CONTROL PROBLEMS: "PASSIVE" COMPETITIVE INVESTMENTS AND THE STANDARD OF CONTROL UNDER THE PHILIPPINE COMPETITION ACT*

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ABSTRACT

This Note discusses whether acquisitions of non-voting shares in corporations may be subject to Mergers & Acquisitions review under the Philippine Competition Act. Even if the economic literature shows the possibility of non-voting shares giving rise to anti-competitive effects, it is unclear whether their acquisition may be subject to Merger & Acquisitions review under the Philippine Competition Act. Under this law, only acquisitions that result in the acquisition of control are subject to review. Control is defined as the ability to "substantially influence or direct the actions or decisions of an entity," a definition open to interpretation. In this Note, the "decisive influence" standard of control from the European Union and the "material influence" standard of control from the UK are discussed as benchmarks for defining "substantial influence." The author argues based on rules of statutory construction that the standard of "substantial influence" should be interpreted as similar to the "material influence" standard as used in the UK. The paper concludes that by following such interpretation of "substantial influence," acquisitions of non-voting shares will be subject to Mergers & Acquisitions review under the Philippine Competition Act, especially considering the rights granted to non-voting shareholders in the Revised Corporation Code.

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I. INTRODUCTION: COMPETITION, CORPORATIONS AND THE STANDARD OF CONTROL

Competition enforcement in the Philippines is in its nascent stages, considering that the Philippine Competition Act (PCA) was passed only in 2015. There are antecedent laws which sought to enforce antitrust policies such as Article 186 of the Revised Penal Code, Article 28 of the Civil Code, the Downstream Oil Industry Deregulation Act of 1998,[1] and the Electric Power Industry Reform Act of 2001.[2] However, the PCA is the first comprehensive antitrust law to specifically regulate mergers and acquisitions.

The policy objectives of the PCA are the protection of consumer welfare, advancement of domestic and international trade, and economic development.[3] The PCA recognizes a healthy competitive environment as the best way to achieve these goals. This is emphasized by the standard for prohibition under the PCA: the anti-competitive effects brought about by an action or transaction or the substantial lessening, restricting, or preventing of competition.[4]

The usual subjects of antitrust regulation are the biggest players in the different markets. For the most part, markets today are dominated by corporations which permeate through our everyday lives. Money and investments are desirable, if not necessary, for any business organization to successfully compete in a meaningful manner with other players in the market. One of the common ways a corporation raises funds is by issuing and selling non-voting shares, which is only one of the many tools a corporation uses to compete. For example, a business expansion or new market entry usually requires some form of investment. Ideally, through the issuance or sale of non-voting shares, a corporation increases its capital without any of its current shareholders sacrificing their current level of influence in corporate affairs. However, does the acquisition of non-voting shares raise *any* antitrust concerns? And if it does raise antitrust concerns, what can the Philippine Competition Commission (PCC) do to regulate such acquisitions under the PCA?

The main issue of this Note is whether the acquisition of non-voting shares can result in the acquisition of control of a corporate entity and thereby

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[1] Rep. Act No. 8180 (1996). *See* Andre Palacios, *Origins and Outcomes: The Philippine Competition Act of 2015*, 93 PHIL. L. J. 344, 355 (2020).

[2] Rep. Act No. 9136 (2001). *See* Palacios, *supra* note 1, at 356.

[3] Rep. Act No. 10667 (2015), § 2, ¶3(c). Philippine Competition Act ("PCA").

[4] §§ 14(b), 15, 20.

come under the review of the PCC for its anti-competitive effects under the Merger and Acquisition ("M&A") review of the PCA. Under the PCA, the jurisdiction to review acquisitions of shares only extends to purchases of securities which are for obtaining control.[5] Control is defined as the ability to substantially influence or direct the actions or decisions of an entity, whether by contract, agency, or otherwise.[6] Without any acquisition of control, the PCC does not have the power to subject the acquisition to M&A review.

Two questions must be answered to determine whether the acquisition of non-voting shares is subject to M&A review under the PCA. First, what should the standard of control under Section 4(f) of the PCA be? Second, does the acquisition of non-voting shares without coupled agreements fall under the standard of control as defined?

In answering the questions posed above, the key is in defining "substantial influence" or "substantially directing" as used in Section 4(f) of the PCA.[7] "Substantial influence" does not have a precise definition in the PCA and is open to further interpretation. The Merger and Acquisitions Office of the PCC has issued guidelines which provide that control may either be legal or *de facto*,[8] but has not further defined "substantial influence." This Note argues that a "low" threshold of influence, similar to the "material influence" standard used in the UK, should be used in defining control, and that considering the rights granted to a non-voting shareholder under the Revised Corporation Code, the acquisition of non-voting shares can result in the acquisition of control.

1. Illustration: Hypothetical Acquisition of Non-Voting Shares by Competing Firms

Before the questions posed may be resolved, three hypothetical scenarios are offered to contextualize the possible anti-competitive effects of non-voting share acquisitions. Imagine a market with two main players, "Corporation A," and its rival, "Corporation B." These two corporations have dominated the market for many years and wield significant market power. In these hypothetical scenarios, shares of Corporation A would be sold to a majority shareholder of Corporation B, "Mr. X," or to Corporation B itself.

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[5] § 4(a).

[6] § 4(f).

[7] Recall that Section 4(f) of the PCA defines control as "the ability to substantially influence or direct the actions or decisions of an entity."

[8] Merger Review Guidelines, §3.1. Note however, that these guidelines were not intended to form part of the Implementing Rules and Regulations of the Philippine Competition Commission (PCC).

In scenario one, either Mr. X or Corporation B acquires *voting* shares in Corporation A. As a shareholder in both companies, the primary concern of Mr. X is to ensure that his investments in the two corporations are profitable. If Corporation B was the shareholder, then Corporation B would act in such a manner to make sure that Corporation B is the most profitable. The profit incentive of Mr. X or Corporation B does not take into consideration whether Corporation A can compete in a significant manner with Corporation B. Mr. X or Corporation B would have the ability, through their voting shares, to influence the conduct of Corporation A and would likely use their voting shares to vote in a manner following their profit-making incentive. Their decisions would be aimed at achieving the most beneficial situation for themselves, *even if such decisions may lead to less competition between Corporation A and Corporation B*. Their individual profit incentive as shareholders is what guides their decisions.

In scenario two, either Mr. X or Corporation B would acquire *non-voting* shares of Corporation A *coupled with another agreement*, such as a veto power on certain management decisions. In this scenario, Mr. X and Corporation B are still driven by the same incentives. Mr. X is still primarily concerned in ensuring that both of his investments in the corporations perform as well as possible. Corporation B is still solely interested in making sure that Corporation B is the most profitable. Although in this scenario, Mr. X or Corporation B would not be able to influence the everyday policies of Corporation A to the same extent since they only hold non-voting shares. Mr. X or Corporation B would still use their rights as non-voting shareholders and their veto power in a manner that would be most profitable for themselves, *even if it would mean vetoing management decisions that would make Corporation A more competitive with Corporation B*. As in scenario one, the profit incentive is what guides the decisions of Mr. X and Corporation B.

In scenario three, Mr. X or Corporation B acquire *non-voting* shares of Corporation A, without any coupled agreements. The same assumption of Mr. X or Corporation B acting according to their own profit incentive as stated in Scenarios 1 and 2 still applies. Are Mr. X or Corporation B powerless to protect their interests and act on their profit incentives, as holders of non-voting shares? No, because under the Revised Corporation Code, a holder of non-voting shares is still guaranteed rights as a stockholder.[9] Mr. X can still use these rights to ensure that he is making the most money out of *both of his investments*. Corporation B can still use its status as a holder of non-voting shares in Corporation A, *to protect the interests of Corporation B*.

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[9] REV. CORP. CODE, § 6.

Is there a possibility of anti-competitive effects in all these hypothetical scenarios? Yes. *The only difference is the degree of the effect since the degree of influence granted to Mr. X or Corporation B in each scenario changes.* The highest degree of influence is in scenario one, then scenario two where non-voting shares with a coupled agreement are acquired, and the lowest degree of influence is in scenario three where only non-voting shares are acquired.

Can all acquisitions under these three scenarios be subject to an M&A review by the PCC under the PCA? For scenario one, the answer would be a definite yes. For scenario two, the answer would be a less definite yes, but a yes, nonetheless. For scenario three, the answer would be the classic—it depends.

2. Outline of Succeeding Sections

Part II of this Note will focus on the context of the antitrust issue—the Philippine policy on competition and the literature on the possible anti-competitive effects of acquisitions of non-voting shares. Part II will also discuss the current definition of control in the theory of the corporate entity and the current understanding of control of a corporation in Philippine law.

Part III will survey the standards of control that have been used in other countries and the standard of control that should be used in the PCA. Part III.A will focus on the "decisive influence" standard of the EU, and then Part III.B. will discuss the arguments, anchored on statutory construction, in support of an interpretation of the PCA's "substantial influence" in line with EU law. Part III.C. will discuss the "material influence" standard used in the UK. In Part III.D., it will be argued that "substantial influence" must be interpreted similarly to the "material influence" standard, again using statutory construction. Part III.D. will also discuss the "solely investment" exception found in the PCA, which is lifted from US antitrust law, to support the lower standard of control interpretation. Lastly, Part III.E. will discuss the rights of non-voting shareholders under the Revised Corporation Code which grant them a level of influence in a corporation and why an interpretation of "substantial influence" as similar to "material influence" is necessary to give effect to the legislative intent behind the PCA.

The paper concludes that by interpreting "substantial influence" as similar to "material influence," the acquisition of non-voting shares can result in the ability to substantially influence or substantially direct the conduct and decisions of a corporation using the rights granted to a non-voting shareholder in the Revised Corporation Code.

II. COMPETITION POLICY IN THE PHILIPPINES AND THE ANTI-COMPETITIVE EFFECTS OF ACQUISITIONS OF NON-VOTING SHARES

A. Competition Policy in the Philippines and its Recent Developments

Competition is a state policy embodied in the Constitution, which provides, "The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed."[10] The Supreme Court has interpreted this provision thus:

> *Section 19, Article XII of our Constitution is anti-trust in history and in spirit. It espouses competition.* The desirability of competition is the reason for the prohibition against restraint of trade, the reason for the interdiction of unfair competition, and the reason for regulation of unmitigated monopolies. Competition is thus the underlying principle of section 19, Article XII of our Constitution [...]. We subscribe to the observation of Prof. Gellhorn that the objective of anti-trust law is "to assure a competitive economy, based upon the belief that through competition producers will strive to satisfy consumer wants at the lowest price with the sacrifice of the fewest resources. Competition among producers allows consumers to bid for goods and services, and thus matches their desires with society's opportunity costs." He adds with appropriateness that there is a reliance upon "the operation of the 'market' system (free enterprise) to decide what shall be produced, how resources shall be allocated in the production process, and to whom the various products will be distributed. The market system relies on the consumer to decide what and how much shall be produced, and on competition, among producers to determine who will manufacture it."
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> *Again, we underline in scarlet that the fundamental principle espoused by section 19, Article XII of the Constitution is competition for it alone can release the creative forces of the market.* But the competition that can unleash these creative forces is competition that is fighting yet is fair. Ideally, this kind of competition requires the presence of not one, not just a few but several players. A market controlled by one player (monopoly) or dominated by a handful of players (oligopoly) is hardly the market where honest-to-goodness competition will prevail. *Monopolistic or oligopolistic markets deserve our careful scrutiny and laws which barricade the entry points of new players in the market should be viewed with suspicion.*[11]

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[10] CONST. art. XII, § 19.

[11] Tatad v. Sec'y of the Dep't of Energy [hereinafter *"Tatad"*], G.R. No. 124360, 281 SCRA 330, 358-59, Nov. 5, 1997. (Emphasis supplied, citations omitted.)

The Supreme Court, in the same case, stated that Article 186 of the Revised Penal Code and Article 28 of the Civil Code breathe life to this constitutional policy.[12] The PCA breathes life anew into the constitutional policy and calls for a roaring enforcement of long overdue comprehensive antitrust regulation. The first attempt to pass a competition law in the Philippines was filed in Congress more than two decades ago.[13] Despite this, the Philippines was one of the last member countries to comply with its international obligations under the Association of Southeast Asian Nations (ASEAN) treaty. The goal commitment made in 2007 was to introduce competition policy in all members of ASEAN by 2015. By the time 2015 was ending, the Philippines was only one of three countries in ASEAN that has yet to introduce a competition law in its jurisdiction.[14]

The potential of the PCA to benefit the Philippine people if enforced correctly does not require much explanation. However, it must be noted that the true effectiveness of the competition law might take numerous years to develop. Advanced jurisdictions, such as the UK, Germany, Japan and Australia, all with long-standing competition laws, took decades to develop an effective competition law, and are still improving their respective competition policies.[15] Some of the ASEAN neighbors of the Philippines are more than a decade ahead in enacting a comprehensive competition law, but are still trying to find ways and means to create a working competition law.[16] This Note seeks to contribute to that working competition law by tackling an issue which has already become a problem even in more advanced jurisdictions.

B. Economic Theory on Anti-Competitive Effects of Acquisitions of Non-Voting Shares

The acquisition of non-voting shares as traditionally understood can be classified as a subset of what are called "passive investments." In a pure passive investment, there is a silent financial interest and the acquiring firm or person is entitled to a share of the acquired firm's profits, but has no power to control or even influence the decisions of the acquired firm.[17] According

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[12] *Id.* at 355-56.

[13] Palacios, *supra* note 1, at 345 *citing* Performance of the Senate, 16th Cong., 3rd Sess. (July 27, 2015-June 6, 2016).

[14] *Id.* at 366.

[15] Erlinda Medalla, *Understanding the new Philippine Competition Act* (2017), (Phil. Institute for Dev. Stud. Discussion Paper Series, No. 2017-14), 23.

[16] *Id.* at 23–24.

[17] Daniel P. O'Brien & Steven C. Salop, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 ANTITRUST L.J. 559, 577 (2000).

to Professor Herbert Hovenkamp, "under the normal rules of competition, one firm would like nothing more than to force out its competitor through efficiency; however, when there is a passive investment, the firm has a strong financial interest in the welfare of its competitor and thus the risk of collusion becomes greater."[18] In a situation without passive investment, economic theory dictates that a firm that lowers its price or increases its output would cause economic harm to its competitors.[19]

The main reason that anti-competitive effects arise is that a passive investment causes the investor (the acquiring firm) to compete less vigorously with the firm in which the investment was made because such aggressive competition would lower the value of the investor's investment.[20] The anti-competitive effects of partial ownership acquisitions depend on two factors—financial interest and corporate control:[21]

> In analyzing the competitive effects of partial ownership, it is necessary to distinguish between two aspects of partial ownership, financial and corporate control. *Financial interest refers to the acquiring firm's entitlement to a share of the profits of the acquired firm.* Corporate control refers to the acquiring firm's ability to control or influence the acquired firm's competitive decision making, including pricing and product selection as well as sale of the company's assets. *These two factors have separate and distinct impacts on the competitive incentives of the acquired and the acquiring firm. Financial interest affects the incentives of the acquiring firm, while corporate control affects the incentives of the acquired.*[22]
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> This distinction between financial interest and corporate control is key to understanding the competitive effects of partial ownership arrangements. In simplest terms, *when a firm acquires a partial financial interest in a rival, the acquiring firm's unilateral pricing incentives to compete are reduced at the margin. What about the unilateral competitive incentives of the acquired firm? If the acquiring firm has no control or influence over the rival, acquired firm, that rival's incentives to compete may be unaffected.* However, if the acquiring firm also has control over the rival, then the rival's incentives to compete are affected. Thus, to understand the implications of partial ownership interests on

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[18] David Gilo, *The Anticompetitive Effect of Passive Investment*, 99 MICH. L. REV. 1, 14 (2000), *citing* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY, 497 (1994).

[19] Andrew Konstant, *Passive Investments' Attempt to Find a Home in South African Competition Law*, 131 S. AFRICAN L. J. 819, 830 (2014).

[20] Gilo, *supra* note 18, at 4.

[21] O'Brien & Salop, *supra* note 17, at 562.

[22] *Id.* at 568. (Emphasis supplied.)

> competition, it is necessary to analyze financial interest and corporate control as distinct elements.[23]

In a merger, the distinction between financial interest and corporate control is not made because one firm automatically acquires control of the other together with its financial interest.[24] However, in the case of partial ownership interests—such as non-voting share acquisitions—the financial interest is separable and can lead to anti-competitive effects.[25]

The anti-competitive effects of a passive investment can either be unilateral or coordinated. Unilateral effects refer to the capability of a firm to raise its own prices or its reluctance to cut prices to compete post-acquisition of non-voting shares.[26] Theoretically, acquisitions of non-voting shares do not lead to any change in the incentives to compete of the firm from which the non-voting shares are acquired.[27]

The capability of a firm to raise its prices is increased after a passive investment in a competitor because it lessens the cost of a price increase. The cost of a price increase by one competitor is the sales lost as some customers substitute to products sold by competitor firms as price increases.[28] This change in the unilateral pricing incentives of a firm acquiring non-voting shares can be demonstrated in simple examples made by O'Brien and Salop. First, consider the *pre-acquisition position* of two competing firms:

> To illustrate the effect of a partial financial interest on the unilateral pricing incentives of the acquiring firm, [consider the pre-acquisition position of two competing firms,] where a 10 percent price increase by the acquiring firm from $100 to $110 causes a loss of eight units of demand, four of which are diverted to the acquired firm. Absent the transaction [referring to the acquisition of a partial shareholding], the acquiring firm suffers harm of $160 from losing eight customers (i.e., a margin of $20 for each of the eight units lost) and a benefit of $80 (i.e., an increase in margin of $10 for each of the eight units retained), for a net reduction in profits of $80. The price increase benefits the acquired firm because it gains four

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[23] *Id.* at 571. (Emphasis supplied.)

[24] *Id.* at 562.

[25] *Id.*

[26] Ariel Ezrachi & David Gilo, *EC Competition Law and the Regulation of Passive Investments among Competitors*, 26.2 OXF. J. LEG. STUD. 327, 329 (2006).

[27] O'Brien & Salop, *supra* note 17, at 575.

[28] Marco Claudio Corradi, *Bridging the Gap in the Shifting Sands of Non-Controlling Financial Holdings?*, 39 WORLD COMPETITION 239, 243 (2016). *See* D. O'Brien & S. Salop, *supra* note 17, at 572.

> new units of sales, leading to an increase in its profits of $160 (i.e., a margin of $40 for each of the four customers). Thus, absent the transaction, the acquiring firm does not have the incentive to raise price to $110.[29]

Second, consider the *post-acquisition position* of one competitor after acquiring a partial interest in its competitor:

> Suppose instead that the acquiring firm purchases a 25% ownership share in the acquired firm. In making its pricing decision, it now would reason that the price increase would raise the profits of the acquired firm by $160. *As a 25 percent owner, it would factor into its benefit calculation that it is entitled to 25 percent of these profits, that is, $40, at least if the profits accrue to the shareholders. Because it would take this $40 as an additional benefit to the price increase,* it would see that the net effect of the price increase on its profits would be a loss of $40, not the loss of $80 it anticipated absent the ownership share. […] This incremental $40 benefit would not be large enough to tip the profit scales positive.
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> However, if the example were expanded to examine other potential price increases, a somewhat smaller price increase might be profitable. For example, suppose that a 2.5 percent price increase to $102.50 causes the acquiring firm to lose two units of demand, one of which is diverted to the acquired firm. In this case, before the acquisition of a partial ownership interest, the loss of the two customers would reduce the acquired firm's profits by $40, but the increased $2.50 margin on the remaining fourteen customers would increase its profits by $35, for a net loss of $5. *However, if the acquiring firm has a 25 percent share in the acquired firm and the acquired firm gains one of the two customers diverted and earns a margin of $40 on the diverted customer, then the acquiring firm recaptures $10 (i.e., 25 percent of $40, the acquired firm's margin on the additional unit). Thus, the net effect on its [the acquiring firm] profits becomes a net gain of $5 instead of a loss of $5.* The conclusion is that a partial financial interest increases the acquiring firm's incentives to raise price, but not by as much as a full merger that gives the acquiring firm a 100 percent financial interest.[30]

The financial incentive to compete less vigorously is greater when a controlling stockholder of one firm invests in the firm's competitor. This is because the smaller the controller's stake in the firm it controls, the more weight the controller gives to its stake in the competing firm.[31] This is

[29] O'Brien & Salop, *supra* note 17, at 575.
[30] *Id.* at 576. (Emphasis supplied).
[31] Gilo, *supra* note 18, at 25.

demonstrated in the following example, where a controlling stockholder acquires shares in the competitor of the firm it controls:

> [T]he controller can strengthen the anticompetitive effect by diluting its stake in the firm it controls. […] Suppose GM (National's controller) passively acquires 25 % of Avis, which is National's competitor. Suppose further that GM initially holds 100% of National. Assume that if National competes vigorously (e.g., price cuts), National makes a net gain of $3 but Avis loses $8. Thus, assuming GM indeed controls National's pricing policy, GM will cause National to price cut, because GM makes $3 (100% of $3) from price cutting, and, because of its 25 % share in Avis, GM loses only $2 (25 % of $8), which is less than $3.
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> Suppose now, however, that GM dilutes its stake in National to 55 % instead of 100%. The other 45% may be held, for example, by public shareholders, or by nonpublic minority shareholders that do not possess control. *Assume further that GM runs National so as to maximize GM's own profits. That is, assume that GM disregards profits that flow into the hands of passive investors in National. It is easy to see that now GM will refrain from making National price cut. GM now gains only $1.65 (55 % of $3) from a price cut, and loses $2 (25 % of $8) (because of GM's 25 % stake in Avis).* Since $1.65 is less than $2, GM will not make National price cut.[32]

This analysis could also apply to an investor who holds interests in several firms which are competitors, thereby creating a horizontal shareholding. Horizontal shareholding occurs when several equity funds own shares of competitors operating in a concentrated product market.[33] The incentive of a firm to cut its prices to compete is lessened after a passive investment in a competitor because its profits from price cutting diminish.[34] If a firm price cuts, the competitor's profits will fall, and so will the value of the price cutting firm's investment in the competitor.[35] The incentive to raise prices or restrict output may materialize whether the minority shareholding is passive (giving it no influence in the target's decisions) or active (giving it some influence over the target's decisions).[36] To summarize, one of the possible anti-competitive effects, in theory, of a passive investment arises from the *change in the financial incentives to compete of the acquiring firm or its controlling*

[32] *Id.* at 22. (Emphasis supplied.)

[33] Fiona Morton & Herbert Hovenkamp, *Horizontal Shareholding and Antitrust Policy*, 127 YALE L. J. 2026, 2027 (2018).

[34] Gilo, *supra* note 18, at 13.

[35] *Id.*

[36] *White Paper: Towards More Effective EU Merger Control* [, ¶ 29, COM (2014) 449 final (July 9, 2014) [hereinafter "*White Paper*"].

shareholder which is manifested by the increased willingness to increase prices or to refrain from price cuts.

Aside from changes to unilateral pricing incentives, passive investments may also give rise to coordinated effects. Coordinated effects refer to the facilitation of collusion, whether explicit or tacit.[37] A passive investment may be part of a collusive strategy to not engage in a price war since one firm will need to calculate the losses connected to its stake in the other firm.[38] Coordinated effects may also arise from the possibility of information sharing, since one firm is a shareholder of another.[39] Both American and European antitrust authorities have raised their concerns over access to non-public, competitively sensitive information.[40]

The analysis of lawyers in antitrust enforcement has focused on the "active force" arising from acquisitions, which is the acquisition of legal control of the corporation depending on corporate rights and/or the influence in the firm.[41] The analysis of economists in antitrust has focused on the "passive force," which is the financial counter-incentive to compete.[42] This financial counter-incentive to compete is most likely to arise in markets which are characterized by oligopolistic competition.[43] Active and passive investments both have anti-competitive effects; although in active investments, the possibility to influence the target firm may lead to more anti-competitive concerns.[44] In the oft-cited work[45] of David O'Brien and Steven C. Salop, it was demonstrated using two indicators for anti-competitive incentives—the Herfindahl-Hirschman (HHI) Index and the Price Pressure index (PPI)—that passive investments have anti-competitive effects although to a lesser extent than that of a full merger.

The extent of anti-competitive effects of an actual acquisition may vary in application because of the possible variations in agreements and market structures. For example, the return and loss on an investment may vary depending on the guaranteed return stipulated in the transaction. This also entails a difference in the degree of the change in the incentives. It is

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[37] Ezrachi & Gilo, *supra* note 26.

[38] Corradi, *supra* note 28, at 244.

[39] *Id.* at 242.

[40] David Broomhall et al., *Remedies for Addressing Minority Shareholding Issues: Experiences from European and US Merger Control*, 6 COMPETITION L. INT'L 39, 41 (2010).

[41] Corradi, *supra* note 28, at 246–247.

[42] *Id.*

[43] Ezrachi & Gilo, *supra* note 26, at 330.

[44] Gian Diego Pini, *Passive-Aggressive Investments: Minority Shareholdings and Competition Law*, 23 EUR. BUS. L. REV. 575, 585 (2012).

[45] O'Brien & Salop, *supra* note 17.

possible that the cross-elasticity of demand between the products of competitors may vary depending on consumer taste and product differentiation.

These theorized anti-competitive effects of passive investments can apply to the acquisitions of non-voting shares in Philippine corporations because holders of non-voting shares acquire a financial interest in the corporation. In addition, under the Revised Corporation Code (RCC), holders of non-voting shares acquire rights that may lead to coordinated anti-competitive effects. However, the jurisdiction of the PCC to subject acquisitions to M&A review is not based on possible anti-competitive effects—no matter how possibly pernicious they may be—but solely on the acquisition of control as defined in Section 4(a) in relation to 4(f) of the PCA.

C. Definition of Control in the Corporate Entity: Philippine Corporation Law and Theory

Control has a clear definition in the theory of the corporation as a business organization:

> Since direction over the activities of a corporation is exercised through the board of directors, we may say for practical purposes that control lies in the hands of the individual or group who have the actual power to select the board of directors, (or its majority), either by mobilizing the legal right to choose them—"controlling" a majority of the votes directly or through some legal device—or by exerting pressure which influences their choice. [I]n most cases, however, if one can determine who does actually have the power to select the directors, one has located the group of individuals who for practical purposes may be regarded as "the control."[46]

The board of directors exercises the corporate powers and directs the activities of the corporation.[47] The structure of the corporation has resulted in the dissolution of the atom of ownership into its component parts: control and beneficial ownership.[48] The stockholder retains beneficial ownership of the assets which he has placed into the corporation, while the control of the corporation and its physical assets lies with the management.[49] Shareholders

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[46] ADOLF BERLE JR. & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY, 69–70 (1933).
[47] *Id.*
[48] *Id.* at 7.
[49] *Id.* at 124.

of a firm exercise virtually no control over either day-to-day operations or long-term policy.[50]

Control as defined in the theory of the corporation is almost identical, if not completely identical, with the legal definition of control in Philippine corporate law. The board of directors as the governing body of the corporation exercises corporate powers, conducts all business, and controls all properties of the corporation, unless otherwise provided for in the RCC.[51] Stockholders are basically investors in a corporation and they do not have a hand in running the day-to-day business operations of the corporation unless they are, at the same time, directors or officers of the corporation.[52] The board of directors has the sole authority to determine policies, enter into contracts, and conduct the ordinary business of the corporation within the scope of its charter.[53]

The right of a stockholder to participate in the control and management of a corporation is done through his right to vote for the Board of Directors.[54] In the landmark case of *Gamboa v. Teves*,[55] the Supreme Court declared that for purposes of complying with the constitutional provision that public utilities must be effectively controlled by Filipinos, only holders of common shares that vote in the election of the board of directors exercise control over the corporation. Holders of shares who have no voting rights in the election of directors do not have any control.[56] Non-voting shareholders are those which are denied the right to vote for the board of directors and can only vote on the matters listed in Section 6[57] of the RCC.[58] Only shares classified as redeemable or preferred can be non-voting shares.[59]

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[50] Stephen Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 STAN. L. REV. 791, 800 (2002).

[51] REV. CORP. CODE, § 22, ¶ 1.

[52] Espiritu v. Petron Corp., G.R. No. 170891, 605 SCRA 245, 256-57, Nov. 24, 2009.

[53] Filipinas Port Services, Inc. v. Go, G.R. No. 161886, 518 SCRA 453, 463, Mar. 16, 2007.

[54] Castillo v. Balinghasay, G.R. No. 150976, 440 SCRA 442, 453, Oct. 18, 2004.

[55] [Hereinafter "*Gamboa*"], G.R. No. 176579, 652 SCRA 690, June 28, 2011.

[56] *Id.*, at 725.

[57] REV. CORP. CODE, § 6 provides that the matters which a non-voting shareholder can vote on as a matter of right are: (a) Amendment of the articles of incorporation; (b) Adoption and amendment of bylaws; (c) Sale, lease, exchange, mortgage, pledge, or other disposition of all or substantially all of the corporate property; (d) Incurring, creating, or increasing bonded indebtedness; (e) Increase or decrease of authorized capital stock; (f) Merger or consolidation of the corporation with another corporation or other corporations; (g) Investment of corporate funds in another corporation or business in accordance with this Code; and (h) Dissolution of the corporation.

[58] *Gamboa*, 652 SCRA 690, at 723-24.

[59] REV. CORP. CODE, § 6, ¶ 2.

However, to demonstrate how the concept of "control" in antitrust law necessarily differs from the classic definition of "control" in Philippine corporate law, it is helpful to take note of this classification of minority shareholdings:

> (1) *Controlling shareholdings*: i.e., minority shareholdings giving the shareholder the legal or de facto power *to determine the target's strategic commercial behavior*, e.g., through preferential shares, due to the wide dispersion of the voting rights or the supermajority requirements provided by the company's statute or corporate law. Control may be sole or joint, legal or de facto;
>
> (2) *Non controlling active shareholdings*: i.e., shareholdings providing voting and/or representation rights, thus allowing the shareholder *to exert some influence* over the target *and access competitively sensitive information*;
>
> (3) *Non controlling passive shareholdings:* only financial rights are attached to these shareholdings and the shareholder *is prevented from directly influencing the policy of the target firm.*[60]

This classification shows that when tackling antitrust concerns, influence, or control by minority shareholdings on corporate firm behavior exists on a spectrum. This classification was made in the context of European Union merger control, which defines the concept of control as the power to determine strategic commercial behavior of a firm. Nonetheless, these classifications are helpful guideposts in understanding the standards of control that could be used in regulating acquisitions for antitrust purposes.

Control could be set at a high threshold, such as "the ability to determine the strategic commercial behavior,"[61] or to a lower threshold of "to exert some influence and access sensitive information."[62] Purely financial rights where there is no power to influence policy of the acquired firm cannot be a standard of control in the Philippines since that would contravene the words of the PCA. It must be noted that the low standard of influence to be used in defining "control" argued for in this paper is specifically for competition law. Competition law is a special field of law and the definitions of concepts in this specific branch of law should specifically cater to the purposes of competition law enforcement.

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[60] Pini, *supra* note 44, at 576.
[61] *Id.*
[62] *Id.*

Lastly, it must be emphasized that there is a distinction between acquisition of control that is based on the coupled agreements accompanying the transaction and *acquisition of control based on the acquisition of the non-voting shares per se*. In the former, the control arises because of the coupled agreement that grants certain rights, while in the latter, control would arise because of the rights arising from the ownership of a non-voting share itself. This paper will focus on applying the analysis to the acquisition of non-voting shares *per se*. With this focus, it will be established that the jurisdiction to review the transaction is the acquisition of the non-voting shares *per se* and not the infinite possibilities of agreements that may accompany such acquisition.

III. SUBSTANTIAL INFLUENCE UNDER SECTION 4(F) OF THE PHILIPPINE COMPETITION ACT: DECISIVE OR MATERIAL?

There are generally two regimes for the review of acquisitions of stock for purposes of antitrust law. *Control based review regimes* require the acquisition of control of the firm before the transaction can be reviewed. Conversely, *non-control based regimes* do not require control. The most famous of the control based review regimes is that of the EU.[63] Some examples of countries which follow a control based review regime are the People's Republic of China,[64] the UK,[65] Germany,[66] Canada,[67] South Africa[68] and India.[69] The most famous of the non-control based review regimes is that of the US.[70]

The Philippines has adopted a control based M&A review regime.[71] As alluded to earlier, the level of control that may be required to constitute an acquisition to subject it to M&A review exists on a spectrum. Different legal systems define different levels of intensity of control, such as "decisive influence," "significant influence," "material influence," or "competitively significant influence." The meaningful differences among these are less clear

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[63] Council Regulation No. 139/2004, art. 3, 2004 O.J. (L 24) 29, 1 (EC) [hereinafter "*EU Merger Regulation*"].

[64] Anti-monopoly Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) (China).

[65] Enterprise Act 2002, c. 40, § 26(3) (UK).

[66] Gesetz gegen Wettbewerbsbeschränkungen [GWB] [Act against Restraints of Competition], July 27, 1957, BGBL. I at 1081, as amended in 2005, BGBL. I at 2114, § 37 (Ger.)

[67] Competition Act, R.S.C. 1985, c. c-34, § 91 (Can.).

[68] Competition Act 89 of 1998, § 12 (S. Afr.).

[69] The Competition Act, 2002, No. 12, Acts of Parliament 2003, § 5 (India).

[70] 15 U.S.C. § 7, ¶¶ 1-2; § 18 (1914).

[71] Philippine Competition Act, § 4(a).

from a legal perspective than from an economic perspective.[72] In the Philippines, the jurisdictional threshold of control required is that of "substantial influence." Whether this constitutes a high or low level of control is dependent on the interpretation of Section 4(f) that will be given by courts. The standards of "decisive" and "material" influence are possible benchmarks to be used in defining substantial influence under the PCA.

A. The Decisive Influence Standard from EU Merger Control

The Competition Commission of the EU can only review acquisitions amounting to concentrations. Concentrations require that there be acquisition of control or in other words, *decisive influence* on the acquired firm's conduct.[73] Prior to the issuance of the Merger Regulations in 1990 by the EU, acquisitions were reviewed under the provisions on anti-competitive agreements or abuses of dominant position, the other two pillars of antitrust regulation.

In the landmark case of *Philip Morris*,[74] the Court of Justice of the EU interpreted Article 85(1)[75] of the Rome Treaty prohibiting anti-competitive agreements and the standard of control necessary for the acquisition to be prohibited as an agreement giving rise to anti-competitive effects. The standard was *whether the acquiring firm could influence the commercial conduct of the companies in question to restrict or distort competition on the market in which they carry business.*[76] This lower standard of influencing the commercial conduct only applied for cases of anti-competitive agreements between competitors and the abuse of dominant position.[77]

In that case, Philip Morris International Inc. was set to acquire 24.9% of outstanding voting rights in its competitor in the tobacco market, Rothman's International. However, to comply with anti-competitive concerns raised by other competitors to the European Commission, the two parties agreed to (i) eliminate Philip Morris' representation on the Rothmans' board; (ii) terminate all of the cooperation agreements having any effect in the

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[72] ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, POLICY ROUNDTABLES: DEFINITION OF TRANSACTION FOR THE PURPOSE OF MERGER CONTROL REVIEW, 6 (2014).

[73] *EU Merger Regulation*, art. 3 (1)(b).

[74] Joined Cases 142 & 156/84, Bat and Reynolds v. Comm'n, E.C.R. 04487 (1987). [hereinafter "*Philip Morris*"].

[75] Now Article 101 of the Treaty on the Functioning of the EU.

[76] *Philip Morris*, ¶ 37.

[77] Barry Hawk & Henry Huser, *"Controlling" the Shifting Sands: Minority Shareholdings Under EEC Competition Law,* 17.2 FORDHAM INT'L L. J. 294, 297 (1993). This was then construed at the time to apply to Articles 85 and 86 of the TFEU.

European Community; and (iii) implement various "Chinese Wall" provisions intended to insulate Rothman's International from any influence by Philip Morris. This means that Philip Morris would not seek any competitively sensitive information from Rothmans.[78] In light of these stipulations, the Court of Justice of the EU held that the agreement *could not be prohibited since there was no control over commercial conduct constituted by voting rights. The lack of control meant that there were likely no anti-competitive effects.* The Court of Justice of the EU stated that there would be "influence on commercial conduct" if any of these four tests were satisfied: (i) the shareholding results in legal (de jure) or de facto control; (ii) the agreement gives the acquiring firm the possibility of reinforcing its position at a later time and thereby eventually taking effective control of the entity; (iii) the agreement provides for or creates a structure likely to be used for commercial cooperation between the parties; or (iv) *the minority shareholding requires the firms to take into consideration each other's interests when determining commercial policy.*[79]

The European Commission again tackled the standard of control necessary to trigger review of an acquisition of shares under either anti-competitive agreement or abuse of dominant position in the *Gillette* case.[80] Gillette's equity acquisition in Eemland, its competitor in the wet-shaving business in Europe, conferred no voting rights, no representation on the board of directors or at the shareholders meeting and no access to internal information. However, unlike the *Philip Morris* decision, the European Commission found that Gillette would be able to exercise some influence over the commercial conduct of Eemland *which would then constitute an abuse of dominant position leading to anti-competitive effects.*[81] The European Commission considered the fact that the non-voting shareholding confers *some influence over the commercial conduct of a target firm*. The European Commission concluded that the transaction would fall short of being an anti-competitive agreement *but would be sufficient to trigger review under abuse of dominant position.*[82] The European Commission differentiated this from the Philip Morris case by citing the fact that Gillette had a dominant position in the market for wet-shave products and therefore had a special responsibility not to allow its conduct to impair genuine undistorted competition in the common market.[83]

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[78] *Philip Morris*, ¶ ¶ 1-33.

[79] *Philip Morris*, ¶ ¶ 37-40, 48.

[80] Case No. IV/33.440, 33.486—Warner-Lambert/Gillette, 1992 O.J. (L 116) 21.

[81] Kadir Bas, *Reforming the Treatment of Minority Shareholdings in the EU: Making the Problem Worse instead of Better*, 38 WORLD COMPETITION 77, 85-86 (2015).

[82] *Id. at* 84. *See* Hawk & Huser, *supra* note 77, at 321-322.

[83] Bas, *supra* note 81, at 86.

Gillette and Philip Morris discussed the acquisition of control through the purchase of shares in the context of being used as a tool to bring about anti-competitive effects *either as an anti-competitive agreement or as abuse of dominant position*. These two cases demonstrate that there are many possible levels of control that could lead to anti-competitive effects and this would vary based on the specific context of the parties to the transaction. The lower standards of control were adopted in these cases, precisely because the framework of anti-competitive agreements and/or abuse of dominant position was applied. *However, this does not mean that these lower standards of control could not have been adopted for defining a "concentration" or an "acquisition."*

With the issuance of the European Union Merger Control (EUMR), mergers and acquisitions were placed under their own review mechanism and a new threshold of control to constitute an acquisition subject to review by the EU Commission was defined. Under the EUMR, control is constituted by rights, contracts, or any other means which confer the possibility of exercising *decisive influence* on a firm.[84] Decisive influence refers to the ability *to control* the *strategic commercial behavior of a firm*.[85] The definition of control under the EUMR may be different from other areas of law and the interpretation of control in other areas is not decisive for the concept of control under EUMR.[86]

Decisive influence under the EUMR has a higher threshold than the "influence on commercial conduct" standard of control used in the *Gillette* and *Phillip Morris* cases. Generally, an acquisition that does not include a majority of the voting rights does not confer control even if it involves the acquisition of a majority of the share capital.[87] In the case of minority shareholdings (i.e. where less than 50 percent of voting rights are acquired) decisive influence may be acquired on a *de facto* basis,[88] such as when the remainder of shares are widely dispersed,[89] where the shareholder is likely to get a majority of votes at a shareholders' meeting,[90] or where an agreement confers an option to purchase shares in the near future.[91] Negative control exists when a shareholder can veto strategic decisions of a firm but does not have the power through a positive vote to impose such decisions.[92] An

[84] *EU Merger Regulation*, art. 3(2); Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, 2008 OJ (L C95) 1, ¶ 16 (2008) [hereinafter *"Jurisdictional Notice"*].

[85] *Jurisdictional Notice*, ¶ 54.

[86] ¶ 23.

[87] ¶ 56.

[88] ¶¶ 59-60.

[89] ¶ 59.

[90] ¶ 59.

[91] ¶ 60.

[92] ¶ 54.

example of negative control is when strategic decisions require a supermajority and the shareholder can veto all such strategic decisions.[93]

Commercial conduct refers to the day-to-day management and the right to appoint a majority of the managing body which would make decisions based on a simple majority vote, separated from the right of acquisition or divestiture of assets of a company.[94] Commercial, strategic, and competitive activities of an entity, such as business and strategic plans and hiring or firing of senior management, has always been distinguished from rights created under national laws granted to minority shareholders to protect the value of their investment, such as corporate decisions affecting incorporation, changes in legal headquarters, dissolution or winding up, and dividends.[95] EU regulation of acquisitions under M&A review has been strictly limited to investments leading to control and therefore does not address passive investments.[96]

B. The Arguments to Interpret Substantial Influence under the PCA Similarly to the Decisive Influence Standard

The argument for substantial influence under the PCA as similar to decisive influence under EUMR is primarily based on a reading of Section 25 of the PCA. In determining the control of an entity, the competition authority may consider several circumstances which generally focus on the power to vote, ability to elect the board of directors, and capability to direct the financial and operating policies of the corporation.[97] Control is presumed when more than one half (1/2) of the voting power of an entity is acquired.[98] Control still exists if one half (1/2) or less of the voting power is acquired, but the other circumstances enumerated in Section 25 of the PCA are present. The catch all phrase in Section 25(f) provides that control can be based on "rights or contracts *which confer decisive influence* on the decisions of the entity." The rule of statutory construction is that every part of the statute must be interpreted with reference to the context, i.e., that every part of the statute must be

[93] ¶ 58. *See* Case No. COMP/M.3678—BBVA/BNL, 2004 O.J. (L 24) 29.1.

[94] Case No. IV/M.232—Pepsi Co./General Mills, 1992 O.J. (C 228), 6, ¶ 7.

[95] Hawk & Huser, *supra* note 77, 305 & n.44.

[96] Ezrachi & Gilo, *supra* note 26, at 337.

[97] Section 25 of the PCA provides that the PCC may take into consideration the following circumstances in determining control: "(a) controlling more than 50% of the voting power in an entity; (b) there is power over more than ½ of voting rights by virtue of agreements; (c) the power to direct or govern the financial and operating policies of the entity; (d) the power to appoint or remove the majority of the board of directors; (e) there exists ownership over or the right to use all or a significant part of the assets; or (f) there exists rights or contracts which confer decisive influence on the decisions of an entity."

[98] Philippine Competition Act, § 25.

considered together with the other parts, and kept subservient to the general intent of the whole enactment.[99] Following this rule, the factors used in Section 25 should be considered in interpreting substantial influence as used in Section 4(f) of the PCA. This construction would lead to an interpretation of a high threshold of control similar to "decisive influence" under the EUMR, which focuses on the acquisition of voting shares to influence the commercial conduct of a firm.

Another rule in statutory construction is that when a local Philippine rule is patterned or copied from that of another country, the decisions of the courts in such country are entitled to great weight in interpreting the local rule.[100] Article 3(2) of the EUMR defines control "as rights, contracts or any other means which [...] confer the possibility of exercising decisive influence on an undertaking." The catch-all phrase in Section 25(f) of the PCA is patterned after EUMR article 3(2) as it provides "rights or contracts which confer decisive influence on the decisions of an entity." The definition of control under the EUMR, as construed by the European Commission and the European Court of Justice, is therefore persuasive in understanding the definition of substantial influence in relation to the conferment of decisive influence as used in Section 25(f) of the PCA.

If "substantial influence" is interpreted as similar to "decisive influence," holders of non-voting shares who have no vote in determining the board of directors cannot acquire control of a corporation. Such acquisitions would fail to meet the jurisdictional threshold of control under the PCA and would not be considered an acquisition which could then be the subject of an M&A review. Furthermore, this interpretation of substantive influence as focusing on the acquisition of voting shares would be in line with the definition of control in Philippine corporate law and is supported by the current doctrinal definition of "control" in corporations as laid down in *Gamboa*.

Such an interpretation will leave a gamut of acquisitions with possible anti-competitive effects free from review. The EU has recognized the gap of jurisdiction over acquisitions falling below the "decisive influence" standard of control. There has been a push for reform of merger and acquisition control in the EU to cover "non-controlling interests," as shown by the White Paper.[101] The European Commission confirmed the existence of an

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[99] Phil. Int'l Trading Corp. v. Comm'n on Audit, G.R. No. 183517, 621 SCRA 461, 469, June 22, 2010.

[100] People v. Pagpaguitan, G.R. No. 116599, 315 SCRA 226, 241–42, Sept. 27, 1999.

[101] *White Paper, supra* note 36.

enforcement gap as regards minority shareholdings, concluding that the EUMR and the articles on anti-competitive agreements and the abuse of dominant position of the Treaty on the Functioning of the European Union (TFEU) are not effective enough to capture all non-controlling shareholdings.[102] The European Commission intends to improve the EUMR's effectiveness by applying it to transactions that involve structural links. These are acquisitions that do not meet the legal definition of acquisition of control or decisive influence, but in which, instead, the acquirer of non-controlling minority shareholdings, nevertheless, gains the possibility to exercise material influence over the target, which leads, potentially, to significant anti-competitive effects.[103]

C. The Possible Lower Standard of Control: The Material Influence Standard from the United Kingdom

Another possible interpretation of substantial influence is a standard akin to "material influence." A lower "material influence" standard has been applied in both Germany and the UK, their domestic antitrust laws being distinct from the antitrust regulation of the EU. German merger law provides the general rule that acquisitions meeting the notification threshold of at least 25% of capital or voting rights in a firm are subject to review and notification.[104] However, the lower standard of "material competitive influence on another undertaking"[105] was added in 1990 to prevent firms from circumventing merger control by structuring acquisitions to not meet the 25% notification threshold.[106] Material competitive influence is not specifically defined in German merger law. However, the German courts have provided examples of what have been considered to be "plus factors" to determine material competitive influence:

> [D]ecisions of the BKartA [the Federal Cartel Office, the national competition regulator], and of the German courts have provided examples of what have been considered to be "plus factors" in certain cases. Such examples include: the right to nominate seats in the board of directors; consortium agreement in terms of voting within the shareholders' meeting; veto rights in relation to the sale of shares of

[102] Bas, *supra* note 81, at 78.

[103] Gabrielle Williamson & Marie-Madeleine Husunu, *Non-Controlling Minority Shareholdings in EU Merger Control*, 15 BUS. L. INT'L 123, 126 (2014).

[104] GWB, § 37(1)(3).

[105] GWB, § 37(1)(4).

[106] Organisation for Economic Co-operation and Development – Directorate for Financial and Enterprise Affairs (Competition Committee), Common ownership by institutional investors and its impact on competition - Note by Germany, at 2-3 (November 29, 2017), *available at* https://one.oecd.org/document/DAF/COMP(2017)10/en/pdf.

> the target, and the execution of certain contract's by the target; *right to acquire more equity capital (pre-emption right);* right to select a third acquiring party in the event of intervention by the BKartA; *special voting rights within the shareholders' meeting*; installation of a permanent advisory council which approves the account statement including financial and investment planning as well as collaborating with the management; contractual agreement to retire the right of nominating seats in the board of directors in the case of BKartA intervention; low attendance at shareholder meetings.[107]

Meanwhile, in the UK, there are three different levels of control or influence for the purposes of M&A review. They are, from highest to lowest: (1) ownership, (2) ability to control policy (de facto control), and (3) ability to materially influence policy.[108] The ability to exercise material influence means that "a person or group of persons able, directly or indirectly, to control or materially to influence *the policy* of a body corporate, or the policy of any person in carrying on an *enterprise but without having a controlling interest in that body corporate*."[109] "Controlling interest" as used in the provision of the UK law refers to the traditional concept of corporate control, which is the direct influence on the commercial conduct of a corporation through the use of voting shares. The material influence standard is far more flexible than the decisive influence test applied in the EUMR, *since it does not deal with the concept of "exercise of control" in the traditional ways as understood in corporate law*.[110]

The gap between decisive and material influence was demonstrated in the landmark *RyanAir/Aerlingus* case.[111] In that case, Aerlingus (the flag airline carrier of Ireland) filed a petition with the European Commission praying that Ryanair, another airline with headquarters in Ireland, be ordered by the European Commission to divest its 29% previously acquired minority shareholding in Aerlingus. The European Commission denied the petition because the 29% shareholding of voting shares did not constitute a concentration and was therefore outside the ambit of its review.[112] On appellate review, the Court of Justice of the EU confirmed that the European

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[107] *Support Study for Impact assessment concerning the review of Merger Regulation regarding minority shareholdings*, at 22 (Feb. 23, 2017), https://op.europa.eu/en/publication-detail/-/publication/85490864-fa5c-11e6-8a35-01aa75ed71a1. (Emphasis supplied, citations omitted.) [hereinafter *"Support Study"*]

[108] Broomhall et al., *supra* note 40, at 40.

[109] Enterprise Act 2002, c. 40, § 26(3) (UK). *See also Support Study*, *supra* note 107, at 15.

[110] Corradi, *supra* note 28, at 251.

[111] [Hereinafter, *"Ryanair/Aerlingus"*] Case T-411/07, Aer Lingus Group plc. v. Eur. Comm'n, 2010 E.C.R. II-3695.

[112] *Ryanair/Aerlingus*, ¶ 65.

Commission lacked jurisdiction under the EUMR to investigate non-controlling shareholding acquisitions of RyanAir in Aerlingus, since it failed to confer decisive influence.[113] Even if Ryanair had attempted to (1) block special resolutions, (2) gain access to business plans of Aerlingus and their business secrets, and (3) demand the holding of special stockholders' meetings to overturn decisions of the Board of Directors of Aerlingus, there was no jurisdiction to review the shareholding under the EUMR.[114] Even if Ryanair could engage in all these seemingly anti-competitive activities, the European Commission could not prevent the minority shareholding from engaging in such activities.

In contrast, the UK competition authority subjected the same acquisition to review on the basis that there could be material influence exercised by RyanAir over Aerlingus that would significantly lessen competition in the market.[115] The factors that were taken into account by the UK competition authority include: (1) the ability to block special resolutions at general meetings of Aerlingus,[116] which would in turn influence the ability of Aerlingus's ability to combine with other airlines and to optimize its portfolio of slots in Heathrow airport,[117] and (2) the capability of Aerlingus to make capital changes that might be needed to compete with Ryanair.[118]

Under UK law, the ability to block special resolutions has been regarded as a very strong indicator of material influence.[119] Special resolutions are passed by at least 75% of those who vote on a resolution.[120] The ability to control more than 25% of the votes would give a shareholder the ability to block such a resolution.[121] Special resolutions are required to make changes to a company's constitution—the equivalent of the articles of incorporation in Philippine corporate law—and to carry out certain procedures which affect the rights of shareholders, including the buyback of shares and the waiver of

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[113] *Ryanair/Aerlingus*, ¶¶ 12-13.

[114] *Id.* at ¶¶ 67-76.

[115] Leigh M. Davison, *Accommodating Minority Shareholdings Within the European Union Merger Control Regime: Advocating a More Cooperative Way Forward*, 38 LIV. L. REV. 259, 265-266 (2017).

[116] UK Competition Commission, Final Report completed acquisition by Ryanair Holdings plc. of a minority shareholding in Aer Lingus Group plc., ¶¶ 4.16-4.21 (Aug. 28, 2013).

[117] *Id.* at ¶¶ 4.18-4.20.

[118] *Id.* at ¶ 4.18.

[119] UK Competition Commission, Final Report on Acquisition by British Sky Broadcasting Group PLC of 17.9 Per cent of the shares in ITV PLC, ¶ 3.40 (Dec. 14, 2007).

[120] Companies Act 2006, c. 40 § 283 (UK).

[121] UK Competition Commission, *supra* note 119, ¶ 3.40.

pre-emption rights.[122] A shareholder that is able to block a special resolution will also be able to block a merger.[123] These corporate actions which require special resolution under UK law are part of the strategic options of a company in pursuing its commercial policy or strategy of business.[124]

The matters requiring special resolutions under UK law are similar to the corporate acts requiring a 2/3 majority vote *of all holders of capital* under the Revised Corporation Code in Philippine law,[125] such as the denial of pre-emptive right,[126] the increase or decrease of capital stock,[127] and the approval of a plan of merger and consolidation.[128] In addition, even the 2014 EU White Paper recognizes that an example of a minority shareholding granting the acquirer influence over the target is when the acquirer is able to exercise influence over the outcome of special resolutions.[129] The concept of material influence, like decisive influence, focuses on the commercial conduct of the firm; however, unlike decisive influence, it considers decisions that involve major changes to the corporation and not just decisions on day-to-day operations and company policy.

D. The Arguments to Interpret Substantial Influence under the PCA Similarly to UK's Material Influence Standard

First, Section 4(f) of the PCA uses the words "substantially influence or direct the actions or decisions of an entity," *without qualifying actions or decisions. Ubi lex non distinguit nec nos distinguere debemus.* Where the law does not distinguish, neither should we.[130] It follows that *all possible corporate actions*, and not just decisions on day-to-day operations and selection of management, should be considered in determining control. Substantial influence, as used in Section 4(f), should be interpreted as also referring to major corporation

[122] *Id.* at ¶ 3.41.

[123] *Id.* at ¶ 3.42.

[124] *Id.* at ¶ 3.66.

[125] The corporate acts requiring the approval of 2/3 majority vote are: Amending Articles of Incorporation (§15); Power to Extend or Shorten Corporate Term (§ 36), Power to Increase or Decrease Capital Stock or Incur, Create or Increase Bonded Indebtedness (§37), Power to Deny Preemptive Right (§ 38), Sale of all or substantially all of the corporation's properties and assets (§ 39), Power to Invest Corporate Funds in Another Corporation or Business or for any other Purpose (§41), Issuance of Stock Dividends (§ 42), Merger or Consolidation with another corporation or corporations (§ 76) and Voluntary Dissolution (§§134-135).

[126] REV. CORP. CODE, § 38.

[127] § 37 *in relation to* § 6(e).

[128] § 76 *in relation to* § 6(f).

[129] *White Paper, supra* note 36, ¶ 32.

[130] Villongco v. Yabut, G.R. No. 225022, 854 SCRA 132, Feb. 5, 2018.

actions or decisions of an entity, including matters which require the vote of non-voting shareholders under the Revised Corporation Code. Therefore, substantial influence should be interpreted as similar to the "material influence" under UK law, since the "material influence" standard considers the influence even on corporate actions or decisions requiring the vote of non-voting shareholders under the Revised Corporation Code.

With regard to the circumstances of corporate control listed in Section 25 of the PCA that are used to determine the existence of control which were mentioned earlier,[131] these circumstances are not an exclusive listing of what constitutes control under the PCA. The consideration of these circumstances is discretionary, not mandatory, on the part of the reviewing authority because of the use of the word "may."[132] These circumstances, then, may be completely disregarded by the reviewing authority if warranted. Actions or decisions of an entity as used in Section 4(f) to define control should not be unduly limited by a listing of indicators that are not mandatorily considered in determining control.

1. The Wrinkle of the "Solely for Investment" Exception Copied from the United States

Another important part of the PCA that supports the interpretation of "substantial influence" as similar to "material influence" is the use of the "solely for investment" exception as found in the Clayton Act of the USA which was substantially copied in the PCA.[133] Section 21 of the PCA provides:

> That the acquisition of the stock or other share capital of one or more corporations *solely for investment and not used for voting or exercising control and not to otherwise bring about, or attempt to bring about the prevention, restriction, or lessening of competition* in the relevant market *shall not be prohibited*.[134]

On the other hand, Section 7 of the Clayton Act as amended by the Celler-Kefauver Act provides:

> This section *shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about*, or in attempting to bring about, the substantial lessening of competition.[135]

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[131] *See supra* Part III.B.

[132] Philippine Competition Act, §25, ¶ 1.

[133] Palacios, *supra* note 1, at 364.

[134] Emphasis supplied.

[135] 15 U.S.C. §18 (1950) *amending* the Clayton Act.

The rule that the decisions of foreign courts have persuasive effect[136] in the interpretation of Philippine laws copied or patterned after the foreign law finds application once again. In the United States, the general rule is that all acquisition of shares are subject to review, whether or not they result in acquisition of control.[137] The "solely for investment" exception has been construed by American courts as not automatically applying just because the acquired interest is non-controlling.[138] Most US courts have held that the solely for investment exception applies only where the acquisition in question did not "substantially lessen competition" at all, which means that it would be lawful whether or not it was solely for investment.[139] Control is not the issue. The issue is having enough power to influence firm behavior or performance or to block others from so doing. The power to vote is important, although not decisive.[140]

The Supreme Court of the United States has ruled that a company need not acquire control of another company, i.e., the ability to vote on the board of directors, to violate the Clayton Act.[141] Section 7 of the Clayton Act proscribes acquisition of any part of a company's stock where the effect "may be substantially to lessen competition, or to tend to create a monopoly."[142] The "or otherwise" clause in relation to the "solely for investment" clause means that the exception also does not apply even if the anticompetitive effects do not flow from the exercise of voting rights, but rather because the stock is used to reduce incentives to compete.[143] The assumption that the lack of control will not lead to any anti-competitive effects ignores the possibility that there may be a mechanism that causes anti-competitive behavior other than control.[144] The US regulation of acquisitions under the Clayton Act can cover all possible anti-competitive acquisitions, unlike the EUMR which is much narrower in scope.[145] This could be attributed to the fact that US merger review is not based on the acquisition of control.

Although the "solely for investment" exception was from a non-control based M&A review regime, it was copied into PCA. Even if such

[136] Comm'r of Internal Revenue v. Solidbank Corp., G.R. No. 148191, 416 SCRA 436, 453, Nov. 25, 2003.

[137] 15 U.S.C. § 18, ¶ 3 (1950).

[138] Morton & Hovenkamp, *supra* note 33, at 2043.

[139] *Id.* at 2042 *citing* Crane Co. v. Harsco Corp., 509 F. Supp. 115, 123 (D. Del. 1981).

[140] *Id.*

[141] Denver & Rio Grande Western R. Co. v. United States, 387 U.S. 485 (1967)

[142] *Id.* at 501.

[143] Einer Elhauge, *How Horizontal Shareholding Harms Our Economy - And Why Antitrust Law Can Fix It*, 10 HARV. BUS. L. REV. 207, 263 (2020).

[144] United States v. Dairy Farmers of America, 426 F.3d 850 (2005).

[145] Elhauge, *supra* note 143, at 273.

provision has no EUMR counterpart, Section 21 as part of the PCA must be applied. This could be a possible conflict in the law since provisions were lifted from two different jurisdictions with substantially different merger review systems. This conflict caused by the wrinkle of copying the exception from a non-control based merger review system becomes apparent by the simple application of a plain reading of the use of the word "and" in the last paragraph of Section 21 of the PCA[146].

The use of the word "and" means that what is not prohibited are acquisitions which are not used in any manner to lead to anti-competitive effects, *not just acquisitions which contemplate the acquisition of voting rights for the board of directors to bring about the anti-competitive effects*. In other words, the law meant *to exempt* from prohibition only those acquisitions which would not have any anti-competitive effects and meant *to include* in the prohibition any acquisition which could have anti-competitive effects, *even if the acquisition did not grant control of a corporation through voting shares.*

The "solely for investment" exception in Section 21 of the PCA must be applied simultaneously with the definition of acquisitions requiring control under Section 4(f) of the PCA. The rule is that a statute must be so construed as to harmonize and give effect to all its provisions whenever possible.[147] As much as possible, the interpretation that should prevail is one that gives effect to the requirement of control laid down in Section 4(a) in relation to section 4(f), while also giving effect to Section 21. If substantial influence were to be interpreted as decisive influence, then it would render the "solely for investment" exception nugatory. Such construction would limit the review to acquisitions leading to influence of the commercial conduct of a firm through the use of voting shares, rendering mere surplusage the phrase "and not to otherwise bring about, or attempt to bring about the prevention, restriction, or lessening of competition."

The persuasive effect of US decisions in interpreting the "solely for investment" exception and the plain reading of the PCA show a recognition of other methods by which acquisitions of shares may bring about anti-competitive effects aside from the acquisition of voting shares. Non-voting shareholders through the use of their rights may possibly use their shares to

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[146] Recall that the last paragraph of Section 21 of the PCA provides: "That the acquisition of the stock or other share capital of one or more corporations solely for investment *and* not used for voting or exercising control and not to otherwise bring about, or attempt to bring about the prevention, restriction, or lessening of competition in the relevant market shall not be prohibited."

[147] Chavez v. Jud. & Bar Council, G.R. No. 202242, 676 SCRA 579, 599, July 17, 2012.

otherwise bring about, or attempt to bring about, the prevention, restriction, or lessening of competition. Therefore, such acquisitions should be susceptible to review and prohibition by the Philippine Competition Act because they do not fall under the "solely for investment" exception. The "solely for investment" exception in Section 21 and the requirement of control under Section 4(a) are both given the most possible effect when the construction of "substantial influence" in Section 4(f) is akin to "material influence" as understood in the United Kingdom. This is because an interpretation of lower threshold of control gives the PCC more leeway to regulate more acquisitions. Therefore, following the rule that a statute must be so construed as to harmonize and give effect to all its provisions whenever possible, "substantial influence" under the PCA should be interpreted similarly to "material influence" as understood in the United Kingdom.

E. Leaving Acquisitions of Non-Voting Shareholdings and the Rights Attached Thereto Unregulated Defeats the Intent of Competition Law

The special position of non-voting shareholders in the Philippine context which could give rise to anti-competitive effects should be given special attention in finally deciding the interpretation of "substantial influence." Holders of non-voting shares can certainly influence the conduct of a corporation pursuant to the rights granted by the Revised Corporation Code. They can also exercise such rights to benefit themselves and gain inside information on the corporation. The examples of rights cited will show that not having the jurisdiction to review the acquisition of non-voting shares would defeat the intent of the PCA and necessitate the interpretation of "substantial influence" as similar to "material influence" under UK law.

First, the vote of non-voting shareholders is required for the adoption or amendment of the by-laws, or delegation to the board of directors of the power to do the same.[148] The by-laws of a corporation are its own private laws which substantially have the same effect as the laws of the corporation.[149] The importance of by-laws has been demonstrated in *Gokongwei v. Securities and Exchange Commission*,[150] where the Supreme Court held that it was valid for a by-law to disqualify a shareholder who was a director in a competitor from being a director in the corporation pursuant to the power of a corporation to prescribe the directors' or trustees' qualifications, duties, and responsibilities.[151] By-laws cover matters such as the manner of election and

[148] REV. CORP. CODE, §§ 6(b), 45 and 47.
[149] Peña v. Ct. of Appeals, G.R. No. 91478, 193 SCRA 717, 729, Feb. 7, 1991.
[150] [Hereinafter "*Gokongwei*"], G.R. No. 45911, 89 SCRA 336, 365, Apr. 11, 1979.
[151] REV. CORP. CODE, § 46(f).

term of corporate officers,[152] the manner of issuing stock certificates,[153] and other internal governance matters.[154]

Second, holders of non-voting shares have a vote in all matters involving the amendment of the articles of incorporation, which would be needed in corporate actions such as the change of principal office, the approval of a merger, and the increase or decrease of authorized capital stock.[155] These corporate actions are possible tools for a corporation when competing with other firms, especially when the corporation needs financing or intends to change its long-term company policy. As discussed earlier,[156] these matters requiring the vote of non-voting shareholders under the Revised Corporation Code are similar to the matters which require special resolutions under UK law and are considered in determining material influence. Applying the reasoning of the UK competition authority in the *Ryanair/Aerlingus* case, holders of non-voting shares under the Revised Corporation Code can exercise material influence over a corporation's conduct since they can acquire the ability to block these major corporate decisions which require special resolutions.

Third, several other rights which are attached to the non-voting share are open to the possibility of being used in an anti-competitive manner. Holders of non-voting shares have a pre-emptive right to the issuance of shares whether they be voting or non-voting, unless otherwise denied by the

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[152] § 46(h).

[153] § 46(j).

[154] Section 46 of the Revised Corporation Code provides:
"Contents of Bylaws. – A private corporation may provide the following in its bylaws: (a) The time, place and manner of calling and conducting regular or special meetings of the directors or trustees; (b) The time and manner of calling and conducting regular or special meetings and mode of notifying the stockholders or members thereof; (c) The required quorum in meetings of stockholders or members and the manner of voting therein; (d) The modes by which a stockholder, member, director, or trustee may attend meetings and cast their votes; (e) The form for proxies of stockholders and members and the manner of voting them; (f) The directors' or trustees' qualifications, duties and responsibilities, the guidelines for setting the compensation of directors or trustees and officers, and the maximum number of other board representations that an independent director or trustee may have which shall, in no case, be more than the number prescribed by the Commission; (g) The time for holding the annual election of directors or trustees and the mode or manner of giving notice thereof; (h) The manner of election or appointment and the term of office of all officers other than directors or trustees; (i) The penalties for violation of the bylaws; (j) In the case of stock corporations, the manner of issuing stock certificates; and (k) *Such other matters as may be necessary for the proper or convenient transaction of its corporate affairs for the promotion of good governance and anti-graft and corruption measures.*"

[155] REV. CORP. CODE, § 6(a).

[156] *See supra* Part III.D.

articles of incorporation or an amendment thereto,[157] a vote on whether to invest corporate funds for a non-primary purpose and in incurring or creating a bonded indebtedness,[158] and a statutory right to access the documents of the corporation.[159]

A non-voting shareholder has the right to access documents listed in Section 73 of the Revised Corporation Code, which include records of business transactions, records of all board resolutions, and the capital structure of a corporation.[160] They also have a right to the financial statements of a corporation.[161] The Revised Corporation Code allows *all shareholders* the right to inspect and access corporate documents.[162] Stockholders are entitled to inspect the books and records of a corporation in order to investigate the conduct of the management, determine the financial condition of the corporation, and generally take an account of the stewardship of the officers and directors.[163] The inspection and access to documents can be denied to a stockholder on the grounds listed in Section 73, which include that the requesting stockholder "is a competitor, director, officer, controlling stockholder or otherwise represents the interests of a competitor."[164] These grounds for refusal of inspection of corporate documents are considered justifying circumstances, and the burden of proof lies with the corporation to prove why its refusal for inspection is valid, such as when there is improper purpose or motive.[165]

The exercise of the right to inspection granted even to a non-voting shareholder could give rise to the anti-competitive effect of access to non-

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[157] § 38.

[158] § 6.

[159] § 73.

[160] Section 73 of the Revised Corporation Code provides: "Every corporation shall keep and carefully preserve at its principal office all information relating to the corporation including, but not limited to: (a) The articles of incorporation and bylaws of the corporation and all their amendments; (b) The current ownership structure and voting rights of the corporation, including lists of stockholders or members, group structures, intra-group relations, ownership data, and beneficial ownership; (c) The names and addresses of all the members of the board of directors or trustees and the executive officers; (d) A record of all business transactions; (e) A record of the resolutions of the board of directors or trustees and of the stockholders or members; (f) Copies of the latest reportorial requirements submitted to the Commission; and (g) The minutes of all meetings of stockholders or members, or of the board of directors or trustees."

[161] § 74.

[162] Terelay Investment Corp. v. Yulo, G.R. No. 160924, 765 SCRA 1, 13, Aug. 5, 2015.

[163] *Gokongwei*, 89 SCRA 336, 386.

[164] REV. CORP. CODE, § 73.

[165] Republic v. Sandiganbayan, G.R. No. 88809, 199 SCRA 39, 47, July 10, 1991.

public and competitively sensitive information. The acquisition of a minority shareholding with information rights has been tackled by the EU Commission in the case of *Siemens/VA Tech.*[166] In that case, the EU Commission prohibited the acquisition based on anti-competitive effects arising from financial incentives and information rights. The acquisition of a minority shareholding *may enhance transparency due to the privileged view it offers the acquirer into the commercial activities of the target.*[167] The privileged view increases the gravity of the threat of retaliation made by an acquiring firm if the target firm deviates from the collusive behavior.[168]

The use of rights granted to holders of non-voting shares would likely lead to anti-competitive effects when placed in the hands of a competitor. The firm's investor who is at the same time a competitor would likely use such rights granted to non-voting shareholders under the Revised Corporation Code in an anti-competitive manner due to the financial counter-incentives to compete.[169] For example, a competitor who invests in the non-voting shares of its rival may block most of the corporate actions listed in Section 6 of the Revised Corporation Code, which are sought by a majority of voting shareholders and the board of directors, if the passive competitive investor has at least 35% of the total outstanding stock of the corporation—without holding a single voting stock.

Taking into consideration all these possible anti-competitive effects arising from the special position of a non-voting shareholder in the Philippine context, the rule of statutory construction that the law must be interpreted in such a way that the intent of the law is given paramount emphasis. The Supreme Court may consider the spirit and reason of a statute, where a literal meaning would lead to absurdity, contradiction, or injustice, or would defeat the clear purpose of the law makers.[170] *The intent and policy of the PCA is to prohibit all possible anti-competitive acquisitions,* [171] *not just those that result in the acquisition of control in the corporation by acquisition of voting shares.*

Competition is an underlying principle of the Constitution[172] and is recognized as an economic right of the people which must be vigilantly protected by the Supreme Court.[173] The objective of antitrust law is to "assure

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[166] Case COMP/M.3653—Siemens/VA Tech, 2005 O.J. (L 353), 19.
[167] *White Paper, supra* note 36, ¶ 35.
[168] *Id.*
[169] *See supra* Part II.B.
[170] People v. Manantan, G.R. No. 14129, 5 SCRA 684, 692, July 31, 1962.
[171] Philippine Competition Act, § 2(c).
[172] CONST. art. XII, §19.
[173] *Tatad*, 281 SCRA 330, 370.

a competitive economy, based upon the belief that through competition producers will strive to satisfy consumer wants at the lowest price with the sacrifice of the fewest resources."[174] The essence of competition in a free market is for the purpose of serving the consuming public with the lowest priced goods.[175]

To construe the definition of "substantial influence" as "decisive influence" or in line with control standing doctrine as defined in *Gamboa*[176] would defeat the intent of the law and of the Constitution and the PCA, since under such interpretation, possible anti-competitive effects arising from acquisitions of non-voting shares could not be reviewed. *Consumer welfare is not benefited when firms are not incentivized to cut prices to compete or are incentivized to incrementally increase prices because a stockholder of a firm may take into consideration their financial interest in the firm's competitor.* This undesirable situation would likely arise when a competitor becomes a passive investor in its rival, or in other words—*a "passive" competitive investor.* Although a non-voting share is traditionally understood as a passive investment, a non-voting share placed in the hands of a competitor could be much more active than passive. The "passive" competitive investor will follow the basic economic principle that people respond to incentives and use the rights as a non-voting shareholder under the Revised Corporation Code to benefit himself—even if it is detrimental to competition in the market.

Therefore, the interpretation of "substantial influence" to define control under Section 4(f) of the PCA should be similar to the standard of "material influence" as understood in the United Kingdom. This interpretation would place acquisitions of non-voting shares within the meaning of acquisition under Section 4(a) and subject the acquisitions to review under the PCA because a non-voting shareholder may substantially influence corporate actions and decisions through the use of their rights under the Revised Corporation Code.

Lastly, it is worth noting that the EU "decisive influence" standard applies to acquisitions that have a "community dimension." The European Commission only reviews transactions that would influence at least two countries in the EU. The European Commission is regulating a much larger market than the PCC ever will. The "material influence" standard is adopted from single-country regulation jurisdictions, such as the United Kingdom and Germany. The market that the PCC will be regulating is the Philippine market

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[174] *Id.* at 358.
[175] *Gokongwei*, 89 SCRA 336, 378.
[176] *Gamboa*, 652 SCRA 690.

alone and the interpretation of the PCA should be aimed at ensuring that the optimum level of competitiveness is achieved in Philippine markets. This is likely achieved when the regulatory authority has more leeway in reviewing acquisitions because a lower threshold of influence was required for an acquisition to be within its jurisdiction.

IV. CONCLUSION: THE PHILIPPINE "PASSIVE" COMPETITIVE INVESTOR IS UNDER REVIEW

The question posed at the beginning of this paper, "what should be the standard of control under Section 4(f) of the PCA?" has been answered. The standard of control should be a low one where "substantial influence" is interpreted in a similar manner to "material influence."

First, from a policy consideration standpoint, the interpretation of control is vital to the development of antitrust enforcement in the Philippines since it would clarify the acquisitions coming within M&A review of the PCC. If the EU, which is one of the most advanced jurisdictions in antitrust enforcement in the world, has already recognized the problem of non-controlling acquisitions, then the Philippines should likely recognize the problem as well. At this juncture, the Philippines has the choice of shaping its own antitrust policy and perhaps even covering gaps that were found in the source law.

Second, from a legal standpoint, the reading of the several provisions of the PCA point to a definition of substantial influence akin to the material influence standard. This is not to disregard the strength of the argument for the decisive influence standard based on borrowed concepts from the EU and established jurisprudence in Philippine corporate law. However, the intent and spirit behind the law is the paramount consideration and the law must be interpreted in a manner to give life to the antitrust spirit of the highest law of the land. This interpretation of the standard of control as a low threshold recognizes the role of special corporate actions, which require the vote of non-voting shareholders under the Revised Corporation Code (such as approving mergers, the substantial disposition of assets, the increase or decrease of authorized capital stock, and the incurring of bonded indebtedness among others), as useful corporate actions when competing with other firms. *It recognizes the reality that only truly passive investments which are silent financial interests are likely to bring no anti-competitive effect at all.*

The second question of "does the acquisition of non-voting shares without coupled agreements fall under the standard of control as defined?"

has been answered as well. Applying the interpretation of "substantial influence" as similar to "material influence," the acquisitions of non-voting shares could result in the acquisition of control of a corporation under Section 4(f) of the PCA. The acquisition of control in this case is based on the statutory rights granted to non-voting shareholders under the Revised Corporation Code.

Therefore, the acquisition of non-voting shares can result in the acquisition of control of a corporate entity and should thereby be subject to review by the PCC for its anti-competitive effects under the M&A review of the PCA.

A further area of study that is recommended would be a comparison of the treatment of non-voting shareholders in corporations incorporated in different countries. It is possible that Philippine corporate law may place holders of non-voting shareholders in a different position from the classic understanding of passive investments in non-voting shares in other jurisdictions. The nuances of non-voting shareholders under the Revised Corporation Code make it a powerful passive competitive investor. Without any restrictions on the rights granted by the Revised Corporation Code, can a non-voting shareholder be properly considered as having a purely financial interest in a corporation for antitrust purposes? In line with this, the rights granted to non-voting shareholders should be compared to other jurisdictions to see where the distinctions for the purposes of antitrust regulation of passive investments are found.

Hopefully, you now have a definite answer to the question posed in hypothetical scenario number three.[177] Hopefully, it is no longer "it depends," but a simple and assured "Yes."

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[177] *See supra* Introduction.