RESPONSE TO CONSULTATION ON THE ENTERPRISE ACT 2002 (MERGERS INVOLVING NEWSPAPER ENTERPRISES AND FOREIGN POWERS) REGULATIONS 2024

1. INTRODUCTION

1.1 News UK is grateful for the opportunity to comment on The Enterprise Act 2002 (Mergers Involving Newspaper Enterprises and Foreign Powers) Regulations 2024 ("Regulations"). It acknowledges (and is sympathetic to) the concerns about the risks associated with foreign state ownership of, or control or influence over, the UK's newspapers and news magazines – but is concerned by the unintended consequences of not calibrating the implementing framework correctly, which could have a detrimental impact on the ability of UK newspaper enterprises to receive direct or indirect investment where there is no concern about the influence of foreign powers.

1.2 Therefore News UK welcomes the government's recognition – in connection with its new foreign state intervention ("FSI") regime that will be introduced as part of the Digital Markets, Competition and Consumers ("DMCC") Bill – of the need to avoid "undesired effects in relation to wider investment in UK media and business", as well as the government's stated aim of ensuring proportionality.

1.3 The government's proposed exception for state owned investment organisations ("SOIs") set out in the draft Regulations does indeed go some way toward satisfying those considerations, but we believe certain aspects require further clarification. Notably, the Regulations could go further in excluding situations where there is no possible risk of actual (as opposed to deemed) influence by a foreign power, noting that pursuant to Schedule 6B, Part 1, section 1(1) of the Enterprise Act 2002 (as amended by the DMCC Bill), a foreign power will be deemed to control or influence the policy of a person carrying on a newspaper enterprise for the purposes of section 70A (the operative provision for the triggering the FSI regime) if, amongst other things:
(a) "the foreign power holds, directly or indirectly, any of the shares in the person" (Condition 1); or
(b) "the foreign power holds, directly or indirectly, any of the voting rights in the person" (Condition 2).

1.4 Ideally, the uncertainty created by the above mechanics would be resolved with a clear "safe-harbour" allowing for SOIs to acquire shares or voting rights in a person carrying on a newspaper enterprise up to a level of 15%. In other words, the proposed exemption in the draft Regulations would be increased to this level across the board, regardless of whether or not the newspaper enterprise was part of a wider diversified business group or any other factors. That would provide clarity for all stakeholders and avoid unduly jeopardising continued investment in the UK's media and newspaper industry whilst appropriately protecting against foreign state influence. For context, a 15% safe-harbour for investment by SOIs would still be well below the 25% threshold at which a transaction becomes eligible for a mandatory notification under the National Security and Investment Act 2021 ("NSI Act").

1.5 Absent the introduction of such a safe-harbour, however, News UK would like to propose three additional sub-categories of exceptions in connection with SOIs that would significantly minimise the scope for undesired effects and ensure proportionality in the FSI regime.

These relate to acquisitions by SOIs:

(a) via independent third-party investors;

(b) of non-voting shares or debt instruments; and

(c) of small minority stakes in publicly listed companies. Each of these sub-categories is explained in further detail below.

2. PRELIMINARY MATTERS

2.1 As a preliminary drafting point, News UK suggests that the wording of the new Part 1A, section 2B(1), as discussed above, should be more clearly linked to Part 1, section 1(1). Specifically, Part 1A, section 2B(1) will modify the circumstances in which a foreign power is treated as being “able to control or influence the policy” of a newspaper owner pursuant to Part 1, section 1(1). To avoid misinterpretation, Part 1A, section 2B(1) should therefore include an explicit cross-reference to Part 1, section 1(1).

2.2 News UK also considers that the wording of the new Part 1A, section 2B should be amended to include a higher acceptable threshold of 15% for investment by SOIs in a diversified business group, where turnover from the UK newspaper enterprise accounts for no more than 10% of the group’s total global turnover. This would be consistent with the government’s reasons for proposing a higher threshold for diversified business groups, whilst reflecting that the incentive and scope for foreign state influence in the newspaper aspect of the business falls commensurately with the relative importance of the newspaper enterprise to the overall performance of the wider group.

2.3 A final preliminary matter concerns the wording of the new Schedule 6A, section 1(2)(a) of the Enterprise Act 2002 (as amended by the DMCC Bill). The new Schedule 6A, section 1(2)(a) will amend section 23 of the Enterprise Act such that the turnover threshold for determining whether a relevant merger situation has been created in connection with the FSI regime will be lowered from £70 million (i.e. the level for the ordinary merger control regime) to only £2 million. This is a remarkably low threshold and may have a range of unintended consequences, such as capturing an unfeasibly large number of small publishers of newspapers and magazines under the FSI regime (thereby hindering investment into those smaller publishers, increasing their compliance burden, and raising the government’s own enforcement responsibilities to level of granularity that may cause difficulties).

3. ACQUISITIONS BY INDEPENDENT THIRD-PARTY INVESTORS

3.1 The first additional sub-category of exception in connection with SOIs that News UK wishes to raise relates to acquisitions via independent third-party private investors. In particular, News UK suggests that the following exception to the FSI regime should be introduced:

(a) A foreign power is not to be treated as being able to control or influence the policy of a newspaper owner by virtue of the shares condition or the voting rights condition in Schedule 6B, Part 1, section 1 where:

i. any shares or, as the case may be, voting rights that the foreign power holds in the newspaper owner are held by the foreign power indirectly via a state owned investor;

ii. any shares or, as the case may be, voting rights that the state owned investor in

turn holds in the newspaper owner are held by the state owned investor indirectly via a third-party private investor;
iii. the state owned investor holds, directly or indirectly, no more than 15% of the shares or voting rights in the third-party investor; and
iv. neither the foreign power nor the state owned investor has the right or ability, directly or indirectly, to control or materially influence the third-party investor's policy.

3.2 As they stand, the Regulations would allow a foreign power to acquire up to 5% of the shares or voting rights in a newspaper owner where those shares or voting rights are held indirectly via an SOI (and up to 10% of shares or voting rights where the newspaper enterprise is part of a larger diversified group).

3.3 However, exactly the same limits apply if the SOI was itself investing indirectly via a genuinely independent private third-party vehicle, such as a private equity fund. In particular, the provisions of Schedule 6B, Part 1, section 1 would take effect (as explained above), with the result that the foreign power would be deemed to indirectly control or influence the policy of a newspaper owner if a third-party vehicle in which an SOI had made an investment acquired any of shares or voting rights of that person above the 5% limit (or 10% for larger diversified groups).

3.4 To address this counter-intuitive outcome, News UK suggests that a clear exception is warranted that would allow independent private third-party investors to acquire any level of shares or voting rights in a newspaper owner. The independence of the third-party private investor can be ensured by virtue of the exception only applying where no foreign power, via an SOI:
(a) holds, directly or indirectly, more than 15% of the shares or voting rights in the third-party investor or
(b) has the right or ability, directly or indirectly, to control or materially influence the third-party investor's policy (following the well-established standard for material influence as it is currently understood in relation to s 26 of the Enterprise Act 2002).

3.5 News UK notes that a 15% cap on an SOI investing via a third-party vehicle which is in turn acquiring shares or voting rights in a newspaper paper owner is still significantly below the 25% threshold at which a transaction becomes eligible for a mandatory notification under the NSI Act.

4. NON-VOTING SHARES OR DEBT INSTRUMENTS

4.1 The second additional sub-category of exception in connection with SOIs that News UK wishes to raise is the acquisition of non-voting shares and debt instruments. In particular, News UK suggests that the following exceptions to the FSI regime should be introduced:
(a) A foreign power is not to be treated as being able to control or influence the policy of a newspaper owner by virtue of the shares condition in Schedule 6B, Part 1, section 1 where:
i. the foreign power holds indirectly any non-voting of the shares in the person;
ii. the non-voting shares that the foreign power holds indirectly in the newspaper owner are held by the foreign power indirectly via a state owned investor;
iii. the foreign power does not satisfy any of the other conditions for control or

influence in Schedule 6B, Part 1, section 1.
(b) A foreign power is not to be treated as being able to control or influence the policy of a newspaper owner by virtue of the conditions in Schedule 6B, Part 1, section 1 where:
i. the foreign power holds indirectly a debt instrument or a non-equity finance instrument;
ii. the debt instrument or a non-equity finance instrument that the foreign power holds indirectly in the newspaper owner is held by the foreign power indirectly via a state owned investor;
iii. the foreign power does not satisfy any of the following conditions for control or influence in Schedule 6B, Part 1, section 1: Condition 1, Condition 2 or Condition 3; and
iv. the foreign power does not have the right or ability, directly or indirectly, to control or materially influence the person's policy.

4.2 The policy justification for introducing this sub-category of exception in relation to non-voting shares and debt instruments is self-evident. Non-voting shares, by definition, are not capable of facilitating control or influence over the issuing company. They provide an inherently passive means of investing.

4.3 Similarly, debt instruments do not typically feature any rights that would give rise to control or influence, and the proposed exception would not be available in circumstances where such an instrument did give a foreign power the right to control or materially influence the policy of a newspaper owner (following the well-established standard for material influence as it is currently understood in relation to s 26 of the Enterprise Act 2002).

5. SMALL MINORITY STAKES IN PUBLICLY LISTED COMPANIES

5.1 The third additional sub-category of exception in connection with SOIs that News UK wishes to raise is the acquisition of small minority stakes in publicly listed companies. In particular, News UK suggests that the following exceptions to the FSI regime should be introduced:
(a) The acquisition by a foreign power of a shareholding of up to 10% of shares or voting rights in a publicly listed newspaper enterprise, where any shares or, as the case may be, voting rights that the foreign power holds in the newspaper owner are held by the foreign power indirectly via a state owned investor.

(b) The acquisition by a foreign power of a shareholding of up to 15% of shares or voting rights in a publicly listed diversified business group which includes a UK newspaper enterprise, where:
i. any shares or, as the case may be, voting rights that the foreign power holds in the publicly listed diversified business group are held by the foreign power indirectly via a state owned investor;
ii. the UK newspaper business accounts for 20% or less of the group's global turnover in the most recent qualifying period of 12 months; and
iii. the foreign power has no shareholding at all in the company that directly operates the UK newspaper business.

5.2 There are a number of compelling policy reasons to implement these additional sub-categories of exceptions, including:

(a) The fact that there is no realistic prospect of a foreign power obtaining control, or a meaningful degree of influence, over a UK newspaper enterprise when investing indirectly via an SOI in a publicly listed company at these levels. Unlike many private companies, publicly listed companies typically have a wide base of smaller shareholders, none of which can individually exercise the setting of business policy or strategy. In light of the stated aim of proportionality, the indirect acquisition by a foreign power via an SOI of a shareholding of up to 10% of shares or voting rights in a publicly listed newspaper enterprise should therefore be treated as an acceptable – and effectively passive – minority holding that allows for continued investment by a wide range of shareholders into the UK media and business.

(b) The government has already acknowledged, in relation to its proposed exception for SOIs under the draft Regulations, that “there may be circumstances where newspaper enterprises are part of a much larger diversified group of enterprises”, and that limiting investment at 5% for SOIs “may disincentivise investment into the wider business, where there is no risk of foreign state influence in the newspaper aspect of the business”. News UK submits that this reasoning can and should – for the sake of proportionality – be extended to allow a foreign power to acquire a shareholding of up to 15% of shares or voting rights in such a publicly listed diversified business group.

(c) It is not an efficient use of public resources for the government to continuously monitor the public trading of shares in relevant newspaper enterprises or diversified business groups in order to effectively detect (and therefore, deter) the acquisition of small minority investments at these low levels. Unlike the traditional merger control regime under the Enterprise Act 2002, the FSI may, without these new exceptions, potentially capture hundreds or even thousands of very small acquisitions of publicly traded shares on a regular basis. This could result in a regime that is unduly costly and difficult to enforce.

(d) Implementing the FSI regime without an exception for the acquisition of small minority investments in publicly listed companies by SOIs would also impose a disproportionately high compliance burden on those publicly listed companies themselves. The disproportionality is heighted for publicly listed diversified business groups, which may face an increased compliance burden that is triggered by a UK newspaper enterprise that only accounts for a small fraction of its overall holdings.

(e) An exception for the acquisition of small minority investments in publicly listed companies by SOIs would also reduce the need for more complicated exceptions in relation to very small shareholdings by individuals, such as associated persons of officials within a foreign government (which includes children and other family members of such officials), as currently envisaged by the draft Regulations.