

Dear Sir/Madam,

I am writing on behalf of [X], an investment firm [X]. As part of our mandate, we advocate for open, fair, and transparent markets in the UK, which we believe is essential in maintaining the UK's status as a global leader in impact investments.

We are pleased to submit our comments in response to the Issues Statement and the Phase 1 Decision for the anticipated acquisition by UnitedHealth Group Incorporated of EMIS Group plc. We hope that the CMA and the Inquiry Group will consider them in due course.

Comments:

1. The CMA considered that the prevailing conditions of competition to be the relevant counterfactual¹. This was not controversial. However, we believe the application of this counterfactual was inconsistent.
2. The CMA rightly considered that the counterfactual should “*not seek to ossify the market at a particular point in time... the prevailing conditions of competition... absent the merger under review, a merger firm would have continued making investments, innovations or new products.*”² (emphasis added)
3. With that in mind, in relation to the offering of customized APIs, the CMA considered that, even though a) many of EMIS's historical customized APIs are now incorporated into the regulated IM1 standard³, b) EMIS has not provided customized APIs to third parties in recent years⁴, and c) EMIS only currently provides a customized API to a few parties⁵, “*EMIS would start to develop customized APIs*”⁶ for PHM providers, if the demand was there in the future.
4. The CMA cited no evidence for this, simply noting EMIS can obtain a fee and as such there may be an economic incentive for EMIS to offer this. It appears the CMA has determined that the counterfactual's prevailing conditions of competition will lead EMIS to develop customized APIs for PHM providers even if it does not currently do so. Based on this, the CMA drew the conclusion that since the Merged Entity might not do the same, there is a realistic prospect of an SLC.

¹ Phase 1 Decision, paragraph 67-68

² Phase 1 Decision, paragraph 67

³ Phase 1 Decision, paragraph 178

⁴ Phase 1 Decision, paragraph 181

⁵ Phase 1 Decision, paragraph 181. Note this was inferred from the first redacted sentence.

⁶ Phase 1 Decision, paragraph 182

5. In other words, in the CMA’s forward-looking counterfactual, at some point in the future there is “*substantial demand for PHM services*”⁷, and that “*customized integration for PHM services*”⁸ are critical inputs. EMIS will respond to this with innovations or new products such as customized APIs for PHM providers.
6. However, if this was the case, to be consistent, the CMA must also consider that under this counterfactual, following the CMA’s own logic, then standalone EMIS will also likely enter the PHM services market, either directly or indirectly.
7. In the CMA’s counterfactual, the market for PHM services would have progressed significantly such that the CMA considers access to EMIS’ customized APIs will be a critical input. At the same time, in this environment, the CMA has concluded that there is a “lack of profit”⁹ in purely supplying custom APIs when compared to the potential profits from the provision of PHM services.
8. EMIS is a profit-maximizing entity and would be expected to seek to maximize its profits. Given the structure of the market as articulated by the CMA, there is strong economic incentive to provide PHM services vs. simply providing customized API access.
9. If the CMA is correct, it would be irrational for standalone EMIS to simply satisfy itself with the provision of customized data APIs to PHM providers. It will have significant incentive to expand its offerings into PHM services to capture some, if not all, of the economics of providing PHM services.
10. **This is true even if the CMA considers that EMIS currently do not have the ability to enter the PHM market on its own.**
 - a. EMIS’ entry can be achieved either through *de novo* entry, or if they considered they could not obtain the expertise independently, in

⁷ Phase 1 Decision, paragraph 182

⁸ Phase 1 Decision, paragraph 182

⁹ Phase 1 Decision, Paragraphs 218. To be clear, we do not agree with the CMA’s conclusion that there is little profit to lose in the data business compared to the potential gains from the PHM business. We believe there is no incentive to partially foreclose for both standalone EMIS and the Merged Entity under any scenario. Our conclusion here, however, does not hinge in this difference of opinion with the CMA.

exclusive partnerships with existing PHM providers, including providers that are not presently in the UK.

- b. As the CMA noted, under its counterfactual, EMIS would have access to one of the most important inputs that is unavailable elsewhere. Potential PHM providers (including EMIS itself) will be incentivized to partner with EMIS on an exclusive basis to maximize its ability to win business, and EMIS would be incentivized to provide this in exchange for appropriate compensation reflecting the value of its EPR even on a standalone basis.
- c. Even if only a portion¹⁰ of the PHM profits accrues back to EMIS, it will be incremental to EMIS under the market structure articulated by the CMA.
- d. EMIS' ability to enter the market in partnership with a global industry participant¹¹ with PHM expertise, even one without any prior UK PHM experience, is consistent with the CMA's finding that even after the divestiture of Optum's PHM business, a "successful re-entry" is likely since the Merged Entity will have "wider PHM capabilities and EMIS' market position in EPRs."¹² A standalone EMIS partnered with any player with global PHM expertise would essentially have the same PHM capabilities as the Merged Entity after divestitures, and consistent with the CMA's own findings, be "well-placed"¹³ to enter the UK market for PHM services.

11. This is also true even if the CMA considers that EMIS have not indicated any desire previously to enter the PHM market on its own.

- a. The fact that EMIS currently do not offer PHM services is also not indicative of its inability or unwillingness to do so should the market develop. As the CMA has considered, "*evidence indicates that the*

¹⁰ Given the importance of EMIS' customized APIs under this counterfactual, and the significant number of players in the PHM market, it is likely EMIS will be able to capture a substantial portion of the economics in any partnership.

¹¹ In the US alone, there are 50 PHM providers according to Frost & Sullivan *Frost Radar™: US Population Health Management Market, 2021* <https://store.frost.com/frost-radartm-us-population-health-management-market-2021.html> Free Summary available: <https://cdn-aem.optum.com/content/dam/optum4/resources/pdf/frost-and-sullivan-radar-report-2021-pop-health-mgmt.pdf>

¹² Decision to Refer, paragraph 21.

¹³ Decision to Refer, paragraph 20.

technical capability of customised integration with EMIS is not currently important for the majority of existing PHM offerings.”¹⁴ As such, without the advantage of its customized APIs being a critical input today, then EMIS will, of course, have no incentive to enter a market that has yet to develop.

- b. However, this position cannot rationally be assumed in the CMA’s forward looking counterfactual, where the demand for PHM requiring customized integrations has substantially increased and EMIS’ customized integrations have become essential, such that CMA has considered EMIS will start to offer customized APIs to PHM providers. EMIS have demonstrated historically that it had the ability to and will enter adjacent business areas where there is demand and there is potential for increased profits¹⁵.

12. In essence, following the CMA’s own conclusions and logic in the Phase 1 Decision and Decision to Refer, will lead to a counterfactual where EMIS will have both the incentive and the ability to enter the PHM business, and as such will likely have at least a share in its own PHM business. This is essentially identical to the market structure and incentives for the Merged Entity.

13. It would be irrational for the CMA to conclude that standalone EMIS, in the forward-looking counterfactual, would elect to provide unfettered customized APIs to PHM rivals, while at the same time, conclude that the Merged Entity would elect to partially foreclose its PHM rivals when faced with essentially the same market structure and incentives.

14. Instead, we submit it is much more likely that both standalone EMIS in the counterfactual and the Merged Entity would behave in the same way:

- a. If, indeed, that standalone EMIS would be incentivized to develop customized APIs for other PHM competitors and not to engage in partial foreclose strategies, then so would the Merged Entity,

¹⁴ Phase 1 Decision, paragraph 182.

¹⁵ A prime example would be the EXA business which EMIS entered *de novo* after demand from customers for a more user-friendly data platform.

- b. If, on the other hand, standalone EMIS would be incentivized to partially foreclose other PHM competitors, then so would the Merged Entity.

15. In either case, since the merger outcome is substantially identical to the counterfactual, it would be irrational for the CMA to conclude that, relative to the counterfactual, *“the Merged Entity might worsen the quality or increase the prices of custom integration”*¹⁶.

16. Since the ability to foreclose competitors arises solely from EMIS’s standalone position in EPR, the above logic can also be applied to the CMA’s other conclusions regarding the potential mechanisms to partially foreclose PHM competitors described in the Phase 1 Decision, Paragraphs 171(b) and (c), giving substantial doubt to the conclusion that the Merged Entity has the ability and the incentive to partially foreclose its PHM rivals relative to the counterfactual.

Importantly, the above conclusion follows from the CMA’s own conclusions about incentives and the market structure in the forward-looking PHM market – it does not hinge on any change in the CMA’s view regarding the parties’ incentives or market structure. To be clear, however, we disagree with the CMA’s conclusion that the Merged Entity will be incentivized to partially foreclose potential PHM competitorsⁱ, but we expect the parties to be better placed to comment on that and have not address them in the above comments.

Thank you very much for your consideration. I am available to discuss further if necessary.

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¹⁶ Phase 1 Decision, Paragraph 171(a)

ⁱ Our conclusion is based upon our decades of investment experience in the technology space:

1. In the data-driven markets where we have invested in, most of the economic value rest with the provision of data, *not* the services provided on top, such as PHM services. PHM services have many characteristics of a consulting business, which are dependent on people with portable expertise and have low barriers to entry and low margins. As a result, we believe there is no incentive to risk a more profitable business to partially foreclose an inferior PHM market.
2. The fact that the US PHM market, which the CMA considers “mature”, still has more than 50 standalone PHM players (see footnote 11) despite a concentrated payor market, is consistent with a market structure where there is no incentive to partially foreclose other PHM providers. All payors in the US owns and manages their own data without the benefit of an overseer like the NHS and most payors are vertically integrated and offers their own PHM services. Even so, there is a vibrant ecosystem of third-party PHM providers.
3. The NHS has significant influence on market behavior even if it is not involved in every commercial agreement. In the UK, the NHS will always be the end customer for healthcare service providers in the UK, no provider will risk adverse action from the NHS, since it can be fatal to their business. We do not believe it is advisable for any provider to risk its reputation with its only revenue source. The NHS has wide discretion to exclude a provider from future bids and projects. While the NHS may not immediately catch all instances of “undesirable” behavior, they have substantial power to remedy any harm and is a very strong deterrent for all market participants.