THE PHILIPPINES' ANTI-TRUST REGULATION RELATING TO MINORITY SHAREHOLDINGS: IS THERE AN ENFORCEMENT GAP?*

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ABSTRACT

In this paper, I discuss the different types of minority shareholdings and why these arrangements warrant a closer look by competition agencies, particularly in the Philippines. There is consensus in literature and agency decisional practice in the European Union and the United States that minority shareholdings can have anti-competitive effects. To understand the implications of these types of arrangements for the highly oligopolistic markets in the Philippines, I analyze the boundaries of the Philippines' merger control regime and show that an enforcement gap exists. I then recommend three parallel courses of action to address the enforcement gap.

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I. INTRODUCTION

In 2017, one of the biggest conglomerates in the Philippines notified the Philippine Competition Commission (PCC) of an acquisition in accordance with the *ex-ante* merger notification requirement under the newly created Philippine Competition Act ("PCA"). SM Retail, Inc. proposed to acquire Goldilocks Bakeshop, Inc. ("Transaction").[1] SM Retail, Inc. is the retail and merchandising arm of SM Investments Corporation ("SMIC"), one of the largest companies in the Philippines by market capitalization, with subsidiaries engaged in mall, residential, and commercial development, operation of hotels and convention centers, and retail and banking.[2] SMIC's property arm is one of the largest integrated property developers in the Philippines with 76 malls in the country, known as SM malls.[3] The target company, Goldilocks, is a Filipino-owned bakeshop chain with more than 420 stores in the Philippines and abroad.[4]

As Goldilocks stores and its competitors are tenants of SM malls, competition concerns were raised on the possibility of foreclosure and the sharing of competitors' business information.[5] The PCC allowed the Transaction to proceed subject to the parties' commitment to treat mall tenants competing with Goldilocks on fair, reasonable, and non-discriminatory ("FRAND") terms, and to maintain data protection protocols that would prevent sharing of information between the merged firm and its competitors, among others.[6]

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[1] Phil. Competition Comm'n (PCC), *PCC approves SM Retail's commitments in the acquisition of Goldilocks Bakeshop*, PCC WEBSITE, Jan. 9, 2018, *at* https://www.phcc.gov.ph/press-releases/pcc-approves-sm-retails-commitments-acquisition-goldilocks-bakeshop/.

[2] SM Investments Corporation (SMIC), *2017 Annual Report*, SMIC WEBSITE, *at* https://www.sminvestments.com//wp-content/uploads/2020/08/2017-SMIC-lo-2.pdf; SMIC, *2020 Annual Report*, SMIC WEBSITE, *at* https://www.sminvestments.com/wp-content/uploads/2021/07/SMIC-Integrated-Report-2020-1.pdf.

[3] *Id.*

[4] Goldilocks Phil., *Our Story*, *at* https://www.goldilocks.com.ph/our-story/the-goldilocks-brand (last accessed Feb. 10, 2023).

[5] Acquisition by SM Retail, Inc. of Goldilocks Bakeshop, Inc., PCC Case No. M-2017-002 (PCC Dec. 29, 2017), *available at* https://phcc.gov.ph/wp-content/uploads/2018/05/Commission-Decision-No.-42-M-017-2017.pdf; Patrizia Paola Marcelo, *PCC airs concerns over SM's Goldilocks acquisition*, BUSINESSWORLD, Dec. 13, 2017, *at* https://www.bworldonline.com/pcc-airs-concerns-sms-goldilocks-acquisition/.

[6] *Id.*

Shortly after the said Decision was rendered on December 29, 2017, SM announced that it would no longer pursue the Transaction.[7] However, a few months later, news media reported that SM is set to acquire a 34% stake in Goldilocks.[8] After the minority share acquisition, there were changes in the composition of the Goldilocks board.[9]

Under the PCA, control exists even when an entity owns less than one-half of the voting power of another entity, as long as there is an ability to substantially influence the actions or decisions of the latter.[10] With this expansive definition of control under the law, even a minority acquisition of 34% can result in a change in control over an acquired entity—falling squarely within the jurisdiction of the PCC. The only difference is the lack of a requirement to notify the PCC of the Transaction prior to its consummation. The PCA's Implementing Rules and Regulations ("PCA IRR") requires notification only for acquisitions of more than 35% or 50% of voting shares in the acquired company.

Yet, while the PCC retains its *motu proprio* power to review transactions that fall below the notification threshold, it has historically refrained from using its *motu proprio* powers[11] for non-notifiable transactions, including the Goldilocks minority share acquisition. Theoretically, it can open an investigation on whether the minority share acquisition is coupled with a transfer of control, and if it does, whether the same competition concerns in its original review of the Transaction still applies.

The questions that ensue are whether minority share acquisitions pose less risk to competition, and whether the existing legal framework for merger control in the Philippines fails to capture minority acquisitions that may have a negative effect on competition. This topic is unexplored as no literature has yet emerged that assesses negative effects to competition arising from

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[7] CNN Philippines Staff, *SM Retail stops plans to acquire Goldilocks*, CNN PHILIPPINES, Feb. 1, 2018, *at* http://cnnphilippines.com/business/2018/02/01/SM-Retail-stops-plans-to-acquire-Goldilocks.html.

[8] Arra Francia, *SMIC says in final stages of acquiring 34% stake in Goldilocks*, BUSINESSWORLD, Aug. 14, 2018, *at* https://www.bworldonline.com/corporate/2018/08/14/ 180203/smic-says-in-final-stages-of-acquiring-34-stake-in-goldilocks/.

[9] Goldilocks Bakeshop, Inc. General Information Sheet, Aug. 7, 2018.

[10] Rep. Act No. 10667 (2015), § 4(f). Phil. Competition Act [hereinafter "PCA"].

[11] An exception is the case of the Transport Network Vehicle Service applications of Grab and Uber. *See* Acquisition by Grab Holdings, Inc. and MyTaxi.PH Inc., of Assets of Uber B.V. and Uber Systems, Inc., PCC Case No. M-2018-001 (PCC Aug. 10, 2018), *available at* https://www.phcc.gov.ph/commission-decision-no-26-m-12-2018-acquisition-by-grab-holdings-inc-and-mytaxi-ph-inc-of-assets-of-uber-b-v-and-uber-systems-inc/.

minority shareholdings in the Philippines, and which specifically tackles the question on whether minority share acquisitions in its various permutations are covered by the PCA. This paper will hopefully spur research and contributions on this subject.

The analysis reveals that minority share acquisitions pose competition concerns. To capture these acquisitions, the PCC can improve its merger notification design. However, for certain minority acquisitions that are not covered by the law, it appears that an enforcement gap exists which requires an amendment of the law.

Part II gives an overview of the potential anti-competitive effects of minority share acquisitions. Part III explores the approaches taken by two major antitrust jurisdictions on the issue of minority share acquisitions. Part IV describes the necessity for the Philippines to ensure that minority acquisitions are reviewed by the PCC. Part V undertakes a legal analysis of the Philippine merger review framework to see if an enforcement gap exists. Part VI offers proposals.

II. MINORITY SHAREHOLDINGS

A. Definition of Minority Shareholding or Partial Ownership

Minority shareholding, also referred to as partial ownership, is the ownership of less than 50% voting rights of a firm. This less-than-majority ownership of voting rights may or may not translate to control as ownership or financial interest over the shares can be decoupled from control. As such, there are instances when a minority shareholding can give rise to control, either solely or jointly with other shareholders.[12] The right and ability to exert influence usually stems from corporation law or contractual arrangements (*de jure*), but in certain cases, it may be the factual circumstances surrounding the relationship of the shareholders of a company (*de facto*).

Minority shareholding can be classified according to three levels of control exercised by an acquirer in the target:

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[12] PCC Guidelines on Notification of Joint Ventures [hereinafter "Notification Guidelines"] (2018), *available at* https://www.phcc.gov.ph/guidelines-on-notification-of-joint-ventures/.

1. A minority shareholding that results in control, whether sole or joint ("controlling minority shareholding"); and
2. A minority shareholding that falls short of control ("non-controlling minority shareholding"), further sub-categorized into two:
   a. One that results in a certain level of influence without such influence becoming decisive ("non-controlling minority shareholding with influence"); and
   b. One where such an influence does not exist ("passive minority shareholding").

B. Are There Minority Shareholdings That are Anti-competitive?

The question of whether acquisitions of minority shareholdings that result in control (controlling minority shareholdings) over the target firm can lead to unilateral anti-competitive effects is assessed under the well-established framework for merger control analysis. The assumption is that both the acquiring firm and the controlled target firm are a single entity with the incentive to raise prices, unless constrained by its rivals.[13] In the event of a price increase by the acquiring firm, lost sales are diverted to the target firm and vice versa, which recaptures some profits lost from the price increase without the merger.[14]

According to Steven Salop and Daniel O'Brien, the incentive of the acquiring firm to raise prices is influenced by the level of financial interest it has in the target firm, calculating the incremental profits it will obtain from a price increase.[15] The incentive of the target firm to raise prices in cases where it is controlled by the acquiring firm is the same as the incentives of the acquiring firm.[16] The acquiring firm sets the target firm's prices in

[13] Organisation for Economic Co-operation and Development (OECD), Antitrust Issues Involving Minority Shareholding and Interlocking Directorates, at 21, DAF/COMP(2008)30 (June 23, 2009), *at* https://one.oecd.org/document/DAF/COMP(2008)30/en/pdf; Steven Salop & Daniel O'Brien, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 ANTITRUST L.J. 559, 573 (2000).

[14] Jill Walker, *Economic Analysis in Merger Investigations* (2020), OECD Global Forum on Competition Discussion, *at* https://www.oecd.org/daf/competition/economic-analysis-in-merger-investigations-2020.pdf; Salop & O'Brien, *supra* note 13, at 573.

[15] Salop & O'Brien, *supra* note 13, at 573−74.

[16] *Id.*

consideration of the profits it will obtain due to diverted sales in the event of a price increase by the target firm.[17]

Salop and O'Brien note that a partial financial interest increases the acquiring firm's incentive to increase prices, but to a lesser extent than in a situation where the acquiring firm has 100% financial interest in the target firm.[18] When the acquiring firm's control over the target firm is coupled with a small financial interest, the acquiring firm takes a free ride on the losses of the target firm, because the former benefits from the latter's higher price and bears only a fraction of the loss of the target firm.[19]

Gilo similarly notes that in cases of an investment by a controller of a firm in its competitor, the anti-competitive effect is greater than when the firm itself invests in its competitor, as the controller can dilute its financial interest in the firm it controls.[20] This is because "the smaller the controller's stake in the firm it controls, the less aggressively will the controller cause the firm it controls to compete" as "the smaller the controller's stake in the firm it controls, the more weight the controller places on its stake in the competing firm."[21]

Acquisitions of non-controlling minority shareholding can likewise result in unilateral anti-competitive effects. In a seminal study of partial ownership which does not convey control, Robert Reynolds and Bruce Snapp found that in markets where entry is difficult, partial ownership may result in less output and higher prices.[22] Increases in ownership interest incentivize firms to compete less vigorously and adopt a behavior conducive to joint profit maximization.[23] The acquiring firm that holds a minority stake in its competitor will refrain from competing aggressively, as it will suffer losses from such a strategy through its investment in the rival. This leads to lower market output as partial ownership allows firms to internalize the benefits that each firm generates for rivals when it restricts its output unilaterally. This probability increases with the level of ownership, while the effect is more pronounced when the number of firms with linkages are high, when the

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[17] *Id.* at 575.

[18] *Id.* at 576.

[19] *Id.* at 579.

[20] David Gilo, *The Anti-competitive Effect of Passive Investment*, 99 MICH. L. REV. 1, 22 (2000).

[21] *Id.* at 25.

[22] Robert Reynolds & Bruce Snapp, *The Competitive Effects of Partial Equity Interests and Joint Ventures*, 4 INT'L J. INDUSTRIAL ORG. 141, 142 (1986).

[23] Reynolds & Snapp, *supra* note 22, at 142; Gilo, *supra* note 20, at 4.

diversion ratio between the acquiring firm and the target firm is likewise high, or when the margins of the target firm are greater.[24]

These anti-competitive effects also materialize when the minority shareholding has some level of influence in the target firm through shareholders' meetings to approve certain strategic investments, engagement in acquisitions, and raising of capital, among others.[25] Contrary to a standard merger analysis which assumes that the acquiring firm will have full control over the acquired post-merger, Salop and O'Brien's framework sees the competitive effects of partial ownership arrangements as dependent on financial interest in the profits of the firm and corporate control over the firm.[26] A central part of the analysis of partial ownership is an assessment of which owners have certain types of influence or control over the corporation, and how this control translates into management decisions.[27]

Thus, the acquiring firm may influence the target firm to compete less aggressively, which would result in higher profits for the former. An increase in the price of the target firm benefits the acquiring firm through the recaptured sales, while bearing only a fraction of the cost depending on the level of its financial interest.[28] Therefore, minority shareholdings that confer some level of influence to the target firm result in higher anti-competitive effects compared to a purely passive minority shareholding.

On the other hand, Dubrow points out that there are factors which can mitigate the effects of structural links between firms, such as conflicting management incentives, inability of the minority shareholder to capture the benefits, and the existence of incomplete information.[29] A careful analysis should therefore be made regarding the decisions of the target firm and the alignment of incentives between the minority shareholder and the management of the target firm.[30]

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[24] OECD, *supra* note 13, at 35.

[25] *Id.* at 20−21.

[26] Salop & O'Brien, *supra* note 13, at 570.

[27] *Id.*

[28] European Comm'n, *Staff Working Document Accompanying the White Paper 'Towards more Effective EU Merger Control'* [hereinafter "EC Staff Working Document"], 19−20 (European Union, Commission Staff Working Document 221, 2014).

[29] Jon Dubrow, *Challenging the Economic Incentives Analysis of Competitive Effects in Acquisitions of Passive Minority Equity Interests*, 69 ANTITRUST L.J. 113, 131−35 (2001).; OECD, *supra* note 13, at 9.

[30] OECD, *supra* note 13, at 37.

In addition, Ariel Ezrachi and David Gilo submit that, in the case of differentiated products, the effect throughout the market of the acquiring firm's eagerness to increase prices will normally induce other rivals to follow suit without fear of losing market share, thereby leading to a market-wide price increase.[31]

While economic literature is not unanimous on the existence of coordinated anti-competitive effects, the majority view is that minority shareholding between competitors in concentrated markets that are prone to collusion facilitate coordination between firms.[32] This is primarily through increased transparency and changes in incentives of firms.

A minority stake can come with board representation and the ability to appoint senior managers, influence the transparency of pricing, modify commercial strategies, and access confidential business information.[33] Even if the minority stake is purely passive, transparency is increased as the investment allows access to business information unknown to an independent competitor.[34] Hence, a minority shareholding can facilitate collusion or make the monitoring of commonly-agreed conduct easier.

Moreover, according to Reynolds and Snapp, partial ownership improves cartel performance and enhances cartel profits.[35] Operating profits for all firms in the market are increased, making collusion more sustainable,[36] while the target firm's incentives to cheat on the collusive equilibrium are reduced as the firm will benefit financially from the collusive agreement. The increased ability to detect cheating facilitates retaliation, and at the same time creates incentives for the acquiring firm to undertake investments to deter entry by new players which could challenge the stability of the collusive arrangement.[37]

The foregoing does not take into account the incentives of other firms in the market to engage in price-cutting, which can lead to a breakdown of the

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[31] Ariel Ezrachi & David Gilo, *EC Competition Law and the Regulation of Passive Investments Among Competitors*, 26 OXFORD J. LEGAL STUD. 327, 330−31 (2006).

[32] OECD, *supra* note 13, at 30.

[33] *Id. See also* EC Staff Working Document, *supra* note 28.

[34] *Id.*

[35] Reynolds & Snapp, *supra* note 22, at 148−49.

[36] Ugo Merlone & Carmelo Salleo, *Minority Stakeholdings as an Anti-Competitive Device* (2003), *at* https://www.researchgate.net/publication/240641546_MINORITY_STAKEHOLDINGS_AS_AN_ANTI-COMPETITIVE_DEVICE.

[37] Reynolds & Snapp, *supra* note 22, at 149; OECD, *supra* note 13, at 31.

collusive equilibrium. However, according to Gilo,[38] when the firm most eager to cut prices (the "maverick") invests in a competitor, it sends a signal to the rest of the firms that it is committed to the collusive situation. With the maverick committed to the collusive price, tacit collusion becomes sustainable, leading to potentially strong anti-competitive effects.[39]

In sum, unilateral effects are generated in minority shareholdings—whether control is present or not—with the reduced incentives of the acquiring firm to compete. Additionally, the incentives of the target firm to compete are negatively affected if there is a degree of influence over the acquired firm which does not reach the level of control. The anti-competitive effects will then vary along a continuum, depending on how the firms take into account the interests of their shareholders. Lastly, specifically in cases of controlling minority shareholding, a free rider problem exists, which could yield unilateral increases in prices to drive demand towards the acquiring firm. This effect is negatively correlated with the percentage of financial interest in the acquired firm. Coordinated effects can also materialize in minority acquisitions due to increased transparency and changes in the incentives of firms.

The abovementioned anti-competitive effects generated by controlling and non-controlling minority shareholdings can also be seen in the decisional practices of two major antitrust authorities, which will be discussed below.

III. AGENCY APPROACH TO MINORITY SHAREHOLDINGS

A. Minority Shareholdings in the EU

1. Controlling Minority Shareholdings

The European Council Regulation EC No. 139/2004[40] on the control of concentrations between undertakings ("EU Merger Regulation") captures only acquisitions between firms that would result in a change of control on a lasting basis.[41] Control is characterized by the possibility of exercising decisive

[38] Gilo, *supra* note 20, at 5; Ezrachi & Gilo, *supra* note 31, at 332.
[39] *Id.*
[40] Dated Jan. 20, 2004.
[41] European Council Reg. No. 139/2004, art. 3.

influence on an undertaking.[42] No minimum level of shareholding is required to be caught under the EU Merger Regulation.

This means that a minority acquisition can be subject to merger review if it leads to sole or joint control of an undertaking, notwithstanding the amount of shares to be acquired.[43] Sole control may be acquired by obtaining the majority of voting rights in a firm, or through a situation where only one shareholder is able to veto strategic decisions.[44] Veto rights that go beyond minority shareholder protection rights, such as where the acquiring firm is able to block strategic decisions of the target firm, also indicate decisive influence. In this regard, veto rights over decisions on the acquired firm's appointment of senior management, determination of budget, formulation of business plans, and direction of strategic investments, among others, may indicate control.[45]

A *de facto* change of control and joint control are likewise subject to merger review. The former can occur when the shareholder, despite the minority shareholding, will achieve *de facto* majority at shareholders' meetings; when there are structural, economic, or family links between the minority shareholder and other shareholders; or when the minority shareholder is a lender of the target firm.[46] Meanwhile, joint control may arise if two or more firms or persons will be able to exercise decisive influence over the target firm, such that they have to agree on major decisions concerning the subject firm.[47] This can be similarly established on a *de jure* or *de facto* basis.[48]

Hence, minority acquisitions are covered by the EU Merger Regulation if they confer control or decisive influence in favor of the acquiring firm, including instances of joint control (controlling minority shareholding).

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[42] Art. 3(2).

[43] An undertaking is an entity engaged in economic activity.

[44] European Union, *Commission Consolidated Jurisdictional Notice Under Council Regulation (EC) No. 139/2004 on the Control of Concentrations Between Undertakings* [hereinafter "Jurisdictional Notice"], at 16, O.J. C95/01 (2008).

[45] *Id.* at 18.

[46] *Id.* at 17. According to the Directorate General for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF), a 20% minority shareholding may confer exclusive control if the concerned minority shareholder operates in the same sector as the target or in a similar sector and if the other shareholders are financial investors, *cited in* Florence Ninane et al., *Minority Interests Require Attention*, INT'L FIN. L. REV. (2008), *available at* https://www.iflr.com/Article/2025672/France-Minority-interests-require-attention.html.

[47] *Id.*

[48] *Id.* at 20.

Similar to a competition analysis of a majority share acquisition or a complete merger, a controlling minority share acquisition can lead to unilateral and coordinated effects when the acquiring firm is a close competitor of the acquired firm.

One example is the *Vivendi/Telecom Italia* case.[49] The European Commission ("EC") found that while Vivendi only held 23.93% voting rights in Telecom Italia, it is able to exercise sole *de facto* control due to several factors, including Vivendi's status as the largest and only industrial shareholder, and its power to appoint the majority of the board of directors.[50] While Telecom Italia has a subsidiary (Persidera S.p.A) in the wholesale access to digital terrestrial networks for broadcast of TV channels (DTT Wholesale Access), Vivendi owns financial interests in Mediaset, a competitor of Persidera. Hence, there is an overlap between Vivendi and Telecom Italia's businesses in the DTT Wholesale Access market that raises anti-competitive, horizontally unilateral effects.

Telecom Italia, controlled by Vivendi, would have changed incentives to compete against Mediaset.[51] The former could raise prices or offer poorer conditions, leading to financial benefit for Mediaset and Vivendi. Thus, the transaction was cleared on the condition that Telecom Italia divests itself of Persidera to remove the overlap and ensure continued competition between Persidera and Mediaset.[52]

2. Non-controlling Minority Shareholdings

The EC already recognizes that non-controlling minority shareholdings likewise lead to anti-competitive effects. In a 2001 Green Paper, the EC discussed the possibility of widening the scope of the merger regulation to cover non-controlling investments. It was acknowledged that minority shareholding and interlocking directorships may alter the linked firms' incentive to compete and consequently impact market conditions.[53]

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[49] Vivendi/Telecom Italia, Case M.8465 (Eur. Comm'n 2017), *available at* https://ec.europa.eu/competition/mergers/cases/decisions/m8465_568_3.pdf.

[50] Pierantonio D'Elia, Eleonora Ocello, & Salvatore De Vita, *The EU Commission Conditionally Approves the Acquisition of a De Facto Sole Control over a National Incumbent Telecommunications Company, Subject To Remedies (Telecom Italia / Vivendi)*, CONCURRENCES, May 30, 2017, *at* https://www.concurrences.com/en/bulletin/news-issues/may-2017/the-eu-commission-conditionally-approves-acquisition-of-de-facto-sole-control.

[51] *Id.*

[52] *Id.*

[53] European Commission, Green Paper on the Review of Council Regulation (EEC) No. 4064/89, ¶ 107 [hereinafter "Green Paper"], COM(2001) 745 (Dec. 11, 2017).

However, the EC believes that the extension of the EU Merger Regulation to cover passive minority shareholding is disproportionate, since only a small number of transactions will raise competition concerns that are not covered by Articles 81 and 82 of the EC Treaty.[54]

In the White Paper released on July 9, 2014, with proposals on the possible amendments of the EU Merger Regulation,[55] the EC recognizes that obtaining a minority interest in a competitor can lead to unilateral effects by increasing the acquirer's ability and incentive to raise prices or restrict output. Firms that have stakes in their competitors' profits may internalize the positive effects of their own output reductions or price increases on their competitors' profits.[56] Such an effect materializes whether the shareholding is active or passive (meaning its holder has no influence on the target firm's decisions).[57]

Additionally, as discussed in Part II, if the acquiring firm has influence over the target firm, the former may sway the latter to increase its price because:

> [T]he acquiring firm fully benefits from the positive externalities of the competitor's price increase but bears only part of the costs, depending on the level of its financial ownership rights. If the target company is ultimately forced to stop competing with the acquirer, the situation would be akin to a full merger but without any of the cost-saving efficiencies that a merger can generate.[58]

The acquiring firm can also use its influence to limit the competitive strategies of the target firm, weakening it as a competitor,[59] by influencing the outcome of special resolutions for approving significant investments, raising

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[54] *Id.*, ¶ 109.

[55] European Comm'n, White Paper Towards more effective EU merger control [hereinafter "White Paper"], COM(2014) 449 (July 9, 2014).

[56] *Id.*, ¶ 29.

[57] *Id.* Similarly, in its decision in *Vivendi/Telecom Italia*, the European Commission stated that: "Minority shareholdings, including non-controlling shareholdings, can potentially weaken competition between operators active on the same market through non-coordinated anti-competitive effects. The minority shareholding in a competitor may increase the incentive and ability of the minority shareholder to unilaterally increase its own prices or restrict its output. If an undertaking has a financial interest in its competitor's profits, it may decide to 'internaliser' increase those profits by reducing its own output or increasing its own prices. This anti-competitive effect may occur whether the minority shareholding is passive (conferring no influence on the decisions of the undertaking) or active (conferring some influence on the decisions of the undertaking)."

[58] EC Staff Working Document, *supra* note 28, ¶ 51.

[59] White Paper, *supra* note 55, ¶ 30.

capital, changing the product or geographic scope of the business, and entering into mergers and acquisitions.[60]

An example of anti-competitive effects arising from the acquisition of a non-controlling minority shareholding with influence is *Toshiba/Westinghouse*.[61] Westinghouse sought to acquire Toshiba, which has 24.5% of the voting rights in Global Nuclear Fuel ("GNF"), one of the two most important competitors of Westinghouse. Toshiba's veto rights could be used to prevent GNF from expanding into competing fields with Westinghouse. Furthermore, through its information rights and board representation, Toshiba could obtain sensitive confidential information to make GNF's expansion more difficult. The approval of the transaction required Toshiba to relinquish all board and management representation in GNF, its veto rights, and all rights to obtain any confidential information.

Another case is *Nordbanken/Postgirot*.[62] Nordbanken, a large Swedish bank, sought to acquire Postgirot, a Swedish company which owns and operates one of Sweden's two *giro*[63] payment systems. The second *giro* system is operated by Bankgirot, where Nordbanken held a significant shareholding and was represented in the board of directors. Post-transaction, Nordbanken would have access to confidential business information of Postgirot's only competitor, and hence could exert significant influence on strategic decisions of both systems, lessening Bankgirot's ability and incentive to act as an independent competitor and allow coordination of their pricing structure and conditions. Nordbanken then undertook to reduce its shareholding in Bankgirot to less than 10%, withdraw all its representatives in Bankgirot's board and other bodies, and pledged to obtain no commercial information.[64] The EC found this will remove the structural links between the two competitors, allowing them to continue to compete.

In *AXA/GRE*,[65] the EC was concerned that the acquisition by AXA of Guardian Royal Exchange ("GRE"), which included GRE's investment in

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[60] EC Staff Working Document, *supra* note 28.

[61] European Comm'n Case C-184/02 (2006).

[62] European Comm'n Case C-347/05 (2001).

[63] A *giro* payment system is a method for transferring funds. The decision explains: "Postgirot is the only bank in Sweden that has its own internal giro system mainly because state authorities were under an obligation until 1994 to use Postgirot for their in- and outgoing payments. On the basis of its system, Postgirot enables its household and corporate customers to make direct transfers and payments between Postgirot accounts using so-called Postgiro numbers as an identifier." *Id.*, ¶ 26.

[64] *Id.*, ¶ 60.

[65] European Comm'n Case COMP/M.1453 (1999).

Le Foyer, would produce structural links between two competitors in the insurance market in Luxembourg.[66] While the parties argued that the investment in Le Foyer is a pure financial interest, the EC considered that post-transaction, AXA would have representation in the board of its competitor and would be involved in strategic business decisions that impact AXA's competition with Le Foyer.[67] Consequently, AXA proposed commitments to eliminate the structural link with Le Foyer.

The non-controlling minority shareholding may also lead to coordinated anti-competitive effects when the acquiring firm has access to the competitor's commercial activities and competitively sensitive information.[68] As noted in economic literature, deviation from collusive behavior is less likely as there is credible and severe threat of retaliation.[69]

An example is the case of *VEBA/VIAG*.[70] Both the acquiring and acquired firms are present in all levels of the electricity industry, with minority stakes in other regional and local energy firms.[71] Since the industry's characteristics facilitate oligopolistic parallel behavior, the merger would encourage coordination between competing firms.[72] The transaction was cleared with divestments of the parties' minority stakes in other power companies.

Finally, input foreclosure is more likely to result in non-controlling minority shareholdings because the acquiring company only internalizes a part, rather than all, of the target firm's profits. In some cases, the risk of foreclosure from a minority shareholding is actually higher than in full integration. Such was the concern in *IPIC/MAN Ferrostaal*,[73] where the subsidiary of International Petroleum Investment Company ("IPIC") was one of the major producers of melamine, while MAN Ferrostaal AG had a 30% minority shareholding in Eurotecnica, which supplies the non-proprietary technology for melamine production. The 30% interest confers material influence as decisions are taken by supermajority and all shareholders have extensive information rights. To remedy the expected effect of a foreclosure

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[66] *Id.*, ¶ 24.
[67] *Id.*
[68] EC Staff Working Document, *supra* note 28, ¶ 58.
[69] *Id.*
[70] European Comm'n Case COMP/M.1673 (2000).
[71] *Id.*, ¶ 92.
[72] *Id.*, ¶¶ 70−89.
[73] European Comm'n Case C-114/02 (2009).

strategy for the production of melamine and increased risk of coordination, MAN Ferrostaal divested its entire minority shareholding in Eurotecnica.[74]

The foregoing discussion illustrates how the EC has sought to address the anti-competitive effects of non-controlling minority shareholdings with influence. While the decided case examples have not dealt with the anti-competitive effects arising from purely passive minority shareholdings, the EC recognizes the economic theory on the anti-competitive effects arising from passive non-controlling minority shareholdings in its issuances.[75]

B. Minority Shareholdings in the United States

Section 7 of the United States' Clayton Act prohibits acquisitions where the effect may be to substantially lessen competition.[76] However, it has no requirement of control as seen in the EU Merger Regulation. Section 7 contains an exception: acquisitions of stock solely for investment purposes, and are not being used to bring about, or attempt to bring about, the substantial lessening of competition. Mirroring this, the Hart-Scott-Rodino Act exempts from pre-merger notification transactions that are solely investment acquisitions, setting the threshold at 10% of the outstanding voting securities of the issuer.[77]

The Rules, Regulations, Statements and Interpretations Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 define the phrase "solely for the purpose of investment" as the situation where the person holding or acquiring the voting securities has "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer."[78] In the Federal Trade Commission's (FTC) Statement of Basis and Purpose, acts such as nominating a board member candidate, proposing corporate action requiring shareholder approval, soliciting proxies, being a competitor, or having a controlling shareholder, director, officer, or employee simultaneously serving as an officer or director of the issuer show that the acquisition is not for investment purposes.[79]

Thus, minority shareholdings, whether resulting in control, are covered by the law and assessed to determine whether it will result in

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[74] *Id.*
[75] White Paper, *supra* note 55; Green Paper, *supra* note 53.
[76] 15 U.S.C. § 18. Clayton Act of 1914.
[77] 15 U.S.C. § 18a(c)(9). Hart-Scott-Rodino Antitrust Improvements Act of 1976.
[78] 16 CFR § 801.1(i)(1).
[79] 43 Fed. Reg. 33450, 33465 (1978).

substantial lessening of competition. The "solely for investment" exception will not apply if the acquisition will have anti-competitive effects.[80]

This is seen in *Briggs Manufacturing Co. v. Crane Co.*,[81] where Crane purchased less than 10% of Briggs stock in the open market and was exerting efforts toward the election of its nominated directors in Briggs. The exception was held inapplicable in view of the Crane chairman's admission that there was no intention to purchase Briggs stock as an investment (but to use their plants), among other factors. The court noted that the two companies are competitors, and a further acquisition will increase concentration and the removal of an important competitor in the market.[82] In *Gulf & Western Industries*, the court considered a corporation's well-established practice of acquiring minority shares in companies initially and then insinuating itself onto the board as evidence of intention to obtain control.[83] As the parties are involved in the retail food market in New York metropolitan area, it was alleged that the acquisition would violate antitrust laws.[84]

In *Hamilton Watch Co. v. Benrus Watch Co.*,[85] Benrus obtained 24% of Hamilton's outstanding shares through the stock exchange and claimed that the acquisition was for investment purposes. The court rejected Benrus' claim, pointing out that Benrus sought manufacturing facilities in the United States as a hedge against future difficulties in importation and insisted upon its right to vote and elect at least one director in Hamilton's board. These would allow Benrus, a competitor, to obtain confidential information that could allow collaboration or harm Hamilton's market position.[86]

In instances when the acquiring firm agrees not to seek board representation, not to exercise its right to vote, and to limit its share ownership, US courts have permitted the application of the "solely for investment" exception. Such was the case in *Anaconda Co. v. Crane Co.*[87] where Crane, proposing to acquire 22.6% ownership of Anaconda, submitted a "Stipulation" not to seek board representation, not to acquire more than the

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[80] Janet Winningham, *Solely for Investment Purposes: Evolution of a Statutory Exemption under Clayton Section 7*, 12 LOY. U. CHI. L.J. 571, 590 (1981).

[81] Briggs Manufacturing Co. v. Crane Co., 185 F. Supp. 177 (E.D. Mich.), 280 F.2d 747 (6th Cir. 1960).

[82] *Id.*

[83] Gulf & Western Industries, Inc. v. Great Atlantic and Pacific Tea Co., 476 F.2d 687 (2nd Cir. 1973).

[84] *Id.* at 6.

[85] Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307, 313 (D. Conn. 1953).

[86] *Id.*

[87] Anaconda Co. v. Crane Co., 411 F. Supp. 1210 (S.D.N.Y. 1975).

five million shares, and not to take any action in its business that would lessen competition with Anaconda.[88]

In another transaction, the FTC had the occasion to stress that the exception is limited to situations in which "the investor has no intention to influence the management of the target firm."[89] A firm that owned less than 10% in its competitor—with rights to receive competitively sensitive non-public information, appoint a director in the board, and vote on all matters for shareholders' approval—was prohibited by the FTC to have representation on the board, participate in the business of the competitor, and have access to books and records.[90]

In the case of *KMI/Carlyle/Riverstone*,[91] Kinder Morgan, Inc. ("KMI") was to be acquired by private equity funds managed by The Carlyle Group ("Carlyle") and Riverstone Holdings LLC ("Riverstone"). One of the funds controlled and managed by Carlyle and Riverstone had 50% interest in the general partner controlling Magellan Midstream Partners, L.P. ("Magellan"). KMI and Magellan compete in at least eleven terminal markets in the United States. The exercise of unilateral market power was more likely as KMI and Magellan are close competitors with no other suppliers likely to replace the lost competition. Coordinated effects were also more likely, due to the remaining few firms in the markets, as the transaction would eliminate an independent participant that served as an important competitive influence. The transaction would have resulted in higher prices of gasoline and other petroleum products, among others.[92]

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[88] Winningham, *supra* note 80, at 584; *Id.* at 1217.

[89] U.S. Fed. Trade Comm'n (FTC), *Third Point Funds Agree to Settle FTC Charges that They Violated U.S. Premerger Notification Requirements* (2015), *at* https://www.ftc.gov/news-events/press-releases/2015/08/third-point-funds-agree-settle-ftc-charges-they-violated-us. Three funds claimed that they were exempt from notification because their acquisition of Yahoo shares was made solely for investment. The FTC filed a complaint alleging that actions inconsistent with an investment-only intent were taken by the purchaser as it communicated with certain persons on becoming a CEO or board member of Yahoo.

[90] OECD, *Hearing on Common Ownership by institutional investors and its impact on competition – Note by the United States*, DAF/COMP/WD (2017), 5, *citing In re* Medtronic, Inc., Dkt. C-3842 (Oct. 1, 1998).

[91] US FTC File No. 061 0197, TC Group L.L.C., Riverstone Holdings LLC, Carlyle/Riverstone Global Energy and Power Fund II, L.P.; Analysis of Proposed Agreement Containing Consent Orders to Aid Public Comment, 72 Fed. Reg. 4508 (Jan. 31, 2007), *available at* https://www.ftc.gov/legal-library/browse/federal-register-notices/tc-group-llc-riverstone-holdings-llc-carlyleriverstone-global-energy-power-fund-ii-lp-analysis.

[92] *Id.* at 4508–10.

The FTC found that the partial minority ownerships would result in the reduction of competition through board representations on KMI and Magellan, veto power at Magellan, and exchange of confidential information between the two competitors. Consequently, under a consent agreement, Carlyle and Riverstone were required to remove representatives from the Magellan board of managers and directors, refrain from further appointing representatives to these boards, refrain from influencing or attempting to influence Magellan, refrain from receiving non-public information about Magellan, and establish safeguards against the sharing of competitively-sensitive information between KMI and Magellan.[93]

The foregoing cases demonstrate that the US FTC acts against anti-competitive effects brought about by minority shareholdings, regardless of control or the level of influence. However, similar to the EU practice, it allows purely passive minority shareholding to be exempted from antitrust scrutiny. It has been noted that agency practice neglects the effect of purely passive non-controlling minority shareholding on the incentives of the acquiring firm itself.[94]

Nonetheless, in other decided cases involving minority shareholdings, the US Department of Justice (US DOJ) sought the divestment of all minority shares. It appears that this was geared towards the anti-competitive effects of even purely passive minority shareholding. This is the case in the consent decree on US West's acquisition of Continental Cablevision.[95] The US DOJ stated that the acquirer's pricing and output decisions would be influenced by its partial ownership of a significant direct competitor. It would not be detrimental for US West to lose customers to TCG, and it would have less incentive to lower prices or increase quality.[96] Thus, the final judgment in this case required complete divestiture of the minority shareholding.[97]

Likewise, in *CommScope/Andrew*,[98] complete divestment was sought by the US DOJ because the transaction would result in the substantial lessening

[93] *Id.* at 4510–11.

[94] Gilo, *supra* note 20, at 33.

[95] United States v. US West, Inc., 48 F.3d 1092 (9th Cir. 1994), Competitive Impact Statement (1996), *available at* https://www.justice.gov/atr/case-document/competitive-impact-statement-220.

[96] *Id.*

[97] United States v. US West, Inc., 855 F. Supp. 1184 (1994), Final Judgement, *available at* https://www.justice.gov/atr/case-document/final-judgment-192.

[98] United States v. CommScope, Inc., 72 FR 72376 (2007) , Competitive Impact Statement (2007), *available at* https://www.justice.gov/atr/case-document/competitive-impact-statement-73; Final Judgment (2008), *available at* https://www.justice.gov/atr/case-document/final-judgment-54.

of competition in the drop cable market due to the minority shareholding of Andrew in Andes Industries, Inc., a competitor of CommScope Inc., the acquiring firm. The US DOJ noted that CommScope's interest in Andes would reduce its incentive to compete with the latter. In addition, with CommScope's governance rights, it would be able to appoint two members of Andes' board, have access to confidential business information which would create the opportunity and incentive to coordinate its activities with Andes, and weaken Andes' ability to compete. Thus, the consent decree required the divestment of Andrew's entire share in Andes.

The snapshot presented above on the United States' decisional practice on different types of minority shareholdings—including those that are controlling and with some level of influence and those that are purely passive—appears to be fluid. Regardless, and pending further research on this issue, both the US DOJ and the FTC have recognized the possible anti-competitive effects of minority shareholdings. Indeed, the US DOJ and FTC Horizontal Merger Guidelines specifically recognize that partial acquisitions that do not result in control may result in anti-competitive effects.[99] It echoes the economic literature on this subject. First, the partial acquisition may provide the acquiring firm with the ability to influence the competitive conduct of the target firm, for example, by inducing the target firm to compete less aggressively or to coordinate its conduct with that of the acquiring firm. Second, it may reduce the incentive of the acquiring firm to compete as it will share in the losses inflicted by aggressive competition on the target firm.[100] Lastly, competition may be lessened because of the acquiring firm's access to non-public, competitively sensitive information from the target firm, thereby enhancing the likelihood of coordination between the firms.

IV. THE PHILIPPINE CONTEXT

A basic premise in the economic literature on minority shareholding is that in oligopolistic markets with high barriers to entry, partial ownership modifies the economic incentives of firms to compete, which may result in less output with higher prices and facilitate collusive outcomes.[101] Such market conditions can likewise lead to minority shareholdings giving rise to

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[99] US Dep't of Justice and FTC Horizontal Merger Guidelines (2010), *available at* https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

[100] OECD, Antitrust Issues Involving Minority Shareholding and Interlocking Directorates – United States, at 3, DAF/COMP/WP3/WD(2008)26 (2008).

[101] Reynolds & Snapp, *supra* note 22, at 142. This is due to the positive correlation of profits between competitors.

the requisite degree of influence over the acquired firm that will further magnify the anti-competitive effects identified that result from non-controlling minority shareholding.

The risk is higher in the case of the Philippines, where a handful of firms or "family dynasties"[102] dominate the economy. The country's president himself has publicly recognized and vocalized his battle against oligarchs profiting at the expense of the poor in the Philippines.[103] In a 2018 study by the World Bank, there was a rise in the Philippines' average four-firm concentration ratio across all subsectors from 71% in 1988 to 81% in 1998. A notable proportion of markets was classified as highly concentrated, with more than 40% in manufacturing, near 50% in wholesale and retail, more than 70% in agriculture, and more than 95% in transport and storage.[104]

Moreover, there are several markets in the Philippines with only one firm in operation, where competition would usually be viable.[105] The study further found that 45% of the market restrictions discriminate and protect vested interests, 34% relate to rules conducive to collusion or an increase of costs to competition, and 21% relate to rules that reinforce dominance or limit entry.[106] In addition, the Philippines scored approximately 2.12 in the OECD Product Market Regulation ("PMR") Indicator, clustered with the economies of Guatemala, Croatia, Israel, and El Salvador. Meanwhile, most European countries score under 1.74 to less than 1, and in the Asia-Pacific, Australia and New Zealand among the top performers.[107] The Philippine PMR indicators point towards a less conducive environment for competition, especially due to high barriers to trade and investment, barriers to entrepreneurship, and high degree of state control.[108]

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[102] Rodrigo Duterte, 5th State of the Nation Address, July 27, 2020, *available at* https://www.officialgazette.gov.ph/2020/07/27/rodrigo-roa-duterte-fifth-state-of-the-nation-address-july-27-2020/; Aurora Almendral, *Crony capital: How Duterte embraced the oligarchs*, NIKKEI ASIA, Dec. 4, 2019, *available at* https://asia.nikkei.com/Spotlight/The-Big-Story/Crony-capital-How-Duterte-embraced-the-oligarchs; Jason Castaneda, *New oligarchs replacing old in the Philippines*, ASIA TIMES, Aug. 1, 2020, *available at* https://asiatimes.com/2020/08/new-oligarchs-replacing-old-in-the-philippines/.

[103] *Id.*

[104] The World Bank Group, *Fostering Competition in the Philippines: The Challenge of Restrictive Regulations* (2018).

[105] *Id.*

[106] *Id.* at 9.

[107] *Id.* at 40. *See also Indicators of Product Market Regulation*, OECD WEBSITE, *at* https://www.oecd.org/economy/reform/indicators-of-product-market-regulation/.

[108] *Id.* at 1–12.

A small market economy such as the Philippines cannot ignore the natural conditions of its markets—the high degree of concentration and high entry barriers—in crafting optimal rules to protect and preserve competition.[109] After all, "whether firms compete is very much a matter of the structure of the markets in which they operate, and structure is influenced primarily by the natural conditions of the market."[110] Michal Gal posits that the fact that a small market can only support a limited number of firms necessarily increases their interdependence and facilitates conscious parallelism. This requires not just strict enforcement against collusion, but the adoption of additional regulatory methods such as a prohibition against facilitating practices that have no or minimal offsetting pro-competitive effects.[111]

Therefore, it is important for competition law and policy to break down oligopolistic coordination and "induce oligopolists to operate at higher levels of output and lower prices than they would have but for the legal consequences."[112] It is even more urgent when one considers that the country has only achieved a competition statute in 2015 when other jurisdictions such as the European Union and United States have been able to implement competition policy for decades (1990 and 1914, respectively). A critical tool for the PCC to achieve such objective is the prevention of minority share acquisitions which create structural links between competitors in an oligopolistic market. These acquisitions generate unilateral effects and facilitate coordination, if not collusion, between firms, while generating no efficiency gains compared to a full merger.[113]

V. AN ENFORCEMENT GAP?

The Philippines has a compulsory notification merger regime for transactions that satisfy both the size of person and size of transaction tests. It covers both mergers as well as acquisitions. A merger is defined as the joining of two or more entities into an existing entity or to form a new entity.[114] An acquisition is defined as the purchase of securities or assets,

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[109] MICHAL GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES 253 (2003).

[110] *Id.*

[111] *Id.* at 254.

[112] *Id.*

[113] Frank Maier-Rigaud, Ulrich Schwalbe & Felix Forster, *The Role of Non-Coordinated Effects in the Assessment of Minority Shareholdings*, 14 ZEITSCHRIFT FÜR WETTBEWERBSRECHT 246 (2016).

[114] PCA, § 4(j).

through contract or other means, *for the purpose of obtaining control*.[115] Failure to comply with the notification requirement under the PCA renders the transaction void *ab initio* and imposes a penalty of 1–5% of the value of the transaction upon the merging parties.

Similar to the EU framework, control is a prerequisite for the PCA to apply to acquisitions. Control under the PCA "refers to the ability to substantially influence or direct the actions or decisions of an entity, whether by contract, agency or otherwise."[116] The reference is therefore control over an entity, as highlighted by Section 25 of the PCA, which provides that in situations where an entity owns one half (1/2) or less of the voting power of another entity, the PCC may consider the following to determine control:

(a) Power over more than one half of the voting rights;
(b) Power to direct or govern the financial and operating policies;
(c) Power to appoint or remove majority of the board members;
(d) Ownership or right to use all or a significant part of the assets of the entity;
(e) Existence of rights or contracts which confer *decisive influence* on the decisions of the entity.[117]

The decisive influence standard for control was taken from the EU Merger Regulation, where control is defined as the possibility of exercising decisive influence on an undertaking, on the basis of rights, contract, or any other means.[118] No definition under Philippine statute and case law exists for decisive or substantial influence. According to the Philippine Congress' deliberation records, factors (d) and (e) were adopted from the EU while (a) through (c) were taken from the Securities Exchange Commission's (SEC) definition of control.[119] Therefore, acquisitions that will not result in control is outside the scope of the PCA, and accordingly, the PCC, cannot acquire jurisdiction over minority share acquisitions that do not result in control.

As a proxy for control in share acquisitions, the implementing rules of the PCA provide a share acquisition threshold. Notification is required if the acquisition of shares will result in holding more than 35% voting shares of the company, or 50% if the 35% had already been breached.[120]

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[115] PCA, § 4(a).
[116] § 4(f).
[117] § 25.
[118] European Council Reg. No. 139/2004, art. 3(2).
[119] Transcript of the Stenographic Notes of the Bicameral Conference Committee on the Disagreeing Provisions of S. No. 2282 and H. No. 5286, 16th Cong. (2015).
[120] Rep. Act No. 10667 Rules & Regs. (2016), Rule 4, § 3(b)(4).

It must be noted, however, that these percentages are only a presumption that control has been acquired. The PCC is not precluded from investigating *motu proprio* whether a lower share acquisition results in the acquisition of control.

As seen in the EC's Consolidated Jurisdictional Notice[121] and PCC Guidelines on Notification of Joint Ventures, there are various permutations of control. It can be sole, joint, positive, negative, *de facto*, or *de jure*.[122] Consequently, the PCC can verify if the level of influence exercised or to be exercised or acquired by a minority shareholder will amount to decisive influence, taking into account various factors such as historical voting patterns, board representation, economic and family links, technical dependence, and hiring and firing of officers. [123] Whether this is a realistic option for the PCC will be discussed in the subsequent section.

For non-controlling minority share acquisitions, with or without influence, the PCC may only consider its anti-competitive effects if these arise in the context of a separate transaction where control is acquired. This is the situation in the EU cases previously discussed[124] where there was an acquisition resulting in control that forms the basis for the jurisdiction of the antitrust agency, and there were preexisting minority shareholdings by either the acquiring or target firm that create overlaps between their business operations. In these situations, the PCC can raise competition concerns on those minority shareholdings, even if they are not in themselves a basis for notification.

Nevertheless, the acquisition of the non-controlling minority shareholding cannot be a ground for PCC to acquire jurisdiction. This allows unexamined potential anti-competitive effects flowing from the acquisition of a non-controlling interest in a competitor.

VI. PROPOSALS

Having discussed the importance of the PCC examining minority shareholdings, recommendations on how to improve enforcement and address an enforcement gap are proposed in this section.

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[121] Jurisdictional Notice, *supra* note 44.

[122] Notification Guidelines, *supra* note 12, at 10.

[123] *Id.*

[124] Nordbanken/Postgirot, Eur. Comm'n Case C-184/02; AXA/GRE, Eur. Comm'n Case COMP/M.1453; VEBA/VIAG, Eur. Comm'n Case COMP/M.1673. *See supra* pp. 13–15.

A. Controlling Minority Shareholdings

As previously stated, the PCC can, in theory, go after controlling minority shareholdings that fall below the 35% benchmark under the implementing rules. In its brief history, the PCC has not opened a case for a minority share acquisition to see if the acquisition will result in control and whether it will lead to a substantial lessening of competition. An assessment then on how realistic it is for PCC to be able to go after controlling minority shareholdings is needed at this juncture.

First, the economic concept of control under the PCA is unprecedented in Philippine law. The traditional way that the Philippine courts have evaluated control is limited to cases questioning the nationality of a corporation.[125] Cases dealing with the doctrine of piercing the corporate veil based on the alter ego theory is inapplicable. As a company will be held liable for another's debts, there must naturally be convincing proof that the control exercised must be of "complete domination," not only of finances but of policy and business practice, such that the corporate entity has "no separate mind, will or existence of its own."[126] This is obviously inapplicable to the PCA's version of control, which does not require complete domination but only decisive influence. There is no precedent as to how control is attributed under competition law.

Another difficulty is the fact that any attempt by the PCC to obtain relevant documents to prove the existence of control, such as minutes of meetings, voting trust arrangements, and management agreements, would be met with resistance from the transacting parties, potentially leading to costly and time-consuming litigation. For a young competition agency, effectiveness is crucial. Going after big companies with unlimited resources on a threshold question will most certainly be stymied at the court. This will drag on, rendering moot any substantive analysis of the transaction, delivering a huge blow to PCC's credibility.

A prime example was the 2016 acquisition by the only two telecommunications providers in the country of an imminent entrant to the market.[127] The PCC sought to review the said acquisition and released a

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[125] Securities & Exchange Comm'n Off. of the Gen. Counsel (SEC-OGC) Op. No. 16-19 (Aug. 11, 2016); SEC-OGC Op. No. 07-22 (Dec. 7, 2007).

[126] WPM Int'l Trading, Inc. v. Labayen, G.R. No. 182270, 735 SCRA 297, Sept. 17, 2014.

[127] PCC, *Telco deal not deemed approved*, PCC WEBSITE, June 17, 2016, *at* https://phcc.gov.ph/press-releases/telco-deal-not-deemed-approved-pcc-comprehensive-review/.

preliminary statement of concerns on the transaction.[128] Two days later, on August 26, 2016, the Court of Appeals issued a preliminary injunction barring the PCC from continuing with the review based on procedural grounds.[129] Additionally, a gag order was issued by the same court enjoining the PCC from issuing statements on the case, including its preliminary findings that raised competition concerns on the transaction.[130] In the meantime, the parties had already consummated the transaction.

Third, considering that the Philippine business and political landscapes are dominated by family elites with a diversified portfolio, proving *de facto* control through family links is a real challenge. A corporation may have only one or two family members as board directors—and yet, such corporation can act pursuant to the entire family's interests. It may very well be the case that there is no individual interest of the family members separate from the family itself. Unfortunately, this is entirely difficult, if not impossible, to prove, as the family members can merely argue that they are acting for themselves independently and not for their other family members.

Fourth, the requirement of independent directors under SEC rules[131] may be used by companies to avoid attribution of control. In the proposed acquisition by Chelsea Logistics Holdings Corporation of shares in KGLI-NM Holdings, Inc.,[132] the parties used this particular argument to support their position that the acquired firm's ultimate controller will have no control over the acquired firm's subsidiary post-transaction. Specifically, it was argued that since there are nine company directors with at least two required by corporation laws to be independent, only seven regular directors are left for election. Accordingly, since the acquiring firm can only elect a maximum of four (out of nine total directors), there is no control.[133]

The PCC disposed of the issue by stating that the independent directors are elected by persons who are also directors of Chelsea. This determination, however, was not elevated to the courts. With existing

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[128] *Id.*

[129] PCC, *Press Release No. 2017-012*, PCC WEBSITE, Apr. 19, 2017, *at* https://phcc.gov.ph/press-releases/pcc-asks-sc-lift-ca-injunction-blocking-review-p69-1-b-telco-deal/.

[130] Froilan Castelo, *Official Statement on PCC and SMC*, GLOBE TELECOM WEBSITE, May 31, 2017, *at* https://www.globe.com.ph/about-us/newsroom/corporate/official-statement-pcc-smc.html.

[131] Securities & Exchange Comm'n (SEC) Mem. Circ. No. 16 (2002).

[132] *In re* Proposed Acquisition by Chelsea Logistics Holdings Corp. of Shares in KGLI-NM Holdings, Inc., Case No. M-2018-002 (PCC July 3, 2018).

[133] *Id.*, ¶ 35.

regulation on the qualifications of an independent director to safeguard his fiduciary duty to the company and not to the latter's majority shareholders or directors,[134] the jury on this issue is still out.

Lastly, from a strategic perspective, the PCC's important work in preventing anti-competitive mergers from taking place should not be stymied by costly and time-consuming disputes on threshold issues. As a new agency building up its credibility and expertise, it has incentives to prioritize clear wins that will hold in any subsequent litigation.

These factors surrounding the investigation and establishment of control hinder a controlling minority acquisition from being the subject of a successful case to obtain jurisdiction. The value, then, of being able to acquire jurisdiction over acquisitions of non-controlling minority shareholdings becomes obvious. If the threshold question of control is eliminated, it is no longer necessary for PCC to hurdle the issue of control in assessing the anti-competitive effects of minority share acquisitions.

Within the current legal framework, the PCC can improve its enforcement of controlling minority shareholdings by lowering the notifiable threshold for share acquisition from 35% to a shareholding level that is grounded in the realities of when decisive or substantial influence is exercised. This will obviate the challenges faced by the PCC in extending its jurisdiction over non-notifiable controlling minority shareholdings. The next question is at what level of shareholding will it be reasonable to assume that decisive or substantial influence is present.

The EC's 2016 Support Study for Impact Assessment concerning the review of Merger Regulation regarding Minority Shareholdings ("Support Study")[135] looked at how different countries (specifically the United Kingdom, Germany, United States, Japan, and Austria) set their threshold review of minority acquisitions and the rights attached to different shareholding levels. It concluded that while it is not possible to identify which rights are attached to certain shareholding levels, it can be observed that first, before reaching a 10% shareholding, it is generally unlikely that a minority shareholder will acquire any significant rights such that it can interfere with the business strategy of the company. Further, there seems a certain point above which veto rights are expected to enable such interference. An approximately above

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[134] SEC Mem. Circ. No. 16 (2002), *supra* note 131.

[135] Patricia Ypma, Peter McNally, Lena Boucon, & Ioannis Kokkoris, *Support study for impact assessment concerning the review of Merger Regulation regarding minority shareholdings : final report*, PUBL'N OFF. OF THE EUR. UNION (2016), *at* https://data.europa.eu/doi/10.2763/09009.

25% shareholding would be expected to carry vetoes on certain key issues. Lastly, even if such vetoes can allow interference in the company's business strategy, such interference will still depend on the factual circumstances.[136]

Hence, the EU White Paper proposal used 25% level of shareholding as the upper limit for the threshold, ultimately choosing 20% as the appropriate starting point to identify potentially problematic transactions. Below 20%, the additional elements needed are "badges of influence," such as a *de facto* blocking minority, a seat on the board, or access to commercially sensitive information of the target.[137] This is consistent with the decisions in *Toshiba/Westinghouse, Allianz/Dresdner, Nordbanken/Postgirot,* and *Anaconda,* among others, where the EC and FTC or US DOJ allowed the transaction only after board and management representation, right to confidential information, and veto rights were removed, to prevent anti-competitive effects from arising out of shareholdings in competitors or in vertically-related markets.[138]

In the Philippines, corporation law leaves much scope for the parties to define the relationship and governance of the company. Shareholders of at least 20% shares with a five-member board are usually entitled to at least one board seat, with access to confidential business information. While a 20% minority shareholder cannot block fundamental corporate decisions, this does not say much about such shareholder's real ability to influence. Much still depends on the discretion of the parties in negotiating the shareholders' agreement, the actual extent of participation of other shareholders, and the relationship of the shareholders with each other, among others—factors which vary from case to case. The law's usefulness in setting the shareholding level where influence is present is hence very limited.

The SEC, pursuant to its 2018 requirement that all companies must declare beneficial ownership information in their SEC filings, has prescribed that "Ultimate Effective Control" may be achieved through direct or indirect ownership of at least 25% of any category of voting shares or capital, and attributes indirect beneficial ownership of a security to a person when their immediate family holds interest in such security.[139] The Bangko Sentral ng Pilipinas (BSP) has also set a presumption of control (direct or indirect) for ownership or holding of 20% or more of a class of voting shares.[140] Even the

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[136] *Id.* at 68–69.
[137] White Paper, *supra* note 55, ¶ 47.
[138] *See supra*, pp. 13–15.
[139] SEC Mem. Circ. No. 17 (2018).
[140] Bangko Sentral ng Pilipinas (BSP) Circ. No. 969 (2017).

International Financial Reporting Standards, practiced in the country, likewise sets at 20% the ability of one firm to significantly influence another firm.[141] All these developments and rules evidence that at a 20% shareholding, a minority shareholder already exercises significant influence amounting to control over a firm, because at this threshold, certain rights affecting governance of the company are expected by the investor. A 20-25% level is therefore a good starting point for the PCC.

A lower threshold of 10% shareholding can only be reviewed if it is accompanied by certain factual indicators that would lead the PCC to believe that such minority shareholder can exercise control. This is in line with how Japan[142] sought to capture instances where an acquisition gives rise to a certain degree of influence and screen out purely passive investments. Shareholding of more than 25% is subject to the review of the Japan Fair Trade Commission (JFTC) if the acquiring company is the sole leading holder of voting rights, while a 10% interest is reviewed only when it is coupled with a level of influence, i.e., the acquiring company is ranked among the top three voting right-holders,[143] where the following factors will be considered:

(a) Its shareholding rank, shareholder ratio and distribution of shares among other shareholders;
(b) Cross-shareholding and other mutual relationships among the companies involved;
(c) Interlocking directors, officers and employees;
(d) The business, financial or other relationship between the parties; and
(e) Above-enumerated items when including companies that already have joint relationships with the parties.[144]

Similar to the proposal in the White Paper, these factors which look at the relationship of the shareholders, the distribution of the shares among shareholders, and actual circumstances governing how the company is managed provide clear indication of the extent of influence an investor has over a company. Adoption of a similar targeted design for less than 20% acquisition is practical and narrowly tailored to capture only minority shareholdings that result in decisive influence.

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[141] IAS Plus, *Int'l Accounting Standard 28 – Investments in Associates and Joint Ventures*, IAS PLUS WEBSITE, *at* https://www.iasplus.com/en/standards/ias/ias28-2011 (last modified 2011).

[142] Japan Act No. 54 (1947), art. 10; OECD, *supra* note 13, at 133.

[143] OECD, *supra* note 13, at 133.

[144] *Id.* at 134.

Through the lowering of the notification threshold, controlling minority share acquisitions will automatically be screened by the PCC, improving its enforcement mechanism for anti-competitive acquisitions.

B. Non-controlling Minority Shareholdings

Certain jurisdictions whose laws capture non-controlling minority shareholdings use a lower threshold than control. For example, the United Kingdom's Competition Markets Authority may review a non-controlling minority shareholding where it confers the ability to exercise material influence over the target firm, which is presumed to be acquired at a 25% shareholding. Germany has jurisdiction over 25% shareholdings, and for acquisitions less than that, direct or indirect "material competitive influence" is required.[145]

These examples of a lower threshold than control will still fail to capture purely passive non-controlling minority shareholdings. As discussed, a purely passive investment can result in a change of incentives of the acquiring firm and may constitute a signaling mechanism facilitating coordination between firms in the market. The obvious and simple way to address the enforcement gap is to remove the control requirement for acquisitions. This ensures that the PCC is allowed to review non-controlling minority share acquisitions.

A related question is whether notification of these transactions should be made to the PCC. Ezrachi and Gilo propose an *ex post* analysis, which is done after the transaction has taken place.[146] The drawback to this is it will be difficult to enforce in practice considering the necessity of obtaining internal company documents. Companies have no incentive to furnish such documents voluntarily to the agency which necessarily means that getting access to these would be litigious and time consuming. Additionally, an *ex post* review would limit the available remedies (including prohibition) that the agency can impose in view of the difficulty of unscrambling an already consummated transaction.

Since any anti-competitive effect normally arises only if the entities are operating in the same or related markets, such that there is a horizontal or vertical relationship between their firms, it is then possible that an exemption can be narrowly tailored to include only those non-controlling minority

[145] Gesetz gegen Wettbewerbsbeschränkungen (1958), § 37(1).
[146] Ezrachi & Gilo, *supra* note 31, at 348.

shareholdings where the acquiring and target firms, as well as their subsidiaries and affiliates, are not competitors of each other or are not in vertically-related markets. This is similar to the recommendation of the White Paper where a competitive link will arise only where there is a *prima facie* competitive relationship between the acquirer's and the target's activities.[147] Notification can be only required for non-controlling minority shareholding when there is a competitive relationship between the acquirer's and target's activities, that is, active in the same markets or active in vertically-related markets.[148]

These are notification design options for the PCC to consider—what is crucial is that the law will allow the agency to acquire jurisdiction over non-controlling minority share acquisitions.

C. Prohibition from Having Interlocking Directors, Officers, and Employees

The United States prohibits interlocking directors and officers of competing firms ("competitive interlocks"). Firms are competitors "by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws,"[149] subject to a certain threshold size of the companies. This *per se* prohibition recognizes that common directors can restrain competition between two rival firms through coordination of policies,[150] and automatically prevents this from occurring. Indonesia likewise has a similar *per se* prohibition, while South Korea and Japan subsume the examination of such interlocks in their merger control regime.[151]

Such a rule, which goes beyond competition law and into the realm of corporate law, can prevent the anti-competitive effects of non-controlling minority shareholding from materializing by limiting the channels of influence the rival minority shareholder can exercise over the target firm, and can prevent the flow of confidential business information.

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[147] White Paper, *supra* note 55, ¶ 46.

[148] *Id.*

[149] 15 U.S.C. § 19.

[150] Arthur Travers, Jr., *Interlocks in Corporate Management and the Antitrust Laws*, 46 TEXAS L. REV. 819, 840 (1968), *cited in* Gokongwei v. SEC, G.R. No. 45911, 89 SCRA 336, Apr. 11, 1979.

[151] Indon. Law No. 5 (1999), Prohibition of Monopolistic Practice and Unfair Business Competition; S. Kor. Law No. 332, The Monopoly Regulation and Fair Trade Act; Japan Act No. 54 (1947), The Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade.

This has already been recognized in the Philippines as early as 1979 when the Supreme Court highlighted the dangers posed when rival companies have the same directors or officers in the seminal case of *Gokongwei v. SEC*. In the said case, San Miguel Corporation's ("SMC") by-laws were amended to disqualify a minority shareholder, who was a director of a competing firm, from being elected as a board member. This was challenged by such minority shareholder as invalid and unreasonable, tailed to suppress the minority, and depriving of his vested right to be voted for and to vote for a person of his choice as director.[152] The Supreme Court recognized the anti-competitive effects of such interlocks, ruling that the election of the shareholder can bring about an illegal situation as "a common director of two or more competing corporations would have access to confidential sales, pricing and marketing information and would be in a position to coordinate policies or to aid one corporation at the expense of another, thereby stifling competition."[153] It proceeded to identify anti-competitive effects when it warned:

> Reason and experience point to the inevitable conclusion that the inherent tendency of interlocking directorates between companies that are […] competitors is to blunt the edge of rivalry between the corporations, to seek out ways of compromising opposing interests, and thus eliminate competition. […] [K]nowledge by CFC-Robina of SMC's costs […] could determine the most profitable volume at which it could produce for every product line in which it competes with SMC.[154]

Despite the aforementioned jurisprudence, no prohibition on competitive interlocks has been legislated in the Philippines, with the exception of the banking sector where the BSP has prohibited interlocks between directors and officers "to safeguard against the excessive concentration of economic power, unfair competitive advantage or conflict of interest situations."[155] The Corporation Code makes mention of this only in the context of voidable contracts should the interest of the interlocking director in one corporation be "substantial" in one while nominal in the other. Interestingly, a 20% shareholding is enough to be considered substantial in this case.[156]

While the SEC has not prohibited interlocks, it has been vested with rule-making power specially to prevent fraud and abuses by stockholders,

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[152] *Gokongwei*, 89 SCRA, at 344–46.
[153] *Id.* at 377.
[154] *Id.* at 378–79.
[155] Manual of Regs. for Banks (2017), § 137.
[156] Batas Blg. 68 (1980), § 33. This is the old Corporation Code of the Philippines.

directors, and officers of a corporation.[157] SEC's issuance of a circular is a cost-effective way of promoting competition, without needlessly taking up the limited resources of the antitrust agency. This prohibition will support the PCA's objectives and, from a corporate governance perspective, prevent conflicting incentives by the common director or officer that could lead to a violation of his fiduciary duty to the company. It is hence in the common interest of both agencies to pass such regulation.

VII. CONCLUSION

This study sought to answer the question of whether an enforcement gap exists in the Philippines' antitrust regulation on minority shareholdings. It was necessary to first establish that certain minority shareholdings generate anti-competitive unilateral and coordinated effects that the Philippines should seriously consider in view of its market structure and relatively new framework for antitrust regulation. The kinds of harm that could arise depends on the type of minority shareholding—controlling minority shareholding, with influence short of decisive, or completely passive.

I find that the PCA can assert no jurisdiction over non-controlling minority shareholding due to its definition of acquisitions which requires the element of control, similar to the EU regulation. While the PCA covers all controlling minority shareholding in theory, the PCC is, in reality, hamstrung in going after these acquisitions.

To address the enforcement gap, I propose three parallel processes. One is to commence advocacy work to prepare for an eventual amendment of the PCA and propose the elimination of the control requirement. Removing control as a requirement in the PCA will allow the PCC to have flexibility in designing its notification threshold to include non-controlling minority shareholdings. Second is to lower the 35% threshold to 20–25%. This will ensure controlling minority shareholdings are reviewed as a matter of course by the PCC. Lastly, the PCC should work with the SEC to advocate for the prohibition of interlocking directors, officers, and employees. Such rule will cover all minority shareholdings preventing coordinated effects such as described by the Supreme Court in *Gokongwei*.

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[157] § 143.