

Valuation of privileged voting shares in a public offer

July 13 2016 | Contributed by [Meyerlustenberger Lachenal](#)

Facts

Contractual arrangements

Best price rule

Monetary value of additional covenants and obligations

Valuation of privileged voting shares

Relevance of decision

In its assessment of Kiwi Holding IV Sarl's public offer on the publicly held registered B shares of Kuoni Travel Holding Ltd, the Takeover Board reviewed the methods to value different share categories of a target and the monetary value of additional covenants and obligations entered into by a shareholder.

Facts

On February 29 2016 Kiwi published the prospectus regarding its public tender offer for all publicly held registered B shares of Kuoni Travel with a nominal value of Sfr1. Kiwi launched its tender offer in concert with the Kuoni and Hugentobler-Foundation (K&H Foundation), which held all unlisted registered A shares with a nominal value of Sfr0.20 each for Kuoni Travel (and thus in the aggregate 25% of the voting rights and 6.25% of the capital of Kuoni Travel). The A shares held by the K&H Foundation qualified as voting shares with a privileged voting right or privileged voting shares due to their lower nominal value (and based on the mandatory principle of Swiss corporate law of one share, one vote).

Kiwi's tender offer valued Kuoni Travel (which had been hit by competition from online travel and holiday agencies and unrest in popular tourist destinations) at Sfr1.35 billion (approximately \$1.4 billion). The offer was subject to:

- a minimum acceptance threshold of at least 67% of Kuoni Travel's voting rights and more than 50% of its total share capital (with the inclusion of the A shares held by the K&H Foundation); and
- the deletion of the share transfer and voting right restrictions in the articles of association, to be approved by an extraordinary general meeting of the shareholders, which was held in early May 2016 and approved the resolutions requested by the offeror.

The offer was also subject to the usual regulatory approvals (eg, merger control). Kuoni Travel had entered into a transaction agreement with Kiwi providing for the launch of a the public offer for Sfr370 in cash per registered B share and the resignation of Kuoni Travel's incumbent board in case the tender offer succeeded. Subject to successful completion of the offer, Kiwi intended to arrange for a delisting of Kuoni Travel's shares from the SIX Swiss Exchange. In light of these events, Kuoni Travel's board resolved to postpone the ordinary shareholders' annual general meeting originally planned for April 26 2016. Further, Kiwi and the K&H Foundation agreed that K&H would contribute its Kuoni Travel A shares to Kiwi, pursuant to an exchange ratio to be determined based on the final tender offer price for a B share and compensation for the contribution of the A shares as confirmed by the review body and the Takeover Board to be permissible, taking into account any side benefits of both Kiwi and the K&H Foundation of up to 20%. Kiwi's offer prospectus stated that "the value at

AUTHORS

[Alexander Vogel](#)



[Stefanie Maurer](#)



which the Kuoni A Shares will be contributed has not yet been agreed".

Contractual arrangements

In addition, Kiwi and the K&H Foundation entered into a shareholders' agreement, which, among other things, provided K&H Foundation with a right to veto the meeting resolutions of shareholders, Kiwi's board of directors and its subsidiaries, including Kuoni Travel, and to receive an annual cash payment of Sfr2 million from Kiwi. Kiwi in turn was provided with a 'drag along' right, an acceleration option giving it the right to accelerate its exit by paying a certain amount to the K&H Foundation and a limited exclusivity right providing that the K&H Foundation was allowed to accept a competing offer of a third-party offeror only in case such a third-party offer exceeded the price offered by Kiwi by at least 10%.

Based on the provisions of the shareholders' agreement, the valuation report for the privileged voting A shares held by the K&H Foundation and to be contributed to Kiwi argued that K&H Foundation's three contractual obligations – the drag along, the acceleration option relating to the exit and the limited exclusivity right – should be qualified as additional consideration of the K&H Foundation to Kiwi with a monetary value which would entitle the K&H Foundation to receive an additional consideration from Kiwi (in addition to the valuation report's already higher valuation of its privileged voting A shares), partly in the form of the annual cash payment of Sfr2 million by Kiwi and partly in the form of a higher stake in Kiwi.

Best price rule

After reviewing the terms of the tender offer, the Takeover Board found that Kiwi's offer to Kuoni Travel shareholders met the legal requirements. It also noted that the best price rule – requiring that the amount paid to any security holder is the highest paid to any other holder of the same security and thus guaranteeing equal treatment of all shareholders – applies not only with regard to the listed B shares subject to the tender offer, but also to the intended contribution of the A shares to Kiwi by the K&H Foundation. K&H argued that the A shares should be considered as a distinct class of shares and should be treated differently from the listed B shares due to their voting privilege. It subsequently appealed both Takeover Board decisions to the Takeover Committee of the Financial Market Authority (FINMA) and simultaneously sought to suspend the appeal procedure in order to reach a consensual agreement with the Takeover Board.

Monetary value of additional covenants and obligations

Rejecting the view expressed in the valuation report, the Takeover Board considered that the three contractual obligations (ie, the drag along, the acceleration option relating to the exit and the limited exclusivity right) could not be qualified as additional consideration with a monetary value and thus did not justify the K&H Foundation's receipt of an additional consideration for its A shares based on these obligations. The board concluded that the drag along and acceleration right were to be considered as usual contractual provisions found regularly in an M&A context (eg, representations and warranties or other covenants). The rules applicable to 'irrevocables' (ie, irrevocable undertakings of shareholders to tender their shares in a future offer) providing that such irrevocables become revocable in case of a competing offer also apply to shares which were not the object of the offer – like the A shares – and thus K&H Foundation's exclusivity commitment was therefore invalid.

Valuation of privileged voting shares

On May 2 2016, based on a review body report by Ernst & Young, the Takeover Board decided that the privileged voting A shares held by the K&H Foundation could be contributed to Kiwi as the offeror at an additional value of 8% on a par value adjusted basis, as opposed to the Sfr370 offer price for the publicly held B shares. Further, it confirmed that the adjusted shareholder agreement, as well as the contribution agreement between the K&H Foundation and Kiwi, complied with the provisions of the Financial Markets Infrastructure Act and the implementing ordinances.

In particular, the Takeover Board confirmed that the contribution of privileged voting A shares did not have to be effected strictly on a par value adjusted basis and that the contribution value

allocated by Kiwi to the K&H Foundation – valuing five voting-privileged registered A shares at an aggregate value of Sfr399.60, compared to the offer price of Sfr370 for the publicly held B shares – was in line with the best price rule. This value provided for an adequate ratio between the par value adjusted contribution value of the privileged voting A shares and the offer price of Sfr370 for each listed B share. This par value adjusted price difference of 8% between the two categories of shares corresponded to a funding advantage and to an empirical observation of the par value adjusted price difference between share categories at a par value ratio of 5:1 observed in the Swiss market. The par value adjusted added value of the voting-privileged A shares reflected the increased voting power of such unlisted privileged voting A shares.

Conversely, in order to obtain the approval of the shareholder agreement, as well as the contribution agreement, K&H Foundation had to agree to the cancellation without substitution of the annual cash payment of Sfr2 million originally provided for in the shareholder agreement. Other than the clause providing for the annual cash payment, the Takeover Board stated that the shareholders' agreement contained no other obligations relevant in the context of the best price rule in favour of the K&H Foundation. In particular, the veto right granted to the K&H Foundation was considered by the Takeover Board to be a typical provision in an agreement between investors, especially if their participations differ in size. Consequently, such provision was not regarded as an additional non-cash consideration by Kiwi to the K&H Foundation relevant for purposes of the application of the best price rule by the Takeover Board. The same analysis also applied with regard to the various contractual rights granted to Kiwi by the K&H Foundation, particularly the drag along right in case of a sale.

Based on this informal settlement and the May 2 2016 decision approving the amended versions of the contribution agreement and the shareholder agreement, the K&H Foundation withdrew its complaint lodged with FINMA.

Relevance of decision

Even though the number of issuers with shares listed at the SIX Swiss Exchange which still have two categories of shares with differing voting rights (ie, common shares and privileged voting shares with a privileged voting right) has decreased significantly, from approximately 36 in the late 1990s to approximately 12 in 2010, the decision of the Takeover Board nevertheless provides important guidance, particularly because it was the board's first decision dealing with the issue of two share classes with unequal valuations (ie, an implicit (control) premium attributable to one share class) since the abolishment of control premiums which entered into force in 2012 (for further details please see "[Control premium](#)"). In addition, the Takeover Board's guidance on the practical significance for valuation purposes of other contractual obligations entered into by a tendering or selling shareholder is helpful, even though a more detailed analysis of the economic impact – and perhaps a more differentiated consideration and view – of the drag along obligation, for example, would have been desirable. Further, the decision is also relevant for the interpretation of similar provisions under the Merger Act, requiring equal treatment of shareholders in the context of a merger, demerger or conversion and, in particular, providing that in case of special rights attached to one class of shares in the transferring company (eg, special voting or dividend rights), the absorbing or acquiring legal entity must grant equivalent rights in exchange for such shares or pay an adequate compensation for the loss of the rights due to the merger, demerger or conversion.

For further information on this topic please contact [Alexander Vogel](#) or [Stefanie Maurer](#) at Meyerlustenberger Lachenal by telephone (+41 44 396 91 91) or email (alexander.vogel@mll-legal.com or stefanie.maurer@mll-legal.com). The Meyerlustenberger Lachenal website can be accessed at www.mll-legal.com.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).