

010:GTD/TOLS;3D 0100:0690:84:0H379.85:0L1243.74:0C1270.33:02:24:(4.96%)

000-V6F4943K

LPK 482.98 ▼ 15.33

2023 Year in Review

Behind the Numbers

TUESDAY, FEBRUARY 13, 2024

12.17

AAY

OPT 25.85 ▼ 1.47

OPT 25.85 ▼ 1.47

DKT 249.71 ▼ 18.90



Dechert

LLP

Welcome and introductions



Laurence Bary
Partner
Paris



Mike Cowie
Partner
Washington, D.C.



James Fishkin
Partner
Washington, D.C.



Michael Okkonen
Partner
Brussels



Bernardo Piereck
Partner
Washington, D.C.

Global award-winning antitrust practice

AWARDS



- Recognized for innovation in North America, Europe and Asia-Pacific
- Financial Times Innovative Lawyers Awards, 2022

2022

2023



- Ranked as a leading firm for antitrust/competition in Belgium, France, and the United States

2018–2023



- Ranked as one of the leading antitrust/competition practices in the world as part of Global Competition Review's Global Elite; "Elite" in France and Pennsylvania, "Highly Recommended" in Brussels

2017–2023



- Ranked for Merger Control and Civil Litigation/Class Actions: Defense in the U.S.
- Recognized in the Belgium, France and Germany

2023



- ESG and Community Impact Leader

2022



- Competition Practice Group of the Year

2019–2020

DAMITT “significant” antitrust merger investigations in U.S. and EU



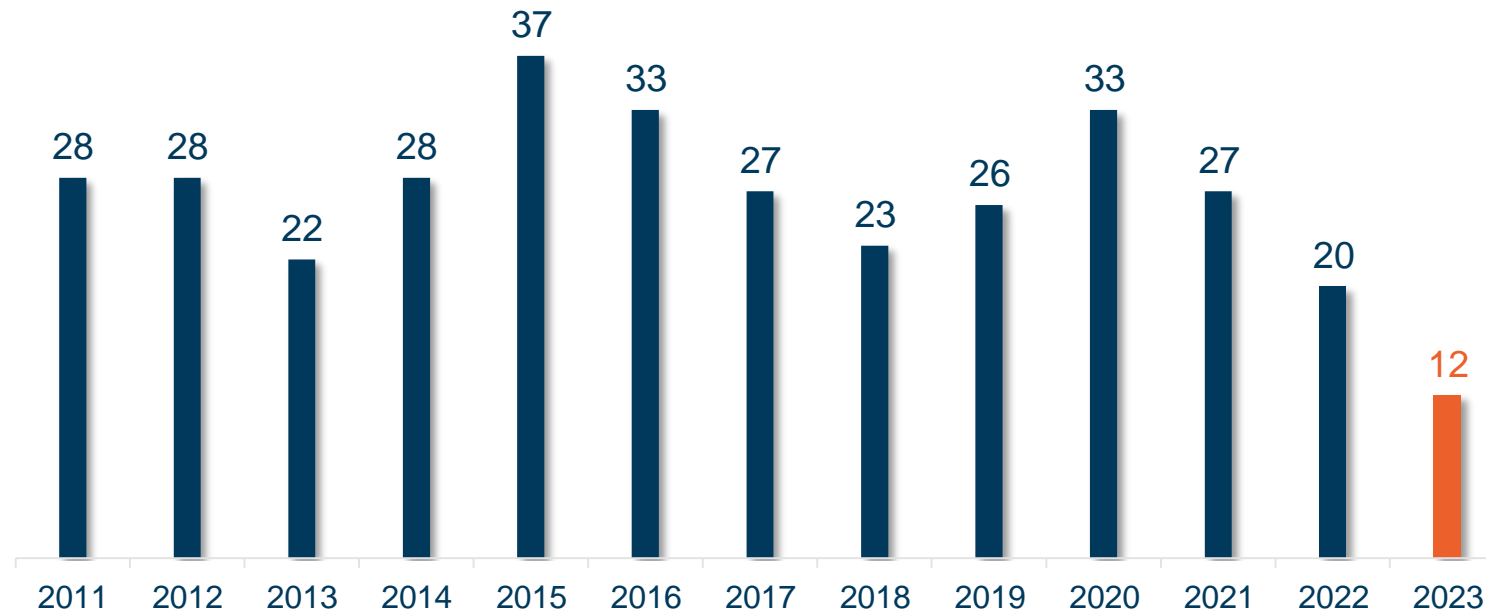
- United States: investigations of proposed Hart-Scott-Rodino reportable transactions that result in a public action by one of the antitrust agencies, including a:
 - closing statement
 - consent order
 - complaint challenging a transaction, or
 - press release regarding a transaction abandonment
- European Union: investigations of transactions subject to the EU Merger Regulation and resulting in either:
 - Phase I remedies, or
 - initiation of a Phase II investigation



Number of U.S. significant investigations



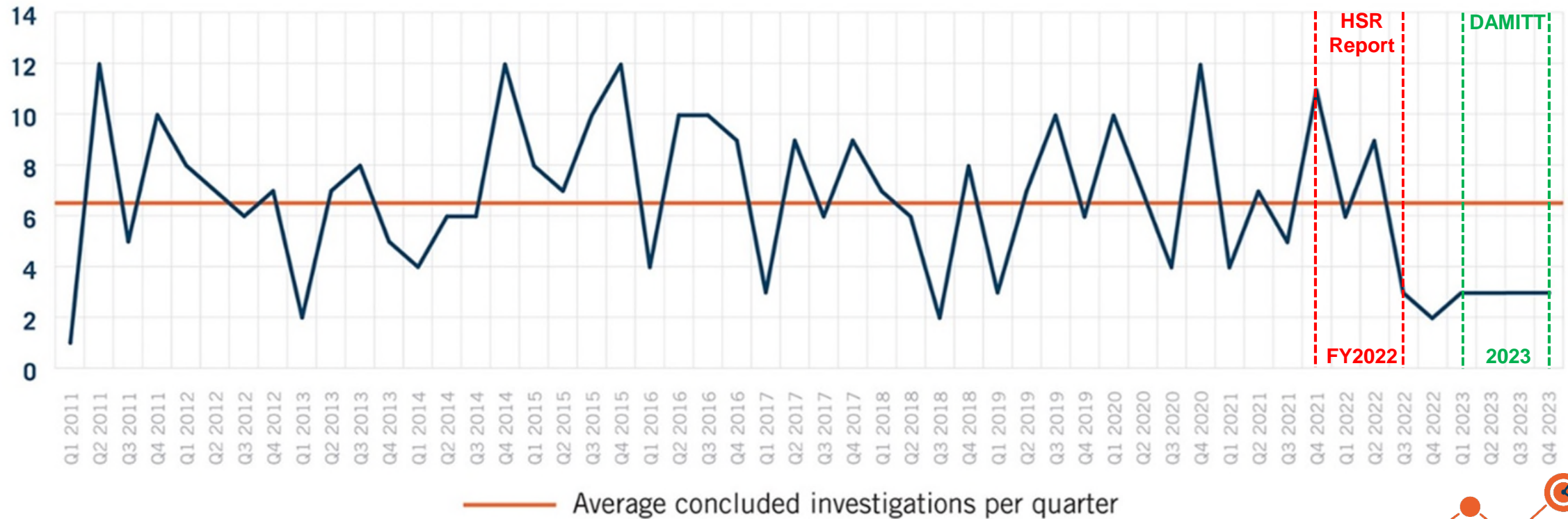
- 12 significant U.S. merger investigations in 2023
- This is by far the lowest observed in DAMITT history.



Headlines About “New Record” Highs Reflect Stale Data



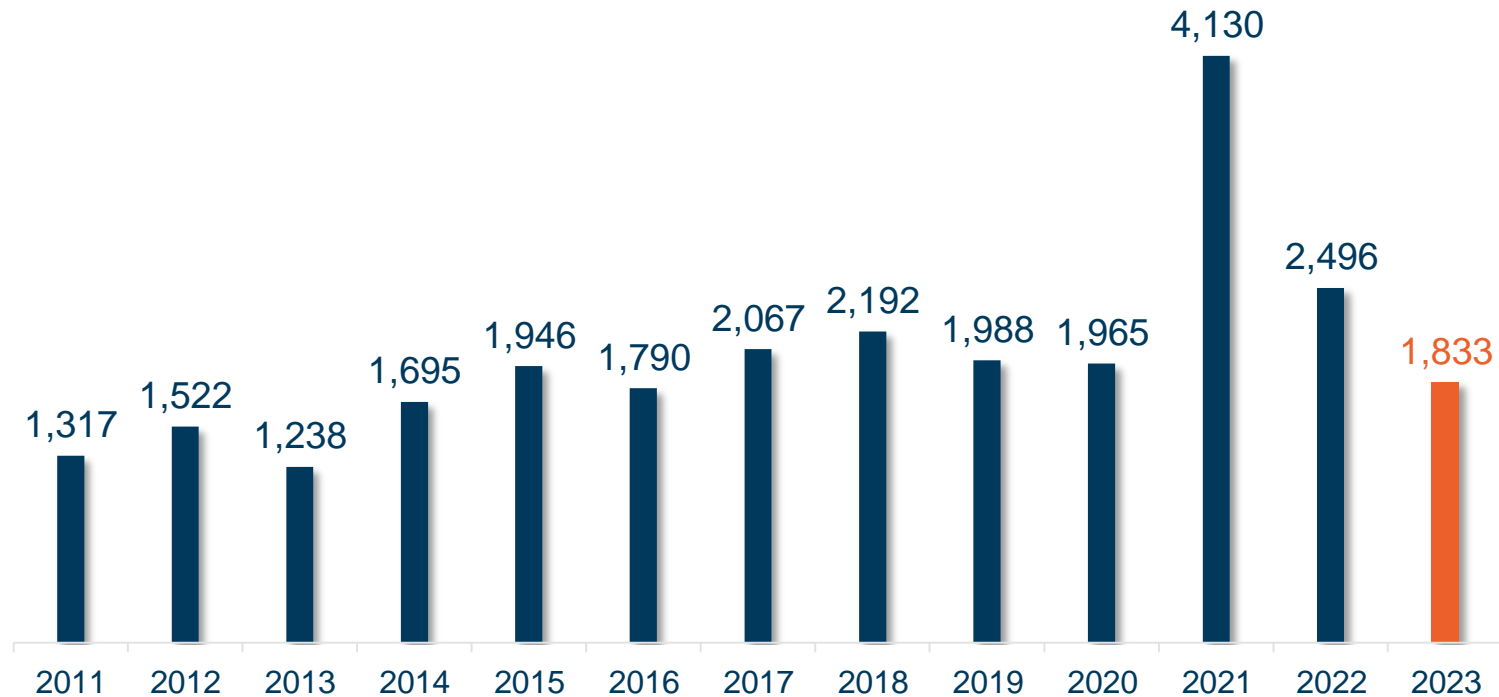
- The agencies’ recent HSR Report to Congress lags **five quarters behind** DAMITT



U.S. merger notification levels fell



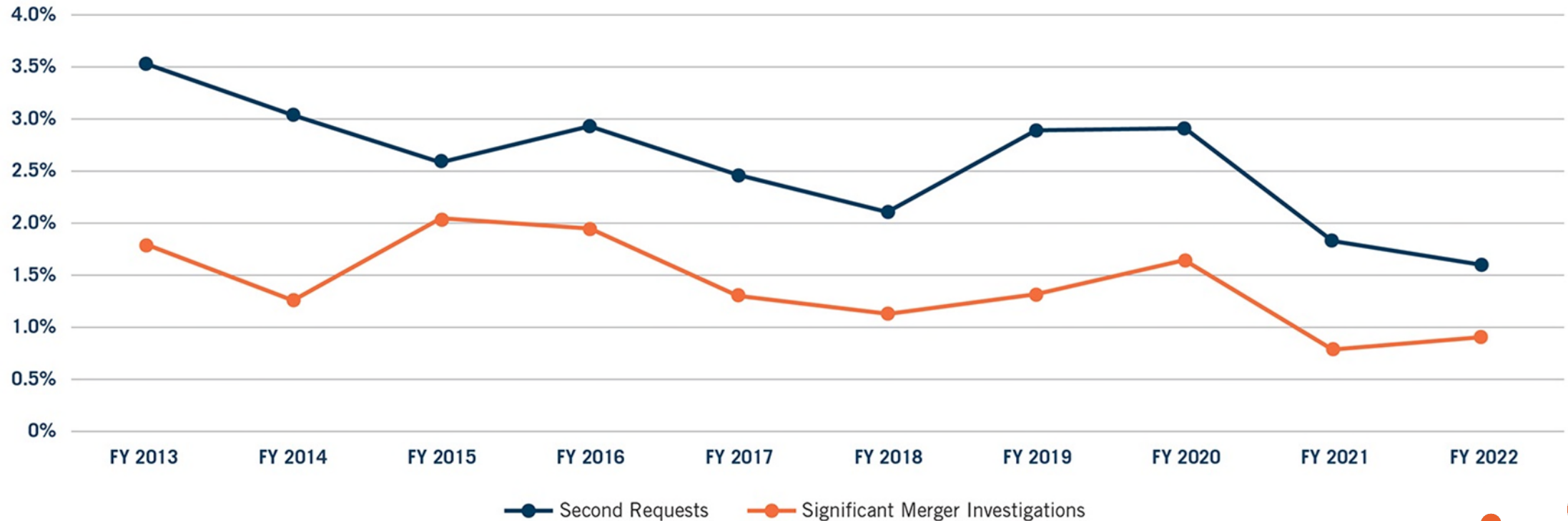
- Lower HSR filings reflect an overall slowdown in M&A activity



Percentage of Filings Leading to Second Requests Also Falls



- FY 2022 saw the lowest proportion of filings with Second Requests in the history of the HSR Act



DOJ Confirms Trend of Fewer Investigations But More Complaints



Agency Update with the U.S. Department of Justice – Antitrust Division

2023 ABA Antitrust Spring Meeting

March 29, 2023

Hetal J. Doshi, Deputy Assistant A.G., DOJ Antitrust Division

Andrew J. Forman, Deputy Assistant A.G., DOJ Antitrust Division

Margaret Goodlander, Deputy Assistant A.G., DOJ Antitrust Division

Michael B. Kades, Deputy Assistant A.G., DOJ Antitrust Division

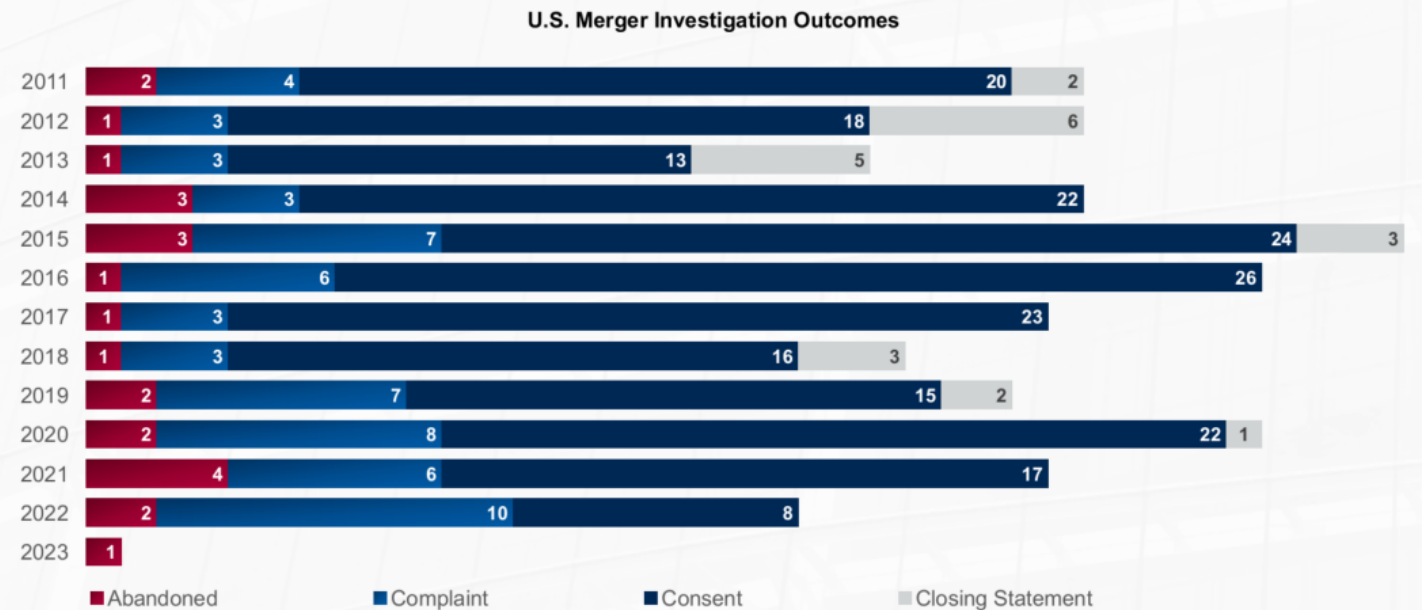
Manish Kumar, Deputy Assistant A.G., DOJ Antitrust Division

Susan Athey, Chief Economist, DOJ Antitrust Division

Moderated by: Fiona Schaeffer, Milbank LLP, fschaeffer@milbank.com

U.S. Merger Investigations (2011-2022)

- 2022 was not an unusually active year for investigations, but as promised, the agencies sued to block more transactions



NOTE: The above chart contains only investigated HSR reportable transactions that concluded with a consent order, complaint, official closing statement, or abandonment as announced by agency press release. Additional investigations may have concluded without public attention.

SOURCES: DAMITT; DOJ and FTC Press Releases. Current as of February 8, 2023.

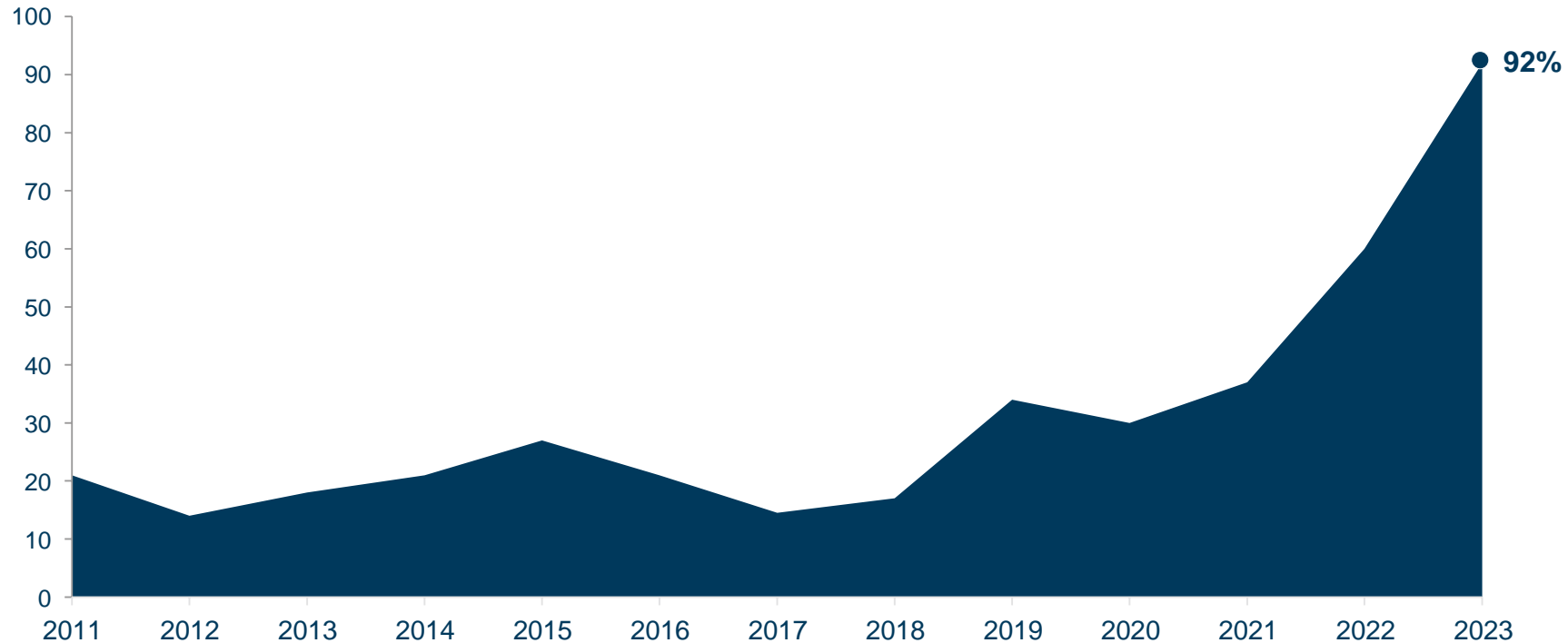
2023 ABA Antitrust Spring Meeting

7

Percentage of U.S. Significant Investigations Resulting in a Complaint or Abandoned Transaction



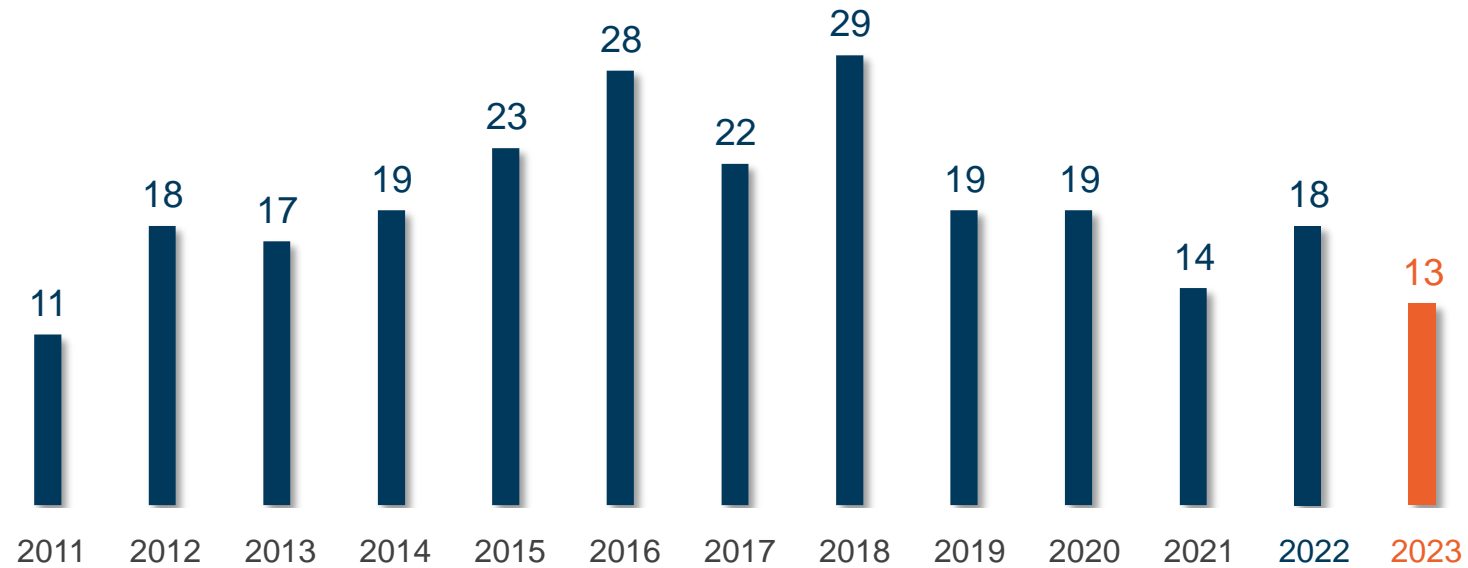
- A record **92 percent** of investigations ending with complaints or abandoned deals demonstrates growing skepticism of merger remedies and settlements



Number of EU significant investigations



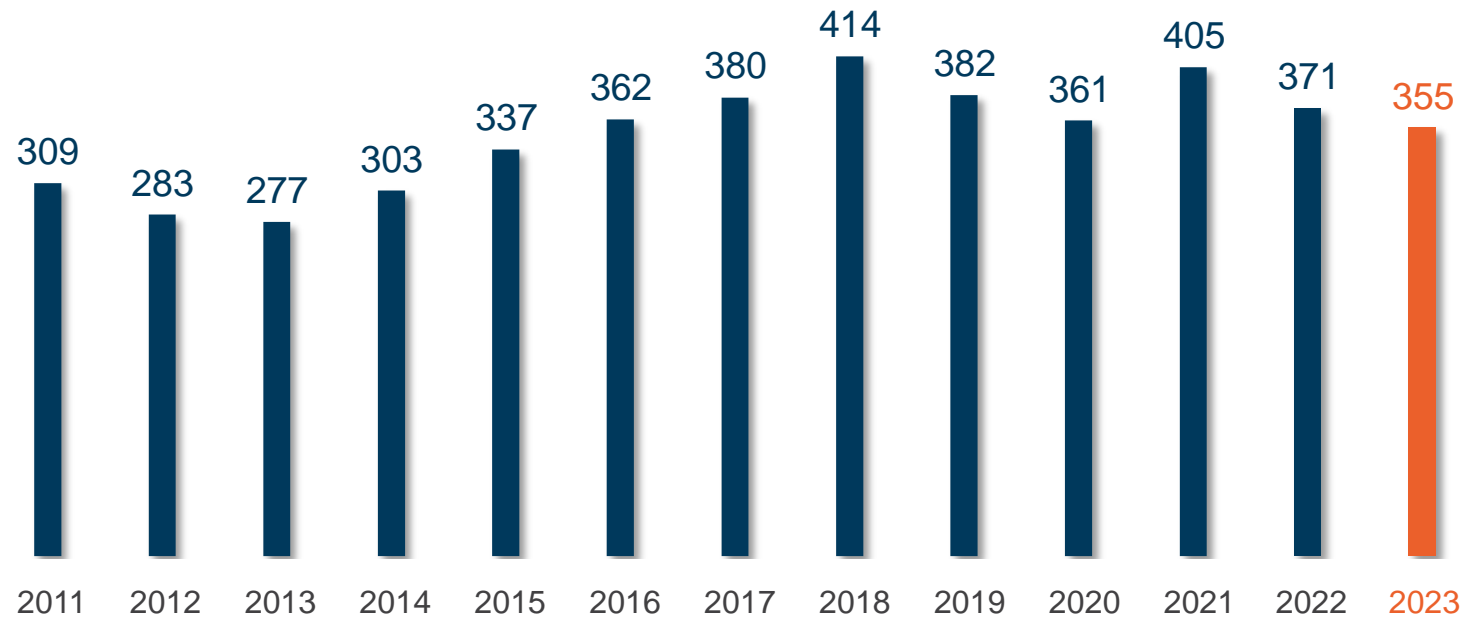
- Number of significant investigations in the EU in 2023 plummet and falls below the last decade average



Decrease in number of EU merger notifications



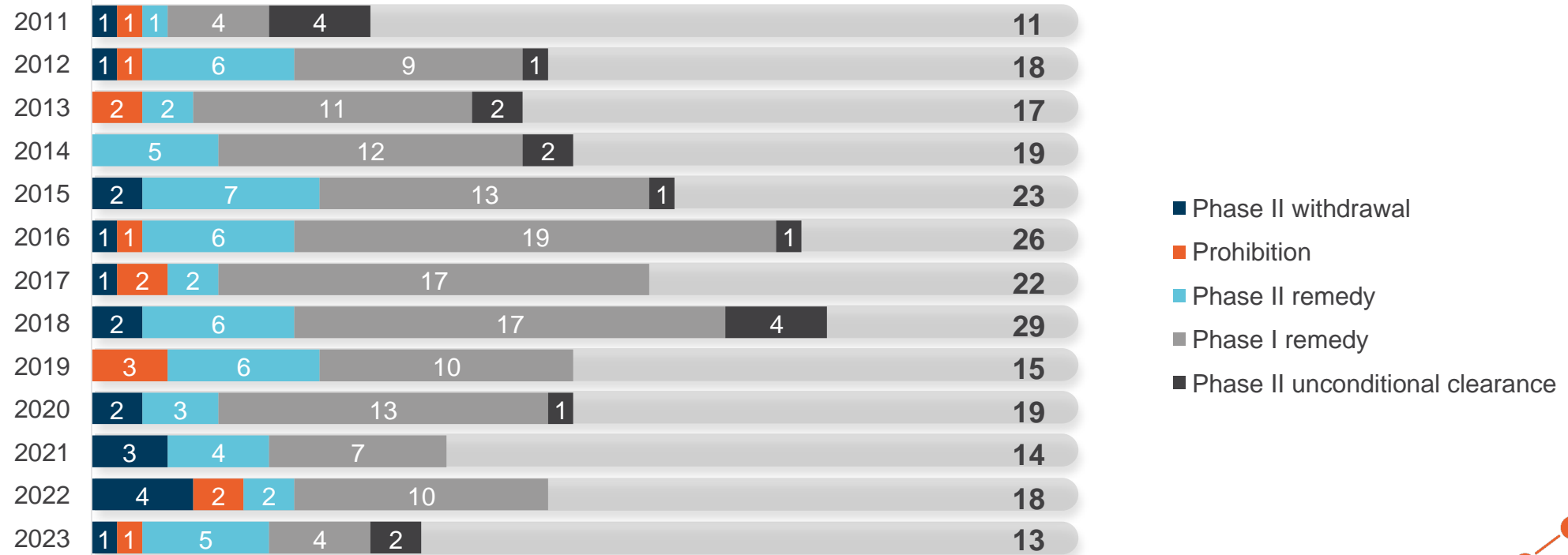
- **355 cases** notified in 2023: number of EU filings continues to slowly decrease



Outcomes of EU significant investigations



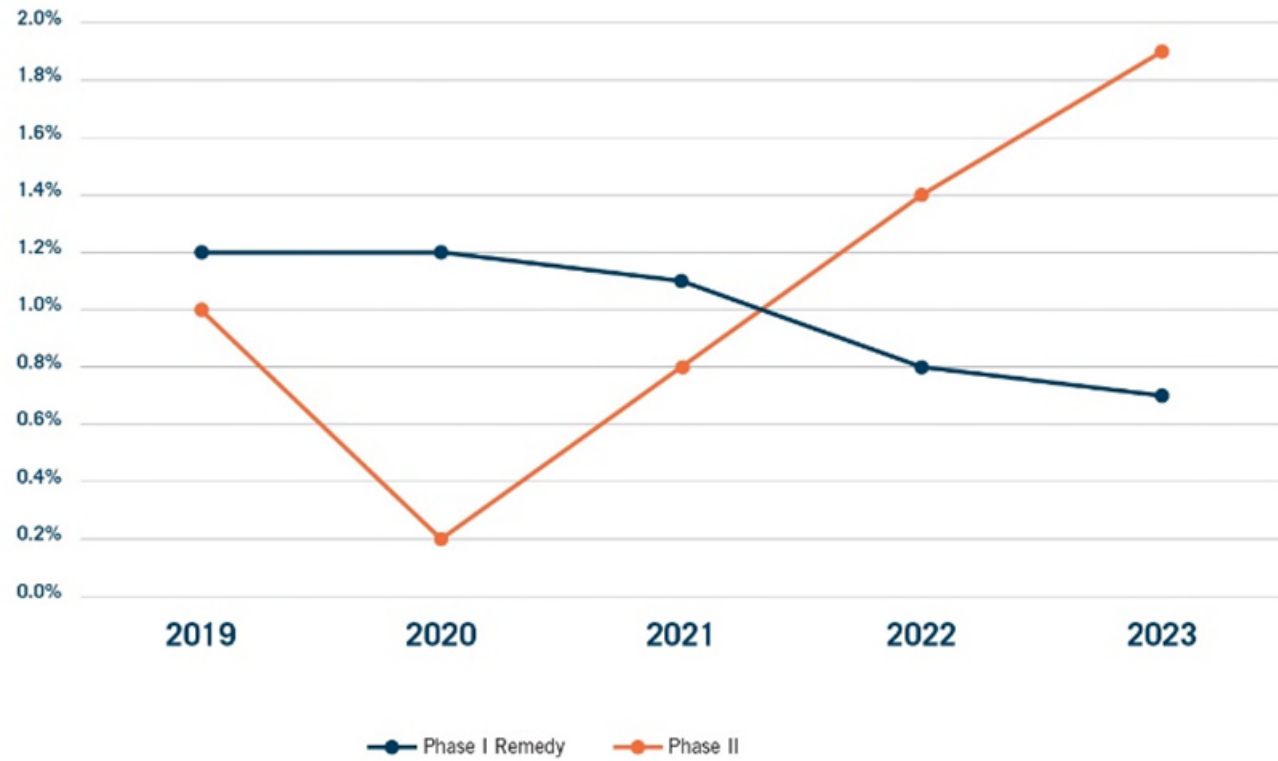
- Only 4 cases cleared in Phase I with remedies – the lowest since 2011
- With 9 Phase II cases concluded in 2023 the EC remains above average



Intervention rate remains stable with more cases going to Phase II

- Despite low numbers, **EU merger enforcement remains vigorous**, with a stable – if not slightly increasing – proportion of notified cases triggering a significant investigation
- Cases with substantive issues are **more likely than ever to undergo a Phase II investigation** than to be cleared in Phase I with remedies

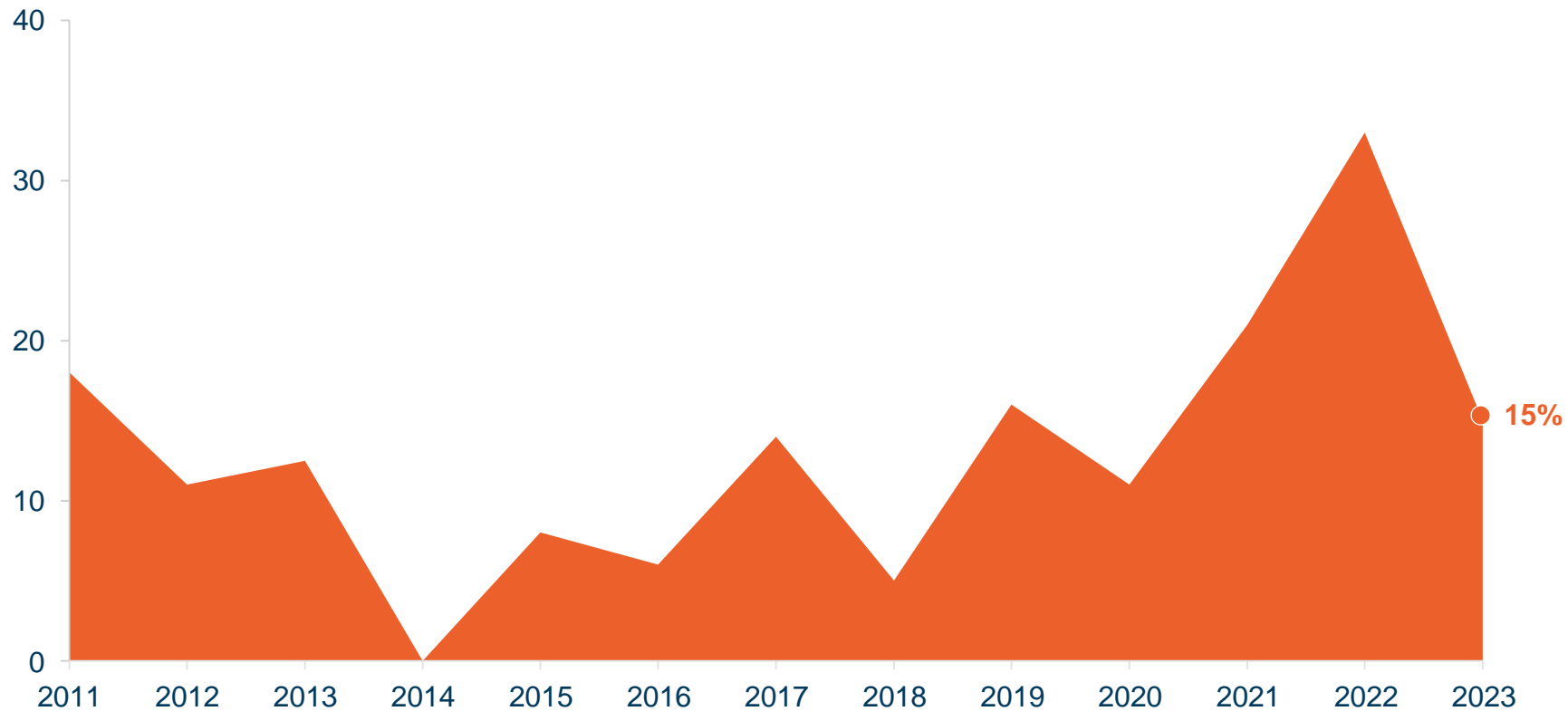
PROPORTION OF DEALS NOTIFIED EACH YEAR UNDERGOING A SIGNIFICANT INVESTIGATION



Percentage of EU Significant Investigations Resulting in a Prohibition or Abandoned Transaction



- Proportion of significant investigations resulting in a blocked or abandoned transaction falls to **15%** after 2022 record-high



2023 M&A Trends



Less Predictability

- Antitrust Risk as a Factor in Selecting Buyer



Regulatory Covenants

- Efforts Provisions
- Reverse Break Fees
- Divestiture Requirements
- Duty to Litigate



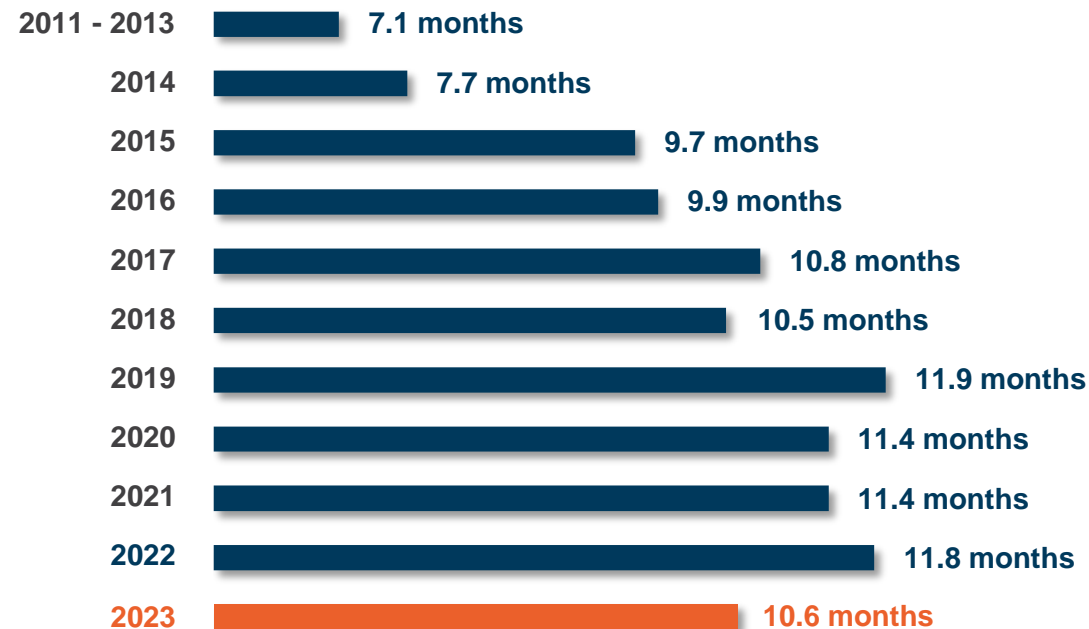
Termination Dates



Duration of U.S. significant investigations



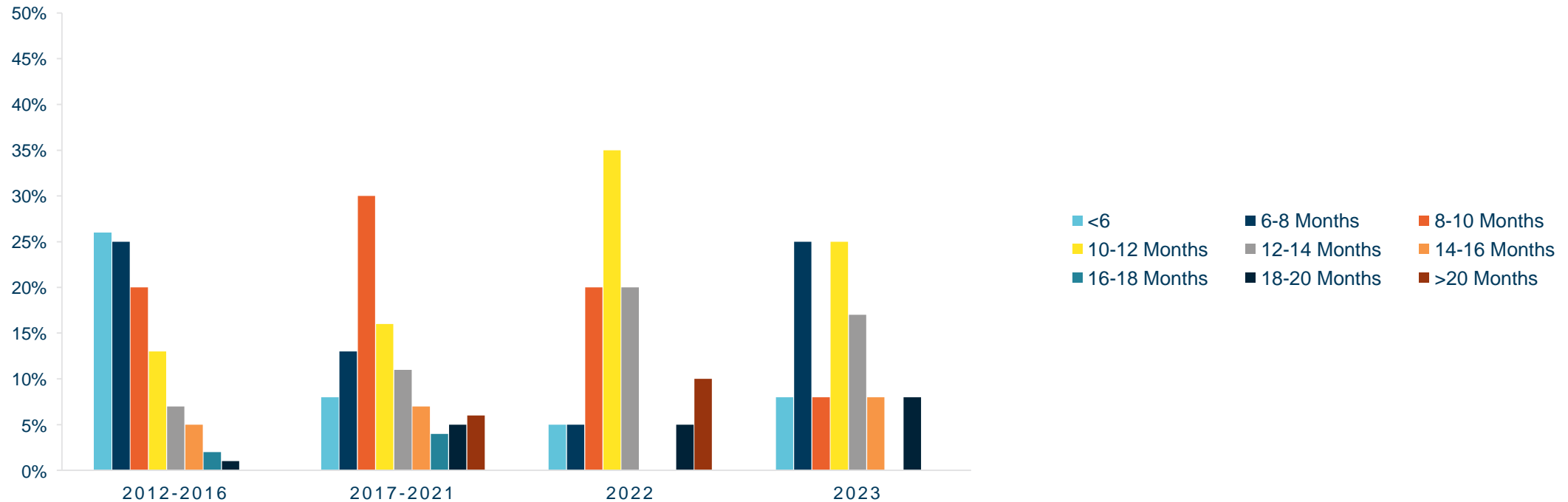
- The average ticked downwards to **10.6 months** in 2023
- The Q4 2023 average was **11.2 months**
- Longer durations have significant M&A implications



Spread of duration for U.S. significant investigations



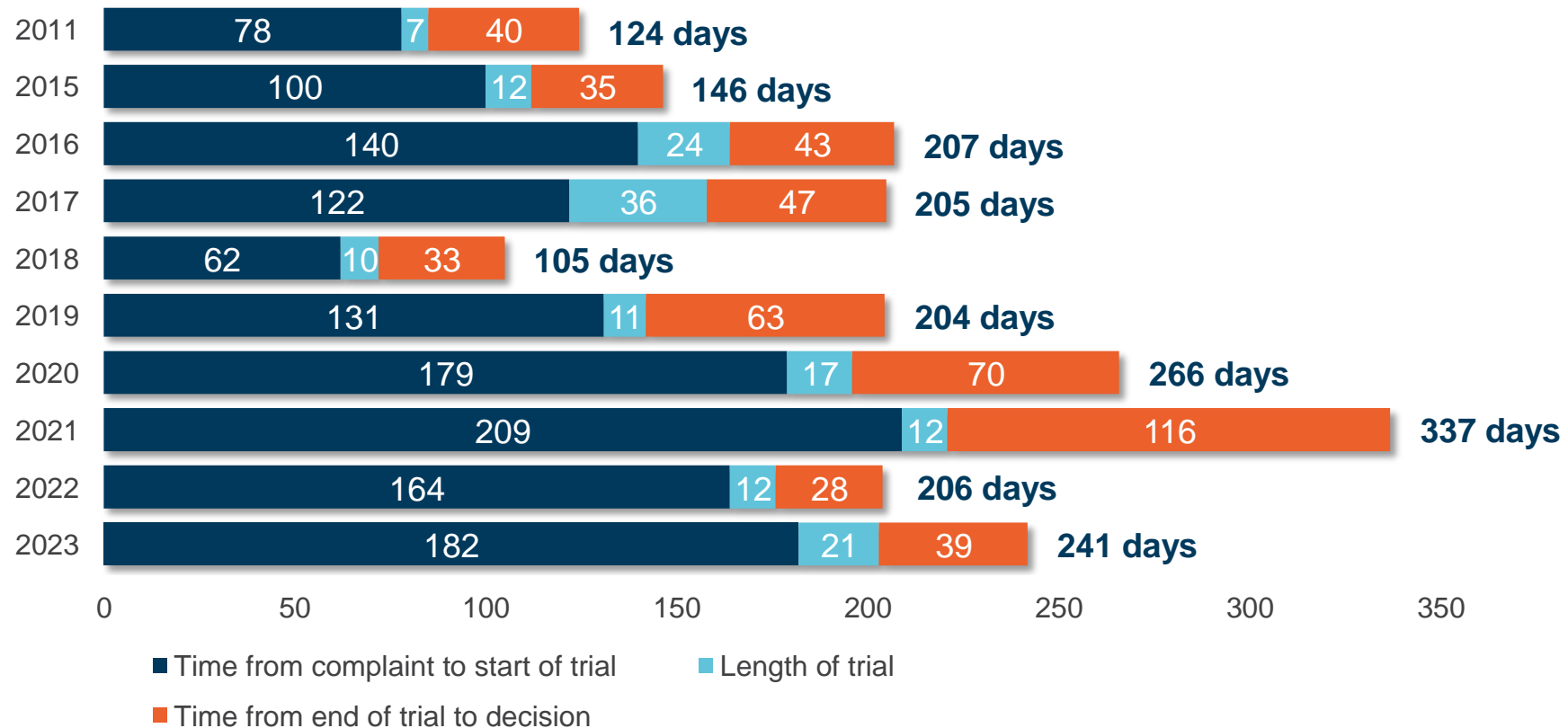
- 2023 saw a surge in investigations falling under 8 months



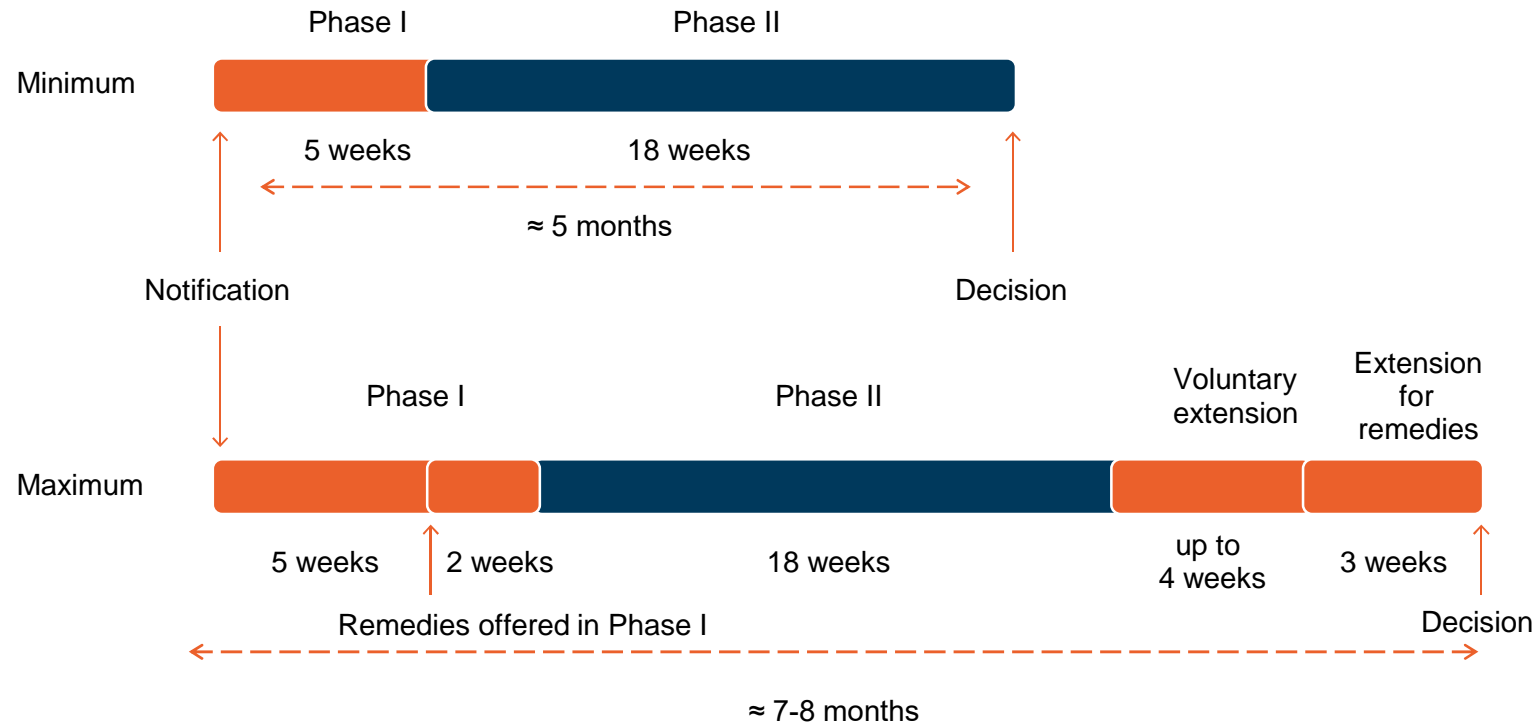
Duration of U.S. merger litigation



- Lengthy JetBlue/Spirit trial **pushes up average duration** for 2023



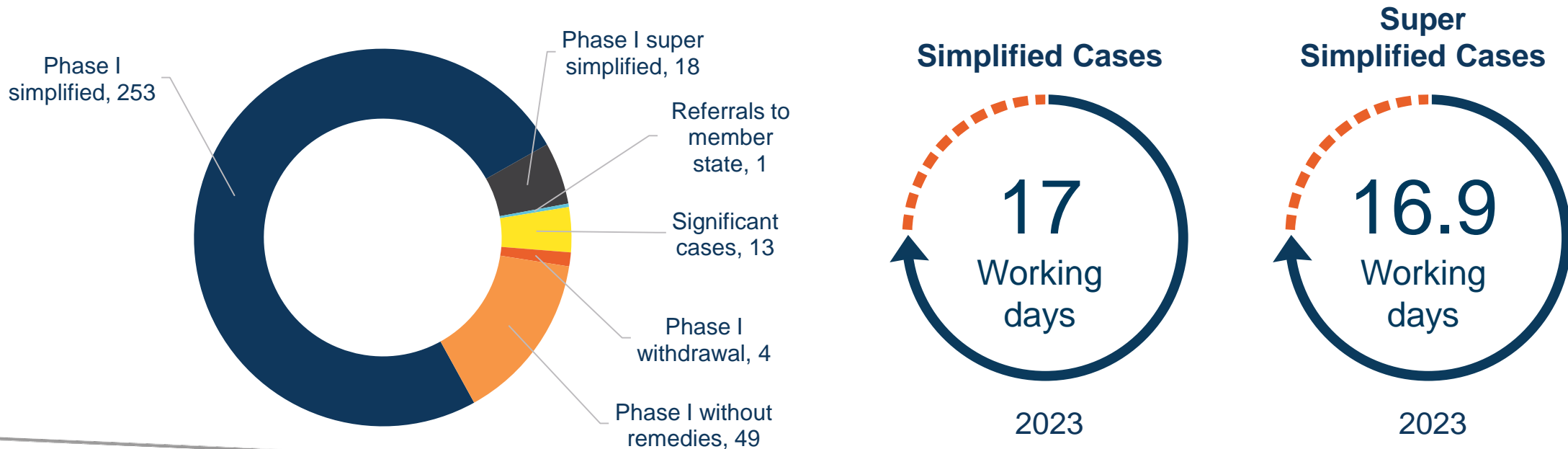
EU Merger Regulation “fixed” timeline



EU short form/simplified procedure



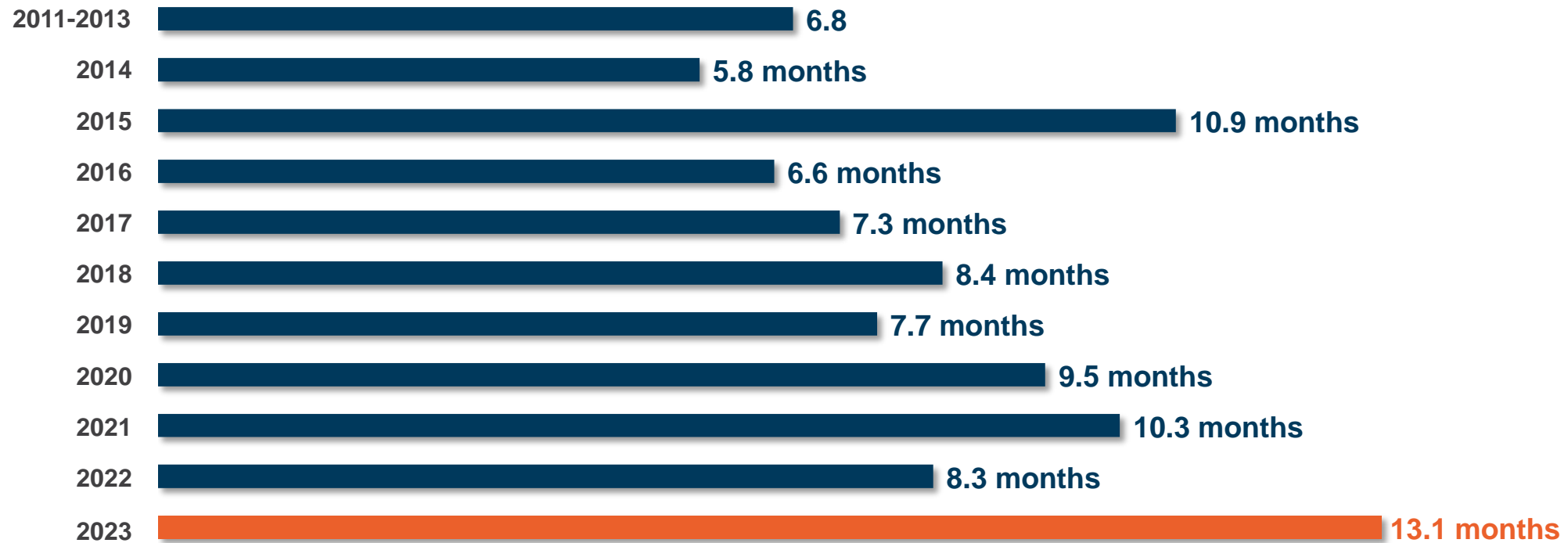
- **80%** of 2023 decisions were notified under the short form/simplified procedure/super simplified procedure in 2023, including **18 cases under the super simplified procedure** introduced by the 2023 Merger Simplification Package
- Average duration for short form/simplified notifications was **17 working days** in 2023, in line with the 17.2 working day period in 2022; Duration of super simplified cases was virtually the same



Record duration of EU Phase I Remedy cases



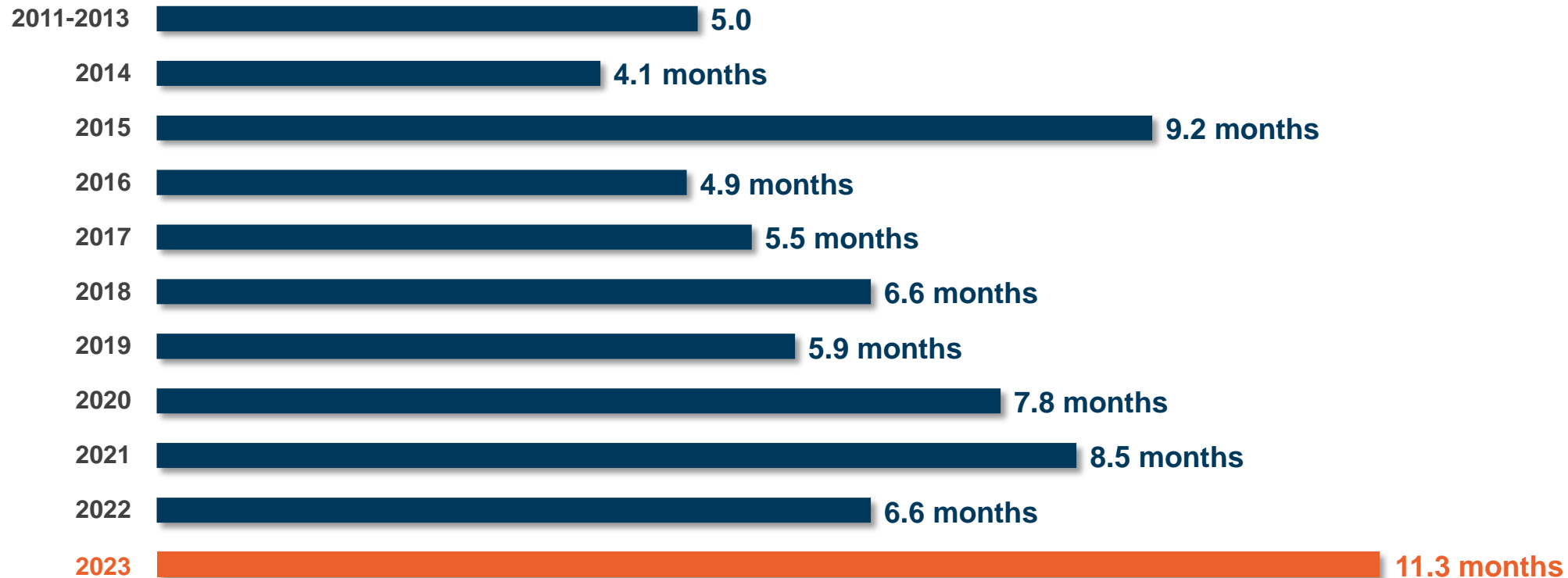
- EU merger investigations resulting in Phase I remedies took an average of **13.1 months** in 2023, a DAMITT record



Length of EU pre-filing discussions for EU Phase I remedy cases



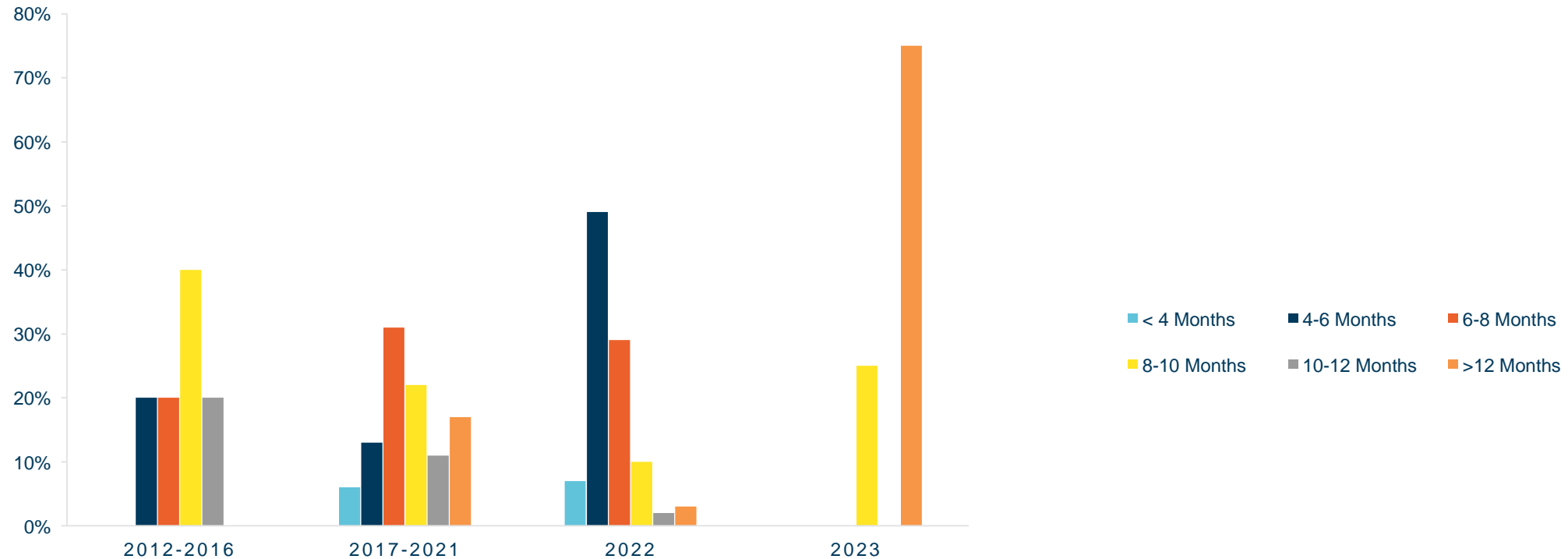
- Time from deal announcement to EU notification for Phase I remedy cases increased by **71%** from 2022 to 2023



Duration Spread for Significant EU Phase I Investigations



- Significant EU Phase I investigation **timelines keep getting longer**



Duration of EU cases proceeding to Phase II



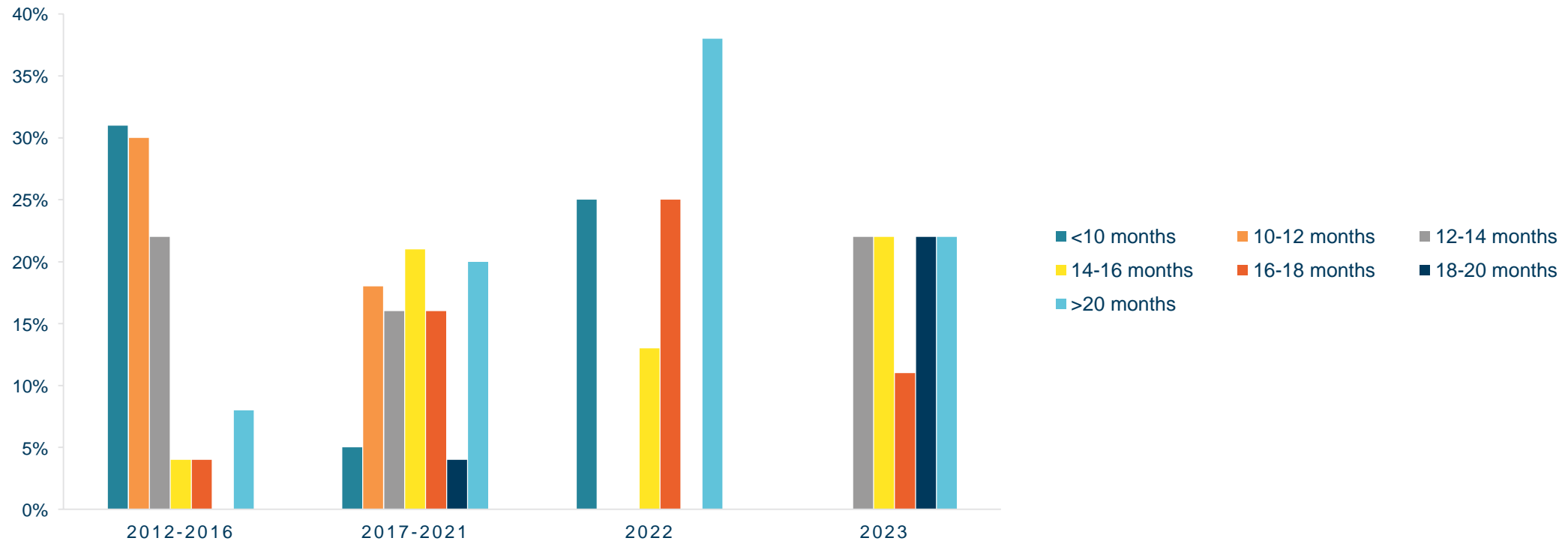
- EU merger investigations that proceeded to Phase II averaged **17.3 months** in 2023, slightly faster than 2022, but still 19% above the average over the past five years



Duration Spread for Significant EU Phase II Investigations



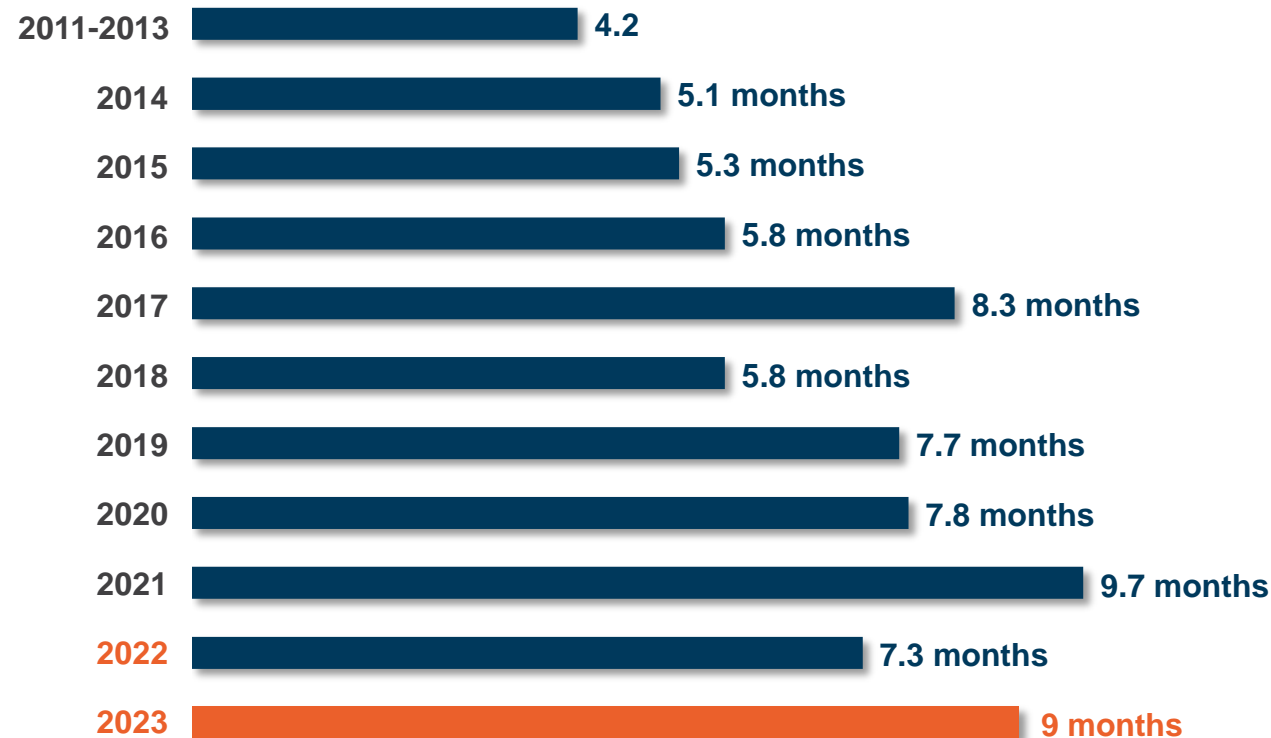
- Significant Phase II investigation timelines in 2023 remains on a high end, with a broadly equal spread between 12 and 23 months



Length of EU pre-filing discussions for cases proceeding to Phase II



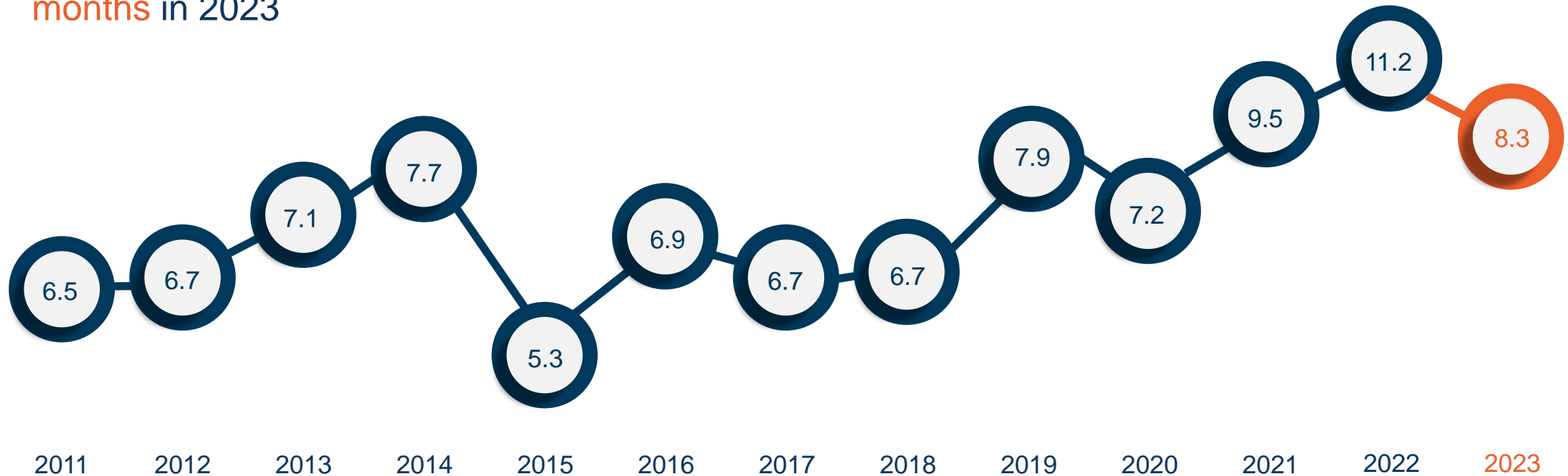
- Time from deal announcement to EU notification for cases proceeding to Phase II has increased to **9 months** in 2023, 17% above the past 5-year average



Duration of Phase II “formal” review



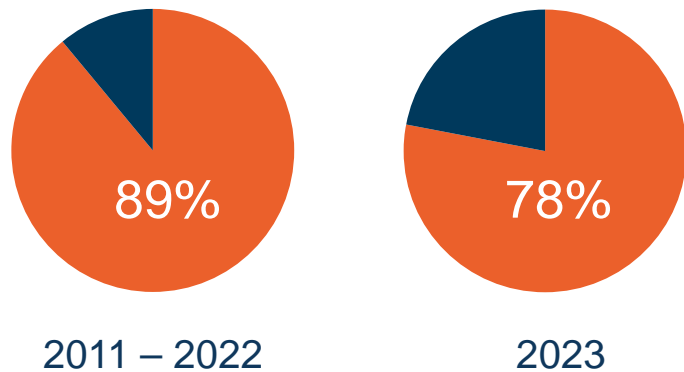
- Following a record high in 2022, the duration of the formal review period decreased to **8.3 months** in 2023



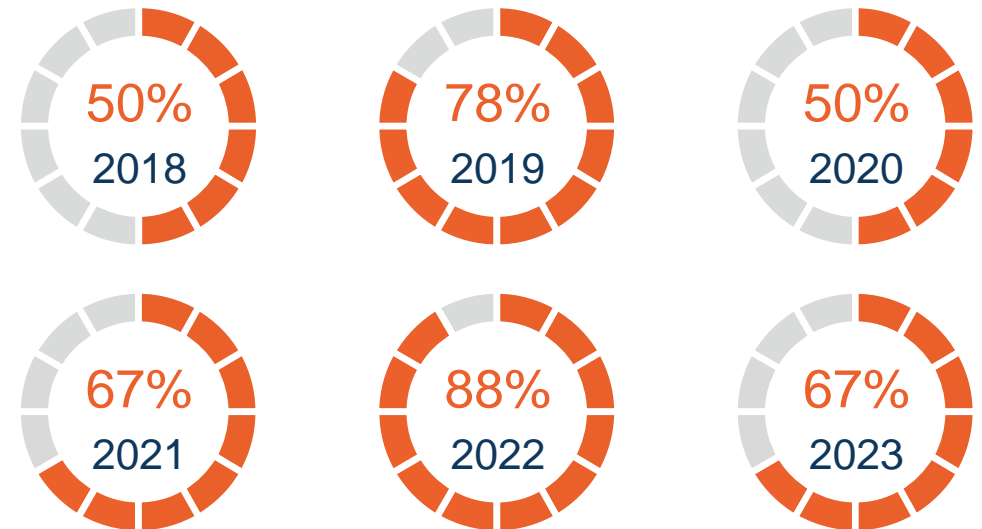
Use of voluntary extensions decreases in 2023



Voluntary extensions remains fairly standard



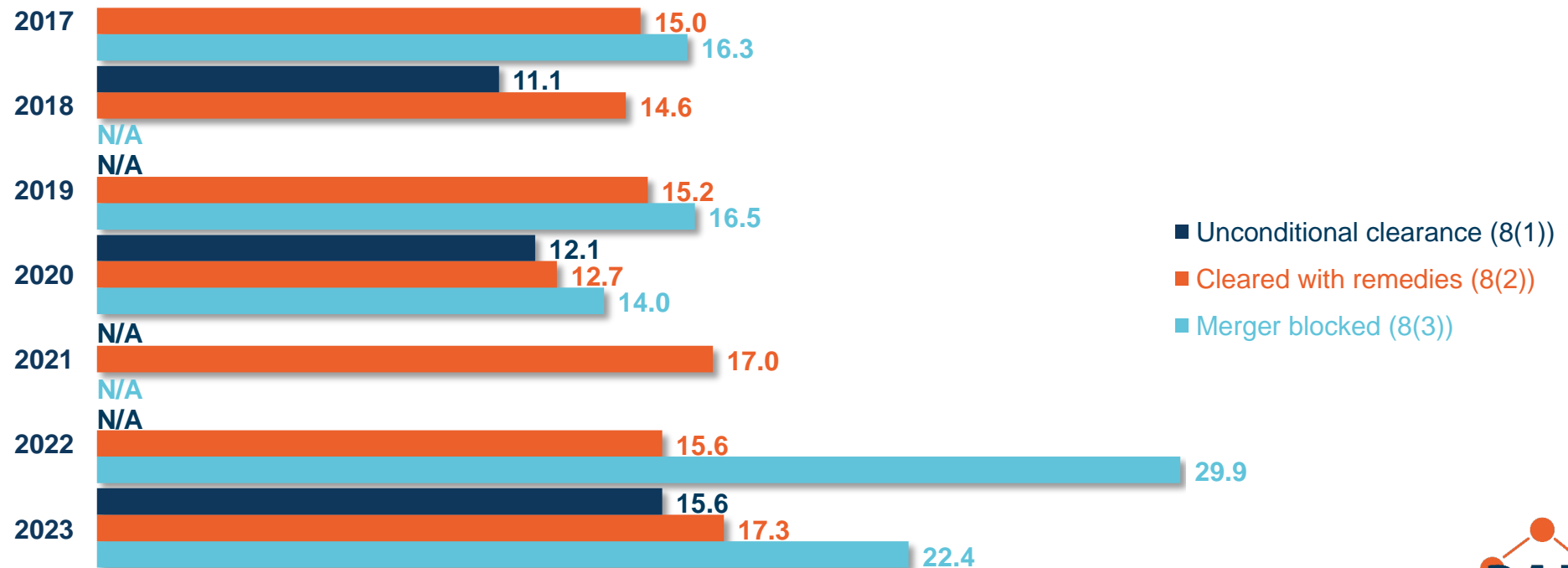
Frequency of clock stoppages by EC in 2023



Duration of Phase II investigations by outcome



- Durations of investigations resolved with remedies reached a **new 17.3-month record high**, but remained significantly below durations of investigations concluded by a prohibition



2024 Outlook



United States

- 2023 Merger Guidelines
- New HSR Filing Requirements
- More Litigation Ahead



- Change in EC Leadership
- Longer and fewer Phase I Remedy reviews
- Potential Article 22 referrals and DMA impact

Questions and Answers



Thank you for attending



Laurence Bary
Partner
Paris



Mike Cowie
Partner
Washington, D.C.



James Fishkin
Partner
Washington, D.C.



Michael Okkonen
Partner
Brussels



Bernardo Piereck
Partner
Washington, D.C.



Dechert
LLP

LEXOLOGY

For further information, visit our website at [dechert.com](https://www.dechert.com)

Dechert practices as a limited liability partnership or limited liability company other than in Dublin and Hong Kong