

# Anticipated acquisition by Roper UK Limited of CliniSys Group Limited

**ME/6564-15**

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 11 December 2015. Full text of the decision published on 19 January 2016.

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

## **SUMMARY**

1. Roper UK Limited (**Roper UK**), the wholly-owned UK subsidiary of Roper Technologies, Inc (**Roper**), has agreed to acquire PB Topco Limited, the ultimate parent company of CliniSys Group Limited (**CliniSys**) (the **Merger**). Roper and CliniSys are together referred to as the **Parties**.
2. The Competition and Markets Authority (**CMA**) considers that the enterprises of the Parties will cease to be distinct as a result of the Merger, that the share of supply test is met and that accordingly arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
3. Roper's subsidiary, Sunquest Information Systems, Inc (**Sunquest**), and CliniSys overlap in the UK in the supply of clinical laboratory information management systems (**LIMS**) to NHS hospitals and the supply of order entry requesting and reporting software (also referred to as order communications software) (**Order Comms**) to the healthcare sector. Both LIMS and Order Comms are software-based products that form part of the healthcare software used in the provision of pathology services.
4. LIMS are used by hospital laboratories to support clinical processes. The CMA's merger investigation found that a full LIMS package comprises several applications or modules and that most NHS hospitals purchase a full LIMS package. The CMA has therefore assessed the impact of the Merger in the supply of LIMS to NHS hospitals in the UK.

5. Order Comms are used by healthcare providers, such as general practitioner (**GP**) practices, hospitals and prison healthcare teams, to order (and receive the results of) laboratory tests. The CMA's merger investigation found that a significant proportion of customers purchase Order Comms as a stand-alone package, rather than as part of a wider package of integrated healthcare software (ie, a package designed to meet all of the software needs of a healthcare provider, including electronic patient record software and patient administration system software). The CMA also found that some suppliers, including the Parties, only offer Order Comms on a stand-alone basis. The CMA has therefore assessed the impact of the Merger in the supply of stand-alone Order Comms to the healthcare sector in the UK.
6. The CMA considered whether the Merger would give rise to unilateral horizontal effects in the supply of LIMS to NHS hospitals in the UK and the supply of stand-alone Order Comms to the healthcare sector in the UK. The CMA also considered whether the Merger would give rise to conglomerate effects based on the partial or total foreclosure of the Parties' rivals in the supply of either LIMS to NHS hospitals or stand-alone Order Comms to the healthcare sector in the UK.
7. In relation to the supply of LIMS, the CMA's investigation found that Sunquest has not provided a significant competitive constraint on CliniSys in the recent past. Sunquest has [redacted] and has bid against CliniSys [redacted] in the last five years. Furthermore, almost all customers and competitors that responded to the CMA's investigation indicated that they did not consider that the Merger would have an effect on competition and confirmed that there are several other credible suppliers of LIMS to NHS hospitals in the UK.
8. In relation to the supply of stand-alone Order Comms, the CMA's investigation found that CliniSys has not provided a significant competitive constraint on Sunquest in the recent past. CliniSys has [redacted]. Furthermore, almost all customers and competitors that responded to the CMA's merger investigation indicated that they did not consider that the Merger would have an effect on competition and confirmed that there were other credible suppliers of stand-alone Order Comms to the healthcare sector in the UK.
9. In relation to conglomerate effects, the CMA considered first whether the merged entity would have the ability to foreclose its competitors by either bundling its LIMS and Order Comms products, or limiting their interoperability with the products of third parties. Based on the evidence gathered during its investigation, the CMA considers that the Parties will not have the ability to foreclose competitors post-Merger because: (i) a number of alternative suppliers remain for both LIMS and Order Comms; (ii) customers typically procure LIMS and Order Comms separately; (iii) interoperability with third

party software is a key requirement for customers that is built into the tender specification for both LIMS and Order Comms contracts; and (iv) standards have been adopted for communication between healthcare software systems. As the CMA considers that the Parties will not have the ability to foreclose competitors, it has not had to conclude on the incentive for the Parties to do so or the effect of such a foreclosure strategy on competition.

10. The CMA considers that these constraints, taken together, are sufficient to ensure that the Merger does not give rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects or conglomerate effects.
11. The Merger will therefore **not be referred** under section 33(1) of the Enterprise Act 2002 (the **Act**).

## ASSESSMENT

### Parties

12. Roper is a US-based technology company that produces products for a range of markets. Roper's wholly-owned subsidiary Sunquest is also based in the USA. Sunquest is active in the supply of diagnostic and laboratory software, including LIMS and Order Comms in the UK.
13. CliniSys is a private company based in the UK that specialises in the supply of LIMS and other healthcare software, including Order Comms. The turnover of CliniSys in the financial year ending 31 March 2015 was approximately £[~~8~~] worldwide of which approximately £[~~8~~] was generated in the UK.

### Transaction

14. The Merger involves the acquisition by Roper UK of PB Topco Limited, the ultimate parent company of CliniSys. The Parties entered into a share purchase agreement on 15 September 2015 and the Merger was announced by the Parties on 26 October 2015.

### Jurisdiction

15. As a result of the Merger, the enterprises of Roper and CliniSys will cease to be distinct. The UK turnover of CliniSys does not exceed £70 million, so the turnover test in section 23(1)(b) of the Act is not satisfied.
16. The Parties overlap in: (i) the supply of LIMS to NHS hospitals in the UK, with a combined share of supply of [35–45]% (increment [0–10]%), and (ii) the

supply of stand-alone Order Comms to the healthcare sector in the UK, with a combined share of supply of [35–45]% (increment [0–10]%). The CMA therefore considers that the share of supply test in section 23 of the Act is met.

17. The CMA therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
18. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 29 October 2015 and the statutory 40 working day deadline for a decision is therefore 23 December 2015.

## Counterfactual

19. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie, the counterfactual). For anticipated mergers, the CMA generally adopts the prevailing conditions of competition as the counterfactual against which to assess the impact of the merger. However, the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it considers that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions as between the merging parties.<sup>1</sup>
20. Roper submitted that in relation to LIMS, the Merger should be assessed using a counterfactual that takes into account [REDACTED]. Roper has not put forward an argument for an alternative counterfactual to the prevailing conditions of competition in relation to Order Comms.
21. The CMA's investigation found that [REDACTED]. Therefore, given that [REDACTED], the CMA considers the prevailing conditions of competition to be the relevant counterfactual.

## Frame of reference

22. The CMA considers that market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as it is recognised that there can be

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<sup>1</sup> *Merger Assessment Guidelines* (OFT1254/CC2), September 2010, from paragraph 4.3.5. The *Merger Assessment Guidelines* have been adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), January 2014, Annex D).

constraints on merger parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. The CMA will take these factors into account in its competitive assessment.<sup>2</sup>

23. The Parties overlap in the supply of LIMS to NHS hospitals in the UK and in the supply of stand-alone Order Comms to the healthcare sector in the UK.

### **Product scope**

24. Both LIMS and Order Comms are software-based products that form part of the healthcare software systems used in the provision of pathology services in the UK, primarily by the NHS. As individual components in a wider healthcare software system, it is important that LIMS and Order Comms products are able to interface with each other, as well as other healthcare software products.

### *LIMS*

25. LIMS provide IT support for laboratory processes and their functionality includes order entry, sample collection, equipment management, quality control, technical and clinical authorisation of test results, result interpretation and reporting, sample disposal, and billing. In addition to software licences, LIMS suppliers typically provide additional support services to their customers.
26. Roper submitted that the narrowest candidate frame of reference in this case is the supply of LIMS to NHS hospitals.<sup>3</sup> In support of this, Roper explained that in the UK laboratories do not tend to specialise; meaning that customers generally require a LIMS package that provides full functionality rather than only specific LIMS applications or modules (such as microbiology, anatomic pathology or molecular). Roper also submitted that most LIMS suppliers are able to offer a full LIMS solution (ie, one covering all LIMS applications).
27. The CMA's predecessor, the Office of Fair Trading (**OFT**), previously considered the supply of LIMS in iSOFT/Torex<sup>4</sup> and CliniSys/Torex.<sup>5</sup> In iSOFT/Torex, the OFT found that the relevant product frame of reference was the supply of LIMS to NHS hospitals.<sup>6</sup> In CliniSys/Torex, the OFT found that

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<sup>2</sup> [Merger Assessment Guidelines](#), paragraph 5.2.2.

<sup>3</sup> [REDACTED].

<sup>4</sup> OFT, [Completed acquisition by iSOFT Group Plc of Torex Plc](#), 24 March 2004.

<sup>5</sup> OFT, [Anticipated acquisition by Clinisys Solutions Limited of Torex Laboratory Systems Limited](#), 26 January 2005.

<sup>6</sup> [iSOFT/Torex](#), paragraph 22.

the same LIMS products were supplied to NHS and private hospitals. It therefore assessed the transaction using a frame of reference of the supply of LIMS to hospitals (ie, to both NHS and private hospitals) on the basis of supply-side substitutability.<sup>7</sup>

28. The CMA's merger investigation indicated that the vast majority of customers purchase a LIMS package with full functionality and that the majority of suppliers provide LIMS packages that cover all of their customers' requirements. Furthermore, bidding data submitted by Roper indicated that almost all tenders carried out by customers in the last five years were for a LIMS package with full functionality.
29. The CMA also considered whether the market could be segmented between the supply of software licences for LIMS and support services. However, the CMA's merger investigation found that customers typically purchase LIMS software licences and support services together and that LIMS suppliers generally do not offer support services for the products of competitors. Accordingly, the CMA considers that software licences and support services form part of a LIMS package and should not be assessed separately.
30. The CMA has not considered in detail the possible aggregation of the supply of LIMS to NHS hospitals and to private hospitals [✂].
31. The CMA therefore considers that the appropriate product frame of reference to assess the Merger is the supply of LIMS to NHS hospitals.

### *Order Comms*

32. Order Comms software is used by healthcare providers, including GP practices, hospitals and prison healthcare teams, to order laboratory tests and subsequently receive the results of the tests undertaken by the laboratory. Historically, such communications were made in writing, but in recent years Order Comms software has been developed to streamline the process.
33. Roper submitted that the narrowest candidate frame of reference in this case is the supply of Order Comms for the healthcare sector in the UK. In support of this, Roper submitted that suppliers of Order Comms freely switch to supplying customers across a range of healthcare providers that need to order laboratory or pathology work, including public and private healthcare customers. Roper also submitted that Order Comms is often supplied as part of a wider, integrated healthcare software package (ie, one designed to meet all of the software needs of a healthcare provider, including electronic patient

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<sup>7</sup> [CliniSys/Torex](#), paragraphs 8 to 12.

record software and patient administration system software) and that, consequently, the supply of Order Comms on a stand-alone basis and as part of an integrated healthcare software package should be considered as part of the same frame of reference. In support of this, Roper provided the CMA with a number of examples of customers that had opted for an integrated package incorporating Order Comms functionality, rather than a stand-alone Order Comms package.

34. Neither the CMA, nor its predecessors the OFT and the Competition Commission, have specifically considered Order Comms in previous cases. Third party responses to the CMA's merger investigation were mixed regarding the substitutability of purchasing Order Comms as a stand-alone product or as part of an integrated healthcare software package. However, the majority of customers that responded to the CMA's merger investigation indicated that they currently had a stand-alone Order Comms package and would continue to do so in the future. Furthermore, the CMA notes that the Parties and a number of their competitors supply Order Comms on a stand-alone basis.
35. The CMA did not find evidence in its merger investigation that there are material differences in the supply of Order Comms to different types of customers. One supplier of LIMS suggested to the CMA that Sunquest may have a higher share in relation to the supply of Order Comms to GP practices, as compared to hospitals, noting that this was the result of the historical approach to the procurement of healthcare software in this sector. However, none of the suppliers of Order Comms that responded to the CMA's investigation identified any different groups of customers within the UK that they would not be able to supply.
36. Based on the evidence before it, the CMA has excluded Order Comms supplied as part of an integrated healthcare software package from the product frame of reference. The CMA has therefore assessed the impact of the Merger using as the frame of reference the supply of stand-alone Order Comms to the healthcare sector.

### ***Geographic scope***

#### *LIMS*

37. Roper submitted that the relevant geographic market for LIMS is at least EEA-wide on the basis that it is possible for suppliers located outside the UK to supply LIMS to UK customers and because EU public procurement rules require that purchasing entities within the NHS do not prejudice suppliers based outside the UK.

38. In *CSC/iSOFT*, the European Commission considered the relevant geographic market for the supply of healthcare software, but its merger investigation was inconclusive, with respondents divided over whether the market for healthcare software was national or at least EEA-wide.<sup>8</sup> In *iSoft/Torex* and *CliniSys/Torex*, the OFT considered that IT software for the healthcare sector could be developed anywhere in the world and that suppliers based outside the UK could bid for contracts to supply healthcare software, including LIMS, to NHS hospitals. However, in both cases the OFT noted that, from the demand side, customers require a local presence for the purposes of installation, maintenance and servicing. The OFT therefore assessed the transactions using a national frame of reference, but took into account possible regional differences within the UK arising from the implementation of the National Programme for IT (**NPfIT**) by the NHS in England.<sup>9</sup>
39. The CMA notes that, following an announcement by the UK government in September 2011, the NPfIT has been dismantled.<sup>10</sup> Accordingly, the CMA considers that the considerations regarding possible regional difference arising from the NPfIT, addressed by the OFT in its previous decisions, are no longer relevant as procurement of healthcare software is now carried out by the relevant contracting NHS entity.
40. Responses from third parties to the CMA's investigation in the present case indicated that while customers do consider potential suppliers based outside the UK, a presence within the UK market is considered to be an advantage. In particular, customers indicated that they needed to be confident that suppliers would be able to meet the needs of an NHS organisation, which might differ from those of healthcare providers in other countries. Some overseas competitors with a limited UK presence that responded to the CMA's investigation indicated that while it was possible to bid for contracts in the UK, particular effort was needed to win them. The CMA did not find evidence during its investigation that suggested segmentation of the market within the UK would be appropriate.

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<sup>8</sup> European Commission, [Case COMP/M.6237 – Computer Sciences Corporation/iSOFT Group](#), 20 June 2011, recital 35.

<sup>9</sup> See [iSOFT/Torex](#), paragraphs 23 and 24; and [CliniSys/Torex](#), paragraphs 13 and 14. As set out in detail in paragraphs 7 to 17 of the *iSOFT/Torex* decision, the NPfIT was designed to be a wholesale update of the NHS's IT systems in England. In order to implement the NPfIT, England was divided into five regions with a Local Service Provider appointed in each region, responsible, among other things, for selecting a preferred software supplier.

<sup>10</sup> Department of Health, [Dismantling the NHS National Programme for IT](#), 22 September 2011.



41. On the basis of the evidence before it, the CMA has assessed the effect of the Merger on the supply of LIMS to NHS hospitals using a national frame of reference.

#### *Order Comms*

42. Roper submitted that, for the same reasons as for LIMS, the relevant geographic market for the supply of Order Comms is at least EEA-wide.
43. Responses received from third parties during the CMA's merger investigation indicated that, as with LIMS, customers for Order Comms tend to focus on suppliers active in the UK market and have some preference for those with in-country support services. The CMA has found no evidence that the frame of reference for Order Comms should be narrower than the UK.
44. The CMA has therefore assessed the effect of the Merger on the supply of stand-alone Order Comms to the healthcare sector using a national frame of reference.

#### ***Conclusion on frame of reference***

45. For the reasons set out above, the CMA has considered the impact of the Merger in the following frames of reference: (i) the supply of LIMS to NHS hospitals in the UK; and (ii) the supply of stand-alone Order Comms to the healthcare sector in the UK.

## **Competitive assessment**

### ***Horizontal unilateral effects***

46. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or degrade quality on its own and without needing to coordinate with its rivals.<sup>11</sup> Horizontal unilateral effects are more likely when the merger parties are close competitors. The CMA assessed whether it is or may be the case that the Merger has resulted, or may be expected to result, in a substantial lessening of competition in relation to unilateral horizontal effects in (i) the supply of LIMS to NHS hospitals in the UK; and (ii) the supply of stand-alone Order Comms to the healthcare sector in the UK.

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<sup>11</sup> [Merger Assessment Guidelines](#), from paragraph 5.4.1.

### *Horizontal unilateral effects in the supply of LIMS to NHS hospitals in the UK*

47. Roper submitted that the Merger does not give rise to a realistic prospect of a substantial lessening of competition in the supply of LIMS to NHS hospitals in the UK on the basis that: (i) the overlap between the Parties is insignificant with Sunquest having only a [0–10]% share of supply; (ii) there are at least nine other credible suppliers competing with the Parties to win contracts; (iii) the Parties have not been close competitors, [redacted]; and (iv) barriers to entry and expansion are low and customers have significant buyer power.
48. Roper also submitted that [redacted].
49. The CMA has considered the closeness of competition between the Parties and the competitive constraints imposed on them through an analysis of shares of supply of LIMS currently installed at NHS hospitals, recent bidding data, the views of third parties, and the Parties' internal documents.

#### *Shares of supply for LIMS*

50. LIMS contracts entered into by NHS hospitals typically run for between five and ten years, often with options for extension. Roper provided the CMA with shares of supply estimates based on LIMS installations at NHS hospitals in the UK. These estimates are set out in Table 1 below.

**Table 1: Parties' estimates of shares of supply of installed LIMS at NHS hospitals in the UK**

<i>Supplier</i>	<i>Share of installed base</i>
	%
CliniSys	[35–45]
Sunquest	[0–10]
<b>Combined</b>	<b>[35–45]</b>
CSC (iSOFT)	[30–40]
InterSystems	[0–10]
Meditech	[0–10]
Cerner	[0–10]
Technidata	[0–10]
Roche	[0–10]
Other	[0–10]

Source: Parties' estimates.

51. The Parties' share of supply estimates indicate that Sunquest is a relatively small supplier of LIMS in the UK at present and that the increment in CliniSys' share of supply resulting from the Merger will be small. The estimates provided by the Parties also suggest that, [redacted], there are a number of other providers active in the UK, including CSC which has a significant share of supply.

52. The majority of third parties that responded to the CMA’s merger investigation indicated that CliniSys had a significant share of supply in the UK for LIMS, but that Sunquest was regarded as a small player with limited presence.

*Bidding data for LIMS*

53. Roper provided the CMA with bidding data for LIMS contracts tendered by NHS hospitals since 2010. The data identified the winning bidder in all 25 of the completed LIMS tenders of which the Parties are aware over the period and, where known to the Parties, set out the identities of other bidders who were shortlisted. Roper explained that shortlisting by a customer typically reduced the number of interested bidders to between two and four.
54. As noted above, Roper submitted that [REDACTED]. The bidding data shows that [REDACTED]. Roper noted that in some cases it was not aware of whether or not Sunquest had been shortlisted by the customer. However, the CMA considers that even if, on a cautious basis, Sunquest is assumed to have been shortlisted every time it bid for a contract, the bidding data still indicates that Sunquest has not imposed a significant constraint on CliniSys over the period.
55. The bidding data also indicates that CliniSys has bid for contracts against suppliers other than Sunquest and that these other suppliers have been shortlisted by customers on a number of occasions. Table 2 below sets out the number of times that different competitors have been shortlisted against CliniSys in tenders for the provision of LIMS, and the winner in each case, based on the data for the 25 tenders provided by the Parties.

**Table 2: Number of times suppliers shortlisted and number of successful bids in NHS hospital LIMS tenders in the UK since 2010**

<i>Supplier</i>	<i>Number of shortlisted bids</i>	<i>Number of successful bids</i>
CliniSys	[REDACTED]	[REDACTED]
Sunquest	[REDACTED]*	[REDACTED]
CSC/iSOFT	[REDACTED]	[REDACTED]
Technidata	[REDACTED]	[REDACTED]
Cerner	[REDACTED]	[REDACTED]
InterSystems	[REDACTED]	[REDACTED]
Roche	[REDACTED]	[REDACTED]
Integrated Software Solutions	[REDACTED]	[REDACTED]
Meditech	[REDACTED]	[REDACTED]
Autoscribe	[REDACTED]	[REDACTED]
No contract ultimately awarded	[REDACTED]	[REDACTED]

Source: Parties’ LIMS bidding data for period January 2010 to April 2015 covering 25 completed tenders.

\*Assumes that Sunquest was shortlisted every time it bid.

56. The CMA notes that there is likely to be some asymmetry of information between the Parties and customers regarding which competitors bid for particular tenders. This may mean that the data provided by Roper is incomplete, in particular in relation to capturing the competitors that were

shortlisted. As noted above, Roper itself is uncertain whether or not it was shortlisted in relation to all the tenders in which it submitted a bid.

57. The responses received by the CMA from third parties during its market testing did not allow it to confirm the number of times that different competitors have been shortlisted for tenders against CliniSys. However, the CMA's investigation confirmed that Sunquest has not been a frequent bidder for LIMS contracts in the UK in recent years and that other competitors have bid more often than Sunquest. The CMA therefore considers that the bidding data provided by Roper indicates that the Parties have not been close competitors in supplying LIMS in the UK and that there are a number of other competitors that have been active in bidding for LIMS contracts.
58. The CMA notes that the Parties' bidding data does not include tenders that have yet to be awarded. Roper submitted that [REDACTED]. The CMA notes that, in any event, adding information from ongoing tenders to the bidding data submitted to the CMA does not alter the fact that there are a number of other credible competitors active in bidding for LIMS contracts.

#### *Third party views on the supply of LIMS*

59. During its merger investigation, the CMA sought the views of competitors and customers on the closeness of competition between the Parties and, [REDACTED], the extent to which customers had alternative suppliers that would constrain the Parties post-Merger.
60. Almost all of the customers that responded to the CMA's investigation indicated that they did not consider that the Merger would have an effect on competition in the supply of LIMS to NHS hospitals in the UK. As noted above, the majority of customers indicated that Sunquest is a small player in the supply of LIMS in the UK, with a limited market presence. Furthermore, all customers that responded to the CMA's market investigation named alternative suppliers that they considered to be credible suppliers of LIMS in the event of a future tender, with most customers naming five or more potential suppliers.
61. Given that the duration of LIMS contracts tends to be between [REDACTED] and [REDACTED] years, the CMA notes that for some customers it may have been some time since they last engaged with the market. Accordingly, the CMA has given particular weight to the responses received from customers that have tendered for LIMS contracts more recently. One customer that has recently tendered for a LIMS contract informed the CMA that it had received bids from ten different suppliers, of which it considered nine were credible. Furthermore, the customer noted that there were two other LIMS suppliers that it had

expected would bid, but did not do so on that occasion. Another customer that has also recently undergone a tendering process told the CMA that the Merger would not have influenced the outcome of the bidding process.

62. The responses received from competitors that responded to the CMA's merger investigation confirmed that there are a number of suppliers of LIMS to customers in the UK. In general, the responses from competitors indicated that CliniSys is a strong player in the supply of LIMS in the UK, but that Sunquest has a limited presence in the UK.
63. The CMA considers that the responses received from third parties during its merger investigation indicate that Sunquest has not exerted a significant constraint on CliniSys in the supply of LIMS to NHS hospitals, and support the conclusions drawn from the shares of supply and bidding data provided by Roper.

#### *Internal documents*

64. During its merger investigation, the CMA reviewed a number of the Parties' internal documents, including their business plans and internal presentations on strategy. The CMA considers that the Parties' internal documents generally support Roper's submission that Sunquest does not have a strong UK presence in relation to the supply of LIMS and that the merged entity will face a constraint from a number of other competitors. For example, [REDACTED].<sup>12</sup> [REDACTED].<sup>13</sup>

#### *Conclusion on horizontal unilateral effects in the supply of LIMS*

65. Based on the evidence gathered during its investigation, and for the reasons set out above, the CMA considers that Sunquest is a relatively small player in the supply of LIMS to NHS hospitals in the UK and does not impose a significant constraint on CliniSys. Furthermore, the CMA considers that, post-Merger, there will remain a number of competitors for LIMS contracts in the UK, which the customers that responded to the CMA's merger investigation have confirmed are credible suppliers of LIMS. Accordingly, the CMA does not believe that there is a realistic prospect of a substantial lessening of competition in the supply of LIMS to NHS hospitals in the UK.

#### *Horizontal unilateral effects in the supply of stand-alone Order Comms*

66. Roper submitted that the Merger does not give rise to a realistic prospect of a substantial lessening of competition in the supply of stand-alone Order

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<sup>12</sup> [REDACTED].

<sup>13</sup> [REDACTED].

Comms to the healthcare sector in the UK on the basis that: (i) the Merger will result in an insignificant increment to the Parties' share of supply; (ii) the supply of Order Comms to customers in the UK is highly competitive with 12 well-resourced and knowledgeable independent suppliers operating in the sector; (iii) CliniSys and Sunquest are not close competitors, as indicated by the limited interaction between the Parties when bidding for Order Comms contracts; and (iv) barriers to entry and expansion are low and customers have significant buyer power.

67. Roper submitted that [REDACTED]. In addition, it submitted that [REDACTED]. However, the CMA notes that [REDACTED].
68. The CMA has considered the closeness of competition between the Parties and the competitive constraints imposed on them through an analysis of shares of supply of stand-alone Order Comms contracts, recent bidding data, the views of third parties, and the Parties' internal documents.

*Shares of supply for Order Comms*

69. Roper provided the CMA with estimates of shares of supply based on the number of Order Comms contracts held by competing suppliers in the UK. Roper's estimates of the shares of supply for stand-alone Order Comms contracts (ie, excluding those contracts where Order Comms has been supplied as part of an integrated healthcare software package) are set out in Table 3 below.

**Table 3: Parties' estimates of shares of stand-alone Order Comms contracts in the UK**

<i>Supplier</i>	<i>Share of installed base</i>
Sunquest	[35–45]
CliniSys	[0–10]
<b>Combined</b>	<b>[35–45]</b>
EMIS Indigo4	[35–45]
Plumtree	[0–10]
Technidata	[0–10]
InterSystems	[0–10]
Self-supply	[0–10]
Other	[0–10]

Source: Parties' estimates.

70. Roper submitted that [REDACTED]. To support this view, Roper explained that Sunquest's position in the supply of Order Comms reflects the fact that it inherited the majority of its Order Comms contracts when it acquired Anglia Healthcare Systems (**Anglia**) in 2008. Anglia, in turn, obtained its share of Order Comms contracts primarily as a result of being appointed as the

preferred software supplier of BT Healthcare, the Local Service Provider for London under the NPfIT. As noted above, the NPfIT has since been dismantled and, as a consequence, NHS healthcare providers are now able to conduct their own competitive tender processes. Roper therefore submitted that competition for Order Comms contracts has opened up and opportunities for bidding for NHS contracts are more frequent.

71. The CMA considers that the shares of supply submitted by Roper indicate that: (i) CliniSys has not been successful in bidding for Order Comms contracts; (ii) EMIS Indigo4 will have a similar share of contracts as the Parties post-Merger; and (iii) there are other competitors offering stand-alone Order Comms with a similar share of contracts as CliniSys.

*Bidding data for stand-alone Order Comms*

72. Roper provided the CMA with bidding data for 12 stand-alone Order Comms contracts tendered by healthcare providers in the UK since 2010 in which one or both of the Parties has competed. The bidding data showed that CliniSys bid for [REDACTED]. The bidding data also indicated that each of EMIS Indigo4 and Plumtree has bid for [REDACTED] of the 12 contracts, and that both have been successful in winning contracts [REDACTED]. Table 4 below sets out a summary of the Order Comms bidding data provided by Roper.

**Table 4: Frequency of bidding and successful bids for Order Comms contracts in the UK since 2010**

<i>Supplier</i>	<i>Number of bids</i>	<i>Number of successful bids</i>
Sunquest	[REDACTED]	[REDACTED]
EMIS Indigo4	[REDACTED]	[REDACTED]
Plumtree	[REDACTED]	[REDACTED]
CliniSys	[REDACTED]	[REDACTED]

Source: Parties' Order Comms bidding data for period 2010 to 2015.

73. As with the bidding data provided for LIMS, the CMA notes that there is likely to be some asymmetry of information between the Parties and their customers regarding which competitors bid for particular tenders. The responses received by the CMA from third parties during its market testing did not allow it to confirm the number of times that different competitors have bid for tenders against Sunquest. However, noting that the information provided by Roper may be incomplete, the CMA nevertheless considers that the bidding data indicates that CliniSys has not been imposing a significant constraint on Sunquest in terms of bidding for stand-alone Order Comms contracts because it shows that [REDACTED].

### *Third party views on the supply of Order Comms*

74. During its merger investigation, the CMA sought the views of competitors and customers on the closeness of competition between the Parties and the extent to which customers had alternative suppliers that would constrain the merged entity.
75. Almost all of the customers that responded to the CMA's merger investigation indicated that they did not consider that the Merger would have an effect on competition in the supply of Order Comms in the UK. Only around half of customers indicated that CliniSys was a potential supplier of Order Comms in the UK and, of those that did mention CliniSys, several indicated that it has a limited market presence in the supply of Order Comms. By contrast, the majority of customers identified Sunquest as a supplier of Order Comms in the UK and several referred to Sunquest's acquisition of Anglia as the basis for its significant share of Order Comms contracts.
76. Most customers indicated that there were alternative providers of stand-alone Order Comms in the UK, with one customer listing five other potential suppliers. Some customers indicated that EMIS Indigo4 was the second strongest provider in the supply of Order Comms in the UK, after Sunquest. The potential alternative suppliers of Order Comms listed by third parties in response to the CMA's merger investigation included EMIS Indigo4, Cerner, Plumtree, InterSystems, Technidata, IMS and CSC.
77. The CMA also received responses during its merger investigation from other suppliers of Order Comms. These competitors confirmed that Sunquest has a strong position in the supply of Order Comms in the UK, but that CliniSys is regarded as a small player. One competitor indicated that Sunquest has a particularly strong position in relation to the supply of Order Comms to GP practices. However, the CMA notes that public information available in relation to EMIS Indigo4 indicates that it supplies Order Comms to over 200 NHS trusts, clinical commissioning groups, and private healthcare organisations,<sup>14</sup> as well as supporting the delivery of about 50% of blood test requests to and from GPs.<sup>15</sup> Furthermore, the evidence the CMA found in its investigation did not indicate that there are material differences between the supply of Order Comms to different healthcare providers.
78. The CMA considers that the responses received from third parties during its merger investigation indicate that CliniSys has not exerted a significant constraint on Sunquest in the supply of stand-alone Order Comms to the

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<sup>14</sup> EMIS Health website pages on its [tQuest and Review](#) products.

<sup>15</sup> EMIS Group plc, '[Acquisition of Indigo 4 Systems Limited](#)', London Stock Exchange RNS, 17 July 2014.



healthcare sector in the UK, and support the conclusions drawn from the shares of supply and bidding data provided by Roper.

*Internal documents*

79. During its investigation, the CMA reviewed a number of the Parties' internal documents, including their business plans and internal presentations on strategy. The CMA considers that the Parties' internal documents do not contradict Roper's submission that CliniSys does not have a strong UK presence in relation to the supply of stand-alone Order Comms.

*Assessment of the constraint from providers of integrated healthcare software*

80. As set out above, the CMA has excluded from its frame of reference the supply of Order Comms as part of a broader, integrated healthcare software package. However, the CMA has considered the extent to which suppliers of such integrated healthcare software packages may impose an additional constraint on the merged entity.
81. Roper provided the CMA with a list of 12 examples of customers procuring Order Comms as part of an integrated healthcare software package.<sup>16</sup> Evidence from third parties that responded to the CMA's investigation indicated that it was possible to source Order Comms as part of an integrated healthcare software package, but also indicated that this would usually form part of a longer term strategy on the part of a customer to move to an integrated solution, which is something that may become a trend in the future. One supplier of integrated healthcare software packages that responded to the CMA's merger investigation indicated that it had relatively little business in the UK at present, but was looking to expand.
82. On the basis of the mixed evidence found by the CMA during its merger investigation, the CMA considers that the constraint imposed by suppliers of integrated healthcare software packages on stand-alone Order Comms is not particularly strong. However, the CMA notes that for some customers an integrated healthcare software package may represent an alternative and it is possible that this constraint will increase in the future.

*Conclusion on horizontal unilateral effects in the supply of Order Comms*

83. Based on the evidence gathered during its investigation, and for the reasons set out above, the CMA considers that CliniSys is a relatively small player in

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<sup>16</sup> Merger Notice, Annex 15.

the supply of Order Comms to the healthcare sector in the UK and does not impose a significant constraint on Sunquest. Furthermore, the CMA considers that post-Merger there will remain other competitors for stand-alone Order Comms contracts in the UK. Accordingly, the CMA does not believe that there is a realistic prospect of a substantial lessening of competition in the supply of stand-alone Order Comms to the healthcare sector in the UK.

#### *Conclusion on horizontal unilateral effects*

84. As set out above, the CMA considers that at present Sunquest does not impose a strong constraint on CliniSys in relation to the supply of LIMS to NHS hospitals and, similarly, CliniSys does not impose a strong constraint on Sunquest in relation to the supply of stand-alone Order Comms to the healthcare sector in the UK. Furthermore, the CMA considers that, post-Merger, there will remain a number of alternative providers of LIMS and stand-alone Order Comms in the UK. Accordingly, the CMA found that the Merger does not give rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects in relation to the supply of LIMS to NHS hospitals in the UK or the supply of stand-alone Order Comms to the healthcare sector in the UK.

#### ***Conglomerate effects***

85. Conglomerate effects may arise in mergers of firms that are active in the supply of goods or services that do not form part of the same markets but which are nevertheless related in some way, either because their products are complements (so that a fall in the price of one good increases the customer's demand for another) or because there are economies of scale in purchasing them (so that customers buy them together).<sup>17</sup>
86. Most non-horizontal mergers are considered to be benign or even efficiency-enhancing (when they involve complementary products) and do not raise competition concerns. However, in certain circumstances, a conglomerate merger can result in the merged entity foreclosing rivals, including through a tying or bundling strategy. In the present case, the CMA has considered whether the Merger could result in the foreclosure of competitors through the merged entity adopting one of the following strategies:
- The merged entity could offer a forced bundle comprising LIMS and Order Comms to customers, rather than allowing them to choose an individual

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<sup>17</sup> [Merger Assessment Guidelines](#), paragraph 5.6.2.

product, or offer a better price if the customer selects both products (the **forced bundling strategy**).

- The merged entity could exploit the need for LIMS and Order Comms to connect to each other and offer the necessary ability to interface with customers' other healthcare software by reducing the interoperability of its Order Comms product such that purchasers would be forced to also purchase its LIMS product (rather than the LIMS product supplied by a rival) or vice versa (the **interoperability reduction strategy**).

87. The CMA's approach to assessing conglomerate theories of harm is to analyse (a) the ability of the merged entity to foreclose competitors, (b) the incentive of it to do so, and (c) the overall effect of the strategy on competition.<sup>18</sup> These are discussed below.

*Ability to foreclose competitors using a forced bundling strategy*

88. Roper submitted that although CliniSys and Sunquest are each strong in neighbouring healthcare software segments, namely the supply of LIMS and Order Comms respectively, there is no prospect of the merged entity having either the ability or incentive to foreclose its rivals.
89. Roper submitted that this was on the basis that: (i) there is no evidence of either CliniSys or Sunquest successfully leveraging their respective positions, even though they both already offer LIMS and Order Comms; (ii) the merged entity will not have market power in either LIMS or Order Comms; (iii) customers do not typically procure LIMS and Order Comms at the same time (unless purchasing an integrated healthcare software package); and (iv) where customers do opt for an integrated healthcare software package, the merged entity would not be able to compete because such integrated packages are generally broader than the merged entity's combined product offering.
90. One competitor that responded to the CMA's merger investigation was concerned on the basis that there would be a benefit to customers in having the same supplier of LIMS and Order Comms. In particular, that competitor suggested that having a common supplier would reduce overheads for the customer from it only having to deal with one software provider.
91. Customers that responded to the CMA's investigation did not raise concerns about the merged entity being able to pursue a forced bundling strategy. Although some customers and competitors suggested that there may be

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<sup>18</sup> [Merger Assessment Guidelines](#), paragraph 5.6.6.

some cost benefits from purchasing LIMS and Order Comms together, overall the responses from customers confirmed that typically LIMS and Order Comms are procured separately. As one customer explained to the CMA, the cost of tendering for a new healthcare software package is reasonably high and therefore it was unlikely that NHS entities, in particular, would want to or be able to procure both LIMS and Order Comms at the same time. In that regard, the CMA notes that the bidding data provided by Roper included only one instance of a customer purchasing both LIMS and Order Comms as part of the same tender.

92. As set out above in relation to the assessment of horizontal unilateral effects, a number of competitors will remain post-Merger in relation to both the supply of LIMS and the supply of Order Comms. The CMA therefore considers that the ability of the merged entity to adopt a forced bundling strategy is restricted by its customers' ability to switch away to stand-alone providers, for either LIMS or Order Comms. Furthermore, the CMA notes that some of the merged entity's competitors, such as Technidata and Integrated Software Solutions, are also able to supply both LIMS and Order Comms, and that integrated healthcare software packages include both LIMS and Order Comms. The CMA considers that these may offer a credible alternative for customers that are seeking a bundled software package that includes both LIMS and Order Comms.
93. Based on the evidence gathered during its investigation and for the reasons set out above, the CMA does not believe that the Merger will give the Parties the ability to foreclose rivals on the basis of a forced bundling strategy, given that such a strategy would risk the merged entity losing business to suppliers that offer LIMS or Order Comms on a stand-alone basis. Furthermore, the CMA considers, in particular, that the possible cost savings for customers arising from reduced overheads by having a single supplier of LIMS and Order Comms will not give the merged entity the ability to adopt a forced bundling strategy because LIMS and Order Comms are typically purchased separately.

*Ability to foreclose competitors using an interoperability reduction strategy*

94. Two competitors expressed concerns to the CMA that the merged entity might be able to limit interoperability between its products and those of its competitors in order to reduce its competitors' ability to win contracts. Both competitors confirmed that their own LIMS products have been able to interface with other providers' Order Comms products to date. However, they were both concerned that the merged entity's leading position in LIMS and Order Comms could lead it to restrict interoperability in the future.

95. One of the competitors submitted that Sunquest has a particularly strong position in the supply of Order Comms to GPs and suggested that one interoperability reduction strategy would be for the merged entity to increase the frequency of updates to its Order Comms product. The effect of such a strategy would be to increase the costs for other LIMS providers to maintain the ability to interface with the merged entity's Order Comms product. Although the merged entity would also incur costs in maintaining the ability to interface with its own LIMS product following updates to its Order Comms product, the suggestion was that the merged entity could gain an advantage by offering customers seamless compliance in relation to its LIMS product immediately following the Order Comms update (whereas other LIMS providers would need time to adapt to the change). One LIMS customer that does not also require Order Comms raised a possible concern that a reduction in interoperability post-Merger could affect the ability of its LIMS to interface with third parties' Order Comms.
96. The CMA has therefore considered the extent to which the merged entity would be able to use an interoperability reduction strategy to foreclose its competitors from supplying customers that already use either CliniSys' LIMS product or Sunquest's Order Comms product.
97. Roper submitted that, in addition to the reasons set out above in relation to the forced bundling strategy, there is no prospect of the merged entity limiting interoperability with its competitors' products because such interoperability is an essential requirement of customers. Roper further submitted that if the merged entity limited interoperability of its products it would risk its product offer being unacceptable to customers and lose bids to its competitors.
98. The CMA found in its merger investigation that customers consider the interoperability of LIMS and Order Comms with other healthcare software products to be a key contractual requirement and, along with functionality, one that takes precedence over price in terms of the factors considered in making a purchase. Some customers that responded to the CMA's merger investigation also indicated that it was unlikely in practice that the merged entity would stop supporting such interoperability as it would undermine its chances of winning future contracts.
99. As part of its merger investigation, the CMA reviewed invitations to tender prepared by customers in relation to the procurement of LIMS and Order Comms contracts. For both LIMS and Order Comms, the invitations to tender required the bidder to demonstrate that the product supplied would integrate with other healthcare software products. The CMA also notes that the NHS has adopted standards to ensure that its healthcare software systems can communicate with each other, including the HL7 standard for the exchange of

messages between systems from different manufacturers.<sup>19</sup> A requirement for the chosen provider to utilise the HL7 standard was included in an Order Comms invitation to tender reviewed by the CMA during its investigation, along with a requirement to support ongoing internal and external systems integration throughout the contract.

100. One competitor that responded to the CMA's investigation informed the CMA that the practical application of the HL7 standard is open to some interpretation and that compliance with HL7 does not automatically mean that software systems are interoperable. However, based on the evidence it has found, the CMA considers that the importance of interoperability to customers and the contractual requirements regarding interoperability imposed on suppliers of LIMS and Order Comms, when combined with the adoption of standards for communication between software systems, will constrain the ability of the merged entity to foreclose its rivals using an interoperability reduction strategy.
101. As set out above, a number of competitors will remain post-Merger in relation to both the supply of LIMS and the supply of Order Comms. The CMA therefore also considers that failure on the part of the merged entity to interface with customers' other healthcare software products would in practice lead to the merged entity losing bids or its customers switching away to other providers, particularly as LIMS and Order Comms are typically purchased separately and interoperability with third party software is a key requirement for customers that is built into the tender specification for both LIMS and Order Comms contracts.
102. Based on the evidence gathered during its investigation and for all the reasons set out above, the CMA does not consider that the Merger will give the merged entity the ability to foreclose rivals on the basis of an interoperability reduction strategy.

### *Incentive*

103. As the CMA considers that the merged entity will not have the ability to foreclose its competitors, the CMA has not had to conclude on the incentive for the merged entity to do so.

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<sup>19</sup> NHS, 'National Pathology Programme – Digital First: Clinical Transformation through Pathology Innovation', published on 14 February 2014, p17.

## *Effect*

104. Similarly, as the CMA considers that the merged entity will not have the ability to foreclose its competitors, the CMA has not had to conclude on the effect of such a strategy on competition.

## *Conclusion on conglomerate effects*

105. Based on the evidence gathered by the CMA during its investigation, the CMA considers that the Parties will not have the ability to foreclose competitors post-Merger because: (i) a number of alternative suppliers remain for both LIMS and Order Comms; (ii) customers typically procure LIMS and Order Comms separately; (iii) interoperability with third party software is a key requirement for customers that is built into the tender specification for both LIMS and Order Comms contracts; and (iv) standards have been adopted for communication between healthcare software systems.
106. Accordingly, the CMA found that the Merger does not give rise to a realistic prospect of a substantial lessening of competition as a result of conglomerate effects in relation to the supply of LIMS to NHS hospitals and the supply of stand-alone Order Comms to the healthcare sector in the UK.

## ***Barriers to entry and expansion***

107. Entry, or expansion of existing firms, can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no substantial lessening of competition. In assessing whether entry or expansion might prevent a substantial lessening of competition, the CMA considers whether such entry or expansion would be timely, likely and sufficient.<sup>20</sup>
108. However, the CMA has not had to conclude on barriers to entry or expansion as the Merger does not give rise to competition concerns on any basis.

## **Third party views**

109. The CMA contacted customers and competitors of the Parties. Two competitors raised concerns regarding possible foreclosure of rivals by the merged entity. One LIMS customer that does not also require Order Comms raised a possible concern that a reduction in interoperability post-Merger could affect the ability of its LIMS to interface with third parties' Order Comms. No other third parties raised concerns about the Merger.

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<sup>20</sup> [Merger Assessment Guidelines](#), from paragraph 5.8.1.

110. Third party comments have been taken into account where appropriate in the competitive assessment above.

## **Decision**

111. Consequently, the CMA does not believe that it is or may be the case that the Merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

112. The Merger will therefore **not be referred** under section 33(1) of the Act.

**Jonathan Parker**  
**Director of Mergers**  
**Competition and Markets Authority**  
**11 December 2015**