

Newsletter No.

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Best Price Rule in Public Takeovers – MINOR Changes, MAJOR Effect

In the current matter of Von Roll, the Swiss Takeover Board (TOB) recently had to decide on the applicability of the best price rule under Swiss takeover rules in two similar cases. Despite similarities in the facts of the two cases, the outcomes diverged markedly. The two TOB decisions show just how critical it is to carefully structure transactions around a PTO and to obtain a decision from the TOB beforehand.

Best Price Rule in Public Takeovers – MINOR Changes, MAJOR Effect



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In its decision 846/01 dated 23 June 2023 (published 11 August 2023), the Swiss Takeover Board (TOB) confirmed the applicability of the best price rule to payments resulting from an asymmetric allocation of sales proceeds and linked to a public takeover offer. In its decision 846/02 dated 4 August 2023 (published 11 August 2023), however, the TOB also confirmed that the best price rule does not apply if, from a formal standpoint, the payments are made irrespective of whether or not the public takeover offer is subsequently launched.

Background

Through the publication of its pre-announcement on 11 August 2023, Germany-based ELANTAS GmbH (ELANTAS) announced a public cash tender offer for all publicly held shares in Von Roll Holding AG (Von Roll), a company listed on the SIX Swiss Exchange (SIX).¹ On the same date, ELANTAS and Von Roll had entered into a transaction agreement. The board of directors of Von Roll had recommended the offer for acceptance. ELANTAS is indirectly held by the Germany-based Altana AG (Altana).

The majority (80.89%) of Von Roll shares are held by members of the von Finck family (Family), and 73.2% of Von Roll shares are held, directly or indirectly, by three members of the Family (Shareholder Group). Upon the publication of the pre-announcement, ELANTAS therefore also entered into a share purchase agreement (SPA) with the Family. Those shares fall outside the scope of the PTO.² The price per share agreed under the SPA is equal to the price per share offered in the PTO (in both cases, CHF 0.86 per share in Von Roll).

In addition, the CEO and the CFO of Von Roll (the Managers) each signed a tender agreement with ELANTAS on 11 August 2023 pursuant to which they undertake to tender their shares to the PTO. Together, they hold Von Roll shares representing about 1.68% of Von Roll's total share capital.

Decision 846/1 – the Allocation Agreement

According to decision 846/1 dated 23 June 2023 (published on 11 August 2023) of the Swiss Takeover Board (TOB), the Shareholder Group promised to grant the Managers certain financial benefits deriving from the sale of the Shareholder Group's shares as a reward for their support for the Shareholder Group and the turnaround they had achieved for Von Roll. Initially, the original plan was that the Managers would sell their shares alongside the Shareholder Group under the SPA, with asymmetric allocation of the proceeds from such sale. The asymmetric allocation would be stipulated under a separate agreement (Allocation Agreement) to which Altana would not be party, but which would be based on the SPA. The proceeds would have been allocated such that the Managers would receive a price per share that would have been 3.89 or 3.15 times higher than the price offered in the PTO. The funds required to cover social security contributions and income taxes imposed at the source, which were payable by Von Roll (as the Managers' employer), would be deducted from the purchase price and charged to Von Roll.

Against this backdrop, the Shareholder Group requested the TOB to confirm that the closing of the SPA and the Allocation Agreement would not violate the best price rule.

Best price rule vs. minimum price rule

The best price rule is not to be confused with the “price of the previous acquisition”, an element of the **minimum price rule**. The minimum price rule states that in mandatory and change-of-control PTOs, the offer price for the shares in the target (or other equity securities) must not be lower than the higher of (i) the volume-weighted average price (VWAP) of the relevant equity securities during the 60 trading-day period preceding the offer (“stock exchange price”) and (ii) the highest price paid by the offeror for the respective equity securities during the 12 months preceding the PTO (“price of the previous acquisition”).³ Since the minimum price rule is part of the regime governing mandatory PTOs, it is not applicable if the target company has a valid opting out provision in its articles of association.⁴ In contrast to the minimum price rule, the best price rule applies to all PTOs.

The **best price rule** states that the highest price the offeror has paid for equity securities during the period commencing, generally speaking, on the date of publication of the PTO (or the pre-announcement, as applicable) and ending six months after the end of the additional acceptance period of the PTO must be offered to all offerees of the PTO. The purchase of even a single equity security at a price exceeding the price originally offered by the offeror thus triggers an obligation for the offeror to pay this higher price to all offerees in the PTO. Consequently, the best price rule and its scope of application are of high practical relevance and importance.

Scope of application of the best price rule

(i) Personal scope

The best price rule applies to all transactions entailing the purchase of shares and other equity securities by the offeror, the offeror group and persons acting in

concert with the offeror. According to the TOB’s practice, a person is deemed to be acting in concert with the offeror if such person has agreed with the offeror on the PTO and its terms and coordinates its conduct with the offeror regarding the launch of the PTO and the terms of the PTO. Controlling shareholders who sell their equity securities to the offeror under a separate purchase agreement before the PTO is launched are deemed to be acting in concert with the offeror if such selling shareholders undertake to (publicly) support the PTO. The same applies to other persons who sell or tender their shares in a PTO, provided that such persons are in a position that allows them to influence the terms and conditions of the PTO. The target company and its subsidiaries also qualify as acting in concert with the offeror after they have signed a transaction agreement at the latest.

In the present case, the TOB stated that the Shareholder Group controls Von Roll with a 73.2% majority of the voting rights and dominates the company’s board of directors. The TOB concluded that the Shareholder Group was therefore able to influence the terms and conditions of the PTO. The fact that certain provisions in the draft SPA obliged the Shareholder Group to support the PTO showed, in the TOB’s view, that the Shareholder Group indeed intended to coordinate its actions with Altana.⁵ The TOB therefore held that the Shareholder Group, if it entered into the SPA, is to be deemed as acting in concert with Altana and is thus subject to the best price rule.

(ii) Material scope

The best price rule applies to any direct and indirect acquisitions of shares in a target company as well as any other equity securities and equity derivatives at a price higher than the offer price. Whether or not the purchased securities are listed and whether or not they are subject to the PTO is irrelevant. The best price rule also applies to transactions between

the offeror and persons acting in concert with the offeror. This practice aims at preventing the offeror from first forming a group with individual shareholders and then providing the members of such group with additional benefits in circumvention of the best price rule. Accordingly, the TOB held that in the case at hand, the transactions envisaged under the SPA and the Allocation Agreement fell within the material scope of the best price rule.

(iii) Temporal scope

As a **general rule**, the best price rule applies from the date of publication of the pre-announcement or, if no pre-announcement is published, from the date of publication of the offer prospectus. The rule then continues to apply for the entire duration of the offer and until the expiry of six months from the end of the additional acceptance period. This six-month extension is aimed at preventing circumvention transactions, e.g. shareholders waiting for the expiry of the additional acceptance period to demand a premium from the offeror that would not be permissible under the best price rule.⁶

In its decision, the TOB confirmed that the temporal scope is applicable if the conclusion of the relevant agreement occurs within the above timeframe, irrespective of when the transaction is closed. Consequently, transactions agreed on prior to publication of the pre-announcement generally do not fall within the temporal scope of application of the best price rule.

However, as an **exception to the general rule**, the best price rule is still applicable to so-called “coupled transactions” (*gekoppelte Gesamttransaktionen*). The TOB uses the concept of coupled transactions to prevent circumventions of the best price rule. A transaction is deemed coupled with the PTO if it was agreed upon prior to the publication of the PTO but is conditional on the launch or successful completion of a PTO. The reverse case, i.e., if the PTO is conditional on the

transaction, is also considered to be a coupled transaction. Consequently, if the relevant transaction and the PTO are subject to the same conditions, they also qualify as a coupled transaction.

However, the TOB also applies an **exception to the exception**: It does not qualify a transaction which is subject to the same conditions as the PTO as a coupled transaction, provided that said conditions are necessary or indispensable conditions. Such conditions include the condition that there be no court or regulatory injunction prohibiting the closing of the transaction, the granting of approvals (without undue obligations and conditions) by the competent authorities as well as register entries.

In the case at hand, Altana stated that the SPA stands completely separate from any PTO and would also be executed independently. Altana would not be involved in or be able to influence the allocation of the sales proceeds and does not know the bases underlying such allocation either. Consequently, the Allocation Agreement between the Family and the Managers would not affect the PTO or the offer price and thus would not fall within the scope of the best price rule.

Von Roll further explained that the reason for the unequal distribution of the sales proceeds was that the Shareholder Group had granted the Managers a reward for the successful turnaround achieved. This reward fell due when the Shareholder Group sold its shares, irrespective of whether or not the Managers sold their shares as well. The distribution of the proceeds constituted the fulfillment of an obligation that existed independently of the SPA with Altana (to which the Managers should accede).

The TOB focused on the question of whether the SPA (and thus the Allocation Agreement which was based on the SPA) was subject to the same conditions as the

planned PTO. The TOB concluded that the SPA and the PTO were subject to essentially the same conditions. Since the conditions were neither "necessary" nor "indispensable" in the above-mentioned sense, the TOB held that the SPA and the PTO constitute a coupled transaction. As a result, the best price rule was applicable to the transactions foreseen in the SPA and the Allocation Agreement. Entering into these agreements would therefore have violated the best price rule. This meant that the parties had to come up with an alternative structure. They did so and presented the alternate structure to the TOB for review once again.

Decision 846/2 – independent bonus payments

The alternate structure envisaged that the Shareholder Group would enter into a bonus agreement with the Managers before, and regardless of whether or not the SPA would be signed or the PTO launched. The bonus agreement, which would be entered into in lieu of the Allocation Agreement and would replace any previous agreements between the Shareholder Group and the Managers, would provide for bonus payments to the Managers. The social security contributions and income taxes imposed at the source owed by Von Roll would still be paid economically by the Shareholder Group. The payments would be executed unconditionally before the Shareholder Group entered into the SPA and before the PTO was launched. Only after the payments under the bonus agreement are made, would the Managers each sign a tender agreement with the offeror, instead of acceding to the SPA. The Shareholder Group argued once more that the bonus agreement and the payments thereunder are completely independent of the SPA and any PTO. It would therefore be possible for the SPA with Altana not to be concluded, while the bonus payments would

have already been irrevocably paid to the Managers.

Against this backdrop, the Shareholder Group requested the TOB to confirm that the payments under the bonus agreement would not violate the best price rule.

In its decision 846/02 of 4 August 2023 (published on 11 August 2023), the TOB confirmed the applicants' view that the payments under the bonus agreement were transactions independent from the SPA and the PTO. The bonus agreement and the payments, respectively, did not qualify as a coupled transaction. Hence, the best price rule was not applicable. Since the articles of association of Von Roll contained an opting out clause, which the TOB had declared valid in the event of a PTO by Altana or ELANTAS, the minimum price rule did not apply either.⁷

Conclusion

Shareholders' agreements sometimes provide for an asymmetric allocation of the sales proceeds. Where a listed company is involved, such clauses must be analyzed in detail against the background of the best price rule and the minimum price rule. The same applies to any transaction planned around a PTO. The two TOB decisions show just how important it is to carefully structure transactions around a PTO and to obtain a decision from the TOB beforehand; finally, the decisions also show how minor changes to deal structures can have a major effect.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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Endnotes

- 1 For a discussion of public takeover offers under Swiss law, see: https://www.walderwyss.com/user_assets/publications/230825_Newsletter-195.pdf
- 2 Public Takeover Offer.
- 3 A separate pricing rule applies if the shares are deemed to be “not liquid” as defined under art. 42 para. 4 of the FINMA Financial Market Infrastructure Ordinance (FinMIO-FINMA); for an explanation of the term “liquidity”, see TOB Circular no. 2 (Liquidity in the context of takeover law).
- 4 So had Von Roll; for a discussion on the opting out decision 843/01, see: https://www.walderwyss.com/user_assets/publications/230825_Newsletter-195.pdf
- 5 Such obligations included: prohibition of inadmissible measures as defined under art. 132 para. 2 of the Swiss Financial Market Infrastructure Act (FinMIA); exercise of voting rights in line with the SPA; no violation of the best price rule in the event of a PTO.
- 6 The TOB even further extends this six-month period on a case-by-case basis if, for example, it finds that the offeror, when launching the offer, already intended to purchase additional shares after the end of the six-month period at a price above the offer price. Even a subsequent squeeze-out merger resulting in a higher price may trigger the best price rule if carried out within the relevant time frame.
- 7 For a discussion of the TOB decision 843/01 regarding the opting out, see: https://www.walderwyss.com/user_assets/publications/230825_Newsletter-195.pdf

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