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Determination

Sika AG and MBCC Group [2023] NZCC 5

The Commission:	Dr Derek Johnston Dr John Small Vhari McWha
Summary of application:	An application from Sika AG, via its wholly-owned subsidiary Sika International AG, to acquire 100% of the shares in LSF11 Skyscraper HoldCo S.à.r.l. (the ultimate parent company of the MBCC group of companies).
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to the proposed acquisition (subject to the divestment undertaking dated 30 March 2023 provided by Sika AG under section 69A of the Commerce Act 1986).
Date of determination:	3 April 2023

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The Proposed Acquisition

1. On 18 January 2022, the Commerce Commission registered a clearance application (the Application) for the proposed acquisition by Sika AG (Sika), via its wholly-owned subsidiary Sika International AG, of 100% of the shares in LSF11 Skyscraper HoldCo S.à.r.l., the ultimate parent company of the MBCC group of companies (MBCC) (the Proposed Acquisition).[1] We refer to Sika and MBCC together as 'the Parties'. The Proposed Acquisition is part of a global transaction that was also considered by other competition agencies.

Our decision

2. Sika and MBCC are the two largest chemical admixture suppliers in New Zealand. The Commission's investigation focused on whether the loss of competition between Sika and MBCC would enable the merged entity to profitably raise prices above, or reduce quality or service below, the levels that would prevail absent the Proposed Acquisition in the market for chemical admixtures.

3. Following the Proposed Acquisition, the merged entity would have a high market share in the supply of chemical admixtures. It would also be the only supplier to manufacture chemical admixtures domestically. This is a characteristic that some customers expressed a preference for, due to the view that a domestic admixture producer is better placed to provide customers with technical advice based on local conditions and can provide a greater security of supply. Some firms believed it was more cost effective to produce locally rather than importing the finished admixture product which contains a high volume of water.

4. In our view, the combined constraint from the remaining and potential competitors in the chemical admixture market and the countervailing power of customers (together with all other constraints from outside the market) would not have been sufficient to constrain the merged entity from increasing the prices of chemical admixtures and/or reducing quality or service.

5. To address these concerns, Sika offered an undertaking (the Divestment Undertaking) under section 69A of the Commerce Act 1986 to divest the entire MBCC business in New Zealand (the Proposed Divestment). We are satisfied the Divestment Undertaking will remedy the competition concerns we identified.

6. The Commission gives clearance to the Proposed Acquisition (subject to the Divestment Undertaking) as we are satisfied that the Proposed Acquisition together with the Proposed Divestment would not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

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[1] A public version of the Application is available on our website at: http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/.

Our framework

7. Our approach to analysing the competition effects of mergers is based on the principles set out in our Mergers and Acquisitions Guidelines (our guidelines).[2]

    7.1. We assess mergers using the substantial lessening of competition test. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).[3]

    7.2. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.[4] There is no bright line that separates a lessening of competition that is substantial from one which is not. What is substantial is a matter of judgement and depends on the facts of each case.[5]

    7.3. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.[6] If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.

8. We may accept undertakings to dispose of assets or shares.[7] If we accept a divestment undertaking, it is deemed to form part of a clearance.

9. As set out in our divestment guidelines,[8] upon receiving a divestment undertaking or divestment proposal, we will consider whether it is sufficient to remedy any substantial lessening of competition that may otherwise arise from the proposed merger.

The Parties and the Proposed Acquisition

The applicant (Sika)

10. Sika AG is the ultimate parent company of Sika Group, a speciality chemicals group that is headquartered in Switzerland.[9] Sika has subsidiaries in over 100 countries, and operates its New Zealand business through its subsidiary, Sika (NZ) Limited. Sika operates chemical admixture production plants in Auckland and Christchurch and supplies a range of chemical admixtures and other construction material-related products throughout New Zealand.

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2 Commerce Commission, *Mergers and Acquisitions Guidelines* (May 2022).
3 *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].
4 *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].
5 *Mergers and Acquisitions Guidelines* above n2 at [2.23].
6 Section 66(3)(a) of the Commerce Act 1986.
7 Under section 69A(2) of the Act, we are only able to accept undertakings for the disposal or assets or shares.
8 *Mergers and Acquisitions Guidelines* above n2 at Attachment F.
9 The Application at [2.1].

The target (MBCC)

11. The direct Target is LSF11 Skyscraper HoldCo S.à.r.l., a holding company established in Luxembourg for the sole purpose of holding and administering the shares in the MBCC Group of entities.[10] MBCC is a global supplier of chemical admixtures, including in New Zealand, Australia and the United States. MBCC manufactures and supplies a range of chemical admixtures and other construction material-related products in New Zealand. MBCC operates its New Zealand business through its subsidiary, MB Solutions New Zealand Limited, which is the only New Zealand shareholding of LSF11 Skyscraper HoldCo S.à.r.l. and the only relevant entity for the Application. MBCC operates one chemical admixture plant in Auckland, from which it supplies its products throughout New Zealand.

The Proposed Acquisition

12. The Proposed Acquisition relates to the manufacture and supply of chemical admixtures, which are ingredients that are added to concrete to impart certain characteristics, for example, reducing the required water content for a concrete mixture or altering the setting rate.[11] Admixtures are one of the five basic components of concrete, alongside cement, water, sand and aggregates.[12]

13. Chemical admixtures are produced by mixing raw material inputs known as polymers. Both Sika and MBCC import polymers from overseas and mix them in their New Zealand plants to create their own chemical admixtures, whereas other chemical admixture suppliers in New Zealand import the finished chemical admixture product.

14. There are different varieties of chemical admixtures, and Sika and MBCC both produce the core types, being:[13]

    14.1. water-reducing admixtures – which reduce the water content required for a concrete mixture;

    14.2. air-entraining admixtures – which relieve internal pressure on concrete;

    14.3. retarding mixtures – which slow the rate of setting concrete;

    14.4. accelerating admixtures – which reduce the time required for proper curing;

    14.5. corrosion-inhibiting admixtures – which slow corrosion of reinforcing steel in concrete; and

    14.6. plasticisers and superplasticisers – which reduce water content and can improve the slump of concrete.

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10 The Application at [3.3].
11 The Application at [1.3].
12 The Application at [8.1].
13 The Application at [9.5].

15. Water-reducing admixtures and air entrainers appear to be the most commonly purchased admixture, however customers will normally buy a full range of admixtures to enable them to deal with different situations. As the various types of chemical admixtures serve different purposes, customers commonly use a combination of chemical admixtures in each batch of concrete.[14] Suppliers typically provide the full range of admixtures to be able to service customer needs.

16. Direct sales to ready-mix concrete producers account for 90% of both Parties' customers in New Zealand.[15] The Parties each supply one of the two biggest ready-mix concrete producers in New Zealand (Allied and Firth).[16]

17. Sika and MBCC also produce construction material-related products and supply these to customers in New Zealand. Construction material-related products include concrete works, premix mortars, flooring, expansion joints, sealants, fiber and silica fume.

Market definition

18. Market definition is a tool that helps identify and assess the competitive constraints a merged firm is likely to face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.

19. We define markets in the way that we consider best isolates the key competition issues that arise from a merger. In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products and services that fall outside a market, but which would still impose some degree of competitive constraint on a merged entity.

20. Sika submitted that the relevant market definition is the market for the supply of chemical admixture solutions in New Zealand.[17]

21. Having considered all the evidence and submissions before us, and for the reasons set out below, we agree with Sika that the competitive effects of the Proposed Acquisition are best assessed in a national market for the supply of chemical admixtures.

Product dimension

22. The evidence we gathered demonstrated that there is limited demand-side substitution between different chemical admixtures as each type of admixture is used for a different purpose. For example, customers could not use a water-reducing admixture in place of an accelerating admixture. There is however some supply-side

[14] The Application at [9.6].
[15] The Application at [12.1(a)].
[16] The Application at [12.5].
[17] The Application at [13.13].

substitution, as we understand most other suppliers supply the range of admixtures and use the same equipment to produce each kind.

23. Given Sika and MBCC (and other admixture suppliers) largely supply the same kinds of chemical admixtures, the constraints are likely to be similar across the different types of admixtures. Further, defining separate product markets would not affect the outcome of our analysis, as the aggregation would likely cause a substantial lessening of competition in individual product markets. For the purposes of our analysis, we therefore defined the relevant product market as one that covers all chemical admixtures.

Customer dimension

24. Our investigation identified that chemical admixture customers broadly require the same kinds of admixtures (albeit with some differentiation). We would not expect that the supplier options available to customers would be significantly different. We therefore did not consider that the evidence supported separate customer markets.

Geographic dimension

25. We consider that the key competition issues that may arise from the Proposed Acquisition are best assessed by defining a national market for the supply of chemical admixtures. Although Sika and MBCC's plants are in Auckland or Christchurch, they both supply admixtures to customers located throughout New Zealand.[18]

With and without scenarios

26. Assessing whether a substantial lessening of competition is likely requires us to:

    26.1. compare the likely state of competition if the Proposed Acquisition proceeds (the scenario with the merger, often referred to as the factual) with the likely state of competition if it does not (the scenario without the merger, often referred to as the counterfactual); and

    26.2. determine whether competition is likely to be substantially lessened by comparing those scenarios.

27. With the Proposed Acquisition, Sika would acquire 100% of the shares in MBCC in New Zealand and globally. Without the acquisition, [ ].[19]

28. Based on the evidence before us, we consider that the likely counterfactual is the status quo.

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[18] We have included imports in the national market however we do not consider that their presence or absence in the market affects our analysis.

[19] The Application at [15.1].

Competition assessment

Unilateral effects in the market for the supply of chemical admixtures

29. Our investigation primarily focused on whether the Proposed Acquisition would be likely to substantially lessen competition via unilateral effects in the national market for the supply of chemical admixtures. Unilateral effects can arise when a firm merges with, or acquires, a competitor that would otherwise provide a significant competitive constraint. The Proposed Acquisition could substantially lessen competition due to unilateral effects if, in any relevant market, the competition lost between the Parties' products allowed the merged entity to profitably increase the wholesale price and/or reduce the quality of its products.

30. In investigating the Proposed Acquisition, we have considered:

    30.1. how closely Sika and MBCC currently compete to supply chemical admixtures;

    30.2. the strength of existing competitors;

    30.3. the extent to which the merged entity would be constrained by potential entry and expansion; and

    30.4. the extent of countervailing power.

31. For the reasons set out below, we consider that the Proposed Acquisition raises concerns about unilateral effects in the market for the supply of chemical admixtures in New Zealand.[20]

The Applicant's views

32. Sika submitted that the Proposed Acquisition would not be likely to substantially lessen competition in any relevant markets due to unilateral effects because:[21]

    32.1. the availability of imports will continue to constrain the merged entity;

    32.2. major customers will continue to exercise significant countervailing power and customer-sponsored entry is highly likely;

    32.3. it is easy and low-cost for customers to switch admixture suppliers; and

    32.4. there are low barriers to entry and expansion as local production is not required to compete in New Zealand, the technical skill required for chemical admixture production is low, and raw materials required to manufacture chemical admixtures are readily available.

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[20] For completeness, we are satisfied the Proposed Acquisition is unlikely to substantially lessen competition in relation to any of the construction material-related products supplied by the Parties. For each product, the evidence suggests that MBCC is a not a significant competitor to Sika and/or alternative suppliers remain.

[21] The Application at [19.1]-[24.2].

Closeness of competition between Sika and MBCC and loss of competition

33. Our enquiries indicate that Sika and MBCC are each other's closest competitors in the supply of chemical admixtures as they are the two largest chemical admixture suppliers in New Zealand and the only two suppliers that manufacture chemical admixtures domestically.

34. Many customers told us that that they see Sika and MBCC as each other's closest competitors and advised that the two compete against one another.[22] [ ].[23]

35. The Proposed Acquisition would therefore result in the removal of what appears to be Sika's largest and closest competitor and there would be a substantial loss of future competition between Sika and MBCC. Post-acquisition, the merged entity would have a high market share of over 75% in the national market for chemical admixtures and customers would not have the option of another domestic supplier to switch to.

Constraint from existing admixture suppliers

36. Post-acquisition, the main alternative supplier in the market, GCP, would compete using an import model. Based on the evidence before us, suppliers that use an import model may not be viewed as good alternatives for some customers seeking to switch suppliers.

37. Some customers prefer a supplier that produces chemical admixtures in New Zealand as they believe a domestic presence could provide better advice on developing chemical admixture combinations, technical support or assistance with trials and projects.[24] Some customers also told us that a chemical admixture supplier that understands the local products, aggregates and conditions is important.[25]

38. Further, some market participants believed that locally produced chemical admixtures are less likely to be subject to supply shortages and are cheaper than imported chemical admixtures, with one market participant estimating them to be

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22 For example, [ ] said that Sika "definitely" affects the behaviour of MBCC (Commerce Commission interview with [ ]), [ ] (an MBCC customer) said that Sika has been aggressive in trying to get its business (Commerce Commission interview with [ ]). [ ] told is that if it was not with MBCC it would have to go with Sika, as it wants a New Zealand domiciled supplier (Commerce Commission interview with [ ]; [ ] told us that if it was not with Sika it would go with MBCC and GCP in that order (Commerce Commission interview with [ ]); and [ ], an MBCC customer, said if it switched, it would be to Sika or GCP (Commerce Commission interview with [ ]).

23 For example, [ ] and [ ].

24 Commerce Commission interview with [ ] and Commerce Commission interview with [ ].

25 Commerce Commission interview with [ ].

[ ] cheaper.[26] These market participants said that this is because domestic suppliers import the raw materials to make the chemical admixtures, while importers import the heavier finished chemical admixture product, which increases the associated freight costs.[27]

39. The evidence we gathered also suggested that many of the other competitors mentioned in the Application are not sufficiently active in New Zealand to impose a strong constraint on the merged entity.

40. We are therefore not satisfied that the competition from the other existing chemical admixture suppliers would be likely to be sufficient to constrain the merged entity.

Constraint from expansion and potential new entry

41. To constrain an exercise of market power by a merged entity, entry or expansion in response to a price increase or other exercise of market power by a merged entity has to be likely, sufficient in extent, and in a timely fashion, satisfying what is termed the 'LET test'.[28]

42. The evidence before us indicates that the conditions of entry to establish a chemical admixtures plant are significant given economies of scale. While some chemical admixture suppliers that do not currently have a plant in New Zealand told us that finding the right location for the plant and sourcing skilled staff would be challenging, the main barrier to entry is achieving sufficient customer volumes to justify the establishment of a production plant.[29]

43. One reason for this is that, according to some customers, changing admixture suppliers can be disruptive, risky and time consuming, as it requires substantial testing to ensure the new admixture supplier's formulations produce the correct results when mixed with the customer's concrete.[30] In addition, one competitor told us that it would need a significantly sized customer to make setting up a plant in New Zealand worthwhile, however also noted that it is a 'chicken and egg situation', as customers would want the plant built before signing on.[31]

44. We are therefore not satisfied that entry or expansion by importers is likely to occur in a timely manner and at a sufficient scale to constrain the merged entity in the medium to long term and prevent a substantial lessening of competition.

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26 Commerce Commission interview with [ ].

27 Commerce Commission interview with [ ], Commerce Commission interview with [ ], Commerce Commission interview with [ ].

28 *Mergers and Acquisitions Guidelines* above n2 at [3.95]-[3.96].

29 Commerce Commission interview with [ ] and Commerce Commission interview with [ ].

30 Commerce Commission interview with [ ]; Commerce Commission interview with [ ]; Commerce Commission interview with [ ] and Commerce Commission interview with [ ].

31 Commerce Commission interview with [ ].

Countervailing power by customers

45. A merged entity's ability to increase prices profitably may be constrained by the ability of certain customers to exert substantial influence on negotiations. Countervailing power exists when a customer possesses special characteristics which give that customer the ability to substantially influence the price that the merged entity charges.[32]

46. While customers may have a degree of countervailing power, a merger that results in the removal of an important alternative supplier can reduce customers' negotiating power. If that happens, the countervailing power of customers may be insufficient to effectively constrain a merged entity.[33]

47. Our evidence suggests that the Proposed Acquisition would remove an important alternative source of supply for customers. This in turn could reduce the ability of customers to discipline the merged entity by switching or credibly threatening to switch suppliers.

48. We also are not satisfied that customer-sponsored entry is likely. We did not receive any examples of this, and our market enquiries indicated that, while customers could theoretically sponsor entry, the size of the customer would determine how viable any sponsorship would be. Lastly, some customers did not see self-supply as a credible alternative, telling us that it would be "too much of a distraction", "difficult", of "no benefit" or "not worth the risk".[34]

49. In any event, any countervailing power that a customer could exercise would only protect other customers if it resulted in new entry or expansion (and, as noted above, the evidence indicates that there are significant barriers to expansion and entry). Other customers would not be protected if a customer only used their countervailing power to leverage lower prices for themselves.

50. We are therefore not satisfied that countervailing power by customers would be sufficient to constrain the merged entity.

Coordinated effects in the market for the supply of chemical admixtures

51. We have considered whether the Proposed Acquisition might change conditions in markets so as to facilitate coordination, ie, so as to make coordination "more likely, more complete or more sustainable" as per the test in the Commission's Mergers and Acquisitions Guidelines.[35] However, we are satisfied that this is unlikely for the following reasons:

    51.1. Coordination on price is likely to be difficult, as prices are not transparent. Customers run tenders when considering changing suppliers, meaning

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32 *Mergers and Acquisitions Guidelines* above n2 at [3.115].

33 *Mergers and Acquisitions Guidelines* above n2 at [3.116].

34 Commerce Commission interview with [ ]; Commerce Commission interview with [ ]; Commerce Commission interview with [ ] and Commerce Commission interview with [ ].

35 *Mergers and Acquisitions Guidelines* above n2 at [3.86].

competitors do not have visibility over each other's prices. Further, tenders are infrequent and lumpy (there is a range of very small and very large customers), so there is less incentive for competitors to coordinate and it would be harder to punish a firm that deviates from an agreement.

51.2. The Proposed Acquisition would not increase the symmetry in market shares. Instead, the market would be highly asymmetric as the merged entity would in practice supply over 75% of the market and would be the only New Zealand-based supplier. This makes it less likely that the incentives of the remaining firms would be sufficiently aligned to coordinate.

52. As such, we are satisfied that the Proposed Merger will not have, or would not be likely to have, the effect of substantially lessening competition due to coordinated effects.

Vertical and conglomerate effects in the market for the supply of chemical admixtures

53. A merger between suppliers (or buyers) who are not competitors but who operate at different levels of the supply chain could cause a substantial lessening of competition due to vertical effects. This can occur where a merger gives the merged entity a greater ability or incentive to engage in conduct that prevents or hinders rivals from competing effectively, such as refusing to supply an input (which we refer to as "foreclosing rivals"). We are satisfied that such effects would not occur from the Proposed Acquisition as neither Sika nor MBCC supply inputs to rivals.

54. Conglomerate effects can occur when a merged firm gains the ability or incentive to foreclose competitors by using anticompetitive strategies that leverage its market power in a market into another market where it otherwise faces more competition. In this matter we have focussed particularly on whether the Proposed Acquisition changes the ability or incentive of the merged entity to engage in anticompetitive tying or bundling strategies.

55. We are satisfied that such effects would not occur from the Proposed Acquisition because the merged entity would not be the only supplier of any "must have" products. All suppliers appear to provide the same types of chemical admixtures to service all customer needs.

Assessment of the Proposed Divestment

56. As noted above, Sika has offered the Divestment Undertaking to complete the Proposed Divestment.

57. We consider that, taking into account the Proposed Divestment, the Proposed Acquisition is not likely to substantially lessen competition in any market as compared to a scenario where Sika and MBCC continue to operate as independent competitors.

58. We have found no significant risks associated with the Divestment Undertaking which gives effect to the Proposed Divestment.

Our framework for assessing divestment undertakings

59. We may clear a merger only if we are satisfied that the merger would not be likely to substantially lessen competition in any market.[36] If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.[37]

60. We may accept undertakings to dispose of assets or shares.[38] If divestment undertakings are accepted by us, they are deemed to form part of the clearance.

61. For a divestment undertaking to remedy competition concerns, we must be satisfied that, once the divestment is taken into account, the transaction in question is not likely to give rise to a substantial lessening of competition.

62. In making this assessment, we consider all the relevant risks associated with divestment proposals. We assess three kinds of risks associated with divestment undertakings.

    62.1. Composition risk – the risk that the scope of a divestment undertaking may be too constrained, or not appropriately configured.

    62.2. Asset risk – the risk that the competitive effectiveness of a divestment package will deteriorate prior to completion of the divestment.

    62.3. Purchaser risk – the risk that there may not be a purchaser found within the timeframe of a divestment undertaking that is acceptable to the Commission.

63. We have assessed the composition, asset and purchaser risks associated with Sika's divestment proposal in accordance with our guidelines.[39]

The Proposed Divestment

64. Sika has provided a Divestment Undertaking under which it will divest via a share sale MBCC Group's entire New Zealand business, MB Solutions New Zealand Limited, (the Divestment Business). As part of the Proposed Divestment, Sika will also divest:

    64.1. the entire Australian MBCC business, MB Solutions Australia Pty Limited (which owns Bluey Technologies Pty Limited); and

    64.2. the chemical admixture business of the MBCC Group in the countries in the European Economic Area, Switzerland, the United Kingdom, the United States and Canada.

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36 Commerce Act 1986, s 66(1) of the Commerce Act 1986.

37 In *Commerce Commission v Woolworths* Limited (CA), above n 3 at [98], the Court held that "the existence of a 'doubt' corresponds to a failure to exclude a real chance of a substantial lessening of competition". However, the Court also indicated at [97] that we should make factual assessments using the balance of probabilities.

38 Under s 69A(2) of the Commerce Act 1986 we are only able to accept structural undertakings. This means that we are unable to accept behavioural undertakings.

39 *Mergers and Acquisitions Guidelines* above n2 at Attachment F.

65. The Divestment Undertaking provides that there will be a single buyer for all businesses listed above. The Divestment Undertaking also provides for the Proposed Divestment to take place shortly after, if not the same day as, the completion of the Proposed Acquisition (the Divestment Period).

66. In addition to the Proposed Divestment, Sika will also enter into sale and purchase, transitional services, supply and other ancillary agreements with the purchaser (the Divestment Related Agreements).

67. The nature of the Divestment Related Agreements is such that they impose behavioural (rather than structural) requirements on Sika. The Commission is unable to accept behavioural undertakings in the context of its consideration of a merger. However, the Commission can take into account agreements that would exist in the factual (placing the appropriate weight of the likelihood of such agreements being entered into).

Assessment of composition risk

68. Composition risk is the risk that the scope of a divestment undertaking may be too constrained, or not appropriately configured, to attract a suitable purchaser and mitigate competition concerns. Overall, we consider that the Divestment Undertaking is sufficient to mitigate composition risk.

69. We consider that the Proposed Divestment comprises the assets that the purchaser of MBCC would need in order to viably and effectively operate MBCC in competition with Sika. This is because Sika has proposed to divest the entirety of the MBCC business in Australia and New Zealand, which includes all the staff and assets that are used to operate the business in New Zealand.

70. A key focus for our assessment was whether the Divestment Business would retain access to research and development ('R&D') post-divestment as customers told us that having R&D facilities was an important factor in competing.[40] However, since the Proposed Divestment includes the global R&D sites in Europe and the relevant staff members at these sites, we are satisfied that these links will be retained post-Divestment.

71. We are also satisfied that the global Divestment package contains the assets the purchaser would need to be able to effectively compete on a standalone basis, given that it will retain global ownership of all registered patents and trademarks pertaining to the MBCC chemical admixture business.

Assessment of asset risk

72. Asset risk is the risk that the competitive effectiveness of the divestment business or assets will deteriorate prior to completion of the divestment. Overall, we consider that the Divestment Undertaking is sufficient to mitigate asset risk.

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[40] Commerce Commission interview with [ ] and Commerce Commission interview with [ ].

73. This is because the Proposed Divestment will likely take place shortly after, if not the same day as, the completion of the Proposed Acquisition. In the event that there is a delay in completing the Proposed Divestment, the Divestment Business will have everything necessary to continue to operate independently of Sika, including continuous access to the European R&D facilities.[41] This is because completion of the MBCC NZ Divestment will take place alongside the divestment of MBCC Australia and the European Divestment Business. These factors significantly minimise any asset risk to the Divestment Business.

74. Sika also has obligations under the Divestment Undertaking to ensure that the MBCC business is held separate from Sika during the Divestment Period. This includes appointing a hold separate manager, whose role will be to manage MBCC independently of Sika during this period, and to report periodically to the Commission on certain matters related to the operation of MBCC (Hold Separate Obligations).[42]

75. During the Divestment Period, Sika also undertakes to take all necessary measures to ensure that neither it nor any of its related entities obtains any confidential and non-public documents and information relating to MBCC, other than where such disclosure is strictly necessary for a particular specified purpose. Sika also undertakes to comply with protective measures for any confidential and non-public documents and information of that type that it does obtain (Ring-Fencing Obligations).[43] These include taking reasonable steps to ensure the ring-fenced information is stored and protected against people not permitted to access, disclose and use the information and ensuring all people with access to systems containing the ring-fenced information are subject to a binding confidentiality undertaking.

76. Finally, the Divestment Undertaking requires monthly reporting to the Commission on Sika's compliance with the Divestment Undertaking (including specifically Sika's compliance with its Preservation Obligations, Hold Separate Obligations, and Ring-Fencing Obligations), Sika's progress on the Proposed Divestment, and any other information about MBCC or Sika's compliance with the Divestment Undertaking reasonably requested by the Commission.[44] This includes by allowing the Commission to require Sika to appoint an independent monitor to audit and send monthly written reports to the Commission (with a copy to Sika).[45]

Assessment of purchaser risk

77. Purchaser risk is the risk that there may not be a purchaser found within the timeframe of a divestment undertaking that is acceptable to the Commission. Overall, we consider that that the Proposed Divestment and the Divestment Undertaking are sufficient to mitigate purchaser risk.

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41 Sika/MBCC Revised Remedy Submission (11 November 2022) at [5.2].
42 The Divestment Undertaking at [6.1] to [6.3].
43 The Divestment Undertaking at [7.1] to [7.7].
44 The Divestment Undertaking at [9.5].
45 The Divestment Undertaking at [9.1].

78. The Proposed Divestment is likely to be an attractive purchase for potential purchasers.

78.1. MBCC (also known as Master Builders Solutions) is a long-established and proven brand, having been founded in 1909.[46] MBCC is one of the leading suppliers of chemical admixtures worldwide.

78.2. The global element of the Proposed Divestment also makes it attractive, through the access to R&D facilities and ability to achieve scale across three major regions: Europe, United States/Canada and Australia/New Zealand. The purchaser will also retain global ownership of all registered patents and trademarks pertaining to the MBCC chemical admixture business, which could facilitate further geographic expansion.

79. Consistent with this view, the bidding process for the divested MBCC businesses generated significant interest from a range of purchasers, including industry participants and private equity interests internationally. Nineteen potential purchasers requested and received a process letter in relation to the sales process and 11 of these potential purchasers conducted due diligence and submitted non-binding offers.[47] An initial assessment of the five short-listed bidders indicates that there is likely to be a purchaser that the Commission finds acceptable.

80. Clause 4 of the Divestment Undertaking requires Sika to notify the Commission of the identity of the proposed purchaser of MBCC at least 20 working days prior to completion of the Proposed Divestment. It must also satisfy the Commission that the proposed purchaser of MBCC:[48]

80.1. will operate the Divestment Business in a way that restores the competitive constraint that would have been lost with the Proposed Acquisition;

80.2. is not associated with, or an interconnected body corporate of, Sika or any of its related entities (including, for the avoidance of doubt, any entity which transfers to Sika as part of the Proposed Acquisition);

80.3. has the financial resources, proven business expertise and incentive to viably operate and develop the Divestment Business in competition with Sika in the relevant market(s);

80.4. is not likely to breach section 47(1) of the Commerce Act 1986 if they acquire the Divestment Business;[49]

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46 https://www.master-builders-solutions.com/en-au/about-us/history.

47 Sika response to a request for information (16 March 2023).

48 The Divestment Undertaking at [4.3].

49 Section 47(1) of the Commerce Act 1986 prohibits any person from acquiring assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

80.5. is not likely to give rise to a risk that the implementation of the Divestment will be unduly delayed; and

80.6. can be reasonably expected to obtain all necessary approvals from relevant regulatory authorities for the acquisition of the Divestment Business.

81. Under clause 4.5(a) of the Divestment Undertaking, the Commission's approval of the proposed purchaser is also contingent on its approval of the draft Divestment Related Agreements discussed above at [66].

Overall conclusion

82. Subject to the Proposed Divestment occurring, we are satisfied that the Proposed Acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in any market in New Zealand.

Determination on notice of clearance

83. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to Sika AG, via its wholly-owned subsidiary Sika International AG, to acquire 100% of the shares in LSF11 Skyscraper HoldCo S.à.r.l. (the ultimate parent company of the MBCC group of companies) subject to the divestment undertaking dated 30 March 2023 provided by Sika AG under section 69A of the Commerce Act 1986.

Dated this 3rd day of April 2023

Dr Derek Johnston
Commissioner

Attachment A: Divestment Undertaking

30 March 2023

UNDERTAKING

relating to

the divestment of the "**Divestment Business**" as defined in clause 1.1(h)

Given by the Applicant in favour of the New Zealand Commerce Commission in connection with Sika AG's application for clearance of its proposed acquisition, via its wholly-owned subsidiary Sika International AG, of 100% of the shares of LSF11 Skyscraper HoldCo S.à.r.l, the ultimate parent company of the MBCC group of companies under section 66 of the Commerce Act 1986.

Date 30 March 2023

30 March 2023

This **Undertaking** is given on 30 March 2023 and is given by Sika AG (**Sika**), a company incorporated in Switzerland and having its registered office at Zugerstrasse 50, Baar, 6340, Switzerland, in favour of the Commerce Commission (the **Commission**).

Under section 69A(1) of the Commerce Act the Commission may accept a written undertaking from an applicant in granting a clearance under section 66 of the Commerce Act.

If the Commission accepts the Undertaking by granting clearance to the Proposed Transaction, the Undertaking will form part of the Commission's clearance to the Proposed Transaction under section 66(3)(a) of the Commerce Act.

A breach of the Undertaking (accepted under section 69A(1)) will render the clearance to which the Undertaking relates void and of no effect from the date it was granted pursuant to section 69AB(1) of the Commerce Act.

Introduction

A. Sika AG is a listed company headquartered in Switzerland. Sika develops and produces, in particular, chemical admixtures, mortars, sealants and adhesives, damping and reinforcing materials, structural strengthening systems, industrial flooring as well as roofing and waterproofing systems which are used in the building sector and by manufacturing industries. Sika manufactures and distributes products in New Zealand through its subsidiary, Sika (NZ) Ltd.

B. LSF11 Skyscraper HoldCo S.à r.l., is the holding company for the MBCC Group of entities (**MBCC Group**), and established in Luxembourg. MBCC Group produces and distributes chemical admixtures and construction systems for new constructions, maintenance, repair and renovation of residential and commercial buildings, as well as infrastructure. It is specialised in the manufacture of concrete repair and protection systems, performance grouts, waterproofing systems, sealants, performance flooring systems, as well as wood and fire protection products and manufactures chemical admixtures. MBCC Group operates in New Zealand through its wholly-owned subsidiary MB Solutions New Zealand Ltd.

C. Sika, indirectly via its wholly-owned subsidiary Sika International AG, is proposing to acquire 100% of the shares in LSF11 Skyscraper HoldCo S.à.r.l., Luxembourg, the holding company of MBCC Group from Lone Star Funds (**Proposed Transaction**). Sika AG has applied to the Commission for clearance of the Proposed Transaction pursuant to section 66 of the Commerce Act 1986.

D. As at the date of this Undertaking, the Commission is not satisfied that the Proposed Transaction will not be likely to substantially lessen competition in a New Zealand market and has not given clearance to the Proposed Transaction.

E. In order to obtain clearance from the Commission the Applicant undertakes to carry out the Divestment of the Divestment Business.

F. The Divestment of the Divestment Business is a global solution devised by Sika in response to feedback received from the European Commission, the UK Competition and Markets Authority, the Department of Justice, the Canadian Competition Bureau and the Australian Competition and Consumer Commission (together, the **Overseas Regulators**), in addition to the Commission. In short, Sika has committed to divest to a purchaser approved by the Commission (**Approved Purchaser**), and the Overseas Regulators, the worldwide EBA business of MBCC Group (with the exception of the Retained ROW EBA Business) and the EBC business of MBCC Group in Australia and New Zealand.

1. DEFINITIONS AND RELATED MATTERS

1.1. In this Undertaking:

1.1(a) **Adverse Event** has the meaning provided in clause 5.2 of this Undertaking.

1.1(b) **ANZ Divestment Business** means the entirety of MB Solutions Australia Pty Ltd (which owns Bluey Technologies Pty Ltd) and MB Solutions New Zealand Limited, comprising the EBA and EBC business of MBCC Group in Australia and New Zealand.

1.1(c) **Approved Purchaser** means a purchaser of Divestment Business approved by the Commission pursuant to clause 4.

1.1(d) **Applicant** means Sika AG.

1.1(e) **Confidentiality Undertaking** means the documents set out in Schedule B.

1.1(f) **Divestment** means the divestment of the Divestment Business during the Divestment Period or Second Divestment Period, in accordance with this Undertaking.

1.1(g) **Divestment Agent** has the meaning given in clause 2 of Schedule A.

1.1(h) **Divestment Business** means the business as defined in Section B and Schedule A of the EC Commitments and, for the avoidance of doubt, shall in any event include the ANZ Divestment Business.

1.1(i) **Divestment Group** means the legal entities operating the Divestment Business listed in Annex I.1(a) of the EC Commitments and, for the avoidance of doubt, any subsidiaries of the legal entities listed in Annex I.1(a).

1.1(j) **Divestment Period means** the period commencing at 12.01am on the date of the completion of the Proposed Transaction and ending at 11.59pm on 8 August 2023 (being six months from the date of the adoption of the EC Decision) or if completion of the Proposed Transaction has not occurred on 8 August 2023, 11:59 pm on the date which is three months after the date on which completion of the Proposed Transaction occurs.

1.1(k) **Divestment Undertakings** means the undertakings in clause 3.1 of this Undertaking.

1.1(l) **EBA Business** means the “Admixtures Systems” division of MBCC Group, which comprises the chemical admixtures, fibres, underground construction, auxiliaries and polymers businesses of MBCC Group.

1.1(m) **EBC Business** means the “Construction Systems” division of MBCC Group, which comprises the concrete works, adhesives, mortars, roofing, industrial flooring, sealants, waterproofing and ETICS businesses of MBCC Group. (For the avoidance of doubt, the Divestment Business includes the EBC Business in Australia and New Zealand only.)

1.1(n) **EC Commitments** means the commitments made by Sika, and formally accepted by the European Commission, in relation to the divestment of the Divestment Business on terms substantially in the form of those submitted to the European Commission by Sika on 18 January 2023 and enclosed at Confidential Schedule C to this Undertaking.

1.1(o) **EC Decision** means the European Commission’s decision of 8 February 2023 pursuant to Article 6(1)(b) of the Council Regulation (EC) No 139/2004 to declare Sika’s acquisition of the MBCC Group compatible with the internal market and the functioning of the EEA Agreement.

1.1(p) **Hold Separate Manager** means [ ], or any other person appointed in [ ] place in accordance with the EC Commitments.

1.1(q) **Independent Monitor** means a natural or legal person who:

(i) is approved by the Commission and is appointed pursuant to clause 9.1, 9.2 or 9.3 of this Undertaking;
(ii) is independent of the Applicant and its Related Entities; and
(iii) possesses the necessary qualifications to carry out its obligations.

1.1(r) **Interconnected Body Corporate** has the meaning set out in section 2(7) of the Commerce Act 1986.

1.1(s) **Key Personnel** means employees and independent contractors who are necessary to maintain the viability of the Divestment Business, as listed in Schedule A of the EC Commitments. In relation to MBCC Australia and MBCC New Zealand specifically, Key Personnel includes:

(i) [
(ii)
(iii)
(iv)
(v)
(vi)]

1.1(t) **Material Issue** means an issue, event or circumstance following the commencement of the Divestment Period:

(i) which the Hold Separate Manager, acting reasonably, believes may impact the profitability of the ANZ Divestment Business by more than 5% from forecast;
(ii) which the Hold Separate Manager, acting reasonably, believes may materially impact the market value or remaining useful life of the ANZ Divestment Business; or

where the Hold Separate Manager or Independent Monitor concludes, acting reasonably, that the Applicant is failing to materially comply with this Undertaking.

1.1(u) **MBCC Australia** means MB Solutions Australia Pty Ltd and Bluey Technologies Pty Ltd.

1.1(v) **MBCC Group means** LSF11 Skyscraper HoldCo S.à.r.l. and all wholly owned direct and indirect subsidiaries.

1.1(w) **MBCC New Zealand** means MB Solutions New Zealand Limited.

1.1(x) **Monitoring Trustee** has the same meaning as in the EC Commitments.

1.1(y) **Potential Breach** means a matter that the Independent Monitor and Monitoring Trustee jointly consider warrants an internal investigation to determine whether an actual breach has occurred, irrespective of whether an actual breach is ultimately identified.

1.1(z) **Proposed Transaction** means the proposed acquisition by Sika AG, via its wholly-owned subsidiary Sika International AG, of 100% of the shares of LSF11 Skyscraper HoldCo S.à.r.l, the ultimate parent company of the MBCC group of companies.

1.1(aa) **Related Company** has the meaning given to it in section 2(3) of the Companies Act 1993, provided that, for this purpose, references to company in that section will extend to any body corporate wherever incorporated or registered.

1.1(bb) **Related Entity** means an Interconnected Body Corporate and/or a Related Company and/or an "associated person" as defined in section 47(3) of the Commerce Act 1986.

1.1(cc) **Retained ROW EBA Business** means the EBA Business of MBCC Group operated by the relevant MBCC Group legal entities listed in Annex I.2(a) of the EC Commitments. (For the avoidance of doubt, the Retained ROW EBA Business does not form part of the Divestment Business.)

1.1(dd) **Ring-fenced Information** means commercially sensitive information relating to the Divestment Business (including that information which is contained in confidential documents), including but not limited to:

(i) product strategy and development;
(ii) pricing data that is not publicly available, including current, historic and future pricing, pricing changes, margin, strategies, revenues and/or payment terms;
(iii) customer contracts and data;
(iv) supply agreements; and
(v) all other commercially sensitive information relating to the Divestment Business.

1.1(ee) **Second Divestment Period** means the period commencing at the end of the Divestment Period and ending at midnight on the date which is three months from the end of the Divestment Period.

1.1(ff) **Working Day** has the meaning set out in section 2(1) of the Commerce Act 1986.

1.2. References to dates and time in this Undertaking are references to New Zealand Standard Time or Daylight Savings Time as applicable.

1.3. This Undertaking will be governed by, and construed in accordance with, the laws of New Zealand and the Applicant accepts the exclusive jurisdiction of the New Zealand Courts in respect of all disputes arising under, or in connection with the interpretation or performance of, this Undertaking.

1.4. Any disputes under Part 6 of the Act in relation to this Undertaking may be referred to the High Court Commercial Panel and the Applicant undertakes that it will cooperate with the Commission to ensure any such proceedings are dealt with expeditiously.

1.5. Any notice or communication that is given or served under or in connection with this Undertaking must be given in writing in the following manner:

1.5(a) if addressed to the Commission, by hand delivery or email to the following address:

Commerce Commission
Level 9, 44 The Terrace, Wellington 6011
Attention: Mergers Manager (mergers@comcom.govt.nz)

1.5(b) if addressed to the Applicant, by hand delivery or email to the following address:

C/- Bell Gully

48 Shortland St, Auckland

Attention: Glenn Shewan

Glenn.shewan@bellgully.com

2. COMMENCEMENT AND TERM

2.1. This Undertaking comes into effect when it is signed by the Applicant and accepted by the Commission under section 69A(1) of the Commerce Act 1986, save for clauses 5 (Preservation Obligations) and 7 (Ring-fencing) to 9 (Independent Monitor), which come into effect at the beginning of the Divestment Period.

2.2. Except for the obligations set out in clause 7 (Ring-fenced Information), which continue to apply for so long as the Applicant has Ring-fenced Information in its control, the Applicant's obligations under this Undertaking are discharged when:

2.2(a) the sale of the Divestment Business to an Approved Purchaser has completed and the Commission has provided written confirmation to the Applicant that the Applicant's obligations have been discharged; or

2.2(b) where the Commission has provided written confirmation that the Applicant is released from its obligations on the basis that the Proposed Transaction will no longer proceed to completion.

3. DIVESTMENT

3.1. The Applicant undertakes to the Commission that it will, upon completion of the Proposed Transaction:

3.1(a) within two Working Days inform the Commission in writing that the Proposed Transaction has completed;

3.1(b) procure the Divestment of the Divestment Business to an Approved Purchaser within 24 hours of completion of the Proposed Transaction or, in any event, within the Divestment Period in accordance with the terms of this Undertaking (or, if applicable, within the Second Divestment Period, in accordance with the terms of Schedule A of this Undertaking); and

3.1(c) the Applicant will use best endeavours to procure, obtain or assist an Approved Purchaser to obtain any consents required to assign the rights and contracts necessary to operate the Divestment Business to the Approved Purchaser.

3.2. The Applicant acknowledges that the Divestment Undertakings:

3.2(a) form part of any clearance given by the Commission for the Proposed Transaction under section 66(3)(a) of the Commerce Act 1986;

3.2(b) impose legal obligations on it;

3.2(c) may be enforced by the Commission under sections 84, 85A and 85B of the Commerce Act; and

3.2(d) may only be varied by application under section 69AC of the Commerce Act.

4. PURCHASER APPROVAL

4.1. As soon as practicable and no later than 20 Working Days before the anticipated date of completion of the Divestment, the Applicant or the Divestment Agent will notify the Commission in writing:

4.1(a) of the identity of the proposed purchaser (or where negotiations are ongoing with more than one potential purchaser, the potential purchasers) of the Divestment Business; and

4.1(b) that the Applicant is formally seeking purchaser approval for that proposed purchaser (or those potential proposed purchasers).

4.2. The Applicant will ensure that the transaction documentation relating to the Divestment provide that completion of the Divestment is conditional on obtaining the Commission's approval of the proposed purchaser based on the criteria set out in clauses 4.3 and 4.5.

4.3. The Applicant must satisfy the Commission that the Divestment will be carried out in a manner consistent with the Undertaking and that any proposed purchaser of the Divestment Business:

4.3(a) will operate the Divestment Business in a way that restores the competitive constraint that would have been lost with the Proposed Transaction;

4.3(b) is not associated with, or an Interconnected Body Corporate of, the Applicant or any of its Related Entities (including, for the avoidance of doubt, any entity which transfers to the Applicant as part of the Proposed Transaction);

4.3(c) has the financial resources, proven business expertise and incentive to viably operate and develop the Divestment Business in competition with the Applicant in the relevant market(s);

4.3(d) is not likely to breach section 47(1) of the Commerce Act 1986 if they acquire the Divestment Business;

4.3(e) is not likely to give rise to a risk that the implementation of the Divestment will be unduly delayed; and

4.3(f) can be reasonably expected to obtain all necessary approvals from relevant regulatory authorities for the acquisition of the Divestment Business.

4.4. At the same time as providing the written notification as required at 4.1, the Applicant will provide the Commission with a submission in writing to assist the Commission's assessment of the requirements in clauses 4.3(a) – 4.3(f).

4.5. The Commission's approval of any purchaser proposed by the Applicant or the Divestment Agent shall also be contingent on:

4.5(a) the Applicant or the Divestment Agent, as appropriate, providing all draft transaction documentation (including any sales and purchase, transitional services, supply and other ancillary agreements) to the Commission at least 20 Working Days before the anticipated signing date of these documents; and

4.5(b) the Commission's approval in writing of all transaction documentation.

4.6. Neither the Applicant nor the Divestment Agent can proceed with the Divestment until such time as:

4.6(a) a written request for approval under clause 4.1 has been made to the Commission; and

4.6(b) the Applicant or the Divestment Agent and/or the proposed purchaser, has provided the information contemplated by this Undertaking or as requested by the Commission; and

4.6(c) the Commission advises in writing that it has, at its discretion, approved the proposed purchaser and the form of all transaction documents.

4.7. The Applicant acknowledges that:

4.7(a) an approval of a potential purchaser by the Commission under this clause 4 is, once given, an approval for the relevant purchaser to acquire the Divestment Business pursuant to the Divestment during the Divestment Period in accordance with the transaction documents approved by the Commission, but not during the Second Divestment Period; and

4.7(b) if the Divestment does not occur during the Divestment Period, and, accordingly, Schedule A applies, any proposed purchaser intending to purchase the Divestment Business during the Second Divestment Period must be approved for such purchase by the Commission (even if such purchaser had been approved by the Commission as a purchaser under this clause 4 for a Divestment during the Divestment Period).

4.8. Should the Divestment not proceed to a purchaser approved by the Commission pursuant to clause 4.6(c) for any reason, the Applicant may notify the Commission of the identity of an alternative purchaser (or potential purchasers). The terms of clauses 4.2 to 4.6 will equally apply to such alternative purchaser(s).

5. PRESERVATION OBLIGATIONS

5.1. During the Divestment Period and, if applicable, the Second Divestment Period, the Applicant will (either directly or via its Related Entities, or via the Monitoring Trustee, Hold Separate Manager or the Divestment Agent, as appropriate), in relation to the Divestment Business, and in particular the ANZ Divestment Business, use best endeavours to:

5.1(a) preserve the reputation and goodwill of the Divestment Business (including in particular the ANZ Divestment Business);

5.1(b) preserve the economic viability, marketability and competitiveness of the Divestment Business (including in particular the ANZ Divestment Business); and

5.1(c) maintain the provision of goods and services by means of the Divestment Business (including in particular the ANZ Divestment Business) in a manner consistent with the provision of goods and services as at the date of this Undertaking.

5.2. If an issue, event or circumstance arises in relation to the Divestment Business that is either a Material Issue or is sufficiently adverse that the Applicant's ability to achieve the outcomes in relation to the Divestment Business in accordance with clause 5.1 is or may be compromised (after, and for the avoidance of doubt, the Applicant has considered and sought to use best endeavours to meet the requirements of clause 5.1) (the Adverse Event), the Applicant shall, as soon as practicable after it becomes aware of the Adverse Event:

5.2(a) use best endeavours to:

(i) mitigate the adverse effects on the Divestment Business (including in particular the ANZ Divestment Business) of the Adverse Event; and

(ii) restore (as relevant) the reputation, goodwill, economic viability, marketability and competitiveness of the Divestment Business (including in particular the ANZ Divestment Business) to a level that is materially similar to, and consistent with, the operation of the Divestment Business (including in particular the ANZ Divestment Business) immediately prior to the Divestment Period;

5.2(b) report in writing to the Monitoring Trustee and either the Commission or the Independent Monitor (where an Independent Monitor has been appointed under clause 9) on:

(i) the nature of the Adverse Event and when and how it arose;

(ii) why the Adverse Event has compromised or may compromise the Applicant's ability to operate the Divestment Business (including in particular the ANZ Divestment Business) in accordance with clause 5.1;

(iii) what steps have been taken, or are planned to be taken, by the Applicant in compliance with clause 5.2(a); and

(iv) any other material information relevant to the Adverse Event or the performance of the Applicant's obligations under clause 5.2(a).

5.3. During the Divestment Period and, if applicable, the Second Divestment Period, neither the Applicant nor its Related Entities will:

5.3(a) carry out any act upon its own authority that might have a significant adverse impact on the value or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy in relation to Divestment Business;

5.3(b) sell or transfer any of the Divestment Business or contractual rights to use assets which are required to continue to operate the Divestment Business in the ordinary course and in a manner that is materially similar to, and consistent with, the operation of the Divestment Business as at the date of this Undertaking to any person other than an Approved Purchaser in accordance with this Undertaking; or

5.3(c) solicit Key Personnel other than where that person responds to a bona fide public advertisement for a vacant position (provided that the advertisement is not targeted specifically at the person concerned).

6. HOLD SEPARATE OBLIGATIONS

6.1. The Applicant has appointed a Monitoring Trustee pursuant to the EC Commitments. The Applicant has appointed a Hold Separate Manager pursuant to the EC Commitments. The Hold Separate Manager, under the supervision of the Monitoring Trustee will, during the Divestment Period (and, if applicable, the Second Divestment Period), manage the Divestment Business in a manner that is consistent with the Applicant's obligations as set out in clause 5.

6.2. The Applicant will procure that the Monitoring Trustee and Hold Separate Manager use all reasonable endeavours to operate the Divestment Business, and in particular the ANZ Divestment Business, during the Divestment Period and, if applicable, the Second Divestment Period, as it was operated at the date of this Undertaking and as a going concern separate from the businesses operated by the Applicant and its other Related Entities, including procuring that:

6.2(a) the day-to-day management of the Divestment Business is the responsibility of the Hold Separate Manager, under the supervision of the Monitoring Trustee;

6.2(b) the Hold Separate Manager and Monitoring Trustee's respective terms of engagement provide that they are required to operate the Divestment Business in such a way that preserves their economic viability, marketability, competitiveness and goodwill and maximises the value of the Divestment Business as at the date immediately prior to the Divestment Period;

6.2(c) the Hold Separate Manager and Monitoring Trustee's respective terms of engagement provide that the Hold Separate Manager will provide sufficient information to [ ] (or a suitably qualified replacement as nominated by the Applicant to the Hold Separate Manager) to the extent required for the Applicant or its Related Entities to comply with their legal, reporting and regulatory obligations (including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements) or their contractual obligations or to progress, conduct or resolve any legal dispute. For the avoidance of doubt, no more information than is strictly required to meet the relevant obligation or purpose may be provided under this clause; and

6.2(d) the Hold Separate Manager and Monitoring Trustee's respective terms of engagement provide that in the event of an Adverse Event arising, the Hold Separate Manager passes on all relevant information to the Applicant via [ ] (or a suitably qualified replacement as nominated by the Applicant to the Hold Separate Manager) and to the Independent Monitor within three Working Days.

6.3. If the Applicant or any of its Related Entities receives any Ring-fenced Information through the reporting process in clause 6.2(c) to 6.2(d) above, the Ring-fenced Information will be subject to clause 7 (Ring-fencing) below.

7. RING-FENCING

7.1. The Applicant shall implement all reasonable measures to ensure that, from the commencement of the Divestment Period, neither it nor its Related Entities, or their respective officers, employees, contractors, agents or advisers, obtain or use any Ring-fenced Information other than where strictly necessary for one or more of the purposes of:

7.1(a) maintaining the viability of the Divestment Business;

7.1(b) progressing the Divestment;

7.1(c) reporting to the Commission or, if applicable, to the Independent Monitor, pursuant to clause 8.1;

7.1(d) responding to an Adverse Event notified to the Applicant, or reporting to the Commission or the Independent Monitor and/or Monitoring Trustee, as required, if one has been appointed under clause 9.1;

7.1(e) complying with legal, reporting and regulatory obligations (including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements) or to progress any legal dispute; and/or

7.1(f) fulfilling any obligations pursuant to supply or transitional services agreements with the Divestment Business,

provided such information is obtained and used only by those officers, employees, contractors, agents or advisers who have signed a Confidentiality Undertaking in the form set out at Schedule B containing the obligations set out in clause 7.3 and need to know the information in order to carry out the purposes listed at clause 7.1(a)-7.1(f), above.

7.2. The Applicant shall take reasonable steps to ensure that the Ring-fenced Information is stored securely and protected against access, disclosure and use of the information:

7.2(a) by persons; and

7.2(b) for purposes,

not permitted under this Undertaking.

7.3. The Applicant shall ensure that any employees, directors, officers, contractors, agents and advisers with access to systems containing Ring-fenced Information are subject to a binding Confidentiality Undertaking, in a form approved by the Commission and set out in Schedule B of this Undertaking, that:

7.3(a) is for the benefit of the Divestment Business;

7.3(b) enforceable by the Commission and the Divestment Business; and

7.3(c) prohibits the disclosure or use of Ring-fenced Information, except where strictly necessary for the purposes set out in clauses 7.1(a) – 7.1(f) above.

7.4. If, after the date this Undertaking comes into effect, any employee, director, officer, contractor, agent or adviser of the Applicant (or of any of its Related Entities) receives Ring-fenced Information and such person is not already subject to the Confidentiality Undertaking described in clause 7.3, the Applicant will ensure that such person enters into the Confidentiality Undertaking described in clause 7.3.

7.5. The Applicant shall take all reasonable steps to ensure that any Ring-fenced Information that remains in its control at the end of the Divestment Period (or Second Divestment Period, if applicable) is provided to the Approved Purchaser of the Divestment Business and, to the extent any information remains in the possession or control of the Applicant or any of its Related Entities, the Applicant shall use reasonable endeavours to destroy the Ring-fenced Information within 20 Working Days of the end of the Divestment Period (or Second Divestment Period, as applicable).

7.6. Nothing in this clause prevents the Applicant from retaining Ring-fenced Information where strictly necessary for the purposes set out at 7.1(e) provided that:

7.6(a) the provisions of this clause 7 shall continue to apply to such information for as long as it is held; and

7.6(b) the information is provided to the Approved Purchaser of the Divestment Business and destroyed (to the extent the Applicant is reasonably able to destroy the information) within 20 Working Days of the need to retain that information ceasing.

7.7. For the purposes of this clause 7, references to the Applicant's employees, directors, officers, contractors, agents or advisers excludes those employed or engaged by the Divestment Group immediately prior to the Divestment Period and who continue to be employed or engaged by the Divestment Group during and following the Divestment Period.

8. MONITORING COMPLIANCE WITH THIS UNDERTAKING

8.1. During the Divestment Period (and, if applicable, the Second Divestment Period) the Applicant will provide reports to the Commission or, if applicable, to the Independent Monitor, at the times specified below (or at such times as notified by the Commission) detailing:

8.1(a) on a monthly basis, the Applicant's compliance with its obligations under this Undertaking;

8.1(b) on a monthly basis, the Applicant's progress towards carrying out the Divestment;

8.1(c) on a monthly basis, detailed information about the financial performance of the Divestment Group, including but not limited to revenues, profits, volumes, significant contracts won and lost, and significant personnel changes (including with specific reference to MBCC New Zealand);

8.1(d) any actual breach or Potential Breach of this Undertaking within two Working Days of the Applicant becoming aware of the actual breach or the Potential Breach; and

8.1(e) promptly at the Commission's request, any other information and documents reasonably required:

(i) about the Applicant's progress towards carrying out the Divestment; and

(ii) that demonstrate that the Applicant's conduct complies with the Divestment Undertakings.

8.2. If requested, the Applicant will attend a meeting with the Commission at a time and place appointed by the Commission to answer any questions the Commission may have (including by telephone or video conference if more convenient).

8.3. Without limiting clause 8.1, the Applicant will provide to the Commission:

8.3(a) a copy of any information memorandum provided to potential purchasers relating to the Divestment Business; and

8.3(b) notification of the completion of the Divestment, within two Working Days of its completion.

8.4. Nothing in this Undertaking requires the Applicant to provide legally privileged information or documents to the Commission or any other party.

9. INDEPENDENT MONITOR

9.1. If requested by the Commission in writing, the Applicant will appoint an Independent Monitor, approved by the Commission, to audit and report to the Commission (with a copy to the Applicant) on the Applicant's compliance with this Undertaking (and, where relevant, obligations of the Applicant relating to its Related Entities).

9.1(a) The Applicant will provide, for approval by the Commission, the name of the proposed Independent Monitor, and the terms of engagement between the Applicant and the Independent Monitor within 10 Working Days of receipt of the Commission's written request.

9.1(b) If the Commission is satisfied with the proposed Independent Monitor, the Commission will approve the appointment of the Independent Monitor in writing.

9.1(c) If the Applicant has failed to comply with clause 9.1(a), the Commission may nominate or arrange directly for the appointment of an Independent Monitor and the Applicant will accept any terms, timelines or other steps imposed or agreed by the Commission (including as to payment of the Independent Monitor's costs) for this to take effect.

9.2. Once the Commission has notified the Applicant that it has either approved the name and terms of engagement of the Independent Monitor nominated under clause 9.1(a), or has nominated another Independent Monitor and terms of engagement under clause 9.1(c):

9.2(a) the Applicant will appoint the Independent Monitor approved or nominated by the Commission within two Working Days of that notification;

9.2(b) the Applicant will provide the Commission a copy of the executed terms of engagement within two Working Days of the appointment agreement being executed;

9.3. To avoid doubt, if the Applicant fails to appoint the Independent Monitor approved or nominated by the Commission in accordance with clause 9.1(c) or 9.2(a), the Commission may directly appoint an Independent Monitor and the Applicant will accept any terms, timelines or other steps imposed or agreed by the Commission (including as to payment of the Independent Monitor's costs) for this to take effect.

9.4. Where an Independent Monitor has been appointed before a Hold Separate Manager has been appointed, the Independent Monitor is required to inform the business holding the Divestment Business of the Independent Monitor's appointment and contact details.

9.5. The Applicant will procure that the Independent Monitor will submit a written report to the Commission:

9.5(a) on a monthly basis regarding the following:

(i) the Applicant's compliance with:

A clause 5 (preservation obligations);

B clause 6 (hold separate obligations) including the performance of the Hold Separate Manager's obligations; and

C clause 7 (ring-fencing obligations);

(ii) the Applicant's compliance with any other obligations under this Undertaking;

(iii) the Applicant's progress on the Divestment; and

(iv) any other information about the Divestment Business or the Applicant's compliance with this Undertaking reasonably requested by the Commission; and

9.5(b) as soon as practicable following the receipt by the Independent Monitor of any other reports or notifications that the Applicant is required to make to it under this Undertaking, other than the monthly reports required under clause 8.1(a).

9.6. Where an Independent Monitor is appointed under this clause 9, the Applicant will (and will procure that the Hold Separate Manager will) report on matters identified in this Undertaking to that Independent Monitor and otherwise comply with any reasonable request for information or

assistance to enable the performance of the Independent Monitor's obligations as set out in this clause 9.

9.7. In the event that:

9.7(a) the Applicant receives notice that the Independent Monitor's term will end before its obligations in this Undertaking have expired in accordance with clause 2.2; or

9.7(b) the Independent Monitor's term otherwise expires or terminates before its obligations under this Undertaking have expired in accordance with 2.2,

then this clause 9 shall apply to the appointment of a replacement Independent Monitor as though the Commission had issued a written request for appointment of a replacement Independent Monitor on the date that the Applicant received, or ought to have received, that notice.

30 March 2023

EXECUTION

Executed as an Undertaking

Sika AG by

Signature

Signatory name

Position

Name

Date

Witness signature

Witness name

Occupation

Date

SCHEDULE A – PROCEDURE IF DIVESTMENT DOES NOT OCCUR DURING DIVESTMENT PERIOD

1. SALE OF UNSOLD ASSETS

1.1. In the event that the sale of the Divestment Business is not completed by 11:59pm on the last Working Day of the Divestment Period, in each case the relevant unsold Divestment Business become Unsold Assets.

2. DIVESTMENT AGENT

2.1. If, 20 Working Days prior to the relevant Divestment Business becoming Unsold Assets (**Notification Date**), the Divestment has not completed, the Applicant will provide to the Commission, for its approval, the name and proposed terms of engagement of an agent (**Divestment Agent**) to effect the sale of the Unsold Assets within the Second Divestment Period in accordance with this Schedule A. If the Applicant considers the Divestment may not occur during the Divestment Period, it may engage with the Commission earlier than the timing contemplated in this clause.

2.2. If the Commission has not approved the name or terms of appointment of the Divestment Agent 10 Working Days prior to the end of the Divestment Period, or the Applicant fails to comply with clause 2.1 on or before the Notification Date, the Commission may, in accordance with clause 4 below nominate or arrange directly for the appointment of a Divestment Agent, and the Applicant will accept any terms, timelines or other steps agreed by the Commission and the Divestment Agent (including as to payment of the Divestment Agent's costs) for this to take effect.

3. INDEPENDENCE

3.1. The person proposed to be appointed as the Divestment Agent (the **Proposed Divestment Agent**) will be a person with the qualifications and/or experience necessary to effect the sale of Unsold Assets and will be independent from the Applicant. The criteria by which the independence of the Proposed Divestment Agent will be determined include whether the person is:

3.1(a) a current employee or officer of the Applicant or any of its Related Entities;

3.1(b) a person who has been an employee or officer of the Applicant or any of its Related Entities in the past three years;

3.1(c) a person who, in the opinion of the Commission, holds a material interest in the Applicant;

3.1(d) a professional adviser of the Applicant or any of its Related Entities, whether currently or in the past three years;

3.1(e) a person who has a contractual relationship, or is an employee or contractor of a firm or company that has a contractual relationship, with the Applicant or any of its Related Entities, but for the terms of any Divestment Agent agreement with the Applicant;

3.1(f) a material supplier, or a person who is an employee or contractor of a firm or company that is a material supplier, of the Applicant or any of its Related Entities; or

3.1(g) a material customer of, or a person who is an employee or contractor of a firm or company that has a material contractual relationship with, the Applicant or any of its Related Entities.

4. APPOINTMENT OF PROPOSED DIVESTMENT AGENT

4.1. Where the Commission has, within 10 Working Days of receipt by the Commission of the written notice referred to in clause 2.1 of this Schedule A, informed the Applicant that it:

4.1(a) approves the appointment of the Proposed Divestment Agent, the Applicant will:

(i) appoint the Proposed Divestment Agent as the Divestment Agent on terms approved by the Commission within two Working Days; and

(ii) provide the Commission with a copy of the executed terms of appointment within two Working Days of the appointment agreement being executed; or

4.1(b) does not approve the appointment of the Proposed Divestment Agent and nominated (in its absolute discretion) another person (who is appropriate, having regard to clause 3 of this Schedule A) to be the Divestment Agent, the Applicant will:

(i) appoint such person as the Divestment Agent within two Working Days, on terms agreed by the Commission under clause 2.2 of this Schedule A; and

(ii) provide the Commission with a copy of the executed terms of appointment within two Working Days of the appointment agreement being executed.

4.2. Where the Commission has, pursuant to clause 2.2 of this Schedule A, nominated in its absolute discretion and having regard to clause 3 of this Schedule a person to be the Divestment Agent, the Applicant will:

(i) appoint such person as the Divestment Agent within two Working Days, on terms agreed by the Commission under clause 2.2 of this Schedule A; and

(ii) provide the Commission with a copy of the executed terms of appointment within two Working Days of the appointment agreement being executed.

5. OBLIGATIONS RELATING TO EACH OF THE UNSOLD ASSETS

5.1. The Applicant must procure that the terms of appointment of the Divestment Agent include obligations to the effect that the Divestment Agent:

5.1(a) must continue to satisfy the independence criteria in clause 3 of this Schedule A for the period of their appointment;

5.1(b) is empowered by the Applicant and required to effect the Divestment of the Unsold Assets, only to an Approved Purchaser, including at no minimum price and as soon as reasonably practical after each of the Divestment Business become Unsold Assets and within the Second Divestment Period;

5.1(c) must promptly inform the Commission and the Applicant of all offers for each of the Unsold Assets;

5.1(d) must promptly accept any offer for each of the Unsold Assets from an Approved Purchaser upon written instruction from the Applicant given in accordance with clause 5 of this Schedule A;

5.1(e) may charge such fees as are agreed between the Divestment Agent and the Applicant (but not fees contingent on the price to be obtained from the sale of Unsold Assets), and to be paid by the Applicant;

5.1(f) is the only person who may effect the divestment of the Unsold Assets after the Divestment Agent's appointment;

5.1(g) may retain any lawyer or other adviser or agent reasonably required to effect the sale of each of the Unsold Assets, and the reasonable fees of that lawyer, adviser or agent must be paid by the Applicant;

5.1(h) must use his or her best endeavours to enter into a binding agreement for the sale of each of the Unsold Assets as quickly as possible;

5.1(i) must account to the Applicant for any monies derived from the Divestment of each of the Unsold Assets after deduction of:

(i) all disbursements, fees and charges incurred by the Divestment Agent in undertaking his or her duties; and

(ii) all agreed fees of the Divestment Agent (including the fees of any adviser appointed under clause 5.1(g) of this Schedule);

5.1(j) must provide a written report to the Commission and the Applicant on the first Working Day of each month until the Divestment occurs, and promptly answer any reasonable inquiries of either the Commission or the Applicant, concerning:

(i) the efforts made to sell each of the Unsold Assets;

(ii) costs and fees incurred;

(iii) the identity of any advisers engaged;

(iv) the identity of any persons expressing interest in purchasing the Unsold Assets;

(v) the terms of sale offered by any prospective purchaser and their position on any material unresolved points of negotiation; and/or

(vi) any other information reasonably required by the Commission or the Applicant;

5.1(k) must use best endeavours to ensure that the Applicant complies with its obligations as set out in this clause and all other obligations imposed on the Applicant under this Undertaking where relevant to the carrying out of the Divestment, and to promptly notify the Commission and the Independent Monitor of any material failure by the Applicant to do so;

5.1(l) must effect the divestment of each of the Unsold Assets to an Approved Purchaser, approved by the Commission in accordance with clause 4 of this Undertaking, with the Divestment Agent acting in place of the Applicant; and

5.1(m) must follow any reasonable direction given to him or her by the Commission in relation to the performance of his or her functions as Divestment Agent under this Undertaking.

6. COMMISSION'S DIRECTION

6.1. The Commission may direct the Applicant to instruct the Divestment Agent to accept any offer for Unsold Assets notified to it under clause 5.1(c) of this Schedule A.

6.2. The Applicant must comply with such a direction within two Working Days. Where there is more than one offer for Unsold Assets from an Approved Purchaser, the Applicant may stipulate which Approved Purchaser the Divestment Agent must sell to, provided that the Commission has approved the sale to the Approved Purchaser stipulated by the Applicant.

7. THE APPLICANT'S OBLIGATIONS

7.1. Without limiting the obligations in this Undertaking, the Applicant must:

7.1(a) comply with and enforce the terms upon which the Divestment Agent is appointed in this Schedule A and elsewhere in this Undertaking;

7.1(b) indemnify the Divestment Agent for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Divestment Agent of his or her functions as the Divestment Agent except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, or wilful misconduct by the Divestment Agent;

7.1(c) not interfere with, or otherwise hinder, the Divestment Agent's ability to carry out his or her functions as Divestment Agent;

7.1(d) ensure that the Divestment Agent will promptly provide information or documents requested by the Commission directly to the Commission and Independent Monitor;

7.1(e) ensure that the Divestment Agent undertakes to promptly report and respond to the Commission, or otherwise informs the Commission, directly of any issues that arise in the performance of his or her functions as Divestment Agent or in relation to any matter that may arise in connection with this Undertaking;

7.1(f) provide reasonable assistance to the Divestment Agent, as well as any information or documents requested by the Divestment Agent that he or she considers reasonably necessary to effect the sale of Unsold Assets, or for reporting to or otherwise advising the Commission;

7.1(g) assist the Divestment Agent to effect the sale of each of the Unsold Assets as quickly as possible and within the Second Divestment Period;

7.1(h) not direct the Divestment Agent to sell Unsold Assets to a purchaser other than an Approved Purchaser; and

7.1(i) not contract to sell Unsold Assets on terms which would be inconsistent with the Divestment Agent's role, the granting of authority to the Divestment Agent under this clause 7 of this Schedule, or any other obligation in this Undertaking.

8. POWERS OF THE DIVESTMENT AGENT

8.1. The Applicant must grant the Divestment Agent an irrevocable power of attorney conferring all necessary power and authority to effect the Divestment of Unsold Assets on terms considered by the Divestment Agent in his or her sole discretion (acting reasonably) to be consistent with this Undertaking. Any such irrevocable power of attorney granted will be revoked upon termination of

the Divestment Agent in accordance with clause 9 of this Schedule A and completion of the Divestment.

9. RESIGNATION OR TERMINATION OF DIVESTMENT AGENT

9.1. The Applicant will include terms in the Divestment Agent's engagement that mitigate the risk of disruption and delay to the divestment process, should the Divestment Agent's engagement end for whatever reason (including incorporating appropriate notice provisions in the event of resignation or termination). To be prepared for any such resignation, during the Divestment Period (and prior to any question of termination of the Divestment Agent's engagement actually arising), the Applicant will also provide the Commission with the name of an appropriate substitute Divestment Agent at the time of providing the notice under clause 2.1 of this Schedule A.

9.2. The Applicant will immediately notify the Commission in the event that a Divestment Agent resigns or otherwise stops acting as a Divestment Agent.

9.3. The Commission may approve any proposal by, or alternatively may direct, the Applicant to terminate a Divestment Agent's authority to divest the Divestment Business during the second Divestment Period if in the Commission's view the Divestment Agent acts inconsistently with the provisions of this Undertaking.

9.4. If either clause 9.2 or 9.3 of this Schedule A applies, the Commission may nominate an alternative Divestment Agent, having regard to the qualifications and other criteria for a Divestment Agent under clause 3.1 of this Schedule A.

9.5. The Applicant must, within two Working Days of the Commission nominating an alternative Divestment Agent (exclusive of the date of nomination):

9.5(a) appoint a Divestment Agent nominated by the Commission on terms approved by the Commission and consistent with the performance by the Divestment Agent of his or her functions under this Undertaking; and

9.5(b) advise the Commission of the appointment of that Divestment Agent by providing the Commission a copy of the executed terms of appointment within two Working Days of that appointment agreement being executed (exclusive of the date of execution).

9.6. If the Applicant fails to comply with clause 9.5, the Commission may arrange directly for the appointment of a Divestment Agent, and the Applicant will accept any terms, timelines or other steps agreed by the Commission and the Divestment Agent (including as to payment of the Divestment Agent's costs) for this to take effect.

SCHEDULE B – CONFIDENTIALITY UNDERTAKING

Attached as a separate document

SCHEDULE C – EC COMMITMENTS

Attached as a separate document