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How bidders should approach MAC conditions in takeover law

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The market for public takeovers of listed companies was unusually active in 2019, and many experts also expect the transaction volume to remain high in 2020. However, in light of recent events such as the sudden appearance of the corona virus and economic concerns, bidders in takeover transactions should consider how to protect themselves against material adverse change (MAC).

It is therefore not surprising that in 2019 every second takeover bid contained one or more MAC conditions. However, the relevant laws and the administrative practice of BaFin on which they are based set quite narrow limits in this respect. In the case of mandatory offers and offers in connection with a delisting of the target company, MAC conditions are excluded from the beginning, as such offers may only be very limited or may not contain any enforcement conditions.

MAC conditions occur in two different forms. They refer either to a significant decline in the assets, financial position, or profitability of the target company (so-called Company or Business MAC). In practice, significant cases of the Company or Business MAC are insolvency or insolvency readiness and, more recently, increased compliance issues of the target company (so-called Compliance MAC). So-called Market MAC Conditions, on the contrary, protect the target company from significant deterioration of the general market environment.

MAC clauses must be formulated to ensure that these conditions are sufficiently defined or determinable, and that there is no uncertainty for the shareholders of the target company as to whether such a condition has been met. Furthermore, such conditions may only relate to circumstances that are of sufficient importance to the bidder and not of a purely temporary nature. In practice, this means that Company or Business MAC terms are generally based on information that has been or should have been disclosed by the target company by ad hoc release, and has or is likely to negatively impact certain and generally accepted financial ratios. In connection with currently discussed amendments to the real estate transfer tax law, BaFin has also accepted the linking to a hypothetical tax charge in an individual case. In a Compliance MAC, the relevant benchmark is whether the information in question constitutes a criminal offence

or misdemeanour by certain management personnel or whether it gives rise to a corresponding suspicion. In addition, BaFin generally requires that an independent expert determine the occurrence of a significant deterioration.

In terms of timing, it should be noted that MAC conditions cannot protect the bidder from significant adverse changes that have occurred or were foreseeable after the publication of the bidder's intention to make an offer but before the publication of the offer document. In this case, the bidder remains obliged to publish an offer. Furthermore, according to the consistent practice of BaFin, MAC conditions can only protect the bidder against such significant adverse changes that occur until the end of the regular acceptance period, which can be between four and 10 weeks.

If, as is often the case in practice, the completion of an offer is delayed beyond the end of the acceptance period due to pending regulatory approvals (in particular antitrust clearance), the bidder is unprotected for a certain period of time. In order to keep this "unprotected" period as short as possible, it may therefore be reasonable for a bidder to choose a longer acceptance period. However, this approach only applies if the necessary regulatory approvals are expected to be given promptly, and no official inspection lasting months (as in the case of Linde/Praxair) can be assumed. Furthermore, it must be considered on a case-by-case basis whether the disadvantages associated with an extension of the acceptance period, in particular the higher susceptibility to competing offers from other bidders, do not outweigh the associated advantage of extended protection against significant adverse changes. Finally, when formulating MAC conditions, it must be taken into account that once such a condition has been dropped, the bidder can no longer waive it. There is no possibility to execute the offer by waiving the conditions (regardless of the disadvantageous changes).

In summary, MAC conditions are an important instrument for structuring takeover law; nonetheless, their protection in the case of takeovers with time-consuming regulatory approval procedures remains imperfect.