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# MAC clauses in Swiss public takeover transactions

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## Introduction

No-material adverse change conditions (no-MAC conditions or MAC clauses) are frequently found in Swiss public takeover transactions and are included in almost every voluntary offer. Such conditions are intended to protect the bidder against unknown events or, depending on the wording of the clause, developments that result or are likely to result in a material adverse change in the substance or prospects of the target company. When a MAC event is confirmed, the bidder is entitled to withdraw from the offer. MAC clauses are generally permitted to apply until the end of the offer period (but not during the "grace" acceptance period and thus not until closing) and must be of a certain minimum seriousness for the bidder to be entitled to revoke the offer. As recently confirmed in the *Vifor Pharma AG* case,[(1)] the Swiss Takeover Board (TOB) considers the following as permissible thresholds:

- a 5% reduction on turnover level;
- 10% on earnings before interest and taxes (EBIT) or earnings before interest, taxes, depreciation and amortisation (EBITDA) level; or
- 10% on equity level.

No-MAC conditions are not permitted for mandatory offers as in the context of a mandatory offer, the bidder already has acquired control over the target and, therefore, is obliged by law to submit an unconditioned offer (for further details, please see "MAC clauses in Swiss M&A transactions").

As there are no precedents in Swiss public takeover transactions where a bidder has withdrawn from an offer based on a claim that the no-MAC condition is not fulfilled, many practical questions have not yet been clarified. This article addresses several of these issues, in particular:

- whether a MAC clause can be invoked in relation to facts or matters that are known or should have been known by the bidder;
- what procedure applies in case a bidder invokes a MAC clause;
- in what timeframe the relevant event must have a material adverse impact; and
- which takeover law remedies are available against an (unjustified) invocation of a MAC clause.

Due to the lack of case law, not all such questions can be answered conclusively, but must instead be considered in the light of the general rules of Swiss (takeover) law and with a view to precedents from other jurisdictions.

## Application of MAC clause to known events

As a rule, the bidder's knowledge that is gained from the due diligence review or publicly available information will be attributed to the bidder.[(2)] Therefore, the bidder can no longer assert a MAC clause to those "material adverse changes" whose possible occurrence it was apparent or could have been apparent during the due diligence review or based on publicly available information.

The determination of whether a fact, matter or circumstance was known by the bidder can be difficult. This applies in particular to events that were not known by the bidder itself, but which are a (more or less foreseeable) consequence of matters that were known based on the due diligence or publicly available information. An example would be a litigation case (that is known to the bidder) where, during the offer period, a decision is rendered that is likely to have a substantial negative impact on the financial figures of the target company.

Should the bidder now be allowed to withdraw from the offer based on a MAC clause? It must be considered the extent to which the event in question could reasonably be expected to occur prior to the offer period must be considered. If the court's decision is within the expected range, an invocation of the MAC clause is likely not permissible. If, on the other hand, the court has made a decision that has consequences that were not foreseeable in this way prior to the offer period, a withdrawal from the offer by invoking the MAC clause seems plausible. However, the requirements for foreseeability in such cases may not be too high if an experienced market player would have likely anticipated a certain development. Conversely, the bidder should be entitled to assume in good faith that things will develop within the usual course and that not every imaginable risk will materialise as a consequence of known facts.

## Procedure in case of non-fulfilment of no-MAC condition

The bidder must announce the non-fulfilment of a no-MAC condition in the final interim result (to be published at the latest four days after the expiry of the offer period; for the avoidance of doubt: not the grace period). As a rule, the non-fulfilment of a no-MAC condition must be based on the assessment of an independent third party.[(3)]

In practice, the question may arise as to whether an assessment by the independent expert must already be referred to in the announcement in the final interim result. Depending on the timing of the particular case, this announcement may not yet have to be based on a final assessment by the expert, since due to the relatively short offer period (20 to 40 business days) and the time required for the

appointment and instruction of an independent expert, it will in many cases not be practically possible to have a final assessment at the time of the final interim result. Therefore, in such cases, it will be sufficient for the announcement in the final interim result that the bidder assets the invocation of the MAC clause, together with sufficient information substantiating such MAC. The opinion of the independent expert will be provided at a later stage.

If a no-MAC condition is not fulfilled, the bidder may either waive such condition or declare the revocation of the offer (and walk away).

**Relevant time for impact of MAC event**

The usual wording of a MAC clause in Swiss public takeover transactions does not include an indication of when or during what time period the effects of a MAC event must occur or threaten to occur for the bidder to be entitled to withdraw the offer. In the absence of Swiss case law, an independent expert (or the authorities or courts) would consider the following when assessing whether a MAC event has occurred:

- EBIT or EBITDA and net sales are key figures that, by definition, relate to a time period. The thresholds to assess a MAC event are based on annual or interim financial statements and calculated on a one-year basis (ie, the relevant reference or time period for the calculation of these thresholds is one year).
- Therefore, it seems evident that the period in which the MAC has its effects is usually also – absent specific circumstances – one year. Conversely, such period must also be as close as possible to the reference date (based on which the thresholds have been calculated), as otherwise the requirement of the TOB that the threshold values constitute reasonable reference figures reflecting minimum percentages that are material compared with the size of the target company will likely no longer be followed. Consequently, an independent expert may likely take a one-year "measurement" period on a rolling basis, which in principle starts with the date of the MAC event (or, if difficult to determine, with the start of the offering period).
- However, it seems conceivable that in specific circumstances a relevant reduction in EBIT, EBITDA, sales and/or equity in a shorter "measurement" period than one year (eg, over two or three consecutive quarters) may also constitute a MAC event, in particular if the mid-term effects of a material adverse event are difficult to assess.
- Due to the lack of Swiss case law, it is probable that precedents in other jurisdictions would be considered. In a recent and widely noted case in the United States (*Akorn v Fresenius Kabi*), the Delaware Court of Chancery ruled in favour of Fresenius on the rescission of a signed but not yet completed merger agreement based on a MAC clause. In its considerations, the court referred to substantial declines in EBITDA (and other figures) for four consecutive quarters. However, the court also clarified that a MAC must not only have short-term implications, but also longer-term effects. In application of this jurisprudence, the Delaware Court of Chancery ruled in a more recent decision in the context of the covid-19 pandemic that a decline in sales of more than 40% over five weeks, followed by a strong improvement in sales and combined with the prospect that business will recover in the near future, does not qualify as a MAC event (*Snow Phipps v KCAKE Acquisition*). It is unclear to what extent the considerations of these cases would be applied in Swiss public takeover transactions, but at least the statements regarding the temporal relevance of the impact of the MAC event are in line with the above considerations.

**Remedies against invocation of MAC clause**

If a bidder withdraws from an offer on the grounds of a MAC clause, the question arises as to whether there are legal remedies if the invocation of the MAC clause is disputed.

The non-fulfilment of a no-MAC condition and the withdrawal from the offer will be announced to the public with notification in the final interim results. In principle, there is no right of appeal against this publication. However, it can be assumed that the TOB will issue a ruling on the legality of the non-fulfilment of the no-MAC condition and the withdrawal from the offer in the form of a contestable decision. This decision could be appealed by the parties to the procedure (ie, the target company, the bidder and qualified shareholders that have registered for the proceedings). Third parties (including shareholders, with the exception of qualified shareholders that have registered for the proceedings) cannot challenge decisions under takeover law. They can only notify the TOB of facts relevant to takeover law. However, this does neither give them party status and there is no entitlement to have the TOB initiate (or continue) proceedings or issue a decision.

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**Endnotes**

(1) See decision 802/01 in *Vifor Pharma AG* of 14 December 2021, section 2.4.

(2) See decision 243/01 in *Leica Geosystems Holdings AG* of 22 June 2005, section 3.5.2.

(3) See decision 249/01 in *Saia-Burgess Electronics Holding AG*, dated 15 July 2005, section 2.8.3.2.