Anticipated acquisition by Sika AG of MBCC Group

Decision to refer

ME/6984/22

The CMA's decision to refer under section 33 of the Enterprise Act 2002 given on 10 August 2022. Full text of the decision published on 14 October 2022.

Please note that [✂] indicates figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

Introduction

1. Sika AG (**Sika**) has agreed to acquire the whole of the issued share capital of the ultimate parent company of the MBCC Group (**MBCC**) (the **Merger**). Sika and MBCC are together referred to as the **Parties** (each individually, as a **Party** and, for statements referring to the future, as the **Merged Entity**).

2. On 27 July 2022, the Competition and Markets Authority (**CMA**) decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger consists of arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that this may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**).[1]

3. On the date of the SLC Decision, the CMA gave notice pursuant to section 34ZA(1)(b) of the Act to the Parties of the SLC Decision. However, in order to allow the Parties the opportunity to offer undertakings to the CMA for the purposes of section 73(2) of the Act, the CMA did not refer the Merger for a phase 2 investigation pursuant to section 33(3)(b) on the date of the SLC Decision.

4. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings for the purposes of section 73(2) of the Act, it must do so before the end of the

[1] See Sika AG / MBCC Group merger inquiry - GOV.UK (www.gov.uk).

five working day period specified in section 73A(1)(a) of the Act. The SLC Decision stated that the CMA would refer the Merger for a phase 2 investigation pursuant to section 33(1), and in accordance with section 34ZA(2) of the Act, if no undertakings for the purposes of section 73(2) of the Act were offered to the CMA by the end of this period (ie by 3 August 2022); if the Parties indicated before this deadline that they did not wish to offer such undertakings; or if the undertakings offered were not accepted.

5. On 3 August 2022, the Parties offered undertakings (the **Proposed Undertakings**) to divest that part of MBCC's business engaged in the production of chemical admixtures in the EEA, Switzerland, and the UK (**Europe**) (the **Divestment Business**) to a suitable purchaser (the **Divestment Purchaser**). The divestment would be effected through a reverse carve out. MBCC's building materials business in Europe (the **Retained Business**) would, with some exceptions,[2] first be carved out of MBCC's existing legal entities in Europe, and the Divestment Purchaser would then purchase the entire issued share capital of those legal entities.

6. The Divestment Business includes (but is not limited to) the following assets relating to the supply of chemical admixtures in Europe:

   (a) key personnel and other staff;

   (b) production sites, offices and warehouses;

   (c) research and development (**R&D**) sites;

   (d) R&D projects;

   (e) intellectual property (**IP**) rights (i.e. patents, patent families, trademarks, branding and unregistered know-how);

   (f) permits, licences, product authorisations; and

   (g) contracts.

7. The Merged Entity would also enter into a number of transitional services and supply agreements with the Divestment Purchaser relating to [✂] and the supply of [✂].

[2] With respect to Belgium, Czech Republic and Slovakia this would be structured as a carve out of the chemicals admixtures business rather than the building material business, with the existing MBCC legal entities in those countries remaining in the Retained Business and the assets relating to chemical admixtures transferring to the Divestment Business.

8. The Parties also offered to enter into a purchase agreement with a Divestment Purchaser approved by the CMA before the CMA finally accepts the Proposed Undertakings (an **upfront buyer**).

9. The Merger is the subject of review in a number of other jurisdictions. The Parties informed the CMA that the sale of the Divestment Business is also intended to address potential competition concerns of the European Commission.[3] They also informed the CMA that they intend to offer a divestment remedy in respect of chemical admixtures to the competition authorities in the U.S. and Canada (the **North American Divestment Business**) and Australia and New Zealand (the **ANZ Divestment Business**) (and together the **Other Divestment Businesses**). The Parties informed the CMA, at an advanced stage of the CMA's consideration of the Proposed Undertakings, that there is a high probability that the Divestment Purchaser for the Divestment Business will be the same as for the Other Divestment Businesses. The Parties noted that, if the CMA considered it desirable, the Parties would commit to including a requirement in the Proposed Undertakings that the Divestment Business and the Other Divestment Businesses would be sold to the same purchaser.

Assessment of the Proposed Undertakings

10. The CMA concluded in the SLC Decision that it is or may be the case that the Merger may be expected to result in an SLC as a result of horizontal unilateral effects in relation to the supply of chemical admixtures in the UK.

11. Section 73(2) of the Act states that the CMA may, instead of making a reference and for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effect which may be expected to result from it, accept undertakings in lieu of a reference (**UILs**) to take such action as it considers appropriate. When considering whether to accept UILs the CMA has an obligation under the Act to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any resulting adverse effects (section 73(3) of the Act).[4]

12. In order to accept UILs, the CMA must be confident that all of the potential competition concerns that have been identified in its investigation would be resolved by means of the UILs without the need for further investigation. UILs are therefore appropriate only where the remedies proposed to address any

[3] The Parties filed a notification with the European Commission on 7 June 2022 which was then withdrawn on 4 July 2022. The Parties told the CMA they intend to refile with the European Commission in [✂].
[4] Mergers remedies (CMA87), December 2018 (**Remedies Guidance**), paragraph 3.30.

competition concerns raised by the merger are clear-cut and capable of ready implementation.[5] This clear-cut requirement has two separate dimensions:

(a) in relation to the substantive competition assessment, it means that there must not be material doubts about the overall effectiveness of the remedy; and

(b) in practical terms, it means that remedies of such complexity that their implementation is not feasible within the constraints of the phase 1 timetable are unlikely to be accepted.[6]

13. The CMA's starting point in deciding whether to accept UILs offered is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC.[7]

14. The CMA generally prefers structural remedies, such as divestiture, over behavioural remedies.[8] In identifying a divestiture package, the CMA will take, as its starting point, divestiture of all or part of the acquired business, because restoration of the pre-merger situation in a market or markets subject to SLC will generally represent a straightforward remedy.[9] The CMA will generally prefer the divestiture of an existing business, which can compete effectively on a stand-alone basis, independently of the merger parties, to the divestiture of part of a business or a collection of assets.[10] This is because divestiture of a complete business is less likely to be subject to purchaser and composition risk and can generally be achieved with greater speed.[11]

15. In the present case, the CMA believes there are material doubts, for the reasons set out below, as to whether the Proposed Undertakings would be effective in resolving the competition concerns identified in the SLC decision and is capable of implementation within the constraints of the phase 1 timetable.

Composition risks

16. To be an effective remedy, the scope of a divestiture package must be sufficient to allow the divested business to operate as an effective competitor in the market and to attract a suitable purchaser.[12] Composition risks arise

---

[5] Remedies Guidance, paragraph 3.27.
[6] Remedies Guidance, paragraphs 3.28.
[7] Remedies Guidance, paragraphs 3.27 to 3.28 and 3.30 to 3.31.
[8] Remedies Guidance, paragraphs 3.46.
[9] Remedies Guidance, paragraphs 5.6.
[10] Remedies Guidance, paragraphs 5.12.
[11] Remedies Guidance, paragraphs 5.12.
[12] Remedies Guidance, paragraph 5.3.

where the scope of the divestiture package may be too constrained or not appropriately configured.

17. The Divestment Business is not currently operated as a standalone business. The assets comprising the Divestment Business will therefore need to be separated from the assets comprising the Retained Business. A significant number of assets (including a number of production sites, offices and warehouses, an R&D facility, brands, and a number of contracts and employees) are currently shared between the Divestment Business and the Retained Business and will have to be divided between them. The separation of these assets does not appear to be straightforward, as highlighted by the fact that [✂] number of iterative changes have been made to the proposed asset perimeter for the Divestment Business and the Retained Business during the CMA's assessment of the Proposed Undertakings. As well as highlighting the difficulties incumbent in ensuring that the scope of a divestiture package that is not currently operated as a standalone business is appropriate, these changes have made the CMA's assessment of the extent to which the division of those assets creates a composition risk significantly more challenging.

18. There are also links (such as [✂]) between MBCC's chemicals admixtures business in Europe (within the scope of the Divestment Business) and MBCC's chemicals admixtures business in the rest of the world. As set out above, the Parties have submitted that there is a high probability that the Divestment Business and the Other Divestment Businesses will be sold to the same purchaser and submitted they would be willing to commit to this in the UILs. However, the Divestment Business and the Other Divestment Businesses would still be carved out from the chemical admixtures business in the rest of the world, which would be retained by the Merged Entity.

19. The Parties submitted that the Divestment Business will include all the assets that are required for the Divestment Purchaser to compete effectively and that the reverse carve out structure will ensure that any assets required by the Divestment Business will not be inadvertently excluded. The CMA recognises that the reverse carve out structure proposed by the Parties would mitigate, at least to some extent, the composition risks that arise in this regard. The CMA notes, however, that irrespective of the way the divestment is structured, the Divestment Business would no longer operate in the same way as it does now as part of a broader integrated business. There is a significant information asymmetry between the Parties and the CMA (and also any Divestment Purchaser) and therefore it is difficult to determine, particularly within the time constraints of a phase 1 investigation, whether the Divestment Business will retain all of the assets that are required to compete effectively. In addition, the CMA considers that the extent to which assets are currently shared (and

therefore certain assets such as [✂], would be held by the Divestment Business with limitations on their use that do not apply today) creates complexity and gives rise to a material risk of the Divestment Business not being appropriately configured.

20. For completeness, the CMA also does not consider that these risks can be fully addressed through the purchaser approval process, due to the asymmetry of information between the Parties and any Divestment Purchaser outlined above in relation to the identification of assets that are important for the effectiveness of the remedy package. The fact that a purchaser may be willing to purchase a given package of assets does not, in itself, provide sufficient comfort that the asset perimeter is appropriate to restore the competition lost as a result of a merger, given that the incentives of the merger parties and the purchaser may not be aligned with those of the CMA.

21. The CMA also considers that separating the Divestment Business from the wider MBCC business could impact on financial resilience and incentives to invest (including as a result of [✂]). Although this could be mitigated to some extent by the sale of the Divestment Business and the Other Divestment Businesses to the same purchaser, the combined Divestment Business and Other Divestment Businesses would nevertheless be significantly smaller than MBCC is at present.

Purchaser risks

22. Purchaser risks are risks that a suitable purchaser is not available, or that the merger parties will dispose to a weak or otherwise inappropriate purchaser.[13]

23. The Parties submitted that the Divestment Business has received substantial interest from both strategic buyers and large financial sponsors/private equity bidders (including those with experience in the chemicals sector).

24. However, many of these potential buyers have only been identified at a relatively late stage in the CMA's consideration of the Proposed Undertakings, after the scope of the divestment package was broadened to cover both the Divestment Business and the Other Divestment Businesses. These potential buyers have only recently [✂] or are in the process of [✂] with the Parties.

25. The CMA also notes that there are material doubts around the suitability of a number of purchasers that [✂]. [✂] these potential purchasers are large downstream customers of chemical admixtures. The CMA has concerns over whether such purchasers would replicate the constraint lost as a result of the

[13] Remedies Guidance, paragraph 5.3(b).

Merger given that they might have the ability and incentive to limit the volumes that they supply to competitors, and that customers may be reluctant to purchase from a downstream competitor given the need to collaborate closely and disclose commercially sensitive technical information with a chemical admixture supplier to ensure the products have the desired characteristics.

26. Given the evolving scope of the divestment package (which is likely to have a direct bearing on any assessment of purchaser suitability), it has been difficult for the CMA to assess the degree of purchaser risk (in particular given that the purchaser may need to be approved by multiple regulators).

Implementation risk

27. The Parties have proposed that the sale of the Divestment Business would be conditional on (i) the CMA formally approving the Divestment Purchaser and formally accepting the Proposed Undertakings, (ii) if relevant, the Department of Justice in the United States (**DoJ**); the Canadian Competition Bureau (**CCB**); the Australian Competition and Consumer Commission (**ACCC**), the New Zealand Commerce Commission (**NZCC**) and/or the European Commission (**EC,** and together with the DoJ, CCB, ACCC, NZCC, the **ex-UK Competition Authorities**) approving the Divestment Purchaser and (iii) the Divestment Purchaser obtaining the customary regulatory approvals (including merger control approvals) that are likely to be required to complete the sale of the Divestment Business.

28. Ordinarily in upfront buyer cases, the CMA will not accept UILs unless a sale agreement has been agreed that is conditional from the buyer's perspective only on UILs being accepted by the CMA (and completion of the main transaction if it remains anticipated). This is so that the CMA can have a high degree of confidence that the sale to the purchaser that it has approved will go ahead.

29. The CMA recognises that remedies processes involving other jurisdictions bring about an additional layer of complexity. In such cases, the CMA seeks to engage with other competition authorities to assess whether the proposed undertakings give rise to risks or practical considerations in other jurisdictions that may impact on the effectiveness of the remedy in the UK.

30. Under the Parties' proposed timeline, a number of ex-UK Competition Authorities (including the European Commission, where the Merger has not yet been renotified) would not have approved the buyer and/or package by the time the CMA would be required to accept final undertakings (at which point

the CMA can no longer refer the Merger to phase 2).[14] This is the case even under the hypothetical scenario where all the extensions permitted by law to the CMA's consideration of phase 1 undertakings are exhausted.

31. The remedies packages offered to the CMA and the ex-UK Competition Authorities, and the links between those packages, have been evolving rapidly during the CMA's consideration of the Proposed Undertakings. There remains a significant degree of uncertainty around the final remedies offers that may be made to the ex-UK Competition Authorities. Moreover, as noted above, that may not be resolved before the end of the CMA's consideration of the Proposed Undertakings.

32. The need to liaise with other competition authorities in relation to a proposed remedy does not, in and of itself, mean that the remedy is of such complexity that its implementation may not be feasible within the constraints of a phase 1 timetable. But in the particular circumstances of this case, where such a significant degree of uncertainty exists around the links between the Divestment Business and remedies that may be offered in other jurisdictions, the CMA has material doubts as to whether the implementation of the Proposed Undertakings within the constraints of the phase 1 timetable would be feasible.

Asset risks

33. These are risks that the competitive capability of a divestiture package will deteriorate before completion of the divestiture, for example, through the loss of customers or key members of staff.[15]

34. There are inherent asset risks associated with a carve out remedy. These are exacerbated by the prolonged period between execution and completion of the divestment proposed by the Parties along with certain market-specific features such as the lack of formal contractual agreements with a number of key customers and the importance of stability in customer relationships.

Conclusion

35. The CMA therefore considers that there are material doubts over whether the Proposed Undertakings would restore competition to the level that would have prevailed absent the Merger and could be implemented within a phase 1 timetable. The CMA does not consider that these issues could be remedied

[14] Under Section 82 of the Act.
[15] Mergers remedies (CMA87), December 2018 (**Remedies Guidance**), paragraph 5.3(c).

through further modifications of the Proposed Undertakings in the phase 1 process.

Decision

36. For the reasons set out above, after examination of the Proposed Undertakings, the CMA does not believe that they would achieve as comprehensive a solution as is reasonable and practicable to the SLC identified in the SLC Decision and the adverse effects resulting from that SLC.

37. Accordingly, the CMA has decided not to exercise its discretion under section 73(2) of the Act to accept undertakings in lieu of reference.

38. Therefore, pursuant to sections 33(1)[i] and 34ZA(2) of the Act, the CMA has decided to refer the Merger to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 to conduct a phase 2 investigation.

Colin Raftery
Senior Director of Mergers
Competition and Markets Authority
10 August 2022

---

[i] This reference has been corrected in this decision to 'section 33(1)' to correct a typographical error originally stating 'section 22(1)'.