

Collaborative engagement: Takeover Regulation Panel

**PRI South Africa Network Engagement Working Group with
Executive Director of the Securities Regulation Panel (SRP)**

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Reviewed by

Executive Director of the Takeover Regulation Panel (TRP)

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About PRI South Africa Network Engagement Working Group

The vision for the PRI South Africa Network is that it will serve as a platform for PRI signatories in South Africa to come together, discuss, share experience and collaborate on a range of ESG issues that are material for investment decision making in South Africa.

The PRI South Africa Network Engagement Working Group focuses on the regulatory challenges currently in place for collaborative shareholder engagement in South Africa. The group investigates potential collaborative engagements with companies in South Africa and opportunities for dialogue with public policy makers

Preamble

There is an increasing expectation in society, in South Africa and internationally, that institutional investors should act more effectively as good long-term owners, or 'stewards', of companies in which they invest. This has been laid out in voluntary guidelines which increasing numbers of investors are signing up to, and it is increasingly being reflected in regulatory expectations in a number of markets.

These standards agree that one principal way in which institutional investors can be more effective is if they act cooperatively, sharing views and discussing issues of mutual concern. In the absence of such discussions it is too easy for companies to imply that only a single investor takes a particular perspective, dividing and conquering the ability of shareholders to act as good stewards. By having such discussions investors can also test their own thinking and arguments and so ensure that they are only engaging with companies on appropriate matters.

In order for investors to feel empowered to have such discussions, it is important to have clarity over the regulatory rules on concert parties, under which investors working together may need to disclose their collective shareholding. That is particularly true in a market where shareholdings are as concentrated as South Africa, because concert parties with significant collective stakes may in certain circumstances be obliged to make a mandatory bid for the company with which they are engaging.

To clarify this situation, the PRI South Africa Network Engagement Working Group in South Africa entered into discussions with the Takeover Regulation Panel (TRP) and this document is the outcome of those discussions.

We are pleased to note the clear view emerging from those discussions that a concert party is not created where institutional investors simply discuss matters of mutual interest or share their views as to concerns about particular companies. A concert party is only formed where shareholders agree a common plan under which to work together.

We firmly believe that this added clarity will assist institutional investors in living up to the expectations to act as good stewards of companies, and to work cooperatively where this will assist stewardship activities.

Readers can always seek comments from the TRP on a specific situation where they are in doubt about the application of this guidance.

Collaborative Engagement

The UN-backed Principles for Responsible Investment (PRI) were launched in March 2006. These principles encourage collaborative engagement to better incorporate environmental, social and governance issues in decision-making and ownership practices.

Principle 2

We will be active owners and incorporate environment, social and governance (ESG) issues into our ownership policies and practices

- Engage with companies on ESG issues
- Participate in collaborative engagement activities

Principle 5

We will work together to enhance our effectiveness in implementing the principles

- Participate in networks and information platforms
- Collectively address relevant emerging issues
- Develop or support appropriate collaborative initiatives

The updated governance code for South Africa, King III, was presented on 1 September 2009 and is effective from 1 March 2010:

The King Committee stated that it agreed with the Organisation for Economic Co-operation and Development (OECD) that shareholders should be allowed to consult with each other on issues concerning basic shareholder rights. This is of course subject to exceptions to prevent abuse

The International Corporate Governance Network (ICGN); Statement of Principles on Institutional Shareholder Responsibilities (July 2007)

The statement requires shareholders to consider working jointly on particular issues. In working with other investors, they should respect rules with regard to concert parties. Institutional shareholders should encourage regulators to develop rules with regard to market abuse and concentration that can be enforced sensibly and not inhibit reasonable collaboration between shareholders or constructive dialogue more generally

The UK Stewardship Code (July 2010)

Principle 5 requires institutional investors to be willing to act collectively with other investors where appropriate

Code for Responsible Investing in South Africa (July 2011)

The CRISA Code requires, where appropriate, for institutional investors to consider a collaborative approach to promote acceptance and implementation of the principles of CRISA and other Codes and standards applicable to institutional investors

Participate in Networks and information platforms

South Africa has a number of committees, interest groups and networks that meet from time to time to discuss Responsible Investment issues and the governance of underlying investee companies.

These include:

- PRI South Africa Network Engagement Working Group
- The ASISA Responsible Investment committee
- The CRISA committee
- Informal meetings of asset owner and asset manager individuals to discuss ESG concerns relating to investee companies

Purpose of these meetings includes:

- Developing and sharing an awareness of the PRI
- Defining Responsible Investment
- Encouraging PRI membership
- Building understanding and awareness of Responsible Investment
- Understanding South African regulation affecting investor collaboration
- Responsible Investment and retirement fund reform
- Relevance of Responsible Investment in South Africa
- Environmental, Social and Governance (ESG) issues in South Africa
- Implementing the UN-backed PRI principles
- Encouraging academic research on Responsible Investment
- Participating in the development of policy, regulation and standard setting (e.g. promoting and protecting shareholder rights)
- Discussing ESG disclosure of investee companies
- Discussing investee company shareholder resolutions
- Discussing and developing an engagement plan
- Discussing shareholder initiatives and engagement proposals
- Developing possible shareholder resolutions

It was considered important to establish whether the Companies Act of 2008 and the Companies Regulations 2011, restricted or required specific disclosure when investors participated in the above activities

Pursuing the collaborative engagement process

Preliminary guidance was obtained from the Securities Regulation Panel (SRP) as to whether the following actions will be classified as 'acting in concert' and when and what market disclosure is required. It is important to note that beneficial interest includes the right to acquire, vote and dispose of shares. The new Companies Act and Companies Regulations therefore include shares managed under a partially discretionary mandate for purposes of the 35% mandatory offer requirement.

The Companies Act 2008 and the Companies Regulations 2011 became effective from 1 May 2011. The Regulations include Chapter 5 – *Fundamental Transactions and Takeover Regulation*. This chapter incorporates the 'acting in concert' regulation that

was developed by the TRP. We have made some changes to the examples below as result of our discussions with the Executive Director of the TRP after the publication of the Regulations.

Examples

These examples should merely be regarded as guidelines and not a ruling of the TRP or any of its employees.

1. Two or more shareholders meet to discuss their ESG concerns of investee companies
2. They agree that action is required to improve ESG practices or disclosure.
 - a) The action will be developed and implemented independently by the individual shareholders [N]
 - b) A joint strategic plan will be developed to improve ESG disclosure and practices. (See 3 & 4)
3. The shareholders develop a joint strategic plan (see Annexure 1)
4. The shareholders implement the plan
 - a) Two or more shareholders with less than 35% in aggregate of investee voting securities, develop the strategic plan and take action. (No disposal or acquisition of voting securities) [√].
 - Consequence – Acting in concert if they jointly develop a strategy but no mandatory offer is triggered. Disclosures by all shareholders on form TRP 84 are required.
 - b) Two or more shareholders individually holding less than 35%, but in aggregate holding more than 35% of investee voting securities, develop the strategic plan and take action. (No disposal or acquisition of voting securities) [√]
 - Consequence – Acting in concert, disclosure by each on form TRP 84. No mandatory offer is triggered.
 - c) Two or more shareholders with less than 35% in aggregate of investee voting securities develop the strategic plan and take action. (Voting securities disposed of or acquired, joint holding of voting securities remains below 35%) [√] Note 1
 - Consequence – Acting in concert, disclosure by each on form TRP 84. No mandatory offer is triggered.
 - d) Two or more shareholders with less than 35% in aggregate of investee voting securities develop the strategic plan and take action (Voting securities acquired, joint holding moves above 35%) [√] * Note 2
 - Consequence – Acting in concert, disclosure by each on form TRP 84. Mandatory offer is triggered, jointly and severally by all shareholders.
 - e) Two or more shareholders individually holding less than 35%, but in aggregate holding more than 35% of investee voting securities develop the strategic plan and take action (Shares acquired) [√] * Note 3
 - Consequence – Acting in concert, disclosure by each on form TRP 84. No mandatory offer triggered, however, if subsequent to coming into concert any additional voting security is acquired a mandatory offer is triggered.
 - f) Two or more shareholders, already in concert, individually holding less than 35%, but holding more than 35% in aggregate of investee voting securities, develop the

strategic plan and take action (Shares disposed of which results in holding moving below 35%) [√]

- Consequence – No mandatory offer triggered. Note 3
- g) A shareholder, already holding more than 35% of investee voting securities, develops a strategic plan to take action with a shareholder holding less than 35% of investee voting securities (Voting securities acquired).
 - Consequence – Acting in concert, disclosure by each on form TRP 84. No mandatory offer triggered unless shareholder with less than 35% acquires voting securities which reach 35%.

√ = Acting in concert with required disclosure

N = Not acting in concert, no disclosure required

Disclosure will be on a prescribed form to the TRP & Investee Company (form TRP 84)

* Mandatory offer to all shareholders if 1 additional share is acquired after 35% level.

Notes

Parties coming together should take note of the consequences of acting in concert.

Note 1

If at the time they come together they hold in aggregate less than 35% of the voting securities of a particular company and the agreement allows for the acquisition of additional voting securities. After coming together one or more shareholders acquire additional voting securities taking the aggregate holding over 35%.

[If the intention was always to acquire shares that will take the aggregate over 35%,] The guidance from the executive director of the SRP is that they would be considered to have come into concert for purposes of entering into an affected transaction. All disclosures would be required and a mandatory offer would be triggered as soon as the 35% aggregate has been attained.

Note that if less than 35% of shares are held in aggregate and parties agree that although they may purchase shares the holding will not at any stage go through 35%, concert party requirements may apply but no mandatory offer would be triggered. The disclosure of the concert party arrangement is required on form TRP 84.

Note 2

It will be deemed that the strategic plan is to acquire shares that will take the aggregate holding through 35%, the parties will be considered to be coming into concert for the purposes of entering into an affected transaction and a mandatory offer will be triggered.

Note 3

If shareholders who individually hold less than 35% of investee voting securities come together and in aggregate hold greater than 35%, even if only one additional share is acquired, an offer will be triggered to all shareholders. If instead of any acquisition of shares, one or more shareholders sell shares, whether the aggregate stays above or falls below 35%, no mandatory offer is triggered.

If shareholders sell down below 35% and then again acquire shares while still in concert with the aggregate going over 35%, a mandatory offer is triggered.

Note 4¹

Making representations to the board by shareholders together, on its own would not lead to a concert party relationship;

A discussion between the shareholders about matters to be raised with the board on its own does not lead to a concert party relationship

¹ See Practice Statement No 26 issued by the London Takeover Panel. Interpreting concert party relationship the TRP seek to observe international best practice.

NOTE²: THE FACT THAT PERSONS ACT IN CONCERT ON ITS OWN DOES NOT RESULT IN THE TRIGGER OF A MANDATORY OFFER EVEN IF AT THE TIME THEY COME INTO CONCERT EACH HOLDS LESS THAN 35% AND AS A RESULT OF COMING INTO CONCERT THEY CAN VOTE 35% OR MORE, UNLESS ANY OF THEM ACQUIRES ADDITIONAL VOTING SECURITIES.

² See regulation 84.

Annexure 1

The collaborative engagement process



A collaborative engagement plan can include:

- Dialogue with investee company executives
- Dialogue with Chairman, Board members including chairs of committees
- Presentation to the full Board
- Aligning proxy voting with the plan
- Attending AGMs and asking questions
- Maintaining relationship with the press and briefing where appropriate to move the engagement forward
- Briefing shareholders
- Developing and presenting shareholder resolutions to an AGM
- Calling an extraordinary general meeting

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