This response to the Department for Culture, Media & Sport ("DCMS") consultation on the Enterprise Act 2002 (Mergers Involving Newspaper Enterprises and Foreign Powers) Regulations 2024 (the "Regulations") is submitted on behalf of Penultimate Investment Holdings Limited ("PIHL"), an entity indirectly controlled by the Barclay family who are the beneficial owners of Telegraph Media Group Limited ("TMG"), which owns The Telegraph newspaper and The Spectator. PIHL considers that the current public interest intervention regime works well as it offers the flexibility to assess transactions on a case-by-case basis, without deterring investment into the UK. PIHL therefore considers that the new foreign state intervention regime adopted recently — which prohibits "foreign powers" from investing in newspapers, subject to exceptions to be adopted under the Regulations, i.e., where the investment is made through a state-owned investment organisation ("SOI") and is below certain shareholding thresholds — is unnecessary and disproportionate. In particular, given the scale of funding linked directly or indirectly to foreign states, prohibiting newspapers from accessing such funding is likely to have a significant impact on the ability of newspapers to fund their businesses at a time when they are generally experiencing a decline in print circulation and are seeking to adapt to the new digital landscape. Moreover, given that foreign state investment has previously occurred in certain newspapers and does not appear to have been problematic, it is fundamentally disproportionate to prohibit additional newspapers from accessing such funding. Nonetheless, as the foreign state intervention regime has now been adopted under the Enterprise Act 2002 and DCMS is consulting on the Regulations, PIHL makes the following specific observations: (1) The foreign state intervention regime restrictions are unnecessary and inappropriate and will deter investment. (2) The proposed definition of SOI is unduly rigid and burdensome, with no possibility for discretion (3) The proposed shareholding thresholds are inappropriate as they do not take into account the fact that shareholdings of any level can be for economic and investment purposes only. Each of these points is discussed further below. 1. The foreign state intervention regime for newspapers regime is unnecessary — the existing public interest intervention regime can adequately address potential concerns 1.1 PIHL shares DCMS's opinion that the importance of newspapers to our democracy cannot be overstated. Equally, PIHL considers that investment is extremely important to ensure that UK newspapers can thrive, in particular as the UK newspaper industry (including The Telegraph) has been suffering a steady decline in circulation of newspapers since the increase in digital media in the mid-2000s. 2 WEIL:\99744824\2\78909.0003 1.2 However, PIHL considers that the new foreign state intervention regime for newspapers and periodical news magazines recently adopted under the Enterprise Act 2002 is unnecessary and inappropriate as explained further below. (i) The current public interest intervention regime works well. The public interest intervention regime already provides an appropriate mechanism to consider whether investment into UK newspapers and news periodicals raises public interest concerns. Given the small number of transactions triggering the process under Section 58(2A) – (2C) of the Enterprise Act 2002 over the last decade, there is adequate time, resource and flexibility to consider each case on its merits. The current system works well and was introduced specifically to "secure the continued protection of the particular public interests related to newspapers while lifting much of the regulatory burden on the industry and on the regulatory authorities" (Department of Trade and Industry Guidance, May 2004). It is regressive to impose additional regulatory burdens that merely achieve the same objective. (ii) The current public interest intervention regime is flexible. The public interest intervention regime allows the Secretary of State to exercise discretion and evaluate broadly defined public interest issues on a case-by-case basis, including whether any potential issues may arise as a result of the involvement of a foreign state investor or the level of shareholding being acquired. This allows for an appropriate, flexible, caseby-case approach which takes into account the nuances of each individual transaction. The public interest intervention regime also allows for the possibility of negotiations and discussions with acquirers during a potential transaction to consider whether any safeguards or limits may be appropriate to balance investment against any public interest considerations. By contrast, the new foreign state intervention regime and the Regulations introduce fixed thresholds and allow for no discretion. (iii) The current public interest intervention regime is pro-investment. Review under the public interest intervention regime is discretionary and sends an important signal that the newspaper and news periodical industry are open to investment, subject to review only in certain cases where public interest issues may be relevant. However the new foreign state intervention regime imposes prohibitions on certain types of investment, apparently on the erroneous assumption that all state-owned investors act for political reasons and that investing money buys control irrespective of governance rights, failing to recognize that these assumptions may not be applicable in every case. Moreover, the very fact that the new regime was adopted specifically to prohibit a pending transaction itself risks chilling investment into UK newspapers and the UK more generally, particularly by investors with links to foreign states. 2. The definition of SOIs is not workable 2.1 The consultation states that the test for whether an entity is an SOI has five conditions that are applied in a purposive manner to distinguish SOIs from foreign states and from private sector businesses who are not subject to the requirements. However, the test appears to be too rigid and burdensome to achieve this purposive approach: (i) The definition is unduly rigid and may not accurately reflect the nature of the investor. Section 2C requires that the SOI (i) be either directly or indirectly wholly owned or controlled by a foreign power, or that its trustees or members are subject to direction or control of a foreign state (Conditions 1 and 2) and (ii) have as its principal activity the making / managing of investments, using funds principally from the foreign power, for the sole purpose of benefitting the foreign power, its people or the fund's beneficiaries. Given the wide variety of structures and approaches to investment used by state-linked investors, any attempt to crystallize a definition is likely to result in 3 WEIL:\99744824\2\78909.0003 uncertainty, with the likelihood that some state-linked investors would qualify as SOIs while others would not, despite originating from the same country and operating in a broadly similar manner. This uncertainty is likely to further deter investment by SOIs that otherwise are active and important investors into the UK economy. (ii) The definition is unduly burdensome and disproportionate concerning the treatment of states with multiple SOIs. Section 2B(6) of the Regulations specifies that "where shares or voting rights are held by different state owned investors that are owned by one or more foreign powers of the same country or territory, those state owned investors are to be treated as if they were a single state owned investor (and, accordingly, their holdings of shares or voting rights are to be treated as if they were single holdings of shares or voting rights)." This is unduly restrictive as it assumes that SOIs from the same country somehow aggregate their influence in a common manner, which may or may not be the case depending on the investor. For example, multiple public pension funds originating from the same country appear highly unlikely to aggregate influence across independently managed organisations. Even when SOIs originate from the same country, each SOI may have different investment strategies, beneficiaries and governance structures, making it inappropriate to consider all of the SOIs as a single entity. Moreover the effect of this rule is to potentially further restrict the permitted level of investment by any single SOI originating from a country with multiple SOIs that may also wish independently to invest in the same newspaper. 2.2 Overall, the structure of the SOI requirements and conditions in Sections 2B and 2C prevent the exercise of any discretion on the part of the Secretary of State to consider exemptions on a case-by-case basis, and risk deterring investment (through uncertainty of outcomes) into UK newspapers and periodical news magazines, particularly from countries with multiple SOIs. PIHL therefore requests that DCMS reconsider the definition of SOIs and the conditions in Section 2C. The specificities of the conditions would be better replaced with an exemption that allows for consideration of the relevant SOI on a case-by-case basis. 3. The shareholding thresholds are inappropriate 3.1 The Regulations provide that SOIs qualify for the exemption only if they hold no more than 5% of total shares or voting rights in the newspaper owner, or no more than 10% of shares / voting rights if the UK newspaper business accounts for no more than 20% of the group's global turnover and the shares / votes are not held directly in the newspaper owner. 3.2 PIHL considers that assessing control and risk of foreign influence by reference to blunt shareholding thresholds is ineffective and will deter investment. There is no minimum or maximum shareholding which can determine influence or control, as it will depend on the overall context of the transaction, including the applicable governance structures. Moreover the question whether an investment is purely economic in nature (rather than political, as the new regime appears to assume) is also likely to be highly contextual having regard to the identity of the investor and its investment strategy. 3.3 PIHL therefore considers that the shareholding thresholds should either be set at a higher level where risks of influence and control are more likely, or preferably replaced with a more flexible regime that provides discretion to consider each proposed investment on its own merits. 4. Conclusion 4.1 In sum, PIHL considers that the new foreign state intervention regime is unnecessary and disproportionate to the task of addressing potential concerns relating to foreign state-linked investment into UK newspapers and periodical news magazines. 4 WEIL:\99744824\2\78909.0003 4.2 The existing public interest intervention regime adequately tackles the issues raised by potential foreign investment into UK news media, in particular by allowing the Secretary of State to exercise discretion and consider each case on its own merits. The new regime is unduly restrictive – it imposes a blanket prohibition, subject to only very limited exceptions which themselves are defined in a very inflexible way as described above. This will not permit the context or specificities of each transaction to be taken into account, something that is likely to deter necessary investment into UK newspapers as well as beneficial investment in the UK more widely. 4.3 For these reasons, and in light of the overall inappropriateness of the new regime, PIHL asks DCMS to reconsider the definition of SOIs and remove the proposed shareholding limits. Indeed, we consider that there would be little merit in creating a new regime to protect the independence of news media if the measures intended to achieve that goal are so restrictive that they prevent newspapers from accessing the capital needed to survive and thrive.