

Conversations in Competition – Episode 1 ‘The evolving role of competition enforcement in the tech sector’, with Ronan Scanlan and Dave Foster.

[00:00:02.650] - Ronan Scanlan, Of Counsel

Well, very good morning and welcome to this podcast brought to you from Dublin and London. I'm Ronan Scanlan, an Of Counsel in the Competition and Regulated Markets Team here at Arthur Cox, and I'm delighted to be joined today by Dave Foster, Director of Frontier Economics. How are you doing, Dave?

[00:00:18.870] - Dave Foster, Director of Frontier Economics

Very well, thanks. Great to be with you.

[00:00:21.090] - Ronan Scanlan, Of Counsel

Absolute pleasure to have you on this first podcast and actually we were just discussing before we went on, I think the first time that we came across each other was when I was at Tesco back in 2013. Is that right?

[00:00:33.690] - Dave Foster, Director of Frontier Economics

I think so. That is a long time ago.

[00:00:36.080] - Ronan Scanlan, Of Counsel

Just a few years, just over a decade now that we're in 2024, but I was working then with David Ward, who heads up the Regulatory, Ethics and Competition Department there and I'm sure you've come across David yourself over the last few years.

[00:01:02.600] - Dave Foster, Director of Frontier Economics

Yeah. This year will be 20 years.

[00:01:04.180] - Ronan Scanlan, Of Counsel

Wow. Okay. Well, happy 20th birthday in that case. So, Dave, look, thanks very much for joining us. I think today what we want to cover and discuss are some themes in the EU and UK antitrust space that touch on mergers, enforcement and regulation, so quite a full deck for today. I mean, 2023 was quite a year, both in the EU and in the UK.

[00:01:28.400] - Ronan Scanlan, Of Counsel

Of course we had Illumina Grail, which for us techie lawyers was quite an interesting case procedurally being brought under Article 22, and also substantively, and of course is still active in current enforcement proceedings. We had the prohibition of booking eTraveli, a non-horizontal merger, and then late last year, the abandonment of Adobe Figma and of course one could not possibly fail to mention Microsoft Activision, which commenced in fact in 2022, but concluded in October 2023 and obviously more generally in the regulation space, we had the initial designations by the Commission under the DMA of Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft, and then at the end of the year, the first appeals by Apple, Meta and ByteDance against those designations.

[00:02:20.870] - Ronan Scanlan, Of Counsel

In 2024, we have AG Kokott's opinion in the commission's self-preferencing case against Google.

[00:02:20.990] - Ronan Scanlan, Of Counsel

We have Amazon declining to offer remedies in its acquisition of iRobot and of course we also have the continued uncertainty in the UK around the entry into force and scope of the Digital Markets Act. So I think it's fair to say, Dave, quite a lot happening indeed against a backdrop, also of the polycrisis of climate change conflict, cost of living and AI. Have I missed anything?

[00:02:43.750] - Dave Foster, Director of Frontier Economics

Yeah, well, I'm sure there's lots, because there really is a phenomenal amount of activity in the world of competition, enforcement and regulation in general. You'd be forgiven for asking, how did we end up here? What has happened? And I think, like so many things, change comes slowly and then all at once and last year was a year where it all came all at once and I think this year will be the same again. For me, what sits behind that is a broader political development, if you like, which is that we have lost faith in the ability of markets to produce good economic outcomes for society. So, for example, if you take merger control, the narrative has, I think, shifted from one where you would say transactions are generally good for the economy, but we must stop the bad ones, to a world where the narrative now is transactions are generally bad, but perhaps we should let through the good ones and that's a fundamental shift and we see that shift in thinking across all areas of enforcement, I think, where we as a society, especially in our regulators, much more sceptical about the ability of free markets to deliver good outcomes.

[00:04:04.200] - Ronan Scanlan, Of Counsel

I mean, that's such an interesting and such a central point, Dave. I mean, just recalling time at this CMA from, I suppose I left in 2018 so a little bit of time has passed but the last time I checked, most mergers are cleared, indeed, in the UK voluntary regime, even more go through the merger intelligence committee process, the briefing note process, and are cleared without any in depth investigation, even if those that are only a proportion of those are subject to remedies or even fewer prohibitions. So it seems like a very

large leap, even on a quantitative basis, when you look at the mergers that have come before to support this growing presumption that mergers, or at least categories of mergers in more concentrated markets, should be presumed to be bad, I mean, when you look at Lennea Cannon, the US and the new Department of Justice guidelines adopted actually only in December 2023, there's a real step change towards this sort of more activist enforcement that you're discussing, and the new theories of harm we might unpack in a moment but it does really alarm me that in the enforcement side and in some parts of academia, there is this sense that the presumption should be against mergers, that they're not value enhancing, they don't benefit consumers or firms.

[00:05:20.320] - Ronan Scanlan, Of Counsel

There should be a balance of harm test applied instead of balance of probabilities and again, from the legal perspective, it's so important to re-emphasise that the presumption is that mergers are legal.

[00:05:31.700] - Ronan Scanlan, Of Counsel

We're not talking about Object 101 infringements or Chapter One infringements. I mean, unless a regulator can identify with some precision and some certainty, using established economic analytical frameworks and accepted analytical frameworks, that a merger is likely to result in harm, then that merger should be cleared and cleared unconditionally and indeed, our entire competition regime is designed around that and designed around the notion that markets should be allowed to operate with as little intervention as possible. I just think we have stepped so far from those presumptions in the last couple of years.

[00:06:09.750] - Dave Foster, Director of Frontier Economics

I think if you talk about mergers, I think a good way of summarising it will be, is merging a right or a privilege? And the merger control system that was created, let's say, 20 years ago, 25 years ago, was premised on the idea that transactions as a disposal of firms property rights were a right and so there was a high bar to interfere with somebody's free market right to dispose of their property however they wanted and so you had a philosophy which was, this is quite a strict test where we have to pick out the bad ones and then let the rest through. In that world, you're quite entitled to, for example, take a very sceptical view on things like efficiencies, because you really are in the game of letting most things through on the presumption that people should be allowed to do what they want and then really just picking out the ones that must be stopped because they really are harmful but if you flip that narrative on its head and you start to talk, as we have seen in the last five years, all regulators do and sort of say, well, actually the evidence, the economic evidence, is that mergers don't generally create benefits.

[00:07:22.820] - Dave Foster, Director of Frontier Economics

We should actually reverse a bit the presumption and say, well, we should only be letting the good ones through. The system is not designed for that and if you're in the business of saying mergers are a

privilege, not a right, you need a much more open mind to, well, which ones really are the good ones and in a sense, you can have either system you want, you can have a system where mergers are more of a right, or you could have a system where mergers are more of a privilege but be clear which world you're in and you either do or you don't take the benefits of these things seriously, depending on which world you're in and right now we are between the two systems where we have all the scepticism of the old system, but all the new expanded scope of regulators who think, well, mergers should be stopped unless I am convinced that they are a good thing.

[00:08:16.190] - Ronan Scanlan, Of Counsel

I think that raises two really important and related questions, or indeed more than two. I mean, the first is this question around, is the consumer welfare standard the right standard? And then what are the ultimate public policy objectives of competition authorities? And I think for me, we're just over 20 years on from the Enterprise Act 2002 in the UK. And there was this dislocation in the 90s, early naughties away from politicians having direct oversight of the merger control process, and that this would essentially be a technocratic approach that would be bedded in with economic principle and legal oversight and indeed legal redress, but that it would be relatively, how would you say, moderate in its ambitions, and it would be very focused on applying the consumer welfare standard and that meant, as you say, that most mergers would be cleared, that there would be a separate process to take into account public policy concerns, of course and that what we have seen in the last couple of years, either because of the vacuum in the political space, is this march of the merger enforcement authorities into a more activist. What more can we do? How can we be more responsive and reactive to the crises around us?

[00:09:48.330] - Ronan Scanlan, Of Counsel

How can we help the green agenda? How can we be more permissive around sustainability agreements, which are relatively modest but what concerns me is that there is this mission creep away from what was, at least initially, quite a narrow statutory mandate, that you will enforce merger control based on established economic principles to a space where there is little consensus in the economic community, certainly around the regulation of the tech sector and tech companies and I think this leaves us in a difficult space.

[00:10:25.660] - Dave Foster, Director of Frontier Economics

Philosophically, is a competition authority, is it doing law enforcement or is it doing regulation? Because those two things are actually very different. If I am engaged in law enforcement, then I'm like the police. There are a set of rules you must follow, and if you break them, I'm there to intervene and stop you and so what you're really doing is you're saying, there's a boundary, and I'm going to police the boundary and anything that happens inside the boundary, whether I like it or not, whether it could be better for society or not, it is just good for freedom of society that I don't get involved because if the police start telling you not to spit in the street or not to swear at your parents or all that stuff that we might not like, but if we all like the idea of being in a police state, much less than that, right? So you just stay at the boundary. If you are

engaged in regulation, you are stepping out of that law enforcement role and you're saying, my job is market design. It's actually my job to have a view on how I think competition could best work in this market, and then I will use whatever legal powers I've got hanging around to bring about that outcome because it will be better for consumer.

[00:11:47.000] - Dave Foster, Director of Frontier Economics

The comparison to kind of police type law enforcement is a little bit silly, but the trade off is still fundamentally the same because, yes, in any individual case, a regulator can kind of get in there and say, oh, I've got these great legal powers that are going to allow me to produce an outcome that is, I think, better than the one than if I didn't use my powers but it comes at a slightly unseen cost, which is in the economic system as a whole. Really, is it a good thing to have regulators tinkering everywhere with the shape of very dynamic, very innovative markets that have produced fantastic products and fantastic outcomes for society, because they think with all their civil service wisdom, they can see a better world if they just judiciously take the legal powers they've got and make a few changes here and there and that philosophy, I think, is really dangerous.

[00:12:52.620] - Ronan Scanlan, Of Counsel

But I think you're right to call out the meta-narrative and the polycrisis backdrop to these discussions that we have quite pointy-headedly around, whether we've got it quite right on the merger control space or we need to, as you say, tweak the tools we use for digital regulation a little better. I mean, merger control and competition enforcement is a bit cyclical, whether you're looking over the last hundred years or over the last 20. In the 90s, we were looking at mega mergers and chemicals and aggregates, and in the naughties, we were concerned with supermarkets and airports and banks and private health care and now in the last five years, we're looking much more closely at the tech sector. I wonder, though, I'd be interested in your view as to whether you think that the priorities and the targets of competition authorities are quite right, because if you're in a cost of living crisis, and rightly what people are most concerned about is the cost of food, so they're looking again at supermarkets or the cost of filling up their car and the petrol stations, and you see some efforts to run market studies in that space.

[00:14:02.020] - Ronan Scanlan, Of Counsel

But is all of this focus on being the first to regulate AI, and the first to regulate what are ultimately a series of products that consumers often have no upfront cost for in the tech space? Are the competition authorities at risk of missing the wood for the trees. Are there other sectors and other conduct that they should be focusing on in a cost of living crisis?

[00:14:29.270] - Dave Foster, Director of Frontier Economics

I mean, it doesn't sound like the most genius strategy, does it, to kind of make your contribution to a cost of living crisis, by going after people who give away services for free but I guess that's a bit of a trite point.

I completely agree with your characterisation, though, that there's always, at least all through my career, there's always a bad guy that we are somehow all looking at and when I started 20 years ago, it was the supermarkets we were worried in the UK that Tesco took one in every seven pounds of retail spend in the UK, I can't tell you the number of times I heard that statistic trotted out in the early years of my life as an economist and what you would now call ecosystem theories of harm were just the same then, because you had these innovative supermarkets who realised that they had a fantastically efficient way of getting products to consumers and so what started as, I will get you baked beans cheaper than anybody else, became, I could get you garden furniture cheaper than anybody else, I'd get you books cheaper than anybody else, I could get you CDs cheaper than anybody else.

[00:15:50.580] - Dave Foster, Director of Frontier Economics

I can get you clothing. Yeah, everything.

[00:15:53.510] - Ronan Scanlan, Of Counsel

White label goods, don't forget toasters and kettles, banking and even sometimes sort of video streaming back in the day as well, for club cards.

[00:16:03.980] - Dave Foster, Director of Frontier Economics

And that's what happens when you have transformational innovation, because if you crack the problem of how I can just generically do things more efficiently than anybody else, then you can put through that pipe any product you want and that's what the digital firms have been doing in the last ten years. They have created a way of distributing digital products to the world that is just a paradigm shift on what we had in the early two thousands and so, of course, just like Tesco did in the late nineties and early 2000s, they've thought, what other products can I get through this amazing pipe that I've created? This scrutiny follows the innovation always, because then people say, oh, look, you're expanding out. It used to be the death of the high street. That was the thing that the supermarkets were accused of, the death of the high street and that's just part of the natural kind of economic change and development of the economy, that these things happen, but they create concerns and then people investigate, and we're just living through that now. Everything that people worry about, self-preferencing. The European Commission has been trying to get supermarkets on own brand for 20 years, and they've never had the legal powers to kind of do what they really want to do, which is get into that space but in digital, we can do that. With one or two, we can go after self-preferencing.

[00:17:35.810] - Ronan Scanlan, Of Counsel

That does lead to another question, which I'm loathe to agree with you on every point. I think it's fair to say that, I suppose it was perhaps slightly easier for competition authorities to look at the risk of market power in the retail space, because they could still do the traditional isochrone analysis and fascia counting and if you could keep enough players in that space, and of course the limited assortment

discounters and so on coming in as challengers, then you could avoid whatever might have been the tipping point there which would have resulted; self-preferencing would have resulted in a consolidation of too much market power. I think the difficulty in ecommerce is that, at least in that sense, is that without bricks and mortar and with different supply chains going not just nationally but internationally and so on, there are different challenges, and equally in the digital space, with services that are delivered free at the point of delivery, it does make it slightly more difficult to measure market power and measure where that tipping point might be but as you say, there's nothing new. It's just the frame or the sort of shop window looks a little bit different, but the mechanics are still largely the same.

[00:19:00.050] - Dave Foster, Director of Frontier Economics

No, look and I'm not going to pretend that the economics of these businesses are not complicated. There are really complex network effects, there are two-sided markets, there are all sorts of economies of scale and scope in the digital world, and understanding that properly and doing good economic analysis in that space is not easy and 100% we need more economics brought to bear on these cases, rather than less and less, is the current direction of travel, I think, because internal documents seems easier to bring the case. You want to bring in a number of these cases. Actually, we're in the process here of trying to develop some AI technology that will interrogate the long history of competition cases, starting with UK merger cases. And the AI has sort of read all these decisions and you can ask it all sorts of questions, which I shouldn't tell you about, because it's a secret. That's very exciting, but I just did but I saw something terrifying when I was looking at the early tests of this just this week, which is the incidence of reliance on internal documents and qualitative evidence in merger control has doubled in the last five or six years.

[00:20:44.270] - Dave Foster, Director of Frontier Economics

And the instance of relative instance of economic analysis has declined. That is, if you like, is sort of a bit of quantitative stuff, just kind of backs up the intuition that we all have that that's the way the world is going.

[00:21:02.690] - Ronan Scanlan, Of Counsel

Which isn't surprising and that for me, I kind of don't want to bang on about it but I think an intersection between law and economics that I found to be very interesting and underdeveloped in recent cases is the counterfactual is because in this forward looking assessment that we see in recent merger cases in particular, there isn't any quantitative data, not only because the markets are often fledgling or not yet in existence, but because the perceived concerns are happening in the decision maker's eyes five to ten years down the line and so the reliance on qualitative rather than quantitative evidence is pretty unsurprising.

[00:21:42.990] - Dave Foster, Director of Frontier Economics

Yeah, and I have a lot of sympathy, I know what the CMA would say, and the CMA economists would say, for example, on this is just because a question is hard doesn't mean we shouldn't try to answer it. We've got a statutory test, and if the market is rapidly changing and it's going to look different in the future than in the past, which is how they, for example, were thinking about cloud gaming in Microsoft Activision, it's still our job to form a view and if the evidence has to be more qualitative than quantitative, so be it because if we have to look into the future, the statutory test tells us that we've got to make forecasts and just come to our best view and I don't disagree with that at all. They're completely right and the balance of probabilities threshold enables you to take an equally weighted view of things on both sides of the weighing scales and just because something is, if you like, very, very uncertain in the general sense, it doesn't really change where the midpoint of that uncertainty is. So that is absolutely right but things are different in forward looking assessments than they are in backward looking assessments from an economic point of view.

[00:23:05.130] - Dave Foster, Director of Frontier Economics

Some of our articles of faith as economists that come from a history of doing backward looking assessments, like, for example, countervailing, entry and expansion, is not likely. Those articles of faith don't apply when you're looking into the future, because the future is a place where new things happen all the time. And you're absolutely right to be sceptical about entry if you're doing a backward looking assessment, because if it was going to happen, it would have happened already. That is just not true of the future and so we do have to update our kind of whole worldview when we start looking into the future, and not just parts of it that deal with finding new problems.

[00:23:50.570] - Ronan Scanlan, Of Counsel

I do have sympathy with the need to reach a view, but I don't agree that it is the job of the regulators in forward looking markets to decide what is most likely to happen. If there is such uncertainty about what will happen that there is no consensus on the counterfactual. If it is not possible here today, while reviewing a merger to be more likely than not sure about what the market is going to do in future, and that contingency underpins the finding of SoC, then my strong view is that you cannot find an SoC that you haven't met the threshold and I think it's quite artificial and quite incorrect in the interpretation of the legal standard to say that it is the job of the CMA, their commission, to decide on what the future will hold.

[00:24:40.330] - Ronan Scanlan, Of Counsel

No, that is not the position. Legally, every merger is permissible unless the CMA or the European Commission or the FTC is able to show, on the balance of probabilities that an SLC or an SIEC or otherwise will arise. If they are not able to do that, meet that burden, then the presumption must be that the merger is permitted.

[00:25:01.490] - Ronan Scanlan, Of Counsel

And if there is a concern down the line, then it will be dealt with either under the x post mechanism Article 101, 1 or 2, or via market reviews. The competition authorities have plenty of tools at their disposal to deal with it, and I think it is wrong to try to use merger control as a sort of future pre crime predictor of behaviour and I think it goes to your earlier point as to what is the role of the merger enforcer. Is it a police watchdog or is it a regulator? And I think unless there is, if you've met that test, just as you do in criminal cases, which would be of course beyond reasonable doubt, but it is still a threshold that must be met by the authority in showing that there's a concern, it is not for the authority to opine on what the future will hold. If it cannot do that, then it should sit on its hands.

[00:25:54.080] - Dave Foster, Director of Frontier Economics

I'm a big fan of the language of the Tetra Laval judgement that says, the longer, I'm paraphrasing it a bit now, the longer are the chains of cause and effect in your theory of harm, and the more dimly discernible, I think, is the beautiful judicial language that they use, those things are the stronger the evidence needs to be for you to satisfy yourself you're over this bounce of probabilities threshold and that is, I think, intuitively correct to me.

[00:26:23.290] - Dave Foster, Director of Frontier Economics

One of the things that we said to the CMA when they were updating the merger guidelines in the UK was potential competition. Fine. This is important. You absolutely should be addressing it, and you absolutely should be looking into the future in the way that you want to do but in a balance of probabilities world, you have to grapple with the issue of double uncertainty. There is uncertainty about whether the parties will or will not be competitors to one another and that uncertainty is compounded with then the separate unusual question of uncertainty around whether any loss of competition between them will be substantial, which of course requires you to take a view on how the rest of the market will also look in the future and will there be more entry by other people, as well as by the merging parties? And those questions are all very complicated but the uncertainty in that sense does cumulate, and it is then harder to reach a balance of probabilities threshold and if you think there are some efficiencies, they also weigh in the balance more heavily in that assessment.

[00:27:32.820] - Ronan Scanlan, Of Counsel

And I think I would entirely agree with that characterisation, I think it's a really helpful way to put it, David, around double uncertainty but what I often see, reading some of the more recent case decisions, is this notion that in uncertainty is a cover, that when we are not sure about a number of different things, we throw them all into the pot together, we make a casserole and we see what it tastes like, and it's this idea of in the round assessments that really worries me as a lawyer, because when it comes to unpicking those, whether on a full merits appeal in the EU or on a JR standard in the UK, it's very hard for merging parties to discern how the decision maker weighed each piece of evidence if the eventual view is simply made in the round and I don't think that serves justiciability, or indeed serves certainty and predictability

going forward and I do think it falls to economists on both sides of either in the enforcement authority or yourselves, to attempt to reach some consensus on the analytical framework that should apply in those cases because whether they're potential competition cases where an awful lot of work, let's be fair, has been done in the last ten years around, for example, pharmaceutical cases and classifications and understandings of drugs that may be years or even a decade from actual prescription to understanding potential competition in that space

[00:29:02.100] - Ronan Scanlan, Of Counsel

but I do worry that in the digital space, it is a very underdeveloped analytical framework and you see that when you look at the many different ways that ecosystem theories of harm are characterised as portfolio effects, or strengthening dominant positions or otherwise, and I feel that there's a lot of talk and a lot of diverging views on how to tackle it but I don't see an emergent agreed framework that can be applied in the context of what is essentially enforcement decision by a merger authority that can then be challenged in court by the parties.

[00:29:38.890] - Ronan Scanlan, Of Counsel

So I do have some, I suppose, sympathy with the General Court, because I think they were trying to unpick something in CK Hutchison that was also, for those listening who are not so familiar with that case. It was one of those maverick cases. Right? So you have four players, you're acquiring three, which is a much smaller player on the face of it, not have significant market power and there would be a couple of other players remaining and the question was, do they exert a strong, essentially a position greater than their share would suggest? Are they competitively significant and important?

[00:30:13.320] - Ronan Scanlan, Of Counsel

And is the loss of that player such that there is a unilateral horizontal theory of harm arising in an SIEC in a sense that is immensely simple compared to some of the much more complex theories of harm that are now being thrown around?

[00:30:30.140] - Dave Foster, Director of Frontier Economics

Yeah, and I agree with you about the absence of a framework, and I think there's a job of work for economists to do here to try and put a more rational framework in place and I personally am a believer in the answer to that question being what some people call the Dynamic Capabilities Framework. So we've done some research together with a guy called Matt Elliott at Cambridge University on this question of how to think about firms not in terms of the products that they produce, but in terms of the capabilities that they hold and in that context, you can see mergers as not as things that kind of eliminate or potentially contribute to competition in a set of product markets, but as transactions that bring together potentially complementary or substitutable capabilities within the two firms and if you applied that kind of thinking to some of these cases, you would end up in much less contorted analysis. If you took a Google Fitbit or you

took a Facebook Giphy, and you actually started thinking about these firms as clusters of capabilities and not trying to shoehorn everything into market definitions, you could come up with a much more nuanced view about whether these mergers were going to be a good thing or a bad thing.

[00:32:08.250] - Dave Foster, Director of Frontier Economics

Because generally what you should be trying to do is combine complementary capabilities, unless there is an excess of scarcity in those capabilities that are being combined and then maybe you need to think about how they're rationed out across the market, and you should be trying to avoid the agglomeration of capabilities that are fundamentally substitutes for one another and then you have a tricky issue, which is some capabilities can be used in either a complementary way or in a substitutable way, depending on who owns them and those are your really complicated cases, and there are always going to be complicated cases, but it really helps you to identify which world you're in rather than, for example, the CMA tying itself in knots as it did over Facebook Giphy thinking about the market for online advertising, I mean, which I think when you read this, it's just, I think, silly and along comes the court and does something even sillier in trying to put in place this framework on the back of a fag packet, which is, to put it not so politely, nonsense.

[00:33:29.990] - Ronan Scanlan, Of Counsel

I mean, I think that there's certainly a lot of work carried on even ten years ago in moving away from rigid views on market definition toward frames of reference and towards a more holistic approach of the market, with obviously an eye for enforcers on appeals then of course, and it is a delicate line to walk. I do think we could probably spend an entire podcast just talking about Dynamic Capabilities Frameworks. It sounds really interesting, and I do think we are missing at the moment a clear articulation of what exactly it is we're concerned by, what exactly it is we're trying to prove. I mean, I remember back when I was at the CMA, we were working on BTEE, which is a very large vertical merger that was eventually cleared unconditionally at phase two after provisional findings identifying some concerns, or at least the minority of the group, identifying a concern that was subsequently allayed but even know, when we looked at the verticals guidelines, I think it was about a page and a half in the CMA, a couple more pages in the EU, nothing in the US, and we really had to come up from the ground up working closely with Paul Reeve, who's since joined the dark side as well, but on this idea of a strategy of raising rivals costs and I think for me that was again an articulation that resonated and was so much simpler than trying to wade through the ability incentive and effect circular logic of the guidance, which really didn't get us anywhere so there is clearly opportunities for clarity here, whether we call them Dynamic Capabilities Frameworks or something else but I do think the way we're describing at the moment is not serving clarity, I think.

[00:35:17.060] - Dave Foster, Director of Frontier Economics

Yeah, absolutely agreed. And I think there is a broader problem of we don't really know what to do with vertical deals anymore. Everybody kind of acknowledges that the Ability Incentive Effect Framework

doesn't really work. Nobody really does the effect limb, the incentive limb really comes down to what you think about ability. So it all kind of merges into one and it's all a little bit unsatisfactory.

[00:35:46.500] - Ronan Scanlan, Of Counsel

It does seem to me that this is part of the reason why we have these emerging ecosystem theories of harm, because enforcers have taken one look at that framework, the Verticals Framework, and said, no thanks, that's not going to work and then we even have, I suppose, more recently we're here talking about more detailed guidance, but I'm also quite sceptical of the value of that when you look at booking eTraveli, which I was just reading before this call, an excellent 2023/ 2024 recap by Freshfields around that, and a quote they pulled out by Olivier Gerson saying, well, in departing from the conglomerate sort of guidelines, he says, if we were bound by our guidelines, then we would fossilise our practise. We need to have some capacity to depart from them and whilst I agree in principle, it does worry me when even on those marginal sort of, how would you say, sort of pushing the envelope cases, even then you can't trust the guidelines. It does leave merging parties, prospective merging parties, in a really difficult position when they're trying to assess the risks of interventional remedies.

[00:36:58.610] - Dave Foster, Director of Frontier Economics

Yeah and there's a very close relationship between where that thinking is going on, merger control, and where the commission wants to go with the revision of the Article 102 guidelines, which is to effectively say, if you have a dominant position, we are going to be very sceptical about your ability to start doing new things that you did not do before and what we want of a dominant firm is that it kind of sticks to doing what it does now. It's sort of like, well done. You got here, you were very innovative, or you did whatever you did to get your market power and people love your product and they don't want to switch away from it and no one else yet has really come up with a fully effective challenge to what you do now but will you please stop? That's what we want. That's what the DMA aims at, and it's what this expansion of merger control aims at, and it's what the direction of travel in Article 102 enforcement wants. And we call it self-preferencing, or we call it an ecosystem but really what we want is, can you please just stop where you are and don't move?

[00:38:28.930] - Dave Foster, Director of Frontier Economics

Because everything you've done up to now might be fine, but the next thing that you do, we've got a problem, because you might treat yourself differently to other people and that will be bad and the problem is, that's what firms are and it's what they do. They combine different activities together all the time to make things better and yes, of course we should be skeptical about dominant firms because of their market power, but we shouldn't stop them from doing new things better than the things they did before, because that's one of the important engines of progress and you can't rely on the idea that somebody else will come along and create great things if you stop all the dominant firms in the world from also being able to come up with great new things.

[00:39:18.560] - Ronan Scanlan, Of Counsel

And so lots of food for thought, I think, really as we start a new year, Dave, in 2024, and certainly we've only provided a couple of perspectives, both from a sort of legal ex-enforcer side and Dave from the economic side.

[00:39:37.130] - Ronan Scanlan, Of Counsel

And of course there are other views about whether indeed enforcers are doing enough or in fact need to go further and faster and we would really appreciate the opportunity to speak with those voices and to have a sort of robust, respectful discussion with them. So I certainly think, Dave, we would be really interested to revisit this and these themes either in response to kind of listeners' feedback, and or by having further guest speakers in to talk to us.

[00:40:05.730] - Dave Foster, Director of Frontier Economics

There's absolutely no point, is there, in us furiously agreeing with each other any longer. This absolutely is something about which reasonable people can disagree, and some phenomenally thoughtful and highly respectable people would take some fundamentally different views, I think, to the ones that you and I share, and I'm sure, rightly so, in a lot of case, this is what do we know?

[00:40:31.610] - Ronan Scanlan, Of Counsel

Well, indeed. Right. But no. Thank you so much for taking your time to speak with me this morning. Hope the listeners have found it interesting and insightful. As I said, we look forward to discussing these issues again later in 2024. So thank you so much, Dave.

[00:40:48.680] - Dave Foster, Director of Frontier Economics

You're welcome. Thank you.