Stakeholder management in getting the deal done

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It is probably a lazy truism that regulatory and political clearance has become the most challenging and unpredictable factor in executing complex, cross-border mergers and acquisitions.

Anheuser-Busch InBev's proposed combination with SABMiller brought this issue into sharp focus last year. From the outset, notwithstanding the lack of competition law issues, most observers expected South Africa to be the most unpredictable and drawn-out of the regulatory clearance processes facing AB InBev across all its markets. It was equally clear that AB InBev, eager to avoid the regulatory and political quicksand previous large mergers had waded into, had done its homework.

So well prepared was the brewer that, in a January 2016 column for the Financial Mail, journalist Ann Crotty wondered if the manner in which AB InBev was progressing its proposed combination with SABMiller could become a template that would help South Africa "hammer out some sort of policy certainty to replace the highwayman antics of [Minister Ebrahim] Patel's department" About three months later she got a response, when Minister Patel publicly praised the company's approach to issue management and stakeholder engagement as part of its regulatory clearance process.

Non-financial issues are a growing factor in determining the cost and successful execution of complex mergers. This is not limited to South Africa. Across the globe, M&A is increasingly scrutinized by regulators, politicians and special interest groups. Aided by the growth of digital and social media channels, these groups are ready and well-armed to raise red flags about transactions. They do not hesitate to intervene to have them blocked or modified to accommodate their socio-economic or political agendas.

In fact, business is colliding with politics with alarming regularity. Global mega-deals that were recently scuppered as a result of regulatory concerns in different jurisdictions include Pfizer & Allergan, AT&T & T-Mobile, and Halliburton & Baker Hughes. In South Africa, the advice that businesses conducting M&A deals must be prepared for challenges from all sides firmly holds true. But it is the public interest clause in competition law that requires particular and strategic consideration.

The Competition Act of 1998, which sought to "promote and maintain competition in South Africa", was crafted to align with national economic and development goals, including improved employment, small business expansion, transformation, and the growth of industry and trade. Guidelines proposed by the Department of Trade and Industry said competition law should address "challenges that follow from our legacy of economic distortions" and the final Act notes that competition policy should "regulate the transfer of economic ownership in keeping with the public interest."

In line with this approach, the Competition Act enables government to make demands of M&A parties on "public interest" grounds, regardless of whether a transaction is determined to have a negative impact from a strictly competition perspective.

Other countries have a slightly different approach, based on their own priorities and agendas. Providing a view on the outlook for M&A in 2017, US law firm Wachtell Lipton Rosen & Katz makes the point that "prospective non-US acquirers of US businesses or assets should undertake a thoughtful analysis of US political and regulatory implications well in advance of any acquisition proposal or program." Sensible advice that should be the hallmark of M&A in any territory.

Certainly in South Africa, if companies are looking to achieve swift clearance and acceptable M&A conditions, then advanced preparation and strategic implementation should figure in all transaction risks, not just financial and financial stakeholder risk.

South Africa's competition institutions (the Competition Appeals Court, Competition Tribunal and Competition Commission) are independent, premised on strong international benchmarks and precedents, and operate within a well-regarded Constitutional framework, offering strong protection from political risk. That, however, does not remove the risk of political and social stakeholders using those institutions to drag out a transaction timeline, resulting in costly delays.

The Competition Tribunal's public hearing process, which allows concerned parties – from competitors and activist groups to unions and government stakeholders – to voice relevant concerns with a proposed merger, can have significant implications for both the transaction timetable and corporate reputation. But factored into the planning, these risks are manageable.

Though every transaction is different, AB InBev's approach provides a model for successful stakeholder engagement and has highlighted four key principles:

1. Understand and appreciate the socioeconomic and policy agenda

The South African government and ruling African National Congress (ANC) are facing heightened political and social tension, fuelled by high levels of unemployment and the demographics of economic exclusion. Underlying all of this is a national narrative that suggests the primary challenge facing South Africa is inequality (as opposed to growth). Given already high market concentration, regulators are generally of the view that "business as usual M&A" does little to improve supply chain diversity, inclusion or economic participation.

Strategic options to structure transactions in a way that increases downstream economic participation, with a particular focus on empowerment and domestic procurement, can help gain political and regulatory buy-in and reduce the formal (and time costly) space for intervention by special interest groups.

It is crucial for companies to understand the political undercurrents and the players shaping policy in order to appreciate macro imperatives, demonstrate awareness of relevant challenges, and put forward a transaction narrative that addresses key concerns and reflects national policy goals.

2. Determine the trade-offs

The stakeholder engagement and communications strategy must – from the beginning – define and evaluate the trade-offs that a company is willing to make. Based on your industry and the nature of the proposed transaction, will you seek to take the strictly legal route, or are you willing to make concessions? How much are you prepared to concede to achieve acceptable commitments? In which areas are you most willing to invest? How critical is timing and securing regulatory approval swiftly?

In calculating the various trade-offs, companies must consider the cost of a drawn-out regulatory process, the cost and benefits of the commitments, and the impact on stakeholder relationships going forward.

A smart approach will be based on designing acceptable trade-offs that make long-term commercial sense for the business and which also build positive relationships, thus ensuring a favourable public affairs environment post-transaction. It also allows companies to ensure that conditions are effectively self-imposed rather than set by what some see as academically - or theoretically - inclined players who may not appreciate the nuances and practicalities of the real economy.

3. Strike the right tone

Getting a deal done is not just about informing stakeholders of the tangible details of the proposal – it is also about the tone of engagement. Executives must engage early and broadly, and enter into engagements with an understanding that it is not a one-way process. "Checking" egos is critical. Transparency and humility are key. Politicians and regulators are masters of their domain. Companies should focus on their goals and not on personalities or other distractions.

Government stakeholders expect companies, particularly foreign corporations, to listen to their concerns and to partner with them on an iterative process to shape the value proposition. If you have done your homework and properly understood what matters to stakeholders, the process can be short and uncontentious. You need to let people be heard, leave space for stakeholders to push for more, and commit to a two-way process focused on engagement, not dictating or strong-arming.

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4. Align your advisors

It's essential to build a collaborative and integrated team of advisors. From communications and public affairs specialists to lawyers and bankers, all advisors must work together to ensure that legal and financial requirements are balanced against the broader stakeholder and reputational impact.

This integrated approach is equally important within the company to ensure swift, strategic decision-making. This means incorporating counsel from legal and compliance, investor relations, communications and public affairs, human resources, and finance and procurement.

As AB InBev highlighted, following these four steps can make all the difference in executing a successful transaction. ■

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The firm advised Anheuser-Busch InBev on its acquisition of SABMiller.