COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case no.: 25/LM/May03

In the large merger between:

Harmony Gold Mining Company Limited

and

African Rainbow Minerals Gold Limited

Reasons for Decision

APPROVAL

1. On 16 July 2003, we issued a merger clearance certificate approving unconditionally the merger between Harmony Gold Mining Company (Pty) Ltd ("Harmony") and African Rainbow Minerals Gold (Pty) Ltd ("ARMGold"). The reasons for our decision are as follows.

BACKGROUND

2. On 25 June 2003, a merger notification was filed with the Competition Commission ("the Commission") with regard to the above-proposed merger.

3. After concluding its investigation the Commission found that this notified merger was unlikely to prevent or lessen competition in the relevant market[1] and accordingly recommended our unconditional approval of the transaction.

The transaction

4. Harmony, the primary acquiring firm, is acquiring the entire issued share capital of ARMGold, the primary target firm, to create South Africa's largest gold producer.

5.The implementation of this transaction, as submitted by the parties, is subject to the fulfillment of certain conditions. These include, *inter alia*, the sanctioning of

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1 The relevant market definition appears below.

the Scheme of Arrangement[2] by the High Court of South Africa (Witwatersrand Local Division). It is the parties' further submission that in the event that the Scheme of Arrangement fails, for whatever reason, Harmony will make a general offer to ARMGold's shareholders in terms of the rules of the Securities Regulation Panel. After the merger, an application will be made to the JSE Securities Exchange for the delisting of ARMGold. Post-merger Harmony will own all the issued share capital of ARMGold, and African Rainbow Minerals Investment and Exploration Company (Pty) Ltd ("ARMI") will hold 14% of the merged entity.[3]

The merging parties

6. Both parties produce and supply gold to the global market, and both are listed on the JSE Securities Exchange. Harmony, however, is also listed on the New York Stock Exchange and on London's FTSE. Harmony has a considerable number of subsidiaries, both locally and internationally, which need not be identified for the purpose of this transaction. However, it does not have controlling shareholders. Harmony and its subsidiaries and associates are involved in gold mining, exploration and related activities mainly in South Africa, Australia, the Russian Federation and Peru.

7. ARMGold is controlled by ARMI, which currently holds 54,98% of the issued shares in ARMGold. ARMI is controlled by Ubuntu-Ubuntu Commercial Enterprises (Pty) Ltd ("Ubuntu-Ubuntu"). Ubuntu-Ubuntu is controlled by the Kgabo trust whose beneficiaries are previously disadvantaged individuals. Neither the Kgabo trust nor Ubuntu-Ubuntu directly or indirectly controls any other firms in South Africa. According to the parties, ARMGold is South Africa's fourth largest gold producer and the eleventh largest gold producer worldwide. ARMGold does not have any subsidiaries.

8. The four wholly owned subsidiaries of ARMI comprise Northvaal Engineering and Building Company (Pty) Ltd, Ubuntu Small-Scale Mining (Pty) Ltd, National Accommodation and Catering Services (Pty) Ltd, and African Rainbow Minerals Platinum (Pty) Ltd.

9. ARMGold and Harmony each have a 50% shareholding in ARMGold/Harmony Freegold Joint Venture Company (Pty) Ltd ("Freegold").[4]

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2 This is governed by section 311 of the Companies Act 61 of 1973, which specifically deals with compromises and arrangements between the company, its members, and creditors.
3 The merging parties submitted at the hearing that direct shareholding by BEE's in Harmony may not be as much as 26%.
4 See the Tribunal's decision in ARMGold/Harmony Freegold Joint Venture Company (Pty) Ltd and St Helena Gold Mines Ltd (54/LM/Aug02)

Rationale for the transaction

10. The merging parties state that they have complementary management cultures and strategies. They have worked together to pursue various mining opportunities. Indicative of this is the success of the co-operation between the parties in relation to Free Gold and St Helena. In April 2002, Harmony and ARMGold formed a joint venture that acquired the Free Gold assets from AngloGold.

11. The parties further assert that the merged entity is expected to realize synergies in the Free State in the short term, by consolidating the region into one operating unit thereby optimizing the use of infrastructure and exploitation of the ore bodies. This will result in enhanced job security as discussed hereunder. In addition, the transaction has a significant empowerment element as ARMGold is the fourth largest mining company in South Africa and the largest controlled or owned by historically disadvantaged persons.

12. The newly merged entity will own operating mines in all the major gold-producing areas of South Africa. The approval of this transaction will further consolidate the merged entity's position as the biggest producer of South African gold.

Evaluating the merger

The relevant market

13. The relevant product market for the purposes of this case is the production and processing of gold. The relevant geographic market for the production of gold is the international market, while it remains a national market in respect of the processing of gold.

14. Most gold produced in South Africa is converted into bullion at the Rand Refinery in Germiston and sold on the international bullion market. Harmony has its own refinery situated in Virginia.[5] We were informed that Harmony's refinery is not currently operating at capacity, and that it could take additional volume. However, we were also told that the intention, certainly in the foreseeable future, is that ARMGold production will continue to be refined at Rand Refinery. It is however conceivable that at some point in the future Harmony's Refinery could refine some or all of that production. This addresses the vertical issues relevant to this transaction.

5 The parties submitted that the Harmony Refinery currently refines approximately 95-98% of the gold produced by Harmony, and Rand Refinery refines the balance of Harmony's gold production.

15. Although both firms are in the same product market, this does not give the merging parties power in the fragmented international market. Gold is produced by a large number of producers around the world. ARMGold is the fourth largest gold producer in South Africa and the eleventh largest worldwide.[6] Harmony Gold is the third largest gold producer in South Africa and the seventh largest in the world. So while post-merger, they would represent a combination of the third and fourth largest producers in South Africa, in the international market the merged entity's share of gold production is, at some 5,1%, relatively small. (We have already identified the geographic market for production as being an international market). The merged entity would, in the international market, represent a combination of the seventh and eleventh producers. It is common cause that no single producer has the ability to influence the gold price.[7] It should also be noted that the price of gold is not only influenced by the quantity of newly refined gold coming on to the market but also by the decisions of existing holders of gold. Accordingly, it has been held in our previous decisions that gold producers are "price-takers" with the price determined by reference to the daily price fixings of the London Bullion Association.[8]

16. The international market shares of both the merging parties and their competitors, based on estimated output for 2003, are as follows:

Competitor	**Estimated output in ounces for 2003 (000's)**	**Estimated market share (%)**
Newmont	6,941	8,4
Anglogold	6,436	7,7
Barrick	5,384	6,5
Gold Fields	4,726	5,7
Harmony/ARMGold (post merger)	**3,692**	**5,1**
Placer Dome	3,500	4,2
Freeport-Mcmoran	3,385	4,1
Harmony	3,163	3,8
Rio Tinto	2,755	3,3
Kinross	1,873	2,3
Ashanti	1,550	1,9
Beunaventuras	1,402	1,7

6 See Commission's recommendation, page 6.
7 Refer to Our decisions in Harmony Gold Mining Company Limited/Randfontein Estates Limited 16/LM/Feb00; Randfontein Estates Limited/ Anglogold Limited 03/LM/Jan01.
8 See footnote 7 above.

ARMGold	1,092	1,3
Durban Roodepoort Deep	927	1,1

Source: Gold Field Mineral Services, Deutsche Bank

17. This transaction will therefore not have a significant impact on the level of concentration in the relevant market, and given the characteristics of the international gold market, the transaction viewed in its entirety is unlikely to substantially prevent or lessen competition in the relevant market.

Public interest considerations

18. The parties made it clear during the hearing that no retrenchment is envisaged as a result of this transaction. They stated that all the employees of ARMGold would be transferred to Harmony.[9] Furthermore, they submitted that the transaction would result in enhanced job security for those in the employ of the merged entity and possibly the creation of new job opportunities.

19. They asserted further that the transaction would advance black economic empowerment as ARMGold, which is controlled by historically disadvantaged individuals, brings an empowerment element to this transaction. It is envisaged further that Mr Patrice Motsepe of ARMGold will become the non-executive chairman of the merged company and will play an active and extensive role in advancing the long-term interests of the company.[10] Historically disadvantaged individuals will hold approximately 26% of the issued share capital.

Conclusion

20. We accordingly agree with the Commission's findings that the transaction does not raise any concerns on either competition or public interest grounds, and that it will advance black economic empowerment. Accordingly, this transaction is unconditionally approved.

_______________ 29 July 2003

D. Lewis **DATE**

9 Notwithstanding the fact that all the trade unions representing the majority of employees in the merging parties were notified of the merger, none of them raised the objection to this transaction.
10 According to the parties, Mr Patrice Motsepe's functions and responsibilities as the non-executive chairman will be broader and more extensive than those normally allocated to a non-executive chairman.

Concurring: U. Bhoola, L. Reyburn