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NEWSLETTER

Public Takeover Offers and Separate Disclosure Obligations for the Target Company

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Introduction

The announcement of a public takeover offer raises an important question concerning the interaction between the Danish takeover regime and the Market Abuse Regulation ("**MAR**"): once an offeror has announced its decision to make a takeover offer in accordance with the Danish Takeover Order, does the target company incur a separate disclosure obligation under MAR Article 17?

Although this question has attracted renewed attention following the Court of Justice of the European Union's ("**CJEU**") ruling in Brännelius (C-229/24), the answer turns on a more fundamental relationship within MAR itself, namely the relationship between Articles 7 and 17.

A public takeover offer is one of the most significant events in the life of a listed company. The regulatory framework governing how and by whom the announcement of such an offer must be disclosed serves a fundamental objective of ensuring an orderly, transparent and well-informed market.

Under the Danish Takeover Order[1], the obligation to announce the decision to make a takeover offer rests with the offeror. The target's board is required to publish its board opinion on the offer no later than four weeks after the offer document has been made public. This allocation appears straightforward but raises the question of whether the target's board also incurs a separate obligation under MAR Article 17 to disclose the offeror's decision to make the takeover offer.

The answer depends on whether the offeror's decision constitutes inside information that directly concerns the target company within the meaning of MAR Article 17, and, if so, whether the offeror's announcement has already rendered the information public for the purposes of MAR Article 7.

*1. Executive Order No. 614 of 2 June 2025 on Takeover Bids (the "Takeover Order") (**Link**)*

The Structural Framework: Article 7 MAR vs. Article 17 MAR

MAR Article 7(1) defines inside information as specific, non-public information that directly or indirectly relates to one or more issuers or financial instruments and which, if made public, would be likely to have a significant effect on their price. MAR Article 17(1), by contrast, requires an issuer to disclose “inside information that directly concerns that issuer”.

The textual difference is deliberate. MAR Article 17 covers only a subset of the inside information concept in MAR Article 7. Information may constitute inside information for the purposes of the insider dealing prohibition in MAR Article 8, while simultaneously falling outside the issuer’s disclosure obligation under MAR Article 17.

The insider dealing prohibition is broad because it serves to prevent abuse of any information advantage. The disclosure obligation is narrower because it is limited to information the issuer can verify, control and present to the market. To require disclosure of third-party information that the issuer may not have received, cannot verify and cannot control would risk inaccurate or premature disclosure, which may itself constitute market manipulation under MAR Article 12.

The question is therefore whether an offeror’s decision to make an unsolicited takeover offer constitutes information that directly concerns the target company within the meaning of Article 17, or merely information that indirectly relates to it.

Unsolicited and Negotiated Takeover Offers

The Unsolicited Offer: Is MAR Article 17 applicable?

The decision to make an unsolicited takeover offer originates from, and is controlled exclusively by, the offeror – including as to timing, price, conditions and structure. The target company has no involvement in, and no ability to influence, that decision. The information therefore relates to the target company only indirectly: it may affect the price of the target's shares, but it neither originates from, nor is controlled by, the target company.

On this analysis, the offeror's decision to make an unsolicited takeover offer falls outside the scope of the target company's disclosure obligation under MAR Article 17(1). The prior and determinative question is whether the information directly concerns the target company – and in the case of an unsolicited offer, it ordinarily will not.

This interpretation is supported by the amendments to the Listing Act. Under the revised Article 17 framework, intermediate steps in a protracted process are, as a general rule, no longer subject to immediate disclosure. The accompanying delegated regulation defines a protracted process as a series of actions, steps or decisions that must be performed, at least in part, by the issuer.[2] An unsolicited takeover offer initiated solely by the offeror will not ordinarily fall within that concept from the target company's perspective.

Accordingly, the question can be resolved without recourse to the CJEU's ruling in Brännelius. If Article 17 does not apply to offeror-generated information that merely relates indirectly to the target company, no disclosure obligation arises for the target, and the question of whether the offeror's announcement has rendered the information public under Article 7 does not arise.

2. European Commission, Draft Commission Delegated Regulation. Non-exhaustive list of final events or final circumstances in protracted processes (Link)

Unsolicited and Negotiated Takeover Offers

The Negotiated Offer: The Target's Own Inside Information

The position is materially different where the target company has participated in the transaction before the announcement. If the offer has been preceded by negotiations, due diligence, a combination agreement or other substantive contact with the target's board, the target will typically possess its own inside information – including the existence of negotiations, the board's assessment of the offer and any decision to recommend the transaction. This information originates from, and is controlled by, the target company itself, and is qualitatively different from the offeror's unilateral decision.

The Listing Act supports this distinction. A negotiated takeover will ordinarily constitute a protracted process involving the issuer itself, and the target's disclosure obligation arises in respect of the inside information generated through its own participation in that process.

Recent Danish supervisory practice confirms this. In its decision concerning Nilfisk Holding A/S, the Danish Financial Supervisory Authority ("**DFSA**") criticised the company for failing to identify its announcement concerning a forthcoming recommended takeover offer as containing inside information within the meaning of MAR Article 17.[3] The criticism was directed at the categorisation of the announcement. The decision therefore illustrates a negotiated transaction in which the target company possessed and disclosed its own inside information.

3. Påtale til Nilfisk Holding A/S for ikke at have kategoriseret oplysninger som intern viden | Finanstilsynet (Link)

The Regulatory Framework vs. The Practical Position

The conclusion above does not depend on the CJEU's ruling in Brännelius, but the ruling provides additional support. In Brännelius, the CJEU held that information ceases to constitute inside information once disclosed through the publication mechanism prescribed by MAR Article 17. Under Danish law, the offeror's announcement under section 4 of the Takeover Order is published via section 20(1), which refers to section 24 of the Danish Capital Markets Act – the same disclosure infrastructure contemplated by the Court. This strongly supports the conclusion that the offeror's announcement satisfies the publication requirement identified by the CJEU.

That MAR does not impose a separate disclosure obligation on the target does not mean the target is without obligations. The target's engagement with the offer is more coherently explained by the board's fiduciary duty under Danish company law, as given procedural form by the Takeover Order.

The target board's obligation to inform shareholders arises independently of MAR Article 17. Sections 22 and 23 of the Takeover Order give this duty specific procedural form: section 22(1) requires the board to publish a reasoned statement on the offer, including its assessment of the consequences for shareholders and any conflicts of interest, while section 23 obliges the target to forward the offer document and the board statement to registered shareholders. The target is thus required to react to a bid once made – not to announce its existence, which remains the offeror's obligation under sections 3 and 4.

The Regulatory Framework vs. The Practical Position

The two regimes serve different purposes: MAR ensures timely disclosure of inside information directly concerning the issuer, while the takeover framework ensures that shareholders receive the information necessary to evaluate the offer. Recognising this distinction avoids imposing on the target a disclosure obligation that is both legally unfounded under MAR and practically redundant in light of the offeror's announcement. This interpretation also preserves the distinction deliberately drawn by the EU legislature between MAR Articles 7 and 17. To require the target company to republish offeror-generated information merely because it affects the issuer's share price would substantially erode the limitation that Article 17 applies only to information directly concerning the issuer.

In practice, the target board is already required to comment on the offer through its board statement under section 22 of the Takeover Order. However, a number of target companies choose to publish an announcement upon receipt of the bid – before the board statement is finalised. This practice reflects the fact that the target company is the only entity with direct access to the full shareholder base, and that a takeover offer is, by its nature, directed at the shareholders rather than at the board. Offerors will accordingly ordinarily expect – and have a legitimate interest in – the target board communicating the offer to its shareholders at the earliest opportunity. This practical reality reinforces the conclusion that the target board's engagement with the offer is properly grounded in its fiduciary duty to the shareholders and the procedural framework of the Takeover Order, rather than in a parallel disclosure obligation under MAR.

Practical Takeaways

An offeror's unilateral decision to make an unsolicited takeover offer will ordinarily constitute information that only indirectly relates to the target company and therefore falls outside the target's disclosure obligation under MAR Article 17. The offeror's announcement under section 4 of the Takeover Order is published through the same statutory disclosure infrastructure as Article 17 announcements (Capital Markets Act, section 24), which further supports the conclusion that additional disclosure by the target would be duplicative.

Where the target has participated in the transaction prior to the announcement – through negotiations, due diligence, a combination agreement or similar – the target will typically possess its own inside information. The target's disclosure obligation under MAR Article 17 then arises from that information, not from the offeror's decision as such, and the target's announcement should be categorised accordingly.

The target board is required to publish a reasoned statement on the offer pursuant to section 22 of the Takeover Order and to forward the offer document to registered shareholders pursuant to section 23. Any earlier announcement by the target is properly grounded in the board's fiduciary duty, not in MAR. Target boards should accordingly maintain a contingency procedure in accordance with the Danish Corporate Governance Recommendations[4] (Recommendation 1.3.1), ensuring that the board's response to a bid is anchored in its fiduciary obligations rather than in ad hoc reliance on MAR.

The above analysis concerns only the ad hoc disclosure obligation under MAR Article 17. The target's obligations to maintain insider lists, comply with the insider dealing prohibition and observe other applicable MAR obligations remain unaffected.

*4. Danish Recommendations on Corporate Governance (**Link**)*

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