VOLUME 29 SUMMER 2024

I L L I N O I S B U S I N E S S L A W J O U R N A L

FROM GUIDELINES TO GRIDLOCK: THE CHALLENGES FACING DOJ AND FTC'S NEW MERGER GUIDELINES AND THE PATH FORWARD

❖ Note ❖

*James Zhang**

I. INTRODUCTION

The year of 2023 has seen the lowest level of M&A activity in over a decade, since the period after the 2008 global financial crisis.[1] Inflation, rising interest rates and fear of a recession halved Global M&A deal values to $2.5 trillion USD from their peak of more than five trillion dollars in 2021.[2] In the midst of such difficult situations, increasing regulation scrutiny has cast yet another shadow over the flickering future of the M&A market.

On December 18, 2023, the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) released the 2023 Merger Guidelines.[3] This is the final version after gathering public feedback from the draft version released in July 2023.[4] This guideline marks another step forward of the Biden administration's aggressive and interventionalist antitrust policy.[5] It not only lowers the threshold to

* J.D. Candidate, Class of 2026, University of Illinois College of Law.

[1] *See* Brian Levy, *2024 Outlook Global M&A Industry Trends*, PWC (Jan. 23, 2024), https://www.pwc.com/gx/en/services/deals/trends.html.

[2] *See id*; *see also* Michael G. O'Bryan et al., *M&A in 2023 and Trends for 2024*, MORRISON & FOERSTER LLP (Jan. 4, 2024), https://www.mofo.com/resources/insights/240104-m-a-in-2023-and-trends-for-2024.

[3] *See* Steven C. Sunshine et al., *DOJ and FTC Release Final 2023 Merger Guidelines Formalizing Aggressive Merger Enforcement Playbook*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP AND AFFILIATES (Dec. 21, 2023), https://www.skadden.com/insights/publications/2023/12/doj-and-ftc-release-final-2023-merger-guidelines.

[4] *See id.*

[5] *Id.*

presume a merger as anticompetitive, but also raises several novel legal theories to regulate M&A transactions.[6]

If fully effected, this guideline will subject many more M&A transactions to heightened scrutiny.[7] However, given the departure from long-held values and standards, lack of recent caselaw support, and indefiniteness of certain assessment criteria, the guidelines are unlikely to be enforced effectively.

This note will first go over the function and historical development of merger guidelines and list the novel legal theories in the 2023 Guidelines. Then, this note will analyze the 2023 Guidelines and argue that they are unlike to be enforced effectively from four aspects: (1) the proposed threshold and test to presume illegality of merger transactions are too strict; (2) the 2023 Guideline focus too heavily on competitive costs while ignoring competitive benefits; (3) legal theories raised by the 2023 Guidelines are too novel and sometimes overly broad; and (4) the 2023 Guidelines rely too heavily on dated caselaw that lack sufficient support.

II. BACKGROUND

A. M&A Regulation Paradigm Shift

Merger guidelines are essential in DOJ and FTC ("the agencies") antitrust investigations.[8] They build a framework and identify the procedure and enforcement practices the agencies use to evaluate the competitive impact of mergers and acquisitions.[9] Though not legally binding, the guidelines typically play a vital role in the merger enforcement process, and courts often cite them in their opinions of merger enforcement cases.[10]

In 1968, the first merger guidelines were published by the agencies, and they were last revised in 2010 as the Horizontal Merger Guidelines—covering mergers and acquisitions involving actual or potential competitors.[11] This guideline embraced the "customer welfare standard," assessing the necessity to regulate mergers based on the harm/benefit tradeoff such transactions have on customers.[12] It also

---

[6] *See* ANTITRUST DIV., U.S. DEP'T OF JUST. & FED. TRADE COMM'N, 2023 MERGER GUIDELINES (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

[7] *See* O'Bryan, *supra* note 2.

[8] See generally U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 6.

[9] *See* Wrede H. Smith III et al., *FTC and DOJ Release Draft Updates to Horizontal and Vertical Merger Guidelines*, MCGUIREWOODS LLP (July 24, 2023), https://www.mcguirewoods.com/client-resources/alerts/2023/7/ftc-doj-release-draft-updates-horizontal-vertical-merger-guidelines/.

[10] *Id.*

[11] *See* Joseph Farrell and Carl Shapiro, *The 2010 Horizontal Merger Guidelines After 10 Years*, 58 REV. OF INDUS. ORG. 1, 1–11 (2021) (discussing the creation, focus and development of the 2010 Horizontal Merger Guideline).

[12] *See id.*

established, through multiple revisions, that an HHI threshold above 2,500 indicates a highly concentrated market and that a merger resulting in an HHI increase of more than 200 is presumptively anticompetitive.[13]

Ten years later, the 2020 Vertical Merger Guidelines were released during the Trump Administration to address issues with vertical mergers—"those that combine firms or assets at different stages of the same supply chain."[14] However, this guideline was shortly repealed after the Biden Administration came into power in 2021.[15]

In fact, the Biden Administration exhibited tremendous ambition to regulate M&A activities through initiating a paradigm shift. The new paradigm of antitrust law enforcement employs heightened scrutiny on M&A transactions and looks beyond market efficiency or customer welfare to include secondary factors such as impact to the labor market.[16] This scrutiny on M&A activities might be triggered by the soaring M&A market of 2021.[17]

B. Novel Legal Theories Raised in the 2023 Guidelines

The agencies raised several new legal theories in the 2023 Guidelines to detect and regulate M&A transactions, which has not been mentioned in either the 2010 Horizontal Merger Guidelines or the 2020 Vertical Merger Guidelines.

First, per Guideline 5, mergers may violate the law when they create a firm that may limit access to a product, service, or route to market that its rivals may use to compete.[18] This legal theory will capture mergers that do not neatly fit into either the horizontal or vertical merger paradigms.[19] Under this theory, even a related product not in use by a rival company might be regarded as competitively significant, and the limited access of such product can be evidence of a violation.[20] Also, the agencies only need to delineate the overall risk that the merged firm could use its

---

[13] *See generally* ANTITRUST DIV., U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 1 (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#2d.

[14] *See generally* ANTITRUST DIV., U.S. DEP'T OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES 1 (2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

[15] *See* Press Release, FED. TRADE COMM'N, FEDERAL TRADE COMMISSION WITHDRAWS VERTICAL MERGER GUIDELINES AND COMMENTARY (Sep. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary.

[16] *See* ILENE K. GOTTS, 1-ANTITRUST REPORT I 1 (2023).

[17] *See* FED. TRADE. COMM'N, OVERSIGHT OF THE ENFORCEMENT OF THE ANTITRUST LAWS (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf.

[18] *See* U.S. Dep't of Just. & Fed. Trade Comm'n, *supra* note 6.

[19] *See* Sunshine, *supra* note 3.

[20] *Id.*

ability to limit access to the related product, and do not have to identify any precise actions that would lessen competition.[21] Specifically, when a merger involves a multi-sided platform, the agencies examine competitions between platforms, on a platform, or to displace a platform.

Second, in Guideline 6, a merger can violate Section 7 of the Clayton Act if it entrenches or extends an already dominant position in one market into other related markets.[22] This theory relies on a 1972 Supreme Court case that affirmed the FTC's order of Ford Motor Company to divest itself of a spark plug and battery manufacturer, holding that Ford's acquisition adversely affected competition.[23] The guideline states that the agencies will consider not just the impact of the merger holding with fixed factors like product quality and the behavior of other industry participants, but they may also consider longer term impacts of the merger on market power and industry dynamics, even when the agencies cannot predict specific reactions and responses with precision.[24]

Third, per Guideline 8, the agencies no longer confine their examinations to a single merger transaction.[25] When a merger is part of a series of multiple acquisitions, the agencies may use the whole series as evidence of violating antitrust laws, even though each one of the transactions does not exceed the threshold.[26]

Lastly, per Guideline 10, a merger that may not raise issues relating to the sale of products or services may nevertheless substantially lessen competition in labor markets, resulting in lower wages or slower wage growth, reduced benefits or working conditions, and/or other degradations of workplace quality.[27]

III. ANALYSIS

Despite of the agencies' ambition to regulate a broader range of M&A transactions based on new legal theories and stricter thresholds; the 2023 Guideline is unlikely to be applied effectively—at least not to the same extent expected by the agencies.

A. Proposed Strict HHI Threshold and New Test on Post-Merger Market Share Will Likely Be Rebutted by Companies and Raise Doubts from Courts

First, the 2023 Guidelines set too strict an HHI threshold to determine market concentration and presume illegality of merger transactions. It abandoned the

---

[21] *Id.*
[22] *See* U.S. Dep't of Just. & Fed. Trade Comm'n, *supra* note 6.
[23] *See* Ford Motor Co. v. United States, 405 U.S. 562, 578 (1972).
[24] *See* U.S. Dep't of Just. & Fed. Trade Comm'n, *supra* note 6.
[25] *Id.*
[26] *Id.*
[27] *Id.*

previous HHI threshold established by the 2010 Horizontal Merger Guidelines which had been used for the past thirteen years and were relied upon by the agencies to enforce antitrust laws and by courts to adjudicate such matters.[28] Instead, the 2023 Guideline reverted to the much stricter 1982 standard.[29]

Specifically, the 2023 Guidelines dropped the post-merger HHI level required to indicate a highly concentrated market from 2500 to 1800, and the change in HHI to presume anticompetitive mergers from 200 to 100.[30] Under the heightened 1800-HHI threshold, a merger transaction that leads to a market with only four firms with equal market share would not cause any issue; with the new threshold, even a transaction that leads to a market with five firms with equal market share will result in an threshold-exceeding HHI level and be presumed as illegal.[31] Moreover, in a market with firms having shares of 25, 20, 16, 14, 10, 8, and 7, the 2023 Guidelines indicate that the merger of the two smallest firms, resulting in a market share of 15—not even top 3 within the market—would be presumptively illegal with no economic basis that such a merger would substantially lessen competition.[32] The heightened standard puts a heavy burden on companies proposing the merger transactions to offer rebuttable evidence to proceed.[33]

Additionally, the 2023 Guidelines raise a new HHI test—not contained in the 2020 or even the 1992 Guidelines—regarding the combined firm's market share after the merger. The test presumes a merger transaction to be anticompetitive and illegal when the combined market share of the firm is greater than thirty percent and the change in HHI is greater than a hundred.[34] Such presumption is maintained even if one party of the transaction has de minimis market share or the relevant market is otherwise fragmented.[35] This again raises a much-heightened standard by essentially presuming any deal that would increase the market share of a company that already controls thirty percent or more of the market to violate antitrust laws.[36]

Although the agencies may presume certain transactions to be anticompetitive using HHI threshold and market concentration, challenged

---

[28] *See* Shapiro, *supra* note 11.

[29] *Id.*

[30] *Id.*; *see also* U.S. Dep't of Just. & Fed. Trade Comm'n, *supra* note 13.

[31] *See* Antitrust Div., U.S. Dep't of Just., Herfindahl-Hirschman Index, https://www.justice.gov/atr/herfindahl-hirschman-index (last updated Jan. 17, 2024).

[32] *See* Gregory Werden, Two Bridges Too Far: First Take on the *Draft Merger Guidelines*, COMPETITION POL'Y INT'L (Sept. 5, 2023), https://www.pymnts.com/cpi_posts/two-bridges-too-far-first-take-on-the-draft-merger-guidelines.

[33] *See* U.S. Dep't of Just. & Fed. Trade Comm'n, *supra* note 6.

[34] *See* Megan Browdie et al., *New Year, New Merger Guidelines: What Dealmakers Need to Know*, COOLEY LLP (Jan. 10, 2024), https://www.cooley.com/news/insight/2024/2024-01-09-new-year-new-merger-guidelines-what-dealmakers-need-to-know.

[35] *See* U.S. Dep't of Just. & Fed. Trade Comm'n, *supra* note 6.

[36] *See* Claire Kelloway, *Antitrust Enforcers Draft New Guidelines for Approving Mergers. Here's What it Means for the Food Industry*, FOOD & POWER (Aug. 10, 2023), https://www.foodandpower.net/latest/draft-merger-guidelines-2023.

companies can rebut this presumption with evidence. The agencies have the ultimate burden of persuasion in court to prove illegality, and relying solely on market concentration has often proved futile.[37] In *United States v. Gen. Dynamics Corp.*, the company successfully rebutted the government's prima facie case of anticompetitive transactions based on market concentration.[38]

The 2023 Guidelines' heightened standards to presume illegality reverts to long-abandoned threshold and rests on unprecedented reference to post-merger market share. Without providing much justification relating to economic analysis, such presumption will unavoidably raise suspicion from courts—ending up either successfully rebutted by companies or rejected by courts as unpersuasive. As a result, they are unlikely to be enforced effectively.

B. Analysis by 2023 Guidelines Gives Too Much Weight to Competitive Costs while Ignoring Competitive Benefits

The 2023 Guidelines departure from the core value held essential by previous merger guidelines—balancing the benefits and costs of M&A transactions while primarily focusing on net impact to customers.[39] Instead, the 2023 Guidelines only briefly touch upon "efficiencies" —a term to de-emphasize the effect of the benefits—as potential evidence to rebut the agencies' illegality presumption.[40] This contrasts with the 2010 Guidelines which address the "tradeoff" between M&A transactions' benefits and costs to customers directly.[41] This difference essentially reflects the agencies' view to marginalize M&A transactions' benefits to customers through reduced price or increased investments to mere add-on efficiencies.[42]

This approach presumes that the benefits associated with many mergers are largely "illusory."[43] As a result, the agencies overlook those benefits and focus disproportionately on competitive costs to justify aggressive regulation.

One reason for overlooking competitive benefits is that the 2023 Guidelines focus solely on the transactions' impact on competitors – not customers. The head of DOJ's antitrust division, Jonathan Kanter, in a 2022 speech, expressed his stand to jettison the "customer-welfare" standard and replace it with a "competition and the competitive process" test.[44] He stressed that focusing on protecting customer

---

[37] *See* Werden, *supra* note 32.

[38] United States v. Gen. Dynamics Corp., 415 U.S. 486, 511 (1974).

[39] *See generally* Luke M. Froeb et. al., *Cost-Benefit Analysis Without the Benefits or the Analysis: How Not to Draft Merger Guidelines*, 97 S. CAL. L. REV. POSTSCRIPT 1, 2 (2023)

[40] *See* U.S. Dep't of Just. & Fed. Trade Comm'n, *supra* note 6.

[41] *See generally* Farrell, *supra* note 11.

[42] *See* Froeb, *supra* note 39.

[43] Richard A. Epstein, *Symposium:The New Age of Antitrust: The DOJ and FTC's Misguided Attack on Mergers*, 49 IOWA J. CORP. L. 275, 276.

[44] *See* Jonathan Kanter, Assistant Attorney General, Antitrust Div., U.S. Dep't of Just., Remarks at New York City Bar Association's Milton Handler Lecture (May 18, 2022).

interest alone has led to uncertainty and underenforcement, and antitrust law should instead focus on protecting competition which provides spill-over benefits to all industry participants, including customers.[45] This idea has an intellectual appeal for producing a comprehensive framework, but it runs the risk of being conclusory and unhelpful for real-life applications.[46] Indeed, the " customer welfare standard" at least provides a quantifiable criteria to assess benefits and harm; the "competition and the competitive process" test can be interpreted very broadly without offering much guidance. For example, if a merger between two firms in a 10-firm market results in a more efficient and vigorous firm, the "competition and the competitive process" test provides no answer to whether the transaction increases competition by having more vigorous competition among the nine firms that remain or does it decrease competition simply by eliminating the number of competitors.[47]

Indeed, even DOJ acknowledges that the fundamental goal of antitrust laws, such as the Clayton Act, is to "promote fair competition and prevent unfair business practices that could harm consumers."[48] The previous guideline—following the customer welfare standard—align better with this principle: they articulate a transparent methodology to first distinguish pro- from anti-competitive mergers—with the focus on their benefits or harms towards customers—and then encourage good mergers and deter bad ones accordingly.[49]

Additionally, courts have been relying on the traditional "customer-welfare" standard implicitly to determine whether transactions are anticompetitive. In *FTC v. Warner Communications, Inc.*, the Ninth Circuit considered "public equities" including economic benefits and pro-competitive advantages for consumers when ruling on an FTC application for a preliminary injunction.[50]

Therefore, the 2023 Guidelines' one-sided analysis assessing costs without heeding benefits can lead only to imprudence and inaccuracy. Their departure from long-held standards and objectives of antitrust law are unlikely to convince the courts and reduce the effectiveness of their enforcement.

C. New Theories Raised by 2023 Guidelines Are Too Novel and Lacks Determinative Definitions and Criteria

The 2023 Guidelines raised several novel and unproven legal theories to

---

[45] *See id.*

[46] *See* Einer Elhauge, *Should The Competitive Process Test Replace The Consumer Welfare Standard?*, PROMARKET (May 24, 2022), https://www.promarket.org/2022/05/24/should-the-competitive-process-test-replace-the-consumer-welfare-standard/.

[47] *See id.*

[48] *See* U.S. Dep't of Just. & Fed. Trade Comm'n, *supra* note 6.

[49] *See* Froeb, *supra* note 39.

[50] F.T.C. v. Warner Commc'ns Inc., 742 F.2d 1156, 1165 (9th Cir. 1984)

indicate anticompetitive transactions. The most novel theory is that mergers can violate the law when they create a firm that may limit access to a product, service, or route to market that its rivals may use to compete.[51] This theory again reflects the agencies' focus on broad harm to rivals, or competitors, instead of quantifiable harm to customers.[52] Also, this theory applies to mergers that are neither vertical or horizontal, and which are therefore not governed by either the 2010 Guidelines or the 2020 Vertical Merger Guidelines. Inevitably, this theory lacks support from case law precedents, and its potential effectiveness is unclear.

The agencies also fail to define specifically several terms and criteria used to evaluate anticompetitive transactions. The example raising the most concern is the definition of dominance. In the July draft guidelines, the agencies asserted that a merging firm has a dominant position when it possesses at least thirty percent market share; the final guidelines removed such language, and instead base the evaluation on ambiguous grounds—"direct evidence or market shares showing durable market power."[53] Ambiguous guidance like this could overly burden companies with excessive litigation, and at the same time fail to provide justifiable ground to enforce such actions through courts.

D. The Caselaw Relied upon by the 2023 Guidelines Are Too Dated to Provide Compelling Support

As the merger guidelines are not binding law, they cannot impose new standards on courts; rather, courts choose to adopt the guidelines when they find them persuasive, and most importantly, when the guidelines comply with binding caselaw.[54] Even the prior guidelines, which were considered more neutral in approach and more closely tied to case law, are sometimes rejected by courts for lack of support in case law.[55]

Noticeably, courts have declined to pay deference to standards established by the agencies' current merger guidelines and instead have chosen to keep a previously established test. In *United States v. Anthem*, seven years after FTC and DOJ modified their standards to no longer require transaction efficiencies to be merger-specific, the Columbia district court rejected the company's argument that the modified standards in the guidelines should be followed and held that the legal test adopted by courts have not been revised in the wake of the 2010 revision to the guidelines.[56] Further, in

---

[51] *See* U.S. Dep't of Just. & Fed. Trade Comm'n, *supra* note 6.

[52] Ted Bolema, *Decoding the 2023 FTC and DOJ Merger Guidelines: Insights into Shifting Antitrust Enforcement*, MERCATUS CTR. (Feb. 15, 2024), https://www.mercatus.org/research/policy-briefs/decoding-2023-ftc-and-doj-merger-guidelines-insights-shifting-antitrust.

[53] *See* Sunshine, *supra* note 3.

[54] *See* Browdie, *supra* note 34.

[55] *See id.*

[56] United States v. Anthem, Inc., 236 F. Supp. 3d 171, 237 n.39 (D.D.C. 2017)

New York v. Deutsche Telecom AG, in 2020, the U.S. District Court for the Southern District of New York declined to adopt the 2010 guidelines' two-year test for analyzing post-merger potential entrants.[57] The court reasoned that the standard specified by the guidelines "should [not] carry any talismanic force."[58]

In fact, one major challenge to the enforceability of the 2023 Merger Guidelines is its excessive reliance on the dated cases while ignoring recent decisions contrary to its approach.[59] One obvious example is the 1962 Supreme Court case, *Brown Shoe Co. v. United States*. The agencies cited *Brown Shoe Co.* 15 times throughout the article, often relying on dicta of the court's opinion or situations largely discredited in later cases.[60] Even though the agencies tried to incorporate more recent cases in the final version of the 2023 Guidelines, after receiving objection in the draft version, the resulting guidelines still rely heavily on old caselaw that "predate modern antitrust jurisprudence."[61]

Further, even before releasing the more aggressive 2023 Guidelines, the agencies' interventionalist approach to enforce antitrust laws had been obstructed by several high-profile government losses in court.[62] In Meta's merger with a VR software developer, within, the agencies alleged that the deal would eliminate a nascent competitor and lost.[63] The court held that the objective evidence does not support a reasonable probability that firms in the relevant market perceived Meta as a potential entrant.[64] This holding reflects courts' reluctance to adopt the novel legal theories, such as the extension of an already dominant position into related market as discussed above. Similarly, in Microsoft's acquisition of Activision, the court rebutted the agencies' allegation that Microsoft would use this vertical combination to foreclose competing game console providers.[65]

Therefore, given the unfavorable precedents, it is increasingly unlikely for courts to back up the 2023 Guidelines' even more stringent standard and even more novel legal theories.

IV. RECOMMENDATION

A. Incorporation Of Long-Held Values into Analysis

---

[57] New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 232 (S.D.N.Y. 2020).

[58] *Id.*

[59] Daniel Gilman, Antitrust at the Agencies: Back to the Past Edition, Truth on the Mkt. (Sept. 1, 2023), https://truthonthemarket.com/2023/09/01/antitrust-at-the-agencies-roundup-back-to-the-past-edition/ [https://perma.cc/G99D-BA38].

[60] *Id.*

[61] *See* Sunshine, *supra* note 3.

[62] *Id.*

[63] FTC v. Meta Platforms Inc., 654 F. Supp. 3d 892, 903 (N.D. Cal. 2023).

[64] *Id.* at 940.

[65] Fed. Trade Comm'n v. Microsoft Corp., 681 F. Supp. 3d 1069 (N.D. Cal. 2023).

To carry out the enforcement of the guidelines effectively and gain courts' support, the agencies should incorporate long-held values into their analysis to determine which M&A transactions to challenge. Namely, they must look at both benefits and costs of the transactions while considering their net impact to customers. This does not necessarily mean the agencies must endorse the "customer welfare standard," but rather that they should not abandon long-held values endorsed by courts, and they need to have sound economic analysis focusing on specific criteria to justify their decisions.

Following this logic, the HHI level and market concentration of companies should not be the sole factors used to presume certain M&A transactions to be anticompetitive. Rather, they should be combined with sound economic analysis on criteria such as the amount of benefits the transactions could bring about and the aggregate elasticity of consumer demand.[66]

Further, for the reversion to the stringent HHI threshold of 1992, and the newly raised threshold of post-merger market share of thirty percent, the agencies should either justify the stringent standards with rigorous economic analysis or consider loosening them up at least to a mid-point between the 2010 Guidelines level and the current one. Additionally, safe harbor exceptions should be granted for benign and pro-competitive mergers.

B. Allow Market to Rebound Before Employing the New Regulation Standards

One main reason for the agencies' aggressive attitudes towards regulating M&A transactions is the market's soaring activity in recent years. In a 2022 statement, FTC Chairwoman Khan noted the burdens placed on the FTC by referring to market activities in 2021: the global deal value soared up to a historical record level at $5.8 trillion, and the deal count of 3,644 transactions is eighty-seven percent more than the average number of transactions over the past five years. It is against such a backdrop of M&A activities the agencies reached the inference that they necessarily needed to reorient their enforcement strategy with heightened standards and innovative theories to extinguish monopolies before they spread.[67]

However, times have changed, and the agencies need to adapt their strategies accordingly. The M&A market has fallen to its lowest point in a decade, and it would be wise for the agencies to hold off on deploying their most aggressive antitrust guidelines filled with novel legal theories. Rather, the agencies should allow the market time to rebound, especially considering the benefits associated with allowing certain M&A transactions and the social costs incurred when preempting others.

---

[66] *See generally* Joseph Farrell & Carl Shapiro, Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition, 10 B.E. J. THEORETICAL ECON., no. 1, 2010.

[67] Epstein, *supra* note 43.

Therefore, it would be wise for the agencies to follow a step-by-step approach and gravitate towards the final desirable state proposed in the 2023 Guidelines. Along this way, they would have more time to test out different novel legal theories bit by bit, allowing the market to respond and adapt while also collecting more information and evidence to buttress their claims in front of the courts.

This approach will also avoid strangling the M&A market recovery, which will most likely provoke antagonism from both the courts and critics.

C. More Definite Standard Justified by Modern Caselaw

Lastly, the agencies should provide more definite and specific standards and criteria used to assess M&A transactions. These standards and criteria also need to be supported by more recent caselaw. The agencies should think twice about the legal theories that rely solely on inference extrapolated from dated precedents, especially when the language relied upon is dicta or has been discredited. The more substantive the support behind such criteria, the more likely agencies' claims relying on them against mergers and acquisitions will be enforced through the judicial system.