SECURITIES REGULATION PANEL
(sitting on appeal from Executive Committee)

In the matter between :

GOLD FIELDS LIMITED Appellant

and

HARMONY GOLD MINING COMPANY LIMITED First Respondent

MMC NORILSK NICKEL Second Respondent

REASONS FOR THE RULINGS OF THE SECURITIES REGULATION PANEL (SITTING ON APPEAL)

INTRODUCTION

1. This is an appeal against the decisions and rulings made by the Executive Committee of the Securities Regulation Panel.

2. The Appellant is **GOLD FIELDS LIMITED** ("*Gold Fields*") which carries on business as an operator of gold mines in South Africa, West Africa and Australia. The shares in Gold Fields are listed on the JSE Securities Exchange,

South Africa ("*JSE*"), the New York Stock Exchange ("*NYSE*"), the London Stock Exchange ("*LSE*"), the Euronext Stock Exchange ("*Euronext*") and the SWX Swiss Exchange.

3. The First Respondent is **HARMONY GOLD MINING COMPANY LIMITED** ("*Harmony*"). Harmony carries on business as an operator of gold mines in South Africa. The shares in Harmony are listed on the JSE, NYSE, LSE, Euronext and the Berlin Stock Exchange.

4. The Second Respondent is **MMC NORILSK NICKEL** ("*Norilsk*"), a company registered in Russia. Norilsk holds approximately 20.03% of the ordinary issued share capital in Gold Fields.

5. Gold Fields is the target of a take-over bid by Harmony which is aimed at acquiring the entire issued share capital of Gold Fields. The take-over bid by Harmony is made in two stages. The first stage is referred to as the "*early settlement offer*" and the second stage as the "*subsequent offer*".

6. In terms of the early settlement offer, Harmony offers to acquire up to 34,9% of the share capital in Gold Fields and will not acquire any more shares at that stage. If more shares are tendered, a pro-rating will occur to scale back the shares to this percentage.

7. The early settlement offer opened for acceptance from 20 October 2004 and closed for acceptance on 26 November 2004. The subsequent offer was to commence a day after the consideration was settled in respect of the early settlement offer. According to the offer document and circular addressed to Gold Fields shareholders, the subsequent offer would open, at the earliest, 29 November 2004 but no later than 3 December 2004.

8. The early settlement offer is subject only to the condition that certain resolutions are passed at a Harmony general meeting and are duly registered. By contrast, the subsequent offer, which is open for acceptance until 4 February 2005, is subject to a number of additional conditions including :

   8.1 that Harmony receives valid acceptances for over 50% of Gold Fields' entire share capital;

   8.2 that the proposed IAMGold transaction not be implemented for whatever reason, including Gold Fields' shareholders not approving the transaction at the general meeting on 7 December 2004;

   8.3 that the merger be approved by the relevant regulatory authorities including the competition authorities.

9. In terms of a written irrevocable undertaking provided by Norilsk to Harmony (the Norilsk undertaking):

9.1 Norilsk undertakes not to dispose of or encumber its Gold Fields' shares;

9.2 Norilsk undertakes to vote its 20,03% shareholding in Gold Fields against the IAMGold resolution at the meeting on 7 December 2004;

9.3 Norilsk undertakes not to accept the early settlement offer;

9.4 Norilsk undertakes to accept Harmony's subsequent offer provided that if Norilsk receives an offer that is 15% better than the Harmony offer, it will be entitled to accept that offer after giving Harmony a right to make a better offer. There is also a further provision entitling Norilsk to resile from its undertaking if there is a "*material adverse change*" in Harmony's business.

10. Gold Fields contends that the early settlement offer and the subsequent offer are one composite transaction sought to be implemented in phases; alternatively that the early settlement offer (if self-standing) is an indivisible part of a series of transactions that form part of an "*affected transaction*" within the meaning of Section 440A of the Companies Act No. 61 of 1973 ("*the Companies Act*") and the Securities Regulation Code ("*the Code*"). Gold Fields submits that both the early settlement offer and the subsequent offer are under the Panel's jurisdiction and must "*accordingly*" be extended on the same terms and conditions, particularly as to settlement, and should be subject to the same

conditions precedent. In addition, Gold Fields argues that various timing requirements contained in the Code have been breached.

11. Gold Fields also contends that Norilsk and Harmony are "*acting in concert*" as understood in the Code. As a consequence, they argue that the Panel has jurisdiction over the early settlement offer since "*it is effectively an offer for 54,9% of the shares in Gold Fields*" and therefore is an "*affected transaction*".

12. Both Harmony and Norilsk deny that they are "*acting in concert*" as understood in the Code. They also maintain that there are no agreements, arrangements or understandings between them outside of the terms of the Norilsk undertaking.

13. Harmony also contends that :

13.1 the early settlement offer and the subsequent offer are two successive and different offers. They deny that the offers constitute a single composite transaction or a series of transactions that are composite in effect;

13.2 the early settlement offer is not effectively an offer for 54,9% of the shares in Gold Fields;

13.3 the Panel has no jurisdiction under the Code to order an extension of the early settlement offer and the subsequent offer on the same terms and conditions as to settlement and conditions precedent.

14. On 18 October 2004, Harmony publicly announced a proposed merger with Gold Fields. Harmony stated that it intended to achieve this through the early settlement offer for 34,9% of Gold Fields, and, upon closure of the early settlement offer, to make the subsequent offer for the remaining shares of Gold Fields. Both offers were subject to different suspensive conditions. The announcement also made the statement that the mechanics and structure of the offers envisaged in the announcement had been approved by the Securities Regulation Panel (the SRP or the Panel).

15. On 20 October 2004, a circular addressed to Gold Fields' shareholders containing the "*offer document*" was published by Harmony. The stated purpose of the proposal was said to be the "... *merger between Harmony and Gold Fields, in terms of which Harmony will offer to acquire from the Gold Fields' shareholders all of their Gold Fields shares in exchange for the issue of new Harmony shares*". The offer document made the early settlement offer and gave the undertaking to make the subsequent offer after the closure of the early settlement offer. The circular also made reference to the details of the ruling of the SRP which had approved the mechanics and structure of the offers proposed in the document.

16. The Harmony announcement and the publication of the circular was preceded by a letter dated 15 October 2004 addressed by Harmony's attorneys to the Executive Director of the SRP. In that letter, the attorneys confirmed that :

16.1 the Executive Director was satisfied with the structure of the offer and the proposed mechanics of both the initial offer and the subsequent offer;

16.2 the Executive Director would review the revised offer document and announcement for approval by the next day;

16.3 they (the attorneys) were of the view that Harmony would not be precluded from making the subsequent offer under Rule 32.1 of the Code. However, the attorneys confirmed that, insofar as may be necessary, the Panel had consented, as contemplated in Rule 32.1, to the subsequent offer being made immediately after the closing of the initial offer; and

16.4 In the event that Harmony increases the offer consideration under the initial offer, the Panel had, under Rule 30.1, waived the obligation for Harmony to keep the initial offer open for the 21 day period referred to in that Rule,

17. The Executive Director duly approved the revised offer document and announcement and on 18 October 2004 confirmed in writing the dispensations sought by Harmony's attorneys under Rules 32.1 and 30.1 of the Code.

18. In a letter dated 20 October 2004 from Gold Fields' attorneys to the Executive Director, Gold Fields requested the Executive Director to make three rulings, stated as follows :

18.1 "*That Norilsk is a concert party as defined and accordingly subject to the applicable provisions relating to concert parties set out in the Code including the mechanism for calculating whether or not an affected transaction has occurred and the effective percentage shareholding to which the offer relates.*

18.2 That the Panel has jurisdiction over the early settlement offer as it is effectively an offer for 54,9% of the shares in Gold Fields;

18.3 *That the early settlement offer and the subsequent offer (as defined in the offer) is one composite transaction under the Panel's jurisdiction and accordingly should be extended on the same terms and conditions, particularly as to settlement, and should be subject to the same conditions precedent.*"

19. The Executive Committee of the SRP was convened to hear an appeal against the approval by the Executive Director of the mechanics and structures of the offers. The appeal was heard on 29 October 2004.

20. On 27 October 2004 and before the appeal was heard, Gold Fields sought further rulings from the SRP. These were contained in a letter and accompanying memorandum submitted by its attorneys. Gold Fields contended, *inter alia*, that :

20.1 for reasons Gold Fields was to advance before the High Court, the Harmony offers were a nullity;

20.2 it would be inappropriate and irregular for the SRP to hear Gold Fields' case before the High Court had itself ruled on the nullity issue; and

20.3 once the High Court had ruled on the question of nullity, and once a further offer had been submitted after such ruling, certain further rulings sought by Gold Fields should be heard and adjudicated upon.

21. The "*further rulings*" that Gold Fields wanted to be heard at some future date after the resolution of the High Court matter and after the submission of a new offer were contained in a memorandum accompanying the letter of 27 October 2004.

22. At the hearing on 29 October 2004, Gold Fields sought the assurance that it would be permitted to have the further rulings heard. Harmony declined to give such assurance. Harmony maintained that the further rulings, being also directed at the offers (the structure and mechanics of which had been approved by the SRP), constituted further appeals that were out of time. Gold Fields submitted that the rulings sought were not appeals against the approval by the Executive Director, that there had been no notification of the approval for any appeal to have commenced and that the word "*notification*" in Section A, paragraph 2(d) of the Code had to be read as including the qualification, "*by the SRP*".

23. At the hearing before the Executive Committee, Gold Fields contended that the rulings envisaged in its letter of 27 October should be heard there and then before the Executive Committee which had been convened to hear the matters set out in Gold Fields' attorneys letter of 20 October.

24. The Executive Committee characterised Gold Fields' request for rulings dated 20 October as an appeal proceeding and also ruled that the "*further rulings*" sought in the letter of 27 October were further appeals introduced outside the three day period after Gold Fields had received notification of the approval of the mechanics and structure of the offers referred to in the Harmony announcement dated 18 October 2004. Gold Fields did not seek condonation for the late filing of an appeal as it maintained that it was pursuing requests for rulings in the first instance.

25. On 5 November 2004, the Executive Committee made its decision in the following terms :

> "*Having read the submission of all the parties and further heard arguments by counsel representing all the parties the Panel's decision is that the actions of Harmony Gold and Norilsk Nickel did not amount to parties acting in concert. In the premises it is unnecessary to consider whether an affected transaction has occurred.*
>
> *The full reason for the Panel's decision will be furnished to the parties in terms of the Code.*"

26. On 26 November 2004, the Executive Committee delivered its reasons for its decision.

27. Notwithstanding the terms of the Executive Committee's decision, it is evident from its written reasons that the Committee did consider whether the early settlement offer and the subsequent offer constituted a composite transaction. The relevant extract from the Committee's reasons reads as follows :

> "*The Panel (the Executive Committee) decided that they should not be viewed as one composite offer. Although the Panel believed that the early settlement offer and the subsequent offer were connected, it also believed that they were independent of each other. The early settlement*

offer is made on certain terms and subject to certain conditions and the subsequent offer, which has its own terms and conditions, is only open to acceptance once the early settlement offer is completed. The fact that they follow one another does not mean that they should be viewed as one composite offer.

The Panel agreed with the view expressed by Marais JA in the ***Sefelana*** *case. It is only when the consummation of the subsequent offer takes place that a change in control would occur. That is when the transaction becomes an affected transaction.*"

28. On the question of whether Harmony and Norilsk were acting in concert, which would make the early settlement offer, on its own, an affected transaction, the Executive Committee concluded that the co-operation between Harmony and Norilsk "*was not for the purpose of entering into or proposing an affected transaction*".

29. The order on appeal that Gold Fields seeks is set out in paragraph 108 of Gold Fields' counsels' heads of argument in the following terms :

29.1 That the proposed transaction is an affected transaction either because -

(a) its structure, on a proper interpretation, is a single composite transaction implemented in two stages. The transaction is the

offer for the entire issued share capital of Gold Fields. The transaction is not to be confused with a mere step in its implementation ("*the early bird offer*"). However, even if that were done, it is manifest that each of the two stages ("*the early bird offer*") and the "*subsequent offer*" are to be read as part of a series of transactions with the result that both should be reviewed as a unitary or single composite transaction within the meaning of Section 440A of the Act as well as the Code;

(b) even if "*the early bird offer*" is regarded as self-standing and not part of a series, then that offer for the acquisition of 34,9% coupled with the 20% shares owned by Norilsk would give rise to an affected transaction by virtue of the fact that Norilsk is a concert party of Harmony.

29.2 Declaring accordingly that the Panel has jurisdiction over the "*early settlement offer*".

29.3 The "*early bird offer*" must be made subject to the same terms and conditions as attached to the subsequent offer. Thus, the "*early bird offer*" must be withdrawn, or at least not implemented, until the conditions attaching to the "*subsequent offer*" are fulfilled.

29.4 In addition, the splitting of the offer, which would result in the making of a partial offer, must be made subject to the approval of the shareholders of Gold Fields.

29.5 In terms of the Rulings sought in the memorandum (attached to Harmony's attorney's letter dated 27 October 2004), Gold Fields contends that the Harmony circular and the offers set out in that circular are not made in accordance with the requirements of the Code, particularly in relation to timing. In this regard, Gold Fields maintains that the subsequent offer does not comply with Rules 28.1, 28.6 and General Principle 1 and that the entire Harmony offer (both the early settlement offer and the subsequent offer) should be ruled to be void.

29.6 In the memorandum, Harmony advances the further contention that the early settlement offer constitutes a partial offer that does not comply with Rule 8.7 of the Code and is therefore void. It is contended further that if the early settlement offer constitutes a partial offer, the Panel is "*requested to confirm*" that in terms of Rules 32.1 and 32.2 of the Code no subsequent offer (including "*the subsequent offer*") can be made for shares in Gold Fields until a period of 12 months has passed from the date of the closing of the early settlement offer.

30. On 28 November 2004, we made rulings on the issues before us on appeal. The rulings were handed down in writing. These are the reasons for those

rulings. The rulings were given in advance of our reasons because of the urgency of the matter.

31. We made the following rulings :

"A. ***Procedural matters***

(a) GFL's request for rulings dated 20 October 2004 was incorrectly categorised as an appeal proceeding by the executive committee and should have been dealt with as a request for rulings in the first instance.

(b) GFL's request for rulings in the memorandum attached to ENF's letter dated 27 October 2004 was incorrectly categorised by the executive committee as an appeal proceeding which was out of time and should have been dealt with as a request for rulings in the first instance.

(c) In the exercise of its discretion, GFL's request for rulings will be dealt with by the appeal panel and will not be referred back for consideration to either the executive director or the executive committee of the SRP.

B. ***The concert party and related issues***

1. Norilsk is not a concert party with Harmony.

2. The early settlement offer is not an offer for 54,5% of the shares in GFL.

C. ***The composite transaction and related issues***

In the context of considering whether there has been an "affected transaction", the following rulings are made:

1. "the transaction" is the offer by Harmony for the entire issued share capital of GFL.

2. The transaction, upon its implementation, will have the effect of vesting control of GFL in Harmony.

3. The transaction is to be implemented in two stages through the early settlement offer and the subsequent offer.

4. *The division of the implementation of the transaction into two stages does not detract from the fact that there is a single composite transaction, namely, Harmony's offer for all of the issued share capital of GFL.*

5. *In addition and, in any event the early settlement offer and the subsequent offer are part of a series of transactions or scheme which, upon its implementation, will have the effect of vesting control of GFL in Harmony.*

6. *In the premises the panel has jurisdiction over the early settlement offer.*

D. ***Consequential rulings***

1. *The ruling sought in paragraph 108.3 of GFL's heads of argument dated 24 November 2004, namely, that the early settlement offer must be made subject to the same terms and conditions contained in the subsequent offer with the result that the early settlement offer must not be implemented until the conditions attaching to the subsequent offer are fulfilled, is refused.*

2. *The early settlement offer is not a partial offer.*

3. *The appeal panel refuses to give the confirmation sought in paragraph 3.4 of ENF's memorandum attached to the letter dated 27 October 2004.*

4. *The further rulings in relation to timing sought in paragraph 2 of ENF's memorandum attached to the letter dated 27 October 2004, are refused.*

E. ***Costs***

Harmony and GFL are ordered to pay the costs of the appeal tribunal in equal shares."

32. Prior to dealing with our reasoning, it is appropriate to refer to the ambit of our jurisdiction on appeal.

33. In terms of Rule 2(d) of the Code, an appeal from the Executive Director or from the Executive Committee "*... involves a re-hearing ...*". The ambit of a re-

hearing was dealt with by the Supreme Court of Appeal in **Commissioner of Inland Revenue v Da Costa** 1985 (3) SA 768 at 774G-J. A re-hearing involves the appellate tribunal considering afresh the issues that were placed before the first tribunal and to substitute its own decision based on the exercise of "*its own, original discretion*", even though the original tribunal was itself exercising a discretionary power. In other words, the right of appeal is not limited by the strictures of review. Nonetheless, it is a re-hearing of the matters that have been placed before the original tribunal for its consideration. In short, this appeal has an unfettered original jurisdiction to re-hear the issues that were originally placed before the Executive Director and the Executive Committee.

PROCEDURAL MATTERS

34. It was not until 29 October 2004 that the Ruling given by the Executive Director of the SRP on 18 October 2004 (the Ruling) and the letter from Harmony's attorneys to the Executive Director dated 15 October 2004 (referred to in the Ruling) was made available to Gold Fields. Prior to this, neither Gold Fields nor its advisers had been advised of the Ruling or the letter.

35. On 20 October 2004, and at a time when Gold Fields and its advisers were unaware of the Ruling, Gold Fields requested certain rulings from the Executive Director.

36. On 27 October 2004, and at a time when Gold Fields and its advisers were unaware of the Ruling, Gold Fields requested the "*further rulings*" from the Executive Director.

37. At the hearing on 29 October 2004, the Executive Committee ruled that the issues raised in the letter of 20 October and the letter dated 27 October and the attached memorandum fell to be dealt with as appeals against the Ruling and that the issues raised in the letter dated 27 October and the memorandum were out of time.

38. It is common cause that the Executive Director did not notify Gold Fields or its representatives of the Ruling as contemplated in Rule 2(d) and did not confirm the Ruling in writing to Gold Fields as contemplated in Rule 2(e).

39. The references to rulings in the Harmony circular addressed to Gold Fields' shareholders do not assist because they do not specify the precise ambit of the Rulings. In any event, the fact of the matter is that Gold Fields and its representatives were unaware of the letter comprising the Ruling until 29 October 2004.

40. On 3 November 2004, Gold Fields' attorneys addressed a letter to the Executive Director in which Gold Fields requested, *inter alia* that under Section A, Rule 2(a) and (d) and Section P, Rule 34 the Executive Director extend the period of three business days for the noting of an appeal against a

Ruling, that he condone the late delivery of the grounds of appeal contained in the letter of 27 October 2004 and consent to an extension or departure of the three-day period provided for in Rule 2(d). In support of the relief sought, Gold Fields pointed out that its letter of 3 November 2004 was delivered within three business days of the Ruling coming to the knowledge of Gold Fields and its advisers, i.e. within three days of 29 October 2004.

41. In Gold Fields' heads of argument and in oral argument advanced to us, Gold Fields made it clear that it was not pursuing an appeal against the Ruling in its attorney's letters of 20 and 27 October and the memorandum. Gold Fields said that it was pursuing a request for rulings in the first instance. This submission is obviously correct. Gold Fields could not have been pursuing an appeal against a ruling that it was not aware of until 29 October 2004. That this is so is also abundantly clear from the absence of any reference to the Ruling in the letters dated 20 and 27 October and the memorandum.

42. The Executive Committee erred in finding that the Harmony announcement and circular to Gold Fields' shareholders constituted notification of the Ruling to Gold Fields within the terms of the Code. The Code requires notification in writing by the Executive Director or the appropriate Panel. The Code does not invite constructive or presumptive notice.

43. For these reasons, we find that Gold Fields' request for rulings in the letter dated 20 October and its request for further rulings in the letter dated 27

October and the attached memorandum were incorrectly categorised as appeal proceedings by the Executive Committee and should have been dealt with as requests for rulings in the first instance.

44. Harmony contends that the matter of the "*new rulings*" must be referred to the Executive Director to hear or to convene a Committee or Panel to hear at first instance and that there is no scope for hearing the "*new rulings*" on their merits in this appeal.

45. Little turns on the Executive Committee's incorrect categorisation of Gold Fields' request for rulings in the letter dated 20 October as an appeal proceeding as the issues raised in that letter were dealt with by the Executive Committee on their merits. It follows that it matters not whether those self-same issues are dealt with by this appeal tribunal as an appeal from the decision of the Executive Committee or as a request for rulings in the first instance. Either way, the merits fall to be dealt with by us.

46. Rule 34 of the Code provides that :

> "*... the Panel shall enjoy a general discretion to authorise, subject to such terms and conditions as it may prescribe, non-compliance with or departure from any requirement of the Code ...*"

47. The general discretionary power accorded to the Panel finds its origin in Section A, paragraph 2(a) and in the introduction to Section C. It is recognised that it is impracticable to devise rules in sufficient detail to cover all circumstances which can arise in affected transactions. The Code provides that the spirit as well as the precise wording of the general principles and the ensuing rules are to be observed and expressly confers on the Panel a discretion "*... to relax the application of a rule in exceptional circumstances, for example, when it considers that its strict application would operate unduly harshly*".

48. Insofar as it is a requirement of the Code and a matter of general principle of the common law that an appeal from the Executive Director or from the Executive Committee is confined to a re-hearing of the matters which they considered (as a tribunal of first instance), we exercise our general discretion under Rule 34 to authorise non-compliance with or departure from such requirement by adjudicating the rulings and further rulings sought by Gold Fields in the letters of 20 and 27 October (and the attached memorandum) and will not refer those matters back for consideration to either the Executive Director or the Executive Committee.

49. In the exercise of our discretion, we have had regard to the following :

    49.1 Gold Fields' ignorance of the Executive Director's ruling at the time it sought the relief in the letters of 20 and 27 October 2004 (and the attached memorandum);

49.2 The absence of prejudice to Harmony and Norilsk in our adjudicating the merits of the rulings sought by Gold Fields instead of referring those issues back for decision to the Executive Director or to the Executive Committee;

49.3 The undesirability of different tiers of the SRP being seized of the matter at the same time. The creation of a procedural maze should be avoided for obvious reasons;

49.4 The delay and the additional costs that would be incurred by referring the matter to the Executive Director who, in any event, has the power in terms of the Code to hear those matters himself or to convene a Committee or Panel to do so as a tribunal of first instance;

49.5 The importance of the further rulings sought and the need for them to be decided upon as soon as possible.

50. It is in these circumstances that we regarded it as appropriate for us to deal with the merits of all of the rulings sought by Gold Fields.

THE CONCERT PARTY AND RELATED ISSUES

51. The Code defines "*acting in concert*" to mean :

"*Subject to subsection 2(a) of Section 440A (of the Companies Act, which contains certain deeming provisions that are not applicable to this matter), acting in pursuance of an agreement, an arrangement or understanding (whether formal or informal) between two or more persons pursuant to which they or any of them co-operate for the purposes of entering into or proposing an affected transaction."*

52. The Code defines "*affected transaction*" to mean :

"*Any transaction, including a transaction which forms part of a series of transactions or scheme, whatever form it may take, which -*

(a) taking into account any securities held before such transaction or scheme, has or will have the effect of -

(a) vesting control of any company (excluding a close corporation) in any person, or two or more persons acting in concert, in whom control did not vest prior to such transaction or scheme; or

(b) any person, or two or more persons acting in concert, acquiring or becoming the sole shareholder or holders of all the securities or all the securities of a particular class, of any company (excluding a close corporation).

(b) ...."

53. It is clear that the Code requires :

53.1 an agreement, arrangement or understanding;

53.2 conduct in pursuance of such agreement, arrangement or understanding; and

53.3 that the conduct in pursuance of such agreement, arrangement or understanding entails co-operation;

53.4 that such co-operative conduct is for the purposes of entering into or proposing an affected transaction.

54. Mr Unterhalter SC for Harmony and Mr Subel SC for Norilsk submitted that the concerted conduct must be aimed at achieving control, since it must be aimed at entering into or proposing a transaction that has the effect of vesting control. Put differently, if an affected transaction is by definition a transaction that confers control, to aim at entering into or proposing an affected transaction is to aim at conferring control.

55. Mr Kuper SC for Gold Fields submitted that the definition of "*acting in concert*" does not require that the purpose or content of the "*agreement, arrangement*

or understanding" be the acquisition of control. Mr Kuper contended that what the definition requires is co-operation by the parties pursuant to the agreement, arrangement or understanding, and that the purpose of the co-operation is the entering into or proposal of an affected transaction (i.e. a transaction that would have the effect of vesting control). Mr Kuper argued that the content of the agreement, arrangement or understanding may be different from the purpose or object of the co-operation. Put differently, the contents of the agreement, arrangement or understanding may itself not be objectionable but the purpose or object of the co-operation pursuant to that agreement may well be objectionable.

56. Mr Kuper's argument is consistent with Malan J's understanding of the definition of *"acting in concert*" in the case of **Securities Regulation Panel v MGX Holdings Ltd** (unreported WLD Case No. 16026/03 : 23 June 2004) :

> "*The definition of "acting in concert" (requiring only an "agreement, arrangement or understanding", pursuant to which the parties or any of them co-operate "for the purposes of entering into or proposing an affected transaction") requires only that the co-operation must be for the purposes of entering into or proposing a transaction having that* ***effect***, *whether intended or not. It does not require that the purpose of the "agreement, arrangement or understanding", or of the co-operation, be to gain "control""*.

57. The meaning of "*acting in concert*" advanced by Mr Unterhalter and Mr Subel is favoured by such authority as there is on the point (with the exception of the views expressed by Malan J in the **MGX Holdings** case).

58. In **Bock & Others v Duburoro Investments (Pty) Ltd** 2004 (2) SA 242 (SCA), the Court considered the meaning to be given to "*concert party*". Harms JA (at 256I - 257A) said as follows :

> "*One can assume that, in principle, the controlling shares in a company do have a premium but the fact is that the banks acted as creditors and none had a controlling interest and* ***they did not act in concert to take control of Molope Holdings****. This matter was fully thrashed out before the Securities Regulation Panel, and we agree with its conclusion*" (our emphasis).

59. The Ruling of the SRP which the Supreme Court of Appeal endorsed in the **Bock** case unambiguously described the meaning to be given to "*acting in concert*" with reference to concerted action with the purpose of conferring control. The Executive Committee of the Panel specifically contrasted acting for motivations to protect one's investment with acting in concert with another in order to secure the taking of control. In this regard, the Executive Committee said the following :

"*On each bank perfecting its security, it took control of its portion of Molope shares,* ***not to have the effect of vesting control of the company in them but to protect its interests as a creditor****. The banks exercised the rights they had under various pledge agreements. This transaction with Rebhold where the banks agreed to vote together was to minimise their losses incurred in the Molope Group,* ***not to assume control of Molope***" (Our emphasis).

60. This understanding of the meaning of "*acting in concert*" was also clearly evident in the judgment of Myburgh J in the matter between **Rand Gold and Exploration Co Ltd & Another v Fraser Alexander Ltd & 18 Others** (unreported WLD : 6 September 1994, Case No. 21801/94). In that case, the Court was concerned with an alliance which had been formed to vote in a particular manner at a shareholders meeting. Myburgh J said the following :

"*... the present Applicants have to satisfy me that there was some agreement, arrangement or understanding between various of the Respondents that, beyond tomorrow's meeting* ***they would exercise control at future meetings of the company*** *... there is ... no agreement, arrangement or understanding jointly* ***to exercise control*** *...*" (Our emphasis).

61. The need for parties who "*act in concert*" to co-operate with the purpose of conferring control is also accepted by the commentators Blackman,

Everingham and Jooste, with reference to the Commonwealth authorities (see the discussion in Blackman, Everingham, Jooste : Commentary on the Companies Act, vol. III at 15A-10 to 15A-14).

62. It is relevant that the UK TAKE-OVER PANEL in **THE MARINA DEVELOPMENT GROUP PLC** decision sets out the general principle that, in considering concert party issues, the UK TAKE-OVER PANEL would look to the objectives of the parties in entering into the agreement or arrangement in question. If those objectives did not involve obtaining or consolidating control of the company, then the UK TAKE-OVER PANEL would not regard the parties as being "*concert parties*".

63. We prefer the approach given to the meaning of "*acting in concert*" by the Supreme Court of Appeal in the **Bock** case to the approach adopted by Malan J in **MGX Holdings**. In any event, we are bound by the approach in the Bock case. In our view, therefore, it is necessary that the purpose of the co-operation be aimed at the vesting of control. This approach is also consistent with the principle behind the protection afforded by the Code, namely, to assure minority shareholders of the ability to sell their shares when the company in which they hold their minority stake changes control, and not to be disfavoured in the terms of such sale as compared to the sellers who conferred control to the offeror.

64. In **Sefalana Employee Benefits Organisation v Haslam & Others** 2000 (2) SA 415 (SCA), the Supreme Court of Appeal reiterated this principle (i.e. the mischief that the Code was designed to cater for) as follows :

> " ... *under consideration is the stark fact that the sole rationale for the existence of an obligation to make a similar offer to other shareholders, namely a transference of control, has fallen away prior to the making of an offer to them and there no longer exists any present prospects of the offeror acquiring control. Whose "fault" that is (and there may be none) is of no consequence; the fact of the matter is that shareholders who were in jeopardy of finding themselves locked into a company, the control of which has changed without their concurrence are no longer in such jeopardy. The mischief which the relevant provisions of the Act and the Code were enacted to counter is entirely absent (see* ***Spinnaker Investments (Pty) Ltd v Tongaat Group Ltd*** *1982 (1) SA 65 (A) at 72H - 73A)".*

65. It will emerge from our analysis of the relevant facts in this matter that the distinction between the two approaches has no bearing on the conclusion we have reached, namely, that Harmony and Norilsk did not act in concert for the purposes of achieving a change of control in **Gold Fields** (the approach in the **Bock** case) or for the purposes of entering into a transaction that would have that effect (the approach in **MGX Holdings**).

66. On 11 November 2004 (prior to the commencement of the hearing before us), Gold Fields' attorneys addressed a letter to the Executive Director in which they advised him, *inter alia* that :

66.1 it had come to their attention "*that material and relevant documents exist which have a bearing on the question of whether Norilsk in a concert party of Harmony ...*";

66.2 it was expected that the SRP, when approached by Harmony on an *ex parte* basis, would have called for and inspected such documents, but on the assumption that this had not been done, Gold Fields called upon the Executive Director to demand that Harmony in terms of Section 440D of the Companies Act produced to the Executive Director and make available to Gold Fields and the Panel the following documents :

(a) the board packs and board minutes relating to the decision by Harmony to embark upon the affected transaction;

(b) the correspondence and notes of telephone conversations with representatives of Norilsk and their advisers in relation to the affected transaction;

(c) the documents and slides presented to Harmony by its financial advisers in relation to the affected transaction and its planning;

(d) all other documents which may exist relating to contacts between Norilsk and its advisers, agents and Harmony.

66.3 The Executive Director was advised that if he did not undertake to call upon Harmony to produce the documentation referred to, Gold Fields would apply to Court urgently for a *mandamus* against the Executive Director.

67. A flurry of correspondence was exchanged between Gold Fields' attorneys and the attorneys representing the SRP in the aftermath of Gold Fields' demand for the production of documentation. Through the exchange, it emerged that the Competition Tribunal had, on 10 November 2004, directed Harmony to deliver to Gold Fields' attorneys, under embargo of confidentiality, proposals that had been made to Harmony by its financial advisers in relation to the transaction and its planning. At the resumption of the Competition Tribunal hearing on 12 November 2004, reference was made in argument to certain presentations or proposals made to Harmony by Investec Bank Ltd (Investec) and HSBC plc (HSBC).

68. On 16 November 2004, the Executive Director addressed a letter to the secretary of Harmony in which he demanded delivery (by close of business the next day) of the following documents :

68.1 The board of directors packs and board minutes relating to the decision by Harmony to embark upon the affected transaction;

68.2 The correspondence and notes of telephone conversations with representatives of Norilsk and their advisers in relation to the affected transaction; and

68.3 The documents and slides presented to or by Harmony and its financial advisers in relation to the affected transaction and its planning.

69. On 18 November 2004, Harmony's attorneys responded to the Executive Director's letter of 16 November. The Executive Director was advised that:

69.1 Gold Fields' attorneys had been provided with copies of the presentations made to Harmony by its financial advisers (Investec and HSBC) in the proceedings before the Competition Tribunal under the embargo of confidentiality and for use only in those proceedings;

69.2 the board packs and board minutes relating to the decision by Harmony to embark upon the transaction were confidential and contained matters of strategic importance to Harmony. Insofar as those documents made reference to Norilsk, copies of the relevant pages were enclosed of which part of the content of such documents (said to be confidential to Harmony) had been deleted. An abridged

time table for Harmony's offers (included in the board packs) was confidential and would not be made available by Harmony. Should the Panel so require, Harmony would make the board documents including the time table available to one or more members of the Panel at the commencement of the hearing on Friday, 19 November 2004 in order to enable the Panel to confirm that all such relevant pages had been provided to the Panel;

69.3 subject to the above, Harmony was prepared for the relevant pages enclosed under cover of the letter to be handed to the other parties to the proceedings provided they were used solely for the purposes of the proceedings, that they remained confidential, that they not be made available to any third parties and provided the proceedings were conducted in camera;

69.4 Harmony was not in possession of any correspondence and notes of telephone conversations with representatives of Norilsk and their advisers in relation to the Harmony offers and the Norilsk undertaking;

69.5 Harmony tendered production of a document titled "*JP Morgan Presentation*" to Gold Fields' attorneys with the same reservations attaching to the use of that document that applied to the other financial presentations to Harmony made by Investec and HSBC (which had been made available to Gold Fields' advisers in the proceedings before the Competition Tribunal).

70. At the hearing before the Panel on 19 November 2004 (by agreement with the legal representatives of Harmony, Norilsk and Gold Fields), the members of the Panel engaged in the exercise of satisfying themselves that documents or portions of documents, which Harmony objected to the production of, were not being unjustifiably withheld from Gold Fields and its advisers. In approaching this task, we were mindful, on the one hand, of Harmony's claim to confidentiality on strategic grounds particularly in the context of a hostile take over bid and, on the other hand, Gold Fields' entitlement to the use of documents relevant to the issues before the Panel. In the event of conflict between confidentiality and relevance, relevance (subject of course to legal privilege) carried the day for us. We made a ruling to that effect after hearing argument from counsel. After the exercise (which was carried out by members of the Panel in the presence of Harmony's advisers and to the exclusion of Norilsk and Gold Fields with their consent), the relevant documents were made available to the advisers of Norilsk and Gold Fields under the embargoes relating to their use imposed by Harmony and under the umbrella of the privacy of the proceedings before the Panel.

71. The production of these documents led to Mr Kuper arguing that there were other documents in Harmony's possession which were relevant to whether or not there had been "*concert party*" activity, why the Harmony proposal had been structured as a two-tiered offer and relevant also to the Panel's duty to determine the true nature of the transaction proposed by Harmony. Mr Unterhalter objected to the production of any further documents. He argued that there is no discovery process in proceedings before the Panel. He

submitted that Section 440D of the Companies Act (which had not been invoked by the Panel) empowered the Panel, as opposed to parties who appeared before the Panel, to summon the production of documents. Mr Unterhalter also took issue with the wide-ranging nature of Gold Fields' demand for documents and the notable absence of specificity in relation to the documents sought. He also pointed out that all of the documents identified by Gold Fields in its attorney's letter addressed to the Executive Director of 11 November 2004 which Harmony had in its possession and which were relevant had been produced. Mr Unterhalter objected to the 11th hour request for documents and the logistical difficulty which would confront Harmony's advisers should they be directed to produce the broad range of documents sought, having regard to their geographic dispersion. Mr Unterhalter also contended that the proceedings before the Panel were in the nature of "*adversarial litigation*" and, as such, Harmony was only obliged to produce such documentation as was formally requested by the Executive Director or summoned by the Panel in terms of Section 440D.

72. It became unnecessary for us to adjudicate these submissions made by Mr Unterhalter as the issue relating to the production of the further documents sought was resolved by agreement between Gold Fields and Harmony on the basis that Harmony and its advisers would use their best endeavours to produce such further documentation relevant to the issues raised by Mr Kuper and Gold Fields would accept as definitive such documents as Harmony and its advisers produced. It was agreed between the parties that the documentation would be made available **by Harmony to Gold Fields** and

Norilsk's advisers and to the Panel early the following week and within sufficient time to enable the parties to prepare for the adjourned date of the hearing which had been fixed by agreement for 25 November 2004.

73. It is appropriate for us to mention what we expect of parties in their interaction with the Executive Director and in proceedings before the Executive Committee or the Appeal Panel of the SRP, in relation to the production of documents. The following is relevant to the approach we adopt : Paragraph 2(c) of Section A of the Code encourages interested parties or their advisers to consult with the Executive Director (on an *ex parte* basis) in advance of a proposed course of conduct. In the wording of the Code "*In this way, the parties can obtain clarification of the basis on which they can properly proceed on the facts presented and so avoid taking action which might, in the event, be a breach of the Code*". Paragraph 2(b) of Section A of the Code imposes responsibilities on the directors of offeror and offeree companies and their financial advisers "*to act in the best interests of the holders of the respective securities*" and to ensure that "*the Code is complied with in the conduct of an affected transaction*".

74. In order to give effect to the very purpose of the Code and its Rules, namely, "*to ensure fair and equal treatment of all holders of relevant securities in relation to affected transactions*", a high level of co-operation is expected between the boards of interested parties, their individual directors and their advisers, be they legal or financial. A necessary concomitant is the disclosure of information and documentation that is relevant to matters which the SRP is

called upon to adjudicate. The need to carry out that interactive process in the utmost good faith is not only necessary in the context of rulings sought *ex parte* from the Executive Director but is also necessary in contested proceedings before all the tiers of the SRP, bearing in mind the absence of a discovery process similar to that available to litigants in Court proceedings. Parties and their advisers should not abrogate their responsibility to make a full and proper disclosure of all information and documents which may be relevant to the deliberations of the SRP on the basis that it is incumbent upon the SRP to procure the disclosure of information and documents through its investigative powers under Section 440D of the Companies Act. The SRP is not a litigant. It relies on the interested parties to disclose relevant facts and information, the existence of which the SRP is more often than not unaware of. In addition, the invocation of the investigative powers of the SRP in terms of Section 440D, will inevitably lead to delay - a luxury which very few matters that come before the Panel can accommodate. It is in these circumstances that we urge all interested parties and their advisers to ensure that all information which is relevant to rulings that the Panel is called upon to make, are timeously and properly disclosed.

75. Gold Fields contends that Harmony and Norilsk "*have aligned interests and that an agreement, arrangement or understanding (whether formal or informal) of some nature has been reached between them in regard to the future of Norilsk's stake in the enlarged Harmony and/or in relation to Gold Fields and Norilsk's gold assets".* Gold Fields maintains that there exists

between Norilsk and Harmony some collateral arrangement beyond the terms of the Norilsk undertaking, the existence of which is to be inferred from an exposure of the true relationship between Harmony and Norilsk and from the very terms of the Norilsk undertaking itself.

76. The relationship between Harmony and Norilsk is set out in some detail in a letter addressed to the Executive Director by Norilsk's attorneys dated 27 October 2004. It is also dealt with in the registration statement which Harmony filed with the Securities and Exchange Commission in the United States of America (the SEC filing) and in the affidavits which were filed in the South African Competition Tribunal hearing. Evidence of their relationship also emerges from the documents contained in the voluminous bundles made available by Harmony. Documents relevant to that relationship are also contained in the bundle of documents made available by Gold Fields. The *viva voce* evidence of two witnesses was led by Harmony at the commencement of the proceedings before us on 25 November 2004. The witnesses were Mr Adrian Coates, the head of HSBC's Global Sector, Metals and Mining and Mr Jan Sanders, a director of HSBC's Corporate Finance division. Their evidence is dealt with by us in the context of the chronological sequence of events referred to in the following paragraphs.

77. In November 2003, Harmony requested Investec to conduct a review of its operations and potential opportunities for acquisitions. In July 2004, Investec prepared a presentation for Harmony on the value to be obtained from Gold Fields South African Mining Assets. Investec also informed Harmony that

Norilsk was rumoured to be looking for an international entity into which its international assets could be infused.

78. On 15 July 2004, HSBC met with Harmony to present "*concepts for possible business combinations*". HSBC was requested to conduct further analysis for Harmony's consideration.

79. According to Mr Coates, he and his colleagues at HSBC decided to prepare an unsolicited pitch to Harmony concerning Gold Fields. He said that HSBC had a banker - customer relationship with Norilsk (and its holding company) which was confined to dealings in treasury products and that HSBC had never acted as an adviser to Norilsk. Mr Coates said that there was a rumour in the market place that Norilsk wanted to combine its mining assets with Gold Fields to form an international gold company. Mr Coates said that what he and his colleagues at HSBC had in mind was proposing "*a concert party deal*" between Harmony and Norilsk in relation to Gold Fields.

80. Towards the end of July 2004, Harmony requested Investec to perform a detailed analysis on the value proposition with regard to Investec's proposal on Gold Fields. This analysis was presented to Harmony by Investec in late July 2004.

81. On 3 August 2004, HSBC presented to Mr Bernard Swanepoel, Harmony's Chief Executive Officer and two other Harmony executives, a more detailed

analysis of the potential opportunities available to Harmony, including detailed considerations of the strategic implications for Norilsk. HSBC suggested the possibility of meeting with Norilsk to explore Norilsk's strategic thinking with respect to their investment in Gold Fields and to ascertain whether there might be synergy between Harmony's interests and Norilsk's objectives. Investec had also recommended an approach to Norilsk. HSBC had contacts with Norilsk. HSBC was requested to discuss a meeting with Norilsk.

82. During the week of 3 August 2004, a meeting was arranged for representatives of Harmony to meet together with Mr Leonid Rozhetskin, the Deputy Chairman of Norilsk in Moscow on 6 September 2004.

83. It bears mention that the presentation made by HSBC to Harmony in August 2004 sets out various proposed structures to maximise the commercial benefits of a proposed merger between Harmony and Norilsk. We quote from that presentation :

> "*H forms a "concert party" with N to bid for G*".
>
> and
>
> *"I (the joint company to hold the respective international interests) is listed as a new "major" in North America attracting premium valuation second uplift in value"*
>
> and

"*H and N can construct a post acquisition re - organisation* to suit their respective objectives".

84. On 11 August 2004, Gold Fields announced the IAMGold Transaction. HSBC analysed the IAMGold Transaction for Harmony. This analysis indicated that the offer had negative implications for the shareholders of Gold Fields and that there were opportunities for Harmony to present a transaction that would be more favourable to the shareholders of Gold Fields than the IAMGold Transaction.

85. Investec also analysed the IAMGold Transaction. Investec came to the conclusion that it involved value leakage from Gold Fields. Investec was of the view that an opportunity existed for Harmony to develop a proposal that would be more favourable to Gold Fields' shareholders than the IAMGold Transaction.

86. On 6 September 2004, Harmony, represented by Mr Swanepoel and HSBC, represented by Mr Coates, met with Norilsk, represented by Mr Rozhetskin. Harmony and HSBC presented their observations on the value leakage to Gold Fields' shareholders as a result of the IAMGold Transaction. Harmony and HSBC also presented "*a view on possible synergy benefits of a combination of Harmony and Gold Fields"*. Harmony expressed interest in exploring a possible transaction "*to acquire all or part of Gold Fields*". Harmony requested Norilsk to indicate whether it would be opposed to such a transaction. Norilsk undertook to consider the proposal and to revert to

Harmony. According to Mr Coates, Mr Rozhetskin, in no uncertain terms, told the meeting that Norilsk had no interest in negotiating with Gold Fields, Harmony, or anyone else regarding its own gold assets.

87. On 10 September 2004, Mr Coates spoke to Mr Rozhetskin. Mr Rozhetskin informed Mr Coates that Norilsk was dissatisfied with the proposed IAMGold Transaction and expressed interest in receiving a specific proposal from Harmony that was more favourable to the shareholders of Gold Fields.

88. On 23 September 2004, a further meeting took place between Mr Swanepoel, Mr Rozhetskin and HSBC in London, at which Mr Coates was in attendance. According to Mr Coates, HSBC had obtained legal advice (in relation to which Mr Coates elected to waive privilege) to the effect that there could be "*no other discussions*" between Norilsk and Harmony "*other than to treat Norilsk as an ordinary shareholder*". Mr Coates said that by the time of the meeting on 23 September 2004, HSBC had been fully briefed by its legal counsel on the subject of concert party activity and that based on the advice received, any discussions with Norilsk were to be confined to "*ordinary shareholder*" matters.

89. At the meeting in London on 23 September, Harmony expressed continued interest in "*a possible transaction*" but stated that a condition precedent would be the signature by Norilsk of an irrevocable agreement. A draft of the irrevocable agreement sought by Harmony was handed to Norilsk. The draft irrevocable agreement was an irrevocable undertaking by Norilsk "*to support*

such offer". Norilsk informed the meeting that it intended to obtain legal and financial advisers to advise on the irrevocable agreement "*and on the likelihood of success of such a transaction*". Norilsk said that Harmony had yet to provide any indicative pricing on the possible offer.

90. In the course of cross-examination by Mr Kuper, Mr Coates said that it was "*a condition precedent*" to Harmony making any offer to Gold Fields' shareholders that an irrevocable undertaking to support the offer be obtained from Norilsk.

91. On 28 September 2004, Mr Rozhetskin telephoned HSBC and expressed Norilsk's continuing interest in evaluating "*the possible transaction*".

92. Through early October 2004, Harmony's executives worked with Harmony's advisers to analyse the opportunity and to begin preliminary preparations for a possible unsolicited offer for all the Gold Fields' shares.

93. On 5 October 2004, a meeting took place in London between Harmony, HSBC and Norilsk and its advisers (Deutsche Bank). Mr Coates was at the meeting. At this meeting, Harmony suggested an indicative offer premium. Norilsk indicated that the premium was not adequate. A further draft of the irrevocable undertaking sought by Harmony was tabled. That draft made reference to the early settlement mechanism. Deutsche Bank expressed concern about the viability of the transaction. Mr Coates told the meeting that "*the early settlement offer was our way of addressing those concerns*".

94. Mr Coates said under cross-examination that it was discussed at the meeting of 5 October 2004 in London that it was not desirable for Norilsk to be part of the early settlement offer because if the subsequent offer failed, then Norilsk would be left with a diluted stake in Harmony. In addition, Harmony did not need to acquire Norilsk's shares in order to ensure that those shares voted down the IAMGold Transaction. In response to being asked why Norilsk was prepared to execute the irrevocable undertaking and not to participate in the premium attached to the early settlement offer, Mr Coates said that Norilsk found the Harmony offer "*attractive and that is why they accepted the irrevocable*". Mr Coates said that "*outside of the irrevocable there were no other arrangements*" between Harmony and Norilsk.

95. During the early part of October 2004, numerous negotiations took place between the legal advisers of Harmony and Norilsk regarding the terms of the proposed Norilsk undertaking. A number of qualifications, restrictions and conditions in respect of the undertakings were put into the original draft.

96. On 11 October 2004, Deutsche Bank and HSBC met to discuss Deutsche Bank's outstanding issues "*with regard to the irrevocable agreement and other aspects of the possible transaction*". Deutsche Bank indicated that Norilsk's board of directors planned to meet on 18 October 2004 to decide whether it would be prepared to sign the irrevocable.

97. On 11 October 2004, Mr Jan Sanders (of HSBC Corporate Finance) forwarded the "*draft irrevocable*" to Deutsche Bank under cover of an e-mail in which Mr Sanders said the following :

> "*Having reverted to our principals, we can confirm that, as we indicated in the meeting, there would be minimal appetite for pursuing the proposed transaction without the unqualified support of your client. As such, we can see no way to softening the request for a hard irrevocable on the basis previously outlined*".

98. On 12 October 2004, Deutsche Bank forwarded to Mr Sanders its comments on the proposed irrevocable. One of the clauses introduced by Deutsche Bank (clause 13) contained an indemnity by Harmony in favour of Norilsk in the event of the SRP or any Court finding that Harmony and Norilsk "*are concert parties and/or are acting in concert in relation to or in respect of the proposed offer ..*".

99. Mr Sanders said that Norilsk did not explain why it wanted clause 13. Mr Sanders suggested that it was possible that Norilsk's "*lawyers had been unleashed*". He said that certain changes made by Norilsk's lawyers (which he termed "*mark ups*") were reasonable but others were not. Mr Sanders said that the mark ups had been discussed with South African counsel, and that after receiving their input, the mark ups were dealt with during a conference call with Norilsk's negotiating team, during which call Mr Sanders had the assistance of South African counsel.

100. Under cross-examination, Mr Kuper asked Mr Sanders whether he had received legal advice concerning the indemnity sought (i.e. clause 13) and whether its inclusion would be damaging. Mr Sanders (after electing to waive privilege) said that there was nothing in the proposed irrevocable agreement between Harmony and Norilsk that would constitute Norilsk a concert party, and that this being so, he was not prepared to allow the clause to stand as it had no relevance. He said that Norilsk had no difficulty in withdrawing the clause.

101. In his evidence, Mr Sanders explained how the irrevocable had evolved from what he termed "*a hard irrevocable*" to a "*soft irrevocable*". He said that the hard irrevocable presented Harmony's best position as it allowed Norilsk very little opportunity to disengage from the undertakings sought. He explained that the final version of the irrevocable was considerably softened in the sense that it allowed Norilsk to withdraw from its undertakings in certain circumstances.

102. Both Mr Coates and Mr Sanders said that irrevocable undertakings of the nature in question were normal for the type of transaction in question.

103. Mr Sanders testified that Deutsche Bank's main concern was to satisfy itself that the proposed merger would succeed if Norilsk committed itself to the irrevocable undertaking sought and that they drew this comfort from Harmony's commitment to pursue the transaction.

104. Mr Coates and Mr Sanders said that aside from a telephone call between Harmony and Norilsk, the purpose of which was to confirm the signatures to the irrevocable agreement, they were not aware of any other discussions directly between Harmony and Norilsk.

105. There is nothing in the documents or in the evidence led to support Gold Fields' contention that there is any further arrangement or understanding between Harmony and Norilsk outside of Norilsk's written irrevocable undertaking. Norilsk (through Mr Rozhetskin) made it clear at the meeting in Moscow on 6 September 2004 that Norilsk had no interest in combining its own gold assets whether in Gold Fields, Harmony or in any other vehicle. The uncontested evidence is that HSBC's initial proposal of a concert party transaction between Norilsk and Harmony was stillborn. None of the financial presentations in the aftermath of the 6 September meeting (after Mr Rozhetskin made Norilsk's position clear) contained any indication of an extraneous arrangement between Harmony and Norilsk beyond the terms of the irrevocable undertaking. In short, there is no evidence of any joint purpose between Norilsk and Harmony to vest control of Gold Fields in the hands of Harmony or to enter into an affected transaction which would have that effect.

106. Norilsk has given a plausible (and uncontroverted) explanation for its motivation in giving the irrevocable undertaking to Harmony. The facts underpinning Norilsk's motivation appear in the main from a letter addressed to the Executive Director by Attorneys Werksmans dated 27 October 2004 :

106.1 Norilsk acted with an investment purpose, as any normal investor would, and not with a view to co-operating with Harmony to enter into or to propose an affected transaction;

106.2 when Norilsk was confronted with various investment options, it chose, in furtherance of its own investment interests to vote in favour of Harmony's proposed offer instead of the IAMGold Transaction;

106.3 Norilsk's determination to vote in favour of the proposed offer necessarily required rejection of the IAMGold Transaction and it was this that formed the basis on which Norilsk entered into the undertaking with Harmony;

106.4 at no time has Norilsk had a "*joint purpose*" with Harmony to enter into an affected transaction or to vest control of Gold Fields in Harmony. Norilsk's assessment has been a unilateral one as has been its decision to support one transaction rather than another;

106.5 when Gold Fields announced the IAMGold Transaction, Norilsk expressed its annoyance at the IAMGold Transaction to senior management of Gold Fields. Having analysed the terms of the IAMGold Transaction, Norilsk remained opposed to it;

106.6 Norilsk had no choice but to provide the undertaking on the terms requested as it believed that the proposed offer was a favourable offer

for its shares in Gold Fields and that it fitted in with Norilsk's own investment purposes;

106.7 Norilsk did not want to be bound absolutely and indefinitely by the undertaking and negotiated with Harmony a number of restrictions and conditions in respect of its obligations;

106.8 in the final undertaking, Norilsk agreed, *inter alia*, to vote all of its Gold Fields' shares against the proposed IAMGold Transaction; not to accept the early settlement offer in respect of any of its Gold Fields' shares; and subject to certain conditions, to accept the subsequent offer in respect of all of its Gold Fields' shares.

107. An undertaking from a shareholder that such shareholder will accept an offer when made (and will retain its shares in order to make good on the undertaking) cannot of itself amount to acting as concert parties. It is self-evident that if voting in favour of an offer does not amount to acting in concert with the offeror, then merely undertaking to vote in favour of an offer does not amount to acting in concert. In interpreting the City Code, the United Kingdom Panel in the **Marino** ruling said the following :

"*It is not the practice of the Panel to interpret the Code as requiring a person who expresses an intention to accept an offer (or to enter into an irrevocable commitment to do so) to be regarded as acting in concert with the offeror - an interpretation which would extend the*

concept of "acting in concert" to cover a commercial arrangement between an offeror and a shareholder in an offeree company, such as that in the present case, which was never intended to be included."

108. Gold Fields contends that the irrevocable undertaking given by Norilsk is fundamentally different from a mere voting agreement (with which the UK Panel in **Marino** was concerned) as it amounts to "*an agreement not to dispose of or encumber shares, not to accept an offer made to shareholders (i.e. not to accept the early settlement offer) and finally to vote against the IAMGold Transaction*". Gold Fields contends that the purpose of the co-operation between Harmony and Norilsk is the proposal of an affected transaction which goes far beyond the normal voting provision and that the effect of that transaction will be to vest control of Gold Fields in Harmony. Gold Fields submits that Harmony has confused the issue of the purpose for which an agreement is entered into and the effect of that agreement. Gold Fields relies on Harmony's own evidence to the effect that without the irrevocable undertaking, Harmony would not have proceeded with its proposal. Gold Fields contends that by accepting, as Harmony does, that Norilsk "*wish(ed) to be relatively confident that the transaction had prospects of success*" necessarily involves the concession that Harmony accepted that its agreement with Norilsk would have the effect of vesting control of Gold Fields in it. Were that not so, contends Gold Fields, then Norilsk would not have been "*relatively confident*" and would not have entered into the agreement for fear of "*irreparably harming the relationship between Norilsk*

and Gold Fields' management" (the latter being an admitted and understandable concern on the part of Norilsk).

109. There is no evidence to controvert Norilsk's version that in agreeing to vote against the IAMGold Transaction, Norilsk was acting as an investor in a manner to maximise the value of its investment. The fact that Harmony prescribed as a condition to it proceeding with the proposed offer that Norilsk undertake to vote against the IAMGold Transaction does not advance Gold Fields' cause. The condition was imposed by Harmony and was not volunteered by Norilsk. In addition, there are further conditions to Harmony proceeding with the subsequent offer apart from the defeat of the IAMGold Transaction. In any event, the defeat of the IAMGold Transaction does not vest control of Gold Fields in Harmony. There is no evidence that Norilsk's purpose in voting against the IAMGold Transaction was to achieve the vesting of control of Gold Fields in Harmony. This being so, Norilsk's undertaking to vote against the IAMGold Transaction does not constitute co-operation between Norilsk and Harmony to enter into or to propose an affected transaction.

110. Since the announcement of the IAMGold Transaction, Norilsk has been consistent in its concern about the merits of the IAMGold Transaction. That view was not influenced or affected by Harmony's subsequent offer. The Harmony proposal was viewed by Norilsk as a more attractive investment than the IAMGold Transaction. Whilst a natural consequence of the success of the Harmony offer and the failure of the IAMGold Transaction would be to

affect Gold Fields' future strategy, it does not follow that this was the basis or motivation for Norilsk's actions. Norilsk has consistently acted with a view to maximising the value of its financial investment in Gold Fields. Even if it is assumed that every vote against the IAMGold Transaction is a vote in favour of the Harmony transaction, an undertaking to vote against the IAMGold Transaction is no more than an undertaking to vote in favour of the Harmony transaction (which is clearly not offensive).

111. Gold Fields' contention that Norilsk's undertaking not to participate in the early settlement offer is evidence of concert party behaviour with Harmony, is also without merit. Gold Fields' submission is predicated on the assumption that there is no commercial rationale for Norilsk giving such undertaking and therefore there must be something more than meets the eye. This is not so. Norilsk advances cogent reasons why it agreed not to participate in the early settlement offer :

111.1 the value of Norilsk's investment would be diminished if it were left holding shares in both Gold Fields and Harmony, which would almost certainly be the result if it were to tender to accept the early settlement offer as a result of the application of the pro rata allocation requirement;

111.2 Norilsk also wished to mitigate the risk that it would receive a substantial, and therefore illiquid, stake in Harmony should other Gold Fields' shareholders not find the proposed offer attractive and reject it;

111.3 the undertaking provides that Norilsk will be released from its undertakings if there is a competing offer and certain conditions are met. If Norilsk were to tender its shares in the early settlement offer, it would bear the risk of then being unable to accept a competing offer on better financial terms at a later date;

111.4 the value proposition of the proposed offer is substantially predicated upon Harmony's applying its management operating philosophy to Gold Fields' operations, and this is likely to require Harmony holding significantly more than a 20% interest in Gold Fields.

112. The essence of this explanation is that Norilsk was comfortable in accepting Harmony's requirement that it not accept the early settlement offer as it coincided with Norilsk's own investment requirements and was, again, a means for maximising the potential financial value of its investment.

113. The undertaking provided by Norilsk is not absolute and without conditions or limitation. Norilsk is free to accept a competing offer if certain conditions are satisfied. Norilsk also ceases to be bound if a material adverse change affecting Harmony occurs. These facts are consistent with the actions of a normal investor seeking to maximise its investment and are not consistent with concert party activity with Harmony aimed at arresting control of Gold Fields.

114. There is no evidence to controvert Harmony and Norilsk's version that other than for the Norilsk undertaking, no other agreements, arrangements or understandings exist between Norilsk and Harmony.

115. On the facts presented to us, Norilsk did not enter into the written undertaking to co-operate "*for the purposes of entering into or proposing an affected transaction*" or for the purpose of "*vesting control*" of Gold Fields in Harmony.

116. It follows then that whether the approach of the Supreme Court of Appeal in **Bock** or the approach of Malan J in the **MGX Holdings** case is to be preferred, Norilsk and Harmony did not "*act in concert*" as contemplated in the Code.

117. For the same reason the early settlement offer is not an offer for 54,9% of the shares in Gold Fields. Norilsk's stake in Gold Fields does not fall to be aggregated with the early settlement offer.

THE COMPOSITE TRANSACTION AND RELATED ISSUES

118. The question to be answered under this heading is whether the transaction or transactions being proposed by Harmony will have the effect of vesting control of Gold Fields in Harmony. This entails identifying and categorising the transaction or transactions proposed by Harmony.

119. Harmony contends that the early settlement offer and the subsequent offer are two offers not one. Harmony points out that the early settlement offer is open for acceptance and closes on particular terms as to settlement, up to 34,9%, and is subject to particular suspensive conditions. The subsequent offer will be extended only once the early settlement offer closes, and will be subject to different terms as to settlement and suspensive conditions. Harmony maintains that it is offering to take 34,9% of Gold Fields without reservation, but is willing to take more only in the event that the IAMGold Transaction is defeated and that Harmony obtains control. Harmony contends that this is precisely what the Code allows it to do, and that had it made an offer for 35%, once such offer had been accepted and closed, it would have been obliged to extend an offer for the remainder for the same or comparable consideration as the first offer. In other words (according to Harmony), the consequences of an affected transaction imposed by the Code apply only to a transaction that "*has indeed vested control*".

120. Gold Fields submits that the transaction is the business dealing or act through which the securities come to be held or acquired, and that such business dealing is set out in the offer document and circular addressed to Gold Fields' shareholders read together with Harmony's preceding SENS announcement of 18 October 2004. Gold Fields contends that the transaction for acquisition is variously described by Harmony as a "*proposed merger*" or "*proposed offer*" or "*offers*", which, if consummated, involves Harmony acquiring the entire share capital of Gold Fields by way of two immediately consecutive offers.

Gold Fields argues that the early settlement offer and the subsequent offer were presented by Harmony as mere elements of the merger transaction. In support of this contention, Gold Fields refers to the fact that Harmony has made an irrevocable legal commitment to make an offer for the entire issued share capital of Gold Fields. In this regard, Gold Fields refers to :

120.1 the SENS announcement where Harmony says :

> "*Through the making of this announcement, Harmony has irrevocably committed to offer to acquire the entire issued share capital of Gold Fields in the following manner ...*"; and

120.2 the Harmony offer document where the following is said :

> "*Harmony hereby offers to acquire the entire issued share capital of Gold Fields in the following manner ...*"

121. Gold Fields submits that once there is an irrevocable commitment to make both offers, then it is "*inescapable that the transaction, taken as a whole, is the transaction which comes about through the offer to offer or through the irrevocable commitment to make two offers. That is the transaction which Harmony has chosen to offer to the shareholders of Gold Fields*".

122. The alternative proposition advanced by Gold Fields is that if the early settlement offer is not part of one composite transaction, then the early

settlement offer is a transaction "*which forms part of a series of transactions*" which has or will have the effect of vesting control of Gold Fields in Harmony.

123. Harmony submits that the definition of an "*affected transaction*" makes it clear that an affected transaction does not cease to be such merely because it forms part of a series of transactions or a scheme.

124. The gravamen of the Harmony argument is that it remains necessary for the transaction that forms part of the series or scheme to vest control for it to be an affected transaction. The mere fact that it may also form part of a series (which would ultimately vest control) does not mean it becomes an affected transaction.

125. Harmony contends that the Rules in the Code make it clear that the consequences of an "*affected transaction*" apply only to a transaction that has indeed vested control. Harmony refers in particular to Rules 8.1 and 8.2 in this regard.

126. It is submitted by Harmony that it was never intended that, if a party were to make seven successive offers of 5% each, each to close before the next opens, the first offer must be regarded as an affected transaction, triggering a mandatory offer in terms of Rule 8.1, merely because it forms part of a series that will ultimately entail control. In this regard, Harmony relies on the following dictum of the Supreme Court of Appeal in **Sefalana Employee Benefits Organisation v Haslam & Others** 2000 (2) SA 415 (SCA) at 417G-J:

"*What requires to be appreciated at the outset, so it seems to me, is that shareholders are not ordinarily entitled to equality of treatment when offers to purchase their shares are made. A purchaser who sets out to acquire control of a company, not in one fell swoop, but incrementally by way of a succession of purchasers from different shareholders over an extended period of time, is under no legal or moral obligation to offer or to pay the same price from the inception of and throughout the exercise. It is only when the stage is reached at which an intended or proposed transaction will, if consummated, result in a change of control within the meaning of the Code that the hand of the Panel is laid upon the transaction*".

127. The Oxford English Dictionary (volume 2) defines the meaning of a "*series*" as a "*succession, sequence, or continuous course of action or conduct; a connected sequence; an order of succession*". Harmony itself describes the offers as "*two immediately consecutive offers*" in the offer document. Harmony does not (and cannot) dispute that the early settlement offer and the subsequent offer form part of a series of transactions.

128. The crisp question is whether or not the transaction (i.e. the early offer for the purposes of this section of the argument) must of itself vest control to qualify as an affected transaction even if it is part of a series (the early offer and the subsequent offer) which vests control.

129. Grammatically, the primary phrase is "*any transaction*". The parenthesised words (i.e. "*Including a transaction which forms part of a series of transactions*") enlarge the meaning to be given to the words "*any transaction*". The parenthesised words do not qualify or limit the meaning to be given to the words "*any transaction*". The manner of interpreting the word "*include*" was explained in **R v Thebele** 1956 (4) SA 570A at 575-576, as follows :

> "*The word "include" is often used in the definition of acts of parliament for the purpose of* ***enlarging*** *the meaning of a word or phrase by bringing it under something which is not comprehended under the ordinary meaning of that word or phrase*" (our emphasis)

130. **Blackman** understands the phrase to mean that "*on the face of it, it would appear that such a first-step transaction is now to be treated as part of a single transaction, including the offer made for control or to consolidate control*" (v.3 15A-18 to 15A-19).

131. The meaning given to the parenthesised words by Mr Unterhalter and Mr Subel (namely, that an affected transaction does not cease to be such merely because it forms part of a series of transactions or a scheme) does violence to the ordinary grammatical meaning of the words in the context of the sentence in which they appear and also offends against the logical construct and purpose of the words. Mr Unterhalter and Mr Subel's interpretation renders nugatory the words in parenthesis. Had those words been omitted by

the legislature, on the interpretation advanced by Mr Unterhalter and Mr Subel, an affected transaction which formed part of a series of transactions would not cease to be such merely because it forms part of a series. In other words, there is no need for the parenthesised words to achieve the objective of the interpretation advanced by Mr Unterhalter and Mr Subel. The parenthesised words must be given meaning to.

132. From a purposive point of view, it is clear that the legislature intended to cover (through the expression "*a series*") linked transactions in order to prevent the Companies Act and the Code from being circumvented through the simple expedient of splitting up the basic transaction.

133. In defining an "*affected transaction*" in Section 440A of the Companies Act, the legislature has used words of wide import :

> "***Any*** *transaction", "a* ***series*** *of transactions", "scheme", "****whatever form*** *it may take" and "****has or will have*** *the effect".*

134. Each of these words must be given proper significance. This is particularly so since Section 440A is part of a chapter introducing remedial measures. It is a settled rule of construction to extend the remedy as far as the words will admit :

> **Looyen v Simmer & Jack Mines Ltd & Another** 1952 (4) SA 547A;

Glen Anil Development Corp Ltd v SIR 1975 (4) SA 715AD at 727H - 728A;

Sefalana Employee Benefits Organisation v Haslam & Others 2000 (2) SA 415 (SCA), p 419H-I, para (10)

135. Harmony's reliance on the judgment in the **Sefalana** case is, in our view, misplaced. The purchaser postulated by Marais JA (in paragraph 4 of the judgment) did not have the intention to acquire control of a company in one fell swoop but incrementally by way of a succession of purchases from different shareholders over an extended period of time. In other words, the purchases were not transactions forming part of a series of transactions. Put another way, Marais JA was specifically not saying that a transaction which forms part of a series of transactions is not an "*affected transaction*" unless that transaction (irrespective of its connection to the series of which it forms part) itself has or will have the effect of vesting control.

136. The Harmony argument is postulated on the assumption that a transaction is only an "*affected transaction*" when it has the effect of vesting control. The postulate is not correct. A transaction which "*will have the effect*" of vesting control is also an "*affected transaction*". This was clearly recognised by Marais JA in **Sefalana** when he said that :

"*It is only when the stage is reached at which an intended or proposed transaction will, if consummated, result in a change of control within the*

meaning of the Code that the hand of the Panel is laid upon the transaction".

What Marais JA was clearly recognising is the distinction between when the effect of a transaction triggers the regulatory jurisdiction of the Panel, on the one hand, and the existence of a "*state of affairs*" which triggers an obligation to make a mandatory offer to other shareholders. The transaction must result in a change of control in order to trigger a mandatory offer. This is clear from Rule 8.1 of the Code. The hand of the Panel will however be laid on the transaction prior to the stage at which there is a change of control. An "*affected transaction*" comes into existence where the transaction "*... will, if consummated, result in a change of control*" (as per Marais JA, para 4).

137. Fundamental to this interpretation is our conclusion that the determination of whether the transaction will have the effect of vesting control must be determined with reference to the time at which the proposal (i.e. the transaction) to the target company's shareholders is made. We have reached this conclusion for the following reasons :

137.1 The words "*will have*" postulate a future event. If the time for testing that future event was at the time of its occurrence, the words (i.e. "*will have*") are rendered nugatory as that state of affairs is squarely covered by the words "*has ... the effect of ... vesting control*". The legislature clearly intended to distinguish between a transaction which

has the effect (there and then) of vesting control and a transaction which will (at some future point in time) have the effect of vesting control. Harmony's contention that "*the consequences of an "affected transaction" apply only to a transaction* ***that has indeed vested control***" (our emphasis), does violence to the ordinary grammatical meaning of the definition of an "*affected transaction*" and completely ignores the words "*will have*";

137.2 In their commentary on the definition of an "*affected transaction*" in Section 440A, the authors of Henochsberg On the Companies Act (vol. 1) at page 965, state the following :

> "*The operation of the Code, however, postulates the existence of an offer in respect of an affected transaction (see the definition of "offer" in paragraph 3 of Section B of the Code and the numerous provisions relating to the making and content of such an offer). It is submitted, accordingly, that whether a particular transaction qualifies as an affected transaction (with the result that the giving effect thereto will require compliance with the Rules) entails the determination,* ***as at the date of the offer in respect of such transaction is to be made****, of whether* ***at the date of giving effect to the transaction****, in the event that the offer were to succeed, either of the relevant effects will exist."* (Our emphasis)

137.3 Section 440C of the Companies Act describes the functions of the Panel as follows :

"*The functions of the Panel shall be to -*

(a) regulate, in such manner as it may deem necessary or appropriate -

(i) all transactions or schemes which constitute affected transactions;

(ii) all proposals ***which on successful completion or implementation would become affected transactions****..."* (Our emphasis)

137.4 The very first section of the Code, in describing its nature and purpose, provides that the Panel is empowered and required to make rules on certain matters, including "*rules to regulate all transactions and schemes which constitute "affected transactions" and* ***all proposals which on completion or implementation would become*** *"affected transactions*" (our emphasis).

137.5 Rule 8.1A of Section F is also instructive. It provides that if a proposal or offer "*may result in an affected transaction"* on completion or

implementation, then such proposal or offer must comply with the Rules with regard to disclosure and conduct during the making of the proposal or offer.

137.6 Our approach is consistent with the approach adopted by the Appellate Division in **Spinnaker Investments (Pty) Ltd v Tongaat Group Ltd** 1982 (1) SA 65A (at page 73). In that Court's consideration of the provisions of Section 314(2) of the Companies Act (the precursor to Section 440A). Diemont JA said the following :

> "*If the take-over scheme does not involve the making of an offer for shares by the offeror which at the time of making the offer will have the prescribed effect, the provisions of Section 314(2) will have no application to the transaction. It* ***will be*** *seen that two factors are of critical importance : it must be established what the* ***effect*** *of the offer will be, and that effect must be ascertained, not at any time, but at the* ***time*** *when the offer is made.*" (The Court's emphasis)

137.7 The legislation is remedial. Proper effect must be given to the intent and purpose of the legislation so as to ensure that the mischief sought to be dealt with is not readily overcome. The protections afforded to shareholders and other interested parties in the Code would be rendered ineffective if the hand of the Panel were only laid on a

transaction as and when it had the effect of vesting control. What the legislature intended was that the hand of the Panel would be laid on a transaction which, if implemented, would have the effect of resulting in a change of control. If those whom the legislature sought to protect had to wait until an actual change of control occurred before the protections afforded to them by the Rules of the Code were spurred into action, it would be a case of "*too little too late*" as they would effectively be deprived of the protection offered by the Code.

138. The case law indicates that a "*scheme*" is an elastic term that connotes a coherent plan or purpose which contemplates the specific consequence identified by the legislature. It includes a composite transaction which will have the effect described by the legislature and arises where the steps taken are so connected with one another that, when viewed as a whole, they have the particular effect identified in the legislation. At the very least, a scheme consists of a series of connected transactions which are part of a preconceived plan.

Sammel & Others v President Brand Gold Mining Co Ltd 1969 (3) SA 629 AD at 703H;

Meyerowitz v CIR 1963 (3) SA 863A at 871F - 873D;

Ovenstone v SIR 1980 (2) SA 721A at 731H - 732A

139. In our opinion, the merger proposal made by Harmony to Gold Fields' shareholders is a transaction or scheme that will have the effect of vesting

control of Gold Fields in Harmony on implementation or consummation of the merger proposal. The early settlement offer and the subsequent offer are the mechanics by which the merger objective is sought to be achieved. They are not the transaction or the scheme - the proposed merger is. If the early offer and the subsequent offer do merit individual scrutiny and are not part of one composite merger transaction or scheme, then they both form part of the same series of transactions or scheme which, upon its implementation, will have the effect of vesting control of Gold Fields in Harmony.

140. In these circumstances, we came to the conclusion that the Panel has jurisdiction over the early settlement offer either because it forms an indivisible part of a single composite transaction (i.e. Harmony's proposal to acquire all the issued share capital of Gold Fields) or because the early settlement offer and the subsequent offer are part of a series of transactions or scheme which, in either case, will, upon implementation have the effect of vesting control of Gold Fields in Harmony.

THE CONSEQUENTIAL RULINGS

141. Gold Fields contends that once it is found that there is an "*affected transaction*"and that the Panel has jurisdiction over the "*early settlement offer*", then the Panel should rule that the early settlement offer must be made subject to the same terms and conditions contained in the subsequent offer with the result that the early settlement offer must not be implemented until

the conditions attaching to the subsequent offer are fulfilled (paragraph 108.3 of Gold Fields' counsel's heads of argument).

142. We refused the relief sought for the following reasons :

142.1 There is no power in the Code given to the SRP (apart from the provisions in Rule 8 Section F relating to mandatory offers) to order a party to make offers in a particular structure or on particular terms;

142.2 We have found that the early settlement offer is an "*affected transaction*". Upon its closure (i.e. upon its implementation), Harmony is obliged to extend a further offer for all the shares in Gold Fields "*for the same or a comparable consideration*" applicable to the early settlement offer. In our view, this obligation is discharged by Harmony's irrevocable commitment to make the subsequent offer a day after the consideration is settled in respect of the early settlement offer. Our reasons for finding that the subsequent offer constitutes a discharge of Harmony's obligations under Rule 8.1 of the Code will be dealt with below. This however is not the focus of Gold Fields' complaint or the relief that it seeks. Gold Fields maintains that :

> "*Harmony was obliged immediately to make the subsequent offer without any conditions. If it intended to subject the subsequent offer to any conditions, for example the approval of*

the competition authorities, then the "early bird offer" had to be made subject to those same conditions, or withdrawn, or at least not implemented, until the conditions were fulfilled". (Gold Fields' counsel's heads of argument, para 8.3.2).

142.3 The Panel has power or jurisdiction to ensure that a proposal or offer which if successfully completed may result in an affected transaction complies with the rules with regard to disclosure and conduct during the making of the proposal or offer (Rule 8.1A of Section F of the Code). The SRP however does not have the power or jurisdiction to prescribe the terms and conditions that are to be contained in such proposal or offer.

142.4 We are satisfied (and we do not understand Gold Fields to contend otherwise) that the early settlement offer complies with the rules with regard to disclosure and conduct during the offer period. Gold Fields' complaints concerning timing issues relating to both the early settlement offer and the subsequent offer form the subject matter of separate rulings made by us, the reasons for which will be dealt with separately below.

142.5 In our view, the Harmony merger proposal (implemented through the mechanics of the early settlement offer and the subsequent offer) treat all of the shareholders both fairly and equally and do not offend against the Rules of the Code. We refrain from making any comment on the

commercial advantages or disadvantages of the Harmony proposal (Section 440C(1)(b) of the Companies Act).

142.6 Gold Fields' shareholders have a right to decide whether or not to accept the early offer (subject to pro-ration in the event of acceptances reaching 34,9%) or the subsequent offer. If a further premium is offered to Gold Fields' shareholders under the subsequent offer, then shareholders who accepted the early settlement offer will get the benefit of the premium. In other words, both the early settlement offer and the subsequent offer are for the "*same consideration*". Rule 8.3 of the Code specifically recognises that an acquisition of securities would give rise to a requirement to make a mandatory offer notwithstanding the fact that such mandatory offer is dependent upon "*other conditions, consents or arrangements*" provided they are "*clearly communicated to all relevant parties*". The fact that the subsequent offer is subject to suspensive conditions which are not applicable to the early settlement offer does not (on that ground alone) make either the early settlement offer or the subsequent offer offensive to the spirit and Rules of the Code. We are not persuaded that the prejudice contended for by Gold Fields which it alleges will result from Harmony's ability to pursue its two-step offer, is well founded. We are mindful that the principle of fairness and equality which must apply in take-over bids requires parity of regulation as between the offeror and the incumbent board (for the benefit of the target company shareholders). We are satisfied that this

objective has been achieved. The Executive Director was approached for rulings by Harmony and made rulings on the basis that the provisions of the Code were applicable. We also find that the Rules in the Code regarding disclosure and conduct have been complied with. Gold Fields has not produced any evidence to the contrary. It does no more than postulate what consequences might follow if the early settlement offer was "*unregulated*" (paragraph 22 of Gold Fields' counsel's heads of argument). Gold Fields' concern is theoretical and has no factual application to the transaction under scrutiny. We are also not persuaded that the possible exploitation of opportunities by arbitrageurs (alleged by Gold Fields to be one of the consequences of Harmony's two-step offer) results in market chaos or, more importantly, unfairness and inequality to Gold Fields' shareholders.

142.7 For these reasons, we refuse to make the ruling sought in paragraph 108.3 of Gold Fields' counsel's heads of argument.

143. Harmony contends that the early settlement offer constitutes a partial offer which does not comply with Rule 8.7 of the Code and is therefore void. This being so, Harmony submits that in terms of Rules 32.1 and 32.2 of the Code, Harmony is precluded from making the subsequent offer (or any offer for shares in Gold Fields) until a period of 12 months has elapsed from the date of the closing of the early settlement offer. We do not agree with these submissions for the following reasons :

143.1 We have found that Harmony and Norilsk are not concert parties. The disclosure requirements in Rule 8.7 of the Code do not apply as they are predicated on "*a person or group of persons acting in concert*";

143.2 Rule 32.1 of the Code only applies to an offer which "*has been withdrawn or has lapsed*". None of these jurisdictional pre-requisites apply to either the early settlement offer or the subsequent offer;

143.3 Rule 32.2 renders the provisions of Rule 32.1 applicable "*following a partial offer which could result in a holding of not less than the specified percentage and not more than 50% of the voting rights of the offeree company ...*";

143.4 Harmony and Norilsk are not acting in concert. This being so, the early settlement offer is for 34,9% of the issued share capital of Gold Fields. Accordingly, the early settlement offer does not qualify as a partial offer. Even if Harmony and Norilsk were acting in concert, Rule 32.2 would not apply because the early settlement offer would then be an offer for 54,9% of the issued share capital of Gold Fields. Harmony's merger proposal (comprising the early settlement offer and the subsequent offer) is also not a "*partial offer*" as contemplated in Rule 32.2;

143.5 it is in these circumstances that we made the ruling that "*the early settlement offer is not a partial offer*" and also refused to make any rulings in terms of Rules 32.1 and 32.2 of the Code.

144. Gold Fields submitted that the subsequent offer does not comply with Rules 28.1, 28.6 and General Principle 1 and for these reasons the entire Harmony proposal should be declared to be void. We refused the rulings sought by Gold Fields for the following reasons :

144.1 Rule 28.1 provides as follows :

> "*An offer shall initially be open for at least 21 days following the date on which the offer document is posted*".

144.2 Gold Fields submits that the Harmony offer circular contains both the early settlement offer and the subsequent offer in one document and are both required to be open for at least 21 days following the date on which the offer document was posted (on or about 20 October 2004). Gold Fields argue that the subsequent offer does not "*open*" until, at the earliest, the first business day following the closure of the early settlement offer (expected to be on or about 29 November 2004). This being so Gold Fields contends that the subsequent offer does not comply with Rule 28.1 and because both offers are part of one indivisible transaction and are contained in one document, the entire Harmony offer or the subsequent offer should be ruled to be void;

144.3 Harmony contends that Gold Fields' submissions rest on the mistaken premise that the "*offer document*" makes both the early settlement offer and the subsequent offer when, in fact, no offer open for acceptance is made in relation to the subsequent offer. Harmony argues that it is clear that the subsequent offer will only be made once the early settlement offer has closed. Harmony submits that the subsequent offer has not been "*posted*" as contemplated in Rule 28.1 because "*the Code clearly envisages the act of posting of an offer as the act of making the offer, which is open for acceptance*". Harmony contends that the Code distinguishes this situation from "*a firm intention to make an offer*";

144.4 in the Harmony announcement and circular to Gold Fields' shareholders, it is said that :

> "*Harmony irrevocably undertakes, following completion of the early settlement offer to make an immediate follow-on offer on the same terms as the early settlement offer for the balance of the entire issued share capital of Gold Fields not already acquired by Harmony under the early settlement offer ...*"

144.5 this wording is consistent with "*a firm intention to make an offer*" as contemplated in Rule 27.1 of the Code which requires the offer

document to be posted within 30 days of the announcement of a firm intention to make an offer. If Harmony's argument is correct (i.e. that the subsequent offer has not been posted), then Rule 27.1 has not been complied with;

144.6 in supplementary heads of argument which were submitted to us by Gold Fields after the hearing on 27 November 2004 (in response to further written submissions made by Harmony on the timing issues), Gold Fields submitted that the contention advanced by Harmony that the offer document does not make the early and subsequent offer is manifestly wrong for the following reasons :

(a) The offer made in the offer document is an "*(offer) to offer to acquire the entire issued share capital of Gold Fields ...*"; and

(b) The "***form of acceptance, surrender and transfer***" (the transfer form contained in the circular) invites completion by Gold Fields' shareholders **"***who wish to accept the early settlement offer and/or the subsequent offer (in whole or in part)"*.

144.7 Gold Fields argues that because the offer document contains both the early and subsequent offer, "*on any basis the subsequent offer has*

been posted and must be open for at least 21 days following the date of such posting" (Rule 28.1);

144.8 in our view, the Harmony argument ignores the interaction that exists between Rule 27.1 and 28.1. Rule 27.1 requires the offer document to be posted within 30 days of the announcement of "*a firm intention to make an offer*". The offer may therefore not be capable of acceptance for the 30 day period between the announcement and the posting of the offer document. Rule 28.1 however requires that the offer be open for acceptance for at least 21 days after the posting of the offer document. In addition, there is no indication that Harmony may wish to post a further document to Gold Fields' shareholders after the closure of the early settlement offer. Even if it harboured that intention, the fact remains that the subsequent offer was not open for acceptance for 21 days after the posting of the offer document. In our view, the offer document contains both the early settlement offer and the subsequent offer. Rule 28.1 has not been complied with because the subsequent offer is not open for at least 21 days following the date of its posting;

144.9 notwithstanding this conclusion, we declined to make the ruling sought by Gold Fields. We exercised our general discretion in terms of Rule 34 of the Code to depart from Rule 28.1 because of the fundamental conclusion that we reached concerning the Harmony merger proposal, namely, that it treats all of the shareholders of Gold Fields both fairly

and equally. Gold Fields' shareholders have a right to decide whether or not to accept the early offer or the subsequent offer. Both offers are for the same consideration. We cannot conceive of any prejudice to Gold Fields' shareholders arising from the subsequent offer only being open for acceptances after the closure of the early settlement offer. This being so, we condone (*mero motu*) the requirement in Rule 28.1 that the subsequent offer be open for acceptance for at least 21 days after its posting to Gold Fields' shareholders and permit that offer only to be open for acceptances immediately after the closure of the early settlement offer;

144.10 the relevant part of Rule 28.6 provides as follows :

> "*(a) Except with the consent of the Panel, an offer (whether revised or not) may not become or be declared unconditional as to acceptances after midnight on the 60th day after the day of the initial offer document was posted*";

144.11 it is highly unlikely that the subsequent offer will be declared unconditional as to acceptances within the prescribed 60 day period. On Harmony's own admission, it is most likely that the subsequent offer will not be declared unconditional as to acceptances until early

February 2005 (some 120 days after it was posted) due to the need, *inter alia*, for South African Competition Tribunal approval;

144.12 it is not appropriate for us, at this juncture, to make any ruling in terms of Rule 28.6. Whether or not the Panel should give its consent to the subsequent offer being declared unconditional after the prescribed 60 day period, is a matter for the Panel to decide as and when that issue is ripe for consideration. The ruling sought by Gold Fields is premature. Harmony has not sought the consent of the Panel for dispensation from the requirements of Rule 28.6. If and when it does so, the appropriate tier of the SRP will be the correct forum to determine the issue in the light of all of the relevant facts, the composition of which, in part at least, will only mature in the aftermath of this hearing;

144.13 in summary then, we find that the ruling sought by Gold Fields in terms of Rule 28.6 is premature and is therefore declined;

144.14 we refused to make any ruling sought in relation to "*General Principle 1*" as the Gold Fields' submission is predicated on the assumption that the early settlement offer falls outside the jurisdiction of the SRP. We have found that the early settlement offer is subject to our jurisdiction. In addition, we have found that the Harmony proposal treats Gold Fields' shareholders both fairly

and equally and does not offend against the spirit of the Code embodied in General Principle 1.

COSTS

145. Harmony and Gold Fields agreed that costs should follow the result of our findings. Gold Fields has been partially successfully in its appeal. This being so, it is appropriate for Harmony and Gold Fields to pay the costs of the Appeal Tribunal in equal shares.

_____ _____

NEIL LAZARUS SC **BRIAN SPILG SC**

WE AGREE :
CYRIL JAFFE
CHAIRMAN OF THE APPEAL TRIBUNAL

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Dated: 15 February 2005