CLEARY GOTTLIEB

Shaping the Future: A New Era for EU Below-Threshold Mergers

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The ECJ's *Illumina/Grail* Landmark Judgement

Art. 22 EUMR – Referral to the EC

"*1. One or more Member States may request the Commission to examine any concentration ... that does not have a Community dimension ... but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.*

Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned"

Killer Acquisitions in the Spotlight

A traditionally <u>moderate</u> use of Art. 22 EUMR

- Originally, Art. 22 EUMR was aimed to remedy the absence of national merger control system in some MSs (so-called "**Dutch clause**")
- NCAs are allowed to refer to the EC transactions which (i) affect trade between MSs and (ii) threaten to significantly affect competition within the referring MS
- EC was **discouraging** Art. 22 referral requests from MSs that did not have jurisdiction
- Art. 22 became obsolete after almost all MSs adopted merger control laws

How Big is the Issue?

- Enforcement gap: "**Killer acquisitions**" (*e.g.*, in **tech** and **pharma** sectors) often **do not reach national thresholds** and **pass through the EUMR net**

2021 POLICY CHANGE

EC's Guidance Paper on the application of Art. 22 EUMR

- "***Article 22 is applicable to <u>all</u> concentrations****, not only those that meet the respective jurisdictional criteria of the referring Member States*"
- Policy message: EC would in relevant cases "***encourage*** *and accept referrals … where the referring member state* ***does not have initial jurisdiction*** [under its merger control law] *over the case (but where the criteria of Article 22 are met)*"

The Turning Point: the *Illumina/Grail* Case

The *Illumina/Grail* case is a telling illustration of the EC's **new stance** towards Art. 22 referrals

Illumina and Grail, both US-based, were generating <u>no revenues in the EU</u>	**No EU or national merger control thresholds were triggered**	**No reportability to the EC or NCAs**

September 2020
Illumina announces its USD 8 billion acquisition of Grail

February 19, 2021
The EC sends to the NCAs a letter inviting them to make a referral request under Art. 22 EUMR

April 19, 2021
The EC accepts referral request under Art. 22 EUMR and asks the Parties to notify the transaction

The transaction "*could restrict access to or increase prices of next generation sequencers and reagents to the detriment of GRAIL's rivals*"

1 2 3 4 5

December 2020
The EC receives a complaint regarding this acquisition

March 9, 2021
The French NCA requests the referral, subsequently joined by Belgium, Greece, the Netherlands, Iceland, and Norway

"***Genomic cancer tests**, having the potential to identify a wide variety of cancers in asymptomatic patients, **are expected to be game-changers in the fight against cancer***"

"***GRAIL's competitive** significance is not reflected in its turnover, as notably **evidenced by the USD 8 billion deal value***"

ECJ's Ruling: the EC Lacks Jurisdiction

On 3 September 2024, the ECJ overturned the General Court's ruling and ruled the EC lacks jurisdiction to review merger falling below EU and national merger thresholds

Key Takeaway	An MS with domestic merger control rules cannot seek an Art. 22 EUMR referral if the transaction does not fall within its national merger control rules

Literal Interpretation	Historical Interpretation	Contextual Interpretation	Teleological Interpretation
▪ Even where a provision "*appears to be clear*," the Courts may still resort to other methods of interpretation "*to clarify* [its] *exact scope*," justifying a historical, contextual, and teleological interpretation of the provision (§§127-128)	▪ 22's legislative history (*travaux préparatoires*) contradicts the GC conclusions ▪ Art. 22 was enacted to address the absence of national merger control regimes in certain Member States and not the fact that certain concentrations that "*could affect the internal market would, in any event, escape* ex ante *review*" under the EUMR (§§146-148)	▪ The GC failed to consider the existence of a dedicated mechanism in the EUMR to revise the thresholds – Artt. 1(4) and (5) – allowing for the "*rapid adjustment*" of the thresholds should they no longer be "*apt to capture concentrations with potentially harmful effects*" (§§175-184)	▪ Art. 22 is not a "*corrective mechanism*" ▪ Broad interpretation of Art. 22 is "*inconsistent with*" EUMR's objectives (legal certainty, effectiveness, and predictability) ▪ Need for "*clear allocation*" of competences btw the EC and MSs and "*predictable system of control*" ▪ Alternative tool: Art. 102 TFEU (*Towercast*, C-449/21) ▪ Institutional balance, as "*it is for the EU legislature alone*" to review the thresholds or to "*provide for a safeguard mechanism*" for the EC to scrutinize below-thresholds transactions (§§191-199, 203-205, 2011-217)

Case-specific Implications of the ECJ's Judgement

Illumina/Grail Saga

- Art. 266 TFEU: EU institution whose measure has been declared void must take the necessary steps to comply with the judgment annulling that illegal measure
- The ECJ's judgement indirectly invalidates a series of decisions based on the EC's decision which asserted jurisdiction over the case:
  - **Decision to open Phase II**
  - **Prohibition decision**
  - **2 decisions about interim measures**
  - **Decision ordering restorative measures**
  - **Gun-jumping decision** (€ 423 million fine for Illumina; € 1 million for GRAIL)

Compensation for Damages from the EC

- It also opens the possibility for the recovery of damages from the EC (decision not yet made by Illumina)
- Legal test under Art. 268 TFEU:
  - illegal conduct of the EU institutions/servants, in the light of EU law
  - real and certain damage
  - causal link
- Possible damages:
  - legal fees in the EC's administrative procedures
  - monitoring fees and payments to GRAIL to keep it separate/financially independent from Illumina
  - harm suffered from the restrictive conditions imposed for GRAIL's divestment

Implications and Future Perspectives

Navigating the Aftermath of the *Illumina* decision

The EC cannot review transactions that fall below EU thresholds and that do not fall within national merger control rules. Member State need to have jurisdiction to request an Art. 22 referral. The *Illumina* decision:

- Aligns with the approach applied over the past 30 years under the EUMR and its predecessors
- It is consistent with the original rational and purpose of Art. 22
- Supports the Draghi Report on reducing regulatory burden for businesses

Reacting to the *Illumina* judgement, the EC reiterated the need to close the perceived "enforcement gap": the EC is unlikely to surrender the arms in the fight over competence to review killer acquisition

"There will continue to be a ***need to review mergers*** *that have a competitive impact in Europe.*
[W]*e will consider the next steps to ensure that the Commission is* ***able to review*** *those few cases where a deal would have an impact in Europe but does not otherwise meet the EU notification thresholds"*

– EVP Vestager, Sep 2024

"You will focus on the particular challenges facing SMEs and small midcaps, notably to ***address risks of killer acquisitions*** *from foreign companies seeking to eliminate them as a possible source of future competition"*

– President von der Leyen, Mission Letter to T. Ribera Rodríguez, Sep 2024

Option 1: Amending the EUMR

The EC may seek a revision of the EUMR

- The EUMR provides for a mechanism to do so (Art. 1(5))
- Reopening the EUMR for revision could give Member States the opportunity to make other amendments that the Commission may not support
- Potential changes include:

✓ Lowering notification thresholds

✓ Adding value-based thresholds

✓ Introducing new "call in" powers for problematic deals

> ***There are several ways to allow the Commission to find the right fish.***
>
> ***None of them, however, seems optimal at this stage***"
>
> — EVP Vestager, Sep 2024

Option 2: Advocate for Art. 22 Referrals

The EC may continue to accept Art. 22 referrals from Member States competent to review the referred deal

- What does "competence" mean?
  - ✓ Some Member States already apply tests alternative to turnover thresholds (*e.g.*, market share, deal value)
  - ✓ Several Member States have updated their merger control regimes to allow them to "call in" deals below national thresholds
- However:
  - ✓ Alternative set of criteria must be met (*e.g.*, local nexus)
  - ✓ Potentially viewed as a workaround to EU merger rules: may lead to further litigation.
  - ✓ Risk undermining legal certainty

> ***Going forward, the Commission will continue to accept referrals made under Article 22 by Member States that have jurisdiction over a concentration under their national rules where the applicable legal requirements are met"***

EVP Vestager, Sep 2024

Option 3: Potential review on abuse of dominance grounds

The EC may encourage NCA to *ex post* review non-notifiable mergers based on the *Towercast* caselaw

- Proximus' acquisition of EDPnet (Belgium, 2023) – 102 TFEU
- Meat-cutting investigation (France, 2024) – 101 TFUE

Practical Limitation:

- **Inconsistency**: It is a power for the NCAs, not the Commission, which could lead to inconsistency.
- **Narrow scope**: The transaction must involve undertakings with an existing dominant position.
- **High burden**: Art. 102 requires an analysis of the effects of behavior (causal link between the transaction and a harm to competition on a market).
- **Remedial challenges**: The review may take place after the parties have already closed, making it is more difficult for a NCA to remedy.

> **Following the Towercast judgement ex post control of transactions under Article 102 TFEU should *'remain the absolute exception'"***
>
> AG Kokott, Apr 2024

Knock-on Effects: Interactions with Art. 14 DMA

What is the DMA?

- The DMA introduces an *ex-ante* regime for so-called digital "gatekeepers" and their core platform services (CPSs)
- It sets out a merger notification requirement and c. 20 categorical rules – do's and don'ts – for gatekeeper CPSs

What is Art. 14?

- Art. 14 DMA requires gatekeepers to inform the EC of essentially all their digital M&A transactions
- Once gatekeepers have informed the EC, technically, the deal can close, but other merger control rules may apply in parallel to prevent closing

Who enforces Art. 14?

- The EC is responsible for enforcing the DMA
- NCAs may, however, use information gatekeepers provide under Art. 14 to trigger a formal EU merger review under Art. 22 EUMR

Art. 14 information sharing will be of **less practical relevance** now that NCAs can only use Art. 22 EUMR to refer concentrations that fall under their national merger control regime:

- MSs will generally already know about them through mandatory filings
- The EC will continue to be informed of these deals but may lack the ability to intervene in many of them

Nonetheless, the EC may still seek to encourage referrals by MSs with voluntary filing regimes, low jurisdictional thresholds, or broad "call-in" powers, following an Art. 14 DMA notification

National Merger Control Regimes: A New Era

Member States React

Withdrawal of Art. 22 Referral

- *Microsoft/Inflection* case: the transaction did not reach the EUMR notification thresholds + no notified in any MS

- 7 MS submitted an Art. 22 referral request to the Commission

- Following the Illumina/GRAIL judgement, all MS withdrew their referral request (or request to join these referrals)

No Need for Additional Rules

The Belgian NCA has no concrete plans to push for a change + 102TFEU

The Danish NCA "*does not foresee a different approach towards the use of its call in-powers in terms of the referral system*"

The provision of value threshold "*has proven to be very effective as it allows us to examine or refer* [to the Commission] *critical mergers*"

The agency will continue to send cases to the Commission when it believes the EU is best placed to review them and the conditions for referral are met

Towards a Change

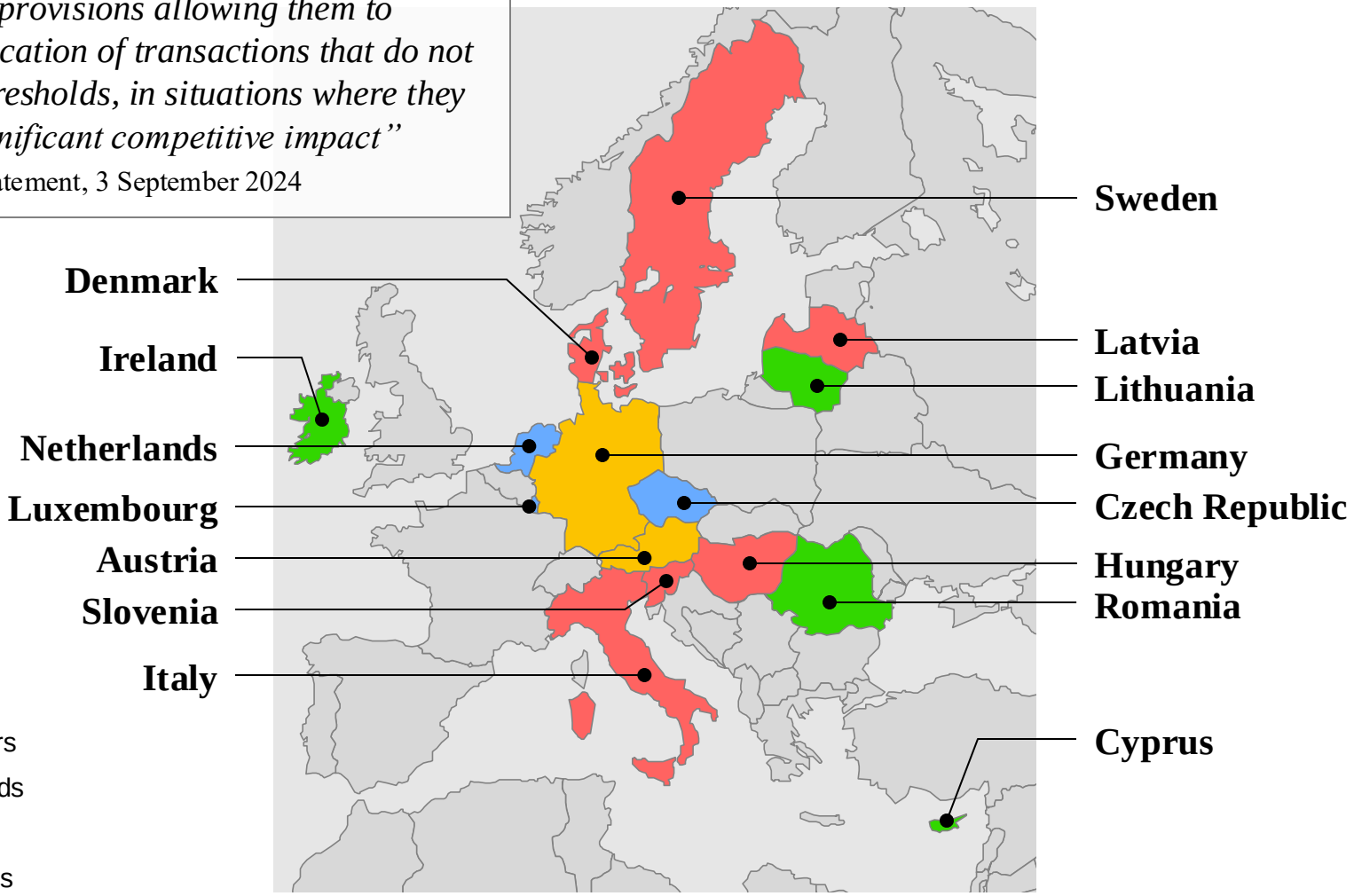
The French NCA is considering "*whether to strengthen [national] the merger control instruments … to apprehend potentially problematic mergers that do not meet the notification thresholds currently applicable in France*"

The Dutch NCA said Illumina/GRAIL judgement provides for "*an additional argument*" for tweaking its merger control regime with a view to restoring its ability "*to refer small acquisitions with a European dimension to the European Commission*"

What's going on in the Member States

"In the last few years, ***several Member States*** *have introduced provisions allowing them to request the notification of transactions that do not meet national thresholds, in situations where they might have a significant competitive impact"*

– EVP Vestager's Statement, 3 September 2024



Call-in Powers in Italy

On August 5, 2022, the Italian Parliament adopted Law No. 118 (the 2021 Annual Competition Law)

The new Art. 16 par. 1-*bis* of Law No. 287/1990

The ICA may request the notification of below-threshold concentrations and review them when **three cumulative conditions are met**:

1. One of the two turnover thresholds provided for in Law No. 287/1990 is exceeded, or the combined aggregate worldwide turnover of the undertakings concerned exceeds EUR 5 billion; and
2. The concentration raises "**concrete risks to competition**" in the national market, also taking into account possible detrimental effects on the development of small enterprises with innovative strategies; and
3. No more than six months have elapsed since the closing of the transaction.

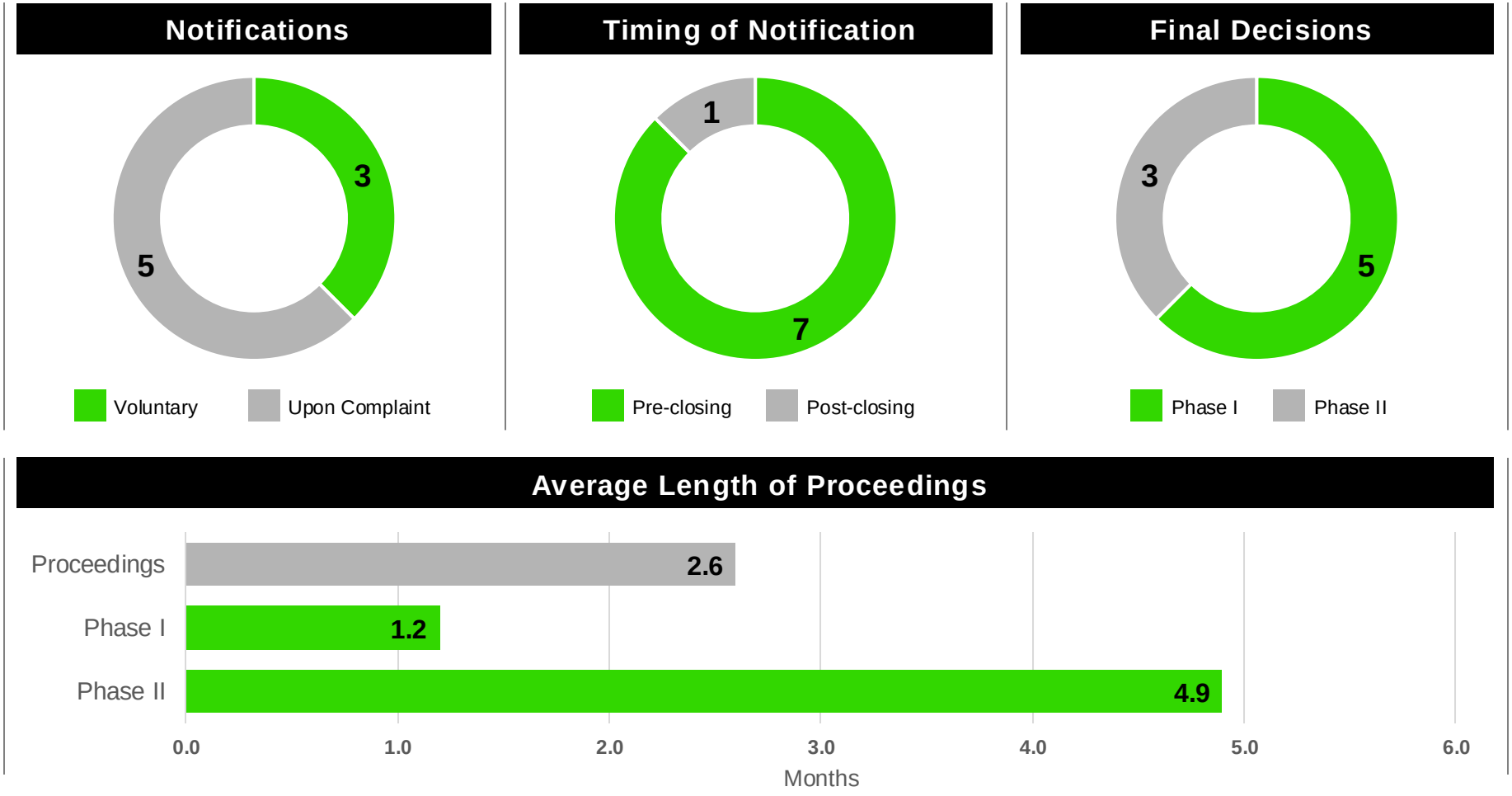
What markets so far?

Traditional local markets

- Sale of out-of-home advertising spaces
- Terminal services
- Laundering and sterilization of medical and surgical equipment
- Procurement of wood wastes and production of particle boards
- Provision of airport infrastructure, handling, and commercial services
- Production and sale of cement, concrete, and clinker

The ICA's Practice So Far: The Statistics

Since the introduction of Art. 16(1-*bis*), the ICA has scrutinized **8* below-threshold concentrations**.



Recent EU and Italian developments on below-the-thresholds mergers: practical implications for companies and their M&A strategies/activities

Salvatore Branca

Associated General Counsel – Snam

Legal/Regulatory Risks Assessment and (Un)Certainty of the Law

Analysis of legal risks which may prevent, delay or anyway affect completion of a merger is one of the key assessments to be made when dealing with a potential M&A project

According to Snam's internal policies, the assessment of potential merger control/FDI/unbundling implications is made since the initial phase of any M&A project and before presenting it – even for informative purposes only – to Snam's corporate bodies

Based on the recent trends in M&A competitive sale processes, sellers usually require bidders – since the submission of non-binding offers – to make a thorough substantive assessment of merger control, FDI and other regulatory approvals/filing, related timing and potential issues

The "discretionary standards" resulting after Illumina/Grail and from the adoption of below-thresholds regimes entail a high degree of legal uncertainty, exposing companies to venturesome and complicated legal prognostic analysis

Ex-post review exposes the companies at additional risks, in terms of closing uncertainty and conditionality of completion, with consequent reputational, economic and financial risks

“Cautious” vs. “Risk-taking” Approaches and Related Pros and Cons

		Pros	Cons
A	“Cautious” approach: transparent and prudent stance towards the seller and voluntary filing to DG COMP/AGCM	▪ Reducing risks of litigations/pre-contractual and contractual liabilities towards the seller ▪ Reducing risks of liabilities of Top Management towards the company’s corporate bodies ▪ Reducing risks of ex-post reviews thereby mitigating the risk of unwind/ conditionality of completion and related reputational and financial risks	▪ Reducing attractiveness/competitiveness of the offer for the seller ▪ Exposing buyer to accept burdensome provisions such as so called “Hell or High Water Clause” or onerous Break-up Fee or Ticking Fee mechanisms ▪ Potentially delaying timing for completion, with potential economic and financial implications ▪ Increasing overall costs for the company
B	“Risk-taking” approach: do not voluntarily file accepting the risk of detection (*e.g.*, given the limited media hype/ geographic scope of the target’s business) and do not disclose the risk to the seller/corporate bodies	▪ Increasing attractiveness/ competitiveness of the offer for the seller ▪ Expediting completion (to the extent the transaction is not detected before closing) ▪ Reducing costs for the company	▪ Exposing the company to possible litigations/ liabilities towards sellers/competent authorities (in case the transaction is detected) ▪ Exposing Top Management to possible liabilities towards the company’s corporate bodies (in case the transaction is detected) ▪ Exposing the company to accept rigorous longstop date and exclusion of any way-out under the SPAs ▪ Risk that the transaction may be reported to the authorities by third party competitors/market operators ▪ Exposing the company to reputational, economic and financial risk in case of ex-post reviews prohibiting the transaction or imposing conditions

Some Possible Consequences of Such Situation

(Unwarranted) proliferation of voluntary notifications (*e.g.*, "Golden Power" pre-notifications) – voluntary filing procedure must ensure Antitrust Authorities' ability to react in a short and certain timeframe (DG COMP timing to react to voluntary notifications is unclear and uncertain/AGCM timing – 60 days – certain but still quite long)

Risk of proliferation of opportunistic complaints by third party competitors/market operators that may have an interest in hindering a transaction of a competitor – Antitrust Authorities must ensure that such third-party reports are appropriately substantiated before starting a below-the-thresholds merger review (TBD fines in case of manifestly ungrounded reports?)

Discourage investments – *e.g.*, horizontal and vertical mergers might be penalized. At odds with the recent debate favoring industrial policy objective (including the creation of EU/national champions)?

Conclusions and Possible Improvements

Recent EU/Italian developments on below-the-thresholds mergers generate uncertainty and unpredictability of the merger control systems – risks and costs for the companies

Such developments may also unduly increase the Antitrust Authorities' burdens and costs

Investments capable (even only in theory) to trigger below-the-thresholds merger review can be penalized in favor of speculative transaction: for example, horizontal acquisitions might be discouraged although they might generate benefits for the system – *e.g.*, synergies and costs-reductions, innovation

Such trends need to be coordinated with the targets envisaged under the EC political agenda aimed at ensuring future of European competitiveness (ref. Draghi's report):

- Reduce the regulatory burden on companies
- EU competition policy to enable/allow mergers resulting in European Industrial Champions
- Accelerate the decision-making processes and increase the predictability of decisions
- Reducing existing ambiguities regarding which non-notifiable mergers can be reviewed and by which public authority

Alternative solution to ensure capturing/reviewing concentrations potentially harmful for competition is to reduce EU/Italian objective thresholds – this would ensure legal certainty and predictability of the review system

Ex-post Art. 102 TFEU review should be the exception and limited to behavior exploiting the market power resulting from the merger