**OECD Workshop on Procedural Safeguards in Competition Cases**

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# "RIGHTS OF THE DEFENCE" AND THE RULE OF LAW

Thank you for the invitation to speak today. I am very pleased to be here.

My subject is – in common with other sessions today – the rights of the defence. I am going to eschew particularity or specificity, because this is an international gathering; and it would be an error to be too parochial. I am quite sure we can discuss specifics later on today; or else on other occasions.

My aim, and I am conscious that I only have 15 minutes, is to identify and describe the tectonic plates that underlie the rights of the defence, which inform their content and their application. My thesis is going to be that the rights of the defence derive from the procedural side of the rule of law; or what Americans would call due process.

The problem with the rule of law is that it means many things to many people; and different people have different understandings. Some would say that the rule of law has a substantive content, and that human rights are underpinned by the rule of law. I am not going to disagree – but that is not an aspect of the rule of law that I am going to touch upon, at least not today.

Equally, some take a very narrow view of the rule of law. Professor Raz – who tried to teach me jurisprudence at Oxford, with only limited success – said that the rule of law was no more than those attributes that made law effective. Thus, a retrospective law infringed the rule of law because it is very difficult (save through the force of coincidence) to follow and obey such a law. I have a great deal of sympathy with Raz's exposition, but it is too narrow for my purposes.

The rule of law I intend to expound upon today turns on procedural due process. We should all be inspired by the words of Justice Jackson (of the US Supreme Court) in *Shaughnessy v. United States ex rel Mezei*:[1]

"Procedural fairness, if not all that originally was meant by due process, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. Insofar as it is a technical law, it must be a specialised responsibility within the competence of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which comprise substantive law. If it be conceded that in some way [the agency in the case could act as it did], does it matter what the procedure is? Only the untaught layman or the charlatan lawyer can answer that procedure matters not. Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures, than under our substantive law enforced by Soviet procedural practices. Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* consideration."

From this, three things are obvious and I would say true: <u>first</u>, this aspect of the rule of law is very much within the province of the judiciary; <u>secondly</u>, it is a value that remains

[1] 345 US 206 (1953), 224 to 225. On the extent to which procedural due process can appropriate soften substantive evil, see Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy*, Oxford University Press, 1st ed (1991).

fairly constant, whatever substantive norms we are concerned about; and, thirdly, it quite clearly underpins the rights of the defence.

Of course, the rights of the defence will underpin any court process. But, at least in the context of the civil court process – the private action between two private litigants – , it would be an error to speak of the "rights of the defence" because, of course, all civil litigation involves litigation between claimants and defendants who ought to be, and generally are, treated fairly and equally. So, in this context, the rights of the defence is too narrow a term, and due process is a better one.

Why does due process matter? It's not as easy a question to answer as one might think, particularly in a private, civil action. But the short answer, which is all I have time for, is that courts exist in civil cases to determine outcomes where the parties cannot agree. An outcome is imposed. And an imposed outcome on a party or parties is something that is, on a quite basic level, inimical to human freedom.

What is more, the outcome is often – indeed, usually – a retrospective one. I don't mean that the law is retrospective. It generally is not, and should not be. But the law is typically applied by courts to past facts.[2] The outcome involves resolving a past matter in dispute and the outcome is, at least to that extent, retrospective.

So courts tread lightly, even in civil cases. I am not going to go into the particulars of what constitutes due process, but the essentials are well-known. A right to hear the case against you. A right to put your own case, knowing what case you have to meet. A right to an impartial tribunal. A right to a reasoned judgment.

[2] There are limited exceptions, generally only partial. The injunction is one. The declaration another.

I mention “rights”, but it is important to note that the rule of law is a moral and not a legal value. It is, more or less imperfectly, embodied in the procedural laws of any given country, but no-one is perfect, and anyone who says that their nation has achieved the Nirvana of procedural perfection is deluding themselves. The rule of law is a value that we should aspire to. Hold that thought, because I will return to it. It goes to how we implement the rule of law in practical terms, and the importance of discretion.

So far, I have been talking of civil claims. It goes without saying that the criminal law (because it involves punishment and possibly the deprivation of liberty) goes beyond this.

But I don’t want to talk about litigation processes before courts, whether civil or criminal. All this has been a lead-up – admittedly a long one – to the role of regulators, including national competition authorities, and the extent to which the rule of law applies to them. And here, of course, the label “rights of the defence” is much more apposite, for the activities of regulators have definite targets, who are entitled to defend themselves. Moreover, regulators are not courts, but that means that their administrative actions are the subject of a form of judicial review that is itself going to be informed by the rule of law.

I want to make a number of points in relation to the rights of the defence and competition authorities:

(1) The extent to which the rights of the defence apply – their depth or intrusiveness, as it were, into the regulator’s processes – varies according to the precise function of the regulator. A regulator whose role it is to investigate and prosecute can reasonably expect the rights of the defence to be maintained

primarily by the court that hears the prosecution. A regulator whose role it is to investigate and decide the case under investigation will – for reasons that are obvious – be the subject of far closer scrutiny.

(2) Whatever a regulator's role, as an administrative body entrusted with certain powers by the state, the regulator will be subject to judicial review, the point of that judicial review to ensure due process. As I say, the depth or intrusiveness of that review will vary according to function. But courts must be astute to recognise that there are some questions in relation to which a regulator will be entitled to a wide latitude. Questions of policy – whom to investigate, which inquiries not to pursue, whether to accept a settlement – these are all matters on which a court will, or ought to, take a back seat. On the other hand, a decision to find a party guilty of a competition law infringement that they deny can expect a good, long, examination. That is so whether the process is labelled criminal, quasi-criminal or civil. The fact is an adverse outcome is being imposed, and with that power comes a responsibility that will be policed.

(3) The variety of circumstance in which the rights of defence apply means that it is dangerous to assume that the rule of law or the rights of the defence can be codified. Of course, we need rules to maintain consistency of outcome and approach. But there is a regrettable trend, these days, under the guise of articulating or entrenching the rule of law, to seek to narrow or confine it. The grounds on which decisions can be challenged can sometimes be laid down with depressing and counter-productive specificity. The reason is often to seek to restrict the reviewing court's room for manoeuvre. Such restrictions usually

fail, because exceptionally clear language is required to exclude the rule of law. Of course, it can be done, within the constitutional limits of the state in question. But even in the United Kingdom, with its firmly entrenched notion of Parliamentary sovereignty, which the courts absolutely respect, Parliamentarians will often shy away from overtly limiting the rule of law, not because they cannot do so but because of the political consequences of infringing a value that all of us, deep down, know really matters. So, I am not much concerned by this aspect of codification. Overt limitation is unlikely; and covert limitation generally cannot survive in the face of our stated commitment to the rule of law. The rule of law is strong not because it is legally entrenched, but because it is a value we all hold dear, even if we cannot articulate it very clearly.

(4) But codification is dangerous for another reason that I propose to spend a few moments exploring.

a. There is, in many books on the rule of law, a sense that rules are good and discretion is bad. Delete “discretion”, and insert “arbitrariness”, and I would not disagree. But I am not talking about arbitrariness at all. Rules, if they are too specific, are causative of just as much arbitrariness as a badly exercised discretion.

b. The point I am making is that the dichotomy between rules and discretion is a false one: both can be arbitrary.

c. It's very far removed from competition law but compare the rules of private international law contained in the Brussels Regulation and in the common law. The rules of common law – now, certainly in the case of jurisdiction, are coming back with a vengeance in the United Kingdom. They rely greatly on judicial discretion. The rules can be shortly stated; and the factors that will inform that judicial discretion are well-known (albeit not closed). Predictability is achieved in this way. A code that is overly complex, piling rule upon exception upon derogation upon special case – and I venture to suggest that is not a totally unfair description of the Brussels regime – has an excellent chance of achieving a high level of arbitrariness because the precise lines being drawn are always open to debate and disagreement.

d. Every rule has its "penumbra" of uncertainty; multiply the rules, and the uncertainties multiply also.

e. There comes a point in any dispute when rules need to give way to a decision-maker's application of those rules. Where the decision-maker's judgement (informed by and seeking to apply the rules) becomes the primary vehicle by way of which the rule of law is itself implemented.

f. To put the same point another way, it is an error – itself an infringement of the rule of law – to try to lay down through rules how a decision-maker should decide the particular case. There is an important line where the *ex ante* general rule-making must cease, and the *ex post* decision-making must begin. The critical importance of the rule of law is that it

informs – through its moral force – the *ex post* decision-making process of the regulator.

g. This, as it seems to me, is a matter of considerable importance to competition regulators. There is, even here, a trend to complexity, not (I think) out of a desire to push away the rule of law, but out of a desire to maintain the comfort blanket of rules which can be pointed to and where it can be said: "My hands are tied – I must do what the rules say".

h. I am afraid that is an insufficient answer, too reminiscent of Pontius Pilate.[3] Individual cases require individual treatment, and the burden of judgement – the proper exercise of discretion, if you like – cannot be contracted out of by the adoption of ever more specific rules.

The tectonic plates of regulatory decisions in the competition sphere cannot be controlled in this way. The issues are, if you like, too important for rules and we need to have regard to our higher values.

That is the challenge; and that is why the abilities and judgement of our regulators, so well represented in this room today, matter so much.

**Thank you for your kind attention.**

[3] Matthew 27:24 (King James' Version): "When Pilate saw that he could prevail nothing, but that rather a tumult was made, he took water, and washed his hands before the multitude, saying, I am innocent of the blood of this just person: see ye to it."