



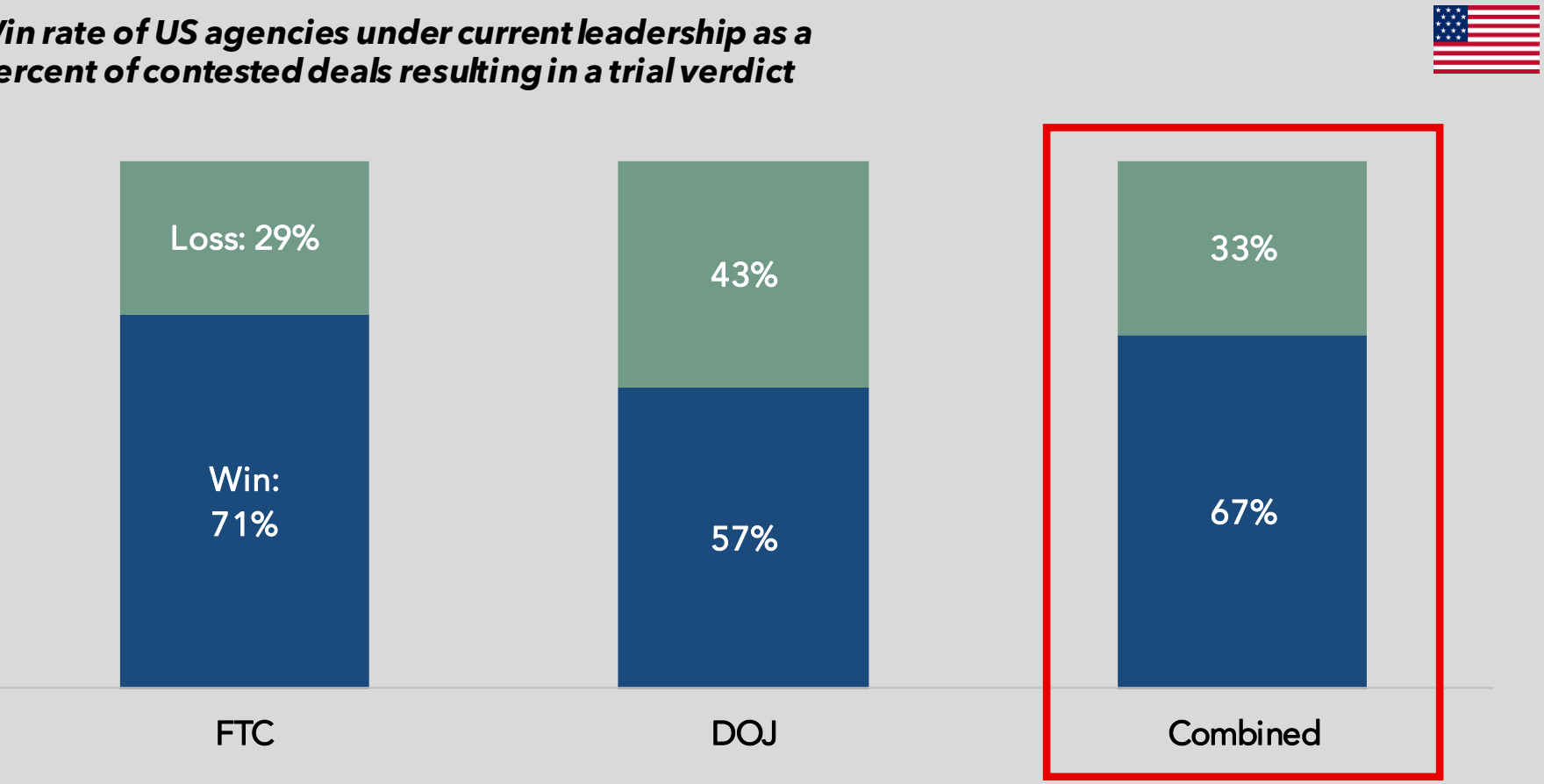
Policy Note



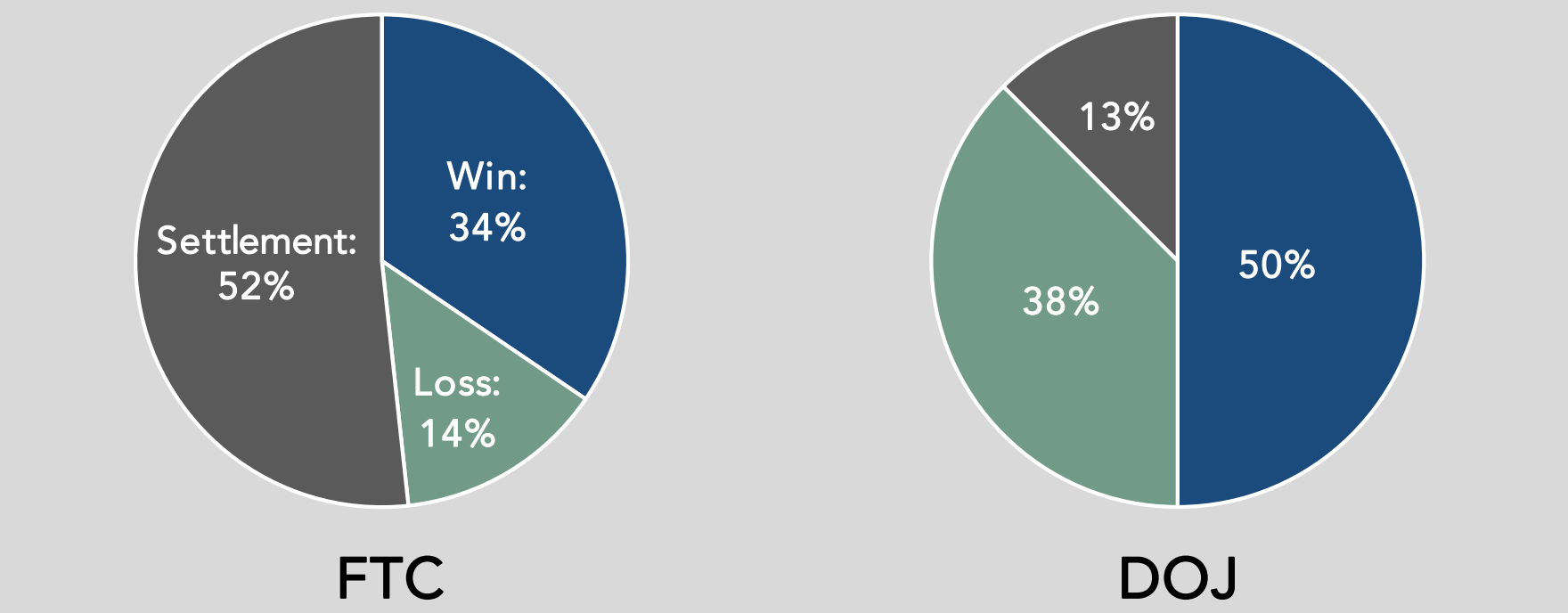
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In December 2023, US regulators released new merger guidelines, effectively **lowering the threshold** for deal scrutiny. In addition, regulators under the Biden Administration have stepped up merger control enforcement, and have been fairly successful. In 2023, US regulators won two thirds of contested deals that resulted in trial. Further, the agencies believe their more hawkish attitude has deterred potentially anti-competitive deals from being announced.










Outcomes of US agency complaints under current leadership



In December 2023, the US Federal Trade Commission (FTC) and Department of Justice (DoJ) released new guidelines for assessing whether a merger presents sufficient risk to warrant agency scrutiny and potential enforcement action. The guidelines apply to both horizontal and vertical mergers and supersede all prior published guidelines. The guidelines take a structural approach to analyzing markets, expand the scope of review, and effectively lower the bar to scrutinize transactions.

Key points in the 2023 merger guidelines

	Market Share	Agencies will presume a merger is illegal if it will result in a Herfindahl-Hirschman index (HHI) of at least 1,800 and an increase in HHI of 100 from pre-merger levels, significantly lowering the bar from the 2010 Horizontal Merger guidelines of 2,500 and 200, respectively.
	“Dominant” Market Position	A company “approaching monopoly power” demonstrated either by a firm’s power to raise price or reduce quality or by the merger resulting in at least 30% market share will be presumed to be illegal.
	Consumer Welfare Standard	Guidelines take a structural approach to markets by focusing on the 30% market share threshold rather than the consumer welfare standards.
	Procompetitive Effects	Guidelines de-emphasize procompetitive effects of a merger by raising the bar of demonstrating those benefits.
	Vertical Mergers	Vertical mergers that would give merging parties the ability and incentive to weaken or exclude rivals would be presumptively illegal.
	Access Control	Guidelines highlight the risk of mergers that give an acquiring firm control over access to products, services or customers that rivals use to compete.
	Ecosystem Competition	Addresses merger situations where an incumbent firm operates in a wide array of products and services and may be partially constrained by a compilation of products and services from other providers. The approach allows scrutiny not only of the acquisition of a direct competitor but also of a niche or partially overlapping service . The approach is novel in the US but embraced by agencies in the UK and EU.

Source: (1-3) A&O Sheaman, “Global trends in merger control enforcement.” Three transactions were formally prohibited. In Illumina/GRAIL, the FTC won on appeal, with Illumina then agreeing to sell off GRAIL in light of the court’s ruling and the EC’s order to unwind the deal. Each agency also secured a permanent injunction – Jet Blue/American Airlines (DOJ) and a healthcare technology transaction (FTC). A further seven deals were abandoned due to US antitrust concerns. (4) Skadden, “DOJ and FTC Release Final 2023 Merger Guidelines Formalizing Aggressive Merger Enforcement Playbook”. White & Case, “U.S. Antitrust Agencies Finalize Changes to the U.S. Merger Guidelines”. Mercatus Center, “Decoding the 2023 FTC and DOJ Merger Guidelines: Insights into Shifting Antitrust Enforcement.”

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“Macro stability isn’t everything, but without it, you have nothing.”