

Notice of consultation to give consent to The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust to merge under paragraph 2.1 of the undertakings given to the Competition Commission under section 82 of the Enterprise Act 2002

Introduction

1. The Competition and Markets Authority (CMA) is currently reviewing the anticipated merger of The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust (**RBCH**) and Poole Hospital NHS Foundation Trust (**PH**) (together, the **Hospital Trusts**) (the **Merger**). This is not the first time that the UK competition authority has reviewed a merger between these two hospital trusts.
2. On 17 October 2013, the Competition Commission (**CC**)¹ published a report on the anticipated merger of RBCH and PH.² The CC found that the proposed merger may be expected to result in a substantial lessening of competition (**SLC**) in several markets.³
3. For the purpose of remedying the SLCs identified in the Report and the adverse effects which flow from them, on 19 December 2013, the CC accepted the undertakings given by RBCH and PH under section 82 of the Enterprise Act 2002 (the **Act**) (**the Undertakings**).⁴ Except with the prior consent of the CMA the Hospital Trusts undertook not to: (i) apply for or implement a merger within the meaning of section 56 (Mergers) of the National Health Service Act 2006, as amended by section 168 of the Health

¹ The CC is one of the CMA's predecessor bodies. On 1 April 2014 the Competition and Markets Authority (**CMA**) took over the functions of the Competition Commission and the competition and certain consumer functions of the Office of Fair Trading (**OFT**).

² [A report on the anticipated merger of The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust.](#), Competition Commission, 17 October 2013.

³ The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust / Poole Hospital NHS Foundation Trust report, paragraph 8.1.

⁴ See [Undertakings](#).

and Social Care Act 2012, of their respective organizations; or (ii) apply for or implement an acquisition by RBCH of PH, or by PH of RBCH, within the meaning of section 56A (Acquisitions) of the National Health Service Act 2006, as inserted by section 169 of the Health and Social Care Act 2012.⁵

4. The acceptance of these Undertakings has the effect that RBCH and PH may not merge (or otherwise cease to be distinct) without the prior written consent of the CMA. The Undertakings may be varied, superseded or released by the CMA under section 82(2) of the Act.
5. Legally, this matters because even if the CMA were to clear the Merger, either after a phase 1 review or phase 2 review, the Undertakings would still be in force. We are therefore consulting on giving consent under the relevant provision of the Undertakings for the Merger to go ahead in the event the CMA clears the Merger after its investigation.

RBCH and PH's request for consent to the Merger

6. The Hospital Trusts approached the CMA on 31 October 2019 requesting consent to merge. RBCH and PH explained that they no longer have the same incentives to compete that were identified by the CC in 2013 in its review of the Hospital Trusts' previous merger proposal.
7. RBCH and PH stated that at a national level, the NHS Long Term Plan, the Five Year Forward View, local Sustainability and Transformation Partnerships (STPs) and financial control totals have all dampened the role of competition for patients and that much greater emphasis has been placed on collaboration and integration across providers, which has already been recognised by the CMA in its recent decisions on NHS mergers.
8. In Dorset, the Hospital Trusts submitted that together with Dorset CCG and other NHS providers in Dorset, they are working collaboratively on day-to-day service planning, quality monitoring and improvement and demand management. A common strategic approach has been adopted aimed at reducing growth in the demand for hospital-based services by providing more care in patients' homes and other community-based settings. Neither Hospital Trust has a strategic goal of competing to attract more patients.
9. They submitted that the remuneration of RBCH and PH has shifted from activity-based tariffs to block contracts so neither Hospital Trust has an incentive to compete for additional patients' referrals. They also submitted

⁵ The main provision regarding the prohibition of the merger is at paragraph 2.1 of the Undertakings.

that financial risk-sharing agreements have been adopted, meaning that neither Hospital Trust fully retains any surpluses, which further dampens competitive incentives.

10. In light of these changes in circumstances, the Hospital Trusts consider that the concerns previously identified by the CC in its report regarding the merger between RBCH and PH in relation to incentives to compete for patient volumes no longer arise, and that therefore the CMA should give consent to the Merger.

Considering RBCH and PH's request

11. The CMA's approach to granting consent under a remedy will depend on the individual circumstances affecting a particular undertaking or order and its terms.
12. In determining whether to give consent under the Undertakings in this case, the CMA is considering whether the circumstances prevailing at the time of the Undertakings have changed, such as to make it appropriate for the CMA to grant consent to RBCH and PH to merge. In doing so, the CMA will have regard to the substantive considerations set out in its guidance on merger remedies,⁶ guidance on merger review,⁷ and the Chairman's Guidance on Disclosure.⁸
13. The scope of the CMA's consent decision is limited to determining whether to grant consent for RBCH and PH to apply for or implement a merger or apply for or implement an acquisition by RBCH of PH or by PH of RBCH (see paragraph 3, above). The consent decision is separate from the decision on whether the merger creates a relevant merger situation that has resulted, or may be expected to result, in an SLC in any market or markets in the UK under Part 3 of the Act (the SLC decision). However, the outcome of the SLC decision will contribute to the consent decision.
14. Before reaching a decision on whether to grant consent, the CMA invites representations from any person or persons who wish to comment on the request for consent to the Merger under clause 2.1 of the Undertakings,

⁶ [Merger remedies, CMA87 \(December 2018\)](#).

⁷ [Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders \(CMA11\)](#). In paragraph 2.6 of this guidance the CMA considers that changes in market conditions are among the change of circumstances that may lead to a variation or termination of undertakings.

⁸ [Disclosure of information in CMA work \(CC7\)](#). This guidance was originally published by the CC and has been adopted by the CMA board. The original text has been retained unamended, therefore it does not reflect or take account of developments in case law, legislation or practice since its original publication.

and whether there are any reasons why consent should not be given in the event the CMA decides to clear the Merger.

15. Representations should reach the **CMA by 5pm on 21 April 2020** and should be addressed to:

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