

## By email

## Public version

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Commerce Commission

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## Sika / MBCC Group: the Revised Remedy

### 1. Introduction and executive summary

1.1 We refer to the proposed acquisition by Sika AG (**Sika**) of 100% of the shares in LSF11 Skyscraper HoldCo S.à.r.l, the ultimate parent company of the MBCC group of companies (**MBCC Group**) (the **Proposed Acquisition**). The Proposed Acquisition is currently the subject of an application for clearance to the Commerce Commission (the **Commission**).<sup>1</sup>

1.2 [ ]. The Parties do not consider that the Proposed Acquisition gives rise to competition concerns in respect of either chemical admixture products or EBC products<sup>2</sup> supplied in New Zealand, but in the interests of ensuring completion of the global Proposed Acquisition in a timely fashion, Sika is prepared to divest:

- (a) the EBA business of MBCC Group in the EEA, Switzerland and the UK (**European Divestiture Business**);
- (b) the EBA business of MBCC Group in the United States and Canada (**Northern American Divestiture Business**); and
- (c) MB Solutions Australia Pty Ltd (which owns Bluey Technologies Pty Ltd (**Bluey Technologies**)) (MBCC Australia) and MBCC Group's entire New Zealand business, via a sale of 100% of the shares in MB Solutions New Zealand Limited (**MBCC NZ**) (collectively, **MBCC ANZ** or the **ANZ Divestiture Business**), comprising the EBA and EBC business of MBCC Group in Australia and New Zealand;

(collectively, the **Divestiture Business**).

1.3 We refer to our letter of 27 July confirming Sika's intention to withdraw the Initial Remedy Proposal of 28 March 2022.<sup>3</sup> Sika now wishes to formally submit a revised divestment package for the Commission's consideration (the **Revised Remedy**). The purpose of this submission is to provide the Commission with the details of the Revised Remedy, identify the key areas of difference between the Revised Remedy and the Initial Remedy Proposal, and explain why the Revised Remedy will result in the Divestiture Business, including MBCC NZ, being a viable business that will be independent of Sika (including the retained MBCC Group) and an

<sup>1</sup> Defined terms in this letter have the same meaning as that in the clearance application and Sika's letter of 27 July 2022, unless otherwise specified.

<sup>2</sup> The Commission has advised that it has no concerns in relation to the supply of EBC products in New Zealand. See Statement of Issues of 29 June 2022 (**SOI**).

[ ]

<sup>3</sup> As the Commission is aware, the Initial Remedy Proposal included the sale of the ANZ Divestiture Business as a going concern to a single, independent third-party buyer.

effective competitor in the New Zealand market. This submission also explains why there is no material composition, asset or purchaser risk attributable to the Revised Remedy.<sup>4</sup>

1.4 While the Revised Remedy is a global solution, the focus of this submission is on the New Zealand aspects of the Initial Remedy Proposal which otherwise remains unchanged. Sika understands the Commission has already market tested the ANZ Divestiture Business, including through the issuance of the SOI. Sika considers that because the Revised Remedy makes the divestment much more straightforward than the Initial Remedy Proposal (specifically the significantly reduced need for supply agreements and TSAs owing to the increased scope of the Revised Remedy and the inclusion of various R&D facilities within the divestment perimeter), the market testing for the Revised Remedy can be limited and focussed on these additional improvements.

1.5 More specifically, this letter sets out:

- (a) how the Revised Remedy will be implemented (**Section 2**);
- (b) the scope of the Revised Remedy and illustrates why it is sufficient to create a viable, long-term, independent and effective competitor (**Section 3**);
- (c) why timely separation and transfer is achievable (**Section 4**);
- (d) why the Revised Remedy maintains the economic viability, marketability, competitiveness and goodwill of the Divestiture Business prior to divestment (**Section 5**); and
- (e) why the Parties are confident that a suitable purchaser will be identified (**Section 6**).

## 2. Implementation of the Revised Remedy

2.1 As previously advised,<sup>5</sup> the Revised Remedy involves a commitment by the Parties to divest to a purchaser approved by the Commission within the Divestment Period:<sup>6</sup>

- (a) the worldwide EBA business of MBCC Group with the exception of the Retained ROW EBA Business<sup>7</sup>; and
- (b) the EBC business of MBCC Group in Australia and New Zealand;

(together, the Divestiture Business).

2.2 For the avoidance of doubt, the Revised Remedy only enhances the Initial Remedy Proposal which otherwise remains unchanged in so far as the ANZ Divestment is concerned. The change to the Initial Remedy Proposal is the addition of the chemical admixture businesses of MBCC Group in the EEA, Switzerland, UK, USA and Canada. Further detail on the scope of the Revised Remedy is provided below in Section 3.

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<sup>4</sup> Sika also refers to the remedies paper which was submitted to the CMA on [ ] (including all [ ] annexures) and which was provided to the Commission on [ ] October (the **CMA Remedy Submission**), and which informs the substance of this submission. [ ].

<sup>5</sup> For example, Sika refers to its letter of 27 July informing the Commission of its intention to propose a Revised Remedy, the CMA Remedy Submission and the Confidential Information Memorandum provided on 12 October.

<sup>6</sup> As per the Draft Divestment Deed provided to the Commission on 28 March 2022 (and updated on 30 May), the Divestment Period starts on completion of the Proposed Acquisition and ends at midnight on the date which is [ ] after the date on which completion of the Proposed Acquisition occurs. Noting for completeness that the Parties are awaiting feedback from the Commission on the terms of the draft Divestment Deed.

<sup>7</sup> "**Retained ROW EBA Business**" means the EBA business of MBCC Group in all countries outside the "Orange" perimeter, operated by the MBCC Group legal entities listed in [ ], which is attached as Annexure 2.

"**Orange**" means the geographic perimeter covering the EEA, Switzerland, UK, USA, Canada, Australia and New Zealand.

- 2.3 For the purposes of the Revised Remedy, the Retained ROW EBA Business and the Retained EBC Business<sup>8</sup> (together, the **Retained Business**) will be carved out and retained by Sika (along with the EBC business of MBCC Group outside of the Orange perimeter).
- 2.4 The Divestment Business will be offered for sale as a going concern to a single purchaser approved by the Commission (the **Approved Purchaser**). The purchaser of the Divestiture Business must also be approved by the European Commission (the **EC**), the Department of Justice (the **DOJ**), the Competition and Markets Authority (the **CMA**), the Canadian Competition Bureau (the **CCB**) and the Australian Competition and Consumer Commission (the **ACCC**) (together, the **Overseas Regulators**).
- 2.5 The sale of the Divestiture Business will be executed as a share sale, and the Approved Purchaser will purchase the entire issued share capital of the existing MBCC Group legal entities that carry on the Divestiture Business.<sup>9</sup> Sika considers that this will comprehensively address any perceived competition concerns globally, including in New Zealand (specifically given the entirety of the New Zealand business (i.e. MBCC NZ) will be divested), along with the parts of the global MBCC business overseas providing R&D and other support to the New Zealand EBA business of MBCC.
- 2.6 Transfer of ownership of all of the shares in MBCC NZ to the Approved Purchaser will be effected indirectly. MBCC NZ will be a wholly owned subsidiary of MBS Nederland BV, which is in turn a wholly owned subsidiary of Master Builders Solutions Deutschland GmbH (**MBS Germany**). The Approved Purchaser will acquire all of the shares in MBS Germany under the Sale and Purchase Agreement.
- 2.7 MBS Germany is also the holding company which ultimately owns all of the shares in MBCC Australia and the various entities constituting the European Divestiture Business. Accordingly, completion of the divestment of the ANZ Divestiture Business will now automatically take place with completion of the divestment of the European Divestiture Business. It is currently anticipated that this will take place shortly after [ ] the completion of the Proposed Acquisition.<sup>10</sup>
- 2.8 MBS Germany also owns Construction Research & Technology GmbH (**CORTE**), the MBCC Group entity which owns the intellectual property which forms part of the Divestiture Business. Accordingly, completion of the sale of MBS Germany will also effect the transfer of the relevant intellectual property to the Approved Purchaser. The intellectual property of the Retained Business will be transferred to Sika prior to completion of the sale of the Divestiture Business.
- 2.9 In terms of the North American Divestiture Business, as the DOJ is requiring a 'fix-it-first' remedy, completion of the divestment of North American Divestiture Business will take place [ ] but just prior to the completion of the Proposed Acquisition. This will be effected by way of share transfer of all of the shares in the two entities which own (directly in the case of Canada or indirectly in the case of the United States) all of the shares in the North American Divestiture Business.
- 2.10 As the divestment of the Divestiture Business is being given effect to by way of share transfer, all of the assets held by the relevant MBCC Group entities will transfer to the Approved Purchaser. In the case of New Zealand, as set out further below, this includes the production facility located in Albany, all MBCC NZ customer and supply contracts, and all other assets, together with MBCC NZ employees.

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<sup>8</sup> "Retained EBC Business" means the EBC business of MBCC Group within the Orange perimeter operated by the MBCC Group legal entities listed in [ ], which is attached as Annexure 2 (i.e., all MBCC Group legal entities housing the EBC business within the Orange perimeter, except those in Australia and New Zealand which will not form part of the Retained Business).

<sup>9</sup> This process is set out in Annex 1 MBCC Structure Chart by End State of the CMA Remedy Submission, provided to the Commission on [ ] October 2022.

<sup>10</sup> For further details on the closing sequence, please see Section 4.5 below.

- 2.11 Following implementation of the Revised Remedy, the Approved Purchaser will own the Divestiture Business, which includes the following:
- (a) the European Divestiture Business;
  - (b) the North American Divestiture Business; and
  - (c) the ANZ Divestiture Business.

2.12 Most relevant to the supply of chemical admixtures in New Zealand is the ANZ Divestiture Business and this submission focuses on describing this aspect of the Revised Remedy (with a particular focus on the New Zealand aspects). As above, the Parties are exclusively pursuing the sale of the Divestiture Business as a single package (as opposed to divesting the Divestiture Business in separate parcels by region).

### **3. The scope of the Divestiture Business is comprehensive and sufficient**

*All necessary assets are included in the Divestiture Business*

- 3.1 As above, the Divestiture Business is comprised of (a) the worldwide EBA business of MBCC Group (with the exception of the Retained ROW EBA Business) and (b) the EBC business of MBCC Group in Australia and New Zealand.
- 3.2 The Divestiture Business will have all necessary facilities, personnel, tangible and intangible assets for it to compete effectively and on a standalone basis. Moreover, the Divestiture Business will have all the patents, R&D staff and R&D facilities to bring to market improved chemical admixtures that have a more sustainable profile and characteristics. The design of the Revised Remedy fully preserves these customer benefits.
- 3.3 The Divestiture Business is also equipped to expand beyond its current geographic perimeter. The Approved Purchaser will retain global ownership of all registered patents and trademarks pertaining to the EBA business. This will allow the Approved Purchaser to expand the Divestiture Business geographically, which – given the low entry barriers and the low amount of investment needed – is not just a theoretical possibility.
- 3.4 Table 1 summarises the key features of the Divestiture Business, which comprises a significant international operation with considerable scale and resources. Covering 36 countries, the Divestiture Business will have total sales of EUR [ ] million with an expected EBITDA of approximately [ ]% in 2022, approximately 1,600 employees, over 30 production sites and 3 R&D sites, including – most notably – the global R&D centre at Trostberg, along with the regional R&D centres in Treviso and Beachwood. In short, the Divestiture Business has everything needed to operate as a significant standalone competitive force from Day 1 after closing. Table 1 also outlines the New Zealand assets which will be transferred to the Approved Purchaser with the sale of MBCC NZ specifically, noting that there is no material change since the Initial Remedy Proposal given the Initial Remedy Proposal included all of the assets of MBCC NZ. However, with the inclusion of the European Divestiture Business in particular, the divestment package (due to the inclusion of the EBA parts of the Trostberg and Treviso R&D facilities), the Revised Remedy represents a significant improvement on the Initial Remedy Proposal, having taken on feedback received from the Commission and other Overseas Regulators.
- 3.5 It is noted that for the European Divestiture Business and the North American Divestiture Business, Sika has adopted a conservative approach to defining the EBA business-related assets (including staff), skewed in favour of the Divestiture Business. This is in order to ensure that the Approved Purchaser has control over all relevant assets contributing to the Divestiture Business. For example, only purely dedicated EBC production sites (i.e., which only produce EBC products) will be transferred out as part of the Retained EBC Business in Europe, with

the European Divestment Business retaining over half of MBCC Group's production sites in the EEA, Switzerland and the UK.

3.6 In summary, the Divestiture Business will be transferred with all necessary tangible and intangible assets, personnel, and all essential business functions for the ongoing competitive operation of the business in New Zealand (and globally).

**Table 1: Key features of the Divestiture Business and the New Zealand assets held by MBCC NZ specifically which will be transferred<sup>11</sup>**

The Divestiture Business	MBCC NZ's assets which will transfer to the Approved Purchaser as part of the NZ Divestment <sup>12</sup>
<ul style="list-style-type: none"> <li>• Net sales of approximately EUR [            ], with approximately [    ] EBIDTA (FY 22 rolling forecast)</li> <li>• Manufactures chemical admixtures, fibres, mineral admixtures, UGC and other related products such as polymers</li> <li>• Operates in 36 countries (EEA, Switzerland, UK, U.S., Canada, Australia, New Zealand)</li> <li>• 25 legal entities, 7 branches</li> <li>• 36 production sites</li> <li>• 53 standalone warehouses</li> <li>• 19 standalone offices including the whole of Mannheim (MBCC's current HQ)</li> <li>• 1070 registered trademarks</li> <li>• 3 R&amp;D sites (Treviso, EBA part of Trostberg and EBA part of Beachwood)</li> <li>• approx. 1600 FTEs, including approx. [            ] R&amp;D/Technical FTEs</li> <li>• Over 60 key personnel including top level executive management [    ] and a number of global functional leads [    ]</li> <li>• [    ] EBA patent families and [    ] nationalised EBC patents in AUS/NZ</li> <li>• [    ] global EBA R&amp;D projects<sup>13</sup></li> <li>• All EBA- related customer/supplier relationships (as well as MBCC ANZ customer/supplier relationships)</li> <li>• TSAs for the benefit of the Divestiture Business for IT, Finance, HR and transitional arrangements for the supply of certain products.</li> </ul>	<ul style="list-style-type: none"> <li>• The freehold interest in the chemical admixture production facility located in Albany, Auckland</li> <li>• All fixtures, equipment, machinery and all other property of a tangible nature held by MBCC NZ (at its Albany production facility or otherwise stored at third-party storage facilities) for the purposes of carrying on the Divestiture Business in New Zealand (including all mixing vessels, bulk storage, IBCs and pallet racking)</li> <li>• All assets and equipment used by the Divestiture Business in New Zealand that are located at the customers' ready mix sites, including all dispensing equipment, tanks and pumps</li> <li>• Ownership of all intellectual property rights and know-how used by MBCC NZ (including brands, domain names and licences)</li> <li>• All MBCC NZ employees</li> <li>• All existing customer contracts, sales orders and purchase orders entered into by MBCC NZ</li> <li>• All relevant supply and distribution arrangements for both raw materials and finished products, as well as for warehousing and distribution of its products</li> <li>• All business records (current and historical), including price lists, advertising materials, financial and legal records, catalogues and mailing lists</li> <li>• All permits, licences, consents, planning permissions, product registrations, certifications or authorisations issued by a government agency and related documentation</li> </ul>

<sup>11</sup> Also see paragraph Table 1 in the CMA Remedy Submission, provided to the Commission on [    ] October 2022.

<sup>12</sup> For the avoidance of doubt, all assets held by MBCC NZ will be transferred to the Approved Purchaser. The summary provided in the Table 1 provides an overview of the key assets by way of illustration.

<sup>13</sup> For completeness, there are [    ] ongoing EBA R&D projects related which will remain with the Divestment Business. These relate to [    ] R&D projects at the [    ] and [    ] at [    ]. The full know-how and information relating to these projects will remain with the Divestment Business. For completeness, Annex 18 to the CMA Remedy Submission (provided to the Commission on [    ] October 2022) provides a list and description of each of the EBA and EBC related R&D projects at each of Trostberg, Treviso and Beachwood.

*There is no material composition risk attributable to the Revised Remedy*

- 3.7 The Divestiture Business represents a comprehensive and attractive standalone and effectively competitive business. There is no risk that the scope of the Divestiture Business will give rise to composition risk (i.e., that it would not allow the Approved Purchaser to operate as an effective competitor in the market). As previously explained, the composition of the Revised Remedy has been created such that its effectiveness does not depend on the identity of the purchaser. For example, because all of the relevant R&D capabilities will be included in the divestment package, it is not necessary that the purchaser will have its own existing R&D capabilities. Accordingly, the divestment package has attracted substantial interest from numerous purchasers, [ ], as explained further in Section 6 below.
- 3.8 Sika will commit to divest to a single purchaser, to allow the Approved Purchaser to function as an effective and financially resilient competitor with an incentive to operate at scale across three major regions – Europe, Australia/New Zealand and United States/Canada. This combined geographic scope ensures that the Divestiture Business will continue to benefit from significant economies of scale.<sup>14</sup> The possibility to expand the Divestiture Business to any other country beyond its current perimeter will further provide for economies of scale. This means that separating the Divestiture Business from the wider MBCC business will not have a negative impact on the financial resilience and incentives to invest (including potential lost economies of scale).
- 3.9 The ANZ Divestment Business is not currently dependent on the retained ROW EBA Business, because:
- (a) The ANZ Divestment Business sources raw materials (particularly polymers) from third parties, or “in-house”. This “in-house” supply occurs within the Divestiture Business and, as such, the Divestiture Business will in no way be dependent on the retained ROW EBA Business in this regard. Over the past few years, MBCC NZ has deliberately sought to diversify its sourcing options for raw materials, this has resulted in significantly reduced dependency on the MBCC Group.<sup>15</sup>
  - (b) All of the R&D needs of the Divestiture Business in so far as the EBA aspects of the business are concerned are met through the R&D activities at Trostberg, Treviso, and Beachwood, which will remain part of the Divestiture Business.<sup>16</sup>
- 3.10 All R&D FTEs of MBCC Group’s EBA business (and in particular those personnel who contribute to R&D for the Divestiture Business and [ ]) will remain with the Divestiture Business.<sup>17</sup> [ ]. Further, the R&D activities at the shared R&D site in Trostberg can easily be reorganised by simple relocations of the EBA and EBC activities between existing buildings so that the Trostberg chemical park houses only the R&D activities of the Divestiture Business with a separate building outside the chemical park and across a railway line housing the R&D activities of the Retained EBC Business. Given that the ANZ Divestiture Business, including MBCC NZ, is already a largely standalone business division, there are no composition risks

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<sup>14</sup> See Appendix, section 12 of the CMA submission (provided to the Commission on [ ] October 2022) for a discussion of the economies of scale.

<sup>15</sup> In relation to EBC products, it is also important to note that the vast majority of products are sourced locally. In 2021 EBC products imported into ANZ from rest of world accounted for only [ ] by volume of the EBC products supplied by MBCC ANZ.

<sup>16</sup> For completeness, in relation to MBCC NZ’s EBC business, this business does not rely on R&D from MBCC Group R&D centres. Leaving aside Bluey Technologies, the MBCC Group’s New Zealand EBC business is relatively small and focuses on an established, existing product portfolio. The MBCC Group has not brought new EBC products on to the market in recent years. Unlike chemical admixtures, EBC products are not adjusted to meet individual customer specifications. The MBCC ANZ EBC Business essentially sells ready-made products, the vast majority of which are produced locally in Australia (whether manufactured by MBCC Australia or sourced locally) together with a much smaller amount of imported products. Bluey Technologies, particularly with its development of BluCem ZeoGlass, has shown that a local business with a relatively small R&D team can be innovative and bring new products to market. BluCem ZeoGlass, an acid resistant shotcrete containing recycled aggregate, was developed inhouse by Bluey Technologies with assistance from the University of Sydney and Sydney Water for testing.

<sup>17</sup> See Appendix, section 6 of the CMA Remedy Submission provided to the Commission on [ ] October.

arising from the legal separation process. The separation structure further ensures that no relevant assets are “lost” in the separation process.<sup>18</sup>

- 3.11 The links between the Divestiture Business and the Retained EBC Business will be limited to only a few specific arrangements.<sup>19</sup> For example, Sika will enter into appropriate transitional supply agreements [ ] to ensure the raw materials and finished goods that are currently supplied by MBCC Group to MBCC NZ will continue to be supplied to the Divestiture Business while alternative sourcing arrangements are put in place – whether this is transitioning to an alternative source of supply within the Divestiture Business or transitioning to third party supply. A consequence of the new enlarged remedy package is that MBCC NZ will be able to source more of the raw materials and products that it currently acquires from MBCC Group from within the Divestiture Business perimeter.
- 3.12 All the assets of the Divestiture Business to allow it to compete effectively will be acquired by the Approved Purchaser. In particular, the Master Builders’ Solutions trademark will remain with the Divestiture Business and all patents and product trademarks relating to the EBA business globally will remain with the Divestiture Business.<sup>20</sup>
- 3.13 The above measures will ensure that the Approved Purchaser can continue to service MBCC NZ’s customers and compete for new customers without the risk of a gap in supply. The Parties are confident that the commitments set out above, coupled with the key assets detailed in Table 1, include all assets that are required to allow the successful production and supply of the chemical admixture products and EBC products in New Zealand and, therefore, the operation of an effective and viable competitor to Sika in New Zealand, both during the divestment period and once the divestment has been completed. The Commission will of course have the opportunity to review and approve the proposed TSAs and supply agreements as part of the divestment process.
- 3.14 Finally, the Parties consider that there will be no loss of financial resilience or incentives to invest nor the loss of any material economies of scale on the part of the Divestiture Business as a result of implementing the Revised Remedy. On the contrary, the Divestiture Business will be able to operate profitably and efficiently from Day 1, as:<sup>21</sup>
- (a) There are limited diseconomies of scale with respect to the Divestiture Business. This is because the Divestiture Business is profitable, viable, competitive and largely standalone.
  - (b) Indeed, on a standalone basis, the Divestiture Business would have operated an EBITDA margin of [ ] on sales of approximately [ ] million in FY2022 and it is expected that similar levels of sales and profitability will be achievable by the Divestiture Business after its sale. It will be viable and attractive to a purchaser, as reflected by the strong interest already shown by bidders, and will be able to compete effectively throughout the EEA, Switzerland, UK, U.S., Canada, Australia, and New Zealand (and potentially beyond).
  - (c) The Divestiture Business will benefit from [ ] senior management personnel (including senior individuals [ ]; as well as numerous global and regional leads for the supporting functions [ ] compared to when the Parties were considering three separate divestment transactions. This will ensure that the Divestiture Business is able to operate across the three regions. However, the additional management overhead

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<sup>18</sup> As explained in Appendix, section 2 of the CMA Remedy Submission provided to the Commission on [ ] October 2022.

<sup>19</sup> These are described in further detail in Appendix, section 11 of the CMA Remedy Submission provided to the Commission on [ ] October 2022.

<sup>20</sup> With the exception of the umbrella brand Master Builders Pozzolith and the product trademark MasterPozzolith in Japan, which will transfer to Sika, as detailed at Appendix, Section 7 of the CMA Remedy Submission provided to the Commission on [ ] October 2022. For further detail regarding the trademarks which will be transferred, please see Schedule 1 of the draft Divestment Deed, submitted to the Commission on 11 November.

<sup>21</sup> For further detail, see also Appendix, section 12 of the CMA submission provided to the Commission on [ ] October.

and other non-staff costs associated with providing global support do not materially affect the cost base of the Divestiture Business. Fully internalising global and regional support services will lead to an increase in costs for the Divestiture Business of just [ ] percentage points of FY2022 RF EBITDA margin. The Divestiture Business will continue to operate on a profitable basis.

- (d) The cost base will not be materially affected by reallocation of staff and separation of assets (including R&D assets). In particular, in relation to the minority of production sites and warehouses that are currently shared, lost economies of scale will be just [ ] percentage points of FY2022RF EBITDA margin.

3.15 Accordingly, the acquisition of the Divestiture Business by any Approved Purchaser would enable it to operate as a viable, long-term, independent and effective competitor to the merged entity and sufficiently preserve competition at the level that existed prior to the Proposed Acquisition.

#### **4. Timely separation and transfer of the Divestiture Business**

4.1 The Proposed Acquisition is an anticipated transaction and the Parties have been continuing to compete independently since signing the sale and purchase agreement in November 2021. There are no risks that the competitive capability of the ANZ Divestment Business will deteriorate before completion of divestiture.

4.2 As set out in the global regulatory timeline previously shared with the Commission and the Overseas Regulators<sup>22</sup>, the Parties had proposed a [ ].

4.3 The Parties have given further consideration to this approach and have formed the view that it would be simpler if they [ ] could be the final stage in a closing of the Proposed Acquisition and Divestiture Business.

4.4 As reflected in the latest global regulatory timeline shared with the Commission on 9 November, it is currently anticipated that the Proposed Acquisition and divestment of the Divestiture Business [ ], so as to significantly minimise, [ ], any perceived asset risk associated with the Revised Remedy. As illustrated, all of the Overseas Regulators will be assessing the purchaser or purchasers put forward by the Parties for approval at approximately the same time. The Parties will facilitate the informal engagement between committed potential purchasers and the Commission in [ ] 2022, provided the Commission is open to such engagement.

4.5 In summary, the stages of the closing now planned for the [ ] are as follows:

- (a) completion of the [ ];
- (b) completion of the [ ];
- (c) completion of the [ ].

4.6 As set out in the timeline provided to the Commission on 9 November, the Parties currently anticipate that these transactions will all complete [ ] (scheduled for [ ]).

4.7 As explained above, because the divestment of [ ].

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<sup>22</sup> We refer to the global regulatory timeline of [ ], shared with the Commission on [ ].



4.8 In addition, [ ], the draft Divestment Deed provides for a [ ] Divestment Period following completion of the Proposed Acquisition within which completion of the Divestiture Business must occur, which is readily achievable.

**5. Competitiveness and saleability of the Divestiture Business can be preserved**

5.1 The risk that the Divestiture Business degrades prior to being transferred to the Approved Purchaser is negligible if not non-existent, given the scope of the Revised Remedy [ ].

5.2 In the event there is any delay between completion of the Proposed Acquisition and the divestment transaction, the Divestiture Business will have all of the necessary resources to enable it to continue to compete independently of Sika. Relevantly for New Zealand, completion of the divestment of MBCC NZ will be effected together with completion of the divestment of MBCC Australia and the European Divestiture Business. Accordingly, MBCC NZ will not have any period where it does not have access to the R&D services provided by Trostberg and Treviso.

5.3 However, the draft Divestment Deed includes all of the usual protections to ensure the Divestiture Business is held separate and maintained as a viable, independent competitor during any Divestment Period between completion of the Proposed Acquisition and the divestment transaction.

5.4 In particular, the draft Divestment Deed currently proposes a [ ] Divestment Period for the sale of the Divestiture Business to the Approved Purchaser. Pursuant to the draft Divestment Deed, Sika will use all reasonable endeavours to preserve the associated reputation and goodwill of the Divestiture Business and to preserve its economic viability, marketability and competitiveness during the Divestment Period. The draft Divestment Deed also provides for the appointment of a hold separate manager should the circumstances require it. Furthermore, as indicated in the CMA Remedy Submission, the Parties also anticipate appointing a monitoring trustee to give the Commission (and the Overseas Regulators) comfort that there is no deterioration risk. Accordingly, the competitiveness and saleability of the Divestiture Business will be preserved during the Divestment Period so as to minimise any perceived asset risk. Sika considers that it is appropriate, and will be the most efficient in the circumstances, if the monitoring trustee can update on a global basis, fulfilling obligations to all of the relevant regulators.<sup>23</sup>

**6. Identifying a suitable purchaser**

6.1 There is no risk that a suitable purchaser will not be available or that the Parties will divest to a weak or otherwise inappropriate purchaser.

6.2 As above, the composition of the Revised Remedy has been crafted such that its effectiveness does not depend on the identity of the purchaser.

6.3 In addition, the Proposed Acquisition will not complete until a binding Sale and Purchase Agreement, in an approved form, has been entered into with a purchaser that has been approved by all six competition regulators, including the NZCC.

6.4 As previously advised, Sika has instructed [ ] to market the Divestiture Business as a single package to prospective purchasers. Engagement with prospective purchasers is currently ongoing. On [ ], [ ] sent process letters to [ ] potential purchasers.<sup>24</sup> As the Commission is aware, on [ ] the Confidential Information Memorandum ("**CIM**")<sup>25</sup> for the Divestiture

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<sup>23</sup> We note that we have included an updated version of the draft Divestment Deed with this submission for the Commission's consideration. The updates are designed to reflect the global nature of the Revised Remedy. Sika welcomes and is ready to consider the Commission's feedback on the draft in light of the Revised Remedy, at its earliest convenience.

<sup>24</sup> [ ].

<sup>25</sup> We refer to our correspondence of 12 October 2022, providing the Commission with the CIM and the list of bidders.

Business (including selected financial information) was sent out to each of the [ ] potential purchasers who received the process letter. [ ].<sup>26</sup>

- 6.5 Sika has now selected [ ] bidders to move onto the second phase of the sales process (the **Short-listed Bidders**).<sup>27</sup> As discussed with the Commission, Sika has taken a careful and conservative approach toward short-listing these bidders. In selecting the Short-listed Bidders to take forward to the next stage, Sika has chosen bidders who, on the basis of initial analysis, do not raise any competition concerns, and who have the commercial acumen, expertise and financial resources to operate the Divestiture Business as an effective competitor in the long-term.
- 6.6 Consistent with previous divestment undertakings accepted by the Commission in previous transactions it has considered, Sika has undertaken to satisfy the Commission that any proposed purchaser of the Divestiture Business:
- (a) is not associated with Sika or any of its affiliates;
  - (b) has the financial resources, proven expertise and incentive to viably operate and develop the Divestment Assets in competition with Sika in the relevant market(s);
  - (c) is not likely to create competition concerns that would result in a contravention of section 47(1) of the Commerce Act 1986; and
  - (d) is not likely to give rise to a risk that the implementation of the Divestment will be unduly delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant authorities for the acquisition of the Divestiture Business.
- 6.7 Sika is confident that the Short-listed Bidders satisfy these criteria. However, as outlined in the draft Divestment Deed, so as to allay any perceived purchaser risk concerns, Sika proposes that the divestiture to the Approved Purchaser be subject to the Commission's approval, including the sale agreement for the Divestiture Business and associated transitional supply agreements.<sup>28</sup> To that end, the Short-listed Bidders are aware of and understand the need to engage with the Commission and provide it with evidence as to their suitability as a potential purchaser. Sika expects that the Short-listed Bidders will reach out to the Commission in short order.
- 6.8 [ ].
- 6.9 It is currently anticipated that the second phase of the sales process will complete no later than [ ]. Sika anticipates that at the end of the second phase of the sales process, it will select [ ] bidders whose names will be provided to each of the regulators as a potential purchaser. Sika anticipates that a number of the regulators, including the Commission, will seek to market test these potential purchasers following this. Sika appreciates that market inquiries can be difficult during January in New Zealand, however Sika believes that its global regulatory timeline allows sufficient time for the Commission to undertake any market inquiries necessary for purchaser approval – including prior to any purchaser being approved by one of

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<sup>26</sup> Copies of these NBOs were shared with this Commission on 4 November 2022.

<sup>27</sup> We refer to our correspondence of 9 November 2022, informing the Commission of the identities of the Short-listed Bidders, which are [ ].

For completeness, the reason for limiting the number of Short-listed Bidders was that the second phase involves a more detailed due diligence and as such it is only practical to satisfy the information needs of a more limited number of participants. For reference, during the second stage the potential purchasers will be provided with (for example) access to a data room, a commercial VDD report, financial and separation reports, a tax and legal factbook and a management presentation.

<sup>28</sup> In accordance with clause 8.1 of the draft Divestment Deed, Sika must notify the Commission of the identity of the proposed purchaser as soon as practicable and no later than [ ] Business Days before the anticipated completion of the Divestment. The Commission has the discretion to approve or reject in writing any purchaser proposed by Sika.

the other regulators (notably the CMA or EC, where purchaser approvals are currently expected by approximately 21 February 2023).

- 6.10 A near final draft of a sale and purchase agreement will be negotiated by [ ] and the second phase is scheduled to complete no later than [ ].

**7. Conclusion, timing and next steps**

- 7.1 The Parties trust that this submission is helpful in assisting the Commission in understanding the Revised Remedy, and stand ready to answer any further questions the Commission may have.
- 7.2 For the reasons explained above, the Parties believe the Revised Remedy comprehensively addresses any possible competition concerns and will result in the creation of a viable, independent and effective competitor, able to compete on a standalone basis immediately after completion of the sale of the Divestiture Business.
- 7.3 There is no material composition, purchaser or asset risk associated with the Revised Remedy. The Divestiture Business is complete: it includes all assets, components, consents, IP, and staff necessary for its ongoing competitiveness. The Divestiture Business will be transferred with all necessary tangible and intangible assets, personnel, and all essential business functions for the ongoing competitive operation of the business in New Zealand. As outlined in this submission, it has already elicited a wide range of interest from suitable buyers and a sale process which can be implemented without exceptional obstacles.
- 7.4 The Parties are committed to working with the Commission (and, in parallel, with the Overseas Regulators) to finalise the assessment of the Revised Remedy within the Parties' suggested timeframe. In parallel, Sika is also engaging with the CMA in the UK, the DOJ in the U.S., the CCB in Canada and the ACCC in Australia. To that end, Sika has provided an updated draft of the Divestment Deed for the Commission's consideration. The updates are designed to reflect the global nature of the Revised Remedy. Sika welcomes the Commission's feedback on the draft in light of the Revised Remedy, at its earliest convenience.

**Annexure 1 – CMA Remedy Submission**

**Annexure 2 – Draft Commitments to the European Commission**