

Discussion Paper Series – CRC TR 224

Discussion Paper No. 745
Project B 05

Advancing Competition Policy in the Digital Gatekeeper Era – A Tribute to Heike Schweitzer

Jens-Uwe Franck¹
Martin Peitz²

May 2026

¹ Department of Law, University of Mannheim, and Mannheim Centre for Competition and Innovation (MaCCI).

² Department of Economics Law, University of Mannheim, and Mannheim Centre for Competition and Innovation (MaCCI).

Support by the Deutsche Forschungsgemeinschaft (DFG, German Research Foundation)
through CRC TR 224 is gratefully acknowledged.

Advancing Competition Policy in the Digital Gatekeeper Era – A Tribute to Heike Schweitzer*

Jens-Uwe Franck[†] and Martin Peitz[‡]

April 2026

Abstract

This contribution examines Heike Schweitzer’s role as a competition policy analyst and adviser in the formative phase of European competition policy towards digital platforms. It situates her work in this context and develops a conceptual framework that captures the challenges of analysis under conditions of uncertainty and dynamic market developments. Through a selective analysis of four key reports, the article reconstructs central analytical approaches and policy proposals, identifies characteristic features of a “Heike Schweitzer approach”, and assesses its influence on subsequent regulatory developments, in particular the Digital Markets Act and section 19a of the German Competition Act.

Keywords: antitrust law, digital platform, Digital Markets Act, German competition law, platform regulation

JEL classification: K21, K23, K20

* The authors gratefully acknowledge support from the Deutsche Forschungsgemeinschaft (CRC TR 224, project B05).

[†] Department of Law, University of Mannheim, and Mannheim Centre for Competition and Innovation (MaCCI).

[‡] Department of Economics Law, University of Mannheim, and Mannheim Centre for Competition and Innovation (MaCCI).

CONTENTS

I.	INTRODUCTION	3
II.	SETTING THE STAGE: COMPETITION POLICY ANALYSIS AND ADVICE ON DIGITAL PLATFORMS IN THE 2010S	3
III.	THE ROLE OF A COMPETITION POLICY ANALYST AND ADVISER IN THE FACE OF DISRUPTIVE AND DYNAMIC DEVELOPMENTS	8
1.	The Dynamic Analytical Triad: Observing, Understanding, and Concluding	8
a)	First Step: Observing	9
b)	Second Step: Understanding	9
c)	Third Step: Concluding	10
2.	A Further Complexity of the Task: The Interplay between the Analytical Steps and Factors	12
IV.	SPOTLIGHT ON FOUR REPORTS	13
1.	Building Blocks: Schweitzer/Fetzer/Peitz (2015/2016)	13
a)	Point of Departure: Competition Law as an Element of a Digital Competitive Order	13
b)	Market Definition: Free Services, Multi-Sidedness, and the Limits of the SSNIP Test	14
c)	Market Power: Network Effects, Data Advantages, and Contestability	14
d)	Abuse Control in Digital Markets	15
2.	Modernising Abuse Control in Digital Markets: Schweitzer/Haucap/Kerber/Welker (2018)	16
a)	Relative Market Power and Contestability in Digital Markets	17
b)	Towards New Legal Instruments	18
3.	Analytical Assessment and EU-Level Governance: the Special Advisers' Report (2019)	18
a)	Diagnosis of "Sticky" Market Power	18
b)	Reflections on Market Definition and Market Power	18
c)	Platforms as "Regulators"	19
d)	Self-Preferencing and Enforcement	20
e)	Impact on the DMA	20
4.	Concrete Reform Proposals: Kommission Wettbewerbsrecht 4.0 (September 2019)	21
a)	EU Platform Regulation	21
b)	Self-Preferencing, Data Portability, and Interoperability	22
c)	Impact on German Competition Law Reform (Section 19a of the Competition Act)	22
V.	THE HEIKE SCHWEITZER APPROACH	23
VI.	HEIKE SCHWEITZER'S PERSPECTIVE ON THE GERMAN SECTION 19A TOOL AND THE EU'S DMA	25
1.	Schweitzer's View on the German Section 19a Tool	26
a)	Concentration and Power Dynamics: Successful Platform Services as Nuclei of Digital Ecosystems	26
b)	Deficits of Abuse Procedures under Article 102 TFEU and Equivalent Domestic Provisions	27
c)	Synthesis	29
2.	Schweitzer's View on the EU's Digital Markets Act	31
a)	Market-Failure-Oriented Analysis as a Basis for Assessment	31
b)	Fairness as a Competition-Policy Concept to Be Rationalized within the DMA	33
c)	The DMA as a Qualified Solution to the Shortcomings of Traditional Competition Law	35
d)	Critique of the Concept of the DMA	36
VII.	CONCLUSION	38

I. Introduction

How can competition be protected in the era of large digital platforms? This question has stood at the centre of European competition law and policy debates for more than a decade. Heike Schweitzer shaped the competition policy discourse on this issue like arguably no other European legal scholar, from its earliest stages until her untimely death on 11 June 2024.

We would like to commemorate her by honouring both her work and her central role as a competition policy analyst and adviser on digital markets in Germany and Europe, particularly during the period between 2015 and 2022. These were the years in which key decisions were taken on the legal framework through which competition is currently protected against the challenges posed by large digital gatekeepers. During this period, foundational concepts were developed, contested, and ultimately translated into binding regulatory and enforcement instruments.

This contribution proceeds in a number of steps. Section II situates Schweitzer's work within the broader development of competition policy analysis and advice on digital platforms in the 2010s. Section III then develops a conceptual framework for the role of the competition policy analyst and adviser in the face of dynamic and disruptive developments. It structures this role along the analytical steps of observing, understanding, and concluding, and highlights the interdependencies between these stages.

Section IV turns to a structured examination of four central reports to which Schweitzer made decisive contributions. The analysis is selective and does not seek to be comprehensive; rather, it highlights key statements, analytical approaches, and policy proposals, and relates them to subsequent factual and legal developments. Sections V and VI build on this by, first, systematizing the challenges faced by competition policy analysis in digital markets and, second, identifying characteristic features of Schweitzer's approach and her handling of these challenges, including her later assessment of the Digital Markets Act and section 19a of the German Competition Act. Section VII concludes with reflections on the enduring significance of her analytical method and normative orientation.

II. Setting the Stage: Competition Policy Analysis and Advice on Digital Platforms in the 2010s

To set the stage, let us briefly look back. By the early 2010s at the latest, it had become apparent to a growing number of scholars and practitioners that addressing the major digital platforms would constitute a central, perhaps even epochal, challenge for competition law practice and theory for years to come. The rapid concentration of economic power, the emergence of new forms of market control, and the limits of traditional antitrust tools increasingly came into focus. It was also clear at this stage that the competition law analysis and assessment of the position and conduct of operators of two-sided digital platforms would not be business as usual. Rather, they would require a reconceptualization of established competition law categories, such as market definition, market dominance, and abuse.

In the first decade of the new millennium, economic theory made significant advances in understanding the peculiarities of two-sided digital platforms. Seminal contributions demonstrated how network effects between the two sides of a platform help explain why profit-maximizing platforms may subsidize one side, and how such pricing strategies depend on user behaviour and market structure.¹ A particularly important case concerns digital platforms that set a price of zero for one group of users. Early work also pointed to the possibility that network effects may favour an inferior incumbent platform when users face coordination difficulties in their usage decisions.²

These contributions equipped economists and legal scholars with analytical tools to identify potential allocative effects in markets characterized by digital platforms and to rationalize observed pricing strategies.³ At the same time, they offered only limited guidance for predicting the evolution of platform business models, in particular with respect to the growing reliance on non-price instruments such as data-driven recommendations, rankings, or access rules. Moreover, the resulting market dynamics and the competitive conditions likely to emerge from these strategies remained largely unclear.

Consequently, the implications for competition law were difficult to assess. It remained uncertain whether existing antitrust concepts and enforcement tools were adequate to address platform-specific forms of market power, or whether the distinctive features of digital platform markets would call for adjustments to the existing legal framework.

Two questions came to structure the debate. First, to what extent did established concepts of competition law require adaptation, and how should such adaptation be pursued within the existing framework, most prominently under Article 102 TFEU, given that platform competition often operates through non-price mechanisms such as ranking, default settings, access rules, and data-driven steering? Second, did the observed developments and emerging challenges call for changes to the legal framework itself, either through amendments and refinements of competition law (at the EU and/or national level) or through complementary regulatory or quasi-regulatory instruments designed to protect competition in circumstances where ex post enforcement would be too slow or ineffective?

The European debate clearly accelerated from 2014 onwards, driven by a series of salient enforcement and policy developments. At EU level, the European Commission's merger clearance of Facebook's acquisition of WhatsApp in October 2014⁴ became an early reference point for discussions on data, platforms, and competitive constraints in digital ecosystems. The Commission's renewed pursuit of the Google Shopping case further highlighted the difficulties of applying established Article 102 TFEU categories to platform-

¹ *Rochet/Tirole*, Platform Competition in Two-Sided Markets, *Journal of the European Economic Association* 1 (2003), 990–1024; *Rochet/Tirole*, Two-Sided Markets: A Progress Report, *RAND Journal of Economics* 37 (2006), 645–667; *Armstrong*, Competition in Two-Sided Markets, *RAND Journal of Economics* 37 (2006), 668–691.

² *Caillaud/Jullien*, Chicken & Egg: Competition among Intermediation Service Providers, *RAND Journal of Economics* 34 (2003), 309–328; *Jullien*, Competition in Multi-Sided Markets: Divide and Conquer, *American Economic Journal: Microeconomics* 3 (2011), 186–220.

³ *Evans*, The Antitrust Economics of Multi-Sided Platform Markets, *Yale Journal on Regulation* 20 (2003), 325–381.

⁴ European Commission, Decision of 3 October 2014, Case COMP/M.7217 – Facebook/WhatsApp, C(2014) 7239 final.

mediated competition: following the opening of the investigation in November 2010,⁵ the Commission reverted to the infringement procedure and issued a Statement of Objections in April 2015.⁶

In addition, the Commission launched a public consultation in September 2015 on “the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy”, signalling that the debate was no longer confined to case-by-case enforcement but had moved into the terrain of potential governance responses.⁷

In Germany, the Bundeskartellamt’s proceedings against price parity clauses in online hotel booking were widely discussed as an early indication of platform-related dependency and the competitive significance of platform rules. In December 2013, the Bundeskartellamt prohibited the leading German booking portal HRS from continuing to apply price parity clauses.⁸ It later addressed similar clauses used by Booking.com.⁹ Then, in October 2015, in a background paper prepared for the annual meeting of the Working Group on Competition Law, the Bundeskartellamt explicitly identified internet platforms as a cross-cutting challenge spanning competition law, privacy, and consumer protection.¹⁰ This can be seen as another indication that the debate had moved beyond isolated cases. Finally, the Bundeskartellamt’s opening of proceedings against Facebook in March 2016 highlighted the growing link between data practices, privacy, and consumer protection on the one hand and abuse control on the other.¹¹

Beginning around 2014, governments and institutions in Europe and beyond started commissioning expert analyses to clarify the nature of the competition policy challenge and the range of potential legal responses. In Europe, this practice of commissioning is evidenced by the Commission’s consultation process, initiated in 2015,¹² as well as the subsequent commissioning of expert reports at the EU and national levels. In Germany, the Bundeskartellamt’s 2015 background paper¹³ and the subsequent series of ministry-

⁵ European Commission, Press Release IP/10/1624, 30 November 2010 (opening an antitrust investigation into Google’s search practices).

⁶ European Commission, Press Release IP-15-4780, 14 April 2015 (Statement of Objections to Google on comparison shopping); see also European Commission, Case AT.39740 – Google Search (Shopping) (case chronology noting the Statement of Objections of 15 April 2015).

⁷ European Commission, Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, launched 24 September 2015 (consultation page); European Commission, Objectives and General Information (consultation background document).

⁸ Bundeskartellamt, Decision of 20 December 2013, Case B9-66/10 – HRS.

⁹ Bundeskartellamt, Decision of 22 December 2015, Case B9-121/13 – Booking.com.

¹⁰ Bundeskartellamt, Digitale Ökonomie – Internetplattformen zwischen Wettbewerbsrecht, Privatsphäre und Verbraucherschutz, Hintergrundpapier zur Sitzung des Arbeitskreises Kartellrecht, 1 October 2015.

¹¹ Bundeskartellamt, Press Release of 2 March 2016; see also Decision of 6 February 2019, Case B6-22/16 – Facebook, para 134 (instituting proceedings by letter of 1 March 2016). For background and legal appraisal of the initiation of proceedings, see *Franck*, Eine Frage des Zusammenhangs: Marktbeherrschungsmisbrauch durch rechtswidrige Konditionen. Facebook im Visier des Bundeskartellamts, ZWeR 2016, 137–164.

¹² European Commission, Publication of 24 September 2015, Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy (“The consultation on platforms covers: the social and economic role of online platforms; transparency e.g. in search results; terms of use; ratings and reviews; the use of information by platforms; the relation between platforms and their suppliers; the conditions of switching between comparable services offered by platforms; the role of online intermediaries including ways to tackle illegal content on the Internet”).

¹³ Bundeskartellamt (n 10).

commissioned expert studies demonstrate a similar shift in focus from case-specific concerns to a broader diagnosis and instrument design.

Heike Schweitzer played a leading role in this phase of the debate. Four milestones illustrate the evolution of the analytical framework and its translation into specific policy proposals and legal reforms.

- 1) In 2015, Schweitzer and her co-authors prepared a report for the German Federal Ministry for Economic Affairs and Energy (BMWi) as part of the “Fachdialog Ordnungsrahmen für die Digitale Wirtschaft” project. In this report, they set out the key building blocks for analysing competition in digital platform markets. An expanded version of this study was published as a discussion paper in May 2016 and has since been widely cited in both academic and policy debates.¹⁴
- 2) Schweitzer was the lead author of the 2018 report “Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen”, which was commissioned by the BMWi.¹⁵ The study focused on modernizing abuse control and developing proposals concerning intermediation power, dependency, and data-related issues.
- 3) In April 2019, together with Jacques Crémer and Yves-Alexandre de Montjoye, Schweitzer submitted the report “Competition Policy for the Digital Era” to the European Commission.¹⁶ The report provided a comprehensive diagnosis of digital market power and examined the interaction between competition enforcement and targeted regulation at EU level.
- 4) In September 2019, the BMWi published the final report of the “Kommission Wettbewerbsrecht 4.0”, co-chaired by Schweitzer and entitled “Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft”.¹⁷ The report set out specific recommendations for the further development of competition law and related regulatory measures in the digital economy. Schweitzer, together with Martin Schallbruch and Achim Wambach, chaired the “Competition Law 4.0 Commission”, which had six other voting members and was jointly responsible for the report. Wambach anecdotally reported that Schweitzer was “in the driver’s seat” when drafting the report – much to the satisfaction of her co-chairs.

Revisiting the analyses, findings, and recommendations in these reports from today’s perspective necessarily involves the benefit of hindsight, shaped by subsequent developments, in particular the realization that major applications of EU competition law to digital platform operators only materialized at a later stage.

¹⁴ *Schweitzer/Fetzer/Peitz*, Digitale Plattformen: Bausteine für einen künftigen Ordnungsrahmen (Study commissioned by the Bundesministerium für Wirtschaft und Energie, 2015); *Schweitzer/Fetzer/Peitz*, Digitale Plattformen: Bausteine für einen künftigen Ordnungsrahmen, ZEW Discussion Paper No. 16-042 (May 2016).

¹⁵ *Schweitzer/Haucap/Kerber/Welker*, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen (Study commissioned by the Bundesministerium für Wirtschaft und Energie, 2018).

¹⁶ *Crémer/de Montjoye/Schweitzer*, Competition Policy for the Digital Era, Final Report prepared for the European Commission (DG Competition), April 2019.

¹⁷ *Kommission Wettbewerbsrecht 4.0*, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft – Bericht der Kommission Wettbewerbsrecht 4.0 (Bundesministerium für Wirtschaft und Energie, September 2019).

In this regard, attention should be drawn to the enforcement of Article 102 TFEU by the European Commission through recalibrated concepts of abuse, most notably in the *Google Shopping*,¹⁸ *Google Android*,¹⁹ and *Apple App Store Practices*²⁰ decisions. This recalibration has thus far been endorsed by both the General Court²¹ and the Court of Justice,²² and has been further advanced by the Court of Justice in its preliminary ruling in *Android Auto*.²³ Moreover, a progressively more stringent approach to merger control has emerged in relation to acquisitions by digital gatekeepers, notably in the *Google/Fitbit*,²⁴ *Microsoft/Activision Blizzard*,²⁵ *Booking/eTraveli*,²⁶ and *Amazon/iRobot*²⁷ cases.

Most importantly, however, far-reaching legislative interventions and strategic policy choices were adopted. A central pillar of competition protection against restrictions imposed by digital gatekeepers is now the EU Digital Markets Act (DMA).²⁸ The political decision in favour of this approach was taken at the level of the European Commission in the autumn of 2020,²⁹ thereby simultaneously setting aside the alternative of market investigations as an instrument for addressing the challenges posed by digital gatekeepers – an alternative that had also been supported by an expert report authored by Schweitzer.³⁰ The DMA, having been adopted by the European Parliament and the Council, entered into force in autumn 2022 and has been in application since 2023.

At the national level, a new type of competition law instrument was introduced in 2021 with section 19a of the German Act against Restraints of Competition through its Tenth Amendment, aimed at combating potential abuses by digital gatekeepers. The so-called “section 19a tool” is activated in respect of a particular undertaking only after that undertaking has been the subject of both a designation decision and a subsequent abuse

¹⁸ European Commission, Decision of 27 June 2017, Case AT.39740 – Google Search (Shopping), C(2017) 4444 final.

¹⁹ European Commission, Decision of 18 July 2018, Case AT.40099 – Google Android, C(2018) 4761 final.

²⁰ European Commission, Decision of 4 March 2024, Case AT.40437 – Apple – App Store Practices (music streaming), C(2024) 1307 final.

²¹ General Court, Judgment of 10 November 2021, Case T-612/17, Google and Alphabet v Commission (Google Shopping), ECLI:EU:T:2021:763; Judgment of 14 September 2022, Case T-604/18, Google and Alphabet v Commission (Google Android), ECLI:EU:T:2022:541.

²² ECJ, Judgment of 11 October 2024, Case C-48/22 P, Google Alphabet v Commission (Google Shopping), ECLI:EU:C:2024:726; pending Case C-738/22 P – Google and Alphabet v Commission; Advocate General Kokott, Opinion of 19 June 2025, ECLI:EU:C:2025:463.

²³ ECJ, Judgment of 25 February 2025, Case C-233/23, Alphabet and Others (Android Auto), ECLI:EU:C:2025:110.

²⁴ European Commission, Decision of 17 December 2020, Case M.9660 – Google/Fitbit, C(2020) 9105 final.

²⁵ European Commission, Decision of 15 May 2023, Case M.10646 – Microsoft/Activision Blizzard, C(2023) 3199 final.

²⁶ European Commission, Decision of 25 September 2023, Case M.10615 – Booking Holdings/eTraveli Group.

²⁷ European Commission, Statement of 29 January 2024, Statement by Executive Vice-President Vestager on announcement by Amazon and iRobot to abandon their transaction; Press Release of 27 November 2023, Commission sends Amazon Statement of Objections over proposed acquisition of iRobot.

²⁸ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). O.J. 2022, L 265/1 (“DMA”).

²⁹ Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 15 December 2020, COM (2020) 842 final.

³⁰ Schweitzer, *The New Competition Tool: Its Institutional Set-Up and Procedural Design* (2020). Schweitzer’s Expert Report has also been published in Motta/Peitz/Schweitzer (eds.), *Market Investigations. A New Competition Tool for Europe?* (Cambridge University Press, 2022), 90–163.

decision.³¹ The instrument therefore differs from traditional competition law, which is characterized by self-executing obligations. The role of the Bundeskartellamt under section 19a of the Competition Act is thus closer to that of a regulatory authority, in that it enjoys discretion as to whether and how to intervene.

These legislative interventions of the early 2020s are noteworthy in that Schweitzer repeatedly expressed a cautious stance towards the introduction of novel instruments for the protection of competition alongside the traditional antitrust tools of Articles 101 and 102 TFEU (and their national equivalents), as well as towards the legislative expansion or tightening of merger control. Against this backdrop, a return to the analyses, conclusions, and recommendations put forward between 2015 and 2019 is particularly instructive. This is so in two respects.

First, in the face of novel and disruptive developments, including the emergence of large digital platforms, competition policy advisers are confronted with complex dynamics and feedback loops between observation, comprehension, and inference, and thus operate on inherently uncertain ground.

Second, this exercise aims to shed light on how Schweitzer understood and performed her role as a competition policy analyst and adviser, and on the convictions that guided her in this capacity.

III. The Role of a Competition Policy Analyst and Adviser in the Face of Disruptive and Dynamic Developments

The digitalization of economies and the rise of digital platform operators have led to technological and economic disruptions comparable, historically, to only a few periods of major structural transformation.³² These developments might give rise to new kinds of risk for a rule-based competitive order. Yet what exactly were these risks, and how should they be addressed?

The demand for competition policy analysis and advice was immense. At the same time, the challenges faced by analysts and advisers were no less significant. In this section, we seek to examine more closely the complexity of the competition policy mandate confronting competition policy advisers in a period of profound technological and economic change. In doing so, we aim to sharpen the analytical lens through which we will examine the work of Heike Schweitzer as a competition policy adviser in the years 2015 to 2019.

1. The Dynamic Analytical Triad: Observing, Understanding, and Concluding

The recipients of Schweitzer's policy advice – whether at the European Commission or at the German Federal Ministry for Economic Affairs – ultimately expected competition policy advisers to provide answers above all to the following questions: should the application of existing rules and procedures be adjusted? If so, what adjustments should be made, and

³¹ For a detailed overview of the structure, scope, covered conduct, procedural and judicial remedies, see *Franck/Peitz*, Digital Platforms and the New 19a Tool in the German Competition Act, *Journal of European Competition Law and Practice* 12 (2021), 513–528.

³² Disruptions are ongoing. Here, however, we look back at the developments that occurred shortly before and during the period in which the reports were written.

how could they be implemented? Should new rules, new procedures, or even novel rule-making mechanisms be introduced?

The challenge in addressing these questions in times of disruptive change lies in the fact that the relevant empirical developments are highly dynamic, and their actual and potential effects on the factors that are decisive from a competition policy perspective are often not yet well understood. To grasp the complexity of competition policy analysis in such contexts, it is useful to distinguish three analytical steps: observing, understanding, and concluding.

a) First Step: Observing

The first step is to establish the relevant facts. From an analytical perspective, this requires distinguishing between two principal objects of observation.

First, it is necessary to develop a clear picture of the market position and the conduct of the relevant market actors, particularly the digital platform operators. This entails observing the dynamics underlying the rise of digital platforms, the emergence and expansion of digital ecosystems – often accompanied by aggressive business practices – and the continuous optimization and adaptation of their business models.

Second, attention must be directed to the way existing competition rules and procedures are applied by authorities and courts, as well as to the effectiveness of their enforcement activities with respect to the conduct and competitive position of digital platform operators and other market players. Where the relevant developments constitute a global phenomenon – as is the case with the rise of digital platforms – the analytical perspective must extend beyond Germany and the European Union to include the enforcement of structurally comparable competition regimes in other jurisdictions. This includes the United Kingdom,³³ the United States, Brazil, Korea, Japan, and Australia. Observing how competition law enforcement engages in parallel experimentation in response to new phenomena promises valuable insights for competition policy.

b) Second Step: Understanding

The second step is to interpret the established facts. Regarding developments in the market and the positioning and behaviour of digital platform operators, this involves assessing how specific developments and forms of conduct affect those parameters that are relevant from a competition policy perspective. Ultimately, the inquiry concerns their effects on consumer welfare, considering both short-term and long-term impacts. However, the proper functioning of competition can be assessed by reference to more tangible indicators of market structure and competitive conditions, including the openness and contestability of markets, most notably the prevention of market foreclosure, particularly through barriers to entry, the limitation of excessive market concentration, the preservation of incentives to innovate, and the avoidance of innovation-detering conduct by firms with market power, as well as the prevention of coordination that excludes or restricts competition. Understanding the observed developments therefore requires, in particular, a practice-oriented engagement with the

³³ The United Kingdom is a special case, as it was still a member of the European Union in the 2010s. It voted to leave the EU in 2016 and ultimately withdrew in 2020.

economic theory of two-sided digital platforms, as well as with available empirical research shedding light on the effects of specific strategies and forms of conduct adopted by digital platform operators.

To assess whether and how existing competition law instruments are effective, it is necessary to analyse individual enforcement cases. The key question is whether these enforcement measures could influence the behaviour of undertakings in such a way that the identified parameters of effective competition protection – such as low barriers to market entry – were promoted. Such case analyses can reveal the gaps and limitations of existing legal mechanisms. First, these shortcomings may be substantive in nature. For instance, the categories of abuse developed under Article 102 TFEU may fail to adequately capture the competitive risks posed by digital gatekeepers, or it may be necessary to address unilateral conduct that falls below the threshold of market dominance. Second, the adaptation of the traditional competition law toolkit is typically accompanied by a period of considerable legal uncertainty and, consequently, a delayed regulatory effect. The precise meaning of the standards established by Articles 101 and 102 TFEU in relation to a particular new scenario cannot be deduced directly from the provisions themselves. Rather, their content remains unclear *ex ante* and must be determined by competition authorities and courts on a case-by-case basis. In this process, the judiciary incrementally develops a body of competition rules. Accordingly, the final content of these provisions remains uncertain until definitive rulings – ultimately by the ECJ – clarify their interpretation. Third, competition enforcement is characterized by significant remedial limitations. The standard remedy consists of obliging the infringing undertaking to bring the violation to an end, combined with the imposition of fines. However, competition authorities typically refrain from specifying which positive measures an undertaking must take to prevent future infringements. Finally, even where competition authorities take the view that they possess the necessary remedial powers, they often hesitate to exercise them by imposing detailed positive obligations on undertakings. Several procedural and institutional factors may explain this reluctance: (1) limited experience in drafting detailed behavioural obligations, particularly where external technical expertise is required; (2) concerns about their ability to generate broadly accepted norms and thereby maintain institutional legitimacy; (3) constrained resources, meaning that investing in the design and monitoring of behavioural remedies is often treated as a secondary priority; and (4) the concern that their internal ethos and “pro-competitive spirit” might be undermined if the authority were compelled to act as a quasi-regulator.

These and other characteristics of the available competition law instruments must be considered as potential explanatory factors when seeking to understand whether, and why, competitive challenges arising from new developments and emerging phenomena cannot be addressed with sufficient effectiveness.

c) Third Step: Concluding

The ultimately decisive question is what conclusions a policy analyst and adviser should draw from the findings and what recommendations follow from them. If gaps or deficiencies in the existing competition law framework are identified, the question arises as to which policy responses are appropriate. These may include legislative amendments to the existing

framework or changes at a lower regulatory level, such as revisions to guidelines. Another option is to advocate alternative regulatory mechanisms, such as targeted legislative interventions or the introduction of so-called new competition tools, for example sector inquiries with rule-making powers for competition authorities.

Which reforms, if any, may be advisable in response to specific challenges depends on a variety of factors. Legislative amendments, or the introduction of new rule-making mechanisms, entail significant costs. These include the political costs associated with parliamentary adoption as well as increased implementation and enforcement costs for authorities and courts. Additional error costs arise from the risk of unintended overregulation or, from a policy perspective, misguided subsequent enforcement practices. Such factors are typically difficult to quantify, and their significance depends to a considerable extent on the relevant institutional and political context.

In addition, significant uncertainty may arise as to the legality of potential reform options. Although legislatures may in principle modify the legal framework, they remain bound by constitutional constraints. Pro-competitive regulatory measures will typically interfere with fundamental rights, most notably the freedom to conduct a business and, in many cases, the right to property, and must therefore satisfy the principle of proportionality. Questions of legislative competence may also arise. Consider, for example, the widely discussed concern that the thresholds set out in Article 1 of the EU Merger Regulation (EUMR) may be too high to capture certain problematic acquisitions by digital gatekeepers. The question then arises how the European Commission's merger review competences could be expanded. The route based on Article 22 EUMR, as envisaged by the Commission and initially operationalized through revised guidance, can be seen as unsatisfactory for several reasons.³⁴ In particular, following the Court of Justice's judgment in *Illumina*, it is now clear that referrals under Article 22 EUMR are permissible only where the transaction is subject to merger control under national law.³⁵ One possible avenue³⁶ would be to make use of the simplified legislative procedure under Article 1(5) EUMR to revise the thresholds and criteria set out in Article 1(3) EUMR. However, it remains uncertain whether this procedure would also permit the introduction of an additional threshold, based for example on transaction value. Another option would be to amend the EUMR itself. The Commission, however, appears reluctant to pursue this route, as the Regulation was adopted based on what is now Article 352 TFEU, which requires unanimity in the Council. While it may be argued that EU merger control legislation could instead be based on Article 114 TFEU,³⁷ such an approach would break new legal ground.

³⁴ *Franck*, Implementing and Enforcing the EU's Digital Gatekeeper Regulation: A German Perspective on the Role of National Authorities, in Decarolis/Marchetti/Torchia (eds), *The EU Digital Regulation and its Impact on Member States* (Springer 2025), 217, 234–235.

³⁵ ECJ, Judgment of 3 September 2024, Case C-611/22 P, *Illumina v Commission*, ECLI:EU:C:2023:205, paras 183–184 and 216.

³⁶ For an overview of other possible options to extend the Commission's merger powers, see *Tzanaki*, *Illumina's Light on Article 22 EUMR: The Suspended Step and Uncertain Future of EU Merger Control over Below-Threshold "Killer" Mergers*, CPI Antitrust Chronicle December 2024, at p. 7.

³⁷ *Franck/Monti/de Streel*, Options to Strengthen the Control of Acquisitions by Digital Gatekeepers in EU Law, TILEC Discussion Paper No. DP 2021-16 (2021).

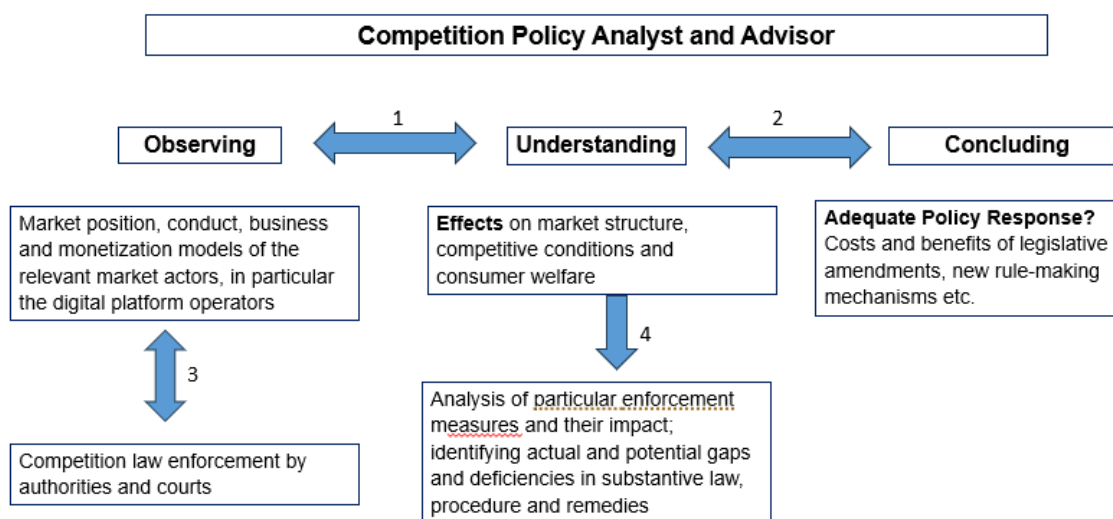
Furthermore, insofar as substantive EU competition law is enshrined in Articles 101 and 102 TFEU, it is effectively crystallized at the constitutional level and therefore not amenable to amendment through ordinary legislation. Any modification would require a revision of the Treaties, which in practice does not appear a realistic option.

All things considered, it can therefore be advisable, even where gaps or shortcomings in competition policy are identified, to refrain from legislative intervention and instead rely on adjustments in the application and interpretation of the existing legal framework by authorities and courts. In such circumstances, policy analysis may focus on encouraging and facilitating such developments.

Ultimately, another option is to refrain from making specific competition policy recommendations and instead to identify and evaluate alternative policy options, together with their respective advantages and disadvantages.

2. A Further Complexity of the Task: The Interplay between the Analytical Steps and Factors

Applying the three analytical steps outlined above in periods of disruptive change adds a further layer of complexity for competition policy analysts and advisers. This is especially true where the effects on parameters relevant to competition policy are only gradually becoming apparent. In such circumstances, a dynamic emerges from the interaction between the analytical steps and the relevant contextual factors, as we illustrate in our figure.



First, the closer and more rigorous the observation of the market positioning, conduct, and business models of the relevant market players, including the material generated through competition law enforcement, the more accurately their effects can be understood and assessed. This improved understanding, in turn, enables more targeted observation, as it clarifies which forms of conduct or market developments warrant particular attention and may become the subject of competition law enforcement.

Second, there are also important interactions between the stage of understanding and the stage of drawing normative conclusions. It is evident that the better one understands, on the one hand, the effects of market developments and forms of conduct on market structure,

competitive conditions, and consumer welfare, and, on the other hand, the extent to which competition law enforcement exhibits gaps or deficiencies, the more solid and precise the policy advice can be. At the same time, the relationship also operates in the opposite direction. At the stage of drawing conclusions, it is necessary to develop a clear view of the relevant normative considerations and their respective weight for possible policy recommendations, which may also require clarifying potential constitutional constraints on policy options. Considering these findings, which are crucial for the formulation of normative conclusions, it also becomes clearer where analytical attention should be directed at the stage of understanding, so that the insights necessary for meaningful policy recommendations can be generated.

Third, an additional dynamic arises at the stage of observation because the two subjects under observation are not independent of one another. Competition law enforcement influences the behaviour and strategic choices of firms, whose subsequent adjustments may themselves become the object of renewed scrutiny by competition authorities and courts.

Fourth, at the stage of understanding observed market conduct and competition law enforcement activities, the dynamic operates primarily in one direction. A clearer understanding of the effects on market structure, competitive conditions, and consumer welfare helps to reveal potential gaps or deficiencies in enforcement within the existing competition law framework.

IV. Spotlight on Four Reports

This section examines four reports that shaped the debate on competition policy in the digital economy between 2015 and 2019. These reports illustrate how the discussion evolved from conceptual analysis to proposals for institutional and legislative reform. In all four reports it is difficult to overestimate the role played by Heike Schweitzer.

1. Building Blocks: Schweitzer/Fetzer/Peitz (2015/2016)

The report by Schweitzer, Fetzer, and Peitz was commissioned by the German Federal Ministry of Economic Affairs and Energy (Bundesministerium für Wirtschaft und Energie), completed in 2015, and published in 2016 as a ZEW Discussion Paper.³⁸ The report seeks to identify the appropriate building blocks (*Bausteine*) of a future competitive order for digital platforms and to assess the capacity of existing competition law to address emerging challenges.

a) Point of Departure: Competition Law as an Element of a Digital Competitive Order

The report adopts a programmatic starting point: safeguarding individual autonomy and economic freedom in digital markets cannot be achieved solely through data-protection or information-ordering rules but requires an effective system of competition law enforcement. Competition is described as a key mechanism for securing innovation, efficiency, and user choice in digital environments.³⁹ At the same time, the authors emphasize that digital platforms often do face competitive constraints, including competition from functionally

³⁸ Schweitzer/Fetzer/Peitz (n 14).

³⁹ Schweitzer/Fetzer/Peitz (n 14), 37.

equivalent services both online and offline. Consequently, the primary task remains to organize competitive oversight within the framework of general competition law, rather than through sector-specific regulation. The report anticipates the emphasis on *contestability* (as subsequently reflected in the DMA⁴⁰). However, it still firmly situates this objective within an evolved application of traditional competition law rather than a separate *ex ante* regulatory regime.

b) Market Definition: Free Services, Multi-Sidedness, and the Limits of the SSNIP Test

The report addresses the treatment of *markets for zero-price services* and highlights that demand for services offered free of charge can nonetheless constitute a relevant market relationship under competition law. It notes that the Bundeskartellamt had abandoned earlier scepticism in this respect and aligned itself with the European Commission's approach. This position foreshadows later statutory clarification in German competition law (section 18(2a) of the Competition Act) and broader acceptance in enforcement practice.⁴¹ With respect to multi-sided platforms, the authors caution against any categorical approach, emphasizing that the decision whether to define a single integrated market or separate markets must remain case-specific.⁴²

The report stresses methodological challenges. In particular, the SSNIP test encounters serious difficulties where services are provided at zero monetary price; attempts to operationalize a hypothetical quality degradation test have, so far, proven largely impracticable due to data limitations.⁴³ While competition authorities have shown increasing willingness to adopt more flexible and context-sensitive approaches to market definition, particularly in digital cases, the boundaries of the relevant market in such contexts often remain contested.

c) Market Power: Network Effects, Data Advantages, and Contestability

The report places particular emphasis on innovation competition, arguing that it requires "special attention" and "special protection" in digital markets.⁴⁴ The authors explicitly reject the complacent view that the mere possibility of disruption suffices to discipline dominant platforms: the fact that disruption may occur "is not sufficient" to effectively constrain a platform's competitive conduct *vis-à-vis* rivals.⁴⁵

Instead, the analysis centres on contestability. Competition can only exert a disciplining effect if entry and expansion are realistic. The oft-invoked claim that "competition is only one click away" is critically qualified: competition becomes effective only if alternative services

⁴⁰ See Article 1(1) of the DMA and Recital 7 to the DMA.

⁴¹ Section 18(2a) of the Competition Act was introduced by the 9th amendment to the German Act against Restraints of Competition and has been in force since 9 June 2017. The government draft bill (Regierungsentwurf) to that amendment was published on 7 November 2016.

⁴² *Schweitzer/Fetzer/Peitz* (n 14), 39. This position is subsequently also reflected in the revised Market Definition Notice. See Commission Notice on the Definition of the Relevant Market for the Purposes of Union Competition Law (C/2024/1645), para 95. Peitz as one of the authors of the report later revised his stance on this issue; see *Franck/Peitz*, *Market Definition in the Platform Economy*, *Cambridge Yearbook of European Legal Studies* 23 (2021), 91, 102–108.

⁴³ *Schweitzer/Fetzer/Peitz* (n 14), 39.

⁴⁴ *Schweitzer/Fetzer/Peitz* (n 14), 40.

⁴⁵ *Schweitzer/Fetzer/Peitz* (n 14), 40.

can attract a critical mass of users within a short period of time.⁴⁶ Against this background, the report identifies multi-homing, switching costs, data portability, and interoperability as key competitive parameters. Practices restricting multi-homing merit particular scrutiny, while interoperability and data portability may reduce lock-in effects and enhance contestability.⁴⁷ These aspects – lock-in, switching costs, portability, interoperability – subsequently became cornerstones of the DMA.⁴⁸

d) *Abuse Control in Digital Markets*

The report describes abuse control in digital markets as facing novel challenges, while reaffirming that the core task of competition law remains to keep markets open to effective and potentially disruptive competition.⁴⁹ Referring to the *Google Shopping* case, then pending before the Commission, the report argues that a search engine's core obligation towards users lies in relevance-based ranking. If a platform systematically deviates from its own relevance criteria in favour of its proprietary services, those placements may require labelling as advertising, and such conduct may constitute an abuse insofar as it disadvantages competitors.⁵⁰ This passage is notable for linking transparency-based remedies with classical abuse doctrine under Article 102 TFEU and section 19 of the German Competition Act. At the same time, the authors caution strongly against broad neutrality mandates. Any such obligation requires "special justification", and generalized neutrality concepts should be approached with restraint.⁵¹

Drawing on the report, Peitz and Schweitzer elaborate on information power by search engines.⁵² They observe that search engines are effectively forced to engage in complex balancing exercises, thereby assuming quasi-regulatory functions: discrimination is inherent in search, and selecting and ranking information according to relevance is the very essence of the service and a central parameter of competition.

Peitz and Schweitzer are sceptical about direct regulatory oversight of algorithms, claiming that this would be practically infeasible and normatively misguided, not least because algorithms constitute business secrets. Where self-preferencing is detected from observational data, however, labelling obligations and abuse control may be appropriate if foreclosure effects arise. According to the authors, competition law is sufficient to protect against market-related forms of abuse of "information power".

Schweitzer, Fetzer, and Peitz (2016) reject general interoperability obligations. Competition law does not impose a universal duty to ensure interoperability; such obligations may force standardization and themselves restrict competition. Interoperability may also entrench lock-in effects by freezing a particular standard and thereby dampening innovation. Proposals for

⁴⁶ Schweitzer/Fetzer/Peitz (n 14), 41.

⁴⁷ Schweitzer/Fetzer/Peitz (n 14), 41.

⁴⁸ Switching costs and user lock-in are addressed in Articles 6(4) and 6(6); data portability in Article 6(9); interoperability of third-party products and services in Article 6(7); and interoperability of messaging services in Article 7.

⁴⁹ Schweitzer/Fetzer/Peitz (n 14), 43.

⁵⁰ Schweitzer/Fetzer/Peitz (n 14), 47.

⁵¹ Schweitzer/Fetzer/Peitz (n 14), 47.

⁵² Peitz/Schweitzer, Suchmaschinen unter der Lupe: Informationsherrschaft und ihre Schranken, *Wirtschaftsdienst* 96 (2016), 825–829.

market-power-independent interoperability mandates should therefore be assessed with caution.⁵³

Under the heading “abuse through violations of law”, the report considers whether infringements of data-protection rules may constitute abuse. Such violations may be abusive where they result in foreclosure effects, but not every legal violation qualifies; a “specific substantive link” is required, and competition law must not be instrumentalized to enforce unrelated norms.⁵⁴ With respect to excessive data collection as a potential exploitative abuse, the authors acknowledge the conceptual possibility but emphasize the significant evidentiary and doctrinal difficulties involved.⁵⁵ This cautious opening addresses an issue that later became central and contested in German enforcement practice, most notably the Facebook decision, where it was precisely the “specific link” requirement that became the focal point of debate.⁵⁶

The authors adopt a restrictive view of the *essential facilities* doctrine.⁵⁷ Access obligations interfere deeply with entrepreneurial freedom and may weaken investment incentives; they are therefore justified only under very narrow conditions.⁵⁸ Digital platforms, the report observes, have thus far generally not been classified as essential facilities. The report goes so far as to state that Google cannot be regarded as an essential facility for online advertising.⁵⁹ Subsequent EU regulation has introduced far-reaching access-type obligations for designated gatekeepers, without explicitly grounding them in essential facilities doctrine.

2. Modernising Abuse Control in Digital Markets: Schweitzer/Haucap/Kerber/Welker (2018)

The report by Haucap, Kerber, Schweitzer, and Welker (2018),⁶⁰ which was commissioned by the German Federal Ministry for Economic Affairs and Energy, occupies an intermediate position between the foundational analysis of Schweitzer, Fetzer, and Peitz (2016) and the EU-level governance turn reflected in the Special Advisers’ Report (2019). While it shares the contestability-oriented diagnosis of digital market power developed earlier, its focus shifts towards the operational modernization of abuse control, asking how competition law instruments should be adapted to address structurally reinforced power positions in digital

⁵³ Schweitzer/Fetzer/Peitz (n 14), 48–49.

⁵⁴ Schweitzer/Fetzer/Peitz (n 14), 51–52.

⁵⁵ Schweitzer/Fetzer/Peitz (n 14), 52–53.

⁵⁶ Bundeskartellamt, Order of 6 February 2019, Case B6-22/16 (*Facebook*). The “specific link” (causality) requirement – i.e. whether a sufficient connection between Facebook’s dominant position and the allegedly exploitative data terms needed to be demonstrated – became the central point of contention of the subsequent appellate proceedings. The Higher Regional Court of Düsseldorf suspended enforcement of the decision on precisely this ground. OLG Düsseldorf, Decision of 26 August 2019, Case VI-Kart 1/19 (V). The Federal Supreme Court overturned the suspension, applying a less demanding causality standard. BGH, Order of 23 June 2020, Case KVR 69/19, BGHZ 225, 359. For contemporaneous doctrinal discussions of the causality problem, see Franck, Eine Frage des Zusammenhangs: Marktbeherrschungsmisbrauch durch rechtswidrige Konditionen – Facebook im Visier des Bundeskartellamts, *Zeitschrift für Wettbewerbsrecht* 2016, 137–164; Körber, Die Facebook-Entscheidung des Bundeskartellamtes – Machtmissbrauch durch Verletzung des Datenschutzrechts?, *Neue Zeitschrift für Kartellrecht* 2019, 187–195.

⁵⁷ ECJ, Judgment of 26 November 1998, Case C-7/97, *Bronner*, ECLI:EU:C:1998:569, paras. 37–46.

⁵⁸ Schweitzer/Fetzer/Peitz (n 14), 50.

⁵⁹ Schweitzer/Fetzer/Peitz (n 14), 51.

⁶⁰ Schweitzer/Haucap/Kerber/Welker (n 15).

and data-driven markets.⁶¹ The report proceeds from the premise that abuse control remains the central framework but requires targeted doctrinal and statutory refinement. It therefore concentrates on adapting existing abuse concepts to market structures characterized by network effects, data accumulation, and multi-sidedness, while avoiding a move towards comprehensive sectoral regulation.⁶²

Echoing the restrictive stance taken by Schweitzer, Fetzer, and Peitz (2016), it stresses that access obligations interfere with entrepreneurial freedom and investment incentives and therefore require careful justification. The essential facilities doctrine is treated as a narrow and exceptional instrument, ill-suited to serve as a general solution to competition problems in digital markets.⁶³ In this respect, the report reinforces rather than abandons the earlier caution towards broad, market-power-independent access mandates.

a) *Relative Market Power and Contestability in Digital Markets*

A central theme is the need to capture forms of power that fall short of classical dominance yet may still allow firms to exercise competitive constraints over dependent trading partners. The report thus explores ways to strengthen the control of relative market power and economic dependency, especially in platform contexts where business users may lack viable alternatives despite the absence of formal dominance.⁶⁴ This emphasis anticipates later statutory developments in German law and reflects a growing concern with asymmetric bargaining power rather than monopoly power alone.

The report analyses *intermediation power*⁶⁵ exercised by platforms vis-à-vis business users and highlights practices that may warrant closer scrutiny under abuse control, such as discriminatory ranking, self-preferencing, or restrictions on multi-homing. These practices are not treated as per se unlawful but as conduct that may raise concerns where it significantly exploits dependency relationships or impairs contestability. This approach remains firmly embedded in case-by-case enforcement logic, yet it is more explicit than the Schweitzer/Fetzer/Peitz (2016) report in identifying recurring patterns of conduct that may justify doctrinal clarification.

The report devotes particular attention to the role of data as a competitive parameter. It acknowledges that access to certain datasets may, under specific conditions, be necessary to prevent foreclosure and preserve competition; it discusses selective, competition-law-based access claims, grounded in existing abuse doctrines and subject to strict conditions, including indispensability, proportionality, and safeguards for innovation incentives.⁶⁶

⁶¹ Schweitzer/Haucap/Kerber/Welker (n 15), 5–6.

⁶² Schweitzer/Haucap/Kerber/Welker (n 15), 29.

⁶³ Schweitzer/Haucap/Kerber/Welker (n 15), 138–139.

⁶⁴ Schweitzer/Haucap/Kerber/Welker (n 15), 47–64.

⁶⁵ Schweitzer/Haucap/Kerber/Welker (n 15), 66–78. Intermediation power can be defined as the ability of a platform to control access between business users and customers and thereby create dependency even in the absence of classical dominance. The notion of “intermediation power” is developed more fully in the Special Advisers’ Report of 2019, see Crémer/de Montjoye/Schweitzer (n 16), 45–47.

⁶⁶ Schweitzer/Haucap/Kerber/Welker (n 15), 128–156.

b) *Towards New Legal Instruments*

Although the report does not advocate an ex ante regulatory regime, it arguably narrows the distance between classical abuse control and later regulatory or quasi-regulatory approaches. By identifying areas where existing abuse-control doctrine faces new challenges (dependency, intermediation power, data access) it prepares the ground for both the EU-level reflections developed in the Special Advisers' Report and the German legislative response that culminated in section 19a of the German Competition Act. The report carries the contestability-oriented analysis of the 2016 report into the realm of concrete legal instruments but stops short of the broader governance agenda that would emerge at the EU level.

3. **Analytical Assessment and EU-Level Governance: the Special Advisers' Report (2019)**

Commissioned by the European Commission (DG Competition) at the request of Commissioner Margrethe Vestager, the report by Crémer, de Montjoye, and Schweitzer⁶⁷ marks a decisive shift from the modernization of abuse control towards a broader EU-level governance perspective on digital markets. Building on the analytical insights developed in earlier reports, the Special Advisers' Report develops a systemic diagnosis of digital market power and examines how competition enforcement and targeted regulation should interact in an environment characterized by strong scale economies, network effects, and data-driven feedback loops.⁶⁸

a) *Diagnosis of "Sticky" Market Power*

The report diagnoses that market power in core digital intermediation can become durable and therefore that the corrective "invisible hand" of market forces may require supplementation. In a programmatic passage, the report states that the "invisible hand of the market" must be supplemented by "the visible hand" of competition authorities or the legislator.⁶⁹ This diagnosis of durability and entrenchment ("stickiness") became part of the Commission's own narrative in the DMA's preparatory materials. The Commission's DMA impact assessment expressly recalls that the Special Advisers' report concluded that the "specificities of competition in the digital world ... make market power 'sticky'."⁷⁰

b) *Reflections on Market Definition and Market Power*

Where the Schweitzer/Fetzer/Peitz (2016) report already highlighted the limits of the SSNIP test in zero-price settings and, more generally, the limited informativeness of price- and turnover-based indicators in markets with multi-sided platforms,⁷¹ the Special Advisers' Report (2019) pushes the methodological point further by emphasizing that market shares in the traditional, turnover-based sense may be largely uninformative where prices do not

⁶⁷ Crémer/de Montjoye/Schweitzer (n 16).

⁶⁸ Crémer/de Montjoye/Schweitzer (n 16), 19–21.

⁶⁹ Crémer/de Montjoye/Schweitzer (n 16), 14.

⁷⁰ European Commission, SWD(2020) 363 final, p. 3.

⁷¹ See also Schweitzer/Haucap/Kerber/Welker (n 15), 18–22 (noting the limits of price-based market definition and turnover-based market shares in zero-price and platform settings).

reflect value and where competition is mediated by attention, defaults, and behavioural biases.⁷²

The report highlights that market power can exist even in apparently “fragmented” environments. It draws attention to forms of dependence akin to the competition law idea of an “unavoidable trading partner” and, in platform settings, to what it terms “intermediation power”.⁷³

The report identifies economies of scope and ecosystem structures as a structural source of incumbency advantages: scope economies favour the integration of complementary services and can confer advantages that are difficult for rivals to replicate.⁷⁴ This theme later reappears in the Commission’s DMA problem analysis, which repeatedly points to ecosystems and the difficulty of dislodging large incumbents as part of the structural contestability problem.⁷⁵

c) *Platforms as “Regulators”*

The report’s arguably most influential conceptual move is its systematic treatment of platforms as rule-setters.⁷⁶ It states that many platforms (especially marketplaces) act as “regulators”, setting the rules and institutions through which users interact; rule-setting is not problematic per se and should be subject to competition between business models, but dominance in such settings creates a particular responsibility not to distort competition on the platform.⁷⁷

This “platform-as-regulator” framing is analytically important because it provides a bridge from classic abuse doctrine (ex post) to the case for standardized obligations⁷⁸ where certain problems recur systematically. The report expressly accepts that, in limited areas, regulation

⁷² Crémer/de Montjoye/Schweitzer (n 16), 48–50.

⁷³ Crémer/de Montjoye/Schweitzer (n 16), 49–50. See already Schweitzer/Haucap/Kerber/Welker (n 15), 21–23 (noting that market power may arise even in fragmented market environments through dependency relationships), and 25–27 (analysing “Intermediationsmacht” exercised by digital platforms vis-à-vis dependent business users).

⁷⁴ Crémer/de Montjoye/Schweitzer (n 16), 3–4; 19–21.

⁷⁵ SWD(2020) 363 final, p. 4.

⁷⁶ Early work on the competition economics of platforms already emphasized platforms’ role as private ordering mechanisms designing internal rules to address coordination problems and externalities, see *Evans/Schmalensee*, *The Industrial Organization of Markets with Two-Sided Platforms*, *Competition Policy International* 3 (2007), 151; *Evans*, *The Antitrust Economics of Multi-Sided Platform Markets*, *Yale Journal on Regulation* 20 (2003), 325. A more explicit focus on platforms as rule-makers governing participation, access, and interaction emerged in management and information-systems scholarship, see *Parker/Van Alstyne/Choudary*, *Platform Revolution: How Networked Markets Are Transforming the Economy—and How to Make Them Work for You* (2016); *Parker/Van Alstyne/Choudary*, *Pipelines, Platforms, and the New Rules of Strategy*, *Harvard Business Review* (Apr. 2017). A systematic economic treatment of platforms as entities that design participation rules, access conditions, and interaction structures is provided in *Belleflamme/Peitz*, *The Economics of Platforms: Concepts and Strategy* (Cambridge University Press 2021), with a couple of precursors (*Belleflamme/Peitz*, *Inside the Engine Room of Digital Platforms: Reviews, Ratings and Recommendations*, in *Ganuza/Llobet* (eds.), *Economic Analysis of the Digital Revolution*, *Funcas Social and Economic Studies* n° 4, 2018; *Belleflamme/Peitz*, *Managing Competition on a Platform*, *Journal of Economics and Management Strategy* 28 (2019), 5–22). In competition-law-oriented economics, the rule-making role of platforms is made explicit e.g. in *Peitz/Schweitzer*, *Suchmaschinen unter der Lupe: Informationsherrschaft und ihre Schranken*, *Wirtschaftsdienst* 96 (2016), 557.

⁷⁷ Crémer/de Montjoye/Schweitzer (n 16), 6, 61–62.

⁷⁸ The term “standardized obligations” is used here descriptively to characterize the type of ex ante obligations later introduced by the DMA; it does not appear verbatim in the 2019 report.

can “bolster” competition law in the platform economy. It mentions transparency regimes and, notably, settings where intervention is needed “on an ongoing basis” (for example, “to impose and allow for effective interoperability”).⁷⁹ Whereas the Schweitzer/Fetzer/Peitz (2016) report was rather sceptical of general interoperability obligations and warned against innovation-stifling standardization,⁸⁰ the 2019 report can be read as a qualified turn: it does not embrace broad neutrality mandates across the board but is more open to targeted, durable obligations where the recurrence and systemic nature of the problem makes case-by-case competition law too slow or too resource intensive.

d) *Self-Preferencing and Enforcement*

The Schweitzer/Fetzer/Peitz (2016) report treated self-preferencing and neutrality debates largely through the lens of Article 102 TFEU and section 19 of the Competition Act, the corresponding provision under German law, and insisted on caution towards generalized neutrality mandates.⁸¹ The 2019 report retains as the starting point that self-preferencing is not illegal per se and should be assessed under an effects logic but develops two DMA-adjacent refinements: (1) a burden-shifting proposal under conditions of high barriers to entry and intermediation centrality; and (2) a more explicit discussion of the remedial limits of behavioural oversight. The report proposes that, where a vertically integrated dominant platform operates in a market with particularly high barriers to entry and serves as an intermediation infrastructure of particular relevance, it should bear the burden of proving that self-preferencing has no long-run exclusionary effects.⁸²

The report underscores the practical challenges of enforcement under competition law that later becomes central to the DMA’s rationale: behavioural remedies (e.g. algorithmic design obligations) can be difficult to monitor; decisions may arrive too late; and, whereas structural remedies (including variants of unbundling) may be justified in certain circumstances, they are not suited to function as a generally applicable enforcement instrument.⁸³

e) *Impact on the DMA*

Academic⁸⁴ and institutional commentary routinely situate the report as one of the key intellectual sources feeding into the DMA. The Commission’s own 2020 Report on Competition Policy explicitly identifies the 2019 report as a central input to its reflection process on competition policy in the digital era.⁸⁵ The Commission’s DMA impact assessment explicitly relies on the report in describing the stickiness of market power and

⁷⁹ Cr mer/de Montjoye/Schweitzer (n 16), 7.

⁸⁰ Schweitzer/Fetzer/Peitz (n 14), 48–49.

⁸¹ Schweitzer/Fetzer/Peitz (n 14), 45–47.

⁸² Cr mer/de Montjoye/Schweitzer (n 16), 7, 67–68.

⁸³ Cr mer/de Montjoye/Schweitzer (n 16), 67–68.

⁸⁴ For example, *Ib ñez Colomo*, The Draft Digital Markets Act: A Legal and Institutional Analysis, *Journal of European Competition Law & Practice* 12 (2021), 561; *Akman*, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, *European Law Review* 47 (2022), 85–114; *Robertson*, The complementary Nature of the Digital Markets Act and the EU Antitrust Rules, *Journal of Antitrust Enforcement* 12 (2024), 325, 326.

⁸⁵ European Commission, Report on Competition Policy 2019, COM(2020) 302 final (2 July 2020), p. 6.

the need to act where competitive pressure is weak and entry barriers are high.⁸⁶ The report's "platforms as regulators" framing and its acceptance of regulation in "limited settings" where intervention is needed on an ongoing basis (explicitly including interoperability) foreshadow the DMA's catalogue of obligations aimed to be enforceable and timely. The report's emphasis on the limits of case-by-case enforcement in the presence of ongoing problematic conduct informed the DMA's move towards a catalogue of clear, predefined ex ante obligations applicable to designated gatekeepers.

4. Concrete Reform Proposals: Kommission Wettbewerbsrecht 4.0 (September 2019)

The report of the Kommission Wettbewerbsrecht 4.0,⁸⁷ submitted in September 2019, marks an important step in the German contribution to the European debate on competition in digital markets. While commissioned by the German Federal Ministry for Economic Affairs and Energy, the report is explicitly oriented towards the further development of EU competition law, rather than national competition law in isolation. In its competition law analysis, the report builds on themes already present in the three reports covered above. It emphasizes that digital platforms can acquire structurally reinforced positions of power through network effects, scale advantages, and control over data and access, and that such positions may be difficult to erode through market forces alone.⁸⁸ The report's principal innovation lies in its majority recommendation to complement traditional abuse control with clear conduct rules for dominant online platforms at EU level, to be implemented through a dedicated EU platform regulation ("Plattform-Verordnung"). In this respect, the report goes a step further than the Special Advisers' Report, which acknowledged the potential need for regulatory intervention in limited areas but deliberately refrained from endorsing a general regulatory instrument.

a) EU Platform Regulation

Where the report departs most clearly from the Special Advisers' Report is at the level of instrument choice. While the Special Advisers' Report acknowledged the potential need for regulatory intervention in limited areas (most notably interoperability), it deliberately refrained from endorsing a general regulatory framework for digital platforms. By contrast, the Kommission Wettbewerbsrecht 4.0 advances the idea of complementing traditional abuse control with clear conduct rules for dominant online platforms at EU level, to be implemented through a dedicated EU platform regulation ("Plattform-Verordnung").⁸⁹

The report justifies this step primarily by reference to enforcement constraints. It argues that the incremental development of abuse doctrine through case law is too slow to respond

⁸⁶ European Commission. Staff Working Document – Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), SWD(2020) 363 final, p. 3.

⁸⁷ Kommission Wettbewerbsrecht 4.0 (n 17). Heike Schweitzer acted as the chair of the Kommission Wettbewerbsrecht 4.0. The report reflects the majority opinion of the commission's members and adopts an analytical framework closely aligned with Heike Schweitzer's prior and contemporaneous work on digital competition.

⁸⁸ Kommission Wettbewerbsrecht 4.0 (n 17), 18–19 and 33.

⁸⁹ Kommission Wettbewerbsrecht 4.0 (n 17), 51–53 (proposing "klare Verhaltensregeln" for "marktbeherrschende Online-Plattformen" and, by majority recommendation, an EU "Plattform-Verordnung"; Recommendation 9 at p. 53; rationale at pp. 52–53).

effectively to rapidly evolving platform conduct and that soft-law guidance would not sufficiently accelerate legal clarification. Generally applicable conduct rules are presented as a means of increasing legal certainty and enforcement speed while still remaining anchored in competition law logic. The proposed platform regulation is conceived as a competition law complement, not as a departure from antitrust principles. The report advocates structuring the relevant obligations as general prohibitions combined with the possibility of objective justification (“Verbot mit Ausnahmevorbehalt”), thereby preserving flexibility and avoiding rigid neutrality mandates.

b) Self-Preferencing, Data Portability, and Interoperability

Among the competition concerns singled out, self-preferencing occupies a central place. The report treats the preferential treatment of a platform’s own services as a paradigmatic risk to competition on and around platforms and proposes a prohibition unless objectively justified.⁹⁰

Similarly, the report places strong emphasis on data portability and interoperability as levers of contestability. Unlike the Schweitzer/Fetzer/Peitz (2016) report, which was markedly cautious about generalized interoperability obligations, the Kommission Wettbewerbsrecht 4.0 proposes targeted duties on dominant platforms to ensure real-time portability of user and usage data in interoperable formats and interoperability with complementary services.⁹¹ These obligations are explicitly justified by reference to switching costs, lock-in effects, and the difficulty of challenging entrenched positions in data-driven markets.

c) Impact on German Competition Law Reform (Section 19a of the Competition Act)

Although framed primarily as a contribution to EU-level reform, the report also proved directly influential in the German legislative context. The report was submitted in September 2019 and was subsequently explicitly taken up in the legislative process leading to the introduction of section 19a of the Competition Act, which was proposed by the Federal Government in October 2020 and adopted as part of the 10th amendment of the GWB. The government bill (“Regierungsentwurf”) repeatedly refers to the report of the Kommission Wettbewerbsrecht 4.0 when explaining both the diagnosis of digital market power and the choice of regulatory technique underlying section 19a GWB. In particular, the explanatory memorandum relies on the report’s analysis of “Intermediationsmacht” and structurally reinforced power positions,⁹² adopts its preference for rule-like prohibitions combined with a justification clause (“Verbot mit Rechtfertigungsvorbehalt”),⁹³ and explicitly cites the report’s recommendations on self-preferencing and data-related conduct when explaining the examples listed in section 19a(2) of the Competition Act.⁹⁴ The report is likewise referred to in the committee report of the

⁹⁰ Kommission Wettbewerbsrecht 4.0 (n 17), 53–54 (identifying the preferential treatment of own services as a central competition risk in platform ecosystems), and Recommendation 10 at p. 54 (proposing a prohibition of such conduct for dominant online platforms unless objectively justified).

⁹¹ Kommission Wettbewerbsrecht 4.0 (n 17), 39 (defining interoperability and its relevance for effective data use), and Recommendation 11 at p. 55 (proposing, for dominant online platforms, real-time portability of user and usage data in interoperable formats and interoperability with complementary services).

⁹² Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer wettbewerbsrechtlicher Bestimmungen (“GWB-Digitalisierungsgesetz”), 19.10.2020, BT-Drs. 19/23492, p. 68.

⁹³ GWB-Digitalisierungsgesetz (n 92), BT-Drs. 19/23492, p. 73.

⁹⁴ GWB-Digitalisierungsgesetz (n 92), BT-Drs. 19/23492, pp. 74, 76.

Bundestag, which again draws on its substantive recommendations when discussing the scope and structure of section 19a of the Competition Act.⁹⁵

The German legislator’s decision to create a specialized competition law instrument for addressing structural competition problems posed by large digital platforms follows the report’s proposals more closely than the DMA does, in that it retains a stronger anchoring in competition law logic, relies on case-triggered intervention against individually designated undertakings, and structures its conduct obligations as competition law prohibitions subject to objective justification, rather than as a closed catalogue of ex ante regulatory “do’s and don’ts”.⁹⁶

V. The Heike Schweitzer Approach

In reflecting on the intellectual contribution of Heike Schweitzer, Giorgio Monti noted:

She had a vision about the nature of European Union competition policy that she felt was necessary to be preserved. And she fought a valiant fight against what I am going to call the “more-economic-approach fundamentalists” who want to reduce competition law to non-existence and the “competition-policy instrumentalists” who want to use competition law to achieve goals that have got nothing to do with competition law.

And in much of her work she tries to hold the middle ground that there is a particular European economic and institutional configuration within which competition law exists. Of course, she knew it had to be developed. But it had to be developed on the basis of some fundamental notions, some fundamental concepts and values that animate all of her work. And I think that’s the kind of centre ground that we need to hold today if competition policy is going to survive against a number of threats that come in its way.⁹⁷

What characterized then Schweitzer’s approach to addressing the challenges posed by large digital platforms, and what lessons does it offer for competition policy? This section distills the central elements of what may be described as the Schweitzer approach, drawing on her work as law scholar and adviser in competition law.

Schweitzer’s work is grounded in an ordoliberal conception of competition law that treats open markets and effective competition as constitutive elements of a free economic order, rather than merely as instruments for maximizing consumer welfare.⁹⁸ In this view, competition law is concerned with safeguarding individual and entrepreneurial freedom against private power, ensuring that market outcomes are shaped by performance and innovation rather than by structural exclusion or lock-in. This perspective is clearly reflected in Schweitzer’s repeated emphasis on competition law as a framework that protects the conditions under which economic actors can exercise autonomy, rather than as a tool for

⁹⁵ Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Energie (9. Ausschuss), 13.01.2021, BT-Drs. 19/25868, pp. 113–116.

⁹⁶ See in detail below sub VI.1

⁹⁷ *Monti*, “Merger Control at the EU Court of Justice: When Judges Meet Economists”, Keynote Speech at the MaCCI Law and Economist Conference, Mannheim, 20 June 2024, available at <https://www.youtube.com/watch?v=1ZR6CGUKFYM> (transcribed and lightly edited). For an assessment of Schweitzer’s intellectual position along similar lines, see *Ibáñez Colomo*, In Memoriam Heike Schweitzer (1968–2024), *Journal of European Competition Law and Practice* 15 (2024), 221, who characterizes her as committed to a distinctly European approach to competition law and resistant to its reduction to a purely instrumentalist welfare calculus.

⁹⁸ See also *de Ridder/Enwaldt/Gutmann/Hornung/von Kalben/Welker/Woeste/Wolters*, Heike Schweitzer (1968–2024), *ORDO – Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* 74 (2025), 463, 465–466.

continuous market management. In her later work, this is translated into a systematic concern with the allocation of control over key economic resources (most notably data) and with the ways in which legal rules shape the competitive process by structuring access, use, and exclusion rights.⁹⁹

This freedom-oriented foundation has direct implications for Schweitzer's positions on digital competition and regulation. She consistently asks whether legal intervention is necessary to preserve contestability and meaningful choice in the face of data-driven lock-in and structurally reinforced market power. In the digital context, this leads to a differentiated stance: competition law remains the primary framework for addressing exclusionary conduct, but regulatory intervention may be justified where it establishes the conditions necessary for effective competition, for example by reducing switching costs or enabling data portability and interoperability. At the same time, Schweitzer is explicit that such interventions must not amount to a generalized market-shaping agenda detached from identifiable competition problems. This concern is articulated through a careful distinction between market-failure-based intervention and broader market-shaping regulation, with the latter viewed critically where it risks freezing market structures or undermining decentralized experimentation.¹⁰⁰

A recurring feature of Schweitzer's methodology is a disciplined view of what economics can (and cannot) do in competition law. Economics is indispensable for understanding competition and its functions, but its insights become legally usable only if they are translated in a way that respects the "Eigengesetzlichkeit der Rechtsanwendung", that is, the internal logic and constraints of legal decision-making (including institutional competence, evidentiary standards, and the need for workable rules).¹⁰¹

This methodological caution also explains Schweitzer's scepticism towards fashionable or overly ambitious economic modelling approaches when they risk displacing the legal structure of Articles 101 and 102 TFEU with open-ended welfare balancing. She criticizes a radical version of the "more economic approach", not because it uses economics but because it tends to require positive welfare measurement/prediction as a condition of illegality, thereby inviting case-by-case utilitarian balancing that she considered both epistemically fragile and institutionally risky.¹⁰² She warns that a radical welfare-balancing approach would "dismiss the constitutional dimension of competition law", expose competition policy to instrumentalization and "constant state intervention", and overburden

⁹⁹ *Schweitzer/Metzger*, Data Access under the Draft Data Act, Competition Law and the DMA, GRUR International – Journal of European and International IP Law (GRUR Int.) 72 (2023), 337, 338–339 (framing competition law as addressing power, access, and the legal infrastructure of markets).

¹⁰⁰ *Schweitzer/Metzger*, GRUR Int. 72 (2023), 337, 339–341 (distinguishing competition law intervention from market-shaping regulation), 343–344 (emphasizing contestability, switching, and freedom of independent use as competition-relevant benchmarks).

¹⁰¹ This core methodological stance is expressed in the formulation: "Gewiss sind die Wirtschaftswissenschaften unerlässlich für die Erkenntnis des Wettbewerbs und seiner Funktionen. Aber diese Erkenntnisse lassen sich im Recht der Wettbewerbsbeschränkungen nur unter Berücksichtigung der Eigengesetzlichkeit der Rechtsanwendung nutzbar machen" (*Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, 7th edn, C.H. Beck 2014, at 65).

¹⁰² See also *de Ridder/Enwaldt/Gutmann/Hornung/von Kalben/Welker/Woeste/Wolters*, ORDO 74 (2025), 463, 469 and 473.

decision-making in ways that endanger the rule-of-law limits on public intervention central to ordoliberal thought.¹⁰³

The same stance underpins her preference for operational, enforceable concepts in digital markets (e.g. contestability, switching costs, access conditions) and her resistance to regulatory solutions that presuppose continuous fine-tuning of market outcomes. Where regulation is justified, it should typically take the form of targeted, administrable obligations that restore competitive conditions (for example, by reducing lock-in).¹⁰⁴

VI. Heike Schweitzer's Perspective on the German Section 19a Tool and the EU's DMA

The enactment of Germany's section 19a tool and the European Union's DMA marked a provisional endpoint in the policy debate on adapting competition law frameworks to digital platforms, a debate that was significantly shaped by the contributions of Heike Schweitzer. In this final section, we therefore turn to Schweitzer's view on these two legal instruments.

At a high level, it can be observed that Schweitzer argued that competition law enforcement alone is insufficient to address the challenges arising from the rise of digital platform operators: "despite more proactive enforcement, competition law has not managed to significantly improve competitive conditions in platform-controlled environments".¹⁰⁵ However, she was reluctant to firmly advocate new competition law instruments or complementary regulatory measures. In her capacity as special adviser to the Commission, while not excluding the possibility that regulation might constitute an appropriate response to particular challenges,¹⁰⁶ she instead proposed, in her own words, (merely) "some readjustments in the interpretation and methodology of competition law".¹⁰⁷ By contrast, the Furman Report,¹⁰⁸ published at roughly the same time, "went one step further and suggested a regime of platform regulation", as Schweitzer observed.¹⁰⁹ Schweitzer's consciously articulated restraint vis-à-vis legislative experimentation with novel regulatory approaches in competition policy reflects her conviction that the capacities of traditional, principle-based competition law should, in the first instance, be fully exhausted.¹¹⁰

Nevertheless, as will be shown below, Schweitzer ultimately acknowledges that both the German section 19a tool and the DMA have their merits, as they are capable of addressing gaps and shortcomings in the enforcement of conventional competition law against digital gatekeepers. However, she also articulates fundamental criticism of the DMA's conceptual

¹⁰³ *Schweitzer*, Efficiency, Political Freedom and the Freedom to Compete—Comment on Maier-Rigaud, in Zimmer (ed.), *The Goals of Competition Law* (Edward Elgar 2012) 169, at 181–182.

¹⁰⁴ *Schweitzer* (n 103), at 181–182.

¹⁰⁵ *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair, *Zeitschrift für Europäisches Privatrecht* (ZEuP) 2021, 503, 506.

¹⁰⁶ See *Crémer/de Montjoye/Schweitzer* (n 16), 8–9 ("more demanding regimes of data access, including data interoperability can be imposed (i) by way of sector-specific regulation ... or (ii) under Article 102 TFEU"); 52–53 ("In some situations, we will find that some issues are closely related to the existence of market power, but arise frequently and systematically enough that a new regulatory regime is warranted").

¹⁰⁷ *Schweitzer*, ZEuP 2021, 503, 506.

¹⁰⁸ *Furman et al.*, *Unlocking digital competition: Report of the Digital Competition Expert Panel*, 2019.

¹⁰⁹ *Schweitzer*, ZEuP 2021, 503, 506.

¹¹⁰ See *de Ridder/Enwaldt/Gutmann/Hornung/von Kalben/Welker/Woeste/Wolters*, *ORDO* 74 (2025), 463, 470.

design. Her analysis suggests that she considers the instrument under section 19a GWB preferable, owing to its clearer integration into competition law and its greater flexibility.

1. Schweitzer's View on the German Section 19a Tool

Schweitzer's final position on section 19a of the German Competition Act ("the section 19a tool") can be most clearly discerned from her writings on the subject in 2024. In that year, she discussed the provision across a total of 77 pages in a volume on the German Competition Act containing section-by-section commentaries.¹¹¹ With regard to the timing of the publication, it should be noted that, while section 19a of the Competition Act had already entered into force with the Tenth Amendment to the Competition Act in 2021, the publication of the volume was delayed owing to the immediately subsequent Eleventh Amendment in 2023, which should also be covered in the revised edition of that volume. As a result, the book was ultimately published only after the DMA had already been enacted, allowing Schweitzer to analyse the German instrument in comparison with the DMA.

For present purposes, the introductory part of Schweitzer's discussion is of particular interest, as it is there that she analyses the necessity of the section 19a tool.

a) *Concentration and Power Dynamics: Successful Platform Services as Nuclei of Digital Ecosystems*

As an initial step, Schweitzer summarizes the specific competitive challenges posed by digitalization and by the rise of digital gatekeepers.¹¹² Schweitzer observes "far-reaching changes in the functioning of markets". Two developments converge. First, data are being "commodified" and large volumes of information are intermediated. Second, digital platforms are emerging that mediate interactions between consumers and businesses or among consumers or businesses themselves. Where these two developments intersect, new "positions and dynamics of power" arise. A small number of platform operators – explicitly mentioned are Google, Amazon, Facebook, and Apple – have thereby developed into central interfaces for interaction between users and user groups.¹¹³ Their position results from the combination of strong positive network effects and economies of scale with the advantages associated with access to user and usage data. This combination may confer significant competitive advantages when entering new markets.¹¹⁴

Taken together, these factors may lead to a situation in which a platform service with a large reach and high levels of user activity becomes the "nucleus of a digital ecosystem". In this context, pronounced data-related economies of scope can arise from combining data from the "origin market" with data from additional markets into which the platform operator expands. If this is further combined with extensive data storage and processing capacities, outstanding technical expertise, and specialized human resources, positions of power may

¹¹¹ Schweitzer, in Körber/Schweitzer/Zimmer (eds.), Immenga/Mestmäcker, Wettbewerbsrecht, Vol. 2, GWB, 7th ed. C.H. Beck 2024.

¹¹² Schweitzer (n 111), at paras 1–5.

¹¹³ Schweitzer (n 111), at para 1.

¹¹⁴ Schweitzer (n 111), at paras 2–3.

become entrenched across multiple markets. The direct monetization of user and usage data through online advertising further reinforces these effects.¹¹⁵

Schweitzer observes that, owing to the interplay between structural factors affecting competition in the “core market” and the corporate strategies built upon them, the major digital platform operators may acquire “a position of power that is difficult to challenge for the foreseeable future”. Competition often takes place only “at the margins” of digital ecosystems. The “large digital ecosystem operators” possess a “broad arsenal” of instruments with which to fend off the expansion of alternative service providers.¹¹⁶

Here, Schweitzer summarizes her view of the distinctive competitive challenges arising from digitalization and the rise of digital platforms. It is striking how naturally the analysis relies on the concept of a digital ecosystem. In doing so, Schweitzer primarily draws on the strategic management literature¹¹⁷ while emphasizing that the discussion remains in flux.¹¹⁸

Particular emphasis is placed on the idea of a single, highly successful platform service that has become largely immune to competitive challenge and that develops into the “nucleus” of an ecosystem. According to Schweitzer, this constitutes the essence of a specific need for regulation, as well as of an appropriate regulatory approach derived from it. This reasoning underpins the concept of section 19a of the German Competition Act and similar legislative interventions such as the DMA.

b) Deficits of Abuse Procedures under Article 102 TFEU and Equivalent Domestic Provisions

In a second step, Schweitzer identifies the factors that explain why traditional abuse-of-dominance proceedings struggle to adequately address the competitive challenges posed by digitalization, the rise of digital platform operators, and the existence of digital ecosystems.¹¹⁹ The analysis culminates in the identification of four key factors.

(1) *The Slowness of Abuse-of-Dominance Enforcement.* First, processes of concentration and foreclosure tend to unfold particularly rapidly in digital markets. A substantial competitive advantage in one market may quickly lead to tipping and thus to market positions that are difficult to challenge. Starting from a position of power in a “core market”, adjacent markets may subsequently be “rolled up”. The duration and complexity of abuse proceedings stand in tension with the dynamics of these developments.¹²⁰

This gives rise to a need for instruments that enable swifter intervention, which may be achieved through a different regulatory approach (with a tendency towards ex ante regulation) and/or through modifications to the substantive intervention thresholds, procedural rules, and systems of judicial review.

¹¹⁵ Schweitzer (n 111), at para 3.

¹¹⁶ Schweitzer (n 111), at para 5.

¹¹⁷ Schweitzer (n 111), at para 14, referring to various articles of the strategic management literature in note 11.

¹¹⁸ Schweitzer (n 111), at para 14.

¹¹⁹ Schweitzer (n 111), at para 6–13.

¹²⁰ Schweitzer (n 111), at para 10.

(2) *The Conceptual and Teleological Limits of Market Definition and Market Power*. Second, Schweitzer points to problems associated with market definition. Market definition underlies the determination of market dominance (or a lower degree of market power sufficient for intervention) and thereby establishes whether an undertaking is subject to abuse control.

Apart from the methodological difficulties that arise in the context of two-sided platforms, Schweitzer emphasizes that market definition may “miss the core of the problem”. While the scope for market conduct not disciplined by competition may be considerable within a given “core market”, traditional concepts of market power on a defined market are unable to systematically capture the “channels of connection between markets” through which a platform operator extends its positions of power into adjacent or third markets. Given the close interconnection of different services and their deliberate integration into a broader digital ecosystem, market boundaries may become blurred.¹²¹

This amounts to a plea for the creation of competition law intervention instruments that can operate without relying on market definition and market dominance as legal concepts.

(3) *The Overly Demanding Consumer Harm Criterion*. Third, Schweitzer points out that, even where an undertaking exercises “control over access to markets and over competition within them”, it may nevertheless be difficult to demonstrate immediate consumer harm. This is because the disadvantages for consumers are mediated through distortions of the competitive process and through impairments of opportunities for innovation appropriation. As a result, such harm is often of a medium- to long-term nature. In the short term, it may even be offset by advantages for consumers, for example those arising from the integration of different services.

Particularly noteworthy is the formulation of Schweitzer’s conclusion: “Precisely” in digital markets, (direct) consumer harm as a condition for intervention may fail to achieve the objective of effective competition protection.¹²² This statement conveys two points. First, regarding the consumer harm criterion, an instrument specifically directed at digital gatekeepers should depart from the enforcement practice that has emerged under Article 102 TFEU. Second, Schweitzer views that development under Article 102 critically. Regarding digital markets, she therefore advocates a more preventive set of enforcement tools oriented towards the protection of the competitive process.

(4) *Remedial Limits of Abuse-of-Dominance Enforcement*. Fourth, Schweitzer argues that abuse control may fail to produce appropriate remedies to cure deficits in digital markets. This is because such enforcement is oriented towards case-by-case intervention: remedies can therefore only be tailored to the cessation of a specific instance of abuse and are, in that respect, subject to a proportionality assessment.

This stands in contrast, however, to the systemic risks of abuse characteristic of digital markets. Addressing these risks, Schweitzer argues, requires “preventive obligations aimed at preventing comparable strategies in other markets”.¹²³

¹²¹ Schweitzer (n 111), at para 11.

¹²² Schweitzer (n 111), at para 12.

¹²³ Schweitzer (n 111), at para 13.

At this point it becomes clear that Schweitzer regards the limitations of traditional competition enforcement as so significant that she advocates complementing it with a conceptually distinct form of competition protection, based on preventive (*ex ante*) rule-setting.

c) Synthesis

In her writings, Schweitzer is cautious in making explicit policy-oriented statements on section 19a of the German Competition Act. However, the two-step analysis reconstructed above from her general observations makes clear that, in her view, traditional abuse-of-dominance control is insufficient to address the competition problems posed by the large digital gatekeepers. From the weaknesses identified by Schweitzer, four requirements for effective competition enforcement in digital markets follow:

- Competition interventions must be capable of producing effects more rapidly.
- Remedies should be available without the need to define markets and establish market dominance.
- The threshold requirement of (direct) consumer harm should be abandoned, or at least substantially lowered.
- Authorities should be able to prevent certain competition-restricting strategies on a preventive basis, independently of a case-specific finding of abuse.

Against this background, an examination of the design of section 19a of the German Competition Act makes clear that the instrument is indeed intended to meet these requirements.

First, legal design promises that, once an addressee of the instrument has been designated, robust remedies can be delivered relatively swiftly. The substantive and procedural modifications to the standard abuse-of-dominance proceedings significantly strengthen the position of the Bundeskartellamt vis-à-vis digital gatekeepers. This is likely to encourage the latter to agree more readily to consensual remedies,¹²⁴ while also enabling swifter outcomes in adversarial proceedings. The need for rapid and effective intervention was also a key reason for the introduction of an abridged system of judicial review: decisions of the Bundeskartellamt in proceedings under section 19a may be challenged directly before the German Federal Court of Justice, which acts as both the court of first and final instance.¹²⁵

Second, to designate an undertaking under section 19a, the Bundeskartellamt is not necessarily required to demonstrate dominance (or even a lesser degree of market power) in a specifically defined market. Conceptually, this significantly lowers the threshold for regulatory intervention.¹²⁶ It is noteworthy, however, that in each of its first three designation decisions – concerning Alphabet, Meta, and Amazon – the authority nevertheless defined

¹²⁴ See the analysis of various institutional design factors and early cases in *Franck*, Abuse Proceedings against Digital Gatekeepers under section 19a of the German Competition Act: Taking Stock of Early Results, in Peres/De Quesada (eds.), *New European Competition Trends in Digital Markets*, Atelier (Barcelona) 2024, 23, 44–50.

¹²⁵ Section 73(5) of the Competition Act. See on the abridged judicial review *Franck* (n 124), at 32; *Franck/Peitz*, *Journal of European Competition Law and Practice* 12 (2021), 513, 525.

¹²⁶ *Franck* (n 124), at 27–28.

precisely one market and found the respective firm to be dominant in that market.¹²⁷ This approach corroborates Schweitzer's observation that the particular regulatory need in relation to digital platforms manifests itself in situations where a single, highly successful platform service becomes largely immune to competitive challenge and evolves into the "nucleus" of a broader ecosystem.

Third, while efficiency and welfare considerations may be relevant, the manner in which they are integrated into the procedure and, in particular, their normative orientation differs markedly from the approach familiar from abuse-of-dominance proceedings before the European Commission. First, it is important to note that these considerations essentially¹²⁸ arise only at the stage of objective justification, given the regulatory approach that proceeds based on seven categories of conduct presumed to be abusive. At that stage, the burden of proof ultimately rests with the undertaking.¹²⁹ Second, the German legislature has clearly emphasized that, considering the specific characteristics of digital markets, particular weight should be accorded to the long-term objectives underlying the section 19a instrument. These objectives include limiting the accumulation of economic power, preserving market openness, and safeguarding the competitive process, rather than prioritizing short-term efficiency gains.¹³⁰ Consequently, both the evidentiary standard for demonstrating likely welfare effects and the threshold for intervention are lower than in traditional abuse-of-dominance proceedings.

Fourth, based on a designation decision, the Bundeskartellamt may prohibit an undertaking from engaging in conduct falling within one of the seven categories defined in section 19a of the Competition Act. Importantly, it is not necessary that such conduct has already been observed. As a rule, the authority must demonstrate that there is a risk that the undertaking will engage in such conduct. Even this requirement may exceptionally be dispensed with where, considering the specific characteristics of the digital economy, earlier intervention appears necessary. In this respect, section 19a of the Competition Act reveals its character as a truly preventive instrument for the protection of competition. As Schweitzer has emphasized, given the preventive objective, it should suffice for the authority to demonstrate a concrete risk of harm to competition.¹³¹

This demonstrates that section 19a of the Competition Act largely implements the requirements for an adapted competition law framework for digital markets and digital platform operators as developed and articulated by Schweitzer. We may therefore conclude that Schweitzer was supportive of the introduction of this new type of competition instrument.

¹²⁷ *Franck/Peitz*, Market Definition and three 19a Designations under German Antitrust Law: Alphabet, Meta, and Amazon, CPI Antitrust Chronicle, January 2023.

¹²⁸ The Bundeskartellamt is at any rate bound to assess the economic and legal context and is bound by the principle of proportionality. Therefore, Heike Schweitzer has argued that it must be able to present a theory of harm in the sense that it can at least plausibly argue that, considering the market situation and other context, the investigated conduct poses a threat to open markets and undistorted competition and that this can be remedied by the intervention. See *Schweitzer* (n 111), at paras 131–132.

¹²⁹ See *Franck* (n 124), at 48–49.

¹³⁰ See *Franck* (n 124), at 31–32.

¹³¹ *Schweitzer* (n 111), at paras 145–146.

2. Schweitzer's View on the EU's Digital Markets Act

Schweitzer wrote influentially on the DMA, and her position can be reconstructed from two 2021 publications. The first is her single-authored article, "The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair".¹³² The second is the co-authored piece "Taming the Giants: The DMA/DSA Package", written together with Martin Eifert, Axel Metzger, and Gerhard Wagner.¹³³ The latter were her colleagues at the Law Faculty of Humboldt University of Berlin, and she collaborated with them at the Institute for Law and Digital Transformation. Considering the respective research focuses of the contributing scholars, it can be assumed that the discussion of the DMA in this joint publication strongly reflects Schweitzer's position.

Both articles refer to the proposal presented by the European Commission in December 2020. This is worth noting when reading them from today's perspective; however, it hardly diminishes their analytical value regarding Schweitzer's fundamental position on the DMA. This is because, while the proposal was modified in certain respects, the Commission succeeded in advancing its overall concept and core principles:¹³⁴ designated gatekeepers are subjected, for those platform services in which their gatekeeper position manifests itself, to a catalogue of prohibitions and obligations, and the regulatory framework remains designed for administrative implementation entrusted to the Commission.

Both articles make clear that Schweitzer does not, in principle, oppose the introduction of a novel regulatory instrument tailored to digital gatekeepers to complement traditional competition law enforcement and to remedy its limitations and gaps. At the same time, however, they articulate a distinct and substantive critique of the DMA's regulatory approach.

Before turning to these aspects in a synthetic analysis of both articles, two focal points merit attention. In "Taming the Giants", a characteristically Schweitzerian perspective is reflected in the analytical premise that regulatory interventions must ultimately be justified by their capacity to address identifiable forms of market failure in a meaningful and coherent way. In "Art to Make Gatekeeper Positions Contestable", Schweitzer, inter alia, explores whether – and in what manner – the criterion of "fairness" in the DMA can be rationalized as a concept grounded in competition policy.

a) *Market-Failure-Oriented Analysis as a Basis for Assessment*

The analysis offered by Heike Schweitzer and her co-authors is explicitly structured around a market-failure framework and thereby evaluates the legitimacy of regulatory intervention under both the DMA and the Digital Services Act (DSA) by reference to whether the respective rules can address identifiable and platform-specific forms of market failure. The authors proceed from the premise that regulatory intervention in digital platform markets requires a functional justification: it must target structural deficiencies inherent in these markets rather than merely redistributing outcomes or imposing abstract fairness

¹³² Schweitzer, ZEuP 2021, 503–544.

¹³³ Eifert/Metzger/Schweitzer/Wagner, Common Market Law Review (CMLRev) 58 (2021), 987–1028.

¹³⁴ See, on the role of the European Commission in the legislative process, Franck, Von der Kunst, Gesetz zu geben, Wirtschaft und Wettbewerb 2023, 181–182.

standards.¹³⁵ On this basis, the DMA (and, complementarily, the DSA) are assessed according to their capacity to remedy three central categories of market failure, namely market power, information asymmetries, and externalities, as well as reflecting broader public interest concerns. The analysis leads to the conclusion that “[l]arge parts of the DSA and the DMA can be conceptualized as responses to well-known and widely recognized market failures, which, however, have assumed a particular form in the platform economy and overlap in novel ways. In addition, there exists a perception of a specific public interest in the platform economy, in which platforms are regarded as a new type of critical infrastructure.”¹³⁶

(1) *Market Power*. The authors identify entrenched market power as a core structural feature of digital platform markets, driven by strong network effects, economies of scale, data advantages, and user lock-in.¹³⁷ They make clear that the DMA provisions are meant to constrain the abuse of intermediary power, which is conceptualized as a specific subcategory of market power characteristic of digital platform environments.¹³⁸ This form of “gatekeeper power” enables platforms to act as private market regulators, controlling access and shaping competitive conditions. The DMA is presented as a regulatory response specifically tailored to this phenomenon: it seeks to ensure the contestability of markets and to prevent the leveraging and entrenchment of such power.¹³⁹

(2) *Information Asymmetries*. A second central market failure identified by the authors lies in the unprecedented degree and nature of information asymmetries in platform markets. Platforms operate as hubs across multiple interconnected markets and possess vast amounts of data about users and business partners, while the latter lack insight into platform operations, including ranking, matching, and pricing mechanisms.¹⁴⁰ The DMA (in conjunction with the DSA) can be understood as an attempt to correct structural information deficits to the detriment of platform users, in particular advertisers, through targeted transparency obligations. As noted by the authors, it introduces specific disclosure duties in core market relationships, especially in online advertising.¹⁴¹ Article 5(g) of the Proposal (now Article 5(9) DMA) requires gatekeepers to provide advertisers with information on prices and remuneration, thereby ensuring transparency regarding key transaction parameters. In addition, Article 6(g) of the Proposal (now Article 6(8) DMA) grants access for advertisers and publishers to performance data necessary to verify the effectiveness of online advertising. These provisions illustrate that the DMA specifically aims to reduce systematic informational asymmetries embedded in platform ecosystems. By enabling advertisers and publishers to better understand pricing structures, allocation mechanisms, and performance metrics, the DMA seeks to rebalance bargaining positions and to constrain the informational

¹³⁵ Eifert/Metzger/Schweitzer/Wagner, CMLRev 58 (2021), 987, 990.

¹³⁶ Eifert/Metzger/Schweitzer/Wagner, CMLRev 58 (2021), 987, 1025.

¹³⁷ Eifert/Metzger/Schweitzer/Wagner, CMLRev 58 (2021), 987, 990–991. This assessment is consistent with Cr mer/de Montjoye/Schweitzer (n 16), 19–27, which identifies extreme returns to scale, network effects, and data advantages as the key structural characteristics driving concentration and incumbency entrenchment in digital platform markets.

¹³⁸ Eifert/Metzger/Schweitzer/Wagner, CMLRev 58 (2021), 987, 997.

¹³⁹ Eifert/Metzger/Schweitzer/Wagner, CMLRev 58 (2021), 987, 990–996.

¹⁴⁰ Eifert/Metzger/Schweitzer/Wagner, CMLRev 58 (2021), 987, 991–993.

¹⁴¹ Eifert/Metzger/Schweitzer/Wagner, CMLRev 58 (2021), 987, 999.

advantage that underpins gatekeeper power. In this way, transparency obligations serve both as a corrective to informational market failure and as an indirect mechanism to discipline market power.¹⁴²

(3) *Externalities*. The third category concerns externalities generated by platform activity. Platforms facilitate and amplify harmful conduct by users, such as infringements of intellectual property or violations of privacy, thereby externalizing costs to third parties on a large scale.¹⁴³ The authors view the regulatory shift from liability exemptions to due diligence obligations as a key mechanism for internalizing these externalities. While the DSA is the primary instrument in this regard, the broader DMA/DSA framework reflects a coherent attempt to impose responsibilities on platforms commensurate with their role in enabling harmful activity. In particular, the introduction of procedural obligations, monitoring duties, and risk-management requirements is designed to ensure that platforms take appropriate measures to prevent and mitigate harm.

(4) *Protection of liberal democratic institutions*. Finally, the authors extend their analysis beyond classical market failures and argue that the DMA/DSA package also responds to a broader public interest concern: the need to safeguard the functioning of markets and the integrity of public discourse as fundamental institutions of liberal democracies.¹⁴⁴ Digital gatekeepers, by virtue of their control over information flows and communication infrastructures, exercise significant influence over public discourse and societal processes. This raises concerns that extend beyond efficiency-based market failures and justify preventive regulatory intervention. The authors thus regard the DMA (together with the DSA) as a coherent response to the systemic risks posed by powerful platforms, including the potential transformation of economic power into societal and political power.¹⁴⁵ In this respect, the legitimacy of the regulatory framework is grounded not only in its capacity to correct market failures but also in its role in preserving the institutional foundations of the liberal democratic order.

b) *Fairness as a Competition-Policy Concept to Be Rationalized within the DMA*

Schweitzer criticizes the DMA proposal for failing to make sufficiently explicit that it is, at its core, grounded in a competition policy logic. Absent such clarification, there is a risk that the instrument may be interpreted more broadly. Schweitzer warns that, “[i]f the DMA were used to impose obligations upon gatekeepers that are no longer tied to the goal to protect undistorted competition, it would mark the entry into some sort of public utility regulation”.¹⁴⁶ At the same time, she argues that, conceptually, the DMA can and, indeed, should be understood as an element of competition policy, insofar as it “should be read as an effort to recalibrate the goals of EU competition policy: away from the protection of consumer welfare, back towards a protection of competition as a process”.¹⁴⁷

¹⁴² Eifert/Metzger/Schweitzer/Wagner, CMLRev 58 (2021), 987, 1015. See Recitals 45 and 58 to the DMA.

¹⁴³ Eifert/Metzger/Schweitzer/Wagner, CMLRev 58 (2021), 987, 992–993.

¹⁴⁴ Eifert/Metzger/Schweitzer/Wagner, CMLRev 58 (2021), 987, 993.

¹⁴⁵ Eifert/Metzger/Schweitzer/Wagner, CMLRev 58 (2021), 987, 990–991, 993.

¹⁴⁶ Schweitzer, ZEuP 2021, 503, 508.

¹⁴⁷ Schweitzer, ZEuP 2021, 503, 508.

A central concern for Schweitzer is to demonstrate that “[t]here is no indication that the DMA’s proclaimed ‘fairness’ aim entails a commitment to goals or a distributional standard that differs from the one inherent in EU competition law”.¹⁴⁸ Her point of departure is that fairness, as a legal concept, is inherently context-dependent. In principle, the DMA could either be interpreted as reflecting a “competition policy driven notion of fairness” or as embodying “a significantly broader fairness conception, to be filled by reference to either the interests of individually dependent business users or public interest concerns more generally”.¹⁴⁹ To address this ambiguity, Schweitzer proceeds in three analytical steps.¹⁵⁰

First, she reconstructs the concept of fairness as it exists in EU competition law. According to Schweitzer, fairness in this context encompasses both the fairness of market processes and, to a more limited extent, the fairness of outcomes. In its core competition policy sense, fairness primarily concerns the integrity of the competitive process: it requires that market outcomes be determined by competition on the merits rather than by the exercise of market power, and that opportunities for market entry, expansion, and consumer choice remain protected. This process-oriented understanding is particularly salient where dominant firms or digital gatekeepers control access to markets, as EU competition law imposes special responsibilities to ensure objective, transparent, and non-discriminatory access conditions. However, the legal framework also contains elements of distributional fairness, notably in the prohibition of exploitative abuses and in the requirement, as reflected under instruments such as Article 101(3) TFEU, that efficiency gains confer a fair share of benefits on consumers.

Second, Schweitzer argues that the obligations laid down in the DMA can largely be understood considering these established fairness concepts, particularly the notion of fairness of market processes. Many of the DMA’s provisions reflect principles already embedded in EU competition law, especially those associated with Article 102 TFEU. The regulation operationalizes fairness primarily as a requirement that gatekeepers act as neutral intermediaries, prohibiting practices such as self-preferencing, price parity clauses, and the use of non-public business user data to compete against those users. While the DMA departs from traditional competition law by imposing generalized and *ex ante* obligations, this does not, in her view, amount to a conceptual break. Rather, it reflects the structural features of gatekeeper-controlled markets, where effective competition depends on proactive safeguards that secure both competition on the platform and competition for the market. Only a limited number of provisions pursue distributional fairness, most notably those requiring fair access conditions, which, however, can still be assessed against established competition law benchmarks.

Third, Schweitzer examines whether the DMA might nevertheless be based on a broader conception of fairness encompassing “further-reaching private interests and public policy goals”. In this respect, she identifies a degree of ambiguity. Certain obligations – such as restrictions on the combination of personal data, requirements of data portability, and transparency obligations relating to profiling techniques – can be interpreted either as

¹⁴⁸ Schweitzer, ZEuP 2021, 503, 508.

¹⁴⁹ Schweitzer, ZEuP 2021, 503, 512.

¹⁵⁰ Schweitzer, ZEuP 2021, 503, 512–517.

measures to protect competition or as instruments pursuing independent objectives, such as data protection or consumer protection. This ambiguity becomes particularly pronounced in the context of the Commission's power to expand the list of obligations, where "unfairness" is defined in terms of a bilateral imbalance between gatekeepers and business users. Such a definition risks opening the door to a broader control of contractual relations and to normative assessments that are no longer firmly anchored in competition policy. Schweitzer therefore cautions that an expansive reading of fairness – especially one oriented towards redistribution or rent-sharing – could shift the DMA towards a form of public utility regulation and thereby undermine its central objective of safeguarding contestable digital markets.

Schweitzer concludes that it is essential to clarify the DMA's normative foundation. In her view, the instrument should be understood unequivocally as part of competition policy, "and nothing else", to provide a clear and coherent reference point for its interpretation and application.¹⁵¹

c) The DMA as a Qualified Solution to the Shortcomings of Traditional Competition Law

Schweitzer acknowledges the weaknesses and limitations of traditional competition law enforcement, observing that it did "not manage to significantly improve the competitive conditions in platform-controlled settings".¹⁵² If the DMA is examined in light of these weaknesses and limitations and the four requirements for effective competition policy in digital markets identified by Schweitzer,¹⁵³ it becomes apparent that the instrument largely reflects these guiding principles.

(1) Faster-Acting Competition Interventions. The prohibitions and requirements set out in Articles 5 to 7 DMA have been established directly by legislation. By contrast, more than a decade of enforcement of Article 102 TFEU has, for example, failed to develop a clear and generally applicable rule prohibiting self-preferencing in ranking, as illustrated by the case of Google Search (Shopping). Various instruments provided by the DMA such as the power to further specify obligations through implementing acts pursuant to Article 8 DMA, the possibility to update obligations by means of delegated acts under Article 12 DMA, and the prohibition of circumvention under Article 13 DMA give rise to expectations of a satisfactory degree of remedial effectiveness; at the very least, in this respect, they can be seen as a noticeable advancement compared to traditional competition law enforcement.

Regarding the DMA's regulatory technique, Schweitzer emphasizes "the need for particularly speedy, effective and systematic enforcement".¹⁵⁴ This constitutes a "widely recognized justification"¹⁵⁵ for replacing the traditional case-by-case balancing of interests in light of the likely effects on competition with a set of more or less precise rules of conduct binding on all gatekeepers across all settings. Schweitzer explicitly endorses this shift¹⁵⁶ and concludes:

¹⁵¹ Schweitzer, ZEuP 2021, 503, 517.

¹⁵² Schweitzer, ZEuP 2021, 503, 506. See also *Eifert/Metzger/Schweitzer/Wagner*, CMLRev 58 (2021), 987, 1003: "[The DMA] reacts to widely acknowledged deficits in the traditional competition law methodology when applied to platform markets."

¹⁵³ See above sub VI.1.b).

¹⁵⁴ Schweitzer, ZEuP 2021, 503, 507.

¹⁵⁵ Schweitzer, ZEuP 2021, 503, 507.

¹⁵⁶ Schweitzer, ZEuP 2021, 503, 510 ("Both deviations deserve support").

“The draft DMA is to be commended for its attempt to move from broad competition law standards to a set of rather concrete rules. This approach will facilitate a more robust and speedier protection of competition than could be achieved based on Article 102 TFEU.”¹⁵⁷

(2) *Decoupling Remedies from Market Definition and Dominance*. Schweitzer points out that the DMA enables pro-competitive interventions against digital gatekeepers without requiring, in particular, that their designation be predicated on the definition of relevant markets or the establishment of market dominance.¹⁵⁸

(3) *Abandoning the Consumer Harm Threshold*. Schweitzer observes and expressly welcomes that the DMA dismisses the consumer welfare test, which had “gained relevance in the Commission’s [Article 102 TFEU] enforcement practice in the wake of the ‘more economic approach’”.¹⁵⁹ Schweitzer justifies this on the grounds that the specific dynamics of digital markets remain less well understood than those of traditional markets and that their evolution is highly uncertain. Under these conditions, requiring proof of likely negative effects on consumer welfare would risk leading to systematic underenforcement.¹⁶⁰

(4) *Preventive Intervention Without a Finding of Abuse*. As already follows from the discussion under “Faster-Acting Competition Interventions”, Schweitzer in principle welcomes the regulatory approach of the DMA, which is based on ex ante regulation.¹⁶¹

d) *Critique of the Concept of the DMA*

Although, as demonstrated in the preceding section, key features of the DMA’s regulatory approach and technique correspond to the characteristics identified by Schweitzer as desirable for addressing digital gatekeeper conduct, she nevertheless raises fundamental criticisms of the DMA. Three aspects deserve special mention.

(1) *Fuzzy Goals*. First, Schweitzer clearly criticizes the lack of conceptual clarity in the DMA’s orientation, observing that “[t]he most important flaw of the proposed DMA is the fuzziness of its goals”.¹⁶² Schweitzer would have preferred a clear-cut competition policy approach. This applies, as explained in detail above,¹⁶³ particularly to the fairness objective associated with the DMA. Schweitzer considers the practical significance of this issue to lie less in the interpretation of individual obligations than in the exercise of the powers to update those obligations under Article 12 DMA. The point is, moreover, particularly relevant for the general anti-circumvention provision in Article 13(4) DMA, which likewise requires an assessment of

¹⁵⁷ Schweitzer, ZEuP 2021, 503, 542–543.

¹⁵⁸ Schweitzer, ZEuP 2021, 503, 507; see also *Eifert/Metzger/Schweitzer/Wagner*, CMLRev 58 (2021), 987, 1001 (“market dominance is not a prerequisite for a gatekeeper designation”, and 1002 (“Under the DMA, there will therefore be no need to define markets or determine market dominance”).

¹⁵⁹ Schweitzer, ZEuP 2021, 503, 507 and 510.

¹⁶⁰ Schweitzer, ZEuP 2021, 503, 510.

¹⁶¹ See also *Eifert/Metzger/Schweitzer/Wagner*, CMLRev 58 (2021), 987, 1001: “For the most part, the DMA is a measure of ‘preventive’ harmonization.” Here, however, “preventive” does not refer (only) to the preventive effect of the obligations but rather to the fact that the legal act is based on Article 114 TFEU, notwithstanding the existence of only very limited national regulation that is now being harmonized by the DMA.

¹⁶² Schweitzer, ZEuP 2021, 503, 542. See also *Eifert/Metzger/Schweitzer/Wagner*, CMLRev 58 (2021), 987, 1025 (“a central problem of the DMA remains the ambiguity of its goals, and the fairness goal in particular”).

¹⁶³ See above sub VI.2.b).

how a given obligation is intended to serve the overarching objectives of contestability and fairness.¹⁶⁴

(2) *Need for Customization of Obligations and a Novel Form of Defence.* Second, Schweitzer and her co-authors consider the “one-size-fits-all code of conduct”¹⁶⁵ to be inadequate and call for “[m]ore room for customization”.¹⁶⁶ In her view, the DMA should allow for a greater degree of flexibility in tailoring its rules to the specific competitive risks associated with particular services and business models.

More specifically, Schweitzer criticizes the DMA’s underlying assumption that gatekeeper-controlled digital markets share a common set of competition risks that can be addressed through a single, uniform code of conduct. In her view, this assumption overlooks significant variation in network effects, economies of scale, entry barriers, and competitive structures across different platforms. Consequently, the DMA departs from more flexible regulatory approaches such as section 19a of the German Competition Act that permit the imposition of tailored obligations based on a case-by-case assessment. While Schweitzer acknowledges that the DMA’s standardized rules may simplify enforcement and reduce the Commission’s evidentiary burden, she argues that this simplification comes at the cost of an insufficiently nuanced response to platform-specific competition risks. As a potential improvement, she suggests distinguishing between clearly prohibited practices and practices that are presumed problematic but remain open to justification, thereby reducing the risk of over-enforcement. Schweitzer identifies a more fundamental deficiency in the absence of mechanisms that would enable the Commission to tailor obligations to specific services or business models based on targeted market investigations.¹⁶⁷

Moreover, Schweitzer argues that the potential over-inclusiveness of the obligations in the DMA creates a need for a defence mechanism, since the regulation currently provides only very limited possibilities for exemptions. Such a defence should not replicate the efficiency defence known from competition law but instead take the form of a pro-competition defence, allowing a gatekeeper to demonstrate that a specific practice would produce overall pro-competitive effects in the particular circumstances of the case. The burden of proof should remain substantial and the procedure designed to ensure speed and administrative manageability, while enabling a regulatory dialogue in which gatekeepers may propose alternative commitments that better promote competition.¹⁶⁸

(3) *Towards Decentralized Public Enforcement.* In Schweitzer’s view, while certain functions under the DMA must remain centralized at the European Commission, the enforcement of obligations should be decentralized. Tasks such as gatekeeper designation, the review of gatekeeper status, and the granting of suspensions or exemptions appropriately require central coordination in order to prevent regulatory fragmentation. By contrast, the per se character of the obligations set out in Articles 5 and 6 (and 7) of the DMA would allow for,

¹⁶⁴ *Franck/Peitz*, *The Digital Markets Act and the Whack-A-Mole Challenge*, CMLRev 61 (2024), 299, 307.

¹⁶⁵ *Eifert/Metzger/Schweitzer/Wagner*, CMLRev 58 (2021), 987, 1003.

¹⁶⁶ *Eifert/Metzger/Schweitzer/Wagner*, CMLRev 58 (2021), 987, 1004.

¹⁶⁷ *Schweitzer*, ZEuP 2021, 503, 534–536.

¹⁶⁸ *Schweitzer*, ZEuP 2021, 503, 537–538.

and indeed benefit from, parallel enforcement by national authorities, which could enhance effectiveness and enable more rapid intervention, particularly in cases of regional relevance. Schweitzer therefore advocates a system of shared enforcement between the Commission and national competition authorities, coordinated through mechanisms akin to the European Competition Network.¹⁶⁹

Schweitzer's overall assessment of the DMA is thus one of qualified endorsement. She regards the instrument as a necessary and largely coherent response to the structural failures of digital platform markets, while arguing that its full potential can only be realized if its normative foundation is clarified, its obligations made more adaptable to platform-specific conditions, and its enforcement architecture designed to harness the capacity of national competition authorities.¹⁷⁰

VII. Conclusion

What, then, can we learn from Heike Schweitzer? The arc of her work, from the early building blocks of 2015/2016 through the Special Advisers' Report to the Kommission Wettbewerbsrecht 4.0, reveals a scholar who was simultaneously value-driven and pragmatic.

She approached competition policy in digital markets not as a technical exercise in welfare maximization but as a normative project rooted in a distinctly European conception of competitive order. She saw two tendencies in the broader field as permanent threats to the discipline: reducing competition law to a pure welfare instrument on the one hand, and bending it to serve goals alien to competition on the other – tendencies that Monti in the quote above labelled as the “more-economic-approach fundamentalists” and the “competition-policy instrumentalists”, respectively.

At the same time, she remained resolutely grounded in case practice and institutional reality. She understood that abstract principles only acquire meaning when tested against concrete analytical and enforcement problems such as market definition in multi-sided platforms, the operationalization of contestability, and the limits of Article 102 TFEU in the face of ecosystem power.

A second and perhaps more striking quality was her intellectual honesty in the face of uncertainty. Schweitzer never pretended that the analytical steps of observing, understanding, and concluding were straightforward or that their interplay was without friction. She acknowledged the limits of existing tools, reflected openly on the risks of regulatory error in dynamic markets, and calibrated her reform proposals accordingly: cautious where caution was warranted; bold where the evidence of market failure was clear. This is precisely why the risk of opportunistic position adjustment – of trimming one's analysis to suit the prevailing political or institutional wind – was so conspicuously low in her work.

¹⁶⁹ Schweitzer, ZEuP 2021, 503, 539–541 and 543.

¹⁷⁰ Her position may be worth keeping in mind as the Commission prepares its first review report on the DMA, due by 3 May 2026 pursuant to Article 53 DMA.

The centre ground she held was not a position of convenient ambiguity but one of principled equilibrium, earned through sustained engagement with the challenging questions that digital markets pose for competition law. That is the standard she set, and the one against which the further development of the DMA and section 19a of the German Competition Act will ultimately be measured.