

# NEWS BRIEF

## The Takeover Panel's Moss Bros decision: the end of MAC in public takeovers?

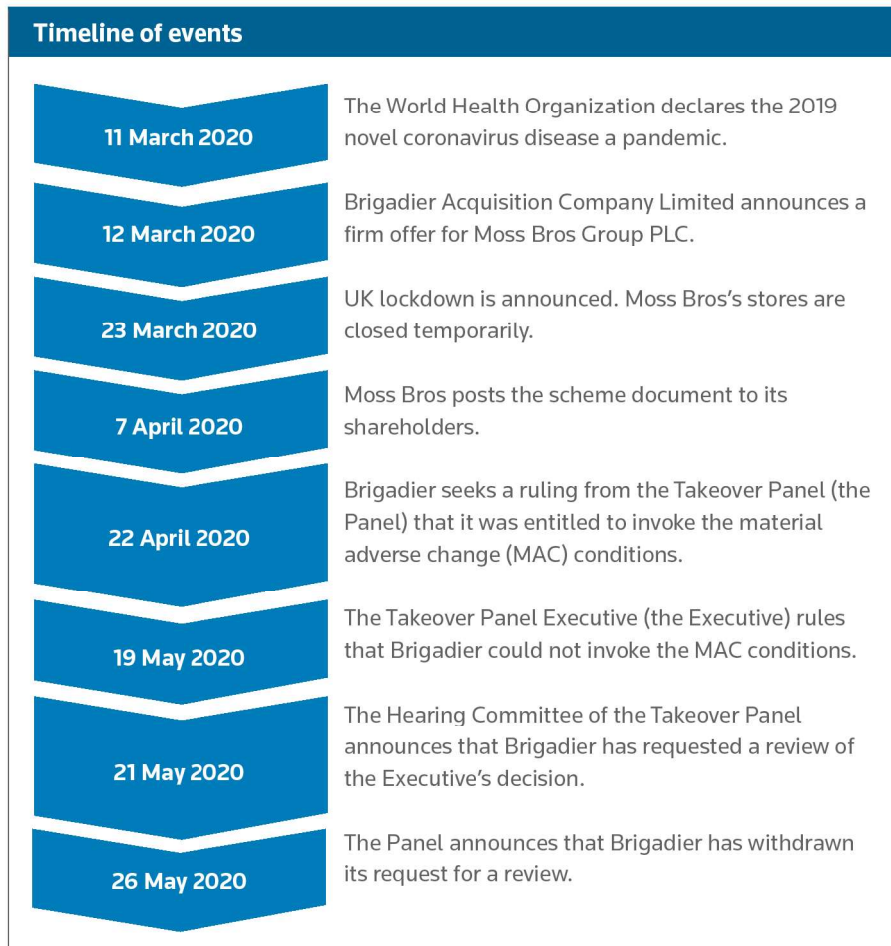
It is not necessarily the case that a material adverse change (MAC) condition can never be invoked in public takeovers. However, the recent decision by the Takeover Panel Executive (the Executive) in relation to Moss Bros Group PLC, when coupled with previous decisions by the Executive, emphasises that a bidder will be able to invoke a MAC condition only in very limited circumstances. A bidder that assumes it will be able to invoke a MAC condition due to severe market events does so at its peril.

### The developing situation

On 11 March 2020, the World Health Organization declared the 2019 novel coronavirus disease (COVID-19) a pandemic (see box "Timeline of events"). On 12 March 2020, Brigadier Acquisition Company Limited, a company ultimately majority owned and controlled by Michael Shina, the owner of Crew Clothing, announced a firm intention to make a cash offer for Moss Bros under Rule 2.7 of the Takeover Code. Brigadier's offer, which was recommended by the board of Moss Bros, was subject to various conditions precedent, including MAC conditions.

The MAC conditions were drafted generically, without expressly mentioning COVID-19. For example, one of the conditions was as follows: "no material adverse change and no circumstance having arisen which would reasonably be expected to result in any material adverse change in, the business, assets, financial or trading position or profits, operational performance or prospects of any member of the Wider Moss Bros Group which is material in the context of the Wider Moss Bros Group taken as a whole". This condition was not specifically highlighted in the offer announcement. The MAC conditions also referred to an inability to pay debts and material contingent liabilities arising.

On 23 March 2020, Boris Johnson, the Prime Minister, announced a UK lockdown, including the closure of most shops. Moss Bros issued a trading update on that day, stating that all stores had been temporarily closed until further notice and that "COVID-19 could result in a sharper decline in trading



performance if mass gatherings (such as Ascot) are voluntarily cancelled or prohibited".

On 7 April 2020, Moss Bros posted the scheme document to its shareholders. The explanatory statement in this document highlighted the MAC conditions and included a number of statements on the trading position in the prevailing environment, including that: "When Bidco announced its Offer, it had taken into account the risk of short term disruption to the business as a result of the COVID-19 pandemic... Since the Announcement, the scale of the disruption and Bidco's expectation of the duration of such disruption in the United Kingdom has worsened materially... Bidco believes that the impact to date has been materially adverse and that there is the potential for further deterioration in Moss Bros' financial position beyond that announced by Moss Bros on 23 March 2020."

On 22 April 2020, Brigadier sought a ruling from the Takeover Panel (the Panel) that it could invoke the MAC conditions to lapse its offer. On 19 May 2020, the Executive ruled that Brigadier had not established that the circumstances giving rise to its right to invoke the relevant conditions were of material significance to it in the context of its offer as required by Rule 13.5(a) of the Takeover Code (Rule 13.5(a)) and, therefore, Brigadier should not be permitted to invoke the MAC conditions ([www.thetakeoverpanel.org.uk/publication/view/2020-4-moss-bros-plc](http://www.thetakeoverpanel.org.uk/publication/view/2020-4-moss-bros-plc)). The Hearings Committee of the Takeover Panel announced on 21 May 2020 that Brigadier had requested a review of the Executive's ruling. However, on 26 May, the Panel announced that Brigadier had withdrawn its request for a review and, accordingly, the Executive's ruling stands.

On 8 June 2020, the High Court issued a court order sanctioning the scheme.

## Reasons for refusal

While the Executive did not provide any detailed reasons for its decision, it was unsurprising for several reasons.

Except for the acceptance condition and certain competition conditions, Rule 13.5(a) will only allow a bidder to invoke a condition if the circumstances that give rise to the right to invoke the condition are of material significance to the offeror in the context of the offer. The Panel's Practice Statement No 5 of April 2004 (PS 5), which was amended in September 2011, expands on the meaning of this test ([www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PS05.pdf](http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PS05.pdf)).

The Panel also considered this test on appeal during the offer for Tempus Group plc by WPP Group plc, as reported in Panel Statement 2001/15 ([www.thetakeoverpanel.org.uk/wp-content/uploads/2008/12/2001-15.pdf](http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/12/2001-15.pdf); [www.practicallaw.com/4-101-6159](http://www.practicallaw.com/4-101-6159)). The Panel refused to allow WPP to invoke a MAC to lapse its offer following the 11 September 2001 terrorist attacks in New York. The Panel stated that the test must be judged by reference to the facts of each case at the time that the relevant circumstances arise but, in the case of a MAC, whether the test is satisfied will depend on the offeror demonstrating that the relevant circumstances are of "very

considerable significance striking at the heart of the purpose of the transaction", although not necessarily amounting to frustration in a legal sense. This is a very high bar.

PS 5 confirms that, in accordance with Response Statement 2004/4, it is the Executive's practice to take into account all relevant factors ([www.thetakeoverpanel.org.uk/wp-content/uploads/2008/12/2005-23.pdf](http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/12/2005-23.pdf)). This includes whether the condition was:

- The subject of negotiation with the offeree company.
- Expressly drawn to offeree company shareholders' attention in the offer document or announcement, with a clear explanation of the circumstances that might give rise to the right to invoke it.
- Included to take account of the particular circumstances of the offeree company.

In the case of Moss Bros, the first and third factors listed above do not appear to have been satisfied. The second factor was satisfied in relation to the scheme document but not the offer announcement. In addition, it is important to establish whether the bidder was aware of, or should reasonably have foreseen, the relevant circumstance

at the time of the offer; otherwise it is not really a MAC at all. The challenge faced by Brigadier in invoking the MAC conditions was that the COVID-19 pandemic had been declared before it made its firm intention announcement and the announcement of both the UK lockdown and the temporary closure of all of Moss Bros' stores took place on 23 March 2020, two weeks before the scheme document was posted. Therefore, Moss Bros would effectively need to have demonstrated that events since 7 April 2020 struck at the heart of the purpose of the transaction, given that it proceeded with its offer by approving the scheme document. Query if the Panel's decision in Moss Bros would have been different if COVID-19 first became apparent after the scheme document was published.

In Panel Statement 2001/15, the Panel remarked that, in that type of case, the MAC condition would need to have an effect on the longer term prospects of the target company, not just short-term profitability. Every situation will turn on its facts but it will often be difficult for a bidder to demonstrate this.

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*Adam Bogdanor is a Partner at international law firm Bryan Cave Leighton Paisner LLP.*

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