use and—as of February 2017—can (with the exception of Irish) be accessed in all official languages of the Member States. The interface offers three types of searches: A simplified search where—as is the case with most online search engines—it suffices to input a term or a phrase into a search bar, a semi-advanced search tool (accessible via the “Wizard” button) that allows for a more refined search and an advanced search (accessible via the “More criteria” button).

With the help of the semi-advanced search function the search can be subdivided into the search for a group of words (in any order), an exact word / phrase or interchangeable alternative words. It is rounded off by the possibility to exclude search results that contain particular words / phrases. Explanations (accessible via “tip” buttons) guide the ECLI-SE end-user through the process.

The advanced search function goes even further. It introduces 14 additional search criteria that range from the ECLI of the case and the issuing institution to criteria such as language of the decision, its abstract or description and date of the decision or the relevant field of law. Explanations (again accessible via “tip” buttons) simplify also the advanced search. In practice, specifying search parameters is advisable in a variety of cases. A simple search for “consumer”, for example, will—as of February 2017—lead to more than 19,000

¹² ECLI-SE search conducted by the author on 7 February 2017.

search results.⁷

The results page lists ECLI cases with their most relevant data. The following is an actual, random result example of a search I conducted on 8 June 2108 on “consumer law” and shall explain how the ECLI-SE works:

ECLI:NL:GHDHA:2015:3876 NL
 ECLI provider: Raad voor de rechtspraak (Council for the Judiciary)
 Issuing country or institution: Netherlands
 Issuing court: Gerechtshof Den Haag
 Decision/judgment type: Judicial decision
 Date of decision/judgment: 26/05/2015
 Date of publication: 09/02/2016
 Wording of decision/judgment: This metadata is available in the following language(s) only: NL
 Field of law: Civil law
 Abstract: This metadata is available in the following language(s) only: NL
 Description: This metadata is available in the following language(s) only: NL

This data refers to a decision of one of the four Dutch Appellate Courts, i.e., the second highest courts in the Netherlands, the *Gerechtshof Den Haag*—more precisely to its decision with the judgment number 3876 (of 2015). Supplementary case law data, e.g., information on the publisher / creator of the ECLI data, can be found when one clicks on the ECLI in the first line of the result. Clicking on one of the language abbreviations in the main result screen will—depending on where one clicks—lead directly to either the decision / judgment itself, its abstract or a short description in the available language(s). In our case all three are limited to the Dutch language.

The ECLI is undeniably an ambitious project and at first sight seems to provide users with sheer infinite possibilities to locate, find & research on case law. In the following I would like to focus on the EU’s belief that the ECLI and its search engine will strengthen legal certainty in the EU. In particular, I will discuss the ECLI-SE in the context of consumer law from a legal certainty perspective and try to answer the question if, and if yes to what extent, it is of actual benefit in B2C situations. Before doing so, however, I will take a brief look at the core concept(s) of legal certainty in general to define the parameters for my later commentation.

4 Legal certainty

4.1 Legal certainty in general

At first sight legal certainty seems to constitute a precise concept. A closer look, however, reveals that the term shows various facets. The notions of legal certainty might differ depending on the context in which it is discussed.

In legal academia legal certainty has been the subject of an abundant number of contributions. It would clearly go beyond the purpose and scope of this paper to pay due tribute

to all of them. I would like to limit my discussion to two commentators: Canaris and Bydlinski. Both break the certainty concept into pieces and show that it refers to several key ideas behind law in general and the rule of law in particular.

In the late 1960s Canaris presented his view on legal certainty in his *Systemdenken und Systembegriff in der Jurisprudenz*. Canaris argued that depending on the context legal certainty could be understood in different ways. He introduced the following certainty subdivisions: Legal firmness and predictability (*Bestimmtheit* and *Vorhersehbarkeit*), legislative and judicial stability and continuity (*Stabilität* and *Kontinuität*) and practicability of the application of law (*Praktikabilität der Rechtsanwendung*) (Canaris 1969: 17). Roughly two decades later Bydlinski (with his *Fundamentale Rechtsgrundsätze*) re-conceptualised the construct and added some more certainty features. According to Bydlinski one can distinguish between the following: Legal clarity (*Rechtsklarheit*), legal stability (*Rechtsstabilität*), legal accessibility (*Rechtszugänglichkeit*), legal peace (*Rechtsfriede*) and legal enforcement (*Rechtsdurchsetzung*) (Bydlinski, 1988: 293; Bydlinski, 2011: 325).

These examples can be used to illustrate that legal certainty has to be considered as a multi-faceted concept that encompasses important theoretical and practical issues. On a different occasion I explained that the certainty expressions identified above serve, in principle, either of two key goals and could be summarised in two groups. First, legal clarity, stability, predictability and transparency contribute to the general clarification of a legal situation. I referred to this certainty manifestation as “legal clarification” (Wrbka, 2016: 13). Legal accessibility, enforcement and the practicability of the application of law could, however, be understood as adding ideas of practical fairness. I called this function “legal rationalisation” (Wrbka, 2016: 13).

4.2 Legal certainty in a EU context

In EU policy- and lawmaking legal certainty is usually found in different contexts than in the Member States, where the general certainty notions of legal clarification and legal rationalisation dominate the agenda. The reason for this is obvious. Unlike Member States’ governments and legislators, EU stakeholders have to concern themselves primarily with the question of how to enhance the internal market, i.e., how to get rid of perceived trade barriers between the Member States. This attributes both a new meaning and additional challenges to exploring and defining legal certainty at the EU level. The two larger sub concepts of legal clarification and legal rationalisation do not fully suffice to explain this endeavour.

When looking at EU consumer law- and policymaking one can primarily identify two issues that relate to legal certainty: Harmonisation on the one hand and the impact of linguistic peculiarities on the other.

Harmonisation of domestic law might arguably be the most obvious expression of legal certainty at the EU level. Related strategies have been revolving around endeavours to standardize rules that Member States had autonomously and diversely enacted at the domestic level. Traditionally, EU policymakers have considered the resulting fragmentation of national

laws as an impediment to the growth of the internal market. In this sense legal certainty has (in particular in a B2C context) to be understood as attempts to simplify cross-border transactions by flattening differences in the level of national consumer protection (Wrška 2015, pp. 217–221 with further references). Based on the belief that the older technique of introducing minimum standards and leaving Member States significant legislative discretion (by basing EU consumer law largely on minimum harmonisation) had not been sufficient to create a market free of national legal deviations, EU policymakers have gradually shifted their focus towards increased full harmonisation.

A number of pertinent EU consumer laws include statements that can be used to illustrate this. One of the most recent examples is the new Package Travel Directive of 2015 (2015 Package Travel Directive) that in a (targeted) full harmonisation way replaced the older minimum harmonised Package Travel Directive of 1990. The new regime does not simply aim to enhance the legal protection of travellers by revising the existing provisions and—additionally—by regulating some new issues that were left outside the scope of the older directive. Reading between the lines, it becomes obvious that the (targeted) full harmonisation structure of the 2015 Package Travel Directive is based on the quest to maximize legal certainty for the involved stakeholders.⁸

A more explicit reference of full harmonisation to legal certainty can be found in the Timeshare Directive of 2009 (2009 Timeshare Directive), which—just like it is the case with the more recent Package Travel Directive—was the result of an attempt to replace the minimum harmonised consumer acquis with a fully harmonised regime. Recital 3 2009 Timeshare Directive explains this as follows: “In order to *enhance legal certainty* and fully achieve the benefits of the internal market for consumers and businesses, the relevant laws of the Member States need to be approximated further. Therefore, certain aspects of the marketing, sale and resale of timeshares ... should be *fully harmonised*” (emphasis added).

In a similar vein was the Proposal for a Regulation on a Common European Sales Law (CESL Regulation Proposal). Its Article 1(2) read as follows: “This Regulation enables traders to rely on a common set of rules and use the same contract terms for all their cross-border transactions thereby reducing unnecessary costs while providing a high degree of legal certainty.”

⁸ See, in particular, Recital 2 of the 2015 Package Travel Directive.

The accompanying Explanatory Memorandum (CESL Explanatory Memorandum) added the following: “[A] Directive setting up *minimum standards* of a non-optional European contract law would not be appropriate since it *would not achieve* the level of *legal certainty* and the necessary degree of uniformity to decrease the transaction costs” (European Commission, 2011: 10; emphasis added). With a focus on consumers the CESL Explanatory Memorandum further explained that consumers “would also enjoy more certainty about their rights when shopping cross-border on the basis of a single set of mandatory rules” (European Commission, 2011:4)

The most specific and comprehensive full harmonisation reference to legal certainty

might arguably be found in the 2011 Directive on Consumer Rights (CRD). Its Recital 7 reads as follows:

Full harmonisation ... should considerably increase legal certainty for both consumers and traders. Both consumers and traders should be able to rely on a single regulatory framework based on clearly defined legal concepts regulating certain aspects of business-to-consumer contracts across the Union. The effect of such harmonisation should be to eliminate the barriers stemming from the fragmentation of the rules and to complete the internal market in this area. Those barriers can only be eliminated by establishing uniform rules at Union level.

Even from a legal certainty perspective the value of full harmonisation of consumer law has, however, not remained undisputed. In legal academia and the Member States, in particular, opposition has grown over the years. Several commentators have been arguing that the Commission's harmonisation plans would actually decrease the level of legal certainty (at least in the Member States). Three references shall exemplify this.

The first two examples, comments by Stürner and Loos, date back to the debate on the CRD Proposal, which—in a fully harmonised way—covered a broad range of the consumer acquis. Stürner explains that the use of full harmonisation might cause the necessity to make some difficult and potentially far-reaching policy decisions at the domestic level, and warns of possible negative effects as a result of legal “friction” (*Friktion*) (Stürner, 2010: 20). According to Stürner domestic legislators would have to choose between prioritising legal stability / continuity or legal clarity / predictability. In either case legal certainty might be at risk. His main argument rests on the fact that the material scope of EU consumer law is usually narrower than its national counterparts, which often are applicable also to scenarios that are not covered by EU consumer law. In case of full harmonisation national lawmakers would have to opt for one of two solutions. One could either choose to implement EU law narrowly, i.e., limit its effect to those cases covered at the EU level. Other scenarios would still fall under the traditional national regime. If the national legislator opted for this solution, legal clarity (and predictability) might be impaired, because predicting the legal consequence in a concrete case would become more difficult. Various questions might arise, such as: Is the affected party a consumer or a business? If it is a consumer, is the case at hand covered by the implemented EU solution or still covered by the unaffected traditional solution at the national level? The other legislative choice would be to extend the applicability of the concept introduced at the EU level to cases that do not fall under the fully harmonised scope. This, however, would stand in contrast with the wish to strengthen the certainty notions of legal stability and continuity with respect to well established domestic rules.

Loos agrees with Stürner and explains that national legislators would have to identify and opt for the lesser of two evils. In Loos's words the critique is framed as follows: “The [national] legislator is not to be envied in making its choice [note: in the just outlined scenario], as both approaches bring clear disadvantages, will require extensive legislation and may bear unexpected consequences” (Loos, 2010: 70).

Shortly after the adoption of the CRD Grundmann reaffirmed the sceptical voices by focusing on Canaris and Bydliński's certainty notions of stability and continuity. He argued that attempts not to allow for domestic solutions that would surpass the EU standards, i.e., not following minimum harmonisation, would stand in clear contradiction to century-long national efforts to search for the best suitable solution for citizens. In Grundmann's words the concerns read as follows: "The more broadly the full harmonization mode is used, the more frustrated become the advantages that the national systems of law have achieved because of centuries of scholarship and practice—advantages in substantive justice and in legal certainty" (Grundmann, 2013: 126). Pursuant to this view, citizens who rely on their home Member States' protective regime would be met with disappointment if the domestic rules had to be abandoned as a consequence of fully harmonised standards.

With its 24 official languages the EU is a multilingual community—some authors use the term "plurilingual" (Jacobs, 2003). Paunio stresses the importance of this to live up to the European motto "united in diversity", arguing that "[m]ultilingualism constitutes one of the very cornerstones of the European project" (Paunio, forthcoming [2017]). However, multi-/plurilingualism presents further challenges for legal certainty in the EU—in principle regardless of the harmonisation level.

For the sake of stabilising and further enhancing the internal market, Member States and national stakeholders need to understand, apply and implement EU law uniformly (unless Member States are left legislative discretion). In this context several authors have pointed out that linguistic diversity might complicate the process and could put legal certainty at risk, because terms might be understood in different ways depending on the language used. In this respect translation and translators play a decisive role in securing a high level of consistency. Reaching a sufficiently high level of consistency can, however, be difficult. Paunio, for example, succinctly refers to the translation process as "[l]ost in translation" (Paunio, 2013: 5).

Cosmai takes a closer look at the implications of language from a legal certainty perspective. Referring to actual examples of terminology used in EU legislation, Cosmai explains that the risk of getting translations wrong is high as a consequence of linguistic nuances. He emphasizes the importance of EU guidelines to simplify the wording used in EU materials. The 2003 Joint Practical Guide [of the European Parliament, the Council and the Commission] for the drafting of legislation within the Community institutions (note: Now available in a 2013 version)⁹, in particular, would deserve appreciation, as it calls for special care when using terminology and concepts that could be understood in different ways throughout the EU. To reduce the risk of misunderstandings and improper translations, the language used in original sources should be as simply and unambiguous as possible (Cosmai, 2014: 85–88). As an alternative (or ideally as a supplementary step) Baaij asks for a stronger involvement of legally trained translators. This, so Baaij, would further increase the consistency of legal translations (Baaij, 2015: 119).

But even the use of legally trained translators could not guarantee a perfect situation. One complicating factor in endeavours to safeguard legal certainty with the help of legal translation

is the fact that language is limited and linguistic differences exist. The linguistically most suitable expression might still have a narrower or broader meaning than in other languages or might represent a vaguer / more unambiguous legal concept. Concrete examples are given by a number of commentators. Sage-Fuller, Prinz zur Lippe and Ó Conaill, for example, use the phrase “obstacles to translatability” (Sage-Fuller et al., 2013: 506-509) and show with the help of just 3 out of 24 official languages—French, English and Irish—how difficult it is to find absolutely suitable legal translations. Authors including Kjaer (Kjaer, 2015), Felici (Felici, 2015), Strandvik (Strandvik, 2015) and Filipowski (Filipowski, 2014) provide for examples from additional languages. Against this background Van der Jeught confirms the view that linguistic diversity can create practical certainty / consistency problems (Van der Jeught, 2015: 131–132). Taking reference to the CJEU’s decision in *Kerry Milk*¹⁰ Van der Jeught explains that in addition to merely translating, comparisons of different language versions and eventually interpretation of potentially confusing expressions might be necessary to clarify a situation—a task that is time consuming and difficult to be achieved, likely also for legally trained translators. Overall, there is a thin line between satisfying the call for legal certainty by offering legal translations of EU law materials and causing legal uncertainty as a consequence of “inherent imperfections of legal translations” (Pozzo, 2016: 142).

Hence, despite its undeniable benefits, legal translation is not seldomly stretched to its limits (Conway, 2012: 149). This could eventually have an impact on the concrete legal treatment of situations in the Member States, as (even fully) harmonised provisions could be understood in different ways. Some civil procedure law authors use this argument to stress the importance of the CJEU in safeguarding legal certainty and enabling EU integration. Storskrubb, for example, emphasizes the importance of “creating a genuine judicial space” (Storskrubb, 2008: 67) to enable companies and citizens to engage in cross-border activities without the risk of falling subject to diverse legal treatment (that could also result from different legal translations). In this respect the CJEU plays a key role to clarify the meaning of ambiguous legal terminology and concepts and by doing so facilitates the consistent application of EU law in the Member States. Cloots is one of the authors who stress the CJEU’s “supervisory and guidance function” (Cloots, 2015: 260). She explains that Member States might—(also) as a consequence of linguistic peculiarities—understand the parameters introduced at the EU level in different ways or implement EU law in a nuanced / unique way (that from a translation / linguistic perspective would still be acceptable). Like already Storskrubb, she points out that the CJEU undertakes to ensure that the terminology used by the EU legislator is understood in the same way throughout the EU. I will return to the language issue later in this paper.

⁹ <http://eur-lex.europa.eu/content/techleg/EN-legislative-drafting-guide.pdf>.

¹⁰ Case C-80/76, *North Kerry Milk Products Ltd. v Minister for Agriculture and Fisheries* (1977) ECLI:EU:C:1977:39.

5. A look at the ECLI-SE from a legal certainty perspective

5.1 Law databases and legal certainty in general

Likely compelled by the findings that harmonisation efforts had not fully succeeded to exploit the potential of cross-border trade, the Commission had to look for supplementary tools to improve legal certainty. Differences in national law were—despite stronger harmonisation—unavoidable. The CJEU and national courts have been playing important guiding roles, but finding case law has remained complex. An important result of the Commission's efforts was the introduction of the ECLI and the ECLI-SE. In particular with the latter one the Commission aimed to take the legal certainty discussion to the next level. This becomes obvious when one recalls the earlier mentioned calls for improved transparency of and accessibility to case law that both relate to the general certainty notions as defined by Canaris and Bydlinski.

The use of case law databases is a key example of how to improve legal certainty. It primarily addresses the earlier discussed certainty notions of legal predictability, clarity, accessibility and law enforcement. This becomes particularly obvious and important in an environment like the EU, where the market consists of a large number of jurisdictions, each with their own legal peculiarities and nuances. Without the possibility to access and compare domestic and foreign case law efficiently and time effective, even the most advanced legal certainty strategies (as discussed earlier) would have a significantly limited effect.

The importance of case law databases has been repeatedly emphasized by EU stakeholders—in particular from a legal certainty perspective. Two examples shall illustrate this. In the framework of the CESL Regulation Proposal the Commission repeatedly referred to case law databases in the context of legal certainty. In the CESL Explanatory Memorandum, for example, the Commission expressed the following view:

In order *to enhance legal certainty* by making the case-law of the Court of Justice of the European Union and of national courts on the interpretation of the Common European Sales Law or any other provision of this Regulation accessible to the public, *the Commission should create a database comprising the final relevant decisions*. With a view to making that task possible, the Member States should ensure that such national judgments are quickly communicated to the Commission (European Commission 2011, recital 34; emphasis added).

Also in the CESL Explanatory Memorandum the Commission discussed the financial consequences of a possible CESL case law database and arrived at the conclusion that on a short- and mid-term basis significant costs might indeed arise. One would have to create a distinct interface and feed the instrument with decisions from a multitude of jurisdictions. Long-term, however, the costs should decrease and the investment could pay off, because stakeholders would become more and more familiar with the CESL and its provisions (European Commission, 2011: 10-11). This in return would—so the Commission—boost the internal market, because contractual parties could rely on one common set of sales rules for cross-border sales (European Commission, 2011: 4).

The CESL Regulation Proposal itself contained a provision to facilitate the introduction of a CESL case law database in its Article 14 (“Communication of judgments applying this Regulation”). Its first paragraph asked the Member States to notify the Commission immediately about CESL decisions issued by domestic courts. Collecting court decisions centrally should—so Article 14(2) CESL Regulation Proposal—enable the Commission to install a publicly accessible database of national and supranational CESL judgments.

In its feedback to the CESL Regulation Proposal the Parliament’s Legal Affairs Committee (JURI) reaffirmed the importance of a CESL case law database. Embedding this idea in a catalogue of “flanking measures”, JURI referred to the Commission’s plan and added that a possible interface should “be fully systematized and easily searchable” (European Parliament 2013, Article 186a[2]).

The JURI reference, in particular, highlights two general legal certainty aspects of a case law databases: First, case law databases should be centrally supervised and uniformly conceptualised. Second, databases should be user friendly in a sense that they are easy to use / browse. One could refer to these two features as “operationality.” In addition to this, one could identify two supplementary challenges (which are of less technical nature): First, search results should actually (and not only theoretically) be useful (“usefulness”). Second, the database visibility must be secured (“visibility”). In the following I would like to take a look at the ECLI-SE from the perspective of legal certainty and will aim to answer the question whether all three parameters—operationality, usefulness and visibility—are sufficiently taken account of and reflected by the instrument (in its current format). The absence of a Member State obligation to use the ECLI for national judgments will be left aside in the analysis, but undeniably has a negative impact on the overall viability of the ECLI-SE.

5.2 The ECLI-SE from the viewpoint of legal certainty

5.2.1 Operationality

Facilitating the accessibility of foreign and supranational case law with the help of a centrally accessible database has the advantage of (possibly) enhancing legal certainty—more precisely primarily its predictability notion—without concerning itself with legal harmonisation. The operationality parameter refers to this issue of a more technical nature. Put into a question, one could ask how the relevant database is principally conceptualised.

In my outline of the ECLI-SE I showed that from an operationality perspective the ECLI-SE looks promising. Although the database is fed by individual stakeholders, two EU institutions—the Commission and the CJEU—act as monitoring and guiding regulators. The widely standardized ECLI (Note: Differences are—in a relatively narrow range—only permissible with respect to the court code and the ordinal number) should guarantee that the actual identification of ECLI case law is easily done. On top of that the multilingual search interface allows ECLI-SE end-users to access the database in their mother tongues—or at least in a language that the end-users would be capable of.

5.2.2 Usefulness

When it comes to the question of the actual usefulness of the ECLI-SE, language—in several ways—plays an important role. In particular two issues deserve a slightly closer look: Language in its literal meaning and language understood as (professional, i.e., legal) terminology. To understand the conclusions in this sub chapter better, one should briefly return to the phenomenon of multilingualism and the actual consequences of linguistic diversity. The EU treasures the languages spoken by its citizens. Various language projects aim to strengthen multilingualism, here understood as the ability to speak (or at least: understand) more than one's mother tongue. Most notably they include study and training programs (“Lifelong Learning Programs”), such as *Erasmus*, *Leonardo da Vinci* and *Comenius*.

Since 2001 the Commission has mandated four “Eurobarometer” studies (Eurobarometer language studies) to assess the interrelationship between the EU and its languages (European Commission, 2001; European Commission, 2005; European Commission, 2006; European Commission, 2012). Some of the results reveal some important data for the present analysis.

Questions covered by the most recent Eurobarometer language study, the 2012 Eurobarometer language study, addressed a number of key issues such as languages other than the mother tongue spoken in the EU; the level of spoken language ability in the EU; passive language skills in the EU; the frequency and situations of use of language in the EU; and the citizens' perspective on multilingualism in the EU and language translation. The answers to the questions related to (foreign) language skills and multilingualism, in particular, deserve a closer look.

The 2012 Eurobarometer language study showed that the ability to understand and speak foreign languages is widely believed as being advantageous and important throughout the EU. Almost all survey participants (98%) would encourage their children to study a foreign language (European Commission, 2012: 7). An overwhelming majority (88%) agreed that being capable of foreign languages would benefit also their own personal development (European Commission, 2012:7). A comparable majority of respondents (84%) expressed the opinion that every European citizen should be able to be capable of at least one foreign language (European Commission, 2012: 8).

Despite the common conviction that all official EU languages should enjoy equal treatment, most survey respondents (69%) believe that having one common European language would be of high value for the Europeanisation process (European Commission 2012, p. 9). In terms of ranking the official EU languages according to their perceived importance, English was by far the most often mentioned one (79%) (European Commission, 2012: 75). The runner-ups finished with a significantly lower score. French and German reached only 20% each and Spanish in fourth place 16 % (European Commission, 2012: 75). Multiple indications were possible, but all remaining languages reached only low one-digit percentage points.

The 2012 Eurobarometer language study further revealed data on the actual language skills of EU citizens. The results show great room for improvement. Only slightly more than half of the respondents (54%) answered that they could communicate in at least one foreign

language. The numbers for those who could speak at least two / three non-native languages were expectedly even much lower (25% and 10% respectively)—multiple indications were again possible (European Commission 2012, p. 12). This left 46% of the respondents with no foreign language skills. When asked which foreign language the study participants could either speak well enough to communicate, follow when used on the TV or radio or read a newspaper or book in, English was (again) the most popular answer with 38% (speaking) (European Commission, 2012: 19) and 25% (both with respect to listening and reading) (European Commission, 2012: 29 & 32) of those who were capable of at least one non-native language. Remarkably (but maybe not unexpectedly) no other language scored higher than 12% (speaking) (European Commission, 2012: 19) and 7% (listening and reading) (European Commission, 2012: 29 & 32) with non-native speakers. The study put the results also into a historical context and showed that multilingualism had, in general, not been on the rise over the years. English and Spanish were the only two notable exceptions that had shown a significant increase in the number of non-native users compared to the predecessor study of 2005 (European Commission, 2012: 142).

What should be concluded from this data for the ECLI-SE? Put differently: Could the language issue be of importance for the success of the ECLI-SE—and if yes: Why and how? All relevant language studies (incl the 2012 Eurobarometer language study) indicate that the number of people who understand at least one foreign language might be higher than in many other regions of the world. At the same time it would be an illusion to think that every EU citizen (or at least an overwhelming majority) is bi- or even multilingual.

What does this imply for the actual usefulness of the ECLI-SE? Multilingualism—if understood as linguistic diversity—exists in the EU. To date one can count 24 official languages and more than twice as many indigenous regional and minority languages (European Commission, 2012: 2). If one uses multilingualism, however, in a way to refer to being capable of foreign languages to make full use of the internal market (as a consequence of—from a linguistic perspective—enhanced cross-border transaction opportunities), then the picture is far from being perfect (or at least satisfactory). With the exception of English (which is understood by slightly more than half of the non-native English speakers in the EU) no other European language is commonly understood—let alone spoken—by non-native speakers in the EU.

With this fact in mind it should be helpful to stress that older EU(-wide) databases of any kind, e.g., CELEX, have traditionally been offering not only searches, but also search results in a variety of official EU languages. To facilitate the translators' jobs and further facilitate the general understandability of search results, the EU has also been providing a range of terminology databases. Furthermore, to enhance legal clarity and access to legislation, EU directives and regulations are usually published in all official languages. CJEU decisions can be accessed in a multitude of official languages as well, at the very least in English, but in many cases in all main or even all official languages. In his earlier mentioned analysis of the language impact on legal certainty Cosmai confirms that translations of EU materials are a significant certainty enhancement and adds some more examples, such as administrative acts (i.e.

materials other than EU legislation) and information materials (for businesses and EU citizens) (Cosmai,2014: 114–116).

In the case of the ECLI-SE the starting point for usefulness considerations is not much different. As shown further above, the database was introduced to improve the level of legal certainty in the EU and its Member States. The interface is clearly and simply designed and offers a wide range of search parameters—a fact that serves operationality requirements. The search results immediately reveal the languages that court decisions, abstracts and descriptions are available in.

However, when taking a closer look, one will realise that language questions pose arguably the biggest issue with the ECLI-SE. Member States are not required (thus far not even encouraged) to offer translations of their domestic case law, case abstracts and descriptions. The only explicit reference to multilingualism found in the ECLI Council conclusions refers to the translation of the name of the decision issuing court. § 4(2)(a)(iii) of the Annex of the ECLI Council conclusions asks for translations of the court names “in[to] all [official EU] languages, according to the multilingual thesaurus of names of organizations as set up to be used within the e-[J]ustice portal, and with hyperlinks to the descriptions of these courts as comprised on the e-Justice portal.”

However, unlike it is the case with the names of the courts, the ECLI Council conclusions missed the chance to ask for the introduction of a truly multilingual database in a sense that the search results (and not only the names of the courts) could be accessed and read in a multitude of languages. When randomly looking at search results, one will see that in the vast majority of cases national case law is available only in the official language of the particular Member State. More than that, even the case abstracts and descriptions are in the vast majority of cases available only in the language of the source country. Unless the data comes from a Member State with English as the official language (which thus far is rather the exception), the published cases would not be understandable by the average ECLI-SE end-user. As explained above, no other language than English is spoken / understood by more than twelve percent of non-native speaking EU citizens. This in combination with the limited availability of results in the English language shows that only an insignificant percentage of possible ECLI-SE end-users would actually be able to read the court decisions, case abstracts and descriptions.

An additional linguistic fact complicates the situation. Results contain a high level of special (legal) terminology. With respect to the average non-legal professional ECLI-SE end-user it is justified to argue that in many cases legal concepts might be too complex and not commonly understandable—regardless of the end-user’s language proficiency. Legal terminology databases and easily understandable case annotations are, however, not integrated into the ECLI-SE. From a legal certainty perspective this has to be regretted, because it would need a legally trained intermediary to clarify and interpret the legal implications of uploaded court decisions. Hence, consumers could (at best) benefit only indirectly from the ECLI-SE.

5.2.3 Visibility

The third parameter of the analysis concerns the visibility of the ECLI-SE or—from an end-user’s perspective—the awareness of the existence of the search engine. Undeniably, the stakeholders’ awareness is generally of prime importance for the viability of any instrument introduced at the EU level. I already dealt with this issue more extensively elsewhere (Wrška, 2015: 269–270 & 298). In the context of the present analysis the key question is whether the ECLI-SE is visible enough to call it a successful tool.

Data with respect to the ECLI-SE itself is still pending, which might be best explained by the fact that the database was introduced only recently. In absence of pertinent data it might be helpful to take a look at awareness studies that focused on comparable instruments. One example is the European Judicial Network in civil and commercial matters (EJN-civil) launched in late 2002. Conceptualised primarily as a platform to facilitate the judicial cooperation between the Member States, the ECJ-civil introduced the European Judicial Atlas in civil matters (European Judicial Atlas) that contains information on procedural EU law. With the launch of the e-Justice portal (i.e. on the same platform that hosts the ECLI-SE), the European Judicial Atlas was integrated into said e-Justice portal.

In 2014 the Commission published an external evaluation of the EJN-civil activities (2014 EJN-civil report). One prominent question covered by the report was the overall visibility of the network. The 2014 EJN-civil report drew a worrisome picture. According to the national EJN-civil contact points, i.e., the national institutions that monitor EJN-civil activities at the domestic level, the general awareness of EJN-civil activities was insufficient. Even among the legal profession the contact points assessed the visibility at a low level—70% of representatives from the legal profession were said not to be aware of EJN-civil (European Commission, 2014: 84). The report arrived at the conclusion that “EJN-civil seems not to be known enough among the legal professions and the general public

... [and that] steps need to be taken to increase the visibility of the EJN-civil among the legal professionals and the general public” (European Commission, 2014: 56).

The 2014 EJN-civil report suggests the assumption that improving the visibility and raising awareness still remains one of the most urgent challenges to enhance the viability of instruments introduced at the EU level including the ECLI-SE. Data processed in my earlier mentioned commentary on the latter one supports this view. Even if one considered the (still low) awareness among the legal profession as somewhat satisfactory, awareness among non-legally trained / experiences stakeholders (from the business and consumer sides) would have to be called insufficient. Without strong efforts to change this situation the ECLI-SE might (at best) remain a tool exclusively to be used by the legal profession and legal academics.

6 Concluding remarks: And now?

The ECLI and the ECLI-SE were introduced to take legal certainty to the next level. Indeed, with the ECLI-SE the EU achieved something unique. For the first time ever, domestic and EU

case law can now be comprehensively accessed via one search portal. Thanks to the (largely) standardized case law identifier (ECLI), the ECLI-SE offers a promising instrument in terms of enhanced accessibility of case law. With every additionally contributing Member State this value will further rise.

However, the ECLI-SE (in its current format) shows some significant flaws. This paper pointed out the arguably two most striking drawbacks (in addition to the absence of a Member State obligation to use the ECLI)—the low awareness of potential ECLI-SE end-users and linguistic issues. Both mean a major impediment from a certainty perspective. With respect to the latter one, this paper showed that the vast majority of court decisions, case abstracts and descriptions uploaded to the ECLI-SE are available only in the source language. None of the actively contributing Member States have English—the only really widely understood language in the EU—as an official language. Hence, the understandability and usefulness of ECLI data is hampered. The absence of explanations of special (legal) terminology and the low general awareness of EU instruments further complicate the situation, in particular with respect to consumers, who—in principle—should be considered as layerpersons, both in terms of legal and linguistic knowledge. Likely positive effects for consumers would merely be of indirect nature, i.e., consumers would, in principle, only benefit from the ECLI-SE if competent, linguistically and legally experienced / trained third party stakeholders assisted them. Hence, from a legal certainty perspective the ECLI-SE fails to adequately satisfy some core expectations of the Commission. To take recourse to Canaris and Bydlinski’s pluralistic certainty concepts, the ECLI-SE in its current state—primarily as a consequence of language and awareness issues—does neither significantly increase legal predictability nor the practicability of the application of law, its overall clarity or legal accessibility.

Awareness raising, the inclusion of a terminology database and translations could improve the situation. With respect to the latter one, one must, of course, note that translating case law comes at a price and is not problem-free in itself. Translations could—due to linguistic peculiarities—lead to ambiguous, imprecise results. At a more general level it should further be noted that DG Translation, the directorate general in charge of official translations at the EU level, is already now stretched to its limits, handling approximately two million pages per year in 2015 (European Commission, 2015: 3). Taking into consideration that already now the ECLI-SE comprises several million cases (not “just” pages), time, money and linguistic feasibility are big concerns (even if case translations were not centralised, but outsourced to the Member State level), in particular if one would expect the cases to be translated into all official EU languages—as is, e.g. regularly the case with documents published in the Official Journal (OJ).

Yet, if one really intends to significantly enhance legal certainty with the help of the ECLI-SE, there is no way around translations (in addition to awareness raising and explaining legal terminology). Data about language abilities of EU citizens shows that

multilingualism—here defined as being capable of foreign languages—is still a big challenge in the EU. One notable exception is the English language, which is the only official EU language that a majority of non-native speakers in the EU understands. Ideally, data published in the ECLI-SE would be readable in all official EU languages. But this, as just explained, might remain wishful thinking. One (at least) temporary solution could be translating case abstracts and descriptions—if not the whole case—into English. These efforts would truly mean a significant step towards improved legal certainty.

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