

In the Matter of AXA SA, Camelot Holdings Ltd., and XL Group Ltd.’s Alleged Violation of the Compulsory Notification Requirements Under Section 2.1 of the PCC Rules on Merger Procedure

PCC Case No. M-2018-004

AXA SA, Camelot Holdings Ltd., and XL Group Ltd.¹

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COMMISSION DECISION No. 30-M-03/2018

I. STATEMENT OF THE CASE

1. This case involves the alleged violation by AXA SA (“AXA”), Camelot Holdings Ltd. (“Camelot”), and XL Group Ltd. (“XL Group”) of the compulsory notification requirement provided under the Philippine Competition Commission’s (“PCC” or “Commission”) Rules on Merger Procedure (“Merger Procedure”) with respect to the acquisition by AXA, through its wholly-owned subsidiary, Camelot, of sole control over XL Group² (“Subject Transaction”), as embodied in the *Agreement and Plan of Merger by and among AXA SA, Camelot Holdings Ltd. and XL Group Ltd.*³ dated 5 March 2018 (“Agreement and Plan of Merger”) executed by Respondents for a total aggregate consideration of ~USD15.3 Billion.⁴
2. AXA, the acquiring entity, is organized and incorporated under the laws of France.⁵ AXA is the holding company of the AXA Group, a prominent player in insurance and asset management, which divides its operations into five general areas, namely: France, Europe, Asia, the United States, and International (including the Middle East, Latin America, and Africa).⁶ In the Philippines, AXA Group maintains its operations through Philippine AXA Life Insurance Corporation, Charter Ping An

¹ AXA SA, Camelot Holdings Ltd., and XL Group Ltd. shall hereinafter be collectively referred to as “Respondents”.

² The Subject Transaction has been cleared by the Commission in Decision No. 29-M-026/2018 dated 16 August 2018, finding that the same “does not result in substantial lessening of competition in the relevant market since there appears to be neither increased ability nor incentive for the parties to engage in either input foreclosure or customer foreclosure, post-merger and there exists sufficient post-Transaction competitive constraint on the Parties from other market participants.”

³ Agreement and Plan of Merger by and among AXA SA, Camelot Holdings Ltd. and XL Group Ltd. dated 5 March 2018 (“Agreement and Plan of Merger”).

⁴ AXA SA’s Description of the Transaction (Appendix 4.1, AXA’s Notification Form).

⁵ Certification and Special Power of Attorney subscribed on 18 June 2018 (Appendix 8.2(A), AXA’s Notification Form).

⁶ AXA SA 2017 Annual Financial Report (Appendix 7.4 (A), AXA’s Notification Form).

Insurance Corporation, Assist and Assistance Concept, Inc., and AXA Shared Services Centre Philippines, Inc.⁷

3. Camelot, a wholly-owned subsidiary of AXA, is a holding company registered under the laws of Bermuda.⁸
4. XL Group, the acquired entity, is a corporation organized and incorporated under the laws of Bermuda.⁹ XL Group is a global insurance and reinsurance company which, through its subsidiaries, provides property, casualty, and specialty products to industrial, commercial, and professional firms, insurance companies and other enterprises on a worldwide basis.¹⁰ It has global operations located in Bermuda, North America, London, and Asia Pacific.¹¹
5. The Subject Transaction involves the merger of Camelot with and into XL Group, with XL Group surviving the merger as a wholly-owned subsidiary of AXA.¹²
6. On 25 June 2018, Respondents filed with the Mergers and Acquisitions Office (“MAO”) their respective merger Notification Forms on the Subject Transaction.¹³
7. On 3 July 2018, the MAO sent to the Respondents Letters to Explain of even date requiring the latter to explain in writing why they should not be held liable for failing to notify the Subject Transaction within the notification period provided under Section 2.1 of the Merger Procedure.¹⁴
8. On 6 July 2018, MAO received Respondents’ respective Letters of even date, in response to the MAO’s Letters to Explain.
9. Based on the submissions made by Respondents and the fact-finding investigation conducted by MAO, the latter filed with the Commission its Final Report dated 20 July 2018 recommending the imposition of a penalty upon the Respondents for failure to notify the PCC within the period specified in Section 2.1 of the Merger Procedure.¹⁵
10. Acting on the Final Report, on 31 July 2018 the Commission issued a Notice of even date, requiring the Respondents to submit their respective Comments on the said report within fifteen (15) days from receipt of the Notice.

⁷ List of Domestic and Foreign Entities within the AXA Notifying Group that have assets in the Philippines or generate revenues from sales in, from, or into the Philippines (Appendix 5.1, AXA’s Notification Form).

⁸ Statutory Merger Agreement (Annex A to the Agreement and Plan of Merger by and among AXA SA, Camelot Holdings Ltd. and XL Group Ltd dated 5 March 2018).

⁹ Affidavit of Acquired Entity (Appendix 8.1(A), XL Group’s Notification Form).

¹⁰ Description of the Worldwide Operations of the Notifying Group and the Worldwide Sales of the Notifying Group (Appendix 2.4, XL Group’s Notification Form).

¹¹ *Id.*

¹² AXA SA’s Description of the Transaction (Appendix No. 4.1, AXA’s Notification Form).

¹³ MAO Final Report, Case No. M-2018-004, dated 20 July 2018 (“MAO Final Report”).

¹⁴ *Id.*

¹⁵ Section 2.1, PCC Rules on Merger Procedure provides:

“2.1. Parties to merger that meets the thresholds in Section 3 of Rule 4 of the IRR are required to notify the PCC within thirty (30) days from signing of definitive agreements relating to the merger (“notified merger”). If deemed necessary, the PCC may likewise investigate mergers by its own initiative (“*motu proprio* review”).”

11. On 15 August 2018, the Commission received Respondents' respective Comments. In their Comments, Respondents sought the Commission's leniency by claiming lack of intent to violate the compulsory notification requirements and by citing mitigating circumstances, viz:¹⁶

"4.1. In conclusion, [Respondents] respectfully [submit] the following:

4.1.1 [Respondents] have no intent whatsoever to circumvent the notification requirement under the PCA and that XL immediately took steps to comply as soon as it reasonably could after it had determined its notification obligation;

4.1.2 [Respondents] have provided all cooperation required to enable the MAO to conduct and complete the review of the Proposed Transaction; and

4.1.3 [Respondents] have not committed any act constituting a consummation of the Proposed Transaction.

4.2 In view of the foregoing, [Respondents] request that the Commission provide leniency to [Respondents], especially since the delay in the filing of the notification has not led to any harm to public interest and has not deprived the Commission of the ability to review the Proposed Transaction in a timely manner prior to its consummation."

12. On 22 August 2018, the Commission issued a Notice directing Respondents to submit additional documents necessary for the proper determination of the case.
13. On 28 August 2018, Respondents filed their respective Letters of even date, with corresponding annexes.
14. On 28 August 2018, the case was submitted for decision by the Commission.

II. THE ISSUE

15. Section 2.1 of the Merger Procedure provides that parties to a merger that meets the compulsory notification thresholds shall notify the PCC within thirty (30) days from the date of execution of the relevant definitive agreement, viz:

"2.1. Parties to a merger that meets the thresholds in Section 3 of Rule 4 of the IRR are required to notify the PCC within thirty (30) days from signing of definitive agreements relating to the merger ("notified merger"). If deemed necessary, the PCC may likewise investigate mergers by its own initiative ('motu proprio review')."

¹⁶ AXA's Verified Comment dated 15 August 2018 ("AXA's Verified Comment"), pars. 1.1, 1.5, 2, 3, and 4; XL Group's Verified Comment dated 15 August 2018 ("XL Group's Verified Comment"), par. 1.1, 1.5, 2, 3, and 4.

16. To sustain a finding of violation of the compulsory notification requirements under Section 2.1 of the Merger Procedure (failure to notify within the period for notification), the following elements must concur:
- (i) the parties signed a definitive agreement relating to a merger or acquisition;
 - (ii) the merger or acquisition is a notifiable transaction under Section 17 of the Philippine Competition Act (“PCA”) and Rule 4, Section 3 of the Implementing Rules and Regulations (“IRR”), as amended by PCC Memorandum Circular 18-001 (“MC 18-001”);
 - (iii) the parties notified the Commission of the transaction beyond the 30-day period following the signing of the definitive agreement relating to the merger or acquisition; and
 - (iv) the parties have not consummated the transaction prior to the Commission’s approval or clearance of the transaction.
17. With respect to the first element, it is a matter of record that on 5 March 2018, Respondents, through their respective authorized representatives, signed the Agreement and Plan of Merger which provides for the merger of Camelot with and into the XL Group, with the latter as the surviving entity to be under the sole control of AXA.¹⁷ The Commission observes that Respondents themselves submitted the Agreement and Plan of Merger as the primary instrument of the Subject Transaction for purposes of its compliance with the notification requirements of the PCC.
- 17.1. The Commission notes that the foregoing agreement falls squarely within the purview of a *definitive agreement* as it sets out the complete and final terms and conditions of the Subject Transaction, including the rights and obligations between or among the transacting parties.¹⁸ In any case, the Respondents do not dispute that the Agreement and Plan of Merger falls within the definition of a definitive agreement.
18. With respect to the second element, Respondents do not dispute that the Subject Transaction is a notifiable transaction under the PCA IRR. This is clear from Respondents’ act of filing a notification on the Subject Transaction and their cooperation with MAO while the Subject Transaction was undergoing Phase 1 Review.
19. Respondents likewise admit the notifiability of the Subject Transaction in their respective Comments when they denied any intention of circumventing the compulsory notification rule and claimed eagerness to urgently comply with the notification requirement.¹⁹
- 19.1. Respondent AXA claims that AXA immediately took steps to comply as soon as it reasonably could “after it had determined its notification obligation.”²⁰

¹⁷ Agreement and Plan of Merger.

¹⁸ PCC Clarificatory Note No. 16-001: *Definitive Agreements and Binding Preliminary Agreements*, par. 4.

¹⁹ AXA’s Verified Comment, par. 1.5; XL Group’s Verified Comment, par. 1.5.

²⁰ *Id.*

20. In any case, the Commission notes that the Subject Transaction is a notifiable transaction since it breaches the notification thresholds provided in the IRR as it meets the Size of Person and Size of Transaction Tests.
- 20.1. Size of Person Test:²¹ AXA, being both the acquiring entity and the Ultimate Parent Entity (“UPE”) itself, derived gross revenues from the Philippines in 2017 amounting to [REDACTED],²² which clearly breaches the 5 Billion Peso-threshold under Section 3(a), Rule 4 of the PCA IRR, as amended by PCC Memorandum Circular No. 18-001. Similarly, AXA’s aggregate value of assets in the Philippines in 2017 was at least PhP126 Billion,²³ which likewise breaches the said threshold.
- 20.2. Size of Transaction Test:²⁴ XL Group, the acquired entity, derived gross revenues from the Philippines in 2017 amounting to [REDACTED],²⁵ which breaches the 2 Billion Peso-threshold under Section 3(b)(4), Rule 4 of the PCA-IRR, as amended by PCC Memorandum Circular No. 18-001. Further, AXA will acquire sole control of XL post-Transaction.
21. With respect to the third element, it is a matter of record that Respondents filed their Notification Forms with the MAO only on 25 June 2018 or one hundred and twelve (112) days after the signing of the Agreement and Plan of Merger on 5 March 2018.
- 21.1. In their respective Comments, Respondents argue that the “delay in filing” has not led to any harm in public interest and has not deprived the PCC of the ability to review the transaction in a timely manner prior to its consummation.²⁶
22. With respect to the fourth element, the Commission takes note of Respondents submissions to the MAO and their respective Comments that they have not committed any act constituting the consummation of the Subject Transaction.²⁷
- 22.1. The Commission also takes note that no contrary submission was put forward by MAO on this point, nor did the MAO dispute that no act constituting the consummation of the Subject Transaction has been made by the Respondents.

²¹ The Size of Person Test is satisfied when the aggregate annual gross revenues in, into or from the Philippines, or value of the assets in the Philippines of the ultimate parent entity of at least one of the acquiring or acquired entities, including that of all entities that the ultimate parent entity controls, directly or indirectly, exceeds Five Billion Pesos (PhP 5,000,000,000.00). PCC Rules of Merger Procedure, Rule 4, Section 3(a).

²² Description of the Business in the Philippines of the Entities Listed in Appendix 5.1 (Appendix 5.4, AXA’s Notification Form)

²³ *Id.*

²⁴ With respect to a proposed acquisition of voting shares of a corporation, the Size of Transaction is satisfied if (a) the aggregate value of assets in the Philippines that are owned by the corporation or by entities it controls, other than assets that are shares of those corporations; or (b) the gross revenues from sales in, into, or from the Philippines of the corporation or by entities it controls, exceed Two Billion Pesos (PhP 2,000,000,000.00); and as a result of such acquisition of the voting shares of a corporation, the acquiring entity would own 35% or 50% of the acquired corporation [if the entity or entities already own more than 35% before the proposed acquisition]. PCC Rules of Merger Procedure, Rule 4, Section 3(b)(4).

²⁵ XL Letter dated 28 August 2018, p. 3.

²⁶ AXA’s Verified Comment, par. 4.2; XL Group’s Verified Comment, par. 4.2.

²⁷ *Id.*

23. On the basis of the foregoing, the Commission finds that Respondents do not dispute the existence of all the elements constituting a violation of Section 2.1 of the Merger Procedure (failure to notify within the period for notification).
24. The Commission takes note of the plea for leniency made by Respondents. To support their request, Respondents claim lack of intent and alleged mitigating circumstances for the Commission's consideration.²⁸
25. Thus, the issue left for resolution of the Commission is the penalty to be imposed on Respondents for violation of Section 2.1 of the Merger Procedure (failure to notify within the period for notification).

III. DISCUSSION

Penalty for Section 2.1 violation

26. In cases where merger parties or their UPEs fail to notify within the period for notification but have yet to consummate the merger, Section 16.2 of the Merger Procedure imposes the following fine on the transacting parties, viz:

“16.2. Failure to notify within the period for notification. Merger parties and their ultimate parent entities failing to notify the PCC within the period for notification provided under Section 2 of these Rules but has yet to consummate the merger will be fined in the amount of **½ of 1% of 1% of the value of transaction**, but not exceeding two million pesos.” [emphasis supplied]

27. Pursuant to Section 16.2 of the Merger Procedure, MAO recommended the imposition of fine of ½ of 1% of 1% of the value of transaction after finding Respondents in violation of Section 2.1 of the Merger Procedure.²⁹
28. In their plea for “leniency”, Respondents allege that they have no intention to avoid compliance with the notification requirements under the PCA and the Merger Procedure.³⁰
 - 28.1. Respondents mainly attribute the delayed notification to their large-scale operations spanning globally and multiple business lines, which allegedly prevented them to timely determine the notifiability of the Subject Transaction.³¹
 - 28.2. Respondents claimed that they immediately took steps to comply “as soon as it reasonably could after it had determined its obligation to notify.”³²
29. Respondents likewise assert that their delay in notification has not led to any harm in public interest and has not deprived the PCC of the ability to review the Subject Transaction in a timely manner prior to its consummation.³³

²⁸

Id.

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MAO Final Report, par. 11.

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AXA's Verified Comment, pars. 1.1 and 1.5; XL Group's Verified Comment, pars. 1.1 and 1.5.

³¹

AXA's Verified Comment, pars. 1.2; XL Group's Verified Comment, pars. 1.2.

³²

AXA's Verified Comment, pars. 1.5; XL Group's Verified Comment, pars. 1.5.

³³

AXA's Verified Comment, par. 4.2; XL Group's Verified Comment, par. 4.2.

30. At this point, it is useful to first understand the rationale behind the compulsory notification requirements of the PCA.
- 30.1. The compulsory notification requirements seek to protect the power and mandate of the Commission to review proposed mergers and acquisitions for possible anticompetitive effects. As a way to protect the Commission's power to review proposed mergers, it is imperative that the sanctions for non-compliance with the notification requirement have a real deterring effect. Otherwise, transacting parties may be tempted to disregard the legal requirement with impunity.
- 30.2. To further operationalize the compulsory nature of merger notification, Section 2.1 of the Merger Procedure provides for a period of thirty (30) days reckoned from the signing of the relevant definitive agreement within which the transacting parties shall notify the PCC of a proposed merger or acquisition ("Notification Period"). The Notification Period provides the transacting parties with sufficient time to complete the notification form and prepare the documentary requirements to be submitted together with the form. The Notification Period also ensures that the merger review and investigation is conducted at a specified period and is not left to the parties' discretion.
31. Thus, to sustain a finding of a violation of Section 2.1 of the Merger Procedure, all that must be shown is the existence of all the elements of the failure to notify within the period for notification. Lack of intent to avoid compliance, the fact that the delay did not harm in public interest, the fact that PCC was not deprived of its ability to review the Transaction, or the fact that the delay was due to the Respondents' large-scale global operations are not accepted as defenses.
- 31.1. Whether Respondents intended to belatedly notify, and whether such late notification has not resulted in public harm or deprivation of PCC's ability to review the Subject Transaction are immaterial insofar as the proceedings under Section 2.1 of the Merger Procedure are concerned. Once it is determined that transacting parties failed to observe the Notification Period, the liability under Section 16.2 of the Merger Procedure attaches to the transacting parties, regardless of intent or the effects of late notification.
- 31.2. Respondents themselves emphasized that they "maintain global operations with multiple business lines and legal entities."³⁴ Thus, it is incumbent upon Respondents, when attending to commercial affairs of such magnitude, to observe a standard of diligence sufficient to enable them to comply with various regulatory requirements in different jurisdictions in which they operate or maintain pecuniary interests.
- 31.3. To give merit to the foregoing claims by Respondents would run counter to the rationale of the Notification Period.
32. The Commission notes that Respondents cite the following mitigating circumstances, namely: (i) that parties have cooperated with the Commission during the conduct of the investigation or review; (ii) that parties have taken adequate steps with a view to ensuring compliance with the Commission's directives, orders, or resolutions; and (iii) that parties have not committed any act constituting the consummation of the Proposed Transaction.

³⁴ AXA's Verified Comment, pars. 1.2; XL Group's Verified Comment, pars. 1.2.

33. The Commission clarifies that Section 16.2 of the Merger Procedure provides a **fixed rate** for the fine at **½ of 1% of 1% of the value of transaction** which in no case shall exceed the statutory limit of PhP2 Million.
- 33.1. It must be noted that the fine under Section 16.2 of the Merger Procedure is significantly less burdensome than the applicable penalty in cases of non-notification. This is due to circumstances specific to late notification cases, which are the supervening notification by transacting parties after the lapse of the Notification Period and their non-consummation of the transaction prior to the approval of the same. Such circumstances are absent in non-notification cases where transacting parties did not notify at all and worse continued to perform acts that further consummate the transaction, without the requisite approval by the Commission.
34. On the basis of the foregoing discussion, the Commission thus imposes a fine of **½ of 1% of 1% of the value of transaction**.
- 34.1. Under Section 16.4 of the Merger Procedure, the fine shall be based on the value of transaction which shall be set with reference to: (a) the aggregate value of assets in the Philippines subject of the proposed transaction or owned by the acquired corporation, including entities it controls, or (b) the gross revenues generated by assets subject of the proposed transaction or from sales in, into, or from the Philippines of the acquired corporation, including entities it controls, whichever is higher.
- 34.2. As XL Group does not have assets in the Philippines and its gross revenues derived from the Philippines is [REDACTED], the imposable penalty shall be ½ of 1% of 1% of its gross revenues derived from the Philippines, or [REDACTED], which is equivalent to **PhP123,861.86**.

IV. DISPOSITIVE PORTION

35. The Commission finds Respondents AXA, Camelot, and XL Group in violation of Section 2.1 of the Merger Procedure (failure to notify within the period for notification). Respondents are hereby directed to pay a fine of ½ of 1% of 1% of the value of the Subject Transaction, equivalent to **PhP123,861.86**, within forty-five (45) days from the issuance of this Decision.

DONE, this 30th day of August 2018, Quezon City, Philippines.

(On official business)
ARSENIO M. BALISACAN
Chairman


JOHANNES BENJAMIN R. BERNABE
Commissioner


STELLA LUZ A. QUIMBO
Commissioner


AMABELLE C. ASUNCION
Commissioner

Copies furnished:

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Respondent

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