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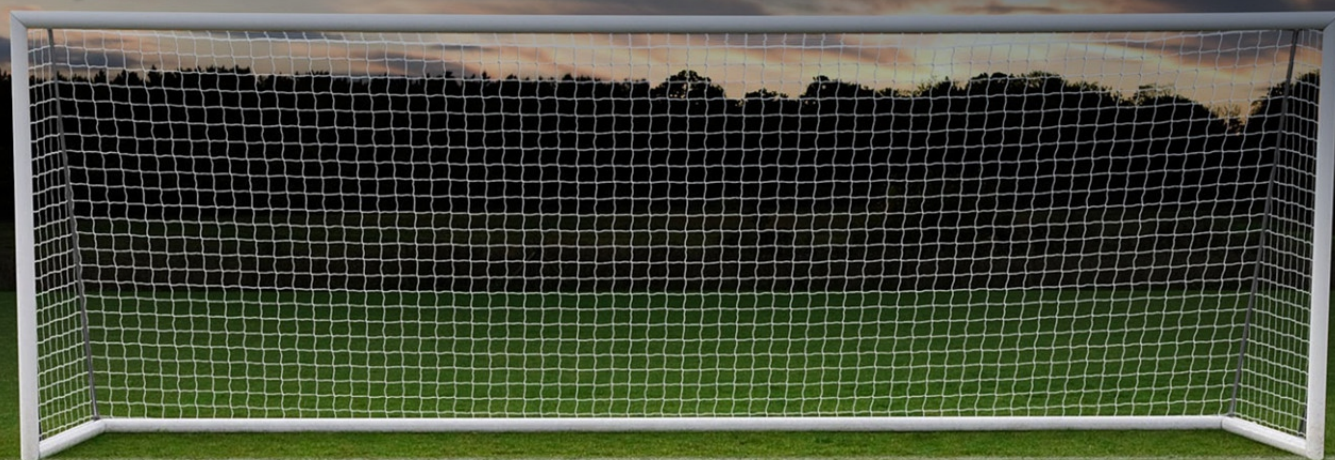
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n JAN ZGLINSKI

THE RISE AND FALL OF THE EUROPEAN SUPER LEAGUE

n NORA LAMPECCO

EU COMPETITION LAW TO THE RESCUE OF PRESS PUBLISHERS' ANCILLARY RIGHTS



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The Rise and Fall of the European Super League

Jan Zgliniski ¹

Football is not for the faint-hearted, but even the most stoic would be forgiven for finding this week's events a bit much. Last Sunday, the creation of a new European Super League was announced in a way that oddly resembled a *coup d'état*: the surprise attack after dawn, the retaliation of the ruling powers, the repeated exclamations of 'war'. By Tuesday night, half of the League's founding members had – as a result of pressure from fans, players, and politicians – already withdrawn from the project. For now, the plans have been put on ice. The organisers of the League have declared they will take time to 'reshape' the project, while UEFA President Aleksander Čeferin has welcomed the breakaway clubs 'back into the fold'.

It is a bang-to-whimper story if there ever was one. One might be tempted to dismiss it as a mere blip and deride the naiveté of the plotters. But the truth is that, for some 48 hours, the world of football was close to experiencing the most monumental change in decades. Although the current initiative has failed, others will surface sooner or later. Therefore, it is worthwhile to reflect on what happened, what could have happened had the breakaway clubs gone through with their plans, what role EU law will play in constraining possible future developments in this area, and what it all might mean for the future of football.

A League of Its Own

The European Super League is not a new idea. The big clubs in European football have threatened to break away on multiple occasions during the past decades, leveraging their threats to change the format of existing competitions or to get better deals on broadcasting rights. That they would need to break away has to do with the pyramid-shaped structure of football, which gives UEFA a monopoly over the organisation and commercial exploitation of European football matches. The current proposal, which has its origins in plans concocted by Silvio Berlusconi in the 1990s, would have created a competition consisting of 20 clubs: 15 permanent members (the founding clubs) and five additional teams that would qualify annually based on their performance in the national leagues. These would play each other in two groups of ten, with the respective top four progressing to a knockout stage. The new League would be a competitor to the existing UEFA Champions League, but not to the national leagues, in which the participating clubs would – if they were permitted – continue to play.

The advantage of this format would, for one, be that only the supposedly strongest teams in Europe would be facing each other, guaranteeing a high quality of games and great public attention. Forget

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about tedious group stage matches against Ludogorets Razgrad or Ferencváros Budapest; it would all be Real Madrid v Liverpool and Barcelona v Manchester United. For the illustrious circle of founding members, it would have another crucial benefit: failing to qualify would no longer be possible. Europe's top football competition would become a quasi-‘closed shop’, similar to the predominant model in US professional sports. This, in turn, would significantly increase the revenues for the participating clubs. The new League's founding members were supposed to receive 233 million euros each just as a sign-on bonus, double what a Champions League winner currently makes.

But the Super League design contains some further elements that merit attention. The participating clubs committed to a spending cap. They agreed to spend a maximum of 55 percent of their revenues on sport expenses, such as player salaries and transfer fees. Also, the League was reported to have pledged over 10 billion euros in solidarity payments over a period of 23 years, money that would benefit domestic leagues across Europe.

Resistance and Retaliation

The plans have been met with great resistance from supporters, politicians, and, unsurprisingly, football governance bodies. In a statement released jointly with the Spanish and Italian leagues and federations on 18 April 2021, UEFA called the project of a Super League ‘cynical’ and ‘founded on the self-interest of a few clubs at a time when society needs solidarity more than ever’. It also promised to do whatever it takes to stop the plans. And without much ado, it took out the big guns, announcing that:

‘...the clubs concerned will be banned from playing in any other competition at domestic, European or world level, and their players could be denied the opportunity to represent their national teams’.

The affected domestic leagues considered taking action, too. The Premier League was quick to point to Rule L.9 of its Handbook, which exists in a similar form in leagues across Europe and stipulates that participating clubs must not enter their teams in any competition other than the ones organised by the English FA or UEFA, unless this has been approved.

In the meantime, the breakaway clubs considered themselves in the right, both morally and legally. Florentino Pérez, the designated chairman of the Super League, dismissed the idea that the project was exclusively, or even primarily, in the interest of the wealthy few. It was an attempt to “save football ... at a critical moment”, a sport that was in dire straits as a result of the COVID-19 pandemic and had to evolve. Likewise, he categorically denied that UEFA had the legal means to stop the new League or that it could ban the participating clubs and their players from domestic and international competitions. A later statement made by the Super League repeated this point, emphasising that the plans were ‘fully aligned with European law and regulations’. An interim injunction granted by Madrid Commercial Court on Tuesday morning, prohibiting UEFA from taking any actions to block the League, appeared to lend some initial support to this proposition.

Enter European Law

It is important to consider what would have happened had the project not been discontinued, as it is unlikely to remain the last attempt of this sort. Could UEFA have stopped the Super League? Could it have banned the participating clubs and players from other competitions? These questions have, first and foremost, to do with EU competition law – and the recent judgment of the General Court in the *International Skating Union (ISU)* (T-93/18) case gives some indication as to what the answers might be.

Could UEFA have stopped the Super League? Could it have banned the participating clubs and players from other competitions?

It is almost certain that the ruling, which was rendered in mid-December 2020 and is currently under appeal before the Court of Justice, has influenced both the decision of the Super League to come forward with its plans and the design of the new league. The facts are quickly told. The ISU is the organisation responsible for regulating and administering figure and speed skating on a global level. Its statutes contained rules stipulating that athletes could participate only in events authorised by the EU or its members, effectively making it impossible for them to compete in races organised by third parties. In case of violation, skaters faced the prospect of severe penalties, including lifetime bans from ISU-run/related competitions such as the Olympic Games and world championships. The Commission issued a prohibition decision in which it found that this practice violated Article 101 TFEU, which was challenged before the General Court.

In its ruling, the Court explained that the fact that ISU both organised sporting events itself and had the power to authorise (or not) events organised by third parties could give rise to a conflict of interests. The ISU was obliged to ensure that third parties were not unduly deprived of market access. Given that there were no clear criteria for the authorisation of third-party competitions and the penalties imposed on athletes were so severe, the ISU’s rules were likely to have a restraining effect on competition. And although the Court accepted that the rules could, in principle, be justified as means to protect the integrity of the sport (for example to prevent betting manipulation) and ensure that sporting competitions comply with common standards, it found them to

be disproportionate. Eventually, the Commission's decision was upheld in most key aspects.

The *ISU* ruling is not an isolated decision. It follows a broader recent trend of sports federations losing legal disputes in attempts to fight off breakaway competitions. In 2016, the Munich Regional Court imposed an interim injunction on the International Basketball Federation (FIBA), prohibiting it from punishing clubs participating in the EuroLeague, a format organised by its competitor. More recently, the Belgian competition authority took a stand against the Fédération Equestre Internationale's (FEI) efforts to prevent rival competitions and penalise participating athletes, successfully defending its decision in court and securing commitments. A few months ago, the German Wrestling Federation was found to have acted in breach of competition law by imposing sanctions against athletes who had joined clubs of a breakaway league.

What does the *ISU* decision mean for the European Super League? The factual settings differ in important aspects, such as the income structure in both sports (the livelihood of skaters depends to a much greater extent on being able to compete in official races) and the scope of the rival competition (the unauthorised races were meant to be limited in number and take place off season). Nonetheless, some lessons can be drawn. UEFA's categorical refusal to allow any new format in football creates an obstacle to market access. And although its ban of Super League clubs and players may not have the same effect as the *ISU*'s actions had on skaters, it might still have a *sufficiently* serious impact. It is not inconceivable that players would, for both sporting and commercial reasons, think twice before joining a club if it meant never, or even for the duration of their contract, being able to play in the Euro, World Cup, and the domestic league.

Much would boil down to the justification and proportionality of the ban. One might consider how the justification grounds brought in *ISU* and other sports-related cases before EU courts would play out. Would the Super League endanger the physical integrity of athletes? No, they would receive the usual level of medical attention. Would it create a risk for match fixing and betting manipulation? Not more than any other football game. Would it deviate from existing standards in football? The matches would be played in line with the Laws of the Game. (Although Pérez's public ruminations about the possibility of shortening game times and the need for football to 'adapt' might have cast some doubt on this.) Would banning the League be necessary to maintain financial solidarity in the sport? The organisers promised solidarity payments to national associations that would exceed the sums these are currently receiving. There is, of course, more than a little cynicism in this. The big clubs have pushed UEFA time and again to increase their share of revenues from the Champions League which, now, makes it easy for them to offer a contribution which is above what national leagues normally get.

A further potential justification for preventing the Super League could lie in ensuring the proper functioning of domestic competitions. Clashes in the timing of fixtures, for example, recently became an issue in basketball in a dispute between FIBA and the EuroLeague. But here, too, the Super League's organisers made sure to pre-empt any problems by declaring that games would be played before the domestic seasons started and in the middle of the week, to prevent scheduling issues.

Which brings us to the final contender: ensuring a competitive balance between clubs. This was accepted as a valid justification ground by the Court of Justice in the *Bosman* ruling and it would probably be

the most serious argument from UEFA's perspective. By increasing their revenue, the breakaway clubs, most of which are already dominating forces in their domestic leagues, might become impossible to compete against. There is strong intuitive plausibility in this argument, but the complete prohibition of new formats is likely to go beyond what is necessary here. Less restrictive measures could, for instance, include imposing salary caps to create a more level playing field (these might be a good idea anyway, but more on that in a second). The bottom-line is: justifying UEFA's ban would not be easy sledding.

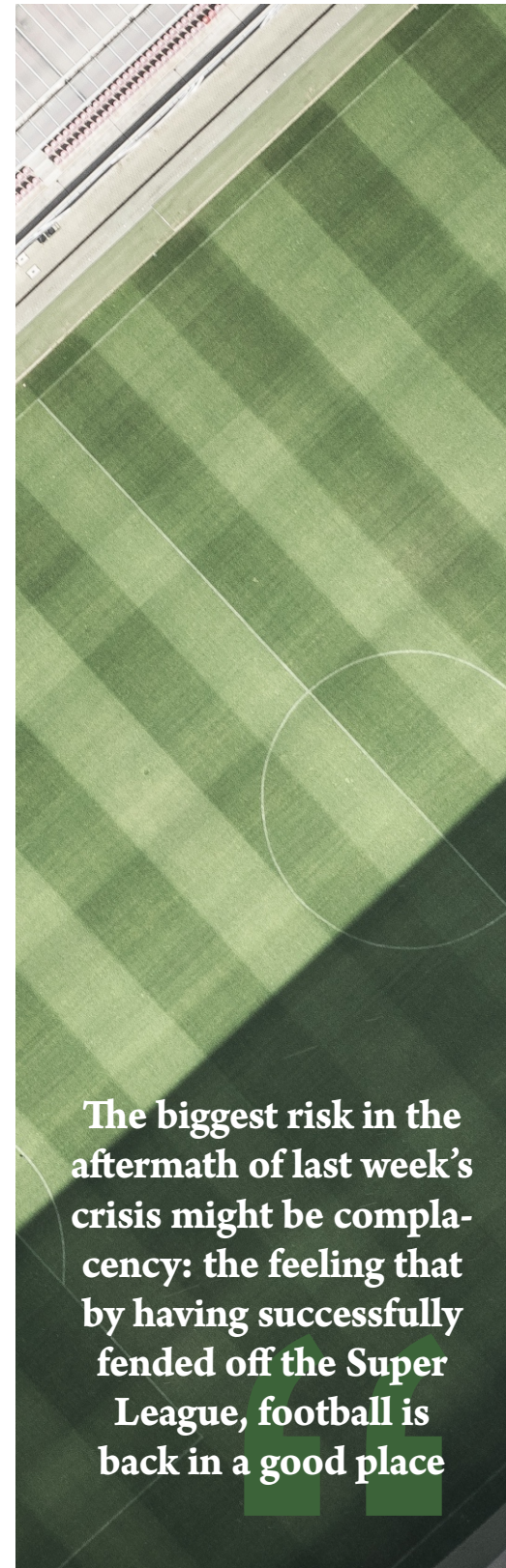
Time for a Change

It is not often that Boris Johnson and Emmanuel Macron, Pep Guardiola and José Mourinho, Tottenham, and Arsenal supporters all agree on something: the European Super League was a terrible idea. Criticisms have centred on the insatiable greed of the breakaway clubs and the departure from the idea of an open and fair competition. The Financial Times bemoaned that the Super League's design broke with football's 'meritocratic principles', which allow 'any team, through strong performances on the pitch, [to] clamber up and reach for the biggest prizes'. Ander Herrera, midfielder for Paris Saint-Germain, put it in similar, if slightly more poetic, terms:

"I fell in love with popular football, with the football of the fans, with the dream of seeing the team of my heart compete against the greatest. If this European super league advances, those dreams are over, the illusions of the fans of the teams that are not giants of being able to win on the field competing in the best competitions will end."

The problem is that such dreams are precisely that: illusions. If you don't happen to have grown up in the right corner of Barcelona, North London, or Greater Manchester, chances are high that you will never see your team competing in the best competitions, unless, by a stroke of fortune, an investor with deep pockets appears on the horizon. As inspiring as notions like 'popular football' may sound, they have long ceased to reflect reality.

This is why the biggest risk in the aftermath of last week's crisis might be complacency: the feeling that by having successfully fended off the Super League, football is back in a good place. There continues to be a glaring competitive imbalance. National leagues have become dominated by a select few teams, which end up playing in the Champions League and, with the money thus earned, become



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The failure of the Super League might prove an important moment by demonstrating to politicians that regulating football could win them an election one day

even more dominant domestically. The situation is similar at the European level, where, with few exceptions, we find the same suspects every year fighting out the later stages of the competitions. The sport is, in its current state, also financially unsustainable. Despite the significant increase in revenue from broadcasting rights and, in some countries, the arrival of wealthy investors, many clubs cannot keep up with the excessive salaries and transfer fees for players. Real Madrid and Barcelona have recently reported deficits of close to 1 billion euros, and many other teams, both in the higher and lower tiers, are struggling. The situation has been aggravated by the fact that the Financial Fair Play mechanism, which was created to prevent such problems, has proven to be of limited effectiveness.

To remedy these and other ailments, change is necessary. If FIFA and UEFA are wise enough to read the signs of the times, they will make efforts to reform football and its governance structures. And there is no shortage of promising ideas. Better regulation of transfers and agents would be a start. Salary or budget caps, similar to those which are in place in US sports or, as of recently, in Formula 1, could be considered. (The English Championship has experimented with a salary cap this season already.) These could be combined with a luxury tax that applies to spendings above the agreed threshold and is used to help smaller teams, an option that has shown success in the NBA. More ambitious reforms might ad-

dress rules on ownership and representation. The German Football League adheres to the so-called '50+1 rule' which requires that clubs hold a majority of their voting rights (50% of the shares plus 1), a safeguard introduced to ensure that the members of a club, not outside investors, have control over its fate. Another focal point moving forward must be greater redistribution. If solidarity is, indeed, so essential to the football pyramid as UEFA has emphasised over the past few days, then the lower levels of that pyramid should receive more financial support.

Should change not come from the inside, it may well come from the outside. Sport governing bodies have traditionally been granted a great deal of autonomy by lawmakers and judges. This has partly to do with historical reasons, but also with the conviction that regulating sport is something best left to the people that know it and can be trusted with taking care of it. Whether this autonomy continues to be justified has been questioned by many not just since last Sunday, but the recent events add fuel to the fire. The UK government has already announced that it will launch a wider review of English football. Among the reform proposals that have been put forward are the creation of an independent regulatory body and legislative changes to the governance and ownership structures. Other ideas go much further: Antoine Duval, for instance, has suggested that football could be turned into a 'transnational public service' by conferring on UEFA and FIFA a state-sanctioned monopoly, while subjecting them to proper regulation. Either way, the failure of the Super League might prove an important moment by demonstrating to politicians that regulating football could win them an election one day. For its creators, this might turn out to be a huge own goal.

EU competition law to the rescue of press publishers' ancillary rights

Nora Lampecco¹

For a long time, press publishers did not receive remuneration for the use of their content by digital platforms. To address this issue, the European Union (EU) adopted Directive [2019/790](#) on copyright and related rights in the Digital Single Market, which created an ancillary right (also known as a related right or neighbouring right) for press publishers. Following the same trend, the Australian Government published, in December 2020, its Treasury Law Amendment Bill aimed at regulating the negotiations between powerful digital platforms and media publishers. However, legislators provide for different legal solutions to address the same issues arising from the business model of powerful digital actors in their relationship with the media.

Globally, legislators are addressing the digital actors-media publishers imbalance of power on remuneration for publication of content

As a matter of fact, over the last decade, legislators from all around the world are attempting to remedy the imbalance in bargaining power between powerful digital actors and media publishers regarding remuneration for the online publication of media con-

tent (2). Although the intended outcome is the same across jurisdictions, namely that media are essential for democracy and that publishers should receive fair compensation for the online use of their content, the legal avenues to enforce this outcome differ largely around the globe. This paper aims at comparing the Australian and European regimes by underlining their differences in the level of protection and by showing how the certain application of EU competition law could bring them closer.

Comparison between Australian and EU regimes

The proposed Australian Bill provides for an allegedly more complete substantive framework than the European regime. While the former creates a comprehensive system including an obligation to negotiate under pain of compulsory arbitration coupled with adjacent protection in the platform ecosystem, the latter provides a more straightforward and limited solution in developing an ancillary right integrated in a preexisted system. The flip side of the wider protection offered by the substantive rights in the Australian legislation is its narrower personal scope.

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2. Article 32 [Ley 21/2014, de 4 de noviembre](#); [Achttes Gesetz zur Änderung des Urheberrechtsgesetzes Vom. 7 Mai 2013](#); [Journalism Competition and Preservation Act 2019](#).

Personal scope

While the European legislation covers all information society service providers in their relationship with press publishers, the Australian legislation applies only to designated platform services, which are determined by the Minister on account of their bargaining power imbalance, and to registered news businesses fulfilling requirements regarding content, professional standard, annual turnover, and a targeted audience (Australian) (3).

Covered content and overall mechanism

The Australian regime offers broader and more complete substantive protection for protected content and its overall functioning; considering the platform's ecosystem.

First, it catches the covered news content made available via any reproduction thereof, provision of an extract or provision of a link to the content - this list being not exhaustive (4). Such *covered content* includes the core news, namely news that are important for the Australian democratic public debate and news of 'public significance for the Australians' (5), as well as all news of interest for the Australian audience, including sports and entertainment (6). Mere opinions are not included (7). In comparison, the European legislation grants press publishers a right to authorise or prohibit the reproduction and the

communication to the public of their publication (Article 15 Directive 2019/790, Articles 2 and 3(2) Directive [2001/29](#) on the harmonisation of certain aspects of copyright and related rights) - this latter concept being narrowly defined. Although it covers 'journalistic publications, (...), in the context of an economic activity' (8), numerous exceptions are provided for. In addition to common copyright exceptions and limitations under the Copyright Directive (9), the following content is excluded from protection: hyperlinking, mere report of facts, scientific publications, individual words, and short extracts (10).

Second, while the European regime is based on an ancillary right for press publishers, the Australian regime is built upon three main complementary mechanisms: obligation to bargain, binding arbitration and requirement of non-differentiation. The designated platforms that make covered news content of registered news businesses available on their designated services must engage in negotiation if a registered news business notifies their intention to negotiate over remuneration or other topics. Additionally, both parties must conduct these negotiations in good faith. Moreover, in case of failure of negotiations over remuneration, the registered news business may notify their willingness to proceed to compulsory arbitration (11). Although arbitration is limited to remuneration issues, its functioning is far-reaching as it involves an obligation to negotiate in good faith (12) as well as compulsory arbitration

3. Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020, art. 52E, F and G.

4. *Ibid.* art. 52B.

5. *Ibid.* art. 52A.

6. *Ibid.*

7. [Treasury Laws Amendment Bill 2020, explanatory memorandum, point 1.73.](#)

8. [Directive \(EU\) 2019/790, recital 56.](#)

9. Directive 2001/29/EC

10. *Ibid.*, art. 15(1).

11. [Treasury Laws Amendment Bill 2020, explanatory memorandum, point 1.157.](#)

12. [Treasury Laws Amendment Bill 2020., art. 52ZH.](#)

(13) determination of the amount of remuneration by the arbitration panel, which will choose one of the parties' proposals (14). Finally, a non-differentiation requirement between news businesses, notably because of a notice of arbitration or negotiation, is required from the designated platform in relation to all its services (15). The scope of this latter obligation is broader than the other requirements as it includes the designated platform's entire ecosystem and all news businesses – whether registered or not (16).

Competition law as an imperfect bridge

The comparison between the two systems shows that the Australian proposed regime offers wider protection to press publishers regarding the use of their content online. Therefore, in order for the EU to be a leader in press content protection, the gap with the Australian regime should be somehow bridged. This could be partially achieved by using competition law to push for an extensive interpretation of Directive 2019/790 as a matter of enforcement policy. Two Member States have already used competition law to stretch the boundaries of press publishers' ancillary rights. They have, in particular, resorted to Article 102 of the Treaty on the Functioning of the European Union, which prohibits the abuse of a dominant position, and its national counterparts. However, such strengthening of the EU re-

gime's enforcement could come at the cost of differing national outcomes depending on Member States perspectives, to the detriment of EU competition law uniformity. Hence, a European clarification on the interpretation of Directive 2019/790 and the application of EU competition law would be required.

To be a leader in press content protection, the EU has to bridge the gap between the EU and Australian regimes

Germany vs France

In 2013, Germany provided for an [ancillary right](#) for press publishers in its legislation (17). As a reaction, Google set up a system whereby press publishers had to waive their right if they wanted extracts of their content to be displayed on Google's platform. A complaint for abuse of dominance was lodged by press publishers before the [German competition authority](#) and the matter was eventually brought to the Regional Court of Berlin which upheld Google's business model.

The German competition authority notably stated that the ancillary right was a right to forbid but did not create a right to remuneration for the press publishers, nor a duty to subscribe a licence for Google (18). More specifically, the [Regional Court of Berlin](#) ruled that Google's conduct, consisting of requesting free authorisations from publishers, was not abusive as it led to a 'win-win' situation where all parties benefited from the system implemented by Goo-

13. [Treasury Laws Amendment Bill 2020, explanatory memorandum](#), point 1.182. The negotiation will be considered as failed if no agreement has been reached after three months.

14. [Treasury Laws Amendment Bill 2020](#), art. S2ZL, S2ZS, S2ZX and S2ZE.

15. *Ibid.* S2ZC.

16. *Ibid.*

17. This national law is now inapplicable after the Court of Justice considered it a technical regulation subject to prior notification to the European Commission, which was not notified accordingly. Judgment of 12 September 2019, *VG Media v Google*, [C-299/17](#).

18. [Entscheidung nach §32c GWB, Google/VG Media u.a.](#), B6-126/14, 08/09/2015, pt 214.



gle: Google raised money from the advertising business, users were given easy access to relevant information and press publishers gained traffic from Google's service.

Although based on national copyright law, the German competition authority's decision is relevant on the EU level as well, due to similarities between the ancillary rights and antitrust German and EU regimes (19). First, both provide for an ancillary right of press publishers to authorise or refuse the making of their press contents available to the public without providing for an explicit duty to negotiate (20). Second, although the German competition law differs in some aspects from the EU regime, the German competition authority assessed the conduct with regard to Article 19 GWB and Article 102 TFEU as the alleged abuse found corollaries at the EU level as well (21).

Following the implementation of Directive 2019/790 in France, Google unilaterally proposed for press publishers either to grant Google a free li-

cence for the use of their content, or their content would no longer be displayed on Google's platform. Several associations representing publishers and their members lodged a complaint before the French competition authority, arguing that this was abuse of dominance and asked for interim measures. In an interim order, the French authority preliminarily considered Google's conduct as likely to amount to abuse of dominance and imposed a duty to negotiate as well as a neutrality obligation on the way in which news publishers' and news agencies' protected content is indexed, classified and presented on Google's platform during negotiations on related rights.

In particular, the [French competition authority's decision](#), based on article L420-20 Commercial Code and Article 102 TFEU, stated that Google's conduct was likely to constitute abuse of dominance under three theories of harm (22). First, it would likely be tantamount to the imposition of unfair trading conditions, under article L420-2 Commercial Code and Article 102(a) TFEU, as this conduct permitted

19. Although the French competition authority considers that such a parallel is not relevant. Autorité de la concurrence, [Décision n° 20-MC-01 du 9 avril 2020](#), points 70, 263-264.

20. [Achttes Gesetz zur Änderung des Urheberrechtsgesetzes Vom 7 Mai 2013](#)

21. Discrimination, refusal to deal, exploitative abuse and *anzapfen*; being respectively included in Articles 19(2), 3, 4, 2 and 5 of the GWB as well as in Article 102(c) (a) and (d) of the TFEU.

22. Decision upheld on appeal; [Cour d'Appel de Paris, 8 Octobre 2020](#).

Google to avoid negotiating with the publishers (23). Google's argument that the legislation did not provide for a right for remuneration but rather for a right to reproduction did not convince the authority (24). Conversely, the authority considered that fair remuneration was due pursuant to a teleological interpretation (25) that derives such a right from Recital 57 of Directive 2019/790 referring to the Directive 2001/29, which in turn provides a right to fair remuneration (recital 10, Directive 2001/29). In imposing commitments which restricted this right, Google likely imposed unfair trading conditions on press publishers. Second, the conduct was likely to constitute discrimination among press publishers under article L420-20 Commercial Code and Article 102(c) TFEU as it entailed treating equally different press publishers and contents (26). Third, following the European *AstraZeneca* case law (27), the conduct was considered likely to be a circumvention of the law given Google's recourse to the free licence exception to bypass the negotiation required by the law (28).

The interim measures create an overall protection for press publishers as they involve a duty to negotiate and a principle of neutrality in negotiation (29). The decision states that if publishers express their willingness to negotiate, the parties must negotiate

in good faith over the remuneration and the display of the content as a matter of the prohibition on abuse of dominance (30). Additionally, negotiations must be neutral regarding Google's ecosystem (31). This neutrality implies that negotiations cannot impact the way that Google displays publishers' content in all its services, and nor can it impact any economic relations between the parties (32).

Need for European clarification

As demonstrated below, the use of competition law for the purpose of integrating the content of ancillary rights can lead to very different outcomes. While the French competition authority has ruled that Google's unilateral proposal for the media publishers to waive their remuneration is abuse of dominance, the German com-

petition authority did not find such behaviour anti-competitive.

A clarification at the European level of the interpretation of the Directive 2019/790 as well as on the role of EU competition law is therefore required to define the extent of EU ancillary rights of press publishers and to reconcile potential opposing national views for the sake of uniformity. This clarification would likely and mainly concern the existence, or

Competition law can be used to integrate the content of ancillary rights but can lead to very different outcomes

23. Autorité de la concurrence, [Décision n° 20-MC-01 du 9 avril 2020](#), 234.

24. *Ibid.* 204.

25. *Ibid.* 70 and 205.

26. Autorité de la concurrence, [Décision n° 20-MC-01 du 9 avril 2020](#), 240.

27. Judgment of 6 December 2012, [AstraZeneca](#), C-457/10, EU:C:2012:770, paras. 129 to 141.

28. Autorité de la concurrence, [Décision n° 20-MC-01 du 9 avril 2020](#), 243-244.

29. *Ibid.*, 70, 309-311.

30. *Ibid.*, 304.

31. *Ibid.*, 309-311.

32. *Ibid.*

not, of a right to remuneration derived from Directive 2019/79 for press publishers, since this aspect is at the core of both national conflicting decisions.

If the French competition authority's view was to be followed, it would bring the EU regime closer to the Australian proposal and would considerably strengthen it. Indeed, the French authority recognised in its decision a right to remuneration deriving from the *esprit de la loi* and imposed a principle of neutrality of the negotiations on the relations between the media publisher and the platform. Hence, this

right could be easily circumvented and consequently largely ineffective. The European Commission's choice to not prohibit this behaviour in its EU regulation proposal for a Digital Market Act (DMA) could be seen as an inclination to support the German view. Indeed, the DMA was released after the French competition authority decision and aims to address competition issues in digital markets through ex ante regulation defining obligations on digital incumbents that are designated as 'gatekeepers' regarding unfair practices. However, the possibility would remain open because the Euro-

would offer more complete protection to press publishers by entitling them to compulsory remuneration, the right to negotiate in good faith, as well as the consideration of the impact of the negotiations on the publishers' treatment in the entire ecosystem of the platform. Nevertheless, some differences would still exist between the regimes, such as the arbitration or the extent of the protected content; notably the protection of snippets. Thus, albeit closer, the two regimes would still offer different levels of protection. While the lack of compulsory arbitration can be seen as ancillary given the strength of available EU competition law remedies, the dissimilarities in the covered content could have a more serious impact.

On the contrary, if the German ruling was followed, the protection offered to press publishers would mainly remain a shot in the dark as this ancillary

pean Commission would be empowered to update the obligations under the DMA through delegated acts 'where there is an imbalance of rights and obligations on business users (33) and the gatekeeper is obtaining an advantage from business users that is disproportionate to the service provided by the gatekeeper to business users'. Hence, as Google's behaviour was known at the time of proposing the DMA but was not included in its obligations, it could be because the European Commission does not see this conduct as a main threat for fairness in digital platforms. On the other hand, its absence in the DMA could also reveal the European Commission's inclination towards the French position and the use of the competition law to fill the interpretative gap instead of the new DMA.

While inherent to some gaps in the decentralised EU competition law system following Regulation

33. European Commission, Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, Brussels, 15 December 2020, article 10.

[1/2003](#), conflicting decisions by national competition authorities (NCA) are detrimental to the fundamental principle of uniform application of EU competition law. The EU competition law system is characterised by a decentralised, yet *mainly* uniform, application of the EU competition rules (recital 22, Council Regulation [1/2003](#) on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty). Various mechanisms exist to balance these two principles. On one side, the decentralisation empowers NCAs and national courts to apply EU competition rules (34) and leads to NCAs applying Article 102 TFEU and national dispositions concomitantly; as seen in the press publishers' ancillary rights related NCA decisions. On the other side, the European Commission, the European Competition Network (ECN) and the Court of Justice of the EU are the guardians of the uniform application of EU competition law notably through case allocation rules, prohibition of conflicting decisions as well as through the preliminary reference mechanism (35). Nevertheless, as seen in the *booking.com* saga (36) and now in the press publishers' ancillary right cases, these mechanisms show some limits; especially when the conduct relates to a novel point of law. Indeed, Regulation 1/2003 imposes on NCAs and national courts a duty to not take decisions conflicting with a Commission decision but it does not cover conflicts between NCAs decisions (Article 16, Regulation [1/2003](#)). And although the 2004 ECN Notice states that the European Commission is in a better position to deal with cases arising new competition is-

suess, it does not impose any allocation duty and is not binding for the NCAs (37). This gap in the EU competition law system thus leads to conflicting decisions threatening its uniform application. Therefore, a clarification from the Court of Justice through a preliminary reference or from the European Commission, through a new allocated case, or through ECN supervision, is needed.

Conclusion

In order to ensure fair remuneration to press publishers regarding the use of their content online when facing powerful platforms, legislators have adopted different legal solutions. While in Australia a complete system including a duty to negotiate, compulsory arbitration and neutrality in the platform's ecosystem is provided for, the EU has adopted an ancillary right to copyright. Assuming the EU is to take a leading role in publishers' rights protection, competition law could be its most effective tool. Competition law has already been used by national competition authorities to define the extent of such ancillary rights in Germany and France, but led to opposite outcomes. Hence, a clarification at the EU level of the application of competition law as enforcement tool of the EU ancillary right regime would be welcome, especially where the European Commission does not seem to intend to address the issue through *ex ante* regulation.

34. Ibid, art. 3.1.

35. Ibid.: Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03), OJ C 101/43, 27 April 2004, pt 15; Art. 267 TFEU.

36. Various NCA cases were concomitantly opened and although some authorities concerted under the Commission's supervision, the German Federal Cartel Office issued a conflicting decision following the concertation. See Swedish Konkurrensverket decision of 15 April 2015 and Bundeskartellamt Press release 23.12.2015.

37. Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03), OJ C 101/43, 27 April 2004, pt 15; Judgment of 13 December 2012, Expedia, C-226/11, paragraph 29. Moreover, the ECN+ Directive did not solve this issue. See Directive 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

News Highlights

19 to 23 April 2021

Hungary and Poland actions against rule of law conditionality mechanism published

Monday 19 April

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Actions for annulment (C-156/21 and C-157/21) lodged by Hungary and Poland against Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget ('the conditionality mechanism').

More actions for annulment lodged against approval of RWE and E.ON merger

Monday 19 April

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Official publication was made of 10 actions for annulment before the General Court challenging the decision of the European Commission of 26 February 2019 declaring the concentration 'RWE/E.ON Assets' compatible with the internal market (Case M.8871).

Commission adopts revised Regional Aid Guidelines

Monday 19 April

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The European Commission adopted revised EU Guidelines on regional State aid, concerning the rules applicable to the granting of State aid to companies to support economic development of less advantaged regions in the EU.

Commission authorises French aid scheme to support media sector

Monday 19 April

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The European Commission authorised a French scheme to support the media sector in terms of an income tax credit under State aid rules.

EU to strengthen relations in Indo-Pacific: trade tensions, human rights, environmental challenges, and the pandemic

Monday 19 April

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The Council of the EU adopted conclusions for renewed attention to be given to the Indo-Pacific region through a cooperation strategy, in order to 'reinforce its strategic focus, presence and actions' there.

Equal right to vote and electoral candidate rights for mobile EU citizens: public consultation

Monday 19 April

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The Commission launched a public consultation on the electoral rights of mobile EU citizens who move across borders.

Court of Justice rules that Maltese PM's powers to appoint judiciary not precluded by EU law

Tuesday 20 April

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The Grand Chamber of the Court of Justice ruled in *Repubblika* (C-896/19) that provisions of the Maltese Constitution and law giving the Prime Minister extensive powers to appoint members of the judiciary are not precluded by Article 19(1) TEU and Article 47 of the Charter.

Commission fines three EU railway companies for customer allocation cartel

Tuesday 20 April

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The European Commission fined three European railway companies an amount exceeding 48 million euros for participating in a customer allocation cartel, in violation of Article 101 TFEU.

German Constitutional Court clears way for ratification of Own Resources Decision

Wednesday 21 April

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The German Constitutional Court (*Bundesverfassungsgericht* (BVerfG)) rejected the application for a preliminary injunction against the ratification by the German President of the German law approving the EU Own Resources Decision (ORD), a necessary step for the entry into force of the ORD and the 'Next Generation EU' recovery fund.

ECtHR: human rights breached by refusal to return and decision to cremate the body of a deceased relative

Tuesday 20 April

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The European Court of Human Rights ruled in *Gatsalova v. Russia* (application no. 41318/10), that the rights to respect for family life and to an effective remedy (Articles 8 and 13 ECHR) were breached by authorities due to (i) refusal to return the deceased's body, (ii) cremation without the family's knowledge, and (iii) failures re procedural review of those decisions.

ECHA publishes report on chemicals subject to potential regulatory action

Wednesday 21 April

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The European Chemicals Agency issued its third report on its Integrated Regulatory Strategy, an update on progress made in 2020 in identifying substances of concern for humans and the environment, and in prioritising them for risk management or data generation.

Council and Parliament reach provisional agreement on European Climate Law

Wednesday 21 April

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The Council of the EU and the European Parliament announced they reached a provisional political agreement on the European Climate Law, which would translate the EU's political commitment to be climate neutral by 2050 into law, in line with the European Green Deal.

Commission registers two European Citizens' Initiatives concerning exchange programme for civil servants and creation of green areas in companies' rooftops

Thursday 22 April

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The European Commission announced its decision on Wednesday to register European Citizens' Initiatives (1) 'Civil Servant Exchange Program', and (2) 'Green Garden Roof Tops'.

AG Kokott: intra-EU individual investment arbitration agreements are compatible with EU law subject to the possibility of judicial review of its conformity

Thursday 22 April

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Advocate General Kokott advised the Court of Justice in Grand Chamber case PL Holdings (C-109/20) that, under its *Achmea* case law, individual intra-EU arbitration agreements between a Member State and an investor are compatible with EU law subject to certain conditions.

Green finance: Commission adopts sustainable finance package

Thursday 22 April

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The European Commission adopted a comprehensive package of measures to foster investment on more sustainable technologies and businesses, focusing on the enhancement of the reliability and comparability of sustainability information.

EFTA Court to hear whether medical training in other States can produce a valid medical licence

Thursday 22 April

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A request for an Advisory Opinion from the EFTA Court on the interpretation of Article 25 of Professional Qualifications Directive 2005/36 was published: *Zvonimir Cogelja v The Directorate of Health* (E-17/20), on Iceland's so-called 'specialists licences' allowing doctors to practice an authorised health profession in Iceland and automatic recognition in ot-

Reform process of the ECHR system: Protocol No. 15 applicable as of 1 August 2021

Thursday 22 April

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The European Court on Human Rights announced on Wednesday that Italy has deposited its instrument of ratification of Protocol No. 15 amending the ECHR, which will trigger the entry into force of the Protocol in respect of all the Council of Europe States as of 1 August 2021.

Court of Justice confirms General Court's assessment of US terrorist designation decisions as not made by competent authorities

Thursday 22 April

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The Court of Justice in *Council v PKK* (C-46/19 P), partially annulled the General Court's judgment in T-316/14 finding that the Council of the EU had in fact relied on adequate reasoning to keep the PKK in the list, on the basis of a 2001 decision of the UK Home Secretary.

ECtHR: withdrawal of life-sustaining treatment from a child in a permanent vegetative state does not breach human rights if decided by courts after a careful examination of all relevant circumstances

Thursday 22 April

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The European Court of Human Rights unanimously declared the application in *Parfitt v. the United Kingdom* (application no. 18533/21) inadmissible, concerning UK courts decision to allow a hospital to withdraw medical treatment from a five-year old in a permanent vegetative state with no prospect of improvement.

Member States agree on technical specifications for Digital Green Certificate

Thursday 22 April

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EU Member States agreed on guidelines for technical specifications for the European Commission's proposed Digital Green Certificate, aimed at securing 'safe free movement inside the EU during the COVID-19 pandemic'.

ECDC guidance for adjusting non-pharmaceutical interventions based on vaccination status

Friday 23 April

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The European Centre for Disease Prevention and Control issued a technical report providing interim guidance on the benefits of full vaccination against COVID-19 for transmission and implications for non-pharmaceutical interventions.

AG Richard de la Tour's Opinion: Brussels Recast Regulation determines both international and national territorial jurisdiction in cases of claims for damages

Thursday 22 April

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Advocate General Richard de Tour advised the Court of Justice in *Volvo and Others* (C-30/20) to rule that, under Article 7(2) of the Brussels Recast Regulation (1215/2015), for a damages claim resulting from a cartel arrangement, the place where the damage has occurred is the particular territory within a Member State whose market has been affected by the breaches in question.

Prescription period for plant variety rights claims should be extended for prolonged infringements: AG Saugmandsgaard Øe's Opinion

Friday 23 April

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Advocate General Saugmandsgaard Øe delivered his Opinion yesterday in *José Canovas Pardo* (C-186/18), on preliminary reference proceedings brought by the Spanish Supreme Court concerning the interpretation of Article 96 of Council Regulation 2100/94 on Community plant variety rights.

Commission presents proposal for a Regulation on Machinery Products

Friday 23 April

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The European Commission presented its proposal for a Regulation of the European Parliament and of the Council on Machinery Products, which aims at harmonising health and safety requirements for machinery in all Member States and to remove obstacles to trade in machinery between Member States.

Legislative proposals withdrawn by the Commission: published list

Friday 23 April

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The European Commission withdrew a number of its legislative proposals in a list published today, concerning the fields of external relations, Brexit, environmental law, data and tech law, and asylum and migration law.

AG Saugmandsgaard Øe's Opinion on national prohibition on a blind person from working as a court assessor in criminal proceedings

Friday 23 April

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Advocate General Saugmandsgaard Øe delivered his Opinion yesterday in *Komisija za zashtita ot diskriminatsia* (C-824/19), further to a request from the Bulgarian Supreme Court for an assessment of the compatibility with EU law of a prohibition on a blind person from working as a court assessor.

Insights, Analyses & Op-Eds

The Court of Justice rules on European standards for national judicial appointments

by Niels Kirst

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Op-Ed on the CJEU's most recent case concerning judicial appointments, this time in Malta, adding to a line of case law on the independence of the judiciary in the Member States: *Repubblika v Il-Prim Ministru* (C-896/19).

The *Anie* judgment: a fundamental contribution to the judicial construction of the interactions between EU law and international investment law

by Edoardo Stoppioni

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Op-Ed on the recent *Anie* ruling from the Court of Justice (C-798/18 and C-799/18), a fundamental step in the ongoing judicial construction of relations between international investment law and EU law, and the fundamental emerging difference between the orders being their approach to the 'right to regulate' of the State.

The Proposal for an AI Regulation: Preliminary Assessment

by Tiago Sérgio Cabral

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Op-Ed on the European Commission's proposal for a Regulation on Artificial Intelligence, presented on 21 April 2020, seeing it as a good first step for the legislative procedure that touches on most of the necessary subjects, but with key and important aspects still needing to be addressed.

Of life, death, resurrection, and legal zombies: Advocate General Bobek's Opinion in *Fédération bancaire française*

by Mariolina Elia Antonio

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Op-Ed on Advocate General Bobek's Opinion in *Fédération bancaire française v. Autorité de contrôle prudentiel et de résolution* (C-911/19), on one of the most debated 'characters' of the EU law universe: soft law, measures which formally have no legally binding force.

It's (not) all 'bout the money: The Court's ruling in *Braathens Regional Aviation*

by Anna Wallerman Ghavanini

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Op-Ed on the Court of Justice's Grand Chamber ruling in *Braathens Regional Aviation* (C-30/19), an addition to its impressive line of case law on effective judicial protection in equal treatment law.

Application of the Maintenance and Jurisdiction Regulation: the Court's ruling in *TKF*

by Daniel Müller and Maja Menard

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Op-Ed on the Court of Justice's judgment *TKF* (C-729/19), which seems to be an example of extraordinary legal formalism to the detriment of effective and efficient protection of European Union citizens and their rights.

From *Asteris* to *Achmea* – Micula hearing scrutinises award in light of State aid law and broader concerns over Intra-EU Investment Arbitration

by Johannes Fahner

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Analysis of the hearing in the appeal case *Micula* (C-638/19 P), in which the Court of Justice considered submissions on whether the *Achmea* case had any bearing on the *Micula* case, and at what point in time the State aid assessment should be made.

The New Regional Aid Guidelines: First reactions

by Maria Segura and Marianne Clayton

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Op-Ed on the new Regional Aid Guidelines that set out the conditions under which Member States may grant State aid which pursues an objective of regional development and cohesion, in line with the principle of territorial cohesion under Article 3 TEU and Article 174 TFEU.

H.A. v Belgium: migration law is not a 'law of exception'

by Carlos Oviedo Moreno

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Op-Ed on the Court of Justice's case *H.A. v Belgium* (C-194/19), concerning the scope of the legal remedy against a transfer decision taken under Regulation 604/2013 (Dublin III Regulation), which on closer examination entails deeper and (even) more significant repercussions for the interpretation of the Dublin system and the whole of the Common European Asylum System.

The VAT Effective Use and Enjoyment-Rule in the *SK Telecom* case

by Darya Budova

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Analysis on the Court of Justice's ruling in *SK Telecom Co. Ltd* case (C-593/19), which provides guidance on the scope of the so-called effective use and enjoyment-rule established in VAT Directive 2006/112.

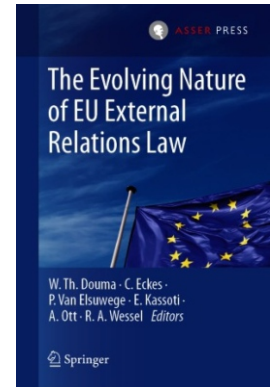
Library - Book Review *h* By Ewa Żelazna

 **W. Douma, C. Eckes, P. Van Elsuwege, E. Kassoti, A. Ott and R.A Wessel (Eds.)**

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The Evolving Nature of EU External Relations Law

Review by Ewa Żelazna, considering the book to be a ‘comprehensive assessment of contemporary legal developments in the area’ that offers a ‘holistic approach’ on how ‘the ongoing legal evolution shapes the nature of the EU as a global actor’.





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