COMPETITION COMMISSION NOTICE OF ACCEPTANCE OF INTERIM
UNDERTAKINGS PURSUANT TO SECTION 80 OF THE ENTERPRISE ACT 2002

In the matter of a reference to the Competition Commission of the proposed
merger of The Royal Bournemouth and Christchurch Hospitals NHS
Foundation Trust and Poole Hospital NHS Foundation Trust

On 29 November 2011 The Royal Bournemouth and Christchurch Hospitals NHS
Foundation Trust (RBCH) and Poole Hospital NHS Foundation Trust (PH) announced their
intention to merge; on 8 May 2012 they signed a memorandum of agreement relating to the
proposed merger (the Merger).

On 22 October 2012 the Office of Fair Trading (OFT) announced it was reviewing the
merger. On 8 January 2013 the OFT made the reference to the Competition Commission
(CC) under section 33 of the Enterprise Act 2002 (the Act) concerning the anticipated
merger of RBCH and PH.

The CC wishes to ensure that no action is taken pending final determination of the reference
which might prejudice that reference or impede the taking of any action by the CC under Part
3 of the Act which might be justified by the CC’s decisions on the reference. The reference
has not been finally determined in accordance with section 79(1) of the Act.

Now, pursuant to section 80(2) of the Act for the purpose of preventing pre-emptive action,
the CC accepts the interim undertakings from RBCH and PH set out in the Annex below and
accordingly the undertakings come into force in accordance with section 80(5) of the Act with
immediate effect.

Signed by authority of the CC

(Signed) ROGER WITCOMB
Chairman
7 March 2013
ANNEX

PROPOSED MERGER OF THE ROYAL BOURNEMOUTH AND CHRISTCHURCH HOSPITALS NHS FOUNDATION TRUST AND POOLE HOSPITAL NHS FOUNDATION TRUST

Undertakings given by The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust to the Competition Commission pursuant to section 80 of the Enterprise Act 2002

A. On 29 November 2011 The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust (RBCH) and Poole Hospital NHS Foundation Trust (PH) announced their intention to merge; on 8 May 2012 they signed a memorandum of agreement relating to the proposed merger (the Merger). On 22 October 2012 the Office of Fair Trading (OFT) announced it was reviewing the merger.

B. On 8 January 2013 the OFT made the reference to the Competition Commission (CC) under section 33 of the Enterprise Act 2002 (the Act) concerning the anticipated merger of RBCH and PH.

C. The CC wishes to ensure that no action is taken pending final determination of the reference which might prejudice the reference or impede the taking of any action under Part 3 of the Act by the CC or another party which may be justified by the CC’s decisions on the reference. The reference has not been finally determined in accordance with section 79(1) of the Act.

D. These Undertakings do not require RBCH and PH to reverse any steps in contemplation of the Merger taken before the date of acceptance of these Undertakings. However, the CC will keep this matter under review.

Now RBCH and PH hereby each give to the CC the following Undertakings pursuant to section 80(2) of the Act for the purpose of preventing pre-emptive action.

Management of RBCH and PH until determination of the reference

1. Except with the prior written consent of the CC, RBCH and PH each undertake that they will not during the specified period take any action which might prejudice the reference concerned or impede the taking of any action under Part 3 of the Act by the CC or another party which may be justified by the CC’s decisions on the reference, including any action which might:

   (a) lead to the further integration of the activities or businesses of RBCH and PH;

   (b) transfer the ownership or control of RBCH to PH or vice versa, or merge the ownership or control of RBCH and PH, or transfer any of the assets or liabilities of RBCH to PH, or vice versa; or otherwise implement the Merger; and/or

   (c) otherwise further impair the ability of the parties to compete independently of one another in any of the markets affected by the Merger.

2. Further, and without prejudice to the generality of clause 1, RBCH and PH will at all times during the specified period procure that except with the prior written consent of the CC:
(a) the RBCH business and activities are carried on separately from the PH business and activities and each maintains separate brand identity;

(b) except in the ordinary course of business, no substantive changes are made to the organizational structure or the management responsibilities of RBCH and PH respectively; and

(c) the nature, description, range and quality of services currently supplied in the United Kingdom by each of RBCH and PH are maintained and preserved.

3 In operating these Undertakings the CC shall have regard to the objective of RBCH and PH to act in the best interests of patients and the duty of cooperation.

4 If RBCH or PH concludes, acting reasonably, that urgent action is required as a result of their objective to act in the best interests of patients and/or the duty of cooperation and that it is not reasonably practicable to obtain consent from the CC in advance of taking such action, they shall be free to take such action notwithstanding any contrary provisions of these Undertakings, provided that full details are provided promptly thereafter to the CC.

5 Further and without prejudice to the generality of clause 1, during the specified period RBCH and PH each undertake not to:

(a) proceed with steps towards implementation of the Merger, including those agreed before 28 January 2013, other than (i) in respect of activities which will be supervised by the Independent Observer (IO) to be appointed pursuant to clause 14, (ii) as permitted pursuant to (i) and in accordance with clause 6 below, or (iii) each party carrying out due diligence upon the other in accordance with the provisions set out in Monitor’s ‘Transactions Manual for providers and commissioners of NHS services covering: Acquisitions, Divestments, Demergers, Joint Ventures, Franchises and Statutory Mergers’ and the October 2010 ‘Addendum to the transactions manual’;

(b) discuss with each other, jointly plan, or otherwise pursue joint bids or tenders to provide services;

(c) discuss with each other, jointly plan or negotiate, or cooperate in any way in respect of renewal, extension or variation of each party’s 2012/13 Department of Health standard contract with the relevant commissioner, or with respect to any other contract that each party may have with a commissioner at the time of acceptance of these Undertakings;

(d) discuss with each other, jointly plan or negotiate, or cooperate in any way in respect of any new or future Department of Health standard contract with the relevant commissioner, or any other new or future contract with a commissioner;

(e) discuss with each other, jointly plan or negotiate, or cooperate in any way in respect of any licences to be granted to either of the parties by Monitor;

(f) discuss with each other, jointly plan or otherwise pursue together the application to jointly achieve university hospital status;

(g) discuss with each other, jointly plan, or otherwise pursue together the recruitment of any staff, including consultants;
(h) discuss with each other, jointly plan, or otherwise pursue together changes to the terms and conditions of employment of the current staff of RBCH and PH;

(i) discuss with each other, jointly plan or otherwise pursue the sharing of staff, including consultants, other than as already implemented on 28 January 2013 pursuant to the relevant service level agreement;

(j) discuss with each other, jointly plan or otherwise pursue the joint procurement of goods or services other than as already implemented on 28 January 2013 and pursuant to the relevant service level agreement; and

(k) implementation of any shared banking service;

without the prior written consent of the CC, such consent not to be unreasonably withheld.

6 RBCH and PH each undertake to provide to the CC for the purpose of monitoring compliance with these undertakings, and where relevant to amend as required by the CC:

(a) any documents and communications referring to the Merger that are issued to their respective members;

(b) any documents and communications referring to the Merger that are issued to potential or future members of the merged RBCH and PH;

(c) five working days before they are issued any documents and communications to staff of RBCH or PH regarding changes to their terms and conditions of employment arising or likely to arise from the Merger;

(d) any guidance provided or to be provided to individuals in either RBCH or PH regarding the sharing of Confidential Information (or information generally) prior to the implementation of the Merger pursuant to section 56 of the National Health Service Act 2006;

(e) any memorandum of understanding between the parties, including any amendments thereto;

(f) any documents or communications brought to the CC’s attention by the IO.

RBCH and PH each undertake to take steps to ensure that any documents referred to in clause 6(f) will only be communicated to such persons permitted by the CC and not further disclosed without prior written consent of the CC.

7 Further and without prejudice to the generality of clause 1, RBCH and PH each undertake that at all times during the specified period no Confidential Information relating to the RBCH business or activities, shall pass, directly or indirectly (including via legal counsel or other external advisors), from RBCH (or any of its employees, directors, or agents) to PH (or any of its employees, directors, or agents) or vice versa, save that:

(a) Confidential Information may be exchanged on a counsel-to-counsel only basis between external advisers of RBCH and PH for the purposes of the reference without this Confidential Information being passed to the external advisers’ respective clients.
(b) Confidential Information necessary for the preparation of documents and communications required for clauses 14(b)-(d) below may be provided to members of the groups identified in clause 14(b) below, subject to the requirement that such staff of RBCH do not disclose Confidential Information of PH to staff of RBCH that are not members of the relevant groups, and vice versa.

(c) Confidential Information may be exchanged following approval by the CC pursuant to clause 6 above. Confidential Information may be exchanged if it is necessary for the Due Diligence exercise identified in clause 5(a)(iii) above and the Confidential Information is not disclosed to anyone other than the Parties’ Directors of Finance, Deputy Directors of Finance and Directors of Nursing and the Merger Programme Director and the procurement team.

(d) Confidential Information may be exchanged with the prior written consent of the CC.

8 RBCH and PH shall each maintain a record of any Confidential Information exchanged in accordance with clauses 7(a) and 7(b) above, which the CC may seek to review from time to time.

Compliance

9 RBCH and PH each undertake to provide forthwith to the CC such information or statement of compliance as it may from time to time require for the purpose of monitoring compliance by RBCH and PH with these Undertakings. In particular, on 15 March 2013 and subsequently on the 15th of each month, (or, where the 15th does not fall on a working day, the first working day thereafter) RBCH and PH shall each provide a monthly statement to the CC confirming compliance with these Undertakings in the form set out in Appendices 1 and 2 to these Undertakings.

10 At all times, RBCH and PH each undertake actively to keep the CC informed of any material developments relating to their respective activities and businesses.

11 RBCH and PH each undertake to comply with such written directions as the CC may from time to time give to take such steps as may be specified or described in the directions for the purpose of carrying out or securing compliance with these Undertakings.

12 RBCH and PH each undertake to notify the CC immediately if they have any reason to suspect that the Undertakings may have been breached.

13 Where these Undertakings require the prior written consent of the CC, RBCH and PH each undertake to allow sufficient time for the CC fully to consider the relevant request to provide such consent.

Appointment and functions of Independent Observer

14 RBCH and PH undertake to jointly appoint an Independent Observer (IO) in order for that person to ensure compliance with these Undertakings, including by:

(a) helping to ensure that no action is taken pending final determination of the reference which might prejudice that reference or impede the taking of any action by the CC under Part 3 of the Act which might be justified by the CC’s decisions on the reference;
(b) save as provided in clause 24 below, attending any meetings that are attended by employees, directors, governors, agents or advisers of both parties in person or via teleconference or video link, of any groups set up or convened on an ad hoc basis to discuss, plan or otherwise pursue the implementation of the Merger, including but not limited to meetings of the:

- joint programme board;
- proposed board;
- joint governors’ workshop;
- joint governors’ reference group;
- merger finance group; and
- organizational department steering group;

(c) reviewing before circulation to attendees any communications or documents (including, for the avoidance of doubt, meeting invitations, speaking notes and PowerPoint presentations) prepared in respect of any of the meetings referred to in clause (b) above;

(d) reviewing before they are issued or circulated internally or externally any documents and communications that are drafted jointly by the parties (including their employees, directors, governors, agents or advisers) or are intended for joint circulation and prepared for the purpose of facilitating the Merger or facilitating discussions relating to the Merger, including but not limited to:

- the integrated business plan; and
- the long-term financial model; and
- the cost improvement programme; but excluding the documents, communications, guidance and memoranda referred to in clause 6(a)-(d) above.

(e) intervening in the meetings referred to in clause (b) above, or taking any other steps in connection with communications and documents reviewed and meetings attended that the IO reasonably considers necessary to ensure compliance with these Undertakings;

(f) bringing promptly to the CC’s attention any documents or communications the IO considers appropriate so as to enable the CC where appropriate to review and approve these pursuant to clause 6 above before they are issued or circulated, and reporting promptly to the CC after each of the meetings referred to in clause (b) above; including:

(i) reporting to the CC on whether the IO has any doubts or uncertainties as to whether RBCH and PH have complied with the Undertakings; and anything that causes the IO to be concerned about a possible future breach of the Undertakings (whether deliberate or inadvertent); and

(ii) responding to any of the CC’s questions on compliance with these Undertakings.
15 It shall also be the function of the IO to comply with any written directions the CC may issue to the IO within the specified period.

16 The IO must act on behalf of the CC and be under an obligation to the CC to carry out his or her functions to the best of his or her abilities.

Qualifications and objectivity of the IO

17 The IO shall possess appropriate qualifications and experience to carry out his or her functions.

18 The IO shall neither have nor become exposed to a conflict of interest that impairs the IO’s objectivity and independence in discharging his or her duties under these Undertakings, unless it can be resolved in a manner and within a time frame acceptable to the CC.

Remuneration and appointment of the IO

19 RBCH and PH each undertake to remunerate and reimburse the IO for all reasonable costs properly incurred in accordance with the terms and conditions of the appointment and in such a way as not to impede the IO’s independence or ability to carry out his or her functions effectively and properly.

20 RBCH and PH each undertake to appoint the IO as soon as is reasonably practicable and in any event by 5pm on Friday, 15 March 2013 and the IO shall continue to act until the CC has finally determined the reference (within the meaning of section 79 of the Act).

(a) The appointment of an IO by RBCH and PH shall be subject to the approval of the CC as to the identity of the IO and his or her terms and conditions of appointment in their entirety.

(b) Once the IO has been approved by the CC and appointed, RBCH and PH undertake to provide the CC with a copy of the agreed terms and conditions of appointment.

Obligations of RBCH and PH in respect of the IO

21 RBCH and PH each undertake to ensure that the terms and conditions of appointment of the IO reflect and give effect to the functions and obligations of the IO and the relevant obligations of the parties as set out in these Undertakings.

22 RBCH and PH and their employees, officers, directors, governors, advisers and consultants each undertake to cooperate fully with the IO, in particular by providing the IO with all cooperation, assistance and information as the IO may reasonably require in order to discharge his or her functions, including:

(a) providing sufficient advance notice of meetings referred to in clause 14(b) above;

(b) providing copies of the documents referred to in 14(c) and 14(d) above in sufficient time to permit the IO to review the documents or communications; and

(c) providing such office and supporting facilities as the IO may reasonably require.
If either RBCH or PH is in any doubt as to whether any document or communication would infringe the Undertakings, they shall use all reasonable endeavours to contact the IO for clarification.

Meetings of joint shadow clinical and non-clinical directorates

The IO is not required to have oversight of the meetings of the joint shadow clinical and non-clinical directorates that are attended by representatives of each of RBCH and PH and are held for the purpose of supporting the application of the parties to Monitor in respect of the Merger.

In respect of all meetings of joint shadow clinical and non-clinical directorates that are attended by representatives of each of RBCH and PH and that are held for the purpose of supporting the application of the parties to Monitor, the parties each undertake that no decisions will be implemented as a result of the meeting without further agreement by one of the groups listed in clause 14(b) above.

In respect of all meetings of joint clinical and non-clinical directorates that are attended by representatives of each of RBCH and PH and that are held for the purpose of supporting the application of the parties to Monitor, the parties each undertake to provide to the CC:

(a) an advance fortnightly schedule of meetings;

(b) advance copies of the agenda, attendance list, presentations, speaking notes or other documents produced for the purpose of facilitating the meeting, and subsequent to the meeting, minutes, notes, action points and any other written output produced as a result of the meeting; and

(c) a compliance statement in the form outlined in Appendix 3 from the relevant chairperson to the effect that:

- the minutes and other written output of the meeting are an accurate and complete record of what was discussed by the attendees on the occasion of the meeting in question;

- the chairperson understands that no decisions will be implemented as a result of the meeting without further agreement by the groups listed in clause 14(b) above.

Interpretation

The Interpretation Act 1978 shall apply to these Undertakings as it does to Acts of Parliament.

For the purposes of these Undertakings:

‘the Act’ means the Enterprise Act 2002;

‘activities’ means the functions of RBCH and PH respectively, as set out in paragraphs 3 and 4 of the Constitution of RBCH and paragraph 2 of the Constitution of PH both as amended, or superseded, supplemented or amended by any licence granted by Monitor under the Health and Social Care Act 2012;

‘business’ has the meaning given by section 129(1) and (3) of the Act;
‘the CC’ means the Competition Commission;

‘Confidential Information’ means business secrets, confidential know-how, commercially-sensitive information, confidential information relating to the activities of the parties, intellectual property or any other information of a confidential nature which is not in the public domain or known otherwise than by breach of these Undertakings; Confidential Information does not mean patient records or other information relating to the care of individual patients;

‘the decisions’ means the decisions of the CC on the questions which it is required to answer by virtue of section 36 of the Act;

‘Department of Health standard contract’ means any of the standard contracts published by the Department of Health setting out the rights and obligations of service providers and commissioners;

‘the Merger’ means the proposed statutory merger pursuant to section 56 of the National Health Service Act 2006 (as amended) of RBCH and PH and as further described in paragraph A of these Undertakings;

‘Monitor’ means the Independent Regulator of NHS Foundation Trusts as provided in section 61 of the Health and Social Care Act 2012;

‘PH’ means Poole Hospital NHS Foundation Trust;

‘RBCH’ means The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trusts;

‘the OFT’ means the Office of Fair Trading;

‘the parties’ means RBCH and PH;

‘the specified period’ means the period beginning on the date of these Undertakings and terminating when the reference is finally determined in accordance with sections 79(1) and (2) of the Act;

unless the context requires otherwise, the singular shall include the plural and vice versa.
FOR AND ON BEHALF OF The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust

Signature ..................................................................

Title ..................................................................

Date .................................................................

Signature ..................................................................

Title ..................................................................

Date .................................................................

FOR AND ON BEHALF OF Poole Hospital Foundation Trust

Signature ..................................................................

Title ..................................................................

Date .................................................................

Signature ..................................................................

Title ..................................................................

Date .................................................................
Compliance statement for The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust

I [insert name] confirm on behalf of The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust (RBCH) that:

(a) RBCH has complied with the Undertakings given by it and accepted by the CC on [date] (‘the Undertakings’) in the period from [insert date] to [insert date].

(b) No action has been taken by RBCH in the period from [insert date] to [insert date] that will impede the taking of any action by the CC which may be justified by its decision on the reference.

(c) In the period from [insert date] to [insert date] RBCH has promptly provided all relevant information to the IO.

(d) No Confidential Information relating to the RBCH business or activities, has passed, directly or indirectly, from RBCH (or any of its employees, directors or agents) to PH (or any of its employees, directors or agents) and no Confidential Information relating to the PH business or activities has been received by RBCH (or any of its employees, directors or agents), save for any such information shared in accordance with clauses 7 and 24 to 26 of the Undertakings.

(e) Except as listed in clause (f) below there have been no material developments to the business or activities of RBCH.

(f) [list of material developments].

Interpretation

Words and terms used in this Compliance Statement have the same meaning as those used in the Undertakings unless otherwise defined.

FOR AND ON BEHALF OF The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust

Signature ....................................................

Name...........................................................

Title..........................................................

Date ........................................................
PROPOSED MERGER OF THE ROYAL BOURNEMOUTH AND CHRISTCHURCH HOSPITALS NHS FOUNDATION TRUST AND POOLE HOSPITAL NHS FOUNDATION TRUST

Compliance statement for Poole Hospitals Foundation Trust

I [insert name] confirm on behalf of Poole Hospital Foundation Trust (PH) that:

(a) PH has complied with the Undertakings given by it and accepted by the CC on [date] (‘the Undertakings’) in the period from [insert date] to [insert date].

(b) No action has been taken by PH in the period from [insert date] to [insert date] that will impede the taking of any action by the CC which may be justified by its decision on the reference.

(c) In the period from [insert date] to [insert date] RBCH has promptly provided all relevant information to the IO.

(d) No Confidential Information relating to the PH business or activities, has passed, directly or indirectly, from PH (or any of its employees, directors or agents) to RBCH (or any of its employees, directors or agents) and no Confidential Information relating to the RBCH business and activities has been received by PH (or any of its employees, directors or agents) save for any such information shared in accordance with clauses 7 and 24 to 26 of the Undertakings.

(e) Except as listed in clause (f) below there have been no material developments to the business or activities of PH.

(f) [list of material developments].

Interpretation

Words and terms used in this Compliance Statement have the same meaning as those used in the Undertakings unless otherwise defined.

FOR AND ON BEHALF OF Poole Hospital NHS Foundation Trust

Signature ......................................................

Name ...........................................................

Title ...................................................................

Date .............................................................
Compliance Statement of the Chairperson of
[name of joint shadow directorate]

I [name] confirm in my capacity as employee of [RBCH or PH] and as chairperson of the [name of joint shadow directorate] which met on [date] at [location] that:

(a) The purpose of the meeting was to support the application of RBCH and PH to Monitor in respect of the Merger.

(b) The minutes of the meeting and any other written output of the meeting, copies of which were provided to the CC on [date], are an accurate and complete record of discussions at the meeting.

(c) It is my understanding that no decisions will be implemented as a result of the meeting without further agreement by the joint programme board, the proposed board, the joint governors’ workshop, the joint governors’ reference group, the merger finance group or the organizational department steering group.

(d) I have understood that it is an offence under section 117 of the Enterprise Act 2002 to knowingly or recklessly supply any information to the CC in connection with the reference of the Merger between RBCH and PH that is false or misleading in a material respect.

Interpretation

Words and terms used in this Compliance Statement have the same meaning as those used in the Undertakings unless otherwise defined.

Signature .....................................................

Name ...........................................................

Title ..............................................................

Date .............................................................