ANTICIPATED ACQUISITION BY UNITEDHEALTH GROUP INCORPORATED OF EMIS GROUP PLC

Issues statement

17 May 2023

The reference

1. On 31 March 2023, the Competition and Markets Authority (**CMA**), in exercise of its duty under section 33(1) of the Enterprise Act 2002 (the **Act**), referred the anticipated acquisition by UnitedHealth Group Incorporated (**UH**) of EMIS Group Plc (**EMIS**) (the **Merger**) for further investigation and report by a group of CMA panel members (the **Inquiry Group**). UH and EMIS are together referred to as the **Parties**, and for statements referring to the future, the **Merged Entity**.

2. In exercise of its duty under section 36(1) of the Act, the CMA must decide:

   (a) Whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and

   (b) if so, whether the creation of that relevant merger situation may be expected to result in a substantial lessening of competition (**SLC**) within any market or markets in the United Kingdom (**UK**) for goods or services.

Purpose of this issues statement

3. In this issues statement, we set out the main issues we are likely to consider in reaching a decision on the SLC question (paragraph 2(b) above), having had regard to the evidence available to us to date, including the evidence obtained in the CMA's phase 1 investigation. This does not preclude the consideration of any other issues which may be identified during the course of our investigation.

4. The CMA's phase 1 decision (the **Phase 1 Decision**)[1] contains much of the detailed background to this issues statement. We intend to use evidence obtained during the phase 1 investigation, but we will also be gathering and

[1] Phase 1 decision will be published on case page UnitedHealth Group / EMIS merger inquiry - GOV.UK (www.gov.uk).

considering further evidence. We are publishing this statement to assist parties submitting evidence to our phase 2 investigation.

5. This statement sets out the issues we currently envisage being relevant to our investigation and we invite parties to notify us if there are any additional relevant issues which they believe we should consider.

Background

The Parties

6. UH is a multinational healthcare insurance, healthcare and health data analytics company. It earns the bulk of its revenue in the US, where it is headquartered, and offers a range of healthcare solutions in the UK through its subsidiary Optum Health Solutions (UK) Limited (**Optum**). UH's total turnover for its financial year ending on 31 December 2021 was approximately £209 billion, of which £[✂] was generated in the UK; of this, £20 million is attributable to Optum. In the UK, Optum, supplies the following:

   (a) Medicines optimisation (**MO**) software: MO software suggests alternatives to doctors (GPs) when they are prescribing medication in order to increase effectiveness and reduce costs.

   (b) Population health management (**PHM**) services: PHM is an evolving market in the UK and encompasses a broad range of products and services that use data analytics to improve physical and mental health outcomes across a population.[2]

7. EMIS is a UK-based healthcare software business that provides a range of IT solutions to the NHS, including a primary care electronic patient record (**EPR**) system (**EMIS Web**). EMIS Web allows GPs to manage appointment bookings, conduct patient consultations, and update, store and share patient records. EMIS also offers **EMIS-X Analytics**, which allows users to conduct data analysis. EMIS's total turnover for its financial year ending on 31 December 2021 was £168.2 million of which £[✂] was generated from customers within the UK.[3]

[2] Phase 1 Decision, paragraphs 7 and 24.
[3] Phase 1 Decision, paragraphs 4 and 25.

The transaction

8. UH intends to acquire EMIS via an all-cash offer under a court-sanctioned scheme of arrangement under the City Code for an approximate consideration of £1.2 billion.[4]

9. The Parties submitted that the Merger will provide them with the opportunity to create a stronger and more capable organisation, and combine investment in innovation.[5]

Our inquiry

10. Below we set out the main areas of our intended assessment in order to help parties who wish to make representations to us.

Jurisdiction

11. We shall consider the question of jurisdiction in our inquiry.

12. In the Phase 1 Decision, the CMA found that it is or may be the case that arrangements are in progress or contemplation which, if carried into effect, will result in the creation of a relevant merger situation on the basis that each of UH and EMIS should be considered an enterprise, these enterprises will cease to be distinct as a result of the Merger, and the UK turnover of EMIS exceeded £70 million in its last financial year.[6]

Counterfactual

13. We will compare the prospects for competition resulting from the Merger against the competitive situation without the Merger: the latter is called the 'counterfactual'. The counterfactual is not a statutory test but rather an analytical tool used in answering the question of whether a merger gives rise to an SLC.[7]

14. For anticipated mergers the CMA generally adopts the prevailing conditions of competition as the counterfactual against which to assess the impact of the merger. In the Phase 1 Decision, the CMA found the prevailing conditions of competition to be the relevant counterfactual.[8]

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[4] Phase 1 Decision, paragraph 26.
[5] Phase 1 Decision, paragraph 27.
[6] Phase 1 Decision, paragraphs 30-33.
[7] Merger Assessment Guidelines (MAGs), paragraph 3.1.
[8] Phase 1 Decision, paragraph 68.

15. We currently intend to adopt the prevailing conditions of competition as the most likely counterfactual to the Merger, but welcome any evidence on this part of our assessment.

Market definition

16. Where the CMA makes an SLC finding, this must be 'within any market or markets in the United Kingdom for goods or services'.[9] The CMA is therefore required to identify the market or markets within which an SLC exists. An SLC can affect the whole or part of a market or markets. Within that context, the assessment of the relevant market is an analytical tool that forms part of the analysis of the competitive effects of a merger and should not be viewed as a separate exercise.[10]

17. In its Phase 1 Decision, the CMA found a realistic prospect of an SLC in the UK as a result of the impact of the Merger on the supply of MO software and the supply of PHM services. Both of these products are generally procured through tenders run by regional NHS healthcare bodies,[11] although the users of MO software are the individual GP practices. The CMA also considered the supply of primary care EPR systems.[12] These systems are sold under NHS frameworks that govern the commercial and service conduct of suppliers.[13] Agreements are generally made between the suppliers of primary care EPR systems and regional NHS healthcare bodies, with individual or groups of GP practices, the users of the product, being able to choose which supplier they use.

18. In relation to PHM services, the CMA recognised that PHM was a nascent and evolving market, with significant uncertainty around how it will evolve and differing views on what products and services constitute PHM.[14] In relation to MO software, the CMA noted that suppliers including Optum have been developing new MO products and that these may lead to growth in the market.[15]

19. In terms of geographic scope, the CMA assessed the impact of the Merger in these product frames of reference on a UK-wide basis.[16]

20. We will use the frame of references adopted in the Phase 1 Decision as a starting point for our analysis and our view of market definition will be drawn

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[9] Section 36(1)(b), the Act.
[10] MAGs, paragraph 9.1.
[11] For example, Integrated Care Boards (ICBs) in England and Health Boards in Scotland and Wales.
[12] Phase 1 Decision, paragraph 43.
[13] Phase 1 Decision, paragraph 36.
[14] Phase 1 Decision, paragraph 51.
[15] Phase 1 Decision, paragraphs 14, 35(b) and 134.
[16] Phase 1 Decision, paragraphs 60, 62 and 64.

largely from the same evidence that informs our competitive assessment. We will consider evidence on how the markets for PHM services and MO software may develop in the future, and would welcome evidence on these points. Where relevant, we will consider out-of-market constraints and/or any differences in the degree of competitive constraints on the Merged Entity from different suppliers.

Assessment of the competitive effects of the Merger

Theories of harm

21. The term 'theories of harm' describes the possible ways in which an SLC may be expected to result from a merger and provides the framework for analysis of the competitive effects of a merger.

22. In the Phase 1 Decision, the CMA found that the Merger gave rise to a realistic prospect of an SLC as a result of partial foreclosure in relation to (1) the supply of MO software in the UK and (2) the supply of PHM services in the UK.[17] We intend to focus our competitive assessment on these theories of harm at phase 2. Subject to new evidence being submitted, we do not currently intend to investigate any other theories of harm in relation to the Merger.

23. We may revise our theories of harm as the inquiry progresses and the identification of a theory of harm does not preclude an SLC being identified on another basis following further work, or our receipt of additional evidence.

Framework for the theories of harm

24. In certain circumstances non-horizontal mergers can weaken rivalry, for example when they result in foreclosure of the merged firm's competitors. This would weaken the constraints that the merged entity faces and, as a result, harm competition and therefore customers.[18]

25. In assessing an input foreclosure theory of harm, the CMA's approach is to consider whether three cumulative conditions are satisfied:

    (a) Ability: Would the merged entity have the ability to use its control of inputs to harm the competitiveness of its downstream rivals?

    (b) Incentive: Would it have the incentive to actually do so, ie would it be profitable?

[17] Phase 1 Decision, paragraph 243.
[18] MAGs, paragraph 7.2.

(c) Effect: Would the foreclosure of these rivals substantially lessen overall competition?[19]

26. The CMA may use the same framework in similar situations where the merged entity could use its presence in one market to directly harm the competitiveness of its rivals in another, even if there is not a conventional supplier/customer relationship.[20] These situations give rise to the same three questions, and in the following sections we consider how these three cumulative conditions were considered to apply to the theories of harm in the CMA's Phase 1 Decision, and how the CMA proposes to investigate them further in phase 2.

27. Foreclosure in these situations could be total (eg refusing to supply) or partial (eg increasing the price or worsening quality).[21] For both theories of harm in the Phase 1 Decision, the CMA focused on partial foreclosure because of the various NHS rules and standards that EMIS Web is subject to that meant the CMA did not consider total foreclosure to be realistic.[22]

Partial foreclosure in the supply of MO software in the UK

28. In the Phase 1 Decision, the CMA found there was a realistic prospect of an SLC as a result of partial foreclosure in the supply of MO software in the UK. The CMA considered whether the Merged Entity would be able to use EMIS's position in primary care EPR systems to reduce the competitiveness of Optum's MO software rivals by, for example, worsening integration with EMIS Web or raising the costs for integration.[23] Based on the evidence available to it, the CMA found:

(a) Integration with the primary care EPR system, such as EMIS Web, is essential for MO software suppliers. In particular, custom integration with EMIS Web is needed by Optum and its main rival based on the functionality required, which is not available through NHS mandated interfaces. Custom integration and co-operation is agreed and negotiated directly between EMIS and the supplier.[24]

(b) EMIS has market power in the supply of primary care EPR systems based on its high share of supply, low levels of customer switching, significant

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[19] MAGs, paragraph 7.10.
[20] For example, it could do this by using control of a complementary product to deteriorate its interoperability with competitors (MAGs, paragraph 7.11).
[21] MAGs, paragraph 7.9.
[22] Phase 1 Decision, paragraph 10.
[23] Phase 1 Decision, paragraph 11.
[24] Phase 1 Decision, paragraph 12.

costs to customers of switching, and the essential nature of the product to customers (in that all GP practices will require an EPR system).[25]

(c) There are a range of feasible mechanisms available to the Merged Entity including worsening integration with EMIS Web, impairing rivals' product quality and ability to innovate, worsening the user interface affecting the attractiveness of rivals' products, and raising costs through increasing commission rates affecting rivals' ability to price competitively.[26] The CMA considered the Merged Entity would have access to rivals' commercially sensitive information, and that this could deter current and future MO software rivals from investing and innovating.[27]

(d) Whilst the NHS standards and frameworks are likely to provide some protection for suppliers, the mechanisms above would be feasible as they relate to custom integration outside the NHS standards, and the NHS may be limited in its ability to monitor and enforce breaches of the standards to prevent partial foreclosure of rival suppliers.[28]

(e) Primary care EPR system customer losses would be low as GP practice customers would be unlikely to switch away (based on historic low levels of customer switching and significant switching costs),[29] and so despite the relatively small size of the current MO software market, the Merged Entity would have an incentive to engage in partial foreclosure as the gains from such behaviour would outweigh the losses.[30]

(f) The effect would be significant as Optum has only one main rival in the supply of MO software and so any material weakening of the current constraint could lead to an SLC. In addition, the strategies described above could also raise barriers to entry and limit the ability of potential entrants in the supply of MO software to innovate and compete.[31]

29. During our investigation we will consider whether the Merger may be expected to result in an SLC as a result of partial foreclosure of MO software competitors through leveraging EMIS's position in primary care EPR systems.

30. To assess this theory of harm, we shall consider evidence on the ability and incentive of the Merged Entity to pursue partial foreclosure strategies such as those identified in paragraph 28 and the effect that this could have on

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[25] Phase 1 Decision, paragraphs 12(b), 91 and 92.
[26] Phase 1 Decision, paragraph 12.
[27] Phase 1 Decision, paragraph 119. As noted in the Phase 1 Decision, the CMA may assess this concern as a separate theory of harm or as part of a broader foreclosure theory of harm (MAGs, paragraph 7.3).
[28] Phase 1 Decision, paragraph 13 and 127(b).
[29] Phase 1 Decision, paragraphs 91-93.
[30] Phase 1 Decision, paragraphs 14 and 145.
[31] Phase 1 Decision, paragraph 15.

competition. We intend to consider, and would welcome evidence in relation to:

(a) Ability: (i) how important access to/ integration with EMIS's primary care EPR system is to MO software suppliers; (ii) does EMIS have market power in relation to primary care EPR systems; (iii) what potential foreclosure mechanisms does the Merged Entity have, are these feasible and what impact would they have; and (iv) whether the role of the NHS in respect of these products and services can prevent such foreclosure.

(b) Incentive: what are the costs and benefits of engaging in partial foreclosure, including (i) how large (and likely) are the potential gains in the supply of MO software; (ii) how large (and likely) are the potential losses in the supply of primary care EPR systems; and (iii) would the Merged Entity face any other costs.

(c) Effect: drawing on the evidence considered under (a) and (b) above in order to understand (i) whether competitors would be foreclosed; (ii) would new entrants be foreclosed and/or barriers to entry raised; and (iii) would competition be substantially lessened as a result.

Partial foreclosure in the supply of PHM services in the UK

31. In the Phase 1 Decision, the CMA found that there was a realistic prospect of an SLC as a result of partial foreclosure in the supply of PHM services in the UK. The CMA considered whether the Merged Entity would be able to use EMIS's market position in the supply of EPR systems to reduce the competitiveness of Optum's PHM rivals by, for example, worsening integration with EMIS Web and raising costs through EXA.[32] Based on the evidence available to it, the CMA found:

(a) Primary care data from EMIS (given its strong market position) was seen as an important input in the provision of PHM services by third parties contacted during the investigation.[33]

(b) As described in paragraph 28(b), EMIS has market power in the supply of primary care EPR systems.[34]

(c) While it is possible for some types of PHM services, where suppliers can rely on NHS mandated interfaces, the Merged Entity may have less ability to engage in foreclosure strategies,[35] for other types of PHM services there are a range of mechanisms available to the Merged Entity, including

[32] Phase 1 Decision, paragraph 17.
[33] Phase 1 Decision, paragraph 19(b).
[34] Phase 1 Decision, paragraph 19(a).
[35] Phase 1 Decision, paragraph 19(c).

worsening integration with EMIS Web, or raising the costs of integration (including through EMIS-X Analytics):

(i) Custom integration and co-operation is expected to become more important in the future as PHM suppliers innovate and develop new products. Custom integration and support is agreed directly between the PHM supplier and EMIS, and the Merged Entity may have the ability to worsen this integration in the future. This would impact on the ability of rival PHM suppliers to innovate and offer competitive products.[36]

(ii) Some PHM suppliers rely on EMIS-X Analytics as opposed to a direct connection with EMIS Web. The Merged Entity could increase costs to rival PHM suppliers for the use of EMIS-X Analytics.[37]

(d) The Merged Entity could realise significant gains given PHM services is a growing market and an area of focus for Optum (and UH). Losses from primary care EPR system customers would be expected to be small based on low levels of customer switching.[38]

(e) As described in paragraph 28(d), whilst the NHS standards and frameworks are likely to provide some protection for suppliers, this would be insufficient to protect all types of rival PHM services and suppliers.[39]

(f) Although Optum currently has a relatively small position in PHM services in the UK and there is a large number of competitors, there could be a significant impact on the subset of rivals who are targeted by the partial foreclosure.[40]

32. During our investigation we will consider whether the Merger may be expected to result in an SLC as a result of partial foreclosure of PHM rivals through leveraging EMIS's position in primary care EPR systems and the data it holds.

33. To assess this theory of harm, we shall consider evidence on the ability and incentive of the Merged Entity to pursue foreclosure strategies such as those identified at paragraph 31, and the effect that this could have on competition. In doing so, we will take a forward-looking approach, considering both the current and future nature of PHM services in the UK. We intend to consider, and would welcome evidence in relation to:

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[36] Phase 1 Decision, paragraph 19(d).
[37] Phase 1 Decision, paragraph 19(e).
[38] Phase 1 Decision, paragraph 21.
[39] Phase 1 Decision, paragraph 20.
[40] Phase 1 Decision, paragraph 22.

(a) Ability: (i) how important access to primary care data/ integration with EMIS's primary care EPR system is to PHM service suppliers; (ii) does EMIS have market power in relation to primary care EPR systems; (iii) what potential foreclosure mechanisms does the Merged Entity have, are these feasible and what impact would they have; and (iv) whether the role of the NHS in the supply of these products and services can prevent such foreclosure.

(b) Incentive: what are the costs and benefits of engaging in foreclosure, including (i) how large (and likely) are the potential gains in PHM services; (ii) how large (and likely) are the potential losses in primary care EPR systems; and (iii) would the Merged Entity face any other costs.

(c) Effect: drawing on the evidence considered under (a) and (b) above in order to understand (i) whether competitors would be foreclosed; (ii) would new entrants be foreclosed and/or barriers to entry raised; and (iii) would competition be substantially lessened as a result.

Countervailing factors

34. We will consider whether there are countervailing factors which are likely to prevent or mitigate any SLC that we may find. Some of the evidence that is relevant to the assessment of countervailing factors may also be relevant to our competitive assessment.

35. We will consider evidence of entry and/or expansion by third parties and whether entry and/or expansion would be timely, likely and sufficient to prevent any SLC from arising as a result of the Merger.[41] As discussed above in the theories of harm, we will consider evidence on the role and behaviour of the NHS, and including any countervailing buyer power or ability to sponsor entry it may have.[42]

36. We will also consider any relevant evidence submitted to us by the Parties that the Merger is likely to give rise to efficiencies that will enhance rivalry or benefit NHS customers, such that the Merger may not be expected to result in an SLC.

Possible remedies and relevant customer benefits

37. Should we conclude that the Merger may be expected to result in an SLC within one or more markets in the UK, we will consider whether, and if so what, remedies might be appropriate.

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[41] MAGs, paragraphs 8.28–8.43.
[42] MAGs, paragraphs 8.44-8.46.

38. In any consideration of possible remedies, we may have regard to their effect on any relevant customer benefits that might be expected to arise as a result of the Merger and, if so, what these benefits are likely to be and which customers would benefit.[43]

Responses to this issues statement

39. Any party wishing to respond to this issues statement should do so in writing, no later than **17:00 on 31 May 2023** by emailing UnitedHealth.EMIS@cma.gov.uk.

[43] Merger Remedies (CMA87), paragraphs 3.4 and 3.15–3.24.