1. Introduction

The judgment of the European Court of Justice in case *Simmenthal 2*[1] belongs to the line of core constitutional cases that defined the process of constitutionalisation of EU law in the 60's and 70's of the XX century. The case is commonly understood as a functional follow-up to the developing doctrine of supremacy of EU law over national laws of the Member States. While in *Van Gend en Loos*[2] the Court of Justice established the doctrine of direct effect, in *Costa v. ENEL*[3] it expressed its understanding that EU law can not be overridden by subsequent national measures 'however framed', and in *Simmenthal 2*, it gave answer to the question what are the consequences of the fact that individuals can invoke rules of EU law against the State, such rules having a higher legal force than national legal rules.

The three cases have placed individuals and their individual rights in the centre of the discussion. Unlike in international law, individuals are subjects of the 'new legal order' and enjoy rights which national courts must protect (*Van Gend*). Such rights obtain regardless any subsequent national regulation (*Costa*), and 'render automatically inapplicable' any conflicting provision of national law (*Simmenthal 2*). Accordingly, it is a duty of national courts to set such conflicting rules of national law aside and protect individual rights that are conferred directly by the relevant rule of EU law[4], without requesting or awaiting a prior decision of any other national body having its own discretion, including the national constitutional court[5].

The last mentioned consequence – the duty of national courts to set aside national rules that stand in way of protection of EU law based on individual rights, without prior recourse to a national constitutional court – has fundamentally affected national systems of judicial review. Instead of a recourse to the national constitutional court, an ordinary judge acquired a mandate to resolve the issue of conflict of national law with EU law herself, possibly with interpretative guidance of the European Court of Justice in preliminary reference procedure. This duty of a national judge will be called the Simmenthal mandate[6].

1 Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA (Simmenthal 2)* [1978] ECR 629.

2 Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1978] ECR 1, English special edition.

3 Case 6/1964 *Flaminio Costa v. E.N.E.L.* [1964] ECR 585 English special edition, para 3: '... the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed...'. In German: '... aus alledem folgt, dass dem vom Vertrag geschaffenen, somit aus einer autonomen Rechtsquelle fließenden Recht wegen dieser seiner Eigenständigkeit keine wie immer gearteten innerstaatlichen Rechtsvorschriften vorgehen können.'

4 *Simmenthal 2*, above n 1, para 21: 'Furthermore, in accordance with the principle of the precedence of Community Law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but - in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States - also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.

5 *Simmenthal 2*, above n 1, para 24: '…a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.'

6 The expression 'Simmenthal mandate' was first introduced by M Claes. See M Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006).

While the doctrine of supremacy has not significantly changed since the '60s of the XX century, and has been upheld by the Treaty of Lisbon[7], the Simmenthal mandate has undergone an evolution. Today, it cannot longer be understood as a mere procedural prong of supremacy, but as a finely knit web of reflexive cooperation of national courts with the ECJ. In this paper In Chapter 2, I will *first* describe how the Simmenthal mandate softened, primarily by the development of doctrines of indirect effect and margin of appreciation. *Second*, in Chapter 3, I will discuss whether the Simmenthal mandate can be separated from the doctrine of direct effect and what are the practical consequences of such separation. *Finally*, in Chapter 4, I will try to demonstrate how the Simmenthal mandate affected the European judicial dialogue and possibly triggered a revival of national constitutional review.

2. Limits of the Simmenthal mandate

The original wording of the *Simmenthal 2* judgment immediately rose questions about the effects in national law. One question was whether the judgment, in effect, restricts regulatory powers of national parliaments and the other whether incompatibility with EU law affects the very existence of a national rule, or merely its applicability.

The first question was addressed by the ECJ in 1998, several years following the inauguration of the indirect effect doctrine. The ECJ went to soften the *Simmenthal* doctrine and clarified that supremacy of Community Law does not restrict regulatory powers of the Member States[8], and does not affect existence, but only application of a national legal rule[9]. That position is kept until this day as can be seen from the more recent *Filipiak* judgment[10]. The ECJ confirmed that the duty of a national court to set aside rules of national law incompatible with EU law does not depend on and is not affected by jurisdiction of a national constitutional court to rule on the constitutionality of the same rule.

However, while *IN.CO.GE* and *Filipak* represent internal limits to the Simmenthal mandate, doctrines of indirect effect and margin of appreciation impose systemic boundaries. The main proposition that I want to discuss in this Chapter is that the doctrines of indirect effect and margin of appreciation reduced the number of situations in which setting aside of national law was necessary. On the other hand, national judges acquired new responsibilities, namely to interpret national law in light of EU law and to enforce national margin of appreciation within the limits imposed by the Treaty[11] and being aware of the supervision exercised by the ECJ.

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7 The position of the ECJ is confirmed by the Declaration 17 Concerning Primacy to the Lisbon Treaty and the Opinion of the Council Legal Service: 'The Conference recalls that, in accordance with well settled case law of the EU Court of Justice, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260): "Opinion of the Council Legal Service of 22 June 2007: It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL,15 July 1964, Case 6/6411) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice."'

8 Joined cases C-10/97 to C-22/97 *Ministero delle Finanze v IN.CO.GE.'90 Srl* [1998] ECR I-06307, para 20.

9 *IN.CO.GE.*, above n 8, para 21: 'It cannot therefore, contrary to the Commission's contention, be inferred from the judgment in Simmenthal that the incompatibility with Community law of a subsequently adopted rule of national law has the effect of rendering that rule of national law non-existent. Faced with such a situation, the national court is, however, obliged to disapply that rule, provided always that this obligation does not restrict the power of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for protecting the individual rights conferred by Community law'; see also I Pernice, 'Costa v ENEL and Simmenthal: Primacy of European Law' in M P Maduro and L Azoulai (eds.), *The Past and Future of EU Law* (Oxford 2010) 47, 58.

10 Case C-314/08 *Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu* [2009] ECR 0000, para 84.

11 Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR 9609, para 31.

2.1. Indirect effect

Doctrine of indirect effect, as developed by the ECJ, establishes an obligation for national courts to interpret national law in line with law of the EU. The doctrine has its origin in the international law principle *pacta sunt servanda*. Arguably, the doctrine also has its roots in national legal doctrines of interpretation of national law in accordance with international law, such as the German doctrine of *völkerrechtsfreundliche Auslegung* or Lord Denning's doctrine in *Macarthys v. Smith*[12]. Both doctrines assume that it was not intention of the legislature to contravene international commitments and for that reason national rules have to be interpreted, as far as possible, in accordance with them.

The doctrine of indirect effect is based on similar assumptions. According to the doctrine, national law has to be interpreted, as far as possible, in accordance with EU law. The doctrine is justified by the duty of loyal cooperation (after Lisbon – sincere cooperation), laid down by what used to be Article 5 of the Treaty establishing the European Economic Community, later on Article 10 of the Treaty establishing the European Community and today Article 4(3) TEU.

The doctrine of indirect effect, was clarified by the ECJ in *Von Colson and Kamman*[13]. The obligation arising under original Article 5 of the Treaty, to interpret national law in such a way as to achieve result envisaged by a directive '… is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts.'

While the language of the ECJ was restricted to directives, there is no doubt that duty of cooperation applies to all obligations under the Treaties. This is even more clear after Article 4(3) of the Treaty of Lisbon re-phrased Article 10 EC and now refers to the '… tasks which flow from the Treaties' instead of the earlier one which referred to the 'tasks arising from fulfillment of Treaty obligations'. Chalmers, Davies and Monti consider the new phrase more open-ended and reaching even beyond Treaty obligations[14]. This is also confirmed by more recent case law of the ECJ which speaks more broadly about an obligation to interpret national law in conformity with Community law[15].

The doctrine of indirect effect, made the Simmenthal mandate a subsidiary obligation. It follows from the very logic of judicial deliberation that a national judge deciding a case, will first have to interpret national law, as far as possible, in accordance with law of the EU, and only if that is not possible, will have an obligation to set the national legal rule aside. The ECJ adopted a standing case law according to which it is for the national court to interpret and apply national law in conformity with the requirements of EU law, and where such application is not possible, the national court must apply EU law '… in its entirety and protect rights which the latter confers on individuals, disapplying, if necessary, any contrary provision of domestic law[16].'

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12 'If the time should come when our Parliament deliberately passes an Act – with the intention of repudiating the Treaty or any provision in it – or intentionally of acting inconsistently with it – and say so in express terms – then I should have thought that it would be the duty of our courts to follow the statute of our Parliament … Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty.' *Macarthys Ltd v Smith* [1979] 3 All ER 325.

13 Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para 26. See also Case C-106/89 *Marleasing* [1990] ECR I-4135, para 8; Case C-81/82 *Paola Faccini Dori v Recreb* [1994] ECR I-3325, para 26 ; Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, para 40; joined cases C-397/01 to C-403/01 *Bernhard Pfeiffer, Wilhelm Roith, Albert Süß, Michael Winter, Klaus Nestvogel, Roswitha Zeller and Matthias Döbele v Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, para 110; and Joined Cases C-378/07 to C-380/07 Angelidaki and Others [2009] ECR I-3071, para 106.

14 D Chalmers, G Davies and G Monti, *European Union Law*, 2nd edn (Cambridge 2010) 223.

15 See e.g. Case C-212/04 *Adeneler and Others v. ELOG* [2006] ECR I-6057, para 113.

16 Case C-208/05 ITC *Innovative Technology Center GmbH v Bundesagentur für Arbeit* [2007] ECR I-181, paras 68 and 69 ; see also Case 157/86 *Murphy and Others* [1988] ECR 673, para 11; Case C-262/97 *Engelbrecht* [2000] ECR I-7321, paras 39 and 40, and Case C-224/97 *Ciola* [1999] ECR I 2517, para 26.