EXPLANATORY MEMORANDUM TO

THE ENTERPRISE ACT 2002 (MERGERS INVOLVING NEWSPAPER ENTERPRISES AND FOREIGN POWERS) REGULATIONS 2025

2025 No. 922

1. Introduction

1.1 This Explanatory Memorandum has been prepared by 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. Declaration

2.1 Stephanie Peacock MP, Minister for Sport, Media, Civil Society and Youth, confirms that this Explanatory Memorandum meets the required standard.

2.2 Robert Specterman-Green Director, Media and International, at the Department for Culture, Media and Sport confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Ian O'Neill OBE at the Department for Culture, Media and Sport, Telephone: 07706 381491 or email:ian.oneill@dcms.gov.uk can be contacted with any queries regarding the instrument.

<u>Part One: Explanation, and context, of the Instrument</u>

4. Overview of the Instrument

What does the legislation do?

4.1 These Regulations amend the Enterprise Act 2002 ("the 2002 Act") to create exceptions within the merger control regime in that Act which prohibits foreign state newspaper merger situations (the "Foreign State Influence (FSI) regime").

4.2 A foreign state newspaper merger situation is created where a merger involving a newspaper enterprise (i.e. UK newspapers or periodical news magazines) results in a foreign power being able to control or influence the policy of the person carrying on the newspaper enterprise. This is the case where ae foreign power holds, directly or indirectly, any shares in the person or voting rights in the person. The ultimate impact of falling within the FSI regime is that the Secretary of State would be required to block or unwind the merger situation.

4.3 These Regulations create exceptions by providing that a foreign power is not able to control or influence the policy of a newspaper owner in the following circumstances:

4.3.1 All the shares or voting rights which the foreign power holds in the newspaper owner are held by the foreign power indirectly via a state-owned investor (e.g. a sovereign wealth fund) and that state owned investor holds no more than 15% of the shares or voting rights.

4.3.2 The foreign power holds shares or voting rights as a result of those shares or voting rights being held by a person associated with a foreign power (e.g. a relative of an individual who is a foreign power) and the associated person owns no more than 0.1% of the shares or voting rights. That is a 'de minimis' threshold for small-scale investments.

4.3.3 The foreign power holds shares as a result of those shares being held by a person associated with a foreign power and the associated person holds the shares via certain types of investment funds (e.g. Individual Savings Accounts (ISAs) or a Self Invested Personal Pension Schemes (SIPPs)).

Where does the legislation extend to, and apply?

4.4 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.5 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales, Scotland and Northern Ireland.

5. Policy Context

What is being done and why?

5.1 The FSI regime prevents foreign state ownership of, or control or influence over, UK newspapers and news magazines and the risk this could pose to democracy and free speech. It is therefore an important part of the UK's protection of media freedom and plurality, and supports other recent legislation to strengthen protections against inappropriate foreign influence in key UK sectors such as the National Security and Investment Act 2021 and the National Security Act 2023.

5.2 The FSI regime has been drawn widely in order to minimise the risk that individuals within a foreign power or organisations under the control of such an individual might seek to circumvent the foreign state ownership restrictions.

5.3 The definition of a "foreign power" (based on the definition in the National Security Act 2023) has been drawn widely and covers a foreign government and agencies of a foreign government as well as individuals such as a head of state, senior members of a foreign government or agency and officers of the governing political party. The FSI regime also applies where shares or voting rights are held by a person associated with a foreign power. For example, the regime would apply in a situation where a business owned by the spouse of a government minister of a foreign state held a share, directly or indirectly in a newspaper owner.

5.4 The FSI regime would also capture legitimate investments by state owned investors such as sovereign wealth funds and public pension reserve funds (PPRFs) who may be tracking indices and where UK newspapers or their parent companies may be listed. This is because such investors would be ultimately owned by a foreign power.

5.5 The policy intention of making exceptions to the FSI regime through these Regulations is to ensure that this new regime does not have unintended consequences in relation to wider foreign investment in the UK media. That is, to allow certain kinds of legitimate and passive investments in newspapers and periodical news magazines

What was the previous policy, how is this different?

5.6 The FSI regime, which came into effect on 13 March 2024, did not include any exceptions. As such, the acquisition of any share in a newspaper owner by a state owned investor or an associated individual would trigger requirements under the 2002 Act for the Secretary of State to intervene in the acquisition and to ultimately block or unwind the transaction.

5.7 The policy intention is that state owned investors acting on behalf of a foreign power should be permitted to acquire up to (and not beyond) 15% of shares or the voting rights in the newspaper owner in order to avoid a potential chilling effect on wider foreign inward investment.

5.8 The policy intention is that investments by associated persons should be permitted where they are de minimis or made via an investment fund such as an ISA or SIPP.

6. Legislative and Legal Context

How has the law changed?

6.1 The FSI regime is set out in Chapter 3A of Part 3 of the 2002 Act. inserted by the Digital Markets, Consumers and Competition Act 2024(“the DMCC Act”).

6.2 The Secretary of State is obliged under section 70A of the 2002 Act to give the Competition and Markets Authority (CMA) a foreign state intervention notice if the Secretary of State has reasonable grounds for suspecting that a foreign state newspaper merger situation may have been been created, or arrangements are in progress or contemplation which may result in the creation of such a merger situation, if they are carried into effect. A foreign state newspaper merger situation is a merger involving a UK newspaper or periodical news magazine which has resulted in a foreign power being able to control or to influence the policy of the newspaper or news magazine owner.

6.3 Following an investigation, the CMA must give the Secretary of State a report under section 70B of the 2002 Act, which includes a decision as to whether the CMA believes that a foreign state newspaper merger situation has been created, or arrangements are in process or contemplation which will result in the creation of such a situation. On receipt of a report stating that the CMA does believe this, the Secretary of State must make an order under section 70C of the 2002 Act to reverse or prevent the creation of the merger situation.

6.4 Schedule 6B to the 2002 Act provides that a foreign power is able to control or influence the policy of a person carrying on a newspaper enterprise if one or more of five conditions is met, including the conditions that a foreign power holds, directly or indirectly, any shares in the person (“the shares condition”) or voting rights in the person (“the voting rights condition”).

6.5 These Regulations insert Part 1A into Schedule 6B to create exceptions to the regime.

6.6 <u>State owned investors</u>: Paragraph 2C of Schedule 6B sets out the conditions to be satisfied that determine whether a person is a state owned investor acting on behalf of a foreign power. This provision captures a wide range of state owned investors including sovereign wealth funds and public pension reserve funds.

6.7 Associated persons - de minimis investment: Paragraph 2D(1) of Schedule 6B provides that a foreign power is not able to control or influence the policy of a newspaper owner, by virtue of the shares or the voting rights conditions, if the foreign power holds the shares or voting rights in the newspaper owner as a result of those shares or voting rights being held by an associated person (within the meaning of section 127(4)(a), (b) or (c) of the 2002 Act e.g. relatives, trustees or business partners) and the associated person holds no more than 0.1% of the shares or voting rights.

6.8 Associated person - investment funds: Paragraph 2D(2) of Schedule 6B provides that a foreign power is not able to control or influence the policy of a newspaper owner, by virtue of the shares condition, if the foreign power holds the shares in the newspaper owner as a result of those shares being held by an associated person and the associated person holds those shares via an investment fund which meets a genuine diversity of ownership condition.

Why was this approach taken to change the law?

6.9 There are specific powers in Schedule 6B to the 2002 Act that allow for exceptions to be made to the FSI regime by affirmative regulations.

7. Consultation

Summary of consultation outcome and methodology

7.1 The previous government sought views on the scope of exceptions needed to the FSI regime and sought technical comments on draft regulations. The public consultation ran from 9 May 2024 until 9 July 2024 and was available on Gov.UK Four responses were received. The government's response was published on 15 May and will be available from: https://www.gov.uk/government/consultations/consultation-on-the-enterprise-act-2002-mergers-involving-newspaper-enterprises-and-foreign-powers-regulations-2024.

7.2 Most respondents commented on the definition of state owned investors, primarily to question whether it was effective in capturing all the different types of state-owned investors operating internationally. Concerns were raised that any uncertainty/variation in the application of the definition could deter investment, and that, as the definition was drafted, some state-linked investors would qualify while others would not, despite operating in a similar manner. Respondents argued that due to the wide variety of structures and approaches to investment taken by state owned investors, further clarification to the definition of state-owned investor may be needed.

7.3 One respondent pointed out that, as currently drafted, one or more foreign powers of the same country or territory are to be treated as if they were a single state owned investor, which assumes investments by state owned investors based in the same country somehow aggregate their influence in a common manner, which they thought unlikely. A different respondent asked for the regulations to make explicit that foreign powers from different countries or territories may each hold separate interests, each up to the relevant threshold, and these investments should not be aggregated, as several investments from several countries, in their view, does not translate into increased likelihood of influence for any one of them.

7.4 Two respondents suggested that non-voting shares and/or debt instruments should be formally excepted from the regime. The justification was provided that debt instruments do not typically feature any rights that would give rise to control or influence. Respondents also suggested that debt instruments are an inherently passive means of investing, and therefore creating exceptions for these transactions would pose no substantial risk of active foreign influence.

7.5 The respondents suggested that the regulations should make specific provision to exclude debt instruments to put the issue beyond doubt.

7.6 Multiple respondents were of the view that the proposed exceptions for state owned investors (which would have allowed a state owned investor to hold up to 5% of shares or voting rights in a UK newspaper owner or 10%, as part of a diversified business) were too restrictive and should be increased to 15%, citing the lack of tangible influence under this threshold. One respondent compared the proposed threshold to the 25% threshold at which a transaction becomes eligible for a mandatory notification under the National Security and Investment Act 2021, suggesting disproportionality and discrepancy in approaches.

7.7 There were also comments that attempting to assess control and risk of foreign influence by reference to specified shareholding thresholds is an ineffective approach and will deter investment in UK newspapers and magazines noting that the level of influence depends on the overall context of the transaction, the identity of the investor and its investment strategy. The solution proposed by one respondent was to replace the FSI regime with a more flexible regime that provides the Secretary of State discretion to consider each proposed investment individually, or failing this, that the shareholding thresholds should be set at a higher level to allow for these nuances.

7.8 There was also concern expressed that the turnover test for determining whether a relevant merger situation has been created in connection with the FSI regime has been lowered from £70 million (the level for the ordinary media merger control regime) to £2 million. One respondent questioned whether this is operationally feasible given that it would capture a large number of small publishers, raising the Government's enforcement responsibilities. Some respondents argued that the "target turnover threshold" should be increased to £100m per annum to align with that which applies under the UK's general merger control regime pursuant to amendments made by the DMCC Act.

7.9 Respondents demonstrated concern that the regulations only applied to news magazines and newspapers. Supporting this, one respondent argued that to prevent the new regime from unfairly biassing investment against newspapers, all news service providers, including non-print news media services such as digital, TV and radio services, should be subject to the FSI regime.

7.10 The majority of respondents thought that the qualifications for exception from the regime should be expanded in some way. Suggestions included exceptions for investment via independent third-party investors and small minority stakes in publicly listed companies.

7.11 Respondents also identified a technical issue about the possible effects of the "indirect holdings test rule" and its interaction with the exceptions for state owned investors set out in the draft regulations. Current drafting would allow a state-owned investor to indirectly hold up to 100% of a stake in a newspaper owner up to the threshold (i.e 100% of 5%) but it would not allow a state owned investor to hold a much smaller stake (e.g. 2%) indirectly, if the investment vehicle in the chain, which directly holds the stake in a newspaper enterprise, does so at a level which slightly exceeds the permitted threshold (e.g 11%). This is despite - in this example - the state owned investor not being able to exercise any tangible control or influence by virtue of the diluted nature of its shareholding.

7.12 The government has considered these detailed comments and agrees that the 5% threshold is too restrictive. The government also agrees that the two-tier ceiling with a higher ceiling for shares in diversified companies created additional and unnecessary complications and for that reason believes a single 15% threshold would be appropriate.

8. Applicable Guidance

8.1 The current guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers published will be substantially updated to reflect the new FSI regime and the government's proposals to extend the regime and the media merger public interest regime to online news publications. This will be published in due course.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full impact assessment has been published with these Regulations.

9.2 The impact assessment covers these Regulations, and the corresponding primary legislation that was developed in response to an amendment to the Digital Markets, Competition and Consumers Bill in the House of Lords in March 2024.

9.3 The impact assessment has been considered and assessed with a Green Rating by the Regulatory Policy Committee.

Impact on businesses, charities and voluntary bodies

9.4 A full impact assessment considers the impacts on small businesses and concludes that the changes are not anticipated to result in disproportionate burdens on small and micro-sized businesses.

9.5 The legislation does impact on micro businesses and on charities or voluntary bodies.

9.6 There is no significant impact on the public sector because the Regulations only apply to investment made by foreign powers and associated persons.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Stephanie Peacock, Minister for Sport, Media, Civil Society and Youth has made the following statement:

"This is an important measure and of interest to Parliament. We will keep the operation of the new FSI regime under review to ensure its effectiveness. However, it is not appropriate in the circumstances to make provision for review in this instrument as this could create uncertainty given the high need for long-term certainty."

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 These Regulations relate to a commitment given by the previous government on 26 March 2024 during the passage of the Digital Markets, Competition and Consumers Bill to introduce a number of exceptions to the FSI regime by secondary legislation.

11.2 Section 130(3) of the DMCC Act provides that the FSI regime (as inserted by Schedule 7 to that Act) applies to mergers taking place on or after 13 March 2024. Similarly, and by virtue of paragraph 15(3)(b) of Schedule 6B to the 2002 Act, these Regulations have effect on and after 13 March 2024.

12. European Convention on Human Rights

12.1 The Secretary of State for Culture, Media and Sport has made the following statement regarding Human Rights:

"In my view the provisions of the Enterprise Act 2002 (Mergers Involving Newspaper Enterprises and Foreign Powers) Regulations 2024 are compatible with the Convention rights."

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")

13.2 Paragraph 2B of Schedule 6B provides that a foreign power is not able to control or influence the policy of a newspaper owner, by virtue of the shares or the voting rights conditions, if it holds shares or voting rights in a newspaper owner indirectly via a state-owned investor and the investor holds no more than 15% of the shares or voting rights in the newspaper owner directly or indirectly.