

**Proposed merger of Ashford & St Peter's Hospitals NHS Foundation Trust and
Royal Surrey County Hospital NHS Foundation Trust**

**Notice of acceptance of interim undertakings pursuant to section 80 of the
Enterprise Act 2002**

On 2 May 2014 Ashford and St Peter's Hospitals NHS Foundation Trust (ASP) and Royal Surrey County Hospital NHS Foundation Trust (RSC) announced their intention to merge (the Merger).

On 19 December 2014 the Competition and Markets Authority (CMA) announced that it was reviewing the Merger. On 26 February 2015 the CMA made a reference, pursuant to section 33 of the Enterprise Act 2002 (the Act), to its Chair for the constitution of a group for the purposes of investigation and report pursuant to section 38 of the Act. On 4 March 2015 the Chair constituted a group to investigate and report (the Group).

The CMA wishes to ensure that no action is taken pending final determination of the reference which might prejudice the reference or impede the taking of action by the CMA under Part 3 of the Act which might be justified by the CMA'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) for the purpose of preventing pre-emptive action, the CMA accepts the interim undertakings from ASP and RSC set out in APPENDIX 1 below (the Undertakings) and accordingly the Undertakings come into force within section 80(5) of the Act with immediate effect.

Signed by authority of the CMA

Simon Polito

7 May 2015

**PROPOSED MERGER OF ASHFORD & ST PETER'S HOSPITALS
NHS FOUNDATION TRUST AND ROYAL SURREY COUNTY
HOSPITAL NHS FOUNDATION TRUST**

**Undertakings given by Ashford & St Peter's Hospitals NHS Foundation Trust
and Royal Surrey County Hospital NHS Foundation Trust to the Competition
and Markets Authority pursuant to section 80 of the Enterprise Act 2002**

WHEREAS

- A. On 2 May 2014 Ashford and St Peter's Hospitals NHS Foundation Trust (ASP) and Royal Surrey County Hospital NHS Foundation Trust (RSC) announced their intention to merge (the Merger).
- B. On 26 February 2015, the Competition and Markets Authority (CMA), in exercise of its powers under section 33 of the Enterprise Act 2002 (the Act), made the reference concerning the Merger.
- C. The CMA 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 by the CMA under Part 3 of the Act which might be justified by the CMA's decisions on the reference.
- D. The reference has not been finally determined in accordance with section 79(1) of the Act.
- E. These Undertakings do not require ASP or RSC to reverse any steps taken in contemplation of the Merger before the date of acceptance of these Undertakings. However, the CMA will keep this matter under review.

NOW THEREFORE ASP and RSC hereby each give to the CMA the following Undertakings pursuant to section 80 of the Act for the purpose of preventing pre-emptive action.

Management of ASP and RSC until determination of the reference

- 1. Except with the prior written consent of the CMA, ASP and RSC 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 the Act by the CMA or other party which may be justified by the CMA's decisions on the reference, including any action which might:

- (a) lead to the further integration of the activities or businesses of ASP and RSC save insofar as concerns implementation of their existing partnership arrangement or any of the “Proposed Joint Projects” that were notified by ASP and RSC to the CMA at the initial meeting with the CMA on 10 March 2015 (“the Proposed Joint Projects”);
 - (b) transfer the ownership or control of ASP to RSC (or vice versa), or merge the ownership or control of ASP and RSC, or transfer any of the assets or liabilities of ASP to RSC (or vice versa); or otherwise implement the Merger; and/or
 - (c) otherwise impair the ability or incentive of the parties to compete independently in any of the markets affected by the Merger.
- 2. Further, and without prejudice to the generality of clause 1, ASP and RSC will at all times during the specified period procure that except with the prior written consent of the CMA:
 - (a) the ASP business and activities shall be carried on separately from the RSC business and activities, save to the extent that such activities at the date of these Undertakings are, or are intended to be, carried on jointly by ASP and RSC under their existing partnership arrangement or are envisaged as part of any of the Proposed Joint Projects, and each shall maintain 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 ASP and RSC respectively; and
 - (c) except in the ordinary course of business, the nature, description, range and quality of services currently supplied in the United Kingdom by each of ASP and RSC are maintained and preserved.
- 3. Further and without prejudice to the generality of clause 1, ASP and RSC each undertake that at all times during the specified period no Confidential Information relating to the ASP business or activities, shall pass, directly or indirectly (including via legal counsel or other external advisors), from ASP (or any of its employees, directors, or agents) to RSC (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 ASP and RSC for the purposes of the reference without this Confidential Information being passed to the external advisers’ respective clients.

- (b) Confidential Information may be exchanged with the prior written consent of the CMA.
- (c) Confidential Information that is reasonably necessary to support the Merger, such as certain information contained in the Full Business Case and the Long-Term Financial Model and pertaining to the planned work pertaining to the Ashford Diagnostics Treatment Centre, may be exchanged between the members of the joint ASP/RSC partnership steering group, the members of which shall be limited to those reasonably necessary to plan the Merger (and their identities notified to the CMA at the date of these Undertakings and to the extent that they change from time to time).
4. ASP and RSC each undertake at all times during the specified period not to issue any press releases relating to the Merger or make any internal announcements (whether to members, staff or otherwise) whose primary subject-matter is the Merger which claim, or would lead a reasonable recipient to believe, that the Merger will or is likely to be permitted to proceed unless such press release or internal announcement also includes a statement to the effect that the Merger remains subject to CMA clearance. If ASP or RSC is in any doubt as to whether any such press release or internal announcement would comply with the terms of this clause 4, they shall provide a copy of the same to the CMA, which will exercise reasonable endeavours to approve the announcement or require amendments to be made to it within three working days or receipt.
5. In operating these Undertakings the CMA shall have regard to the objective of ASP and RSC to act in the best interests of patients and their duty of cooperation.
6. If ASP or RSC 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 CMA 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 CMA.

Compliance

7. ASP and RSC each undertake to provide to the CMA for the purpose of monitoring compliance with these Undertakings, and where relevant to amend as required by the CMA:
- (a) any public announcements in the form of press releases concerning or otherwise referring to the Merger; and

- (b) insofar as they are created, any documents and communications to staff of ASP or RSC regarding changes to their terms and conditions of employment arising or likely to arise from the Merger.
8. ASP and RSC shall forthwith provide to CMA such information or statement of compliance as it may from time to time require for the purposes of monitoring compliance by ASP and RSC with these Undertakings. In particular, on 5 May 2015 and subsequently on the 5th day of each month (or, where the 5th does not fall on a working day, the first working day thereafter), ASP and RSC shall each provide a monthly statement to the CMA confirming compliance with these Undertakings in the form set out in ANNEX A below.
 9. At all times during the specified period, ASP and RSC each undertake actively to keep the CMA informed of any material developments relating to their respective activities and businesses.
 10. ASP and RSC each undertake to comply with such written directions as the CMA 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.
 11. ASP and RSC each undertake to notify the CMA immediately if they have any reason to suspect that the Undertakings may have been breached.
 12. Where these Undertakings require the prior written consent of the CMA, ASP and RSC each undertake to allow sufficient time for the CMA fully to consider the relevant request to provide such consent.

Interpretation

13. The Interpretation Act 1978 shall apply to these Undertakings as it does to Acts of Parliament.
14. For the purposes of these Undertakings:

the Act’ means the Enterprise Act 2002;

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

‘ASP’ means Ashford and St Peter's Hospitals NHS Foundation Trust;

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

'the CMA' means the Competition and Markets Authority;

'Confidential Information' means information not in the public domain or known otherwise than by breach of these Undertakings relating to the commercial terms of negotiation with third parties and commercially sensitive information relating to revenues and costs and service levels; Confidential Information does not mean patient records or other information relating to the care of individual patients;

'the decisions' means the decisions of the CMA on the questions which it is required to answer by virtue of section 36 of the Act;

'the Merger' means the proposed statutory merger pursuant to section 56 of the National Health Service Act 2006 (as amended) of ASP and RSC, as further described in paragraph A of these Undertakings;

'RSC' means Royal Surrey County Hospital NHS Foundation Trust;

'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 ASHFORD AND ST PETER'S HOSPITALS NHS
FOUNDATION TRUST

Signature

Title

Date

FOR AND ON BEHALF OF ROYAL SURREY COUNTY HOSPITAL NHS
FOUNDATION TRUST

Signature

Title

Date

Compliance statement for [Ashford and St Peter's Hospitals NHS Foundation Trust] [Royal Surrey County Hospital NHS Foundation Trust]

I [insert name] confirm on behalf of [Ashford and St Peter's Hospitals NHS Foundation Trust (ASP)] [Royal Surrey County Hospital NHS Foundation Trust (RSC)] that:

- (a) [ASP] [RSC] has complied with the Undertakings given by it and accepted by the CMA on [date] May 2015 ('the Undertakings') in the period from [insert date] to [insert date].
- (b) No action has been taken by [ASP] [RSC] in the period from [insert date] to [insert date] that will impede the taking of any action by the CMA which may be justified by its decision on the reference.
- (c) No Confidential Information relating to the [ASP] [RSC] business or activities has passed, directly or indirectly, from [ASP] [RSC] (or any of its employees, directors or agents) to [ASP] [RSC] (or any of its employees, directors or agents) and no Confidential Information relating to the [ASP] [RSC] business or activities has been received by [ASP] [RSC] (or any of its employees, directors or agents), save for any such information shared in accordance with clause 3 of the Undertakings.
- (d) Except as listed in clause (e) below there have been no material developments to the business or activities of [ASP] [RSC].
- (e) [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 [party]

Signature

Title

Date