

“COVID-19 MAC – Can we get out please?” – UK Takeover Panel says no

28 May 2020

A recent ruling from the Takeover Panel (Panel) on the takeover offer for Moss Bros has re-emphasised the difficulty bidders face in invoking material adverse change (MAC) conditions on UK takeovers.

Background

On 12 March 2020, Brigadier Acquisition Company (controlled by Crew Clothing owner Michael Shina) announced a recommended cash offer for Moss Bros (UK menswear chain). On 7 April, Brigadier published its offer document, but on 22 April it was announced that Brigadier was seeking a ruling from the Panel to invoke conditions to, and hence lapse, its offer. Moss Bros argued strongly against this, and that the offer should proceed as planned. Indeed Moss Bros shareholders formally approved the transaction on 29 April.

How was Brigadier seeking to lapse?

Such an attempt to invoke a condition is rare in the UK takeover market, given the "high bar" to doing so explained below. Brigadier's arguments focussed on the impact on Moss Bros of the COVID-19 pandemic and related UK government measures, and various (and relatively boilerplate) conditions in its offer document, including there having been no MAC in the business, assets, financial or trading position or profits, operational performance or prospects of Moss Bros.

The Panel considered a similar request in 2001 in the aftermath of the 9/11 terror attacks when WPP sought to invoke a MAC and lapse its offer for Tempus - in that case, the Panel refused permission to invoke. Rule 13.5 of the Takeover Code sets out the test for invocation of a condition to be whether the circumstances upon which the bidder is seeking to rely are of material significance to it in the context of the offer. The Panel has also previously clarified (in Practice Statement 5) that in the case of a MAC or similar condition, whether this test is satisfied will depend on the bidder demonstrating that the relevant circumstances are of very considerable significance striking at the heart of the purpose of the transaction. This is a high bar.

Panel ruling

On 19 May, the Panel announced that Brigadier had not met this high bar, and hence could not lapse its offer. No detailed reasoning has yet been published, and although Brigadier had appealed the ruling to the Panel's "Hearings Committee", it withdrew this appeal on 26 May.

Commentary

We are unsurprised by the Panel's ruling given the high bar for a bidder to be permitted to lapse an offer once it has been announced.

The chances of invocation can sometimes be increased if the condition was:

- expressly drawn to target shareholders' attention in the offer document or announcement, with a clear explanation of the circumstances which might give rise to the right to invoke it;
- the subject of negotiation with the target; and
- included to take account of the particular circumstances of the target.

It appears in this case that these criteria were not fulfilled, with Brigadier instead relying upon relatively boilerplate conditions. Brigadier may also have struggled to argue that the COVID-19 situation was unforeseeable, given the timing of the offer (when the serious impact of COVID-19 was very much coming to the fore in the UK and globally, if not yet fully developed), and its acknowledgement of COVID-19 and its impact in the firm offer announcement and offer document.

From a general market and policy perspective, we suspect there was reluctance to see Brigadier being allowed to lapse the Moss Bros offer, not least due to the significant precedent change and uncertainty it would create for future offers.

This case acts as another warning to bidders for UK public companies to beware the high bar they face in trying to walk away from an offer after they have made a firm offer announcement (hence why it is sometimes called the "point of no return") – or if significant conditions and the possible need to invoke these are identified, this workstream (and related discussions with target and the crafting of relevant wording into the firm offer announcement) should be prioritised and addressed beforehand, and indeed as early in the process as possible.

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