

Jurisdictional issues

1. This appendix sets out our detailed reasoning and conclusions on the various jurisdictional issues raised during our inquiry. These are considered against the background of the overall transaction by which Archant acquired INM's London Regionals Division having taken place in a number of stages—the 11 December sale agreement, the 11 December option and the 30 December sale agreement, together with a number of ancillary agreements relating to intellectual property and transitional services. Archant announced the acquisition as two transactions, taking place on 11 December and 30 December respectively. In Archant's view each was separate, and did not affect a substantial part of the UK, whether considered separately or as a whole.

Archant's acquisition of the London Regionals Division and the operation of the Fair Trading Act 1973

The acquisition structure

2. Before 29 December 2003 transfers of newspapers or newspaper assets to newspaper proprietors whose newspapers, when taken together with the newspaper or newspapers concerned in the transfer, had an average circulation each day of 500,000 would be unlawful and void if the transfer were made without the consent of the Secretary of State. Such was the effect of the newspaper merger provisions contained in sections 57 to 62 of the FTA and of section 58(1) FTA in particular.¹ Subject to some exceptions, before the Secretary of State could consent to a transfer a reference had to be made to the CC. A reference might take as long as three months to complete.
3. For financial reasons, INM wanted to dispose of the London Regionals Division before the end of 2003. An outright purchase of the whole division by Archant in early December 2003 would have attracted the mandatory consent provisions of the FTA and may well have led to a reference to the CC. A delay of three months or more while the CC considered Archant's bid and the Secretary of State reached a decision might well have proved fatal to Archant's chance to acquire the division. However, in early December 2003 Archant knew that the newspaper merger provisions in the FTA were soon to be repealed by the Communications Act 2003. Archant decided to structure its overall purchase of the London Regionals Division to take advantage of that imminent repeal and the supersession of the FTA newspaper provisions by provisions of the Enterprise Act 2002 that did not require prior consent for newspaper mergers. The mechanism that Archant used was a combination of a sale agreement and an option agreement. The effect of the two agreements was that Archant would acquire at least some of the titles of the London Regionals Division on 11 December 2003, and that it would have the right to acquire the remaining titles once the newspaper merger provisions of the FTA were repealed. By concluding an option agreement on 11 December, under which Archant obtained the right to call for the remainder of the London Regionals Division, and by which INM acquired the right to

¹Section 58(1) provided: 'Subject to the following provisions of this section, a transfer of a newspaper or of newspaper assets to a newspaper proprietor whose newspapers have an average circulation per day of publication amounting, together with that of the newspaper concerned in the transfer, to 500,000 or more copies shall be unlawful and void, unless the transfer is made with written consent given (conditionally or unconditionally) by the Secretary of State.'

put the titles to Archant, but having no power to exercise that right until after the repeal of the FTA newspaper provisions, Archant believed that it had acquired rights to the entire London Regionals Division on 11 December 2003 without triggering the mandatory consent provisions of section 58(1). This was because, in Archant's view, the 11 December option was of no significance for the purposes of the FTA until it was exercised. Two further points arise on the 11 December option and sale agreements. First, the call option conferred on Archant could not be triggered until the repeal of the newspaper merger provisions of the FTA, but had to be exercised on or before 15 January 2004. Second, the greater part of the total overall consideration was paid under the 11 December sale agreement. Further, the consideration payable under the 30 December agreement is subject to adjustments [redacted].

4. On 29 December 2003 the newspaper merger provisions of the FTA were, so far as is relevant, repealed by section 373 of the Communications Act 2003. By exercising its call option on 29 December 2003, the day on which the Communications Act came into effect, Archant believed that it had avoided compulsory notification of the combined transaction to the DTI.

Legal issues

5. During the course of our inquiry the legal effect and apparent simplicity of these arrangements was called into question in two separate sets of representations. In each case, although for different reasons, it was put to us that if Archant's deal structure failed to achieve its ends, real doubt was cast on the jurisdiction of the CC to investigate the 11 December sale agreement. The representations we received on these matters came from [redacted], and from [redacted] in a number of letters, most importantly in a letter dated 24 June 2004. In substance, the representations of [redacted] as to why Archant's deal structure failed to achieve its ends did not add to the views of [redacted]. In our view, the approach that we have taken to [redacted] views also disposes of the issues put to us by [redacted] and we see no need to consider the latter's views separately.

The views of [redacted]

6. [redacted] attended the CC for a hearing on [redacted]. During that hearing it was put to us by [redacted], relying in large part on the advice of [redacted], that on a strict construction of the FTA Archant's overall deal structure had not succeeded in ensuring that the consent of the Secretary of State was not required. In particular, our attention was drawn to the provisions of section 57(2)(a) of the FTA² which, we were told, were to be construed so that an option agreement constituted a transfer of a newspaper or newspaper assets at the time of grant, and not at the time of exercise. If this were right it would mean that on 11 December 2003 Archant had entered into not one but two agreements, the 11 December sale agreement and the 11 December option agreement, that were transfers of newspapers or of newspaper assets for the purposes of section 58(1). It was accepted by [redacted] that this approach to the construction of section 57(2) was at variance with the position in newspaper merger guidance published by the DTI. Because the cumulative effect of the circulation of the titles transferred to Archant on 11 December would trigger the circulation threshold, at least one of the 11 December agreement and 11 December option was void.

²Section 57(2) provided, 'In this Part of this Act "transfer of a newspaper or of newspaper assets" means any of the following transactions, that is to say—(a) any transaction (whether involving a transfer or not) by virtue of which a person would become, or would acquire the right to become—(i) an actual proprietor of a newspaper ...'.

7. Several further and consequential points were put to us by [X]. The most important was that section 58(1) of the FTA was to be construed so that the 11 December sale agreement and the 11 December option were to be treated as one single transfer of newspaper assets. If this approach were correct, it would mean that both the 11 December sale agreement and the 11 December option were void and unlawful, whereas if they were both to be treated as transfers of newspapers or newspaper assets taking place on 11 December, but as separate transfers for the purposes of section 58(1), it would only be the option that was void and unlawful. [X] told us that the advice that they had received recognized that it was not clear that this was the correct approach to the construction of section 58(1), but concluded that on balance it was the better view. [X] did not suggest that the validity of the 30 December sale agreement was impugned by the putative invalidity of the 11 December option agreement. However, it was their view that if the advice on which they relied were correct there were serious implications for the CC's jurisdiction in this case.
8. The points raised with us by [X] were, to the extent that they reflected advice given to them by [X] relayed to us on the basis that [X] did not consider that it was waiving any legal professional privilege attached to its advice, and was not authorizing the publication of its advice in our report.
9. The issues raised by [X] are very serious ones, and are given added weight by virtue of the impeccable source of the advice on which they relied. We asked for, and subsequently obtained, a copy of [X] advice, the substance of which had been reported to us by [X]. However, [X] provided [X] advice only on the bases that no legal professional privilege was thereby waived, and that no publication of the advice in our report was thereby authorized. Further, [X] did not want to be identified as the source of concern about the accuracy of the DTI's newspaper guidance. Because the issues raised are readily understood, we do not think that our investigation has been impeded because of [X] refusal to waive privilege or to allow publication of its advice, or because [X] declined to be identified to Archant as the source of concern.

The views of Archant

10. On 8 June 2004 we wrote to Archant to raise these issues with it. It replied with commendable speed. We received its response, together with an opinion of Richard Fowler QC, on 15 June 2004. In its response, Archant focused primarily on the question of whether the 11 December option could constitute a transfer of a newspaper or of newspaper assets for the purposes of section 57(2)(a).
11. In arguing that the 11 December option was not, on the date of its grant, a transfer of a newspaper or newspaper assets, Mr Fowler relied heavily on the purpose of the newspaper merger provisions. His view was that 'no reasonable purpose' would be served by requiring consent for the grant of an option rather than for its exercise. Mr Fowler also took the view that the right to become a newspaper proprietor referred to in section 57(2)(a) of the FTA did not include a right that was conditional upon an extrinsic event, such as the repeal of the newspaper merger provisions of the FTA. In support of these views, Mr Fowler cited the DTI's guidance on newspaper mergers and the principle against doubtful penalization. Mr Fowler also pointed out that over many years the DTI and the CC have accepted that agreements to transfer newspapers that were made conditional on the consent of the Secretary of State were not transfers of newspapers or of newspaper assets within section 57(2)(a) pending the grant of consent. In Mr Fowler's view such conditional agreements and the 11 December option were to be treated in the same way under the FTA. Allen & Overy LLP, solicitors to Archant, told us that even if the 11 December option was a transfer of a newspaper or of newspaper assets for the purposes of section 58(1) of

the FTA on 11 December, there was no basis on which it should be combined with the 11 December sale agreement and treated as one combined transfer of newspapers for which the consent of the Secretary of State was required. Allen & Overy also told us that whatever the status of the 11 December option, there was no consequential effect on the validity of the 30 December sale agreement.

Our conclusions

12. We have considered all the submissions that we have received very carefully. In our view the proper interpretation and application of section 57(2) of the FTA to the 11 December option is not entirely straightforward. Nor, should we think that the 11 December option was a transfer of newspaper assets on 11 December, is it clear that section 58(1) dictates the combination of the 11 December option with the 11 December agreement so that both would attract the statutory prohibition. If there were nothing more than the language of the FTA to go by, our view is that the matter would not be free from doubt. However, we accept that there is considerable force in two factors. First, in the past agreements for the sale of newspapers or of newspaper assets have consistently been treated as lawful where they were conditional on the consent of the Secretary of State. In our view there is a real degree of equivalence between agreements conditional on the Secretary of State's consent and the 11 December option. In each case there is nothing that can be said to be a transfer until, at least, the occurrence of an extrinsic event. Second, the effect of provisions as severe as sections 57(2) and 58 should not be applied in circumstances where it is not clear that they were intended to be applied. In our view, it is not clear merely from their terms that they were intended to be applied to the facts under consideration. Further, we can see no purpose attaching to the sections that would require their application to these facts. This conclusion is supported by the consistent approach of the DTI and the CC to conditional agreements. This issue has serious implications not merely for the CC's jurisdiction in this case, but also for Archant and INM, both in terms of the validity of a number of their agreements, and also because under section 62 of the FTA it is an offence to be knowingly concerned in a purported transfer of a newspaper or of newspaper assets without the appropriate consent. In the circumstances we believe that the correct course is to conclude that section 57(2) did not apply to the 11 December option agreement on its grant, and to regard the 11 December agreement, the 11 December option and the 30 December agreement as valid and enforceable. Consequently, the transactional structure of Archant's acquisition of the London Regionals Division and its interaction with the FTA does not prevent the CC from having jurisdiction in this case.
13. We are fortified in this conclusion by the following consideration. [⌘]

Jurisdictional issues under the Enterprise Act 2002

Relevant merger situation

14. Archant's acquisition of the London Regionals Division was completed by the 30 December sale agreement. It is therefore a completed merger for the purposes of the Act. Under our terms of reference and pursuant to section 35(1)(a) of the Act, we are required to decide whether a 'relevant merger situation' has been created. There are three limbs to this question. First, we have to decide whether two or more enterprises have ceased to be distinct. Second, we have to decide whether the reference under which we now act was made in time. Third, we have to consider whether the value of the turnover in the UK of the enterprises being taken over exceeds £70 million (the turnover test) or whether the merger will create or enhance a share

of at least one-quarter in the supply of goods or services of any description in the UK, or a substantial part of the UK (the share of supply test).

Enterprises ceasing to be distinct

15. An 'enterprise' is defined in section 129(1) of the Act as 'the activities, or part of the activities, of a business'. By section 26(1) of the Act, enterprises are to be regarded as ceasing to be distinct where they are brought under common ownership or control.
16. The 11 and 30 December sale agreements are agreements for the sale and purchase of assets. They each work in the same way. Each constitutes an agreement for the sale of the entire legal and beneficial ownership of that part of INM's business that relates to the titles to be transferred under each agreement. Specifically, this includes the sale and purchase of goodwill, stock, interests in real property, loose and fixed plant and equipment, intellectual property, IT, leased equipment and vehicles, the benefit of current contracts and certain business records and cash floats. Certain employees have also been transferred from INM to Archant. Some assets relating to the assets were not transferred. These include some cash in hand, tax assets and debts. Archant did not take over liabilities relating to the assets transferred. Some services necessary for the titles transferred remained with INM. Nevertheless, we find that the effect of the 11 December agreement and the 30 December agreement is that in each case the activities of a business or part of a business are transferred and that in consequence enterprises formerly carried on by INM ceased to be distinct from enterprises carried on by Archant. At no point during our inquiry did Archant challenge this.

Timeliness of the reference

17. The second issue in determining whether there is a relevant merger situation is whether the reference made by the OFT on 29 April 2004 was made in time. There is an element of complexity to this question, and it has proved contentious. There are two ways in which the time limits for the making of a reference can be calculated. The first is by taking the time at which the reference is made and, working backwards, calculating whether the relevant enterprises ceased to be distinct 'before the day on which the reference relating to them is made and ... not more than four months before that day'.
18. The second is concerned with the time at which notice of material facts about the circumstances in which the relevant enterprises ceased to be distinct came to the attention of the OFT or were made public. If notice of material facts is not given to the OFT or made public prior to the entering into of the arrangements or transactions leading to the relevant enterprises ceasing to be distinct, the time at which material facts are given to the OFT or are made public becomes the relevant time for calculating the period in which the reference can be made. In this case a reference is invalid if notice was given or if facts became public 'more than four months before the day on which the reference is to be made'.
19. In our view, the reference was made in time on either approach. The reference was made on 29 April 2004. The day on which enterprises ceased to be distinct has been the subject of some debate between the OFT and Archant. The candidate dates are 29 and 30 December 2003, being the date of exercise of the 11 December option and the date of the second sale agreement respectively. In our view it is not necessary to decide between the two dates. Both fall within the period of four months

before the day on which the reference was made, albeit that 29 December 2003 was the first day of that four-month period.

20. During the course of our inquiry Archant showed us an exchange of correspondence between its solicitors, Allen & Overy, and the OFT of 6 and 19 May 2004 concerning the date on which notice of the fact that Archant had exercised the 11 December option, and subsequently agreed and completed the purchase of the second group of titles, was given to the OFT or made public.
21. From that correspondence it appears that on 30 December 2003 Archant wrote to the OFT to advise that it had entered into the second sale agreement. On the same day, Archant published a press release recording the acquisition of the second set of titles. So far as we can discern, Archant has not contended that the OFT can or should have known of the exercise of the 11 December option before 30 December 2003, and it cannot have known of the 30 December agreement before that day. The exercise of the 11 December option and the 30 December sale agreement are material facts about the arrangements or transactions in consequence of which enterprises ceased to be distinct. In our view, therefore, even if the reference were not made in time having regard to the date on which enterprises ceased to be distinct, it would be made in time having regard to the time at which notice of material facts were given to the OFT or made public. Without having to take a view on when notice was given or the facts made public, it cannot have been before 30 December, and 30 December is within the period of four months before the day on which the reference was made. We note that Archant has accepted that a reference made on 29 April 2004 was made in time if the starting date for the relevant period was 30 December 2003.
22. There is one further element to the timing of the reference. In order for the 11 December agreement to fall to us for consideration, it must fall within the scope of section 27(5) of the Act. That section enables us to treat successive events as having occurred simultaneously on the date on which the last of them occurred. In our view, having regard to the criteria in section 27(6) that must be satisfied if section 27(5) is to apply, the 11 December agreement and the 30 December agreement are successive transactions between the same parties by virtue of each of which enterprises ceased to be distinct. In our view, therefore, the 11 December agreement can and should be treated as falling within the current reference. This conclusion on the application of section 27(5) is unrelated to the discussion of the FTA newspaper mergers in paragraphs 5 to 13.

The UK or a substantial part of the UK

23. There remains therefore only the third limb of the jurisdictional test to consider. If we have jurisdiction, it must be the case that the merger will create or enhance a share of at least one-quarter in the supply of goods or services of any description in the UK, or a substantial part of the UK. As indicated, Archant told us that whether taken separately or together, the acquisition of the London Regionals Division does not affect a substantial part of the UK.
24. This is the first occasion on which the share of supply test has been considered in the context of a local newspaper merger. Moreover, the circulation and distribution areas of the titles transferred do not make up one single uninterrupted geographical area of the UK.
25. The question of what constitutes a 'substantial part' of the UK has been considered by the House of Lords in the context of local transport mergers, particularly in the

opinion of Lord Mustill in *South Yorkshire Transport Ltd and another v Monopolies and Mergers Commission and another* 1993 1 All ER 289. We recognize that the opinion of Lord Mustill in *South Yorkshire Transport* was concerned with the FTA, and not the Act, but we do not think that this diminishes the force of Lord Mustill's reasoning, which is as applicable to the Act as to the FTA. The most important points from Lord Mustill's opinion seem to us to be these. First, although 'substantial' is 'an inherently imprecise word', we would be wrong to adopt as its meaning something that is merely 'more than trifling'. Second, given that the meaning of 'substantial' is imprecise, there are several factors that may be taken into account in applying the test correctly, and that there is an element of judgement involved. Third, as a general guide, Lord Mustill stated that the part must be 'of such size, character and importance as to make it worth consideration for the purposes of the Act'.

26. In our view the area in which the titles comprised in the London Regionals Division as a whole are circulated or distributed is a substantial part of the UK. We have no doubt that collectively it constitutes a part of the UK that is worth consideration for present purposes. First, we note that in that area the population having attained the age of 15 years or more is 2,507,000. That is 5.20 per cent of the overall UK population over the age of 15 (the normal measure of newspaper readership). In itself, this makes the area substantial. We also note that the overall circulation and distribution area extends into Government Office Regions constituting 700 square kilometres of Inner and Outer London, or 44.6 per cent of the whole of Inner and Outer London. As a further measure of the significance of the areas in which the overall circulation and distribution takes place, we have noted that using the most recent figures the gross value added of the areas of London in which circulation takes place is £146 billion, being 89.9 per cent of the total gross value added for London as a whole. In our view this is a significant figure and a measure of the substance of the area in which titles of the London Regionals Division are circulated. Having regard to the significance of London in the economic life of the UK, figures of that size in relation to the London area are significant in relation to the UK as a whole. In this context we note that the gross value added of London as a whole is £163 billion and the gross value added for the whole of the UK is £851 billion.
27. We recognize that the circulation or distribution area of the London Regionals Division as a whole does not constitute an undivided geographic area. The question then arising is whether a divided geographic area could constitute a 'part' of the UK. In *South Yorkshire Transport* Lord Mustill focused on the meaning of 'substantial' rather than on the meaning of 'part'. Nonetheless, we believe that his approach to construction, outlined above, is very helpful in addressing the present question. In our view, and in the context of the Act, no useful purpose would be served by restricting the meaning of 'part' to an undivided geographical area. On the contrary, such a restrictive interpretation would be irrational and inimical to the purposes of the Act.
28. For example, a merger may well have effects within two or more specific localities. None of the localities, taken alone, could reasonably be regarded as a substantial part of the UK, yet the total geographical area would indisputably be substantial. If the localities happened to be contiguous, and the share of supply test in respect of the undivided geographic area, even if not in respect of each of the localities taken alone, the CC would have jurisdiction under the Act. However, the economic significance of the merger, in terms of substantial lessening of competition, could well be of the same order, whether or not the localities were separated. If a restrictive interpretation of 'part' were adopted, the CC's jurisdiction would depend upon a fortuitous factor, and mergers of sufficient importance to be worthy of investigation, and which were comparable to those that would be or had been investigated, would

escape investigation under the Act. We do not believe that Parliament intended such an outcome.

29. These general considerations are of particular relevance to newspaper mergers. It is of the essence of a local newspaper that it is circulated or distributed only locally. In itself, in many cases that area will not be significant and will not be a substantial part of the UK. Where newspaper mergers take place in adjoining areas, then competition concerns may arise, for example in relation to packaging and cross-selling of advertising. There is therefore some significance attaching to newspaper mergers taking place in adjacent areas and therefore in an area that might be represented as a single geographic whole. However, these are not the only competition concerns in local newspaper mergers. In numerous reports during at least the last ten years the CC has considered the competition consequences of local newspaper mergers at a series of levels including regional and national concentration—as indeed we do in this case. In many such cases the CC has had to consider the substantive competition significance of concentrations where the increase in concentration at regional or national level is the result of geographically dispersed acquisitions. This shows that local newspaper mergers that are geographically dispersed are nonetheless worthy of consideration for the purposes of the Act.
30. We conclude therefore that a ‘part’ of the UK can be a geographically fragmented area for the purposes of section 23(3) of the Act. We also conclude that in this case it is right to treat the overall circulation and distribution area of the London Regionals Division as a part of the UK. In addition to the matters discussed in paragraph 29 in relation to local newspaper mergers generally, we find that in this case there are other clear unifying factors. These are that the titles acquired represent a business or businesses that have been regarded as a single division and are acquired, commercially, as a single division with the aim of enabling Archant to compete more effectively for advertising across London.
31. Within the area of circulation and distribution of the London Regionals Division, the effect of the acquisition is that Archant has increased its overall circulation of weekly free and paid-for newspapers from 37.3 to 45.4 per cent. These circulation and distribution figures are the JICREG figures for the last six months of 2003 and represent circulation and distribution among members of the population aged 15 years and above. Therefore, the share of supply test is satisfied in this case.