

EXPLANATORY MEMORANDUM TO
THE PUBLIC INTEREST MERGER REFERENCE (TELEGRAPH MEDIA GROUP LTD) (PRE-EMPTIVE ACTION) ORDER 2023

2023 No. 1300

1. Introduction

- 1.1 This explanatory memorandum has been prepared the Department for Culture, Media and Sport and is laid before Parliament by Command of His Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 On 30th November the Secretary of State for Culture, Media and Sport intervened in the anticipated acquisition by RedBird IMI Media Joint Venture LLC (“RedBird IMI”) of the Telegraph Media Group Limited on the grounds of the media public interest considerations in section 58 of the Enterprise Act 2002. This Order is made to prevent actions by the parties to the merger that might impede the Secretary of State’s ability to protect the public interest during the period beginning with the date and time of the Order and ending with the date the intervention notice ceases to be in force. The addressees to the Order are Penultimate Investment Holdings Limited (PIHL) Group, which owns the Telegraph Media Group (TMG), and the prospective acquiring entities of the business (defined as RedBird IMI and any corporate bodies within the same group, RedBird Capital Partners Management LLC and IMI JV Holding Corp which are the two investment partners in RedBird IMI, any other persons or corporate bodies which RedBird IMI is controlled by or corporate bodies that it controls). In summary the Order prohibits the addressees from: transferring ownership of Telegraph Media Group and taking steps to integrate the Telegraph Media Group business (“the business”) with any other enterprise without the prior written consent of the Secretary of State. In addition, the Order requires the addressees to take the necessary steps to ensure that there is no significant change without the Secretary of State’s prior written consent to the organisational structure of, or the management responsibilities within, the business, except where it occurs in the ordinary course of business; or to the composition of the boards of the companies within the business. The order also requires the addressees to ensure, so far as within their power to do so, that key editorial staff within the business are not removed from their positions or transferred to the acquiring entities’ businesses without the Secretary of State’s prior written consent, and that they take all reasonable steps to encourage key editorial staff to remain with the Telegraph Media Group business. 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.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The order was made at 7.17 a.m. on 1st December 2023 and came into force at 10.00 a.m. on the same day, and therefore breached the convention that statutory instruments should not come into force until a minimum of 21 calendar days after laying. This was necessary in order to protect the public interest by preventing the parties to the relevant merger situation from undertaking any actions that might prejudice a reference of the matter to the Competition and Markets Authority (“CMA”) under the Enterprise Act 2002 or impede any action which may be justified by the Secretary of State’s decision on such a reference.
- 3.2 It was not possible to avoid this course of action. A delay between the publication of the public interest intervention notice given by the Secretary of State and the coming into force of the Order might have undermined the purpose and effectiveness of the Order and allowed action by the parties which the Order is designed to prevent.

4. Extent and Territorial Application

- 4.1 The extent of this instrument is the entirety of the United Kingdom.
- 4.2 The territorial application of this instrument is the entirety of the United Kingdom.

5. European Convention on Human Rights

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

6. Legislative Context

- 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, if grounds are made out, 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).

7. Policy background

What is being done and why?

- 7.1 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.
- 7.2 The Government is aware of an anticipated acquisition by RedBird IMI, of Telegraph Media Group. Following a consideration of all the evidence provided to her, the Secretary of State initiated a public interest intervention on 30 November 2023.
- 7.3 In accordance with the public interest intervention notice issued by the Secretary of State, the CMA and Ofcom are required to report to the Secretary of State on the merger by 26th January 2024 after which the Secretary of State will make a decision whether or not to clear the merger, including whether or not to accept undertakings from merger parties designed to mitigate public interest concerns, or refer the merger to a more in depth review by the CMA. This Order is required to prevent actions by the parties to RedBird IMI's anticipated acquisition of Telegraph Media Group that might prejudice a reference of the 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 such a reference.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 This is the first order dealing with this issue and so the need for consolidation does not arise.

10. Consultation outcome

- 10.1 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 by RedBird IMI that might impede the Secretary of State's ability to take steps to protect the public interest. As such, it was not appropriate to contact any of the parties or make others aware of the intention to lay this Order before it was brought into force. Free text.

11. Guidance

- 11.1 The Department for Culture, Media and Sport contacted RedBird IMI and Ultimate Investment Holdings Limited at 9.00 a.m. on 1st December 2023 to make them aware of this instrument and their obligations under it.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies is limited to those parties involved in RedBird IMI's anticipated acquisition of the Telegraph Media Group.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 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.

13. Regulating small business

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

14. Monitoring & review

- 14.1 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.
- 14.2 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).

15. Contact

- 15.1 Janis Makarewich-Hall at the Department for Culture Media and Sport email: janis.makarewichhall@dcms.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Robert Specterman-Green, Director at the Department for Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Secretary of State for Culture, Media and Sport at the Department for Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.