I write on behalf of Clifford Chance LLP in response to the consultation on The Enterprise Act 2002 (Mergers Involving Newspaper Enterprises and Foreign Powers) Regulations 2024 (the Draft Regulations). Our response is limited to the following points:

Without amendments to the Indirect Holdings test, the Draft Regulations do not appear to achieve their intended purpose

The Draft Regulations do not appear to achieve their intended purpose, because they do not address the effect of the test for indirect holdings (the Indirect Holdings Test) in paragraph 9 of the new Schedule 6B of the Enterprise Act 2002 (EA), as inserted by Schedule 7 of the Digital Markets, Competition and Consumers Act (DMCCA).

To illustrate this, take the example of a State owned investor (meeting the conditions in paragraph 2C of the Draft Regulations) which acquires a 0.2% interest in a company that holds a 0.1% interest in another company, which in turn holds an 11% interest in a UK newspaper enterprise. The operation of the Indirect Holdings Test means that the State owned investor will be treated as having acquired the full 11% interest in the UK newspaper enterprise, because it sits at the top of a chain of companies that are connected by the holding of any shares or voting rights, no matter how small, and is therefore treated as holding the entire interest of the company at the bottom of the chain. Consequently, this transaction will fall outside the scope of the exemptions in paragraphs 2B(2) or 2B(3) of the Draft Regulations, despite the fact that the 0.2% interest actually being acquired by the State owned investor (in a company that itself has only 0.1% of the shares in the company below it in the chain) is well below the 5% and 10% thresholds set out in those paragraphs, respectively.

We assume that the Government does not intend for the illustrative example above to fall outside the proposed exemptions, in which case the Draft Regulations should make appropriate amendments to the Indirect Holdings test in order to be effective. This could be achieved by adapting the Indirect Holdings test so that instead of applying if any shares or voting rights are held in the company below (in a chain of companies that ends with a UK newspaper business) it applies only if the interest held in the company below exceeds 0.1% (for the purposes of applying the exemption in paragraph 2D(1) of the Draft Regulations), 5% (for the purpose of applying the exemption in paragraph 2B(2) of the Draft Regulations) or 10% (for the purpose of applying the exemption in paragraph 2B(2) of the Draft Regulations).

If our assumption is incorrect and the Government does intend for such transactions to fall outside the scope of the exemption, we consider that to be a misguided policy position. Capturing such transactions within the scope of the new regime for UK newspapers (in which the Government has no discretion to decline to take action to unwind such transactions) would, in our view, make the regime wholly unworkable. In particular, it would make the Government vulnerable to bad faith actors that submit lists of large numbers of investors with foreign state links in companies that sit at the top of chains of the type described above, so forcing the Government to take action against them and tying up large volumes of public resources to unwind interests that confer no conceivable degree of influence whatsoever over a UK newspaper business.

The definition of a State-owned investor requires some clarification and is too narrow

We have the following comments on the Conditions set out in the new paragraph 2C of Schedule 7 EA02 (as inserted by paragraph 2(3) of the Draft Regulations):

- Condition 4 requires that "the principal source of the funds for the overseas investments is the foreign power or another foreign power of the same country or territory as the foreign power". Many State-owned investors will have received initial funding from a foreign power in the past, but now derive their funding for future investments primarily from the returns on past investments. It seems to us that such investors are intended to be covered by the proposed definition (as the initial funding is the ultimate "source" of all subsequent returns), but this could usefully be clarified, either within the Draft Regulations or accompanying guidance. It would also be counter-intuitive if a State-owned investor that relies principally on the funds of a foreign power is exempt, whereas a State-owned investor that is able to trade off its own balance sheet is not exempted; the latter being less dependent on the foreign power.
- Condition 1 requires that the foreign power holds, directly or indirectly (a) 100% of the shares in the person; (b) 100% of the voting rights in the person; or (c) the right to appoint or remove a majority of the officers of the person. Given that a shareholder will typically meet condition (c) – the ability to appoint or remove the majority of officers – if they hold shareholder voting rights of over 50%, it seems to us that it would be more coherent to set the both thresholds for shares and voting rights at "over 50%", rather than 100%. It seems to us counter-intuitive that an investor in which a foreign power has a 99% shareholding is treated differently to one in which a foreign power has a 100% shareholding.
    - We note also that the Indirect Holdings test may also cause Condition 1 to not achieve what appears to be its intended purpose. For instance, a foreign power than holds 1% of the shares of the holding company of a person would meet Condition 1 as it would be treated, by virtue of the Indirect Holdings test, as indirectly holding 100% of the shares of the person. In contrast a foreign power that holds directly 99% of the shares of the person would not meet Condition 1, as currently drafted.
- Condition 3 is that the principal activity of the person is to make or manage investments that include overseas investments. This Condition means that State owned enterprises (e.g. a State-owned rail company, whose principal activity is not to make or manage investments) cannot benefit from the exemption. However, it seems to us that the rationale for exempting investments by State-owned investors applies equally to other forms of State-owned enterprise. In particular, the latter are subject to a comparable degree of influence of the foreign power and may also acquire minority interests in other businesses for investment purposes (e.g. for managing their employees' pensions). While it appears that such enterprises could avail of the exemption by setting up a subsidiary that is dedicated to making and managing such investments, we query whether Condition 3(a) is necessary, in practice. Moreover, the scope of the exemption (i.e. a 5-10% shareholding, depending on the circumstances of the target/investee company) effectively precludes any significant degree of influence, so there should be no additional risk to the independence of UK newspaper businesses if other forms of State-owned enterprise were permitted to avail of the exemption. Consequently, we favour the

removal of Condition 3(a) and the modification of Condition 5 to make it clear that the exemption applies also to investments that benefit beneficiaries of the pension fund of a State owned enterprise.

Our comments above are not confidential and may be published. We would be happy to have a call with you to explain our observations above in more detail, if that would be helpful.