Submission by Mark Ellis
Commercial Director of The Phoenix Partnership (Leeds) Ltd.

Good afternoon,

In relation to the CMA's provisional findings on the anticipated acquisition by UnitedHealth Group Incorporated of EMIS Group Plc, please find below feedback on various points from TPP (The Phoenix Partnership (Leeds) Ltd).

MO

Throughout the report, there are frequent references to the enforcement measures available to NHS England which could serve as a deterrent to the Merged Entity's ability to foreclose. This is a key piece of information repeatedly relied upon by the CMA. However, this information is inaccurate and misleading; NHS England has absolutely no enforcement power whatsoever in relation to the bespoke integrations with MO systems. These integrations, even by NHS England's own admission at 9.35 of the report, fall outside the remit of NHS England's frameworks. Due to this, NHS England has no oversight of the integrations, would not have any effective methods of detecting foreclosure strategies and, even if it became aware of any such strategy, could take no formal action against it. The Merged Entity would have be able to decide unilaterally whether to continue with a foreclosure strategy.

The CMA's position that NHS England has influence over the Merged Entity's behaviour in relation to MO suppliers forms a key part of the CMA's conclusion that the Merged Entity would not be incentivised to foreclose on FDB.

The CMA's position in this regard is based on the information at 9.25. The example at 9.25(a) is not relevant; this was an entirely different scenario whereby the services provided by Microtest were covered contractually and therefore breach could be contractually remedied. The example at 9.25(b) is where NHS England asked EMIS to comply with a non-contractual requirement. This was not mandatory and compliance with this requirement was not enforceable. Therefore, if EMIS did not want to comply, there would be no direct consequence. Therefore, the example cannot be applied as a deterrent to the Merged Entity's incentive to foreclose. The example at 9.25(c) is similar as NHS England had no power to enforce such interoperability. Again, with 9.25(d) NHS England had no powers of enforcement. With examples 9.25(b)-(d), EMIS only complied because it chose to do so and, almost certainly, because there was a commercial benefit to do so.

In contrast, our own experience of EMIS's anti-competitive tactics suggest foreclosure is likely to take place. Historically, EMIS have changed the format and obfuscation of their data back-ups for migration in order to prevent NHS organisations from moving to a rival GP system. At the time, there was no standard nor contractual enforcement of a data migration extract. However, NHS England were the appropriate body to intervene. Despite raising this with NHS England several times, this behaviour took a decade to resolve. By any metric, this seems an adequate timeframe to execute foreclosure. This situation is entirely analogous with MO.

Given the above, we believe that the conclusion reached by the CMA regarding NHS England's influence over the Merged Entity with regards to MO is fundamentally flawed. This does not disincentivise foreclosure. We would therefore expect CMA to review its position on the suitability of the proposed merger.

PHM

With regard to PHM, the report fails to recognise that 'primary care data' is not restricted to data held by GP systems. As is detailed at 2.5, EMIS has products that are used in a variety of healthcare settings that form part of the complete EPR, including community pharmacy, community care and hospice, which all qualify as primary care data. For example, key data on diabetes clinics and smoking cessation services are often held outside the GP record in community care. Diabetic care and smoking cessation are key priorities for PHM in the UK.

Any reference to IM1 throughout this section can only refer to GP data. The IM1 standard is not a component of any contractual framework in any other primary care setting. As such, NHS England have no control over the provision of data from those other primary care settings. The Merged Entity could therefore operate in an anti-competitive manner entirely independently of the wishes of NHS England. Given this, we would expect the CMA to review its position as it has only considered one component of primary care data in its report.

Should the CMA have any questions in relation to the above, please do not hesitate to contact us.

Kind regards,

Mark Ellis
Commercial Director
TPP