Mylan created Dutch-style poison pill to protect itself

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By Len Boselovic
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Mylan's recent reincorporation in the Netherlands was part of the generic drugmaker's strategy to reduce its global tax bill. But the shift, accomplished while keeping its operational headquarters in Cecil, came with another benefit: a European-style poison pill that could help Mylan thwart a hostile, $43 billion takeover bid from Israeli drugmaker Teva Pharmaceutical Industries.

Last month, Mylan disclosed an agreement with a foundation that can indefinitely transfer voting control of Mylan's stock from shareholders to the foundation. The agreement is triggered by an event that threatens Mylan, such as an unsolicited bid from Teva. The agreement, filed with U.S. securities regulators April 3, grants an option that allows the foundation to buy enough Mylan preferred stock to block an unwanted overture.

The foundation, known as a "stichting" in the Netherlands, is a separate entity from Mylan and can exercise certain rights that would frustrate the takeover, said Marco Ventoruzzo, who teaches law at Penn State University and Bocconi University in Milan. Some U.S. firms rely on poison pills that give shareholders the right to buy additional shares at a discount when a hostile bidder acquires a certain percentage of their stock. Those plans can make a hostile takeover impossible but might leave some discretion to shareholders. Mylan's defense, the stichting, puts decisions on the deal exclusively in the hands of the foundation, Mr. Ventoruzzo said.

While Mylan shareholders may find Teva's $82 per share offer attractive, given that Mylan closed Friday at $73.89, the foundation has the ability to block their efforts to tender their shares to Teva or to oust Mylan's directors and replace them with candidates who support accepting the offer.

"My sense is that [Teva] can't do much with [Mylan] shareholders. The whole idea here is to take away, as much as possible, this decision from shareholders," Mr. Ventoruzzo said.

The standoff is complicated by the fact that Teva is not the only hostile bidder involved. Mylan has made three offers to acquire Perrigo. The Irish drug company quickly rejected all three, including a cash and stock offer Mylan made last week that values Perrigo shares at $244.95 based on Mylan's closing price Friday. Perrigo closed Friday at $186.26.

Many analysts see Mylan's overtures to Perrigo as a defensive measure designed to discourage Teva from going after Mylan.

Poison pills have fallen out of favor to some extent in the U.S. because shareholder activists believe they protect entrenched management at the expense of shareholders. But Mr. Ventoruzzo said some European companies are moving to the Netherlands because laws there offer greater opportunities to shelter controlling shareholders and managers. He cited Fiat Chrysler Automobiles, which reincorporated in the Netherlands last year.

Just how much takeover protection a stichting provides is open to debate. While some believe it is a strong defense, Cowen & Co. analyst Ken Cacciatore thinks Mylan shareholders who believe selling out to Teva makes sense will eventually crack it, particularly if the Israeli drug company makes a higher offer that analysts expect is forthcoming.

“The Mylan shareholders — regardless of the Mylan board or independent foundation’s original decision — will indeed eventually be heard,” Mr. Cacciatore wrote in a Monday note to clients.

Harvard law professor Lucian Bebchuk opposes the use of the Dutch poison pill.

“The shareholders of a company should be able to decide whether to sell the company, and giving the board of a Dutch foundation effective veto power over an acquisition is detrimental to the interests of shareholders,” he said in an email.

Should the foundation exercise the stock option to block Teva’s bid, Mr. Cacciatore believes, “this action will ultimately be reversed by the Dutch courts.” He said the takeover defense “impedes [Mylan] shareholders from exercising their rights to dictate what they would like done with their company.”

The chairman of Mylan’s foundation is Pieter Bouw, the former CEO of Dutch airline KLM. Mr. Bouw was the director of a stichting set up by KPN, a Dutch phone company, that in 2013 successfully thwarted an unfriendly takeover bid from billionaire Carlos Slim. Mr. Cacciatore wrote that there are plenty of instances where foundations did not exercise their options and let takeover talks proceed.

Mylan chairman Robert Coury said the company intends to remain independent, citing the company’s “successful and longstanding standalone strategy” in a Monday letter to Teva CEO Erez Vigodman. But some believe the threat of triggering the poison pill could persuade Teva to make an offer that Mylan shareholders cannot refuse. Mr. Cacciatore noted that Mr. Coury met recently with Mr. Vigodman and that Mr. Coury’s letter suggested what kind of price Mylan believes would be reasonable. Mr. Coury put the price tag at “significantly in excess of $100 per share,” qualifying that by telling Mr. Vigodman “Mylan is not for sale.”

Mr. Cacciatore said the fact that the two executives met and that Mylan has put a price on the table are positive signs.

“We continue to believe this wealth-creating transaction will occur,” the analyst wrote in his Monday commentary.

Hostile bids can be protracted affairs, said Howard Berkower, a partner with McCarter & English in New York City.

“Unless this gets friendly pretty quickly,” he said, “it could go on for months, even longer.”