Anticipated acquisition by UnitedHealth Group Incorporated of EMIS Group Plc

DECISION TO REFER

ME/7016/22

The CMA's decision to refer under section 33 of the Enterprise Act 2002 given on 31 March 2023. Full text of the decision published on 17 May 2023.

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

Introduction

1. UnitedHealth Group Incorporated (**UH**) has agreed to acquire EMIS Group Plc (**EMIS**) (the **Merger**). UH and EMIS are together referred to as the **Parties**.

2. On 17 March 2023, 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 (**UK**) (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 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

[1] See UnitedHealth Group / EMIS merger inquiry - GOV.UK (www.gov.uk).

purposes of section 73(2) of the Act were offered to the CMA by the end of this period (ie by 24 March 2023); 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 24 March 2023, UH offered the CMA the following undertakings (the **Proposed Undertakings**):

   (a) The divestment of assets and personnel of the medicines optimisation (**MO**) software division of Optum Health Solutions (UK) Limited (**Optum UK**) (the **MO Divestment Business**), a UK subsidiary of UH, including:

      (i) current UK MO software products: ScriptSwitch and Accelerate; and

      (ii) UK pipeline product, Population 360, together with its associated staff, intellectual property rights (**IPR**) and documentation.

   (b) The divestment of assets and personnel of the population health management services (**PHM**) services division of Optum UK (the **PHM Divestment Business**), including:

      (i) current UK PHM products and services: PHM advisory services and PHM Reporting Suite;

      (ii) [✂] (part of the UH group) to the purchaser of the PHM Divestment Business to continue to [✂] IPRO in the UK; and

      (iii) UK pipeline product, Primary Care Demand Management, together with its associated staff, IPR and documentation.

   (c) The MO Divestment Business and the PHM Divestment Business being divested either together or separately to an upfront purchaser(s)[2] approved by the CMA.

Assessment of the Proposed Undertakings

6. The SLC Decision found that the Merger gives rise to a realistic prospect of an SLC as a result of:

[2] The use of an upfront buyer or purchaser enables the CMA to consult publicly on the identity and suitability of the proposed purchaser prior to accepting the UILs. See also *Merger remedies (CMA87)*, 13 December 2018 (**CMA87**), paragraphs 5.28 to 5.32.

(a) partial foreclosure in the supply of MO software in the UK; and

(b) partial foreclosure in the supply of PHM services in the UK.

7. The SLC Decision found that:

(a) The Parties together post-Merger (the **Merged Entity**) would have the ability and incentive to partially foreclose competitors in the supply of MO software using EMIS's position in primary care electronic patient record (**EPR**) systems. In particular, the CMA considered that integration with EPR systems is essential for the supply of MO software, and that EMIS has market power in relation to the supply of primary care EPR systems in the UK. The CMA found that the Merged Entity would have the incentive to partially foreclose MO rivals and that the overall effect on competition from partial foreclosure would be substantial. The CMA therefore believed that the Merged Entity could partially foreclose rival suppliers of MO software by restricting or worsening rival's access to EMIS's EPR system (including, for example, by raising costs or degrading access / interfaces).

(b) The Merged Entity would have the ability and incentive to partially foreclose competitors in the supply of PHM services using EMIS's position in primary care EPR systems. In particular, the CMA believes that data held on EMIS's EPR systems is an important input for the Merged Entity's PHM rivals, and that the Merged Entity could partially foreclose these rivals by, for example, increasing prices for access to EMIS's EPR data and/or degrading connections allowing access to such data. The CMA found that the overall effect on competition from partial foreclosure would be substantial.

8. 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 in Phase 1 of its investigation, 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).[3]

9. Accordingly, in order to accept UILs, the CMA must be confident that all of the potential competition concerns that have been identified in its Phase 1 investigation

[3] CMA87, December 2018, paragraph 3.30.

would be resolved by means of the UILs without the need for further investigation.[4] The need for confidence reflects the fact that, once UILs have been accepted, section 74(1) of the Act precludes a reference after that point. UILs are therefore appropriate only where the remedies proposed to address any 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, the clear cut requirement means that there must not be material doubts about the overall effectiveness of the remedy; and

(b) in practical terms, the requirement for remedies to be capable of ready implementation means that any UILs of such complexity that their implementation is not feasible within the constraints of the Phase 1 timetable are unlikely to be accepted.[6]

10. 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 (rather than accepting a remedy that simply mitigates the competition concerns).[7]

11. As set out in the CMA's guidance on merger remedies, the CMA considers the effectiveness of a remedy by assessing its:

(a) impact on the SLC and its resulting adverse effects;

(b) duration and timing – remedies need to be capable of timely implementation and address the SLC effectively throughout its expected duration;

(c) practicality, in terms of its implementation and any subsequent monitoring; and

(d) risk profile, relating in particular to the risk that the remedy will not achieve its intended effects.[8]

12. The CMA will assess whether proposed remedies have a high degree of certainty of achieving their intended effect.[9]

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[4] CMA87, December 2018, paragraph 3.27.
[5] CMA87, December 2018, paragraph 3.27.
[6] CMA87, December 2018, paragraph 3.28.
[7] CMA87, December 2018, paragraph 3.30.
[8] CMA87, December 2018, paragraph 3.5.
[9] CMA87, December 2018, paragraph 3.5(d).

13. The CMA generally prefers structural remedies, such as divestiture, over behavioural remedies in part because structural remedies rarely require monitoring and enforcement once implemented.[10] 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 an SLC will generally represent a straightforward remedy.[11] For a divestment package, the CMA will normally seek to identify the smallest viable, stand-alone business that can compete successfully on an ongoing basis and that includes all the relevant operations pertinent to the area of competitive concern.[12]

14. In the present case, the CMA has material doubts that the Proposed Undertakings would effectively remedy the competition concerns identified in the SLC Decision. The CMA considers that the Proposed Undertakings do not offer a clear cut solution to the competition concerns identified in the SLC Decision.

15. The CMA's SLC Decision found that the Merger resulted in the ability to foreclose (via EMIS's position in the supply of EPRs) and the incentive to foreclose (via Optum's position in the supply of MO software and PHM services).

16. The Proposed Undertakings do not address the Merged Entity's ability to engage in partial foreclosure in either the supply of MO software or PHM services in the UK. Under the Proposed Undertakings, the Merged Entity would retain EMIS.

17. While the Proposed Undertakings might in the short term affect the Merged Entity's incentive to foreclose downstream suppliers, the Proposed Undertakings would not fully address the Merged Entity's incentive to foreclose competitors.

18. As noted in the SLC Decision, PHM is a relatively nascent approach to healthcare in the UK, and so the products and services used to deliver PHM are still developing.[13] As set out in the SLC Decision, the CMA found that Optum's internal documents show that there are potentially [✂] gains in PHM in the UK, eg one document states that Optum expects [✂] in growth of current UK products, [✂]; and Optum's Merger rationale documents show a focus on PHM and related data analytics,[14] with a [✂] attributable to both PHM and MO.[15]

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[10] CMA87, December 2018, paragraph 3.46.
[11] CMA87, December 2018, paragraph 5.6.
[12] CMA87, December 2018, paragraph 5.7.
[13] SLC Decision, paragraph 35(c).
[14] SLC Decision, paragraph 213.
[15] SLC Decision, paragraph 214.

19. In respect to the scope of the Proposed Undertakings, the Merged Entity will still retain UH's capabilities in PHM services outside the UK, in particular, in the more mature US PHM market, where UH offers similar products and services.[16] The CMA considers the Merged Entity's PHM capabilities and product and service offering in the US increase its prospect of re-entering the UK PHM market.

20. UH has submitted that the Divestment Businesses are capable of operating as an independent and stand-alone business, and that internal documents identified by the CMA referencing connections to the US business do not indicate that the Divestment Businesses rely on US PHM capabilities to provide PHM services in the UK. The CMA has, however, seen internal document evidence that suggest that the UK business does draw on US expertise and experience and that utilising this is a part of Optum's future PHM growth plans in the UK, for example a statement that [✂][17] This suggests that the Merged Entity will be well-placed to re-enter PHM services in the UK as well as suggesting that the PHM Divestment Business may be weaker than it would be absent the Merger.

21. While UH has indicated that it would expect to enter into a non-compete clause with a purchaser of the Divestment Business with respect to UK MO and PHM activity for a period of up to [✂], the CMA remains concerned that the Proposed Undertakings would not bring about a lasting structural change such that the Proposed Undertakings would address the SLC effectively throughout its expected duration (the CMA found that the SLC was not time-limited). The Merged Entity will be well-placed to re-enter the UK market for PHM services (including taking any necessary steps to prepare for re-entry) given its capabilities in the US, even if it were prevented from entering the UK market for a period of time as a result of a non-compete agreement. Successful re-entry by the Merged Entity (which the CMA believes is likely given UH's wider PHM capabilities and EMIS's market position in EPRs) would bring with it the Merged Entity's incentives to engage in partial foreclosure. Moreover, the CMA notes that if the Merged Entity were planning to re-enter, incentives to harm PHM rivals would exist today (ie it would not necessarily be the case that the incentives would emerge only when re-entry occurs).

22. In relation to a commitment from UH not to re-enter either the MO software or PHM services market in the UK for up to [✂], eg either a formal commitment given to the CMA under the UILs, or a non-compete provision in the sale documentation with the purchaser, the CMA has material concerns with relying on such a commitment. In particular, the CMA considers that if the effectiveness of the Proposed Undertakings

[16] SLC Decision, paragraph 213.
[17] Optum, [✂].

relies on a non-compete provision or a non-compete duration in excess of [✂] (as set out in the CMA's guidance on ancillary restraints in cases where goodwill and knowhow are transferred[18]), this strongly indicates that the structural element of the Proposed Undertakings is inadequate to comprehensively address the competition concerns identified in the SLC Decision. In addition:

(a) the CMA believes that there are material specification risks associated with any non-compete commitment, in particular, given the nascent and evolving nature of the UK PHM market,[19] where specification risks may be expected to be more acute, eg the CMA considers that any non-compete commitment would not be sufficiently precise to capture comprehensively these dynamic changes, eg it would be significantly challenging to define what would constitute PHM product or service over the entire duration of any non-compete commitment; and

(b) these material specification risks are expected to give rise to other risks normally associated with behavioural remedies, in particular, monitoring and circumvention risks.[20]

23. The CMA considers there is a significant risk that the Proposed Undertakings would not effectively restore competition to the level that would have prevailed absent the Merger. The Proposed Undertakings do not address the Merged Entity's ability to partially foreclose PHM rivals and do not fully address the Merged Entity's incentive to partially foreclose these rivals. As a result of these issues, the CMA considers the Proposed Undertakings do not consist of a clear cut solution to the competition concerns identified in the SLC Decision.

24. The CMA considers further that the Proposed Undertakings do not meet the clear cut Phase 1 standard for the following reasons:

(a) The Proposed Undertakings would require a carve out of the Divestment Businesses both from the broader global Optum and UH businesses, and from the remainder of the Optum UK business.

(i) Although UH has suggested that the Divestment Businesses are capable of operating as standalone businesses and that Optum's internal documents do not indicate that the UK businesses rely on the Optum US business, the CMA remains concerned about the risks posed by the

[18] Annex C to CMA2.
[19] See for example, SLC Decision, paragraphs 51, 167 and 179.
[20] See also CMA87, December 2018, paragraph 7.4, for a description of these risks.

carve out of the Divestment Businesses from the US business. The CMA notes that many Optum UK internal documents reference learning and collaboration from the US. For example, [✂][21] [22]

(b) The Proposed Undertakings would include a [✂] allowing the PHM Divestment Business purchaser to [✂] IPRO in the UK, but [✂] would retain ownership of IPRO. UH has submitted that IPRO is [✂].[23] The CMA notes that while IPRO [✂], Optum had forecast that IPRO would form a [✂]part of its PHM business; [✂].[24] Further, Optum's internal documents suggest that [✂] in the roll out of IPRO due to its reliance on [✂] that could be compounded for a third party operating under [✂] arrangements.[25]

Decision

25. For the reasons set out above, after examination of the Proposed Undertakings, the CMA does not believe that it 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.

26. Accordingly, the CMA has decided not to exercise its discretion under section 73(2) of the Act to accept UILs.

27. Therefore, pursuant to sections 33(1) 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.

Sorcha O'Carroll
Competition and Markets Authority
31 March 2023

[21] Optum, [✂].
[22] Optum, [✂].
[23] Parties' Response to RFI2 on P1 UILs, paragraph 10.2.
[24] Optum, [✂].
[25] Optum, [✂].