DIGITAL MARKETS, COMPETITION, AND CONSUMERS BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

INTRODUCTION

This supplementary Memorandum has been prepared to assist the Delegated Powers and Regulatory Reform Committee with its scrutiny of amendments tabled by the Government to introduce a new Schedule 6A to the Digital Markets, Competition and Consumers Bill at Third Reading of the Bill in the House of Lords.

PURPOSE AND EFFECT

The amendments to the Bill will insert provisions into the Enterprise Act 2002 (by inserting a new Chapter 3A into Part 3 and inserting new Schedules 6A and 6B) creating a new regime which prevents a foreign power from acquiring any new financial interest, or other means of controlling or influencing a UK newspaper or periodical news magazines.

The new provisions will require the Secretary of State to give the Competition and Mergers Authority (the CMA) a notice ("a foreign state intervention notice") if the Secretary of State has reasonable grounds to suspect that arrangements to create a foreign state newspaper merger situation are in progress or in contemplation, or that a foreign state newspaper merger situation has been created.

A foreign state merger situation will be created in circumstances where:

- a relevant merger situation would be created as a result of two or more enterprises ceasing to be distinct (with the value of the turnover of the enterprise being taken over exceeding £2 million and subject to various additional modifications to be inserted via a new Schedule 6A in the Enterprise Act 2002);
- one of the enterprises in the merger situation is a newspaper enterprise; and
- as a result of the merger, a foreign power will be able to control, or influence the policy of the person carrying on the newspaper enterprise via a number of means, including by directly or indirectly holding any shares or voting rights in the enterprise.

A foreign state merger situation will also be created where a foreign power will acquire or has acquired greater control in a newspaper enterprise by virtue of directly or indirectly acquiring more shares or more voting rights in a newspaper enterprise.

Once the Secretary of State has given a foreign state intervention notice to the

CMA, the CMA must give the Secretary of State a report in relation to the case within the period specified by the Secretary of State. The report must include the CMA's decision on whether it believes arrangements to create a foreign state merger situation are in progress or in contemplation or a foreign state merger situation has been created. If the CMA's report includes a decision that a foreign state merger situation has been created or arrangements to create such a merger situation are in progress or in contemplation, the Secretary of State must make an order containing provision to reverse or prevent the creation of the merger.

For the purposes of the new regime, the definition of a newspaper will include periodical news magazines.

The new regime will apply retrospectively from 13 March 2024 to capture any merger situations which are completed after this date and any arrangements to create a future foreign state merger situation which are in progress or in contemplation on this date. Similarly, the delegated powers in this Memorandum provide that regulations made under those powers may make provision having effect on or after 13 March 2024.

The Government intends to use powers set out in the amendments in the Bill to provide that the new regime does not apply to certain foreign state investment organisations, such a sovereign wealth funds or public pension reserve funds from having a passive investment in UK newspapers and news magazines where the level of investment is under a specified threshold. The Amendments to the Bill also include provisions to modify the regime. All powers will be subject to the affirmative resolution procedure.

This supplementary memorandum explains why the new powers have been taken and the reason for the procedure selected.

DELEGATED POWERS

New section 70G(1)(a) of the Enterprise Act 2002: Power to change the meaning of 'foreign power'

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative procedure

Context and purpose

1. Section 70G(1) enables the Secretary of State to change the meaning of 'foreign power'.

2. Section 70G(2) sets out that regulations may, in particular, make provision to exclude categories of persons from being treated as a foreign power and to base this on the level of independence that person has from a foreign power or the level of interest they have in a newspaper or news magazine (which by virtue of s70F(1) are included in the definition of newspaper for the purpose of the new provision).

3. The intention is to use the power to allow certain types of organisations that fall within the wide definition of a 'foreign power' to be excluded from the new regime. For example, the power may, in due course, be used to exclude small shareholdings of negligible size by individuals or entities who fall within the definition of a foreign power either through the purchase of tradable shares in listed companies or via retail investment products such as ISAs or investment trusts. The power would also allow the scope of the definition to be extended to cover variations of foreign state organisations not fully captured by the definition.

Justification for the power

4. Given the broad nature of the definition of foreign power, there is a possibility that the provisions may inadvertently catch individuals and organisations that are not intended to be captured by the new regime. Therefore this power is necessary to ensure that we can adjust the definition of foreign power, to align with that intent.

5. Equally, there may be a need in future to further extend or refine the definition of foreign power to cover examples of foreign state ownership that are not covered by the definition of foreign power in section 70E, for example where there is a risk of transactions being structured in such a way as to circumvent

the regime.

Justification for the procedure

6. There is likely to be a significant level of parliamentary interest in any proposed changes to the meaning of ‘foreign power’ for the purpose of this provision, as any amendments could significantly extend the scope of the restriction.

7. The department therefore considers that it is appropriate that the regulations made using the power in section 70G(1)(a) should be subject to the affirmative resolution procedure. This will ensure sufficient parliamentary scrutiny of any changes to the regime.

Section 70G(1)(b) of the Enterprise Act 2002: Power to change the meaning of ‘newspaper’

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative procedure

Context and purpose

8. Section 70G(1)(b) gives the Secretary of State the ability to change the definition of ‘newspaper’, where reference is made to it throughout this Chapter either to widen or to narrow the scope of the types of news publication covered by the foreign state newspaper merger regime. Section 70F(1) extends the definition of newspaper to include news publications circulating in the UK (or part of the UK) on a periodic basis, for example weekly and monthly news magazines.

9. These regulations may make provision for the Secretary of State to bring additional forms of news publications into scope of the foreign state ownership regime to include, for example, online news publications.

Justification for the power

10. Given the changing nature of the media landscape, and the different ways in which people access news, it is essential that the regime is future-proofed, to ensure that future types of UK news can be brought within the scope of the regime where this is necessary. The power in section 70G(1) provides this flexibility whilst limiting the scope to news publications. The power is also consistent with the existing powers to amend the definition of “newspapers” in section 44 of the Enterprise Act 2002 for the purposes of the media mergers

regime.

Justification for the procedure

11. There is likely to be a significant level of parliamentary interest in any proposed changes to the meaning of “newspaper” for the purpose of this provision, as a change to the meaning could significantly extend the scope of the measure.

12. The department considers that it is appropriate that the regulations made using these powers should be subject to the affirmative resolution procedure. This will ensure sufficient parliamentary scrutiny of any changes to the regime.

Section 70G(3) of the Enterprise Act 2002: Power to apply provisions in Chapter 1 of the 2002 Act for the purposes of new Chapter 3A with or without modifications

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative procedure

Context and purpose

13. Section 70G(3) gives the Secretary of State the power to apply provisions in Chapter 1 of Part 3 to the Enterprise Act 2002 to the new regime in Chapter 3A. For example, Schedule 6A already applies sections 23 to 29 of that Act, which relate to what is a relevant merger situation, for the purposes of Chapter 3A. This power enables the government to apply further provisions of Chapter 1 to Chapter 3A, if needed, and to adjust the application of sections 23 to 29, if needed.

14. In particular, a modification to a provision in Part 3, Chapter 1 by Schedule 6A sets the turnover threshold for the creation of a foreign state newspaper merger situation at £2 million. The power in section 70G(3)(3) would enable this threshold to be varied.

Justification for the power

15. Further modifications to the application of sections 23 to 29 of the Enterprise Act 2002 (which relate to what is a relevant merger situation) may be required

in order to enable the new foreign state newspaper ownership regime to operate effectively.

16. For example, should news publications with significant readership or influence in terms of news and current affairs fall out of scope of this regime by virtue of their turnover falling below £2 million, regulations made in accordance with this power would enable an adjustment to the turnover threshold to keep pace with any developments in the market. Having such a power enables the regime to have sufficient flexibility to respond to rapid changes in media consumption (and therefore in the turnover of news publications).

Justification for the procedure

17. While changes to the application of Chapter 1 to the new regime in Chapter 3A are likely to be technical in nature, there is likely to be a significant level of parliamentary interest in any changes (especially as this would involve the application of primary legislation to the new regime).

18. There is likely to be a significant level of parliamentary interest in any proposed changes to the turnover threshold.

19. The department considers that it is appropriate that the regulations made using these powers should be subject to the affirmative resolution procedure. This will ensure sufficient parliamentary scrutiny of any changes to the regime.

Paragraph 15 of Schedule 6B to the Enterprise Act 2002

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative procedure

Context and purpose

20. The Government wants to ensure that current and future investments made by established foreign state investment organisations that are below certain thresholds are not caught by the regime to ensure that existing and new low level, passive investments in national newspapers, local newspaper groups or in news magazine groups are not disrupted. This will ensure the new foreign state newspaper ownership restrictions are focused on investments where the intention is or is likely to be to be able to influence newspaper enterprises' broader strategic objectives and its editorial policies, rather than purely have investment goals.

21. This power enables the Secretary of State to set rules amending the circumstances in which a foreign state is considered to have control or influence, for instance by amending the threshold of shares or rights which will amount to such control or influence. The power provides flexibility to deal with a variety of different types of foreign state investment organisations and different ways in which they might structure a proposed or actual investment.

Justification for the power

22. This power will be used to create a carve out from the restriction on foreign state ownership, control or influence of newspaper enterprises for certain categories of foreign state investment organisations. That is, it will be used to set a threshold of the level of shares or voting rights that a particular description of foreign power can hold in a newspaper enterprise below which the new regime will not apply. The intention is to allow organisations, such a sovereign wealth or public pension investment funds, to continue to invest in UK newspapers and news magazines up to a specific threshold.

23. Setting the permissible categories of investment and the threshold which applies in secondary legislation ensures the flexibility to review the categories and to increase or decrease the threshold to respond to future assessments of the risk of foreign state investment funds having investments in UK newspapers or news magazines.

Justification for the procedure

24. These powers will be subject to affirmative resolution procedure. The department considers that it is appropriate that the regulations made using these powers should also be subject to the affirmative resolution procedure. This will ensure sufficient parliamentary scrutiny of any changes to the regime.

DCMS
21 March 2024