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CORPORATE AND M&A

Overhaul of the Irish Takeover Rules: *Summary of key changes taking effect on 22 July 2022*

Following its public consultation on proposals to substantially amend the Irish Takeover Rules (the **Rules**) and Substantial Acquisition Rules (the **SARs**), the Irish Takeover Panel (the **Panel**) recently published its response to the consultation and the final amended Rules and SARs.

The changes to the Rules and SARs represent the most significant overhaul of Irish takeover regulation since 2013. The Panel has now confirmed that the new Rules and SARs will come into effect on 22 July 2022. They will not apply to any transaction that is in being on that date.

7 MIN READ

Background

The Rules and SARs regulate takeovers of, and acquisitions of securities in, Irish-incorporated public limited companies listed on certain stock exchanges, including Euronext Dublin, the London Stock Exchange, the New York Stock Exchange and NASDAQ. Certain of the amendments to the Rules simply reflect developments in, or seek to modernise, Irish takeover practice, while others are influenced by changes which have been made to the UK City Code on Takeovers and Mergers (the **UK Code**) over the last number of years. While there has been alignment on certain aspects of the Rules and the UK Code, there will remain a number of critical differences between the two regimes, and more generally between Irish and UK takeover practice.

Key Amendments

1. PUSU

The new Rules introduce an automatic "put-up or shut-up" (**PUSU**) regime. This will:

- require a target company to identify all potential bidders that the target is in talks with, or has received an approach from, in any announcement made by the target regarding a possible offer, and
- impose an automatic PUSU period of 42 days (6 weeks) from the date of such announcement on the named bidders (which is longer than the 28 day PUSU period under the UK Code).

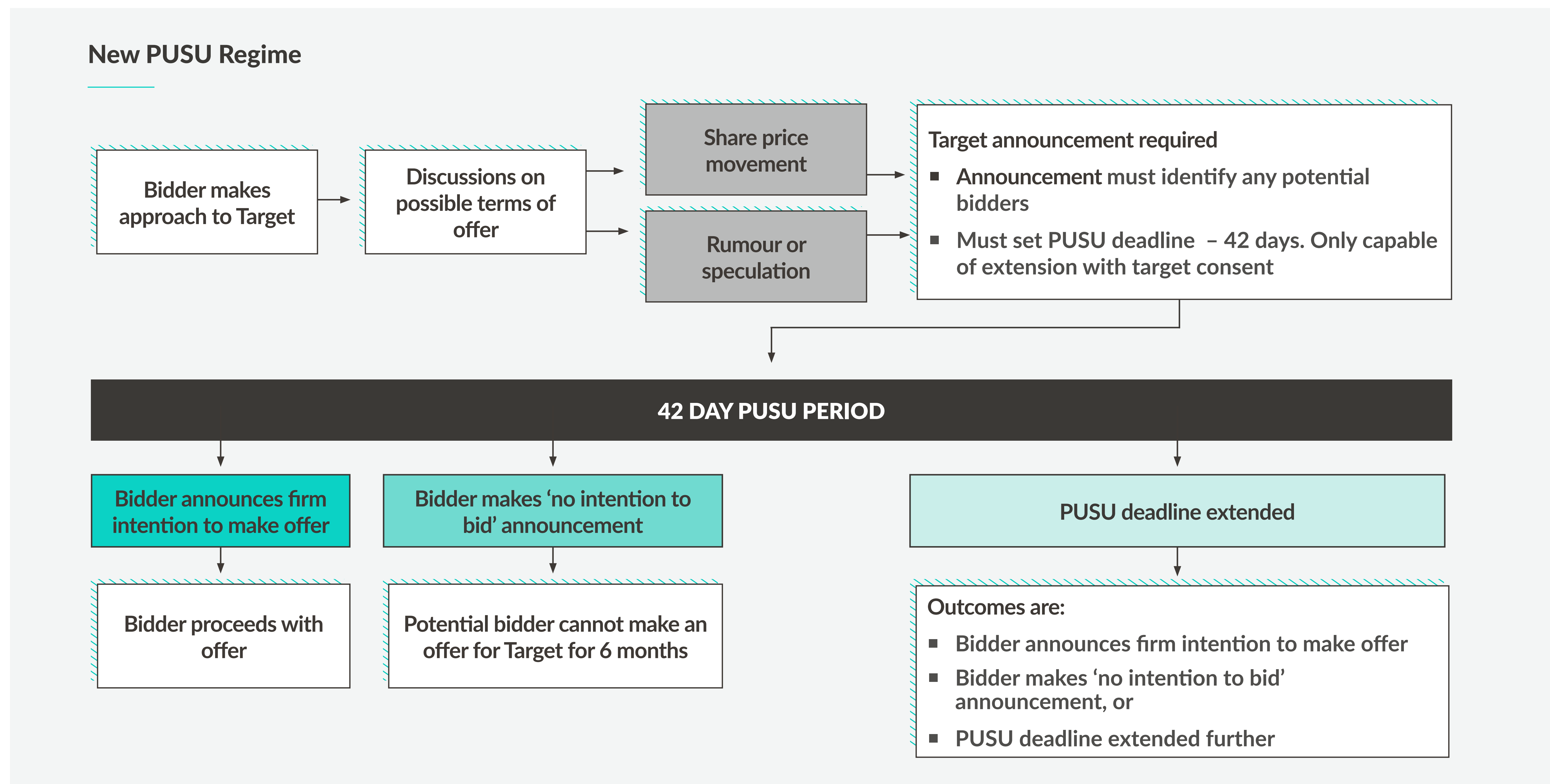
Before the expiry of this 42 day period, each potential bidder must either 'put up' (i.e. announce a firm intention to make an offer for the target) or 'shut up' (i.e. announce that it shall not be making an offer, whereupon it will be 'locked out' from making an offer for a minimum period (see below)). The Panel can extend the six-week deadline at the request of the target. In addition, derogations from the PUSU regime are available in the context of formal sales processes (with Panel consent).

The imposition of an automatic 42-day PUSU deadline is a significant shift from current practice, where a target must request a PUSU deadline, with the Panel having discretion to impose a deadline of its choosing. The automatic PUSU is intended to lessen any period of uncertainty or siege that can be caused to a target and its shareholders following a possible offer announcement.

The new regime could have significant implications for the timing of the initial approach by a prospective bidder to a target. From a bidder's perspective, it will mean that more preparatory work will need to be done pre-approach (e.g. pre-bid due diligence and arranging bid financing (though prospective bidders will also need to be cognisant of the strict confidentiality provisions which apply under the Rules which limit broadening discussions in relation to a possible takeover)). Furthermore, a prospective bidder will be strongly incentivised to avoid any leak of its potential interest in making an offer which would require an announcement.

From a target's perspective, there is a possibility that the change in regime could encourage targets to tactically leak information about a hostile bid in order to start the PUSU period where the target believes the bidder will not be in a position to make a firm offer in the 42-day period.

There have been a number of instances in the Irish market where the lack of a fixed PUSU period has meant that bid uncertainty prevailed for a significant period of time, not always resulting in a bid being forthcoming. Indeed even where a PUSU period was granted by the Panel, these tended to be of significantly longer duration than 6 weeks. We understand that the Panel has monitored developments in the UK since the introduction of the 28 day PUSU period and in particular have assessed whether or not it has had a 'chilling effect' on the number of offers being advanced, concluding that it has not. The rationale for introducing a 42 day period rather than a 28 day period has not been explained, but we understand it follows feedback to the consultation from market participants (including A&L Goodbody), with the objective of balancing the interests of prospective bidders and targets.



2. Lock-out period

In light of the adoption of the new PUSU regime, and in order to address any perceived tactical imbalance that this might create given that it increases the leverage available to the target, the new Rules reduce the lockout period applicable to a bidder who announces that it shall not be making an offer from 12 months to 6 months. The Panel has however not introduced a similar mechanism to that in the UK Code which allows a bidder to make a single approach to a target during the lock-out period (although it will still be possible for the Panel to grant consent to an approach during the lock-out period in certain circumstances, e.g. with target board consent).

3. Profit Forecasts and Quantified Financial Benefit Statements

The new Rules have sought to reduce the burden of the independent reporting requirements that currently apply to profit forecasts, by applying a lighter touch to certain profit forecasts, including (i) those made before an approach; (ii) ordinary course profit forecasts and (iii) those relating to future financial periods. The lighter touch approach avoids the need for accountants and financial advisers to independently report on such forecasts, and instead allows directors to either repeat the forecast (with certain confirmations as to the composition of the forecast) or explain why it is no longer valid. The rules on merger benefits statements, now called quantified financial benefits statements (**QFBS**), have been brought into line with the profit forecasts reporting regime. Notably, cash bidders will not be required to have any type of profit forecast or QFBS in relation to their own business reported on.

In practice, our experience has been that the Panel have exercised increased flexibility in relation to reporting requirements on profit forecasts on a case by case basis in recent years. Standardisation of this is a welcome development in the Irish market, particularly given that Irish public companies do commonly publish current fiscal period forecasts.

4. Interests & Dealings Disclosures

The new Rules require that bidders, the target and any person interested in 1% or more of any class of relevant securities of any securities-exchange bidder or of a target make an ‘opening position disclosure’, detailing their interests (including short positions) in those securities, shortly after an offer or possible offer is announced. The Panel can request shareholder details from both securities exchange bidders and targets to enable it to monitor compliance with these new requirements. These amendments represent a movement from a ‘dealings’-based disclosure regime to a ‘positions’-based one and seek to bring greater transparency over voting control of securities exchange bidders and targets.

This ‘opening position disclosure’ is a welcome development. The vast majority of shares in Irish public companies are traded via an ‘intermediated’ or ‘indirect’ system, (e.g. Euroclear Bank or DTC). These are more opaque than the ‘name on register’ system. Therefore enhanced disclosure of interests should assist both bidders and targets in understanding the shareholder landscape and its evolution during an offer period.

5. Enhanced Disclosure Requirements

As well as introducing a new and more comprehensive regime for disclosure of irrevocable commitments and letters of intent, the new Rules require bidders to make additional disclosures in both firm offer announcements and offer documents, including that:

- the firm offer announcement will now need to clarify a bidder's intentions for the target (including the target's business, employees and headquarters), but a bidder will not be bound by these statements, and
- the offer document will now need to include (i) details of any securities exchange bidder's and target's ratings or outlooks published by credit rating agencies during an offer period (and details of any related changes); and (ii) additional detail regarding a cash bidder's financing (including repayment terms, interest rates and key covenants).

Furthermore, where shareholder approval is being sought by a target for a potential "frustrating action" under the Rules (e.g. a sale of assets of a "material amount"), greater disclosure about the transaction will have to be made to shareholders and, in particular, a target will need to obtain competent independent advice as to whether the financial terms of the proposed action are fair and reasonable.

The bringing forward of disclosure in relation to a bidder's intentions for the target to the firm offer announcement partially reflects market practice, in that it has been common that some short commentary on these matters is voluntarily included in a firm offer announcement. However higher expectations from the Panel in relation to the level of detail to be included, and responded to by the target board, will mean there will need to be an earlier and more fulsome consideration of these matters by the bidder. In light of the new 42-day PUSU period, it is a further example of why bidders will need to front-load their preparatory bid work as much as possible.

6. Asset transactions

The new Rules introduce a number of new requirements which will:

- prevent bidders from avoiding the lock-out restrictions under the Rules (see above) by purchasing the target's 'significant assets', and
- address tactical imbalances that can arise between a prospective bidder and a competing asset purchaser, including by extending certain rules regarding (i) equality of information; and (ii) the minimum level of consideration that a bidder can offer for target shares, to competing asset purchasers.

7. Shareholder communications

The new Rules introduce a welcome move away from the requirement to send physical copies of takeover documents to shareholders, by facilitating email distribution as well as the use of short form 'website notifications', which notify shareholders of online publication of takeover documents.

Conclusion

These changes represent the most far reaching amendments to the Rules since 2013 and are generally viewed as shifting the balance of the Rules towards target companies and their shareholders. The new Rules will require bidders and targets to adapt some of their bid practices and strategies, including for example, when considering the timing of an approach.

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This note identifies only some of the headline changes. For further information or for a more detailed discussion about Irish takeover law, please contact Eugenée Mulhern, Deirdre Geraghty, Alan Casey, Ronan Lyons, Richard Marron, Conor Maginn or any member of A&L Goodbody's Corporate and M&A team.

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