First Databank

1 September 2023

FDB submits this Response to the Provisional Findings published 11 August 2023 (“PFs”) in connection with the proposed acquisition by UnitedHealth Group Incorporated of EMIS Group Plc (“Proposed Transaction”).

Overall FDB was surprised by the PFs, because they represented a substantial change from the Phase 1 Decision. Given the reasoned submissions and the strength of the evidence FDB has provided regarding the potential adverse impact on competition of the Proposed Transaction during its engagement with the CMA ✂, FDB was surprised both at the conclusion the CMA has reached and that there was no indication of the CMA's changing views prior to publication of the PFs.

In particular, FDB was disappointed not to have an opportunity to engage with new arguments made by the Parties and new submissions from third parties, upon which the CMA has relied in its PFs. Whilst acknowledging confidentiality, FDB also considers that it should have had an opportunity to engage with the economic analysis at least at a summary level on the basis this pertains to loss of revenue suffered by FDB.

FDB has two central concerns about the CMA's PFs. First, the CMA's contention that the NHS would be able to discipline the behaviour of the Merged Entity if it tried to foreclose FDB or other third-party suppliers. As we outline below, FDB considers that this is simply not the case. In particular FDB notes that there are contradictions between the CMA's findings on the ability and incentive of the Merged Entity to foreclose third party suppliers. Second, FDB remains very concerned about the Merged Entity's access to FDB's competitively sensitive information. This information is competitively sensitive as we have explained and FDB has no choice but to share this information with EMIS in practice. We address these points in more detail below.

FDB would welcome the opportunity to discuss the content contained herein with the CMA and assist the CMA further in the process.

EMIS' Market power

Paragraph	Observation	Rebuttal or Request
8.84	FDB welcomes the CMA's findings on EMIS' market power. Should FDB find that its commission fees are unfairly increased by EMIS, it would view this as an abuse of EMIS' market power	N/A

Paragraph	Observation	Rebuttal or Request
9.22	CMA relies heavily on the NHS' ability to detect issues and resolve them. The points listed in paragraphs 9.22(a)-(d) of the PFs appear to address instances where the NHS perceives issues with the EPR supplier directly. However, as FDB has explained, degradation issues will appear as the fault of the MO supplier rather than the EPR provider. Another EPR provider supports FDB's view that GPs may not report foreclosure issues to the NHS and NHS responses to such issues have been slow in the past (paragraph 9.21) We note that the NHS made no comments (in paragraphs 9.26 and 9.27) to confirm that the NHS would detect issues with MO degradation and treat it as an issue with the EPR provider rather than the MO supplier. The NHS only says that it considers it could apply the Commercial Standard to customised integrations "*in certain situations*" (paragraph 9.178). The CMA did not properly take account of the NHS' comment that "*it considers certain customised (typically bespoke) integration are not covered by Interoperability*"(paragraph 9.35) – the implication being that EMIS' compliance with interoperability standards does not extend to this. Additionally, both rival EPR providers confirmed that NHS' enforcement mechanisms do not extend to customised integrations (paragraph 9.37). The CMA's conclusion at paragraph 9.42 that "*NHS England would be able to detect potential foreclosure*" does not seem to have any basis other than the Parties' arguments. It is not robustly supported by the NHS or rival EPR providers. It is also unclear why the CMA relied on perceived potential for the NHS to intervene as reducing the Parties'	Request: We request that the final decision include a clear reference to the MO supplier's ability to raise the issue with the NHS as a complaint that would be investigated as a breach of standards (in line with paragraph 9.27(a)) – this should be added to the final sentence of paragraph 9.42 (that FDB (or any other foreclosed third party) would be able to approach the NHS (together with identifying the particular body within the NHS responsible) and have the issue dealt with in accordance with the NHS' enforcement of breaches of standards, including the HM Government Supplier Code of Conduct). If the NHS has evidenced the enforcement measures that would be taken FDB requests these are documented in the final decision in order for interested parties to understand the protection afforded. FDB do not believe it is enough to just to be able to "*approach*" the NHS as this provides no certainty of protection afforded, nor is it sufficient to rely upon standards or a code of conduct if they are not enforceable for custom API integrations.

	incentives to foreclose (paragraph 9.180) when it also dismissed NHS intervention as a means of preventing the Parties' ability to foreclose due to the "*substantial uncertainty*" about the application of standards to Optimise and Analyse whilst also noting that the ultimate remedy to address the Merged Entity's behaviour, to suspend or remove EMIS Web from the DCS Catalogue "*would be extremely difficult to do*" (paragraph 9.43).	

Paragraph	Observation	Rebuttal or Request
Paragraph 9.146	FDB has had no opportunity to review or comment on Appendix C (the vertical arithmetic analysis). But FDB challenges the underlying assumptions, in particular the highest range of switching that the CMA considered was 25%. FDB is unclear why the CMA did not consider any higher than 25% (paragraph 9.146). If FDB's product was materially degraded, it seems unrealistic that only 25% customers would switch. In Phase 1 Decision, the CMA considered that a "*significant numbers of customers could switch away from Optum's MO software rivals*" (paragraph 131).	Request: FDB requests that the assumptions underlying Appendix C be included in the final decision in order for interested parties to understand the basis for them.
Paragraph 9.167	The CMA also concluded in PFs that the Merged Entity would <u>not</u> make any wider gains from foreclosure – it is unclear why it concluded this, especially when the CMA acknowledged that the MO software market is expected to grow "*because of the update of new products*" (paragraph 9.124). FDB cannot see the discussion of this in Appendix C. In the Phase 1 Decision, the CMA noted that "*there are also new and innovative MO software aimed at outcome and cost optimisation available to customers; these new products are also supplied by Optum and FDB…the potential gains to the Merged Entity from pursuing a foreclosure strategy targeted at MO rivals are likely to be higher than looking at current products alone would suggest*" (paragraphs 134 and 135).	Request: FDB has been unable to view Appendix C, but the PFs do not appear to include consideration of the reduced overheads of Optum if the Potential Transaction proceeds given that Optum/Scriptswitch would no longer necessarily have to pay a percentage of invoiced revenue to EMIS. It would be helpful for FDB to understand whether the revenue share was included in any calculation. If this reduction in overheads was omitted, we suggest that this is reviewed since the profit margin will be significantly higher for Optum going forward.

		Rebuttal: Furthermore, if the Potential Transaction proceeds, FDB will be ✂. As FDB are required to pay ✂ of their invoiced revenue to EMIS, which Optum will not have to pay following the Transaction, ✂. OptimiseRx is a more expensive product than Scriptswitch. FDB believes it delivers a more comprehensive solution and greater overall value to the NHS for this price. FDB has recently ✂. We are already in a position where ✂FDB predict this will continue at an increased rate after the Proposed Transaction, quickly eroding FDB's profitability whilst we remain hamstrung by the revenue payable to EMIS ✂. As the CMA concluded the Parties have market power (paragraph 8.84), the ability to foreclose (paragraphs 9.61, 9.74 and 9.85), and that the NHS frameworks would not prevent any foreclosure strategy (paragraphs 9.62, 9.75 and 9.86), a substantial lessening of competition will result even if the incentive is to foreclose *"modest"* (paragraph 9.197). However, as indicated in this response, FDB remains unconvinced that the incentive to foreclose is in fact modest.

Paragraph 9.180		Rebuttal: As mentioned above, it is unclear why the CMA relied on the perceived potential for the NHS to intervene as reducing the Parties' incentive to foreclose (paragraph 9.180) when it dismissed NHS intervention as a means of limiting the Parties' ability to foreclose due to the "*substantial uncertainty*" about the application of standards to OptimiseRx and AnalyseRx whilst also noting that the ultimate remedy to address the Merged Entity's behaviour, to suspend or remove EMIS Web from the DCS Catalogue "*would be extremely difficult to do*" (paragraph 9.43). This is unlikely to reduce the Parties' incentives to foreclose if NHS does not detect degradation issues or perceives them as an FDB issue rather than an EMIS issue (contrary to the CMA's finding in paragraph 9.180). As mentioned, there is also no known route to make such complaints to the NHS.

Access to FDB's Competitively Sensitive Information ("CSI")

Paragraph	Observation	Rebuttal or Request
9.100, 9.102(d)	The CMA found that "*the value of this information* [FDB's CSI] *for Optum would be limited*" because the information is either (i) too high-level/aggregated or, conversely, (ii) too specific to be valuable to Optum (para 9.102). FDB fundamentally disagrees with this. The CMA also notes that Optum has had, for several years, fairly substantial market intelligence on the technological superiority of FDB's product and has not been able to replicate this – the extrapolation seems to be that further information (post-merger) would not enhance its ability in this regard. This seems to be a leap of logic since there is a clear difference between obtaining publicly available market intelligence and gaining access to FDB's confidential and non-publicly available CSI.	Rebuttal: FDB fundamentally disagrees with the CMA's conclusions on this point for the reasons set out in its response to RFI1, question 15. Whilst information in the public domain (and available to Optum) contains details of FDB OptimiseRx and AnalyseRx functionality, FDB does not make any of the following information publicly available (and would never provide this to Optum): 1. Message logic for over 24,000 OptimiseRx algorithms 2. Message or Opportunity content including title, logic and reference sources 3. Detail relating to FDB product changes, enhancements, functionality, or developments for existing and future solutions (FDB's Roadmap) are routinely reviewed at weekly FDB/EMIS Board meetings – please find enclosed as examples: ✂. In addition, FDB's Product Team attend face to face meetings with EMIS Product team to discuss the above items and other key priorities or requests. We are also currently

		involved in detailed ✂ discussions which requires ✂. 4. Rejection reasons provided by end users in response to the 24,000 messages. 5. Requirements for EMIS development. 6. Technical specification for OptimiseRx and AnalyseRx. 7. Customer names and the price paid per customer, including any discounted price paid or refunds provided used by EMIS to calculate the fees payable by FDB to EMIS. FDB consider this information to be competitively sensitive since it could be used to adversely impact competition. In particular, with access to this CSI, Optum could: 1. Deliver the same changes to Optum solutions to ensure parity of functionality, reducing any differentiation in solutions. As EMIS will have the ability to prioritise development work for the Scriptswitch solution (in particular, as FDB's only competitor in market), the Merged Party can deliver the same or similar enhancements ahead of releasing any development for FDB solutions, eroding the competition between the solutions.

		2. Use FDB's algorithms to create new content, including logic (patient data required to trigger a message), reference, and language. 3. Amend existing content to reflect FDB's logic, reference and text 4. Use the knowledge gained by the EMIS team when integrating OptimiseRx and AnalyseRx to integrate Optum solutions, including improving the integration of ScriptSwitch, by implementing the lessons learned from the FDB integrations. 5. Calculate the fee paid to FDB by each NHS customer (identified to EMIS and not aggregated – please see the example invoice and accompanying declaration for July 2023 ✂, and identify how to offer a more competitively priced solution (particularly if combined with the other items in this list) or alternatively match FDB's pricing to limit the competition between Optum and FDB. FDB publish a rate card but this is ✂ and these ✂. 6. Through viewing the rejection reasons (i.e. where the GP rejects a suggestion made by an FDB solution) Optum will gain insight into the content changes or enhancements that would be of value to end users, enabling them to

		leverage this insight ahead of FDB (particularly when combined with FDB's product roadmaps) FDB also notes that the detection of this misuse of the CSI would be difficult to detect in practice. However, unless appropriate safeguards are put in place, this information could be used by Optum to harm FDB or limit competition between FDB and Optum to the detriment of competition and users more broadly. Contrary to the CMA's findings and the Parties' submissions, this CSI listed above must be shared with EMIS, and is not shared at FDB's discretion. If this CSI is not shared FDB's solution would not work - FDB would risk that any change delivered by FDB to its solutions could adversely affect the user interface of EMIS clinical system, or inaccurate invoicing of fees payable by FDB to EMIS by providing incomplete declarations in breach of its Partner Programme Agreement with EMIS.

	The CMA's finding that sharing FDB's CSI is at FDB's discretion – and therefore it could simply stop sharing the CSI if it is concerned about Optum's access post-merger – is not supported by either of the third-party clinical IT systems. Input from TPP and Cegedim was mentioned in the PFs, but the CMA did not engage with how their input affected the CMA's conclusion. TPP commented that "*information about future MO software products or functionalities needs to be provided by MO software suppliers to TPP because TPP needs to develop the customised integration with the relevant MO software accordingly*" (para 9.99). This point and the evidence FDB itself has provided do not appear to have been properly taken into account in the CMA's conclusions.	Request: FDB requests a firmer acknowledgement by the CMA of the requirement for the Parties to comply with best practice regarding the implementation of confidentiality measures to avoid FDB's CSI being shared with Optum, including specifically which safeguards the merged entity will put in place – i.e. moving from the hypothetical suggestions ("*such measures could include*…") to clear commitments on this (paragraph 9.97). Rebuttal: For the reasons stated above, contrary to the CMA's findings and the Parties' submissions, CSI must be shared with EMIS, and is not shared at our discretion. FDB cannot choose to *"simply stop sharing":* - Not providing details of invoiced revenue per customer could amount to a material breach of the Partner Programme Agreement, or result in inaccurate invoicing of fees payable by FDB. - FDB would risk that any change delivered by FDB to its solutions could adversely affect the user interface of EMIS' clinical system. FDB would be unable to innovate or enhance its integration with EMIS resulting in a loss of functionality, and <u>not</u> sharing such information would prevent FDB from improving its products, so even if the sharing

		of CSI is discretionary, it is a moot point. FDB is essentially required to share its forward roadmap with EMIS.