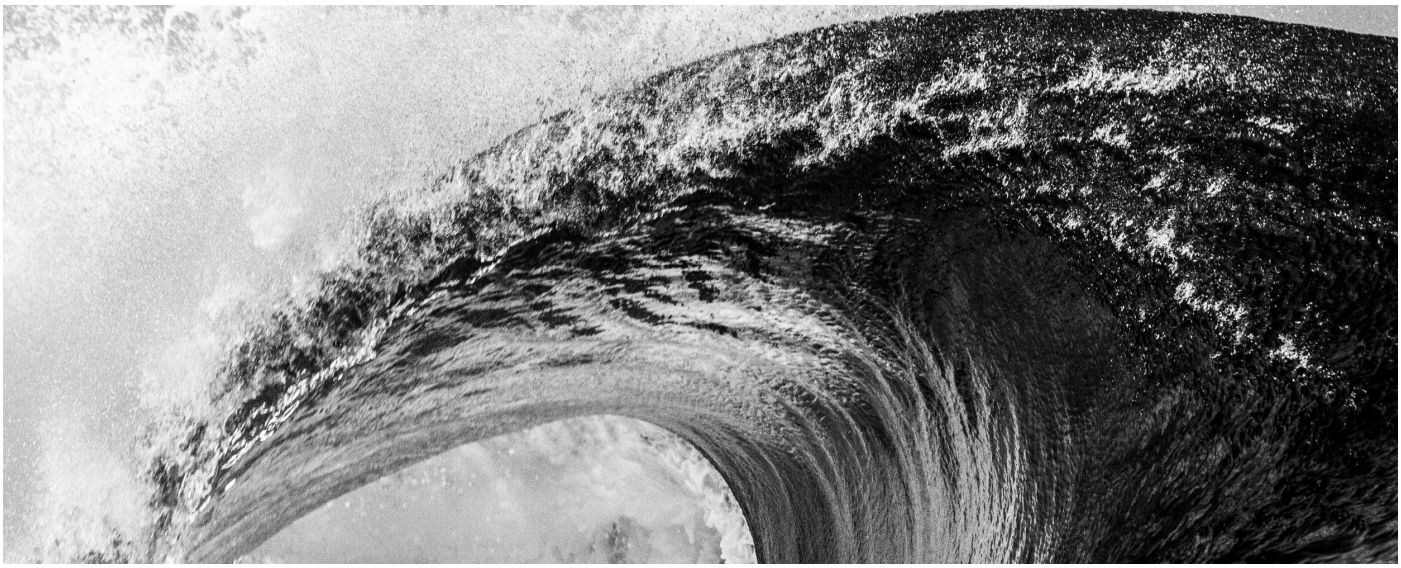
A&O SHEARMAN

ARTICLE

Merger control frustrates more M&A, but are the tides turning?



PART OF OUR REPORT

Global trends in merger control enforcement

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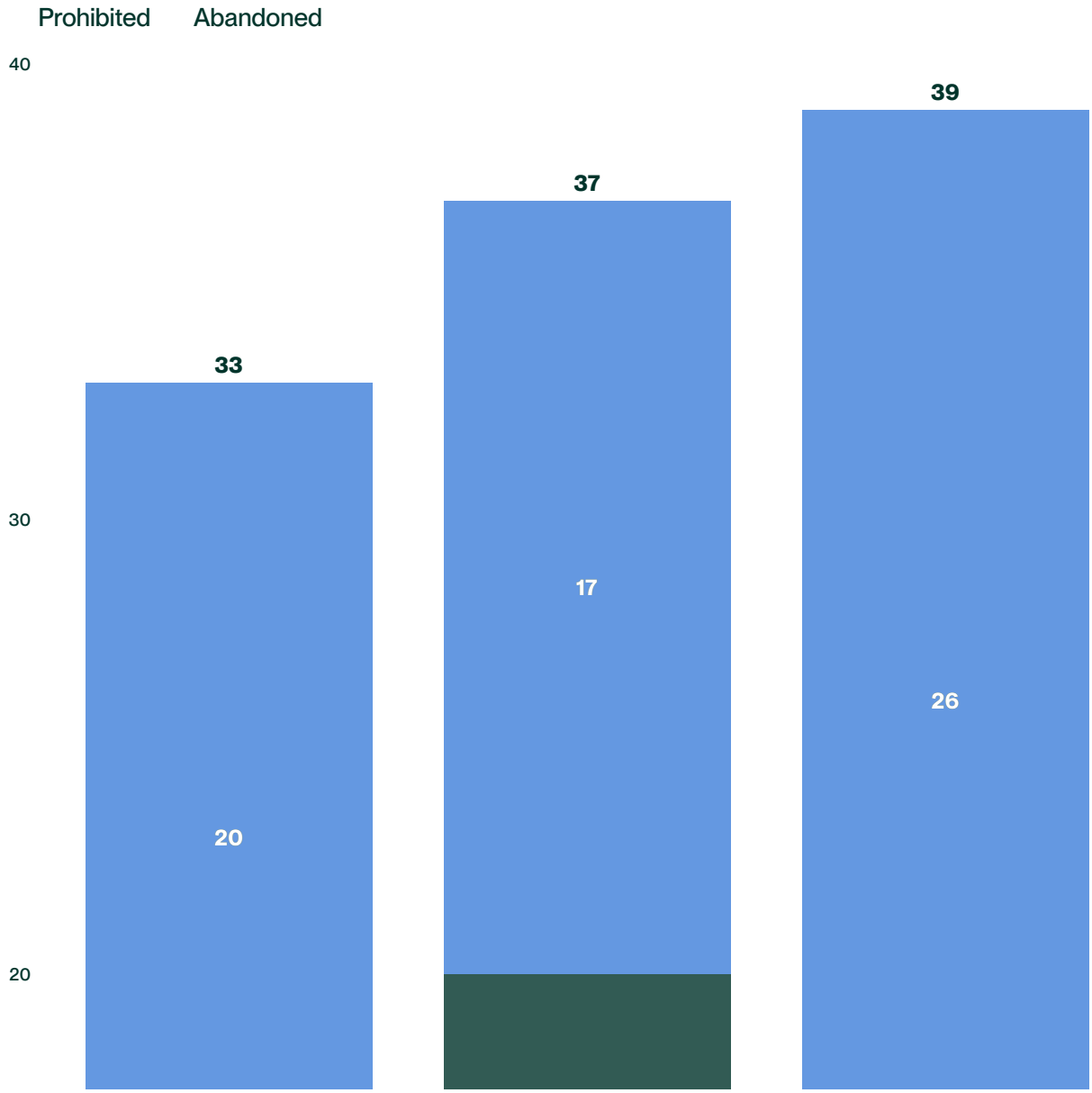
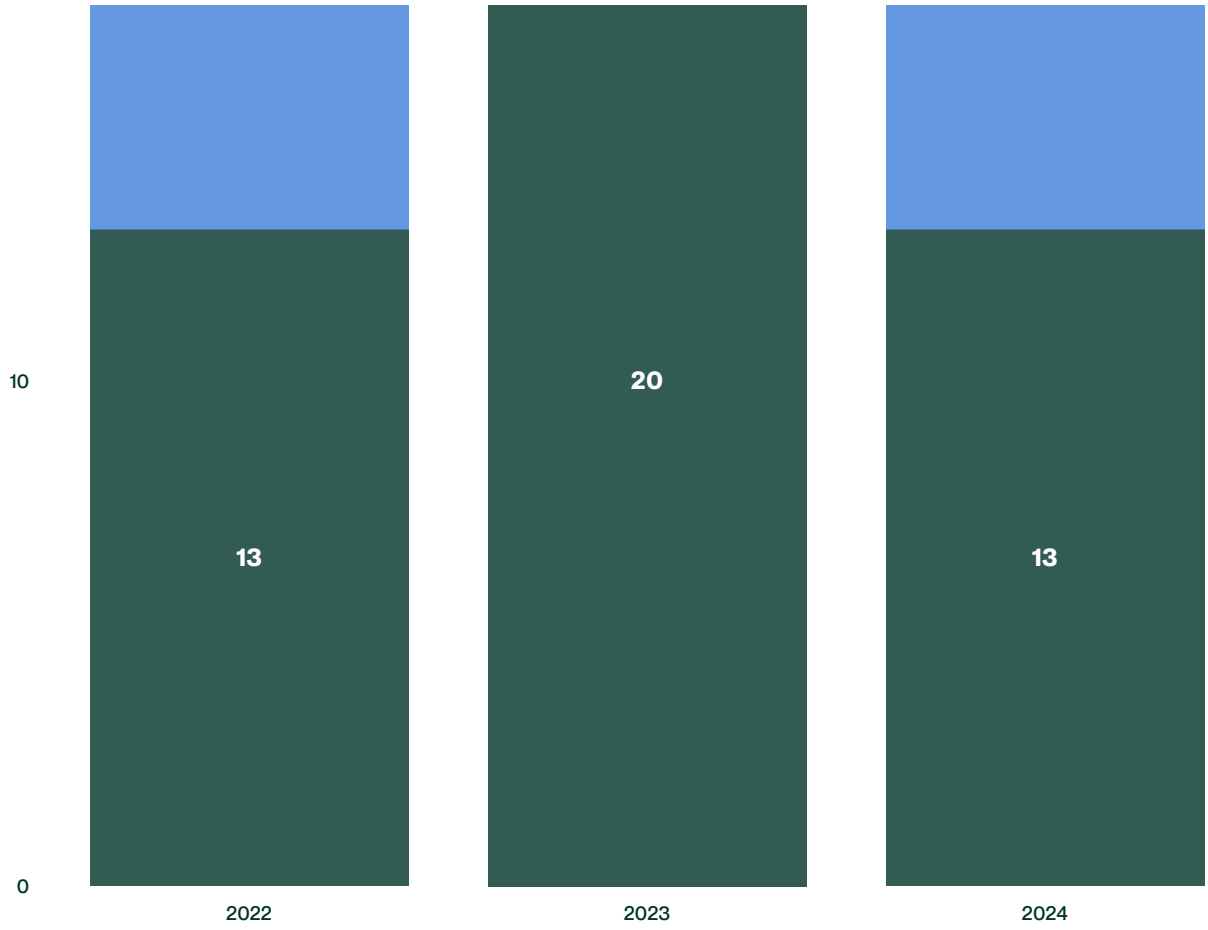
Antitrust authorities killed more deals in 2024, marking a third year of rising mortality levels. Where prohibition was on the cards, many dealmakers abandoned their transactions rather than staying the course. The U.S. agencies led the charge in taking a tough approach. But change is on the horizon. New administrations are expected to adopt a more balanced attitude to merger control enforcement in the year ahead.

Total deals frustrated





2022: Includes EC decision to prohibit Illumina/GRAIL, withdrawn in 2024 following a court ruling that overturned the EC's jurisdiction to review the deal

In 2024, 13 transactions were prohibited and a further 26 were abandoned due to antitrust concerns. Frustration levels across the jurisdictions surveyed have increased by 30% since 2021, despite fewer merger control filings.

In two thirds of deals frustrated, the parties walked away from the transaction due to authority concerns, up from just under half in 2023.

This is striking. It suggests that in the face of significant antitrust hurdles, merging parties have become less willing to fight their case to the end. Authorities' persistent skepticism over remedies, their focus on non-traditional concerns such as innovation, labor issues and ecosystems, plus lengthy review procedures, have all likely played a part.

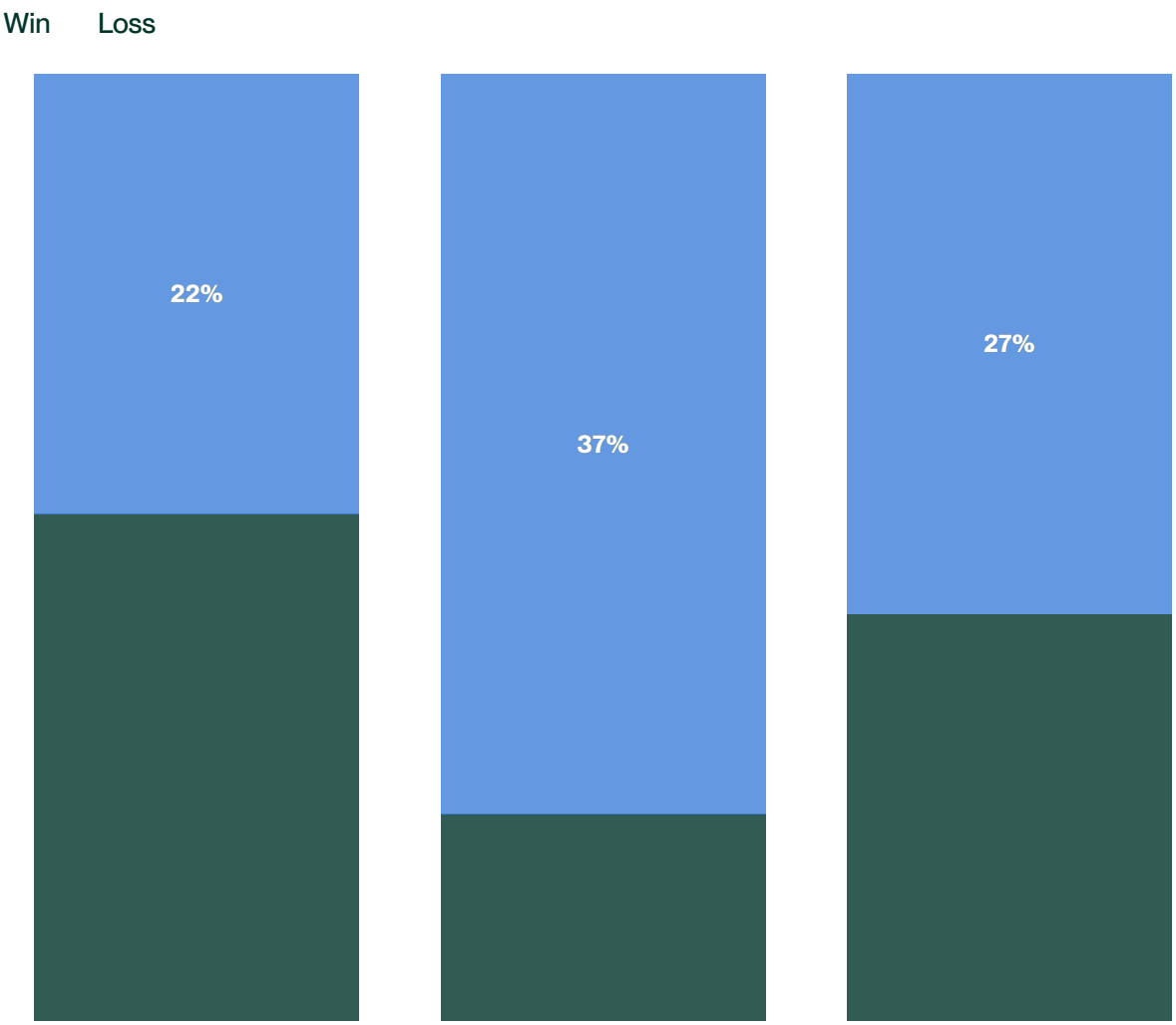
Our data on abandoned M&A is only part of the picture. It does not capture cases where antitrust risk forced parties to drop transactions at an early stage, in some cases even before a formal notification. For many antitrust authorities, this "deterrence" is itself a mark of success.

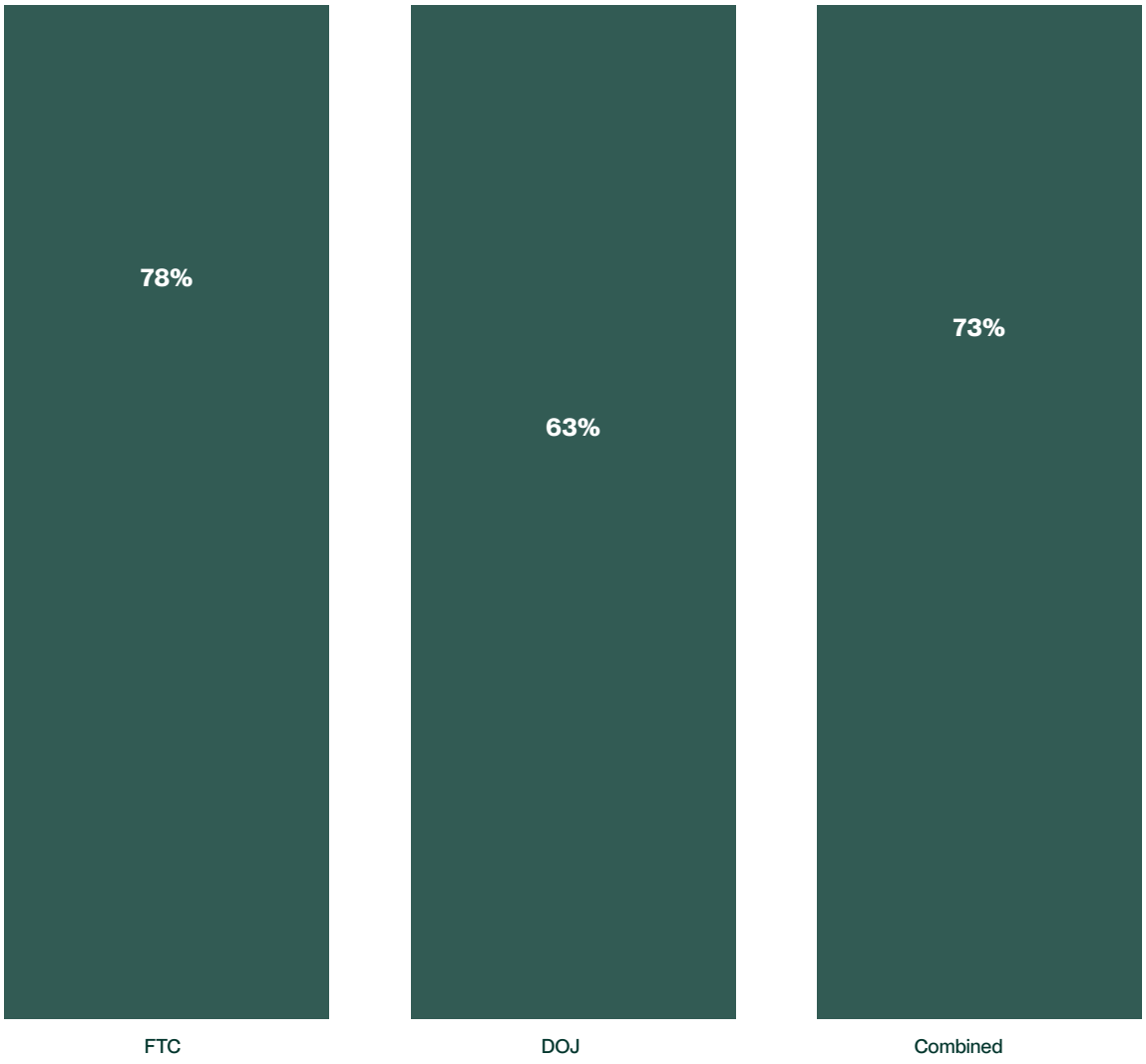
However, the tide may be turning. New leaders of antitrust agencies have been appointed in key jurisdictions at a time when a growing number of governments are prioritizing domestic growth, innovation and "competitiveness" over perceived regulatory burden. We expect political agendas to nudge at least some antitrust authorities toward a more permissive approach to merger control in 2025 and beyond. As a result, we expect some strategic deals that were previously seen as untenable to be back on the table.

U.S. agencies are the standout enforcers but for how long?

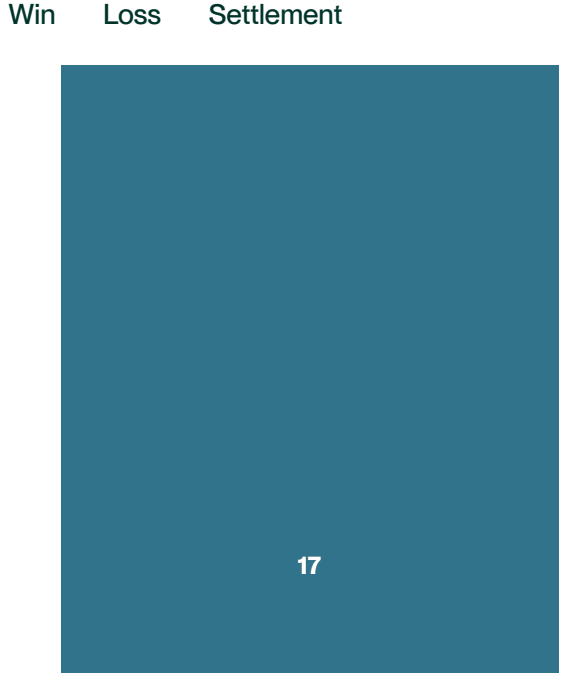
Win rate of U.S. agencies under Biden administration

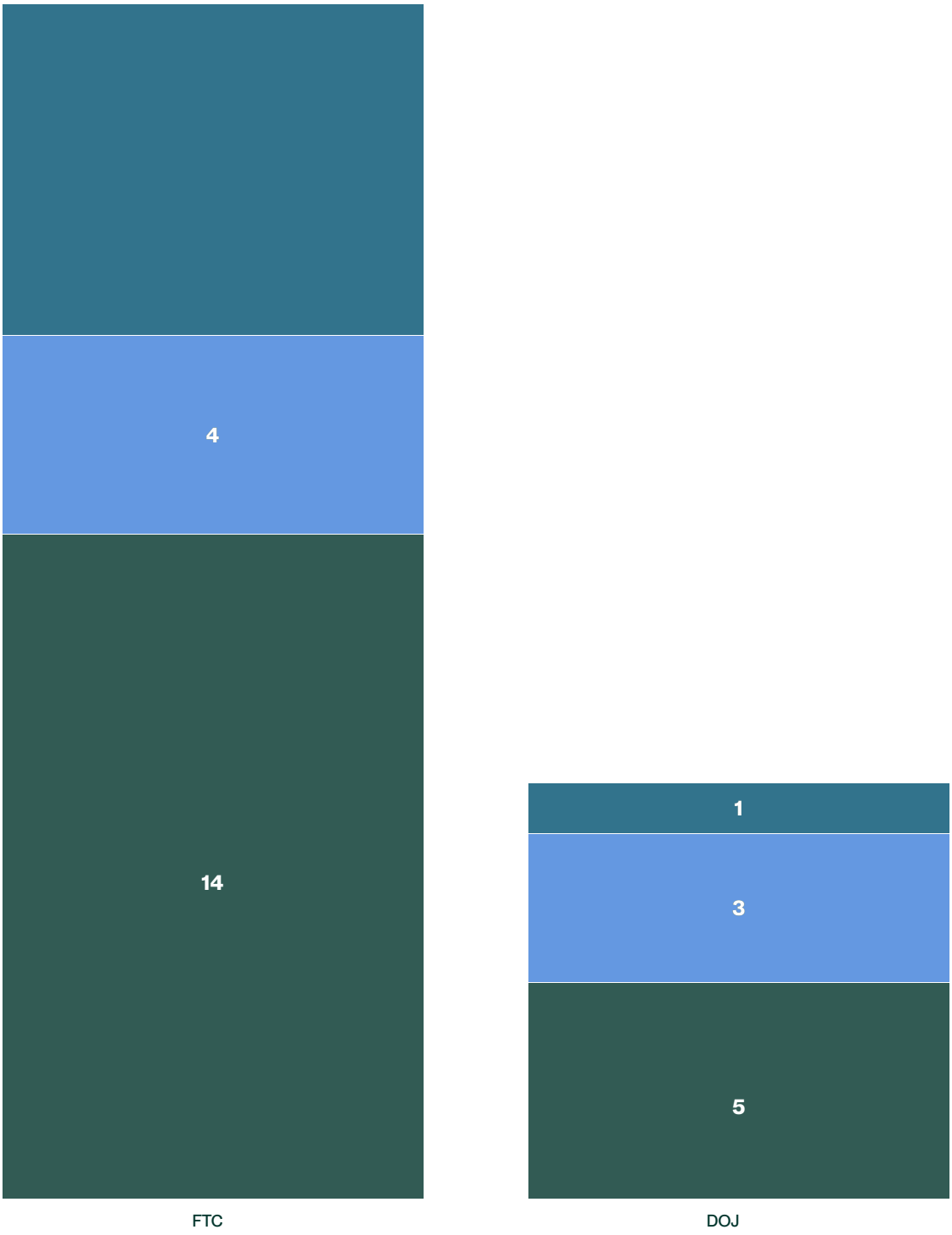
(as a proportion of contested deals resulting in a trial verdict)





Outcomes of U.S. agency complaints under Biden administration





The Biden administration's tough approach to merger control continued in 2024.

Five deals were formally prohibited, the most reported in a year since starting this report a decade ago. A further eight transactions were abandoned due to U.S. antitrust concerns[1]. Enforcement hit a wide range of sectors, including consumer, tech, healthcare and transport.

The U.S. antitrust agencies also won all but one merger challenge in federal court. This has boosted their total win rate during the Biden-era to 78% for the Federal Trade Commission (FTC) and 63% for the Department of Justice Antitrust Division (DOJ). Together, they won at trial in nearly three quarters of cases during President Biden's term.

Last year, litigation was buttressed by the 2023 revised merger guidelines. These set out a lower concentration threshold for presuming illegality of horizontal mergers. They also promote less traditional theories of harm, such as serial acquisitions, vertical mergers and potential adverse impact on labor markets.

The guidelines have already received judicial endorsement. But the agencies must take care to substantiate their claims. In Kroger/Albertsons, a district judge dismissed the FTC's labor market concerns as lacking evidence. Ultimately, though, the judge found sufficient harm to competition to block the deal, rejecting the parties' offer to sell off 600 stores/assets and make multibillion-dollar investments.

Internal documents have been key to the U.S. agencies' arguments in many merger challenges. Statements that merged firms can, for example, "kneecap competitors and dominate the market" have appeared front and center in complaints. It is a clear reminder that what the merging parties communicate about a transaction, in internal and external materials, can impact how a fact finder views the likely competitive effects of a deal.

This will be even more important now the updated Hart-Scott-Rodino (HSR) filing form has taken effect. It requires far more extensive disclosure, including on overlaps, labor issues, minority interests, prior acquisitions, foreign subsidies, and ordinary course documents. This raises the stakes for merging parties. It not only significantly increases their administrative burden but also gives the agencies access to more information upfront on which to assess a deal.

In the coming months, all eyes will be on just how far the new Trump administration's "pro-business" agenda, as well as new heads of the FTC (Andrew Ferguson) and DOJ (Gail Slater, once appointed) will impact the agencies' policies and enforcement.

We are unlikely to see a relaxation of merger control enforcement across the board. Challenges to M&A are still expected. These may well focus on sectors that have a direct impact on consumers (such as energy, healthcare and transport) and tech M&A.

However, we anticipate a greater openness to accepting merger remedies (see our article Antitrust authorities' skepticism of merger remedies causes headwinds for dealmakers). And, while the agency heads have said they will continue to apply the revised merger guidelines as the framework for their analysis, we may see them recenter their focus on more traditional theories of harm (rather than novel concerns such as labor market issues).

The upshot? More M&A is likely to proceed unscathed, with fewer deals being challenged, blocked or abandoned.

EU focuses on innovation concerns as new commissioner takes the helm

No deals were blocked at EU-level in 2024, but four were abandoned after the European Commission (EC) raised concerns[2].

The impact of M&A on innovation continued to be a focus. In Amazon/iRobot, for example, the EC was concerned that possible foreclosure strategies, including self-preferencing, could lead to less innovation (as well as higher prices and lower quality) for consumers of robot vacuum cleaners. The parties walked away from the deal late in the in-depth review.

Innovation concerns look set to remain high on the EC's agenda going forward.

Competition Commissioner Teresa Ribera took office on December 1, 2024, amid a flurry of debate over the future of EU merger control policy.

Influential reports by Enrico Letta and Mario Draghi called for greater European growth, competitiveness and innovation.

Draghi recommended the introduction of an "innovation defense" to enable innovation-enhancing effects of a deal to outweigh any harm to competition.

He also recommended greater significance be given to security and resilience in antitrust assessments, particularly in energy, defense and space sectors, and for more consolidation in certain industries, such as telecoms.

Ribera's mission statement encapsulates some of these elements.

She is tasked with modernizing EU competition policy, including reviewing the EC's horizontal merger control guidelines to give "adequate weight" to the EU's needs in respect of resilience, efficiency and innovation.

What will this mean in practice?

We could see the EC becoming more supportive of European companies scaling up in global markets.

We might also see the EC accepting efficiency arguments (which under current guidelines are subject to a very onerous standard of proof), perhaps based on pro-innovation effects or environmental/sustainability grounds. The latter is a key focus for Ribera—her antitrust portfolio is combined with responsibility for implementing the European Green Deal.

But this does not equate to waving all deals through the EU merger control process.

Ribera is clear that any action will not be at the cost of competition and consumers in Europe. She says that rigorous antitrust enforcement will continue, albeit "more focused, more targeted, more efficient."

U.K. hits completed deals, updates thresholds and gets a new chair

The number of frustrated deals in the U.K. fell to two in 2024[3]. However, the Competition and Market Authority (CMA)'s enforcement action once again showed the authority's hard-hitting powers to unwind completed transactions.

In blocking Spreadex's completed acquisition of Sporting Index, the CMA required the sale of the entire target business. This will be a tricky maneuver for the parties—the target's sports spread betting platform was shut down as

a result of the deal and must be redeveloped to form part of the divestment package. Spreadex is appealing.

The U.K. has just updated its merger control thresholds for the first time in over two decades.

In addition to an increased turnover test and a "safe harbor" for small mergers, a new threshold enables the CMA to take jurisdiction more easily over non-horizontal mergers and killer acquisitions. In theory, this could lead to more frustrated M&A, particularly in the digital sector (see our article Stormy skies for tech deals as antitrust scrutiny intensifies).

In terms of enforcement policy, the U.K. is at a similar crossroads as the U.S. and the EU.

The U.K.'s 2024 general election brought in a Labour government that is urging the CMA to prioritize growth, investment and innovation.

Chancellor Rachel Reeves has said that "[e]very regulator, no matter what sector, has a part to play by tearing down the regulatory barriers that hold back growth" while Prime Minister Keir Starmer took direct aim at the CMA when he announced to an international investment summit soon after the election that "[w]e will rip up the bureaucracy that blocks investment...We will march through the institutions and make sure that every regulator in the country—especially our economic and competition regulators—take growth as seriously as this room does."

Perhaps consistent with the rhetoric, in a dramatic move in January 2025, ministers replaced the CMA's chair with a former Amazon executive.

What this might mean for U.K. merger control enforcement is starting to take shape.

The government's strategic "steer" to the CMA sets out broad objectives, including that the CMA should use its powers in ways that enhance growth, international competitiveness and/or investment, and should act in ways that minimize uncertainty for businesses.

In parallel, the CMA has announced areas for improvement, such as shorter review periods and a "step change" in engagement with businesses. It will also review its approach to merger remedies, looking at when behavioral commitments may be appropriate as well as the scope for remedies that lock in efficiencies or preserve customer benefits. And it will consider, in global transactions, whether action by other authorities could resolve any U.K. concerns.

Arguably, a shift in direction was already underway—late last year, the CMA approved Vodafone's merger with Three subject to unprecedented behavioral remedies, including price caps (read more in our article Antitrust authorities' skepticism of merger remedies causes headwinds for dealmakers).

Ultimately, all this could pave the way for a more light-touch approach to merger control enforcement in the U.K. Developments over the coming months will be pivotal.

Some loosening in Asia but watch out for Australia

Several Asian countries relaxed aspects of their merger control rules in 2024:

- China's increased notification thresholds have resulted in around 20% fewer filings.
- South Korea introduced new exemptions (including for private equity) and raised reporting thresholds for business transfers. However, it remains tough on deals raising antitrust concerns, and last year notched up its first prohibition in eight years.
- Certain thresholds have been increased in India, although this is balanced by a new deal value threshold which brings more mergers—including killer acquisitions—in scope (see our article Rising review risk for deals not meeting merger control thresholds).

Australian merger control will soon have more teeth. A new mandatory, suspensory merger control regime will take full effect from January 1, 2026,

with transitional provisions kicking in from mid-2025. Notification thresholds are low and complex deals, as well as serial acquisitions, will face closer scrutiny. Parties with ongoing or upcoming deals with an Australian nexus should start preparing now.

A "whole of antitrust" approach

As the armories of antitrust authorities expand, some are taking a more holistic approach, using the full breadth of their toolkits. We have seen links between merger control and behavioral antitrust enforcement.

In the U.S., the FTC challenged serial acquisitions using a combination of rules prohibiting monopolies, unfair methods of competition and anticompetitive acquisitions (see our article Private equity and serial acquisitions continue to feel the antitrust heat). In two merger remedy cases the FTC banned the target's CEO from having a seat on the acquirer's board due to alleged concerns over collusion.

The EC opened an investigation into Delivery Hero and Glovo. It suspects that market allocation, information exchange and a no-poach agreement could have been facilitated by Delivery Hero's minority stake in Glovo. In Belgium, the antitrust authority launched an investigation into whether a below-threshold acquisition in the flour sector amounts to an anticompetitive agreement (applying the Towercast case law— see our article Rising review risk for deals not meeting merger control thresholds for more on this). In Brazil, a probe into whether car makers engaged in anticompetitive conduct started after the antitrust authority blocked their joint venture under the merger control regime.

There is also interaction between merger control scrutiny and other regulatory mechanisms. Both the EU and U.K. digital markets regimes require designated digital firms to submit information on transactions, even where merger control thresholds are not met.

The web of antitrust-based regulatory oversight is becoming even more tangled.

The storm before the calm?

It could take time for new enforcement policies to fully emerge in key jurisdictions.

Even if the result is a relatively more permissive (or at least a more traditional) approach, the interim period—especially for multinational M&A raising novel or complex antitrust issues—will be uncertain.

Considering antitrust and other regulatory risk from the outset will help merging parties navigate any choppy waters.

They should factor in the time and resources needed to steer through multiple regulatory processes. Negotiating appropriate risk allocation mechanisms in deal documentation is a must.

Footnotes

1. Qualcomm/Autotalks, abandoned due to “lack of regulatory approvals in a timely fashion”. It was being reviewed in the U.S., the EU and the U.K.

2. Qualcomm/Autotalks, abandoned due to “lack of regulatory approvals in a timely fashion”. It was being reviewed in the U.S., the EU and the U.K.

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