EXPLANATORY MEMORANDUM TO

THE PUBLIC INTEREST MERGER REFERENCE (TELEGRAPH MEDIA GROUP LIMITED) (PRE-EMPTIVE ACTION) ORDER 2024

2024 No. 103

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Culture Media & Sport and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Lucy Frazer, Secretary of State for Culture, Media & Sport at the Department for Culture, Media & Sport confirms that this Explanatory Memorandum meets the required standard.

2.2 Janis Makarewich-Hall, Deputy Director at the Department for Culture Media & Sport confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Janis Makarewich-Hall at the Department for Culture Media & Sport email: Janis.makarewichhall@dcms.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 On 30th November 2023 the Secretary of State issued a Public Interest Intervention Notice ("the 2023 Intervention Notice") in relation to the anticipated acquisition of the Telegraph Media Group Limited by RedBird IMI Media Joint Venture LLC on the grounds of public interest considerations in section 58 of the Enterprise Act 2002.

4.2 On 26th January 2024 the Secretary of State for Culture, Media and Sport ("the Secretary of State") issued a Public Interest Intervention Notice ("the 2024 Intervention Notice") in relation to the anticipated acquisition of the Telegraph Media Group Limited, Telegraph Media Group Holdings Limited or their business or assets by RB Investco Limited, and/or any of its parent undertakings, subsidiary undertakings, or interconnected undertakings (including RB IMI AIV Limited Partnership), or any of its assignees, transferees or successors in title, on the grounds of the media public interest considerations in section 58 of the Enterprise Act 2002. This Order remains in force until both the 2023 Intervention Notice and the 2024 Intervention Notice cease to be in force.

4.3 The addressees to the Order are Penultimate Investment Holdings Limited (PIHL) Group (including Ultimate Investment Holdings Limited (UIHL) and any other body corporate interconnected with PIHL and UIHL), which owns, and is selling, the Telegraph Media Group (TMG), and the prospective acquiring entities of the Telegraph Media Group and Telegraph Media Group Holdings (defined as RB Investco Group, RB Investco, RB IMI AIV Limited Partnership, RedBird Capital

Partners Alternative Holdings LLC, IMI JV Aggregator LLC, RedBird IMI JV Aggregator LP, RB AIV GP, RedBird Capital Partners Fund IV GenPar LLC, any other persons or bodies corporate which control RB Investco, and any bodies corporate which RB Investco controls).

4.4 The Order prohibits the addressees from taking any action which might prejudice a possible reference of either matter to the CMA under section 45 of the Enterprise Act 2002, or impede the taking of any remedial action under Part 3 of that Act which may be justified by the Secretary of State's decisions on either reference. This includes changing or transferring ownership or control of Telegraph Media Group and other related businesses and assets without the prior written consent of the Secretary of State. It also requires the addressees to ensure that, without the Secretary of State's prior written consent, no step is taken to integrate the Telegraph Media Group business ("TMG business") with any other enterprise; and that no significant changes are made to the organisational structure of, or the managerial responsibilities within, the TMG business or to board composition of the companies within the TMG business or the RB Investco Group. The Order also requires the prospective acquiring entities to ensure that no steps are taken to change the corporate structure of RB Investco Group as it exists at the start of the specified period, without the Secretary of State's prior written consent. The addressees must also take all reasonable steps to encourage key staff to remain within the business and to ensure, so far as within their power to do so, that no key staff (executive, managerial or those who exercise editorial control) within the business are removed from their positions or transferred between the business and the Acquiring Entities' business without the Secretary of State's prior written consent. The Order also imposes reporting obligations on the addressees and provides that where parties seek a derogation from the Order, the Secretary of State is not to be treated as having consented to the derogation, unless she has consented in writing.

4.5 The Order revokes the Public Interest Merger Reference (Telegraph Media Group Ltd) (Pre-emptive Action) Order 2023 (2023 Order).

Where does the legislation extend to, and apply?

4.6 The extent of this instrument is the entirety of the United Kingdom.

4.7 The territorial application of this instrument is the entirety of the United Kingdom.

5. Policy Context

What is being done and why?

5.1 Under the Enterprise Act 2002, the Secretary of State has the power to intervene in certain mergers on the grounds of media public interest considerations. The Secretary of State determines whether to intervene in any individual case on a case-by-case basis.

5.2 Subsequent to issuing the 2023 intervention notice, the Government became aware of a change to the corporate structure of the entities seeking to acquire the Telegraph Media Group and related businesses and assets. Following a consideration of all the evidence provided to her, the Secretary of State concluded that a new "relevant merger situation" was in progress or contemplation. She therefore issued a Public Interest Intervention Notice on 26 January 2024. The 2023 intervention notice remains in force.

5.3 The CMA and Ofcom are required to report to the Secretary of State on the mergers identified in the 2023 intervention notice and the 2024 intervention notice by 9.00am GMT 11 March 2024 after which the Secretary of State will make a decision whether or not to clear either or both mergers, whether or not to accept undertakings from merger parties designed to mitigate public interest concerns, or refer either merger to a more in depth review by the CMA. This Order is required to prevent actions by the parties to the anticipated acquisition of Telegraph Media Group Limited which might prejudice a reference or a possible reference of either matter to the CMA under the Enterprise Act 2002 or impede any action which may be justified by the Secretary of State's decision on either reference.

6. Legislative and Legal Context

How has the law changed?

6.1 The Secretary of State has the power under section 42 of the Enterprise Act 2002 to issue a notice intervening in certain merger transactions where (amongst other things) she believes that it is or may be the case that a specified public interest consideration is relevant to a consideration of the relevant merger situation. The need for accurate presentation of news and free expression of opinion in newspapers are specified public interest considerations. Following the issue of an intervention notice, the CMA and Ofcom must report to the Secretary of State, who is then required to decide whether to refer the transaction to a more detailed phase 2 assessment by the CMA. The CMA will assess whether a "relevant merger situation" has been created, or would be created by the proposed transactions, and assess the competition issues relevant to the decision, while Ofcom's report is on the public interest concerns specified in the Public Interest Intervention Notice. Taken together, this information will enable the Secretary of State to make a decision on whether to refer the case for a more detailed Phase 2 investigation by the CMA, or in lieu of such a reference, to accept any undertakings the parties may decide to offer to mitigate public interest considerations.

6.2 Under paragraph 2 of Schedule 7 to the Enterprise Act 2002, the Secretary of State also has the power, where an intervention notice is in force, to make an order prohibiting or restricting the doing of things which the Secretary of State considers would constitute "pre-emptive action" and imposing obligations regarding the carrying on of activities or the safeguarding of assets. Pre-emptive action is defined in paragraph 2(12) of Schedule 7 as "action which might prejudice the reference or possible reference concerned under section 45 … or impede the taking of any action … which may be justified by the Secretary of State's decisions on the reference".

6.3 Such an order may apply to: conduct in the United Kingdom, but also to conduct outside the United Kingdom if the person concerned is a United Kingdom national; a body incorporated under the law of the United Kingdom or of any part of the United Kingdom; or a person carrying on business in the United Kingdom (section 86 of the Enterprise Act 2002).

6.4 A person to whom such an order applies may seek a derogation from its terms; if the Secretary of State consents, the person may take action which would otherwise constitute a contravention of the order (paragraph 2(2C) of Schedule 7 to the Enterprise Act 2002).

6.5 This Order relates to both the 2023 Intervention Notice and to the 2024 Intervention Notice. It also revokes the 2023 Order. Revocation of the 2023 Order does not prevent enforcement of any breaches of the 2023 Order.

Why was this approach taken to change the law?

6.6 The alternative approach would have been to vary the Public Interest Merger Reference (Telegraph Media Group Ltd) (Pre-emptive Action) Order 2023 (S.I. 2023/1300) which this Order now revokes. The changes to that Order would have been numerous and complex, therefore the approach of making a new statutory instrument was preferred.

7. Consultation

Summary of consultation outcome and methodology

7.1 The Order has not been subject to any consultation. The purpose of this Order is to prevent actions by the parties to the anticipated acquisition of Telegraph Media Group IMI that might prejudice a possible reference to the CMA or impede the taking of any remedial action under Part 3 of the Enterprise Act 2002. As such, it was not appropriate to contact any of the parties or make others aware of the intention to make this Order in advance.

8. Applicable Guidance

8.1 The Department for Culture, Media and Sport contacted lawyers for RedBird IMI and RB Investco and Ultimate Investment Holdings Limited at 9.00 a.m. on 30 January 2024 to make them aware of this instrument.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 The impact on business, charities or voluntary bodies is limited to those parties involved in the anticipated acquisition of the Telegraph Media Group by entities associated with RedBird IMI.

9.2 There is no, or no significant, impact on the public sector.

9.3 An Impact Assessment has not been prepared for this Order because it only affects a single merger and transactions related to or contingent upon it, whilst a public interest intervention under the Enterprise Act 2002 is in progress. These interventions are time limited.

9.4 This Order does not apply to activities that are undertaken by small businesses.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring of this legislation is that the Order will only remain in force as long as the public interest intervention, which is time limited, is in progress.

10.2 If the parties request for the Order to be varied or revoked, paragraph 2(11) of Schedule 7 to the Enterprise Act 2002 requires the Secretary of State to consider any representations as soon as reasonably practicable. At any stage, the parties may request a derogation from the Order (see Paragraph 2(2C) of Schedule 7).

10.3 The Order does not include a statutory review clause.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").