

# **Foundations of Judicial Deference**

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# 1 Locating Deference

- Analytical and normative clarity demands that we are cognizant of the different contexts in which the issue of deference can arise
- This inquiry is, in turn, dependent on an understanding of the structure of grants of power/duty to administrative authorities. All such grants of power can be expressed in the following terms:
- ‘if X1, X2, X3 .... XN exists, the administrative agency may or must do Y’.
  - Must be a minimum of one X condition, no a priori upper maximum – the number of X conditions in, eg, Article 101 TFEU is considerable
  - Example: if an employee is injured in the course of employment, the agency may or must grant compensation
  - 3 X conditions: existence of an employee, an injury, which occurs in the course of employment; must or may do Y, grant compensation
  - The X conditions can, in principle, consist of law, fact or discretion

## 2 Deference at the X Level: Issues of Law

- Many legal systems, particularly in civil law countries, do not accord administrative agencies any deference in relation to issues of law at the X level.
- Conceptual and normative assumption: ordinary courts can and should substitute judgment on the meaning of the legal terms that condition the exercise of power by administrative agencies
- This is, also, the approach of the CJEU: it substitutes judgment on the legal meaning of the X conditions contained in Treaty articles, regulations, decisions, and directives.
- Pertinent example for this conference: the CJEU decides on the legal meaning of the X conditions in Art 101-102 TFEU: it decides on the meaning of concerted practice, decision, arrangement, abuse, dominant position etc. No deference to the Commission even though it has expertise.

## 2 Deference at the X Level: Issues of Law

- Some legal systems, particularly in common law countries, are however, willing to accord some measure of deference to the administrative agency in relation to issues of law
- Conceptual and Normative Assumption: courts should exert control over legal issues decided by agencies, but this does not always have to be by way of substitution of judgment
- Most famous example: US Chevron Test: 2 step test:
  - If Congress has spoken to the meaning of the term in issue, the reviewing court applies that meaning and substitutes this for any other legal interpretation made by the agency
  - If Congress has not spoken to the meaning of the term: then the agency meaning prevails subject to rationality review by the court

## 2 Deference at the X Level: Issues of Law

- Conceptual foundation for judicial deference in Chevron model: assumption that where Congress has not spoken to the meaning of the term in issue, it has therefore delegated this to the agency, subject to rationality review
- Tensions within this regime:
  - The interpretation of step 1 of Chevron is crucial, since you never get to step 2 if Congress has spoken to the meaning of the disputed term
  - Ongoing disagreement in the US SC as to way in which step 1 should be construed: narrow textualism v 'ordinary canons of statutory interpretation'; both are problematic, and both lead to paradoxical conclusions
  - Further tensions created by the existence of step zero: Mead doctrine; constitutional compatibility of Chevron –watch this space

## 2 Deference at the X Level: Issues of Law

- Conceptual foundation for judicial deference at X level over legal issues: the justification for according agencies a measure of deference concerning the legal meaning of issues at the X level does not have to turn on the criterion used in Chevron.
- It can turn on more pragmatic considerations, such as the relative expertise of courts and agencies to address the meaning of the particular legal term
  - Canadian functional model
  - UK model as it applies to tribunals
  - US model prior to Chevron

# 3 Deference at the X Level: Issues of Fact and Discretion

- Issues of fact or interpretive discretion can also arise at the X level: for example, merger control may be predicated on showing that the merger created or strengthened the position of the firm in the relevant market.
- Conceptual and normative assumption: general assumption is that courts do not feel the need to exert such tight control over factual or interpretive discretionary issues, as compared to questions of law. This is reflected in tests for review that are framed in terms of manifest error or substantial evidence

# 3 Deference at the X Level: Issues of Fact and Discretion

- Consequence: the very test for review, framed in such terms, carries with it some measure of deference to the primary decision-maker. Thus, provided that the facts withstand scrutiny for manifest error the decision will be upheld
- Qualification: it is open to courts to vary the intensity with which they apply tests such as manifest error, thereby tightening the control over the agency and commensurately reducing the extent of deference accorded to it.
- Exemplification: risk regulation, Pfizer etc; EU competition law the big merger cases such as Tetra Laval; in both instances manifest error accorded a much more muscular meaning



# 4 Deference at the Y Level: Substantive Discretion

- Conceptual and normative assumption: where an agency has discretion at the Y level, courts exercise control but not through substitution of judgment, since the agency is within its assigned area and the legislature has accorded it, the agency, within the discretionary power
- Consequence: control framed in terms of tests such as proportionality, rationality or arbitrary and capricious; such tests necessarily embody, by their very nature, some measure of deference to the agency determination

# 4 Deference at the Y Level: Substantive Discretion

- Qualification: each of the preceding tests can be applied with varying degrees of intensity of review, which, in turn, reflect the extent to which the courts are willing to accord deference/respect to the agency choice. This process may be express and transparent, or opaque and less transparent
- Exemplification:
  - EU: differing intensities of review with which proportionality test applied, compare Fedesa, Pfizer, Digital Rights Ireland
  - US: differing intensities of review with which arbitrary and capricious test applied, compare State Farm, Baltimore Gas, Fox TV