

SIKA AND MBCC GROUP

RESPONSE TO THE STATEMENT OF ISSUES

Date: 15 July 2022

The Registrar
Competition Branch
Commerce Commission
PO Box 2351
Wellington



MBCC GROUP

1. Introduction and executive summary

- 1.1 This submission sets out Sika AG's (**Sika**) response to the Commerce Commission's (the **Commission**) Statement of Issues dated 29 June 2022 (**SOI**) published in relation to the application for clearance lodged in connection with the proposed acquisition by 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 Transaction**).¹
- 1.2 For the reasons outlined in the Clearance Application, Sika's view is that the Proposed Transaction is not likely to substantially lessen competition in any market in New Zealand.² However, in the interests of ensuring the timely completion of the global Proposed Transaction, Sika is prepared to divest MB Solutions New Zealand Limited (**MBCC NZ**) together with MB Solutions Australia Pty Ltd (which owns Bluey Technologies Pty Ltd) (together, the **Divestment Business**), (the **Proposed Divestment**). [] IP rights for Australia and New Zealand will be transferred to the Divestment Business.³ Sika will also provide all transitional support that may be required to facilitate the separation of the Divestment Business from MBCC Group. Further details are provided below.
- 1.3 Sika submits that the Proposed Divestment offers a structural solution that, for the reasons discussed below, will result in the Divestment Business being a viable business that will be independent of MBCC Group and MBCC NZ will be in a position to continue to be an effective competitor in the New Zealand and Australia markets.
- 1.4 As set out at paragraph 8 of the SOI, we understand that the current focus of the Commission's investigation is on the Proposed Divestment. Accordingly, the focus of this submission is on the Proposed Divestment and more specifically those issues the Commission identifies at paragraph 61 onwards of the SOI.
- 1.5 In summary, Sika considers the Proposed Transaction will not give rise to any material composition risk, asset risk or purchaser risk. As set out in further detail below:
- (a) Sika will ensure the continued supply of inputs and finished goods that are currently supplied to the Divestment Business by MBCC Group until such time as the Approved Purchaser elects to move these to alternative supply arrangements. The Divestment Business will also have [].
 - (b) The Proposed Divestment ensures that that the Divestment Business has access to R&D support from MBCC Group, where required and, [].⁴
 - (c) An effective and robust transition plan will be developed with the Approved Purchaser to ensure the commitments in the draft Divestment Deed are fully observed, the viability of the Divestment Business is preserved, and its ability to remain a viable and competitive standalone business is ensured.
 - (d) Sika is confident that suitable purchasers are available which will satisfy the Commission's criteria. [].

2. Summary of the Proposed Divestment

- 2.1 As noted above, the Proposed Divestment involves the sale of the entire MBCC NZ business, as well as the MBCC Australia business. The Divestment Business will function as a going concern, and will be fully equipped to operate as an independent competitor in New Zealand and Australia. The Proposed Divestment will be given effect to by the sale and transfer of all of the shares in MBCC NZ and MBCC Australia. Accordingly, all of the assets held by MBCC NZ (which includes

¹ Unless otherwise specified, defined terms in this response have the same meaning as in the Clearance Application of 27 January 2022, the Divestment Submission and the draft Divestment Deed.

² For completeness, Sika agrees with the Commission's conclusion at paragraph 9 of the SOI (including Attachment A) that the Proposed Transaction is unlikely to cause a substantial lessening of competition in relation to the "minor" and "de minimis" product overlaps.

³ [].

⁴ Sika intends that the Divestment Business will be offered for sale as a going concern to a single independent third-party buyer (the **Approved Purchaser**) approved by the Commission. The Proposed Divestment of the Divestment Business will also be subject to approval by the ACCC.

all manufacturing facilities, warehouses and other sites, all MBCC NZ customer and supply contracts, and all other assets) together with all MBCC NZ employees will transfer to the Approved Purchaser of the Divestment Business. [] all necessary Intellectual Property (IP) rights for Australia and New Zealand to the Divestment Business will also be transferred to the Approved Purchaser.⁵

- 2.2 Historically, when the group belonged to BASF, MBCC Group's New Zealand and Australian business had operated []. [].
- 2.3 [] all required IP [] will be transferred to the Approved Purchaser to allow the Divestment Business to operate effectively from Day 1, as further detailed in section 5 below. Sika will also provide continuous support and [] as further detailed in paragraph 3.1 below.
- 2.4 Sika will also ensure the continued supply of such raw materials and finished products that are currently supplied to the Divestment Business by MBCC Group until such time as the Approved Purchaser elects to move these to alternative supply arrangements or selects other products, as further detailed in section 3 below.
- 2.5 Sika will also enter into transitional services arrangements (TSAs) to cover such matters as IT support for a transitional period.⁶
- 2.6 Sika submits that these measures will ensure that the Divestment Business will continue to be a viable and effective competitor in the relevant markets. While the Divestment Business is largely independent, to the extent it has links with MBCC Group, it will have all the support it needs to continue as a strong and effective competitor from Day 1 as it transitions to full independence from MBCC Group.

3. Access to inputs and finished goods

- 3.1 The Divestment Business will have []. In particular, Sika will enter into appropriate transitional supply agreements [] to ensure raw materials and finished goods that are currently supplied by MBCC Group to the Divestment Business will continue to be supplied post-divestment [] []⁷ while alternative sourcing arrangements are put in place by the Approved Purchaser.
- 3.2 []. It is important to note that the Divestment Business is []. [], the Divestment Business sources [] of its materials from MBCC Group globally [], with the [] being sourced from a [].⁸ The total spend by the Divestment Business on materials from MBCC Group was [],⁹ which was split [].¹⁰
- 3.3 [].
- 3.4 [].
- 3.5 To the extent needed, the transitional services will provide the Divestment Business with technical support to facilitate the transition to alternative suppliers, including any testing required for new sources of raw materials and/or finished products.

⁵ See footnote 3.

⁶ [].

⁷ [].

⁸ [].

⁹ Converted to New Zealand dollars on 6 July 2022, based on an exchange rate of 1 AUD = 1.10192 NZD.

¹⁰ Converted to New Zealand dollars on 6 July 2022, based on an exchange rate of 1 AUD = 1.10192 NZD.

4. Access to research and development (R&D) services

4.1 Sika submits that the Proposed Divestment will ensure that the Divestment Business will continue to support customer needs and innovate, and thus be a strong and effective competitor in New Zealand. As expanded on further below:

(a) the Proposed Divestment will ensure that that the Divestment Business has access to R&D support from the MBCC Group, where required; and

(b) [].

The nature of R&D in relation to chemical admixtures

4.2 It is important to note at the outset that, while there is some R&D in relation to chemical admixtures, chemical admixtures are not comparable to other industries which involve intensive R&D (e.g. pharmaceutical and crop sciences industries), either in terms of investment, expenditure, staffing, patents, or product and technology life-cycles. It is also not comparable to consumer electronics and technology markets where there are frequent releases of new products. While the supply of chemical admixtures involves some initial investment by suppliers, this investment is relatively limited and it does not rely heavily on IP. Indeed, as explained at paragraph 4.5 below, there is often a reluctance by customers to embrace new products without a track record. Further, once a product is developed any further development largely involves determining the chemical admixtures required for an optimal 'mix design' to achieve the desired properties of concrete or cement, and ongoing technical support in relation to those mix designs.

4.3 [].¹¹

4.4 Chemical admixtures are largely produced with commodity raw materials and formulated into the final products. New product development or reinvention occurs in only limited cases, with the vast majority of 'R&D' being more in the nature of technical services involving incremental changes to improve existing products. The focus of such R&D is for the most part on supporting stable commodity product lines and updating or making slight adjustments to existing product formulations. Most of this adaptation and modification occurs at the local level.

4.5 Truly innovative developments resulting from basic research are not common in chemical admixtures. Even when such products are ready to be marketed, customers are often reluctant to use them, preferring to stick with the established commodity products. [].¹²

Existing capabilities in relation to R&D

4.6 A significant proportion of the 'R&D' that takes place in chemical admixtures consists of technical services and is focused on product development and maintenance rather than basic research into new polymers or other compounds. This product development and maintenance work includes the development of new formulations using existing polymers and other inputs or adapting formulations for alternative raw materials. This work can be seen as innovative and can result in 'new' products, however it does not rely on the development of new polymers at the basic research level. This is work in which the Divestment Business has existing experience and capability. By way of example:

(a) [].

(b) [].

4.7 The Divestment Business has existing in-house capacity to support product development work. This capability consists of:

(a) [];

¹¹ [].
¹² [].

- (b) [];
- (c) [];
- (d) [].
- (e) [].

4.8 [].

4.9 [].¹³

Local R&D capability build up

4.10 At the Approved Purchaser's election, [].

4.11 To build up further local R&D capability in Australia, the Divestment Business will:

- (a) []
- (b) [].

4.12 [].^{14 15}

4.13 Notwithstanding the limited significance of R&D for the Divestment Business;

- (a) [] IP will be transferred to the Approved Purchaser;¹⁶
- (b) [].

4.14 In addition, Sika / MBCC Group will provide to the Divestment Business (at the Approved Purchaser's option):

- (a) [];
- (b) [];
- (c) [];
- (d) [].

4.15 The above measures will strengthen the Divestment Business long-term even beyond what it currently is and needs. The R&D transitional services will provide the Divestment Business with the knowledge transfer and other support it requires []. [], with some knowledge transfer from MBCC Group, the Divestment Business will have the requisite expertise and capability to commercialise such new developments.

4.16 The proposed remedy will ensure that the Approved Purchaser can continue to access the R&D support needed for the Divestment Business, and will further build up the existing R&D capabilities. [] and the resulting know-how transfer will ensure that the Divestment Business will continue to support customer needs and innovate, and thus be a strong and effective competitor in the relevant markets.

¹³ [].

¹⁴ Converted to New Zealand dollars on 6 July 2022, based on an exchange rate of 1 AUD = 1.10192 NZD.

¹⁵ Converted to New Zealand dollars on 6 July 2022, based on an exchange rate of 1 AUD = 1.10192 NZD.

¹⁶ Noting, for completeness, [].

5. Additional measures relating to IP

- 5.1 [] in Australia and New Zealand, [].
- 5.2 [] all relevant (registered or unregistered) IP, [], as required for the Proposed Divestment, will similarly be transferred to the Approved Purchaser.¹⁷
- 5.3 [].
- 5.4 In addition, the right to use the current [] will be transferred to the Approved Purchaser. []. As noted above, this will ensure that the Approved Purchaser is not disadvantaged during the transition period as it builds its own R&D capability. The proposed R&D transitional services will ensure that the Divestment Business is supplied with support to enable it to [] in the relevant markets.

6. Key staff will remain with the Divestment Business

- 6.1 Sika is committed to ensuring that key staff remain with the Divestment Business. In particular, [].
- 6.2 Sika assures the Commission that the Divestment Business is well-established in both New Zealand and Australia, with a strong reputation and proven track record in both markets. The Divestment Business has retained its core team and key people over the last few years, and its employees will transfer with the Proposed Divestment to ensure business continuity for the Approved Purchaser.

7. Viability of the Divestment Business post-divestment will be preserved

- 7.1 Sika has proposed a Divestment Period of [] to provide the greatest opportunity for the Proposed Divestment to be completed. However, as the formal sales process is now well underway, []. Accordingly, Sika submits that a [] period is reasonable and will allow sufficient time for completion, noting that Sika [], and will be working towards a shorter completion timeframe. It is submitted that this does not present any significant risk of deterioration to the Divestment Business during the Divestment Period.¹⁸
- 7.2 An effective and robust transition plan will be developed with the Approved Purchaser to ensure the commitments in the Divestment Deed are fully observed and the viability of the Divestment Business is preserved and its ability to remain a viable and competitive standalone business is ensured.
- 7.3 Sika expects to obtain [], all government and third party consents required for the divestment of the Divestment Business. [].

8. Sika identifying a suitable purchaser

- 8.1 Given the high level of interest that the Divestment Business has already attracted, Sika is confident that the sales process will identify a suitable Approved Purchaser which meets the Commission's criteria (as set out in the draft Divestment Deed).
- 8.2 In considering these matters, the identity of the proposed purchaser will be relevant. [].
- 8.3 As outlined in the draft Divestment Deed, the Approved Purchaser is subject to Commission approval. []. Sika is willing to work closely with the Commission on the purchaser vetting process in any case so as to ensure it is satisfied that its criteria is met.

¹⁷ Also see footnote 3.

¹⁸ Sika submits that any potential asset risk concerns are addressed through the robust hold separate and ring-fencing obligations provided for in the draft Divestment Deed. The robustness of, and confidence in, these arrangements are bolstered by the nature in which the Divestment Business has been run to date i.e. as a largely independent business.

9. Conclusion

- 9.1 Accordingly, for the reasons set out in this submission, Sika is confident that the Proposed Divestment will not give rise to any asset, composition, or purchaser risk.
- 9.2 Sika trusts that this submission satisfies the Commission regarding the issues identified in the SOI. However, both Sika and MBCC Group remain happy to discuss any aspects of the Proposed Divestment further with the Commission to the extent that it considers this useful.

Annexure 1

[]

(Attached separately)

Annexure 2

[]

(Attached separately)