

**COMPETITION AND MARKETS AUTHORITY**  
**JUDICIAL REVIEW CONFERENCE 2023**

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**D I S C R E T I O N**

Sir Marcus Smith, President of the UK Competition Appeal Tribunal)<sup>1</sup>

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<sup>1</sup> The views I express are personal only. I should like to thank Amy Dunne, one of the referendaires at the CAT, for her assistance. All errors and any infelicities are entirely my own.

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## A. INTRODUCTION

1. Thank you very much for asking me to speak today. It is a particular pleasure to be here because, of course, the CMA and the CAT are well-known to each other, but mainly in the formal and adversarial setting of the courtroom. There is, inevitably and rightly, a certain tension between the CMA, the authority tasked with the protection and furthering of competition in this jurisdiction, and the CAT, the court tasked with reviewing that authority's decisions.
2. This invitation therefore comes from an organisation self-confident enough to invite someone to speak from an organisation that might be regarded – by a lesser body – as standing in opposition to the CMA. In truth our roles – although in tension – are complementary. I do not think that there can be a strong Competition Appeal Tribunal without a strong Competition and Markets Authority, and I think that the converse also applies.
3. So I thank you for giving me your time.
4. I am going to talk about discretion. I see discretion as a really important legal tool in decision-making in whatever type of body, but I am – unsurprisingly – going to talk about discretion in administrative bodies and in courts.
5. I am going to address the issues that “discretion” gives rise to under a number of heads. My first area of consideration is to articulate a problem. Not a problem with discretion – although discretion clearly does give rise to “issues” – but a problem with the counterpoint to discretion, namely rules. I am going to call this problem the problem of “accretion”.
6. I will then try to define what I mean by discretion which – when I tried to do, proved harder than I thought. Having done so – somewhat inadequately, I fear – I then try to unpack why discretion matters in our particular context, namely the proper regulation of competition law.

## **B. THE PROBLEM OF ACCRETION**

### **(1) An example from science**

7. One of the most satisfying things about science, I imagine (I am not a scientist – so I am imagining), is the process of building on the work of others to reach a better understanding of the world. Whilst the idea of “elementary particles” has been around since pre-Christian times, the notion of the “atom” is a construct of John Dalton in the 19<sup>th</sup> century. “Atom” derives from the Greek “atomos”, meaning indivisible or uncut, thus reflecting what Dalton and his contemporaries thought. And how wrong they were! Atoms, we now know, are but conglomerates of even smaller particles, and (in rough sequence, for this is no science lecture) electrons, the nucleus, protons and so on were theorised and then discovered. The process goes on, and we now have a veritable “particle zoo” of mesons and baryons, quarks and leptons, and the Higgs boson. Physics – and I suspect all true sciences – involve an ever-greater penetration into, and understanding of, the unknown.

### **(2) Law is not a science**

8. If law is a science, which I doubt, it does not work like this, although it appears to. The legal world, like the world of physical science, does undoubtedly accrete, acquiring complexity. But, I am going to suggest, it does so to a potentially malign end. As early as the second edition of what was then *Norton Rose on Civil Jurisdiction and Judgments*,<sup>2</sup> Professor Briggs was contrasting the common law with what was then the Brussels Convention.<sup>3</sup> He noted:<sup>4</sup>

Litigators live, in the language of the Chinese curse, in interesting times. Not so long ago an account of the rules which defined and regulated the jurisdiction of an English court could be set out and explained in a very small number of pages. If the defendant could be served with the writ, that was sufficient to found jurisdiction. If the court had jurisdiction, it would exercise it. If the defendant was outside the geographical range of the court’s jurisdiction, obtaining leave to serve him would be a little more involved; but by and large

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<sup>2</sup> 2<sup>nd</sup> ed (1993).

<sup>3</sup> The Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters

<sup>4</sup> At 1.

there was in operation a single set of rules which applied to all defendants alike, and in all actions *in personam*.

9. Discretion is a granting of freedom to the decision-maker, and we instinctively distrust it. One of the reasons rule-books get longer is because of a desire to control that freedom of action. The problem is that the general case (the rule) drives out the specific case (unless one creates an exception). Crafting general exceptions that are fit for purpose is difficult: either one has to create exceptions to exceptions; or one strays into an encroachment into civil liberty, by legislating for the specific case.<sup>5</sup> The former, but not the latter, difficulty is well illustrated by the Brussels I Regulation.<sup>6</sup> Although there is a general rule that defendants are sued in their state of domicile, there are a series of hard-edged exceptions, which render alternative outcomes mandatory. The rules become ever more complex, and the explanation of the distinctions that drive them ever longer. Again, Briggs' work is an excellent illustration. The second edition ran to a respectable 349 pages. The latest edition – the seventh<sup>7</sup> – reaches a remarkable 941 pages. And all this just on civil jurisdiction. Leave aside jurisdiction in other areas (like crime or international regulation, an area not well served by our text-books); and leave aside the equally weighty question of choice of law.
  
10. Much of this expansion is due to a desire to control – or eliminate – discretion. That is a matter I will be returning to. But there is, I anticipate, a second cause, which is treating law as if it were a science, and as if there were always greater truths to uncover. Sticking with private international law, take for example the jurisdiction clause: a supposedly simple device whereby parties can agree which court should have jurisdiction in a given dispute. Of course, one would expect such a subject to be accorded a chapter in a book on jurisdiction – as, indeed, occurs. But entire books are devoted to the subject.<sup>8</sup> Indeed, we even have books

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<sup>5</sup> Hence the hostility to so called “bills of attainder”, which are legislative acts directed to specific persons. The United States are very hostile to these. In the United Kingdom, less so, but either one must follow the route for private Acts of Parliament or else a special – hybrid – process for public Acts of Parliament, that have a private element. Most recently, we have seen this in the debates surrounding the Holocaust Memorial in Westminster.

<sup>6</sup> Regulation (EC) 44/2001; now the Brussels I Regulation “recast”: Regulation (EU) 1215/2012.

<sup>7</sup> Published in 2021 – less than 30 years later.

<sup>8</sup> See, for example, Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement*, 3<sup>rd</sup> ed (2015).

on specific types of jurisdiction clause.<sup>9</sup> I am not criticising the content of these books at all. Indeed, Joseph’s work is one that I have referred to, with great respect, many times both as a practitioner and as a judge. My point is more subtle, and more in the form of a question. Are we, as lawyers, emulating the physicists, and seeking an ever-greater penetration into and understanding of the unknown? Or are we mistaking the true function of law, which subsists not to explain the world around us at all, but rather to guide and control – in short, to regulate – human conduct in a manner beneficial to human beings generally.

**(3) One warning; and one point to explore**

11. The problem of accretion is a real one. Whatever the exact meaning of the “rule of law”,<sup>10</sup> commentators are agreed that law that strives to comply with the ideal that is the rule of law must be clear and must promote legal certainty.<sup>11</sup> Law that falls short of this is deficient, and deficient in a most serious way.
12. Moving away from the conflict of laws to a topic closer to home – the Chapter II prohibition – we all know that there is a jurisdictional limit in our ability to control abuses of competitive power. An undertaking cannot act abusively if they are not dominant. For the law to be clear, this jurisdictional threshold must be easy to understand and apply *ex ante*. A system that results in experts before a court giving evidence about whether or not the requirement for dominance is or is not met is not doing a very good job. That is my warning.
13. The point to explore – and which I will touch upon in a number of different ways in this paper – is the extent to which rules are wrongly pushing out discretion. That is by no means an easy question, which is why I am labelling it a point to explore. To put my own cards on the table,<sup>12</sup> I am uneasy about where we are presently drawing the line between rules and discretion. My concern is that we – courts, legislators and administrators – are showing a marked over-

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<sup>9</sup> Marshall, *Asymmetric Jurisdiction Clauses*, 1<sup>st</sup> ed (2023).

<sup>10</sup> Not, of course, a rule of law at all, but an ideal to which laws should aspire to.

<sup>11</sup> Raz, “The Rule of Law and Its Virtue”, in *The Authority of Law: Essays on Law and Morality*, 1<sup>st</sup> ed (1979).

<sup>12</sup> See my speech to the OECD Workshop of Procedural Safeguards in Competition Cases, “*Rights of the Defence and the Rule of Law*”, 22 February 2023, accessible on the CAT website under “Speeches”.

enthusiasm for rules in the place of discretion. Even putting the point even as tentatively as that, I am concerned that I am going too far. What I am saying here is very much intended to inform a discussion than to provide an answer.

## C. WHAT IS DISCRETION?

### (1) A basic definition

14. Chief Justice Barak (the former chief justice of the Supreme Court of Israel, and the writer of a book on *Judicial Discretion*) defines discretion as “the power given to a person with authority to choose between two or more alternatives, when each of the alternatives is lawful”.<sup>13</sup> That is not a definition I am going to better, but it is only a starting point, as Barak himself would acknowledge.
15. Barak differentiates between three sorts of “discretion”, two of which I (for reasons I will give) am not going to call “discretion”.

### (2) First negative definition: “discretion” in relation to factual findings

16. Was *X* present at location *Y* at time *Z* or not? This type of question comes before the trial judge every day, and I do not consider that judges exercise discretion when deciding questions of fact.<sup>14</sup> In this jurisdiction, judges swear an oath to “do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will”, and that is an undertaking we all take extremely seriously. I doubt if any judge, in this jurisdiction, would regard factual findings as in any way “discretionary”; and I imagine that there would be some concern if judges regarded factual findings in this way. Yet every judge will have been faced with conflicting evidence on a point of fact where they are torn, conflicted, about what the right answer is. Speaking entirely for myself, those cases where I could properly go one way or the other are the most burdensome and troubling, because one knows – or, at least, one cannot exclude the possibility – that a different judge, hearing the same evidence, might go a different way. So this area of decision-making meets Barak’s general definition

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<sup>13</sup> Barak, *Judicial Discretion*, 1<sup>st</sup> ed (1989), 7.

<sup>14</sup> Barak, I think, agrees: Barak, *op cit*, 13-14.

of “discretion”, but is not when fully considered discretion at all because we want the same factual outcome to pertain whoever the judge.<sup>15</sup>

**(3) Second negative definition: “discretion” in relation to norms**

17. A general rule – a norm – will have fringes of uncertainty, what Professor Hart called a “penumbra” of uncertainty.<sup>16</sup> It is the business of common law judges (where there is an absence of precedent, the process is somewhat different) to determine such uncertainties in the cases that come before them. Barak does call this a question of discretion:<sup>17</sup>

The question – and this is the hardest question of them all – is whether, in this third type of case, the judge has discretion. Is there a situation in which the judge stands before two normative possibilities, each of which is lawful in the context of the system? As we have already said, there are those who maintain that no such discretion exists, not even in the hard cases, since each legal problem, they claim, has only one correct solution. As I noted, I do not share this view. I will discuss this issue further.

18. I disagree that this is a case of “discretion”, for two (related) reasons.
19. First, although I do not contend that even hard cases have a single right answer, I do think that cases of “new law” (for that is what we are talking about) cannot properly be described as discretionary. There are better and worse answers, and judges, when they decide cases like this, are not simply exercising their own judgement (although they are doing that). In a mature legal system like ours, there is an informative *hinterland* on which judges, if they listen carefully, can draw. Call it the incremental approach of the common law, if you like; and that is certainly part of the answer. But there is more to it than that. History, and values held over time, and a mature and critical and sensitive reaction to errors made in the past, all contribute to this *hinterland*, of which the incremental approach is a part. Dworkin spoke of an imaginary judge of superhuman

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<sup>15</sup> That is why, of course, we have rules against bias and the appearance of bias. The judge absolutely must be impartial. That is also why we have rules of evidence, in order to constrain and limit the subjective exercise of judgment. Both of these topics are worthy of papers on their own, but I cannot go into them here.

<sup>16</sup> Hart, *The Concept of Law*, 1<sup>st</sup> ed (1961), 119ff.

<sup>17</sup> Barak, *op cit*, 16.



intellectual power and patience who accepts law as integrity, called Hercules.<sup>18</sup>

Hercules decides the next case like the next author in a chain novel:<sup>19</sup>

Law as integrity asks a judge deciding a common-law case like *McLaughlin* to think of himself as an author in the chain of common law. He knows that other judges have decided cases that, although not exactly like his case, deal with related problems; he must think of their decisions as part of a long story he must interpret and then continue, according to his own judgment of how to make the developing story as good as it can be.

If this is right – and I quite like the image of judges as chain novelists – then where judges “make” law, their choices can be good or bad according to some higher standard. That, I think, is inimical to discretion, even if the higher standard to which we are held is difficult to discern and controversial amongst even experts in their field.

20. I appreciate that, in this, I am coming close to the rejected view that judges “find”, but do not “make”, the common law.<sup>20</sup> But I am not embracing this heresy. I accept that judges make law. The common law is not something that is simply discovered by those judges clever enough to look for it. What I am saying is that judges are not exercising a discretion when articulating norms, because of this elusive higher standard. What they are trying to do is find the answer of “best fit” with what has gone before, and that is why the common law is well-described as incremental.
21. That leads me to the second reason why I do not accept that this is a case of true “discretion”. That is because, once the courts have “made” the law – after all instances of appeal are past, and the “new” law has “bedded down” – the discretion that formerly existed is no more. The frontier has moved on; the law has developed; and what was once a choice of some sort, has been reframed into an altogether harder rule-based bit of law.

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<sup>18</sup> Dworkin, *Law's Empire*, 1<sup>st</sup> (paperback) ed (1986) at 239.

<sup>19</sup> Dworkin, *op cit*, at 238-239.

<sup>20</sup> This is the notion that judges, in such cases, do no more than “declare” the common law. See Stapleton, *Three Essays on Torts*, 1<sup>st</sup> ed (2021) at 4ff.

**(4) An attempt at a positive definition of discretion**

22. So far I have defined discretion in negative terms by outlining what it is not. Much harder is the job of defining what discretion is, within the negative constraints I have considered.

23. Discretion in this sense amounts to a positively allocated “room for manoeuvre”, given to a decision-maker, where:

(1) There is no expectation that the decision made is “correct” or “incorrect” by reference to some idealised standard, as is the case with decisions of fact or decisions of law. In both of those cases – assuming my analysis is correct– there is some form of Platonic ideal against which these decisions can be measured, and found to be wanting.<sup>21</sup> By contrast, in the case of “true” discretion, it makes sense to say of a decision under review: “I disagree with this decision, but it must nevertheless stand”. That is very often the terminology used by appellate judges when reviewing the discretionary decisions appealed to them.

(2) There is no sense that an exercise of discretion renders a later, unrelated, decision more likely or less likely. Unlike with cases where a norm is clarified or further articulated, true discretion does not make law, but rather leaves the law unchanged and untouched.

24. I am not sure how far this attempt at a definition matches that of Barak, who says this:<sup>22</sup>

The second type of discretion concerns the choice among a number of alternative ways of applying a norm to a given set of facts. Frequently, a legal norm gives the judge the power to choose among different courses of action that are fixed in its framework. This grant of authority may be explicit, as when the norm is actually phrased in terms of discretion. The grant may also be implicit, such as when the norm refers to a standard (for example, negligence or reasonableness) or to a goal (such as the defence of the state, public order, the best interests of the child) or to a value (for example, justice, morals). In

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<sup>21</sup> Platonism affirms the existence of abstract forms (widely defined, so as to include properties, types, propositions, meanings, numbers, sets, truth values, etc), which are asserted to exist in a third realm distinct from both the sensible external world and from the internal world of consciousness.

<sup>22</sup> Barak, *op cit*, 14.

these situations the parties might agree amongst themselves about the facts, for example, that the trip in question was made at speed *X*, at time *Y*, and at place *Z*. They may also agree about the content of the norm. Thus, the parties all accept that the test for deciding the reasonableness of the behaviour is the reasonable person standard. The conflict between them concerns the application of this norm to the facts. In this example, the disagreement is about whether or not the driver, in the circumstances, was acting unreasonably or negligently.

25. I agree that goals and values articulated in broad terms are hallmarks of a discretion, for no-one is saying that discretion is arbitrary. Indeed, I am going to be saying very much the opposite – that discretion is not arbitrary, but is in fact (in the right context) consistent with the rule of law. So I am going to come back to goals and values.
26. Where I think I do disagree is with the notion that a reasonableness test is an example of a discretion. It seems to me that reasonableness is a rule of law that is applied to found facts, such that a judge making such a decision (applying established law to found facts) can entirely properly be held to account and where the proposition “I disagree with this decision, but it must nevertheless stand” does not hold good. Granted, there is a great deal of “penumbra” which allows reasonable persons – including judges – to disagree as to whether a particular outcome is “right” or “wrong”. But that is not a hallmark of discretion, merely a sign of the extremely difficult lines that need to be drawn by our courts, both at first instance, and on appeal, when considering non-discretionary outcomes.
27. A standard of reasonableness does, however, accord a degree of flexibility to the actor whose conduct is under review. Let us take the “reasonable driver”, or “reasonable surgeon” or whatever person is the measure of competence against which standard the defendant driver or defendant surgeon is measured in a claim for negligence in tort. The standard is intended to be flexible in terms of the conduct of the defendant – there are many ways in which one can behave competently – and not at the level of the court deciding as to competence. In other words, the actor is given the room for manoeuvre, not the court adjudicating upon that conduct.

28. Viewed in this way, is “discretion” best articulated as a granting of leeway to the person (whoever or whatever that person might be) whose conduct (widely defined, so as to include, decisions) is under review? It is to that question that I will now turn.

#### **D. DISCRETION DEFINED AS LATITUDE TO THE DECISION-MAKER?**

##### **(1) Judicial review**

29. Let me begin with an obvious area where the decision-maker is intended to be primary, with review secondary.

30. The whole point of judicial review is to enable judicial consideration of decisions of administrative actors without engaging in the substance. Thus, one achieves the necessary constitutional supervision of public authorities (by which I mean those bodies exercising public functions) without embarking upon a “forbidden appellate approach”<sup>23</sup> of substituting the court’s judgment for that of the administrative body, by separating the policing of process from the policing of substance.

31. Is this what discretion means? And if that is not what discretion means, why not? In short, is discretion, in the sense I am using it, no more than an expression of a “margin of appreciation” or “latitude” or “room for manoeuvre” accorded by a reviewing court to the decision-maker? I know that “margin of appreciation” has a related, and perhaps quite technical, EU meaning. I am not using the phrase in this sense, although clearly the term is related to what I am considering.

32. The question is a very important one, not least for the CAT. Much ink has been spilled on the question of the “standard of review” that should be applied in relation to various of the CAT’s jurisdictions. Generally speaking, the battle

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<sup>23</sup> The phrase coined by Lord Lowry in *R v. Secretary of State for the Home Department, ex parte Brind*, [1991] 1 AC 696 at 767. But there are many other ways in which the same point has been put.

lines are seen to be as follows: regulators in favour of judicial review; CAT in favour of on the merits review.

33. I do not think that this actually represents the position of either the CMA or the CAT, except as a somewhat grotesque over-simplification by those who ought to, but do not, know better.
34. I am going to suggest that equating judicial review with discretion is wrong; and that – at least, but certainly, in the competition law context – rigidly separating “judicial review” from “on the merits” review or appeal (whatever you want to call it) is, quite simply, creating a distinction where none can or should exist. To any CAT-watchers out there, these views should come as no surprise. But it is important to understand why I am expressing myself so trenchantly. I do so because I am confident that I am right on the point; and I want – so far as is possible – to drive a stake through the heart of what is a distracting waste of time for all concerned when “reform” to the competition law agenda is articulated.

**(2) Is there a true borderline between JR and OTM in competition law?**

***(a) Overview***

35. The points I make about what I am contending is the essentially non-existent borderline between “JR” (i.e., judicial review) and “OTM” (i.e., on the merits) are these:
  - (1) OTM, just like JR, respects policy decisions by the CMA (and, to be clear, other competition regulators).
  - (2) JR, like OTM, does not permit improper substantive invasion of rights.
36. I will take these points in turn.

**(b) OTM, like JR, respects policy decisions**

37. In an article now written over 10 years ago,<sup>24</sup> I emphasised the importance of the CAT avoiding the “forbidden approach” I have already mentioned, and I asked why, if that was the case, some decisions were reviewed OTM rather than JR.<sup>25</sup> I will come to that question in a moment. The point I want to make for the present is that when it comes to the sort of policy questions the review of which would amount to a second-guessing of the decision-maker’s judgment call, the CAT takes a step back, not a step forward.

38. I will cite again the three cases I cited in my article, because these points are so old, and so well-established, that even though they occurred in a different statutory context, they represent the CAT’s approach over the decades:

(1) In *T-Mobile (UK) Ltd v. Office of Communications*,<sup>26</sup> the CAT stated:

It is...common ground that there may, in relation to any particular dispute, be a number of different approaches which OFCOM could reasonably adopt in arriving at its determination. There may well be no single “right answer” to the dispute. To that extent, the Tribunal may, whilst still conducting a merits review of the decision, be slow to overturn a decision which is arrived at by an appropriate methodology even if the dissatisfied party can suggest other ways of approaching the case which would also have been reasonable and which might have resulted in a resolution more favourable to its cause.

(2) In *Albion Water Ltd v. Water Services Regulation Authority*,<sup>27</sup> it was suggested that the CAT can:

...whilst carrying out an assessment of the merits of the case, give due weight to a finding which is arrived at by an appropriate and reliable methodology, even if a dissatisfied party could suggest other ways of approaching the issue which would have been reasonable and which might have resulted in a resolution more favourable to its case...

(3) Similarly, in *British Telecommunications (Termination Charges: 080 calls) v. OFCOM*,<sup>28</sup> the CAT stated:

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<sup>24</sup> Smith, *Standards of Review and Appeal in Cases before the Competition Appeal Tribunal*, [2012] Comp Law 169.

<sup>25</sup> Smith, *op cit*, 173.

<sup>26</sup> [2008] CAT 12 at [82].

<sup>27</sup> [2008] CAT 31 at [72].

<sup>28</sup> [2011] CAT 24 at [230].

We consider questions of policy preference to be, par excellence, the sort of question where there is no single “right answer”, and we agree with the Tribunal’s statement in *T-Mobile* that the Tribunal should be slow to overturn such decisions. This is particularly the case here, where OFCOM is seeking to articulate policy preferences that are compliant with its statutory duties under the 2003 Act. We remind ourselves that these duties, which are broadly framed and clearly give OFCOM a measure of discretion, are duties imposed upon OFCOM itself and not on this Tribunal.

39. Appeals from OFCOM were OTM, and this was a time when there were a number of such appeals before the CAT. But the position would have been no different in the case of the OFT or its successor, the CMA.
40. I am going to put the same point differently, and frame it in the context of the CAT’s decision in *Meta Platforms Inc v. CMA*.<sup>29</sup> On one level, this is a terrible example, because this was a JR (as it has to be) of a merger decision by the CMA. So OTM does not get a look in. But the primary attack on the merger decision by Meta was a substantive attack on the decision, not a procedural one.<sup>30</sup> The attack failed, but not because of any difference between OTM and JR. The answer to whether a merger could be disapproved on grounds of a substantial lessening of dynamic competition lay in statutory construction (which, as a point of law, would be the same under OTM as under JR),<sup>31</sup> an understanding of the differences between static, potential and dynamic competition (again, terms of art that are difficult to articulate, but which are not JR/OTM context sensitive),<sup>32</sup> and a consideration of the market definition and analysis by the CMA of this particular market.<sup>33</sup> It is in this last area that one might expect the JR/OTM difference to manifest itself, but I do not consider that the substance of these parts of the decision would have been any different had the standard of review been OTM rather than JR; and I defy anyone to find a difference of approach between the CAT’s decision in *Meta* (JR) and *BGL (Holdings) Ltd v. CMA* (OTM).<sup>34</sup>

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<sup>29</sup> [2022] CAT 26.

<sup>30</sup> See the summary of the grounds of review at [19].

<sup>31</sup> At [24] and [38] to [40].

<sup>32</sup> At [25]ff

<sup>33</sup> See the decision generally, but in particular Sections B(5) to B(8).

<sup>34</sup> [2022] CAT 36.

41. That brings me neatly to the second point of non-difference, namely that JR, like OTM, does not permit improper substantive invasion of rights.

***(c) JR, like OTM, does not permit improper substantive invasion of rights***

42. JR finds its origins in simple, but important, decisions of administrative bodies, where process needs to be the control because the questions tend to be unanswerable in legal terms, because they involve value judgements. Where one has a very difficult question of weighing different and conflicting responses to an essentially straightforward question (“Do we build an airport here?”; “A nuclear power station, there?”; “A housing development in the field behind my house?”), the substantive answer is not to be found in the judicial mind. These are (small-“p”) political questions, with which judges should not engage substantively save where a legal error can be discerned.<sup>35</sup>

43. But competition law does not raise simple policy questions like this. Let us take your typical Chapter I or Chapter II infringement, which are reviewed OTM. Why? Because they are quasi-criminal in nature, and no-one should be exposed to quasi-criminal sanction without full judicial supervision. So, an administrative decision-maker, like the CMA, must be subject to “full” (i.e., OTM) review. Stepping back, I do question how far in terms of intrusiveness OTM is “worse” than JR. Moreover, OTM has one major advantage over JR, in that a defective decision can be “rescued”. If – my hypothesis – JR is not, in fact, less intrusive, this is an advantage which you get “for nothing” in the case of OTM reviews. Let me unpack these thoughts a little more:

- (1) The biggest difference between a trial and a JR is the approach to facts. In a trial, facts have to be proven. Granted, “facts” in competition law

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<sup>35</sup> Such legal errors may be straightforward errors of law or instances where the decision falls outside the range of reasonable outcomes so as to amount to an error of law. Formerly known as *Wednesbury* unreasonableness, after the decision in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*, [1948] 1 KB 223, this is as far as courts ought to go when dealing with this sort of value judgment. It is a moot point whether the level of complexity in law – and the concomitant loss of discretion – has rendered these essentially political decisions more susceptible of JR. These are questions of profound importance lying outside the scope of this paper, but which are related to the issues of discretion which do concern this paper.



cases have a very peculiar nature,<sup>36</sup> but nevertheless they have to be proven. In a typical appeal against a finding of infringement, the one thing that is rarely challenged is the factual foundation for the case.<sup>37</sup> CMA decisions find a myriad of facts, but they are typically taken as read in the appeal. To this extent, appeals look much more like JRs than OTMs.<sup>38</sup> Of course, one could say there is greater potentiality to hear evidence in OTM reviews than in JRs, but I do question the extent this is really a difference:

- (i) OTMs are not re-hearings. They typically have to be decided “by reference to the grounds of appeal set out in the notice of appeal”, which is the “prism” through which the appeal is seen, and a key control parameter. True, the standard of review is different: but, as I have already mentioned, the margin of appreciation afforded to the CMA is not that different (if at all) between JR and OTM.
- (ii) JRs will sometimes require evidence. In “normal” JRs, this is unusual, and *Meta* did not involve any oral evidence. But let’s take the (hypothetical) next merger decision of the CMA, turning on the effect of a merger on dynamic competition in certain markets. A finding of a substantial lessening of competition is liable to be hotly contested on the analysis, and one can imagine market definition being closely looked at. Now, that also occurs in OTM reviews, where market definition is often central. In an OTM case, the CAT will strive, even if the market definition is “wrong”, to uphold it: look at the consideration given to margin of appreciation in *BGL*.<sup>39</sup> There are many different ways in which a market can be defined. Provided the CMA’s approach is

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<sup>36</sup> A matter I cannot cover in this paper, but which is the subject of another paper to be delivered on 4 May 2023. However, the significance of section 58 of the Competition Act 1998 – which attaches a degree of bindingness on factual findings of the CMA – should not be overlooked. Given the wide-ranging nature of decisions, section 58 might have quite far-reaching potential.

<sup>37</sup> Of course, there are exceptions: the existence of an anti-competitive agreement may be challenged, and that will surely involve significant controversies of fact.

<sup>38</sup> The same is true of disclosure. Neither OTM nor JR reviews have disclosure, in contrast to private actions, where disclosure features considerably.

<sup>39</sup> At [46]*ff*.

methodologically sound, the CAT will accept it (even if the CAT might have preferred a different approach). Moreover, even if the method chosen falls outside the range of the reasonable, the CAT will nevertheless (using its OTM ability to re-make the decision) strive to uphold the decision if it can be upheld.<sup>40</sup>

- (2) JR and OTM part ways, to the detriment of the administrative decision-maker, where an error in the decision has been found to exist. Where such an error has been found, in JR the decision will almost certainly have to be remitted, whereas that is not necessarily the case in OTM. Look, again, at *BGL*, where (at [149]) the CAT found that there was a defective market definition, such that Ground 1 of the appeal had to succeed:

...we do not consider that Compare The Market's success in relation to Ground 1 necessarily means that the Decision is wrong. Market definition is a tool and the fact that it has been misapplied in this case, whilst this weakens the Decision, does not necessarily mean that the outcome found by the Decision is not correct.

- (3) Look, again, at *Meta*, where on the “substantive” JR grounds the CMA succeeded, only to fail on the “procedural” JR grounds. JR will almost always require remission in such a case, which is what happened here;<sup>41</sup> but that does not necessarily follow in OTM cases. Because the substantive decision can be re-made, procedural errors, which would be fatal on JR, can be “cured”.<sup>42</sup>
- (4) Competition challenges are usually highly technical, and this has a tendency to erode the differences between substantive error of law in JR and wrong on the merits in OTM. Take the CAT's decision in *British Telecommunications plc v. Competition Commission*,<sup>43</sup> which was a review, by the CAT, of a price control matter itself reviewed by the

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<sup>40</sup> See *BGL* at [143]ff, where the Tribunal re-does the market definition.

<sup>41</sup> The argument about whether remission could be avoided was never had. *Meta* and the CMA agreed the consequences of the CAT's decision, which involved a re-taking of the decision by the CMA. See, also, the *Eurotunnel* litigation, where the same decision was taken twice over.

<sup>42</sup> See *British Telecommunications plc v. Competition Commission*, [2012] CAT 11 at [218] to [221].

<sup>43</sup> [2012] CAT 11.

Competition Commission. Essentially – and I won't go into a very recondite process – OFCOM's decision was reviewed OTM by the Commission, whose decision could only be set aside by the CAT on judicial review grounds. The CAT's decision – which but for the fact that it is both long and highly technical, I would recommend reading – shows just how the distinction between JR and OTM is really without a difference in these highly technical cases. It is very hard to capture why technical questions erode the distinction in the way they do, but the point is best illustrated in Vodafone's attack on the Competition Commission's simulation model for prices.<sup>44</sup> The model was attacked on JR grounds essentially because it failed to reflect sufficiently or properly the "real" world. That, of course, is a deficiency any model will have – and is not a proper source of criticism. At [266], the CAT said this:

It goes without saying – but it is nevertheless extremely important that it be said – that the construction of a model involves the exercise of judgement of a high order, both in terms of selecting what data is to be input into a model, and then in defining how that data interacts so as to produce an output.

Any criticism of the model would fail unless it could be shown that the model was deficient; that that deficiency could be improved upon; and that the Competition Commission had failed unreasonably to adopt such a solution:<sup>45</sup>

(2) The Commission quite rightly accepted that when considering the construction of a model, a model could only ever hope to be an approximation of reality. In short, no model can, ever, perfectly reflect reality. This is important when considering appeals in relation to models. It is not enough for an appellant to say that a model is an imperfect reflection of reality. That is a truism that take the argument no further. An appellant must do more than that and show that the model is deficient in the sense that a different model could better approximate reality. We doubt very much that such a point can be made good simply by showing (still less, merely by contending) that the model imperfectly reflects reality: we consider an appellant would have to state specifically and in good time how the model could be rendered a better approximation of reality.

(3) Where an appellant is able to demonstrate this, it may be that an appeal can succeed on the merits. However, that will not necessarily be the case.

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<sup>44</sup> At [236]ff and [258]ff.

<sup>45</sup> At [279].

As the Commission recognised, the construction of a model involves judgment. Many, many different ways of modelling a situation may suggest themselves, and each may have advantages and disadvantages. In short, there may be many “right answers” (or, more particularly, many models that are similarly “bad” at approximating reality), and a decision-maker like OFCOM will have to choose one out of these many. We consider that the Commission was entirely right in being slow to criticise OFCOM for picking one particular model out of many potential alternatives.

Although these remarks are directed specifically at modelling exercises, they are of general application to complex questions. Where there are different methodological approaches to difficult questions, the decision-maker is going to get serious latitude, whether the review is JR or OTM.

### **(3) Conclusions on this point**

44. I have – I apologise – come some way off topic. My topic, I remind myself, was “discretion”, and I was considering the extent to which discretion could actually be understood through the prism of the standard of review. The lighter the standard of review, the greater the discretion. Whilst I suspect there is something in this in “ordinary” cases of JR, where the issue under review is simple in how it is expressed, but extremely complex in how it is resolved, my sense is that in competition cases the difference does not exist so clearly.

45. Competition cases throw up extremely complex and technical questions of extraordinary importance. The complexity and technicality of the questions erode – I would say to vanishing point – the difference between OTM and JR when it comes to technical, substantive, questions. And, I would suggest, the role of discretion, in the sense I have described it, in such cases is vanishingly small, if it exists at all:

- (1) I do not believe that the hard questions in competition law infringement – “market definition”, “dominance”, “by object” and “by effect” collusion, “abuse” – are discretionary questions at all. I consider them to be hard questions – but not hard-edged, unfortunately – that are either not discretionary because they consist of factual findings<sup>46</sup> or not

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<sup>46</sup> See [15] above.

discretionary because they are applying norms<sup>47</sup> or not discretionary because they amount to a combination of the two.

(2) What is more, I do not believe that the CMA even comes close to regarding these questions as discretionary when making these decisions. I think that the CMA sees its duty as one of getting these questions right. In other words, when considering market definition, the CMA does not ask itself “What is the range of acceptable processes to define the market?”, and then pick one essentially at random. Of course it doesn’t. The CMA goes for the right answer, not for one that lies within its “margin of appreciation”.

(3) The “margin of appreciation” comes later, on review. Whether on JR or OTM, the CAT accords great respect to the CMA’s decision precisely because the CMA is trying to get difficult questions right. And because they are difficult, and because “right” answers involve a question of judgement, the margin of appreciation exists. The CMA, as competition authority, has the expertise and the economic and investigative capability to be accorded this respect. But that respect arises not because of any “discretion”. The term “margin of appreciation” is far better; but that margin of appreciation is no wider on JR than it is OTM.

46. So my conclusion – so far as substance or substantive questions are concerned – is that discretion in the manner I have defined it does not exist. The CMA takes its decisions on a right/wrong basis and it is because of the judgemental quality of these decisions, by an expert authority, that the margin of appreciation exists at all.

47. Is that the end of the story? Of course, it is not. I have been very careful to confine my limiting of discretion to the substantive and not the adjectival. Process is adjectival, not substantive, in its nature. That is to say, substantive law defines outcomes; adjectival law defines how outcomes are reached. When it is put this way, one wonders why adjectival law is relegated to the backwaters

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<sup>47</sup> See [16]ff above.

of law courses. It is of quite fundamental importance generally. And it is here, I am going to suggest, that discretion finds its true articulation and free rein.

## **E. DISCRETION AND PROCEDURAL LAW**

### **(1) The importance of procedural (or adjectival) law**

48. English lawyers – particularly English universities – relegate the laws of evidence and procedure to the academic backwaters, if they are taught at all. I spent a happy year at the University of Munich, and to the extent I managed to escape the clutches of the Biergarten, I learned that many German academics teach substance and procedure together because they (rightly) appreciate that process informs outcome. So my first point is that procedural due process (“due process”, for short) really does matter; and the interaction between substantive outcome and procedural due process is one that we pay insufficient regard to.

49. We should all be inspired by the words of Justice Jackson (of the US Supreme Court) in *Shaughnessy v. United States, ex rel Mezei*:<sup>48</sup>

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.

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<sup>48</sup> 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).

50. I am going to suggest that the manner in which process is determined, and so outcomes, has the following characteristics:

- (1) First, what constitutes due process is decision-maker specific. By this, I do not mean that some decision-makers are “let off” the rules of due process, whereas in other cases those rules apply with full effect. If you are a public decision-maker, the price you pay (and you should pay it willingly) for the privilege of taking the decisions you are empowered to make is review of your process. What I mean when I say the due process is decision-maker specific is that the precise nature of the process – what process is appropriate – is coloured by the nature, role and function of the decision-maker.
- (2) Secondly, due process is an area where discretion – in the sense I have defined it – ought primarily to hold sway. Rules are not helpful.
- (3) Thirdly, and in counterpoint to the second point, due process is the very reverse of arbitrary. It is not rule-driven, but the discretion is informed by values (not so much goals) which derive directly from the rule of law.

Let me go through these three points in turn.

**(2) Due process is decision-maker specific**

51. A Secretary of State deciding a matter of policy will decide that matter fairly and in accordance with due process in a manner very different to the (similarly fair) processes of a court of law. Court processes are generally (and perhaps excessively) circumscribed by rules of process. There are formal pleadings; rules as to disclosure and the adduction of evidence; formal hearings, and the like. Subject to any specific statutory procedural rules (which, as I have indicated, are becoming more common: consider the judicial review over the third runway at Heathrow airport), our hypothetical Secretary of State does not have to jump through these hoops, not because the process of decision-making in the executive is intrinsically unfair – it is not – but because the nature of the process is inherently different.

52. In the competition context, this (somewhat trite) point was made clear in the first Eurotunnel decision, where it was suggested that the Competition Commission had acted in breach of the rules of natural justice in failing to disclose all of the material it was acting upon to all persons interested in the outcome. That contention received short shrift.<sup>49</sup> The CAT articulated the following broad propositions:

167. We consider the following propositions to emerge from these authorities:

(a) There is a general duty on administrative bodies to act in a procedurally fair way.

(b) What is “fair” is something that is not immutable: it may develop over time in order to adapt to or take account of changing circumstances. It is certainly context sensitive. Above all else, it is a standard that is flexible. By this, we do not mean that the standard of fairness can be sacrificed: in that respect, the rule is much closer to an absolute. However, what is, or is not, “fair” in a given case depends on all of the circumstances. What can be said with confidence is that one standard does not fit all cases.

(c) The standard of fairness has many aspects, one of which – and this is the aspect with which we are principally concerned at the moment – is that a person affected by a decision is entitled to have an opportunity to make representations. That, in turn, means that such a person must know the case against him or her.

(d) As, no doubt, is the case with all aspects of natural justice, this right to make representations is coloured by many factors. These, without seeking to be exclusive, include:

(i) The statutory framework within which the tribunal operates. Of course, some tribunals (albeit not the Commission) do not operate within a statutory framework at all, and are governed only by the common law. However, the important point to note is that statutory frameworks can be supplemented, and are to be read in the light of, the common law. As was noted in *Lloyd v McMahon*, [1987] 1 AC 625 at 702-703, “it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness”.

(ii) Other aspects of context, including in particular the nature of the investigation.

(iii) The significance of any individual item of information in the context of the investigation.

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<sup>49</sup> *Group Eurotunnel SA v. Competition Commission*, [2013] CAT 30 at [124]ff.



168. There remains the question of how issues of procedural fairness are to be determined. What constitutes a fair process is one for the court (or, here, the Tribunal) as a matter of law. That said, the process taken by the administrative tribunal is entitled to great weight. It is the administrative decision-maker, and not the reviewing court, that stands in the front line when assessing what is procedurally fair, and (to descend to the specific) the Tribunal should be slow to second-guess decisions of the Commission in terms of what needs to be shown to an affected party, how confidential certain material is, and how best to protect the confidentiality in that material. We have well in mind the statement of Lloyd LJ in *R v. Panel on Take-Overs and Mergers, ex parte Guinness plc* [1990] 1 QB 146 at 184:

“Mr. Buckley argued that the correct test is *Wednesbury* unreasonableness, because there could, he said, be no criticism of the way in which the panel reached its decision on 25 August. It is the substance of that decision, viz., the decision not to adjourn the hearing fixed for 2 September, which is in issue. I cannot accept that argument. It confuses substance and procedure. If a tribunal adopts a procedure which is unfair, then the court may, in the exercise of its discretion, seldom withheld, quash the resulting decision by applying the rules of natural justice. The test cannot be different, just because the tribunal *decides* to adopt a procedure which is unfair. Of course the court will give great weight to the tribunal’s own view of what is fair, and will not lightly decide that a tribunal has adopted a procedure which is unfair, especially so distinguished and experienced a tribunal as the panel. But in the last resort the court is the arbiter of what is fair. I would therefore agree with Mr. Oliver that the decision to hold the hearing on 2 September is not to be tested by whether it was one which no reasonable tribunal could have reached.”

In short, whilst it is for the Tribunal to decide what is and what is not fair, the Commission’s approach should be given “great weight”. We consider this is reflected in the case-law, which repeatedly emphasises that, when considering what is procedurally fair, one size does not fit all.

53. You will note that *Wednesbury* unreasonableness has crept in. But I suggest that what is *Wednesbury* unreasonable in the context of substance is very different to what is *Wednesbury* unreasonable in the context of process.

54. That brings me, nicely, to the question of discretion versus rules.

### (3) Discretion versus rules

55. There is a regrettable tendency in our law to seek to nail down process in legislation, often primary legislation. We have seen in two relatively recent appeals (I use the word widely) to the CAT how very narrow statutory words results in outcomes that are – if I can be a little unspecific – “undesirable”. Let

me take first, *Apple Inc v. CMA*,<sup>50</sup> a case I am going to say very little about, because it may go onto appeal, and I understand why. There is a tension between the very specific – and pretty convoluted – statutory processes and what was (if I may say so) a fairly common-sensical decision by the CMA to conduct a market investigation. The problem is, statutory process trumps the sensible exercise of what would otherwise be a discretion every time. We can interpret statute purposively and with a sensible objective in mind, but at the end of the day purposively construed rules do not work as well as discretion. *Meta v. CMA* is the other example where massive procedural over-regulation caused more problems than it solved.<sup>51</sup>

56. There is not a lot either the CMA or the CAT can do about procedural over-regulation. We are both rule-takers, not rule-makers. But there are a number of reasons why process ought to be discretionary in the sense I am using the term. In other words, I am suggesting that there be a rule-free zone in terms of how the CMA (and, to a lesser extent, the CAT<sup>52</sup>) reaches its decisions on the following grounds:

- (1) Rules invite challenge, and not in a good way. The whole point about due process is that it thrives on careful flexibility; the moment one has a hard-edged rule, any person opposed to the substantive outcome is given a weapon. Say you are given 14 days to file a response to a statement of objections. Those 14 days become a right, which cannot be reduced (save by carefully reasoned decision), but which can be increased unless (again, by carefully reasoned decision) the extension request can be denied. Rules generate litigation. Of course, they also generate certainty, but my suggestion (and I accept it is controversial) is that this certainty is too much like the rules/exceptions to rules/exceptions to exceptions regime of the jurisdictional rules in private international law that I

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<sup>50</sup> [2023] CAT 21.

<sup>51</sup> [2022] CAT 26 at [130].*ff.*

<sup>52</sup> The reason I am drawing the distinction is because of the distinction between an administrative investigator and decision-maker (the CMA) and a court (the CAT), which (to whatever standard, JR or OTM) reviews but does not investigate. Court processes, because the issues are easier to define and because they are retrospective and not prospective are far easier to render rules-based than investigative processes.

referenced at the outset of this paper. Yes, a *forum non conveniens* /*forum conveniens* discretion is – articulated as such – intrinsically less certain. But stabilise the playing field – keep the law the same for a few years – and practice will make good the uncertainties in the rules. What I am advocating for is really a non-accreting discretion, where the values that inform it are articulated over time, but where rules (whether statutory or judge-made) do not encroach upon discretion properly so-called.

(2) The investigative and decision-making processes in which the CMA, in particular, is involved, are enormously complex. Courts do not even come close to the difficulties faced by the CMA in framing the scope of an investigation; in working out whether – within that scope – there is, in fact, something to investigate; and then, if there is something to investigate, reaching a fair and proper decision on the materials available. Court processes are nicely retrospective. We look back on the decision – now fixed and immutable – and adjudicate upon the various attacks made (also after the event) by the challengers to the decision. The rules of process ought to be appropriately flexible, and governed by a value-based or guidance based regime, with a true margin of appreciation, in a broad rules-based framework. I cannot discuss this – because there is no time – but this has been tried before, both by the SRA in the regulation of solicitors and in some areas of financial services. In both cases, the “principles” began to look very much like rules very, very, quickly. Accretion is very hard to avoid.

57. Be that as it may, I am envisaging a procedural discretion, where various alternatives are available to the decision-maker, and where the choice as to process vests in the decision-maker (here: the CMA), subject to court control, and where that control respects the discretion. Call it *Wednesbury* unreasonableness if you wish, but the control is value-based, and it is to that which I now turn.

**(4) The rule of law: control of arbitrariness**

58. It seems to me that there is sense in substance being rules-based, with process being discretion-based. Substantive matters ought to be – so far as possible – hard-edged. “I am entitled to this.” “You cannot do that.” This is, I think, an essential aspect of what I am going to call the substantive rule of law (to go with substantive due process). This paper is not very concerned with either the substantive rule of law or substantive due process. This paper is, however, very concerned with procedural due process, and the procedural aspect of the rule of law.
59. The rule of law has many exponents, and I am not (at least on this occasion) going to become one of them. Most books on the rule of law have passages equating discretion with arbitrariness.<sup>53</sup> But read those passages carefully, and I think you will see a distinction – at least an implicit one – between substantive right and process. At the beginning of his Chapter 4, Bingham says that “Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion”, and I agree with that. But questions of legal right and liability are substantive questions, which (as I have already said) ought to be hard-edged, and not discretionary. Even Bingham concludes that “[t]he rule of law does not require that official or judicial decision-makers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered.”<sup>54</sup>
60. I agree with this, also – but I am going a little bit further and saying (and I am not sure Bingham would have agreed with this) that in the realm of process discretion can be rendered non-arbitrary if it imports the values and goals of the procedural aspect of the rule of law.
61. So, what are those values and goals? Let me begin with an articulation of why due process matters. The short answer is that it matters a great deal where an

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<sup>53</sup> See, for example, Bingham, *The Rule of Law* 1<sup>st</sup> ed (2010) at 48ff.

<sup>54</sup> Bingham, *op cit*, 54.

outcome is imposed. An imposed outcome on a party or parties is something that is, on a quite basic level, inimical to human freedom. Both the CMA and the CAT are very much in the business of imposed outcomes, and special responsibilities attach. What is more, the outcome imposed is often (save in the case of *ex ante* controls) a retrospective one. I do not mean that the law is retrospective. It generally is not, and should not be. But the law is typically applied by the CMA and the CAT to past facts or infringements.

62. So, it behoves us to tread with some care, and to have regard to the very great responsibilities we have. 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. A right not to incriminate yourself.
63. I mention “rights”, but it is important to note that the rule of law is a moral and not a legal value. The word “rights” implies rules. I am talking about “values”, but it is very difficult to speak of the “value against self-incrimination”. Equally, it is very difficult to avoid the label “rights of the defence”, which is a label often used in these areas, but similarly inaccurate. My point is that processes matter and make a difference only if you understand why it is they matter. Substantive rights are a very different kettle of fish, in that a right you have, but I may not value, is a right nonetheless. Due process is not a right in that sense, but something that we owe ourselves, as a society that aspires to be just and fair. And justice and fairness are values not very susceptible of incorporation into black-and-white rules.
64. To conclude on this aspect, 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) But that scrutiny ought, primarily, be in relation to the substantive outcome, allowing infelicities of process (to the extent they arise) to be cured, unless they are so undermining of the investigative process of the competition authority that cure is impossible.
- (3) Process ought to be the servant of the outcome, not its master. That, let me be clear, is not a “get out of jail free” card, but a very onerous responsibility, all the more onerous because it appears to be unfettered. I know why we like rules. They provide us with a spurious, “computer says “No””, justification for our conduct. The point about a value-informed discretion is that it is hard, not easy, to get things procedurally right. But it matters, because process affects outcome. The servant is a powerful one.

## F. CONCLUSIONS

65. This conclusion was written after the paper above was presented, and takes account of the interesting discussions that followed. I want to reiterate my gratitude to the CMA for inviting me to speak. As ever on occasions like this, I fear that I have learned more than I contributed.
66. In light of these discussions, I am going to try to pull together the threads:
  - (1) Discretion is a very hard to define. It needs to be distinguished from questions that are simply hard. Hard factual questions and hard legal questions may well suggest a range of answers, all of which the decision-maker is entitled to take, but where there nevertheless exists some answers within that range that are – and can be said to be – better than others and where (if this can appropriately be discerned) the better answer ought to prevail over the answer that is legitimate, but less good.

- (2) Discretion does not crystalize. The range of options open to a decision-maker remains similarly wide each time a decision of that type emerges for determination. This is unlike those cases where judges make law: there is, in such cases, a crystallisation or narrowing of future decision-maker's latitude.
- (3) The review of decisions of an administrative decision-maker by a court will be different according as to whether a discretion is or is not in play:
  - (i) Take the case where the CMA is making a "hard" decision (say a question of market definition), where reasonable persons could differ as to the right answer. The CMA will – or ought to be – given a margin of appreciation not because it has a discretion, but because it is hard to discern whether the answer the CMA has reached is right or wrong. The CMA ought – as the expert regulator – only to be corrected when it is wrong. Not when the reviewing Tribunal considers that it would like to do things differently.
  - (ii) Contrast the true "discretion", where there is a genuine choice – policed by the courts – as to how to proceed.
- (4) I am not suggesting that the borderline I have articulated is clear-cut; nor that it will necessarily make a difference in terms of court-intervention. But it does seem to me important to understand why, in any given case, a court is intervening.
- (5) I have suggested that, in competition cases, the distinction between JR and OTM is without a difference. I am not going to repeat my thinking, but it is important to stress that I am not ignoring or riding rough-shod over the distinction. The JR / OTM distinction is rooted in our legislation and the CAT will – in accordance with its duty – apply the law. The point I am making is more subtle: it is that although – in the non-competition world – the difference between OTM and JR is stark indeed,

those differences are eroded to vanishing point because of the nature of competition and decisions that are made in relation to competition law.

- (6) The consequence of this is that spending time debating – in the competition law context – which is the better standard, rather misses the point that they are both rather similar in nature and operation, save for the ability (in OTM cases) for the court to “re-make” the decision. But, even here, the difference is in practice slight: although the legal ability in the court to re-make a decision exists in OTM cases, the CAT’s inability to conduct investigations (which is not an ability it can or should have) acts as a significant practical constraint.