European M&A: Multifunctional Stichtings

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The use of "stichtings," or Dutch foundations, in the M&A context became more widely known outside of Europe in 2015 in connection with Mylan N.V.'s use of a Dutch poison pill defense against Teva's unsolicited offer. The stichting Mylan relied upon is a commonplace defense mechanism in the Netherlands. Used for more than 100 years to hold individual or family assets for religious and charitable purposes, their unique characteristics have allowed them to play a significant role in a number of high-profile M&A situations over the last couple of decades.

Stichtings are legal entities that can own assets. In contrast with other corporate entities, they have no shareholders or members — nobody "owns" a foundation. Given the absence of owners, board members are not fiduciaries; they simply must administer the stichting in a manner consistent with its organizational documents. Moreover, a stichting can be formed so as not to have beneficiaries, which is how it is typically structured in M&A situations. Because a stichting does not have owners and beneficiaries, a court cannot end the stichting's administration of assets (as can happen with trusts) in the interest of its owners or beneficiaries. This, ultimately, is the strength (and, perhaps, the danger, when not properly constituted) of stichtings.

How Stichtings Are Used in M&A

The Dutch Poison Pill. The classic use of a Dutch foundation in the Netherlands in an M&A context is the Dutch poison pill that Mylan used to defend against Teva's unsolicited offer and protect its corporate interest. A stichting is formed and given the right to call preference shares of the target (Mylan) in the event of a threat to the target's corporate interest (*e.g.*, an unsolicited takeover that undervalues the target). While the Dutch poison pill is on the surface similar to the typical U.S. poison pill, it differs in a couple of significant ways: (1) the power to trigger the call is given to an entity over which the target company has no control, and (2) preference shares dilute all shareholders, not only the bidder, because they are acquired by the stichting rather than issued to all shareholders except the bidder (as in the U.S. context). The reason for this difference is that in the Netherlands, corporate law does not allow the issuance of shares to all but one shareholder.

This mechanism was used with varying degrees of success in a number of high-profile cross-border takeover battles over the years: Mylan (2015), KPN's defense against America Movil (2013), Rodamco North America (2001-02), Gucci (1999-2000). As in the U.S., the mechanism can only be used temporarily, to protect the target company's corporate interest, and then only where the offer is demonstrably unfair. Furthermore, shareholders of the target company can challenge the implementation of the poison pill defense in the Enterprise Chamber of the Amsterdam Court of Appeal, as has been done on a number of occasions (Rodamco North America, Gucci).

Crown-Jewel Defense. The stichting also has been used to protect assets from corporate waste in takeover offers. When Mittal Steel launched its offer against Arcelor, it announced that it had agreed to pre-sell Dofasco, an asset that Arcelor had just acquired, for lower than the acquisition value. Mittal Steel had agreed to sell Dofasco to a competitor of Arcelor to solve an antitrust issue that would have otherwise arisen. In response, and to avoid corporate waste, Arcelor housed the asset under a stichting. The objective of the stichting in that context was to maintain ownership of the asset. It was structured such that Arcelor would retain control of the operations of the asset and would be able to derive all of the economic benefits of ownership but would not, without the consent of the stichting's board, be able to sell the asset, even if Mittal Steel successfully acquired a majority of Arcelor. Eventually, when Mittal Steel did acquire control of Arcelor, the

third-party buyer of Dofasco challenged the stichting structure. However, the Dutch courts upheld it.

Enabling Continuing Operation of Assets Where Government Sanctions Are Imposed. The stichting has been used in at least two different contexts to allow oil and gas assets to continue to operate (in the interest of consumers) where sanctions were a consideration. Tamoil, the Dutch-incorporated, Libyan government-controlled oil and gas company, temporarily transferred its shares to a stichting in order to continue operations of its assets despite European Union sanctions. More recently, the U.K. government did not provide its consent to a company's acquisition of U.K. North Sea assets (as part of the company's acquisition of a much larger pan-European oil and gas company with widespread interests) because of concerns that the U.K. North Sea assets would have had to cease operations if the acquirer or its owners were sanctioned. In response, the acquirer housed the U.K. North Sea assets under a stichting with the purpose of continuing operations of its North Sea assets and, if and when sanctions were imposed on the acquirer or its shareholders, to sever all ties with the acquirer and its owners (including economic ties) and sell the U.K. North Sea assets to a third party capable of operating the assets.

Conclusion

The use of stichtings in connection with Dutch poison pills is a tried and tested defense mechanism, including in the cross-border M&A context, and we expect that it will continue to feature in takeover battles in years to come. Given their unique characteristics, however, the use of stichtings as a vehicle goes beyond the Dutch poison pill and even the defense context. We believe stichtings will continue to feature in European cross-border M&A going forward.

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