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**DIGITAL ANTITRUST IN THE EU-  
DRAFT AMENDMENTS TO THE GERMAN AND  
FRENCH COMPETITION LAWS: SHOWING THE  
WAY FOR FUTURE EU RULES ?**

Michael Masling, Christina Renner

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# Morgan Lewis

## **DIGITAL ANTITRUST IN THE EU - DRAFT AMENDMENTS TO THE GERMAN AND FRENCH COMPETITION LAWS: SHOWING THE WAY FOR FUTURE EU RULES ?**



**CHRISTINA RENNER**

**BRUSSELS/PARIS**

**ANTITRUST PRACTICE**



**MICHAEL MASLING**

**FRANKFURT**

**ANTITRUST PRACTICE**

# Background

- Competition authorities in the EU actively focus on competition policy and the enforcement of antitrust law in the digital economy.
  - EU Commission's e-commerce sector inquiry (2017)
  - Special Advisor Report for the Commissioner for Competition "Competition policy for the digital era" (2019)
  - Digital Services Act ("Gatekeeper law")
- Germany and France are the most proactive authorities
  - Joint declarations
  - Active enforcement practice

**SECTION 1**

# **AMENDMENTS TO THE GERMAN COMPETITION LAW**



# Draft Bill – Introduction

- German Federal Ministry for Economic Affairs and Energy published draft bill to amend German Act against Restraints of Competition (“Draft Bill”).
- Implementation of Directive (EU) 2019/1 “ECN+ Directive” and **intention to establish digital regulatory framework** to address challenges associated with digitization of the global economy.
- Draft Bill’s proposals include:
  - (1) revision of provisions on abuse control;
  - (2) revision of German merger control;
  - (3) changes to antitrust enforcement proceedings;
  - (4) clarifications to the damages claims provisions.

# Revised Abuse Control

- Draft Bill proposes to **amend provisions on abuse control** to address digitization of economy.
  - Increased importance and use of data.
  - Market concentration tendencies due to network effects and economies of scale observed in platform economy cf. FCO, B6-22/16 – Facebook; B9-121/13 – Booking.com; B9-66/10 – HRS.
- Proposals take into account opinions of **various expert advisors**.
  - Final report of the Competition Law 4.0 Commission,
  - EU Special Advisor Report (“Competition policy for the digital era”),
  - UK Furman Report, and
  - Final report of the Australian CCC on the Digital Platforms Inquiry.

# Market dominance: Access to data and Intermediation Power

- Draft Bill clarifies that **access to data** is an important criterion to establish market power in general, not just in the digital economy
- Draft Bill introduces/clarifies concept of **intermediation power**.
  - Concerns platform operators and other undertakings active in multi sided-markets.
  - Legislator perceives platform operators to have significant impact on suppliers' access to procurement and sales markets (e.g. dependent on favorable listings and rankings)
  - Concept to apply also to undertakings acting as intermediaries on multi-sided markets insofar as undertakings are dependent on their intermediary services, i.e. there is no sufficient alternative although the intermediary is not market dominant (relative market power).



# Data as Essential Facility (Access to Data)

- Draft Bill proposes extension of the essential facilities doctrine
- **Access to data**, networks or other infrastructure facilities (including platforms and interfaces, the licensing of IP rights) that are necessary to compete on an upstream or downstream market shall be considered as essential facility.
- Access shall be granted **against an appropriate compensation** unless access refusal is objectively justified.
- Compliance with data privacy

# New Concept of Paramount Market Importance (1/2)

- Concept of Paramount Market Importance to supplement the rules currently applicable to dominant/strong companies.
- Addresses in particular digital platform operators active on multi-sided and network markets, which are in a position to also influence other markets (“gatekeepers”).
- Aspects to be considered to establish paramount market importance (no-exhaustive):
  - (i) undertaking’s dominant market position(s),
  - (ii) financial strength,
  - (iii) vertical integration and activities on related markets,
  - (iv) access to competitively relevant data, and
  - (v) importance of its activities for third parties (e.g. access to procurement or sales markets).

# New Concept of Paramount Market Importance (2/2)

- FCO to declare by order that an undertaking is of paramount importance for competition across markets.
- Right of the FCO to prohibit undertakings with paramount market importance inter alia from:
  - preferring its own offers over those of competitors when providing access to procurement and sales markets;
  - using competitively relevant data collected on a market where it is dominant to create or increase barriers to entry or otherwise impede other undertakings on another market;
  - hampering the interoperability of products or services or the portability of data;
- Such **conduct might be objectively justified**, but burden of proof for such justification shall be responsibility of undertaking concerned.

# Concept of Relative Market Power

- German competition law provides for Concept of Relative Market Power.
  - Specialty of German law compared to EU or US provisions.
  - Extends abuse control to unilateral conduct of undertakings with superior market power (i.e. competitors/customers are dependent on them from a competition point of view).
  - Concept currently protects only small and medium-sized undertakings.
- Draft Bill proposes to **extend the concept** to all undertakings irrespective of their size.
  - Extension shall apply across all economic sectors.
  - Government expects extension to be particularly **beneficial for competition in the digital economy** where also large undertakings might be dependent on digital platform operators
  - “Data related dependency”

# Tipping of Markets

- Draft Bill proposes provision to **prevent intentional anti-competitive tipping** of markets.
- Tipping = transformation of a competitive market with strong positive network effects into a monopolistic or highly concentrated market.
- Undertakings with relative market power on a multi-sided/network market may be sanctioned if they impede competitors' independent attainment of network effects and thereby create a serious risk of a considerable restriction of competition on the merits.

# Initial Stakeholder Feedback

- FCO has publicly praised the revised abuse control provisions as a “*convincing approach to tackle digital platforms effectively*”.
- Others, such as the German Monopolies Commission stated that particularly the proposed Concept of Paramount Market Importance would lack clarity and uniformity and, thus, would “*lead legal uncertainties that will keep the courts busy for years.*”

# Merger Control Update

- Draft Bill intends to enable the FCO to focus its resources on competitively significant and complex cases by proposing two major changes.
  - **1. Proposal:** raising the domestic revenue thresholds by EUR 5 million.
  - Merger thresholds would be (i) combined worldwide revenue of the undertakings to the concentration > EUR 500 million, (ii) domestic turnover of at least one undertaking concerned > EUR 30 million, and (iii) domestic revenue of another undertaking > EUR 10 million.
  - **2. Proposal:** introduction of an instrument giving the FCO the right to extend the German merger control regime to concentrations in certain economic sectors with a strong local nexus.

# Further Proposals

- Strengthening of **interim measures**.
- Formalization of **comfort letter**.
- **Implementation of ECN+ Directive** including, for example, rules on the enforcement of decisions of antitrust authorities from other EU member states and mutual assistance.
- **Extended investigation rights** of the FCO in antitrust proceedings including right to issue RFI's to individual representatives of undertakings under investigation with failure to do so being subject to administrative fines.
- Specified criteria re **calculation of fines** such as undertaking's behavior after an infringement (active cooperation, implementation of compliance measures?).
- **Clarifying amendments re antitrust damage claims** following the implementation of the EU Antitrust Damages Directive in 2017.

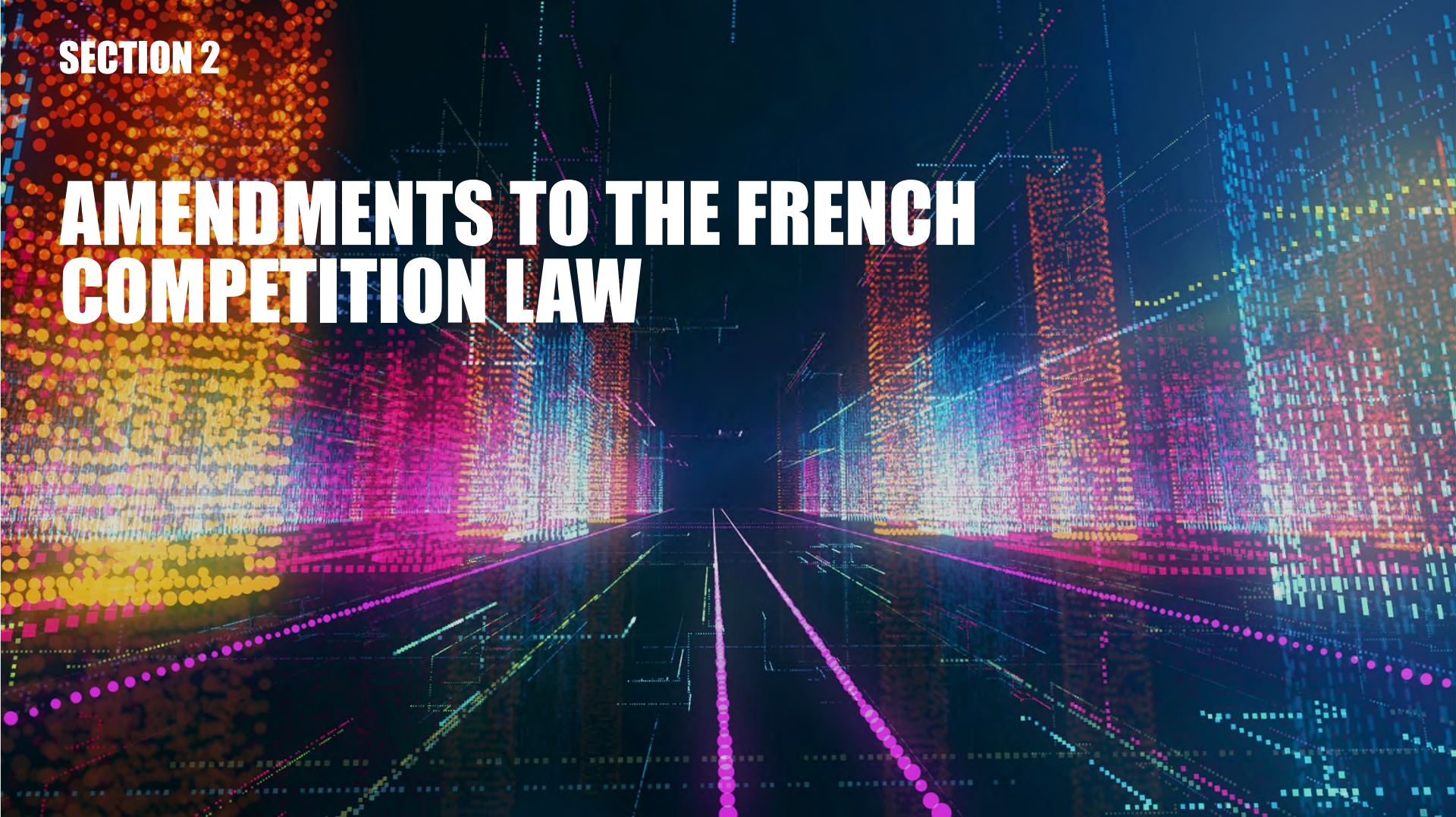


# The Draft Bill Going Forward

- Draft Bill serves as an initial proposal which is subject to further input from various stakeholders and parliamentary consultation.
- Since publication in January 2020, several amendments have been made.
- Parliamentary consultation originally planned for second half of 2020, but delay due to COVID-19 pandemic possible.

## SECTION 2

# AMENDMENTS TO THE FRENCH COMPETITION LAW



# Introducing the notion of “structuring companies”

- List of “structuring companies” to be established by the French Competition Authority:
  - an organisation:
  - that provides online intermediation services aimed at exchanging, buying or selling goods, content or services; and
  - which holds structuring market power-
- Market power determined based on criteria including
  - Dominance on one market.
  - Number of users & access to essential data.
  - Influence on connected markets.
  - Network effects.

# Special competition regime for structuring companies

- Duties on « structuring companies » to inform the Competition Authority of all transaction a month before their closing.
- Possibility to require notification upon investigation.
- Reversal of burden of proof.

## SECTION 3

# SHOWING THE WAY FOR A REFORM OF THE EU RULES?



# Cross-cutting topics

- A sliding evolution of core notions of antitrust
  - from “dominance” to “key competitive edge”
  - from “essential facility” to “gatekeepers” and “referees”
- A greater availability but also enforcement of interim measures
- A gradual reversal of the burden of proof
- A shift to *ex ante* control mechanisms

# And what does the EU do?

- Expanding the scope of investigations: from platform power to data power
- Interim measures
- Multi-instrument and multi-sector approach
- No change of merger thresholds
- Plans for *ex ante* regulation
- “Gatekeeper” law
- Reversal of burden of proof?

**SECTION 04**

# **DIGITAL ANTITRUST DURING THE COVID-19 CRISIS**





# ECN statement of March 23, 2020: relaxing and tightening the grip



Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis

- The ECN is fully aware of the social and economic consequences triggered by the COVID-19 outbreak in the EU/EEA.
- The different EU/EEA competition instruments have mechanisms to take into account, where appropriate and necessary, market and economic developments. Competition rules ensure a level playing field between companies. This objective remains relevant also in a period when companies and the economy as a whole suffer from crisis conditions.
- The ECN understands that this extraordinary situation may trigger the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products to all consumers. In the current circumstances, the ECN will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply.
- Considering the current circumstances, such measures are unlikely to be problematic, since they would either not amount to a restriction of competition under Article 101 TFEU/53 EEA or generate efficiencies that would most likely outweigh any such restriction. If companies have doubts about the compatibility of such cooperation initiatives with EU/EEA competition law, they can reach out to the Commission, the EFTA Surveillance Authority or the national competition authority concerned any time for informal guidance.
- At the same time, it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (e.g. face masks and sanitising gel) remain available at competitive prices. The ECN will therefore not hesitate to take action against companies taking advantage of the current situation by cartelling or abusing their dominant position.
- In this context, the ECN would like to point out that the existing rules allow manufacturers to set maximum prices for their products. The latter could prove useful to limit unjustified price increase at the distribution level.

*“The ECN will not actively intervene against necessary and temporary measures put in place to avoid a shortage”*

*“The ECN will not hesitate to take action against companies that take advantage of the current crisis”*

# The EU's Temporary Antitrust Framework of April 8, 2020 and the return of the comfort letter

*Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak*

Scope	Purpose
<ul style="list-style-type: none"><li>• Cooperation projects aimed at addressing a shortage of supply of essential products and services, and triggered by the current coronavirus crisis.</li><li>• Applicable to all sectors, but focuses on health sector.</li><li>• Applicable until withdrawn by the Commission.</li></ul>	<ol style="list-style-type: none"><li>1. Guidance and criteria for assessing these cooperation projects; and setting enforcement priorities.<ol style="list-style-type: none"><li>a) Designed and objectively necessary to increase output</li><li>b) Temporary in nature</li><li>c) Not exceeding what is strictly necessary</li><li>d) Need to document all exchanges</li></ol></li><li>2. Procedure to provide ad hoc guidance (including comfort letters, issued at the Commission's discretion)</li></ol>

# Impact on procedure

- In Germany, a law was enacted to temporarily extend merger control procedures for concentrations notified to the FCO between 1 March and 31 May 2020.
- In France and other countries, review periods are getting back to normal.
- EU: slowing down of bigger cases but globally little impact – Big Tech remains top priority

# Morgan Lewis Coronavirus/COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at

[www.morganlewis.com/topics/coronavirus-covid-19](http://www.morganlewis.com/topics/coronavirus-covid-19)

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple “Stay Up to Date” button.

# Biography



- Christina Renner
- Brussels
  - T +32.2.507.7524
  - F +32.2.507.7555

- Christina Renner concentrates her practice on European Union and German merger control, competition, and antitrust law, with experience in cartels and general behavioral matters, abuse of dominance, and EU state aid laws. Christina regularly advises clients concerning mergers reviewed by the European Commission and the German Federal Cartel Office, as well as the French, Austrian, and Belgian competition authorities. Her work spans a variety of industries, including transportation, energy, life sciences, telecoms as well as retail. Christina is admitted in Brussels and Germany.

# Biography



- Michael Masling
- Frankfurt
  - T +49.69.714.00.753
  - F +49.69.714.00.710

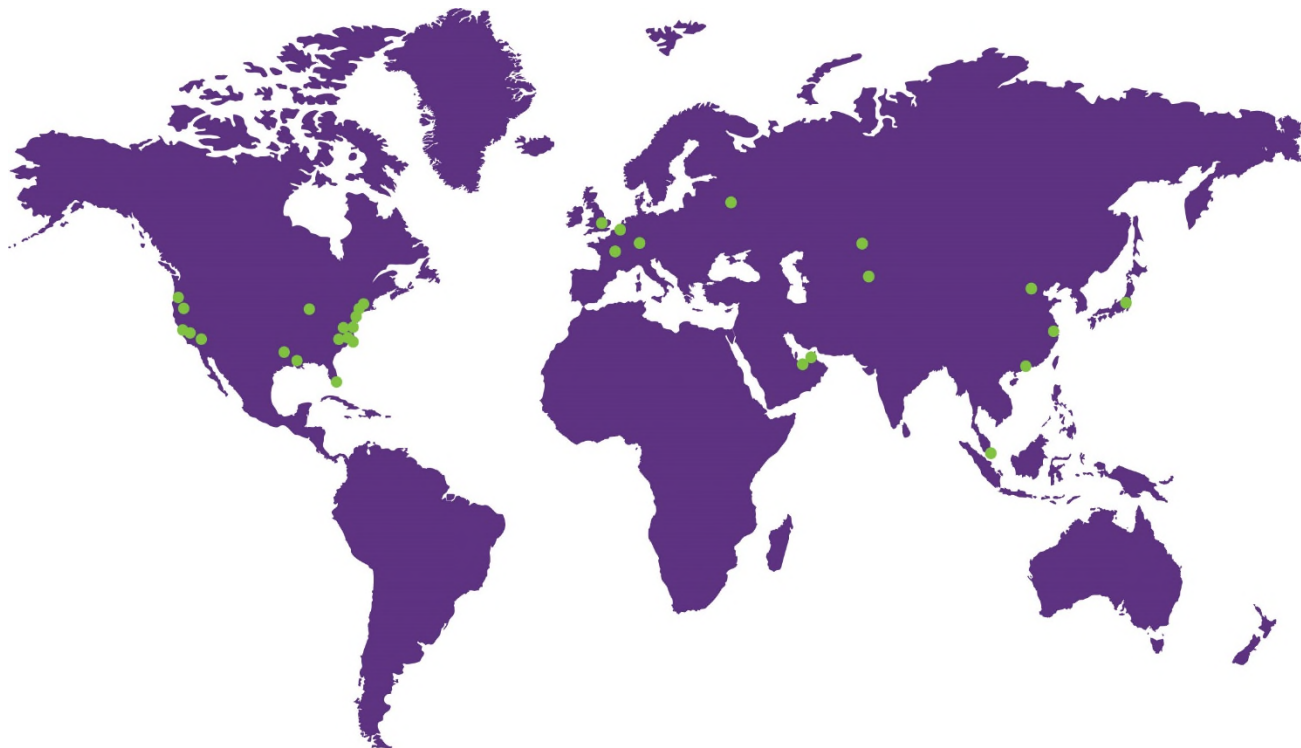
- Michael Masling advises clients on all aspects of EU and German competition law. Michael obtains merger clearances from national and international competition authorities in complex transactions, defends clients in government and private investigations and litigation, and provides antitrust counseling including on distribution systems. In addition, he counsels on European and German foreign direct investment rules. In 2014, Michael was seconded to Morgan Lewis’s Washington, DC, office, where he advised clients on international litigation and merger control matters.

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