

SLAUGHTER AND MAY

**RESPONSE TO THE PROVISIONAL FINDINGS
DATED 11 AUGUST 2023**

**Anticipated acquisition by UnitedHealth Group Incorporated
of EMIS Group Plc**

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AMZL / LJEN / JSJE / AXYN
1 September 2023

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Response to the Provisional Findings

1. Executive Summary

- 1.1 This submission sets out the Parties' response to the CMA's Provisional Findings dated 11 August 2023 (the "**Provisional Findings**") in relation to the Transaction.¹
- 1.2 The Parties welcome and agree with the provisional conclusion reached by the CMA that the Transaction may not be expected to result in a substantial lessening of competition in any market in the UK. The Parties consider that the Transaction will benefit the NHS as well as primary care providers and UK residents more generally.
- 1.3 While the Parties agree with the overall conclusion that the CMA has reached, they do not agree with every aspect of the Provisional Findings. In light of the CMA having already reviewed the Parties' detailed submissions throughout its investigation of the Transaction, the Parties do not intend to make further submissions on matters that have already been comprehensively considered by the CMA. However, for completeness, certain aspects of the Provisional Findings that the Parties wish to highlight are set out below.²
- 1.4 The Parties stand ready to provide any additional information that the CMA may find helpful. In the event that the CMA receives additional submissions from third parties, or that there is any other material change in the investigation which may impact the CMA's provisional conclusion, the Parties reserve the right to make further submissions at that time.

2. The Parties consider that EMIS does not have market power in primary care EPR systems (and is unlikely to have market power in the future)

- 2.1 The Provisional Findings conclude that EMIS currently has market power in the market for the supply of primary care EPR systems in the UK and that EMIS's market power is unlikely to decrease in the foreseeable future.³
- 2.2 For completeness and the avoidance of doubt, the Parties maintain that they have presented a large body of evidence demonstrating that: (a) the NHS currently acts as a significant constraint on EMIS (and will continue to act as a constraint in the future);⁴ (b) switching occurs at the EPR

¹ Unless otherwise defined, defined terms have the same meaning as in the Parties' Responses to the CMA Working Papers.

² Where an aspect of the Provisional Findings has not been highlighted by the Parties in this response, this does not indicate that the Parties agree or disagree with the CMA's conclusion.

³ Provisional Findings, paragraph 8.84.

⁴ See, for example, annotated paragraphs 1.58 and 1.59 of the Annotated Response to the Market Power Working Paper, as well as the annex entitled 'Constraints in the Primary Care EPR Systems Market'.

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system level;⁵ and (c) one new entrant has already entered the primary care EPR system market and a number of prospective entrants are expected to capture material market share from EMIS in the near future.⁶

3. The Parties consider that the Combined Entity would not have the ability to foreclose FDB

3.1 The Provisional Findings conclude that, while the Combined Entity would have no incentive to do so, the Combined Entity would have the ability to engage in partial foreclosure of FDB.⁷

3.2 For completeness and the avoidance of doubt, the Parties maintain that they have presented a large body of evidence demonstrating that the NHS has the ability and motivation to intervene in the market for the supply of MO software so as to prevent any partial foreclosure of FDB.⁸ The Parties note that third parties including the NHS appear to hold a similar view.⁹

4. The Parties consider that wider reputational costs are plausible, and even a small probability of incurring such costs would result in a significant disincentive given the level of possible loss

4.1 The Provisional Findings conclude that the Parties' arguments on wider reputational costs (specifically, losses stemming from (a) US customers; and (b) reduced or lost ☒) are unevicenced.¹⁰

4.2 For completeness and the avoidance of doubt, the Parties maintain that even a relatively low but still plausible risk of incurring a very limited proportion of such losses would outweigh the commercially negligible hypothetical gains from foreclosure of rivals. Reputation, including reputation with the NHS, is critical not only to the success of Optum UK (and EMIS), but also to the success of the broader UnitedHealth Group.¹¹ Optum UK's internal documents explicitly refer to the link between reputation in the UK market and the success of future ☒.¹²

⁵ See, for example, annotated paragraphs 1.32 to 1.66 of the Annotated Response to the Market Power Working Paper.

⁶ See, for example, annotated paragraphs 1.20, 1.21 and 1.29 of the Annotated Response to the Market Power Working Paper.

⁷ Provisional Findings, paragraph 9.104.

⁸ See, for example, Section 4 of the Response to the MO Working Paper.

⁹ See, for example, paragraphs 9.22, 9.26, 9.27, 9.35 and 9.178 of the Provisional Findings.

¹⁰ Provisional Findings, paragraph 9.187(b). The CMA's analysis focusses on MO, but the Parties made similar arguments with respect to PHM.

¹¹ See, for example, Part C of Section 5 of the Response to the MO Working Paper.

¹² See, for example, ☒.

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5. The Parties consider that the Combined Entity would not have any incentive to foreclose PHM rivals

5.1 The Provisional Findings state that, because the Combined Entity would not have the ability to partially foreclose PHM rivals, the CMA has not considered whether it would have an incentive to do so.¹³

5.2 For completeness and the avoidance of doubt, the Parties maintain that they have submitted comprehensive evidence demonstrating that there would be no such incentive.¹⁴

6. The Parties consider that there would be no anti-competitive effects

6.1 The Provisional Findings state that the CMA has not considered the potential effects of partial foreclosure on overall competition in the supply of MO software (on the basis that the Combined Entity would not have the incentive to partially foreclose FDB) or the supply of PHM services (on the basis that the Combined Entity would not have the ability to partially foreclose PHM rivals).¹⁵

6.2 For completeness and the avoidance of doubt, the Parties maintain that they have submitted comprehensive evidence demonstrating that the Transaction would not generate anti-competitive effects.¹⁶

¹³ Provisional Findings, paragraph 10.89.

¹⁴ See, for example, Section 5 of the Response to the PHM Working Paper.

¹⁵ Provisional Findings, paragraphs 9.197 and 10.89.

¹⁶ See, for example, Section 6 of the Response to the MO Working Paper and Section 6 of the Response to the PHM Working Paper.