

The Court of Justice and Judicial Deference

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Warsaw
11 October 2018



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Introduction

Focus on:

- Intensity of judicial review of EU acts exercised by the Union Courts as administrative court on the basis of 263 TFEU.
- EU influence on the intensity of judicial review by national courts of national acts within scope of Union law, in response to preliminary questions on the basis of 267 TFEU.
- Convergence: the ECJ increasingly exports its standards of judicial review applied under 263 TFEU to judicial review by national courts of acts within the scope of EU law – procedural autonomy is vanishing.



No or hardly any judicial deference I: unlimited jurisdiction

- EU courts enjoy 'unlimited jurisdiction' when assessing competition sanctions (fines, penalty payments). They are allowed to:
 - '(...) substitute their own appraisal for the Commission's and consequently, to cancel, reduce or increase the fine or penalty payment imposed.' (KME, C-389/10P)
- N.B.: unlimited jurisdiction standard does not apply to judicial assessment of whether 101/102 TFEU were indeed violated – in this respect: legality review on Tetra Laval standard (see hereafter).
- Standard of unlimited jurisdiction probably applies to the assessment by national courts of competition sanctions for breaches of EU competition law and of other administrative sanctions of criminal nature in the scope of EU law, as well.
 - Requirement is based on Article 47 CFR.
 - Same level of scrutiny prescribed by ECtHR (f.i. Menarini) – binding for ECJ on basis of 52(3) CFR.



No or hardly any judicial deference II: strict legality review

- Applies to EU acts interfering with fundamental rights, in particular with interferences with the right to respect of private life (Article 7 CFR) and the protection of personal data (Article 8 CFR). See ECJ in Digital rights Ireland (C-293/12)
- *'the extent EU legislature's discretion may prove to be limited, depending on a number of factors, in particular, the area concerned, the nature of the right at issue, the nature and seriousness of the interference and the object pursued by it. In the present case, in view of the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference with that right caused by Directive 2006/24, the EU legislature's discretion is reduced, with the result that review of that discretion should be strict'*
- Standard of strict legality review applies to similar national interferences with Article 7 and 8 CFR as well (Case C-203/15 Tele2 Sverige).



Judicial deference I

Judicial deference in case of:

- Administrative discretion: balancing of different political considerations against each other
- Margins of appreciation: administrative authorities' leeway emanates from technical, scientific, economic or otherwise factual complexity of the matter under review.
- In reality: the ECJ uses these term interchangeably. No strict distinction.
- Three cases to illustrate the ECJ's approach.



Judicial deference II: Technische Universität München (C-269/90).

- Intensity of review of Commission customs decision based on a technical evaluation? ECJ:
- Deference as regards substance of decision:
 - *'It must be stated first that, since an administrative procedure entailing complex technical evaluations is involved, the Commission must have a power of appraisal in order to be able to fulfil its tasks'*
 - *Therefore ECJ is not allowed: to substitute its own appraisal of the facts for that of institution, but should limit its review to whether the decision is not vitiated by a manifest error of a misuse of power, or that the institution did clearly exceed the bounds of its discretion'*
- *Compensated by strict process review:*
 - *However, where the EC institutions have such a power of appraisal, respect for the rights guaranteed by the EC legal order in administrative procedures is of even more fundamental importance. Those guarantees include [...] the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (a), the right of the person concerned to make his views known (b) and to have an adequately reasoned decision (c).*



Judicial deference III: Tetra Laval (C-12/03P)

- Applied by EU courts in areas wherein EU institutions enjoy margin of appreciation for reasons of economic, scientific and technical complexity. As regards intensity of judicial review distinction between:
- Strict review of establishment of the facts: The EU Courts have to:
 - *'establish, amongst other things, whether the evidence relied on is factually accurate, reliable and consistent and also whether it contains all the information which must be taken into account in order to assess a complex situation [...]*'
- Restraint review as regards (substantive) appraisal of the facts, in so far complex economic questions are involved.
 - Is appraisal not vitiated by *'a manifest error or a misuse of power'* or did institution clearly *'exceed the bounds of its discretion'*.
 - Compensated by rather strict test of the reasons of decision: is information produced *'capable of substantiating the conclusions drawing from it?'*



Judicial deference IV: Fahimian (C-544/15)

Is this 'mixed' approach imposed on the national courts? Yes.

- Question: does a third country national applying for study visa represents 'a threat to public security'?
- Decision involves 'complex evaluations' of multiple factors: judicial review of substance decision limited 'to absence of manifest error'.
- Compensated by strict process review: The national court must:
 - *'ascertain [...] whether the contested decision is based on a sufficiently solid factual basis'. [...] 'judicial review must also relate to compliance with procedural guarantees, which is of fundamental importance', and which include 'the obligation for those authorities to examine carefully and impartially all the relevant elements of the situation [...], and also the obligation to give a statement of reasons for their decision that is sufficient to enable the national court to ascertain [...] whether the factual and legal elements on which the exercise of the power of assessment depends were present.'*
- No mention of procedural autonomy.



Result

In case of margins of discretion and appreciation the ECJ applies and requires the national courts to apply a mixed approach.

- Judicial deference as regards substance and the appraisal of the established complex facts leading to it: on manifest error, misuse of power, manifestly exceeding discretion.
- Compensated by strict proces review of:
 - Statement of reasons: are they capable of substantiating the substance of the decisions? (Tetra Laval, Fahimian)
 - Establishment of facts: examination must be carefull and impartial (TUM, Fahimian); evidence relied on must be accurate, reliable, consistent and complete (Tetra Laval).
 - Fact finding process: must comply with procedural safeguards, in particular rights of defense and probably other principles of good administration (cf. 41 Charter) (TUM, Fahimian).



Questions

- Right balance between ECJ's task to provide (and require) effective judicial protection on one hand and respecting the authorities' expertise in fulfilment of tasks delegated to it by legislator on the other?

My answer: at conceptual level yes.

- How strict is a strict process review? What entails a careful, accurate, consistent and complete examination?

To be discussed

