

## Can a Pre-Completion Downward Revision to the Target's Forecasted Performance Constitute a MAC in an English Law SPA?

There has historically been very little reasoned consideration by the UK Courts of MAC conditions in English law SPAs. In contrast, there have however been a number of cases in the US Courts (particularly in Delaware) which have considered MAC conditions. The Delaware Courts have interpreted MAC conditions narrowly and in a seller friendly manner – the Delaware Court of Chancery in the important *IBP v Tyson Foods* decision for instance said that MAC conditions were “best read as a backstop protecting the acquirer from the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally significant manner”. The Delaware Courts have also been reluctant to allow a buyer to trigger a MAC condition on the basis that the target had underperformed *vis a vis* forecasts provided prior to execution.<sup>1</sup>

The developing UK jurisprudence, although in its relative infancy, suggests that UK Courts will approach MAC conditions in a similar way to the US Courts and in particular in a narrow and seller friendly manner. One of the recent cases in that developing jurisprudence is *Ipsos v Aegis*<sup>2</sup>, in which the High Court of the England and Wales considered an application to strike out a claim made by the buyer that certain MAC related provisions in an SPA had been triggered. The High Court held that a pre-completion downwards revision to target forecasts is unlikely, of itself, to trigger a MAC clause.

### **Background**

In 2011, Ipsos acquired from Aegis a business division known as Synovate (the “**Target**”) for a purchase price of £528.8 million. Ipsos claimed that purchase price was based on the application of a multiplier to forecasts (the “**Initial Forecasts**”) of underlying profits (of £52 million) for the Target in 2011.

The SPA was signed on the 26 July 2011 and the transaction completed in 12 October 2011. The SPA included an obligation (the “**Notification Obligation**”) on each to party to notify the other of any fact, matter or circumstance reasonably likely to enable the buyer to trigger a condition precedent to completion. One of these conditions precedent was that no ‘material adverse effect’ had occurred.

### **The terms of the MAC Condition**

The MAC condition in the SPA, which was subject to certain express exclusions, had two principal constituent elements:

---

<sup>1</sup> See for instance the Delaware Court of Chancery decision of *Hexion Specialty Chemicals v Huntsman*.

<sup>2</sup> *Ipsos S.A. (Ipsos) v Dentsu Aegis Network Limited (Aegis)* [2015] EWHC 1726

1. “an act or omission or the occurrence of a fact, matter, event or circumstance”; and
2. a causal effect, “affecting [the Target] giving rise to a material adverse effect on the business, operations, assets, liabilities, financial condition or results of operations of [the Target] taken as a whole”

Following completion of the transaction, Ipsos claimed it had discovered that the Target business had materially deteriorated prior to completion and that Aegis had breached the Notification Obligation by failing to inform Ipsos of this fact.

***Ipsos’s claims, which Aegis seeks to strike out***

Ipsos argued that Aegis had breached the Notification Obligation by failing to notify Ipsos of a fact and/or circumstance (being a material deterioration in the Target’s trading performance) which was reasonably likely to enable Ipsos to trigger the MAC condition in the SPA.

Ipsos argued that it would have been entitled to rely on the MAC condition for two reasons:

- the Target’s actual performance in the period between signing and completion was particularly poor; and/or
- certain pre-completion downward revisions to the Initial Forecasts (which were not communicated to Ipsos) could of themselves constitute a MAC.

Aegis sought to strike out Ipsos’s claim for breach of the Notification Obligation.

**Actual Performance**

Ipsos argued that the Target had experienced “extremely poor sales and revenue performance” in the period prior to completion (down by 24% and 17.7% respectively compared to the Initial Forecasts) and a “massive drop” in operating profit in the period prior to completion (down 84.6% compared to the Initial Forecasts). For unknown reasons, Ipsos did not seem to specifically plead an adverse performance *vis a vis* the equivalent periods in the previous year. In any event, Ipsos argued there was no sensible basis on which the actual performance of the target could not constitute a MAC.

The High Court noted that there were difficult drafting and interpretation considerations relevant to these arguments and, at this early stage, felt compelled to refuse Aegis’ application to strike out Ipsos’s claim based on the target’s actual performance.

**Downward Revision to Forecasts**

Ipsos argued that management’s pre-completion downward revisions of the Initial Forecasts (which equated to a reduction in gross profit of \$49.9 million and operating profit of \$27.8 million) were substantial. Ipsos argued that a downward revision to the forecasts constitutes an

“*act, matter, event or circumstance*” affecting the “*business as a whole*” in their own right for the purposes of this MAC condition.

The High Court noted that the root of the issue was whether Ipsos was entitled to trigger the MAC condition on the basis of downward revisions of themselves. The High Court held that Ipsos would not have been entitled to trigger the MAC on this basis. In particular, the High Court made four rulings in striking out Ipsos’s claims:

1. A revision of a forecast does not naturally fall into within the meaning of the words “*act or omission or the occurrence of a fact, matter, event or circumstance*”. The court interpreted these words narrowly.
2. A downward revision to a forecast does not necessarily imply any actual materially adverse impact on the Target’s business etc.
3. To construe the MAC condition in accordance with Ipsos’s arguments would not be in accordance with commercial sense. Aegis had expressly excluded in the SPA any liability for the accuracy of forecasts etc. Ipsos’s construction would therefore effectively result in Aegis warranting the forecasts.
4. Finally, to hold that changes to forecasts could of themselves trigger the MAC would create uncertainty in the market as a whole.

### **Conclusion**

The High Court’s decision in this case expressly supports the tenor of the decisions of the Delaware Courts on MAC conditions (that is, that for policy and other reasons, MAC conditions should be construed in a narrow and seller friendly manner). Specifically, the High Court’s decision strongly suggests that UK Courts will be skeptical of arguments that a downward revision to forecasts could, of itself, warrant the triggering of a MAC particularly where the seller has expressly disclaimed responsibility for forward looking information and forecasts.

## Office Locations

### NEW YORK

One Liberty Plaza  
New York, NY 10006-1470  
T: +1 212 225 2000  
F: +1 212 225 3999

### WASHINGTON

2000 Pennsylvania Avenue, NW  
Washington, DC 20006-1801  
T: +1 202 974 1500  
F: +1 202 974 1999

### PARIS

12, rue de Tilsitt  
75008 Paris, France  
T: +33 1 40 74 68 00  
F: +33 1 40 74 68 88

### BRUSSELS

Rue de la Loi 57  
1040 Brussels, Belgium  
T: +32 2 287 2000  
F: +32 2 231 1661

### LONDON

City Place House  
55 Basinghall Street  
London EC2V 5EH, England  
T: +44 20 7614 2200  
F: +44 20 7600 1698

### MOSCOW

Cleary Gottlieb Steen & Hamilton LLC  
Paveletskaya Square 2/3  
Moscow, Russia 115054  
T: +7 495 660 8500  
F: +7 495 660 8505

### FRANKFURT

Main Tower  
Neue Mainzer Strasse 52  
60311 Frankfurt am Main, Germany  
T: +49 69 97103 0  
F: +49 69 97103 199

### COLOGNE

Theodor-Heuss-Ring 9  
50688 Cologne, Germany  
T: +49 221 80040 0  
F: +49 221 80040 199

### ROME

Piazza di Spagna 15  
00187 Rome, Italy  
T: +39 06 69 52 21  
F: +39 06 69 20 06 65

### MILAN

Via San Paolo 7  
20121 Milan, Italy  
T: +39 02 72 60 81  
F: +39 02 86 98 44 40

### HONG KONG

Cleary Gottlieb Steen & Hamilton (Hong Kong)  
Hysan Place, 37th Floor  
500 Hennessy Road, Causeway Bay  
Hong Kong  
T: +852 2521 4122  
F: +852 2845 9026

### BEIJING

Cleary Gottlieb Steen & Hamilton LLP  
45th Floor, Fortune Financial Center  
5 Dong San Huan Zhong Lu  
Chaoyang District  
Beijing 100020, China  
T: +86 10 5920 1000  
F: +86 10 5879 3902

### BUENOS AIRES

CGSH International Legal Services, LLP-  
Sucursal Argentina  
Avda. Quintana 529, 4to piso  
1129 Ciudad Autonoma de Buenos Aires  
Argentina  
T: +54 11 5556 8900  
F: +54 11 5556 8999

### SÃO PAULO

Cleary Gottlieb Steen & Hamilton  
Consultores em Direito Estrangeiro  
Rua Funchal, 418, 13 Andar  
São Paulo, SP Brazil 04551-060  
T: +55 11 2196 7200  
F: +55 11 2196 7299

### ABU DHABI

Al Sila Tower, 27<sup>th</sup> Floor  
Abu Dhabi Global Market Square  
Al Maryah Island, PO Box 29920  
Abu Dhabi, United Arab Emirates  
T: +971 2 412 1700  
F: +971 2 412 1899

### SEOUL

Cleary Gottlieb Steen & Hamilton LLP  
Foreign Legal Consultant Office  
19F, Ferrum Tower  
19, Eulji-ro 5-gil, Jung-gu  
Seoul 100-210, Korea  
T: +82 2 6353 8000  
F: +82 2 6353 8099