

Statement of Preliminary Issues

Sika/MBCC Group

4 February 2022

Introduction

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 Target) (the Proposed Acquisition). The Target is the ultimate parent company of the MBCC group of companies (MBCC).¹ The Proposed Acquisition forms part of a global transaction which is currently being considered by other competition agencies.²
2. The Commission will give clearance if it is satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
3. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance.³
4. We invite interested parties to provide comments on the likely competitive effects of the Proposed Acquisition. We request that parties who wish to make a submission do so by **21 February 2022**.

The parties

5. Sika and MBCC (each a Party and together, the Parties) are both global suppliers of chemical admixtures, including in New Zealand, Australia and the United States. Chemical admixtures 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 of concrete.
6. In New Zealand, Sika manufactures and supplies a large range of chemical admixtures, together with other construction-related products such as premix mortars and sealants. Sika operates its New Zealand business through its subsidiary, Sika (NZ) Limited.

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/>.

² For example, the Australian Competition and Consumer Commission, the European Commission and the US Department of Justice.

³ The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

7. MBCC also manufactures and supplies a large range of chemical admixtures in New Zealand. MBCC operates its New Zealand business through its subsidiary, MB Solutions New Zealand Limited.

Our framework

8. Our approach to analysing the competition effects of the Proposed Acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.⁴ As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.
9. We determine whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).⁵ This allows us to assess the degree by which the Proposed Acquisition might lessen competition.
10. If the lessening of competition as a result of the Proposed Acquisition is likely to be substantial, we will not give clearance. When making that assessment, we consider, among other matters:
 - 10.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;
 - 10.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and
 - 10.3 the countervailing market power of buyers – the potential constraint on a business from the purchaser’s ability to exert substantial influence on negotiations.

Market definition

11. We define markets in the way that we consider best isolates the key competition issues that arise from the Proposed Acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.⁶

⁴ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019. Available on our website at www.comcom.govt.nz.

⁵ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

⁶ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

12. In the Application, Sika submitted that the relevant market is a national market for the supply of chemical admixture solutions in New Zealand.^{7 8}
13. We will consider whether this is the most appropriate market for assessing the competition effects of the Proposed Acquisition, or whether its impact is better assessed with reference to other markets. For example, we will consider whether the Proposed Acquisition is better analysed by reference to narrower product markets, eg, based on:
- 13.1 product type (such as specific kinds of chemical admixtures); or
- 13.2 customer segmentation (such as ready-mix or precast concrete customers).
14. The Application also states that the Parties have minor overlaps in the following construction material-related categories including: concrete works; premix mortars; industrial flooring; expansion joints; sealants; fibers and silica fume.⁹ In each category, the Applicant submits that:
- 14.1 the Proposed Acquisition will result in “only a very small” market share increment, due to MBCC’s very small presence in New Zealand; and
- 14.2 that the merged entity will face competition from at least six significant competing suppliers post-Acquisition.
15. In relation to each of the above categories, we will consider whether the Applicant has appropriately defined the market and whether unilateral, coordinated or vertical/conglomerate effects are likely to arise. However, the current focus of our investigation, and the focus of the remainder of this Statement, will be on chemical admixtures. This focus may change, however, as our investigation proceeds.

Without the acquisition

16. We will consider what the Parties would do if the Proposed Acquisition does not go ahead, as well as the competitive position of each. We will consider the evidence on whether the without-the-acquisition scenario is best characterised by the status quo or an alternative without-the-acquisition scenario.

Preliminary issues

17. We will investigate whether the Proposed Acquisition would be likely to substantially lessen competition in the relevant admixture market (or markets) by assessing whether horizontal unilateral, coordinated or vertical/conglomerate effects might result from the Proposed Acquisition. The questions that we will be focusing on are:

⁷ The Application at [13.13].

⁸ While mineral admixtures can also be used in the production of concrete, according to the Application neither Party competes in the mineral admixture market in New Zealand (with the exception of de minimis amounts of silica fume). Accordingly, we have not considered mineral admixtures any further.

⁹ The Application at [13.2]-[13.3].

- 17.1 unilateral effects: would the loss of competition between the Parties enable the merged entity to profitably raise prices or reduce quality or innovation by itself?¹⁰
- 17.2 coordinated effects: would the Proposed Acquisition change the conditions in the relevant market/s so that coordination is more likely, more complete or more sustainable?
- 17.3 vertical or conglomerate effects: would the Proposed Acquisition increase the merged entity's ability and/or incentive to foreclose rivals?

Unilateral effects: would the merged entity be able to profitably raise prices by itself?

- 18. Unilateral effects arise when a firm merges with a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that the merged firm can profitably increase price above the level that would prevail without the merger without the profitability of that increase being thwarted by rival firms' competitive responses.
- 19. The Parties mainly overlap in the supply of chemical admixture solutions to trade customers.
- 20. In the Application, Sika submitted that the Proposed Acquisition would not be likely to substantially lessen competition in any relevant chemical admixture markets due to unilateral effects because:¹¹
 - 20.1 the availability of imports will continue to constrain the merged entity;
 - 20.2 major customers will continue to exercise significant countervailing power and customer-sponsored entry is highly likely;
 - 20.3 switching admixture suppliers is easy for customers and low-cost; and
 - 20.4 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.
- 21. We will consider:
 - 21.1 closeness of competition: the degree of constraint that Sika and MBCC impose upon one another in relation to the supply of chemical admixtures or in any other market. To the extent that any constraint is material, we will

¹⁰ For ease of reference, we only refer to the ability of the merged entity to "raise prices" from this point on. This should be taken to include the possibility that the merged entity could reduce quality or innovation, or worsen an element of service or any other element of competition, i.e. it could increase quality-adjusted prices.

¹¹ The Application at [19.1-23.2].

assess whether the lost competition between the merging Parties could be replaced by rival competitors;

- 21.2 remaining competitive constraints: the degree of constraint that existing competitors would impose on the merged entity;
- 21.3 entry and expansion: how easily rivals could enter and/or expand; and
- 21.4 countervailing power: whether customers have special characteristics that would enable them to resist a price increase by the merged entity.

Coordinated effects: would the Proposed Acquisition make coordination more likely?

- 22. An acquisition can substantially lessen competition if it increases the potential for the merged entity and all or some of its remaining competitors to coordinate their behaviour and collectively exercise market power or divide up the market such that output reduces and/or prices increase. Unlike a substantial lessening of competition which can arise from the merged entity acting on its own, coordinated effects require some or all of the firms in the market to be acting in a coordinated way.¹²
- 23. In the Application, Sika submitted that the national market for the supply of chemical admixtures does not currently exhibit signs of coordination. This is because:¹³
 - 23.1 the threat of new entry and low barriers to entry makes any coordination vulnerable to external disruption;
 - 23.2 large ready-mix customers have significant countervailing power; and
 - 23.3 the terms of supply arrangements with customers are not known to competitors.
- 24. We will assess whether any of the relevant market/s are vulnerable to coordination, and whether the Proposed Acquisition would change the conditions in the relevant market/s so that coordination is more likely, more complete or more sustainable. Factors we will consider include:
 - 24.1 whether the Proposed Acquisition removes an aggressive or destabilising competitor;
 - 24.2 the extent to which one of the Parties acts as a disrupting influence to coordinated behaviour, the number and strength of remaining rivals in the relevant market post-acquisition;
 - 24.3 how similar competitors are in terms of size and cost structure;
 - 24.4 the countervailing power of customers, and

¹² *Mergers and Acquisitions Guidelines* above n4 at [3.84].

¹³ The Application at [27.1].

24.5 entry and expansion conditions.

Vertical or conglomerate effects: would the merged entity be able to foreclose rivals?

25. A merger between suppliers (or buyers) who are not competitors but who operate in related markets can result in a substantial lessening of competition due to vertical or conglomerate 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 (which we refer to as “foreclosing rivals”).
26. In the Application, Sika submitted that the Proposed Acquisition would not be likely to substantially lessen competition in the supply of chemical admixtures due to vertical or conglomerate effects because:
- 26.1 the Parties do not currently acquire or supply any inputs (eg, polymers) or services from each other or any other of their competitors;¹⁴ and
- 26.2 the Proposed Acquisition does not materially increase the range of other products Sika can supply to customers, and MBCC is not a “must have” supplier of any other products for chemical admixture customers in New Zealand.¹⁵
27. We will assess whether the Proposed Acquisition is likely to give Sika a greater ability or incentive to engage in foreclosure.

Next steps in our investigation

28. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by **16 March 2022**. However, this date may change as our investigation progresses.¹⁶ In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
29. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above.

Making a submission

30. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference “Sika/MBCC” in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **21 February 2022**.

¹⁴ The Application at [25.2].

¹⁵ The Application at [26.2].

¹⁶ The Commission maintains a clearance register on our website at <http://www.comcom.govt.nz/clearances-register/> where we update any changes to our deadlines and provide relevant documents.

31. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website.
32. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information.