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## The Court of Justice in the Archives Project
## Analysis of the *Simmenthal* case (106/77)

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**Academy of European Law**

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## Abstract

The present paper explores the *dossier de procédure* of the Simmenthal case, decided in 1978 and through which the CJEU empowered national courts to set aside domestic provisions being incompatible with EU law. The analysis of the *dossier* guarded at the Historical Archives of the EU in Florence, allowed for a deeper and more comprehensive reading of the parties' submissions and of the arguments presented before the EU judiciary. Furthermore, these original documents provided us with a clearer picture of the "legal context" in which the case was decided. The files showed an Italian government "jealous" of its constitutional prerogatives and a European Court ready to "seize the opportunity" to advance the integration process one step further. The *dossier* also confirmed the importance of lawyers in the evolution of the jurisprudence of the Court. The findings of this research can certainly be of interest for scholars working on history of the European integration process and Italian constitutional law.

## Keywords

Simmenthal; primacy of EU law; preliminary reference; national courts; European integration.

## Acknowledgments

I would like to take this opportunity to thank the academic and administrative staff of *The CJEU in the Archives* research project. This project has given me the unique opportunity to access the original files of this case—a ruling of pivotal relevance in the history of EU law—and to enrich my own work with some of the findings obtained from this research. It has been a pleasure to contribute to this project, which makes full use of the presence of the Historical Archives of the European Union (HAEU) on the premises of the EUI, as well as of the transfer of the original *dossiers* of the cases from the Court to the Archives, thirty years after each case is decided.

## Executive summary

The overall added value of the *dossier* is moderate. This for the following reasons.

### *A. Insights into legal issues and arguments*

The main arguments of the parties were already reported in the publicly available materials. The reasoning of the Italian government could probably be of some interest for Italian legal scholars. This is because it may allow them to identify more precisely the 'constitutional understanding' that Italian institutions had of the EU at that time. There are also some interesting references by the lawyers defending Simmenthal to the jurisprudence of the German Constitutional Court and to practical issues that the acceptance of the solution advanced by Italy would have implied. The *dossier* also adds clarity to the convergent lines of reasoning of Simmenthal, the Commission, the Advocate-General and the Court.

### *B. Insights into procedures and institutions*

The present author did not discover any major insights into procedures and EU institutions. Researchers may find some interesting features with regard to national institutions. In this respect, please see point A above.

### *C. Insights into actors*

An interesting aspect worth consideration, already noted in other cases and confirmed in *Simmenthal*, is the role played by lawyers and practitioners in the development of EU law. Indeed, the reasoning advanced by Antonio Tizzano (quite young at that time) and his team was followed to a large extent by AG Reischl and the Court. This is something that was possible to grasp only by accessing the *dossier de procédure* of the case.

### *D. The* dossier *as a document (compared to the judgment): length, contents, redaction*

If we compare the *dossier* to the judgment, we find that the latter is quite short and presents less in-depth reasoning. The Court disregarded some of the arguments advanced by the parties, especially the ones that referred to the case law of national constitutional courts and to practical issues that domestic lawyers would have faced if the solution put forward by the Italian government had been followed. On this point, *Simmenthal* confirms what is already known in legal scholarship on the judicial reasoning of the Court of Justice. In *Simmenthal*, the Court confirms its reputation for being a 'cherry picker' with regard to arguments submitted by the parties, deciding to fully address only some of them.

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## 1. Introduction

This working paper seeks to shed light on the legal (and extra-legal) content of the original version of the *dossier de procédure* of the *Simmenthal* case (also known as the *Simmenthal II* case). The first part will focus on the already public available material on the case, namely the final ruling of the Court, the opinion of the Advocate General and the academic scholarship commenting on the decision.

Therefore, in the sections below, I will first try to summarise how *Simmenthal* is usually considered in traditional legal textbooks. Then I will focus on the facts and the legal issues at stake and reflect on the opinion of Advocate General Reischl. In this part I will try to identify similarities and differences in the reasoning of the Advocate General and the Court of Justice. After this section, I will briefly describe the reasoning and the outcome reached by the Court in its final ruling. The concluding section of the first part will attempt to sum up the (ongoing) academic debate on the relevance of *Simmenthal*, mainly from an EU constitutional perspective.

The second part of the paper will focus on the added value of the *dossier* and the documents related to the case that were not publicly available. It will explore the role of the parties and of the intervenors to the proceedings, their legal arguments, as well as their sources and their reasoning. Finally, a few concluding remarks—emphasising the most important take-aways from consulting the *dossier*—will be presented.

## 2. Part I – what we already knew

### *2.1 Simmenthal in textbooks*

In traditional EU law textbooks, *Simmenthal* is usually considered to be the natural consequence of the *Costa v Enel* and *Van Gend en Loos* case law.[1] Indeed, *Simmenthal* arrived at the Court of Justice (CJEU) after it had affirmed the precedence[2] and the direct effect of (at that time) Community law[3] in the legal orders of the Member States. In *Simmenthal*, the Court was called upon to rule on the practical implications relating to these principles. In this regard, the key paragraph for which *Simmenthal* is remembered provides that:

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 provisions by legislative or other constitutional means.[4]

The absolute necessity of giving immediate effect to EU law provisions made inadequate the solution of waiting for the intervention of the national legislature or the Constitutional Court in the event of inconsistency between EU law and national legislation.[5] Therefore, in

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[1] Nial Fennelly, 'The European Court of Justice and the Doctrine of Supremacy: Van Gend en Loos; Costa v ENEL; Simmenthal', in Luis Miguel Poiares Pessoa Maduro and Loïc Azoulai (eds.) *The past and future of EU law: the classics of EU law revisited on the 50th anniversary of the Rome Treaty* (Hart, 2010), 44.

[2] The Court in its judgement in *Simmemthal* uses 'precedence' rather than 'primacy'.

[3] Hereinafter 'EU law'.

[4] Case C-106/77, *Amministrazione delle finanze dello Stato v Simmenthal*, ECLI:EU:C:1978:49 [1978], paras 13-17. Hereinafter 'Simmenthal'.

[5] Paul Craig and Gráinne De Búrca, *EU law: text, cases, and materials* (OUP, Oxford 2010), 349.

*Simmenthal*, the CJEU assigned to national courts a 'constitutional role', namely the one of checking the conformity of national legislation with EU law and setting aside national legal provisions that were incompatible with EU law. It is thus no coincidence that, in many legal textbooks, *Simmenthal* is also considered an essential step in the process of the 'constitutionalisation' of EU law.

In this respect, if the principles of precedence (or primacy) and direct effect of EU law were established to confer rights and obligations not only on the Member States but also on individuals, these rights and obligations would simply not exist if national authorities had the power to unilaterally impede—by national constitutional means—the exercise of the rights conferred by EU law on individuals.[6] This is why the empowerment of every single judge in the EU to set aside incompatible national provisions can be considered a revolutionary change in the relationship between the EU and its Member States and an important step for the protection of the EU's legal order. But how did the Court reach that conclusion?

### *2.2 Factual background and legal issues*

'Simmenthal SpA' (Simmenthal) is an Italian food company located in Northern Italy. In 1973, Simmenthal imported from France a consignment of beef for human consumption. It was charged Lit 581.480 for the veterinary and public health inspection on the beef. At that time, this inspection was regulated by three different Italian pieces of legislation. Two of them entered into force after the adoption of the EEC Treaties.

The Italian company considered that the veterinary and public health inspections, as well as the related fees, were obstacles to the free movement of goods protected under EU law. For this reason, in 1976 Simmenthal decided to bring an action before the 'Pretore di Susa' for repayment of the fees. 'Pretori' in Italy were single presiding judges having jurisdiction in specific civil and criminal law cases (e.g. labour law cases and tort law cases amounting to Lit 50.000.000 as well as environmental crimes).[7] They were replaced in 1989 by first instance tribunals.

During the trial, the Pretore decided to stay the proceedings and make a reference to the CJEU for a preliminary ruling to assess whether such national measures constituted an unlawful hindrance to free movement of goods in the internal market. In December 1976, the Court handed down its ruling, stating that:

> veterinary and public health inspections at the frontier, whether carried out systematically or not, on the occasion of the importation of animals or meat intended for human consumption constitute measures having an effect equivalent to quantitative restrictions within the meaning of Article 30 of the Treaty and that pecuniary charges imposed by reason of veterinary or public health inspections of products on the occasion of their crossing the frontier are to be regarded in principle as charges having an effect equivalent to customs duties.

The Court thus introduced an absolute prohibition on charges imposed by national authorities on the occasion of veterinary and public health inspections within Member States on both domestic and imported products. In the light of this decision, the Italian 'Pretore' ordered the 'Amministrazione delle Finanze dello Stato' (Administration of State Finance) to reimburse the fees illegally charged, together with interest. In 1977, the Italian Administration appealed the order.

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[6] Herwig CH Hofmann, 'Conflicts and Integration: Revisiting Costa v ENEL and Simmenthal II' (n 1).

[7] Guida al Diritto, Il Sole 24 Ore (2019) <https://www.diritto24.ilsole24ore.com/guidaAlDiritto/codici/codiceProceduraCivile/articolo/14/art-8-competenza-del-pretore-abrogato-.html> accessed 5 December 2019.

Having taken into account the arguments put forward by the public authority, the Pretore concluded that the main issue at stake represented a 'conflict of laws' between EU rules and subsequent Italian national provisions, i.e. provisions adopted after the EU rules entered into force.

In this regard, it is important to stress that—in the same year, namely 1976—the Italian Constitutional Court (ICC), in one of its rulings, *inter alia*, judgment n. 232/75, stated that the question of whether the Italian legislation on veterinary and public health inspections on beef was unconstitutional under Article 11 of the Italian Constitution had to be referred to the ICC itself. As a consequence, the Pretore was in need of a clarification as to whether it had to

- refer the question to the ICC and then, eventually, give full application to EU law; or
- because of the principles of precedence and of direct effect, the Pretore had to disapply national provisions that did not comply with EU law, without having to wait for the ICC's decision.

For these reasons, the national judge stayed once again the proceedings and referred the question to the CJEU for another preliminary ruling (discussed below).

### *2.3 The opinion of the Advocate General*

In his opinion delivered on 16 February 1978, Advocate General (AG) Reischl dealt with three major legal questions, one preliminary and two substantive:

- The question relating to the 'relevance' of the CJEU ruling for the Pretore in order to enable the latter to give a judgment;
- The question of whether the principles of precedence and direct effect of EU law required national judges to disregard subsequent national provisions that did not comply with EU law;
- The question of whether legal protection of rights recognized by EU law to individuals may be suspended until any conflicting national measures are actually repealed by the competent national authorities.

In addressing these questions and the supporting arguments, the AG started by making use of a quite literal reasoning, which then gradually became more teleological and systemic, especially in the core of the opinion, reflecting on the substantive questions of the case.

#### 2.3.1 The procedural question

The initial question was actually raised by the Italian Government (representing the 'Amministrazione') and supported by three main arguments.

- First, the applicants argued that the Pretore himself recognized his lack of jurisdiction in the matter, so the ruling of the CJEU would have no practical utility to solve the case at stake.
- Second, the Government maintained that the CJEU had already dealt with the same questions of the case in another ruling.
- Third, since the ICC had declared the conflicting national provisions unconstitutional, there was no need for the Pretore to deliver a final decision.

The AG advised the EU judges to deliver a ruling and recalled the CJEU case law according to which the Court 'does not deal with questions concerning the relevance of decisions, at any

rate in so far as they involve considerations of national law'.[8] However, an exception could be made, the AG acknowledged, in cases of a manifest error made by the referring court. However, the AG also pointed out that this situation had never arisen before in practice (and he advised that no exception should be made in the present case).[9]

Moreover, the AG disagreed with the applicant's argument that the Court had already dealt with the same questions in another ruling (*Benedetti v Munari*)[10]. In fact, in that judgment, the Court ruled on the effects of preliminary rulings, which are binding on the national judge who referred the case. The present case had a much broader scope and encompassed different legal issues. Here we can notice a more teleological and systemic reasoning of the AG, who recognised an occasion for the advancement of the European integration process through the action of the CJEU. This is why he stated: 'there is no unequivocal case-law on this point and for this reason we ought not to miss the opportunity of throwing light upon this fundamental question of Community law.'[11]

### 2.3.2 The substantive questions

In the core of his opinion, AG Reischl provided his view on the two substantive legal issues referred by the Italian national court. The first one concerned the question of whether the principles of precedence and direct effect of EU law required national judges to disregard subsequent national provisions that did not comply with EU law; the second one concerned the question of whether legal protection of individual rights recognised by EU law could be suspended[12] until conflicting national measures were repealed by the competent national authorities.

In this part of the opinion, the reasoning of the AG aimed to provide a more coherent solution to the case with regard to the principles governing the EU legal order. Such principles represented the starting point of the AG's reasoning. He recalled the CJEU's early cases on those principles, where the Court stated that the EU 'constitutes a new legal order of international law and that [EU] law is independent of the legislation of Member States' (*Van Gend en Loos*)[13]. He also pointed out that the EU Treaties had created their 'own legal system which, on the entry into force of the [Treaties], became an integral part of the legal systems of the Member States' (*Costa v Enel*[14]).

However, the AG drew his conclusions in particular from the principles of precedence and direct effect. Indeed, in case of conflict, EU law should prevail over Member State law and the subjects of EU law also included the nationals of the Member States. The Treaties of the Union conferred rights upon individuals, which they could invoke before their national courts and which national judges were obliged to apply.[15] Nonetheless, the simple enshrinement of these principles was not sufficient. The 'executive force' of EU law, argued the AG, should not vary from one State to another 'in deference to subsequent domestic laws' and 'the rules of

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[8] Opinion AG Reischl, C-106/77, *Amministrazione delle finanze dello Stato v Simmenthal* [1978] ECLI:EU:C:1978:31, 649.

[9] Ibid.

[10] Case C-52/76, *Benedetti v Munari* [1977] ECLI:EU:C:1977:16.

[11] Opinion AG Reischl (n 8) 649.

[12] The term 'suspended' is not consistently used in the *dossier*. It is actually 'introduced' by the AG in his opinion and then re-used by the Court in the final judgment.

[13] Case C-26/62, *Van Gend en Loos v Administratie der Belastingen* [1963] ECLI:EU:C:1963:1.

[14] Case C-6/64, *Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66.

[15] Opinion AG Reischl (n 8) 651.

Community law must be fully applied at the same time and with identical effects over the whole territory of the [Union]'.[16]

Therefore, according to the AG, the requirement of 'uniform and immediate application' of EU law over the whole EU territory could not be reconciled with the reasoning of the Italian government, which claimed that only the ICC had the jurisdiction to verify whether national provisions complied with EU law. Nevertheless, considering the EU legal order and its constitutional principles in their entirety, the AG suggested that the only possible answer to the substantive questions referred was that, in the case of directly applicable EU law provisions, conflicting national legislation which is adopted subsequently may no longer be applied by domestic courts.[17] This position, according to the AG, should be adopted so as to provide EU legal provisions with 'immediate effect, without the need to await repeal by the legislature or a declaration by a constitutional court that they are unconstitutional'.[18]

#### 2.3.3 AG's reasoning, Court's reasoning

AG Reischl's reasoning was followed to a large extent by the CJEU in its ruling. Indeed, even the Court mainly adopted a teleological (and systemic) reasoning and assessed the preliminary and substantive questions referred by the 'Pretore di Susa' in light of the constitutional principles of EU law. However, such a 'constitutional' reading of the case had already been given by the judge *a quo*. The Pretore had already asked, in essence, in the way that he posed his questions, whether the legal tools provided by Italian constitutional law were to be preferred in solving conflicts between Italian legislation and EU law provisions, having regard to the EU's constitutional principles.

Although teleological, the reasoning of the CJEU is less complete than the one adopted by AG Reischl in his opinion. In particular, when dealing with the substantive questions raised by the national court, the EU judiciary limited itself to enouncing the constitutional principles of EU law and the practical implications that would stem from keeping in force a national provision that conflicted with EU law. However, unlike the AG, the Court did not directly engage with the arguments put forward by the parties, especially those submitted by the Italian Government.

Nevertheless, in addition to the reflection on EU constitutional principles, the CJEU also took into account the structure of the EU judicial protection system as framed in the Treaties. The judges argued that accepting a different solution from the one proposed by the AG would go against the purpose of the preliminary reference procedure.[19] This confirms once again the Court's teleological (and systemic) reasoning in the case, which led the judges to reach the same conclusions proposed by the AG, expressed in almost the same wording.

### *2.4 The ruling of the CJEU*

The Court answered the question relating to the 'relevance' of the case by recalling its own jurisprudence, according to which a reference for a preliminary ruling, pursuant to (current) Article 267 TFEU, can be considered as validly brought before it 'so long as the reference has not been withdrawn by the court from which it emanates or has not been quashed on appeal

[16] Ibid 652.

[17] Ibid 657.

[18] Ibid.

[19] See *supra*, § 1.2.

by a superior court'. As a consequence, the CJEU deemed the preliminary reference admissible.[20]

Regarding the substance of the case, on the one hand, the Court recalled what the principle of direct effect implies. EU law provisions must be 'fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force'.[21] Plus, these provisions are a 'direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under [EU] law'.[22] The Court continued by making clear that the duty to apply such norms also concerned any national court which is called upon to protect the rights conferred on individuals by EU law.[23]

On the other hand, the principle of the precedence of EU law, according to which EU law should prevail over incompatible national legislation, entailed that EU legal provisions and measures having direct effect render automatically inapplicable any conflicting national provision and— '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'.[24]

As a consequence, national legislation that was not compatible with EU law (and still in force in the Member States' legal orders) represented a denial of the effectiveness of EU law and an impediment to the obligations undertaken unconditionally and irrevocably by the Member States when they signed the Treaties.[25] According to the EU judges, this outcome was also confirmed by the structure of the preliminary reference procedure laid down under Article 267 TFEU. Indeed, 'the effectiveness of that provision would be impaired if the national court were prevented from forthwith applying Community law in accordance with the decision or the case-law of the Court'.[26]

In the light of this reasoning, the CJEU put forward the sentences that went down in history as the legal tool *par excellence* to solve conflicts between EU law and subsequent national legislation, namely the 'Simmenthal doctrine':

> every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.[27]

In this paragraph, the Court uses the verb 'to set aside' rather than 'to annul', which would have implied a deeper interference in the constitutional prerogatives of the Member States. Indeed, only the Member States may decide which national authority has the power to annul national provisions that are incompatible with the Constitution or with EU law (traditionally Constitutional or Supreme Courts). By contrast, the verb 'to set aside', in Italian usually translated with *disapplicare* (referring to a peculiar 'power of disapplication') entails a softer recognition of national courts' powers, while directly referring back to the verb 'to disregard', used by the Pretore and the AG in his opinion.

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[20] Ibid.

[21] Ibid *§§ 13-17.*

[22] Ibid.

[23] Ibid § 16.

[24] Ibid § 17.

[25] Ibid § 18.

[26] Ibid § 20.

[27] Ibid § 21.

### *2.5 Simmenthal in Academia*

Given the importance of *Simmenthal* in the EU 'constitutionalisation' process, the academic literature on this case is incredibly vast.

Some commentators stress precisely the constitutional relevance of the ruling, which can be seen as a 'milestone' in the evolving relationship between the legal order of the EU and the Member States. In this regard, some scholars argue that *Simmenthal* 'solidified' the precedence of EU law.[28] This 'solidification' can also be understood in 'federal' terms, since the ruling has served to consolidate the structure of the EU legal order in a way that is very similar to the way in which early US judicial review of state legislation has served to consolidate American constitutionalism.[29]

In doing so, the CJEU has proven courage, which has allowed the Court—throughout the history of European legal integration—to make strong legal (and policy) decisions, based on the hierarchical constitutional construction of the EU Treaties.[30] Indeed, such courage can also be found before and after *Simmenthal*. If *Costa v Enel* and *Van Gend en Loos* can be considered as the very first steps of a long 'constitutional journey', *Simmenthal* paved the way for a number of rulings in which the CJEU re-affirmed the precedence of EU law (in some cases even beyond 'direct effect').[31]

For instance, in *Marleasing*[32] the CJEU assigned to national courts a 'duty of consistent interpretation' of domestic legislation with unimplemented directives, in order to ensure that the objectives of EU law provisions that did not have direct effect were still achieved. However, the Court excluded such a duty where it might lead to interpretations *contra legem*. Subsequently, in *Hermès,*[33] the Court extended the *Marleasing doctrine* to international agreements binding on the EU. In *Francovich*[34] the Court stated that EU Member States could be liable to pay damages to individuals who suffered a loss by reason of the Member State's failure to transpose a directive into national law.

The jurisprudence of the CJEU has certainly further developed afterwards, but as we can already notice, the Court added one piece at a time, slowly broadening the possibilities under which individuals could see their rights stemming from EU law, protected before domestic judges. It is thus clear that we simply would not have had *Marleasing*, *Hermès* or *Francovich* without *Simmenthal*.

*Simmenthal* is also the point at which national judges clearly became the 'ordinary judges of EU law'.[35] In *Simmenthal*, the Court pointed out that the power to enforce EU law is shared between the EU courts and all judges in the Member States.[36] As mentioned above, in this

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[28] Alan W. Harris, 'The Primacy of European Community Law - Preliminary Ruling, Amministrazione delle Finanze dello Stato v Simmenthal S.p.A.', (1980) 15 Tex. Int'l L. J. 139, 160.

[29] Ibid 161.

[30] Ibid.

[31] Saida El boudouhi, 'The National Judge as an Ordinary Judge of International Law: Invocability of Treaty Law in National Courts', (2015) 28 LJIL 283, 286.

[32] Case C-106/89, *Marleasing v Comercial Internacional de Alimentación* [1990] ECLI:EU:C:1990:395.

[33] Case C-53/96, *Hermès International v FHT Marketing Choice* [1998] ECLI:EU:C:1998:292.

[34] Case C-6/90, *Francovich and Bonifaci v Italy* [1991] ECLI:EU:C:1991:428.

[35] Saida El boudouhi (n 31) 285.

[36] Koen Lenaerts, 'The Role of National Constitutions in EU Law: From Shared Values to Mutual Trust and Constructive Dialogue', 73 Pravnik 5 (2018), 12. See also Justin Lindeboom, 'Why EU Law Claims Supremacy', (2018) 38(2) Oxford Journal of Legal Studies, 351: *'the idea that national courts are wearing two hats certainly seems to be the position of the CJEU in its Simmenthal judgment […]'.*

decision, the EU judges assigned a constitutional role to national courts. National courts were tasked with checking the compatibility of EU legal provisions having direct effect and national legislation, followed by the power to set aside domestic provisions that did not comply. Through the case law cited above, national courts' powers have been gradually increased by the Court, which provided domestic judges with a variety of tools designed to guarantee the uniform and immediate application of EU law in all Member States.[37]

To summarise, as the reader might have noticed from this brief overview, academic literature has mainly reflected on the 'constitutional relevance' of *Simmenthal*, in particular from an 'EU', a 'Member State' and a 'national court' perspective. However, there seem to be less scholarship on the 'citizens' perspective, which may also be extremely interesting to investigate.

## 3. Part II – exploring the *dossier*

### *3.1 The HAEU* dossier

The *Simmenthal dossier* is composed of seven categories of documents, namely:

- Order referring the case: i.e. the order issued by the national court which stays the proceeding *a quo* and refers the question to the CJEU for a preliminary ruling;
- Submissions of the parties: i.e. written submissions of the parties during the written procedure;
- Other process-related documents: namely, acts conferring the power of attorney, correspondence between the Court (Registrar) and the parties, orders by the President of the Court appointing the chamber and reporting judge, as well as setting the dates of the hearings;
- Report of the Oral Hearing by the *juge rapporteur* (Judge Pescatore);
- Opinion of the Advocate General (Reischl);
- Final Judgment of the Court;
- Documents of the original file that are not available to the public (redacted documents).[38]

The table below provides a quantitative overview of the composition of the *dossier*:

**Table 1: The composition of the *dossier de procédure***

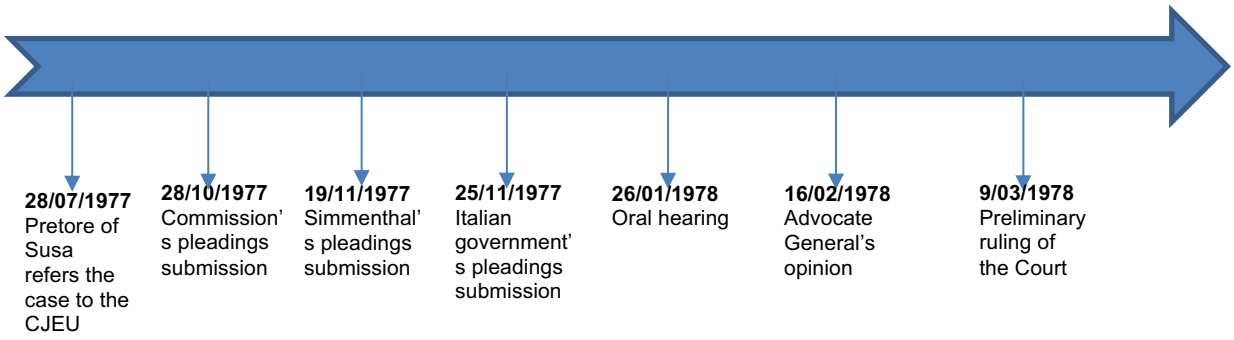
| **Category of Document** | **Number of Documents** | **% of number of documents (n=23)** | **Number of pages** | **% of the dossier (247 p)** | **% of the original file (285 p)** |
|---|---|---|---|---|---|
| Order referring the case | 1 | 4,3 | 6 | 2,4 | 2,1 |
| | 3 | 13 | 51 | 20,6 | 17,8 |

[37] Saida El boudouhi (n 31) 292.

[38] These are the blank pages of the *dossier*.

| | | | | | |
|---|---|---|---|---|---|
| Submissions by the parties | | | | | |
| Other procedure-related documents | 16 | 69,5 | 111 | 44,9 | 38,9 |
| Report of the Oral Hearing | 1 | 4,3 | 18 | 7,2 | 6,3 |
| Opinion of the Advocate General | 1 | 4,3 | 33 | 13,3 | 11,5 |
| Final Judgment | 1 | 4,3 | 28 | 11,3 | 9,8 |
| Documents not available to public | | | 38 | 15,3 | 13,3 |

**Figure 1: Timeline**




### *3.2 Role of the parties and of the intervenors*

As stated already at the beginning of this report, the parties to the proceedings were i) the applicant, namely 'Amministrazione delle Finanze dello Stato' and ii) the defendant, namely the Italian food company 'Simmenthal SpA'. The only intervenor was the European Commission.

It is interesting to note that the defendant, the Commission. AG and the CJEU agreed on essentially everything. The purpose was the same and the lines of reasoning of these 'actors' were all very similar (even though we can identify some modest differences in the arguments submitted). This is because they were all in favour of a solution stemming from the constitutional principles of the EU and enabling national courts to give immediate application to EU legal provisions having direct effect. This is an aspect which could be confirmed only through the consultation of the *dossier de procédure* of the case. The *dossier* thus adds clarity on the convergent lines of reasoning of Simmenthal, the Commission, the AG and the Court.

On the other hand, the Italian Government (representing the 'Amministrazione') had a completely different view on the case, supported by an opposite line of reasoning and a distinct set of arguments. In this regard, the Government put forward arguments aiming to preserve the national sovereignty of the State and the solution proposed by the ICC.

3.2.1. The arguments of the parties and of the intervenor

In the table below I summarise the arguments of the parties and of the intervenors.

To facilitate the reading:

- **'Rejected'**: means that the argument was considered by the AG or by the CJEU, but it was then rejected;
- **'Followed'**: means that the argument was considered and used by the AG or by the CJEU (or by both);
- **'Not followed'**: means the argument was not considered at all.
- In **green**: the arguments not already reflected in public documents.

**Table 2: Arguments of the parties and intervenors**

| Arguments | Proposed by | Rejected/Followed/Not followed |
|---|---|---|
| On admissibility | | |
| The 'Pretore' himself recognised his lack of jurisdiction in the matter (which belongs to the 'Tribunale'), so the ruling of the CJEU would have no practical utility to solve the case at stake.[39] | Italian Government | Rejected by the AG and the Court |
| The CJEU had already dealt with the same questions of the case in another ruling.[40] | Italian Government | Rejected by the AG and the Court |
| The ICC already declared the conflicting national provisions at stake unconstitutional, so there was no need for the Pretore to deliver its final decision.[41] | Italian Government | Rejected by the AG and the Court |
| The CJEU had no jurisdiction over purely internal cases.[42] | Italian Government | Not followed |
| On the solution required by the ICC | | |
| The matter was purely internal, therefore it had to be solved through the constitutional means provided under the Italian legal system.[43] | Italian Government | Not followed |

[39] Italian Government's submission, 2.

[40] Ibid. 4-5.

[41] Ibid.

[42] Ibid 11.

[43] Ibid. 6.

| | | |
|---|---|---|
| Italian ordinary courts may not disapply domestic provisions. The only organ that may declare a national provision unconstitutional is the ICC. [44] | Italian Government | Rejected by the AG and the CJEU |
| *The solution proposed by the ICC would slow down the procedure, given that the parties would have to wait for the ICC's decision to see their rights protected. This might discourage individuals from triggering legal proceedings.[45] | Simmenthal, Commission | Followed by the AG, not followed by the CJEU |
| *Concrete example of the 'Pretore di Roma' which referred a question of constitutionality to the ICC. This found that there was no incompatibility and then required the 'Pretore' to refer the question to the CJEU for a preliminary ruling.[46] | Simmenthal | Not followed |
| The ICC's decision had retroactive effect and eliminated the unconstitutional provision *ex tunc*, in so far as the matters at issue had not been finally disposed of or the legal relationships in question had not expired (principle of *res judicata*).[47] | Italian Government, | Rejected by the AG, not followed by the CJEU |
| The fact that the ICC's decision had retroactive effect was not enough to protect the rights that individuals derive from EU law, since the principle of *res judicata* still applied.[48] | Simmenthal, Commission | Followed by the AG, not followed by the CJEU |
| The ICC's decision produced effects *erga omnes*. This guaranted a uniform application of EU law on the whole national territory. Otherwise, different judges might reach different conclusions and their decisions would produce effects only *inter partes*.[49] | Italian Government, | Rejected by the AG, not followed by the CJEU |

[44] Ibid 7.

[45] Commission's submission, 11; Simmenthal's submission, 11.

[46] Ibid.

[47] Italian Government's submission, 9-10.

[48] Commission's submission, 9; Simmenthal's submission, 15-16.

[49] Italian Goverment's submission, 10.

| | | |
|---|---|---|
| The solution advanced by the ICC would paralyze the PRP under (current) Article 267 TFEU. | Simmenthal | Not followed by the AG, followed by the CJEU |
| The German Constitutional Court authorised national judges to set aside domestic provisions being incompatible with EU law.[50] | Simmenthal | Not followed |
| Ordinary judges in Italy already carried out very similar tasks when they were called upon to identify a *lex posterior* or a *lex specialis*.[51] | Simmenthal | Not followed |
| On the constitutional principles of EU law | | |
| Member States were required under Article 5, to abstain from any measures likely to jeopardise the attainment of the objectives of the Treaty.[52] | Commission | Followed (implicitly) by the AG and the CJEU |
| The principle of precedence did not find place in all the constitutions of the Member States. However, if precedence were to be subject to different constitutional traditions, EU law would have a very uneven application in all the Member States.[53] | Commission | Followed (implicitly) by the AG and the CJEU |
| The solution advanced by the ICC would also provoke a 'systemic gap' in the EU legal order, as it did not appear to be compatible with the principles of precedence and direct effect.[54] Such principles required that EU law provisions having direct effect must be subject to an immediate and uniform application in all the Member States of the Union and should thus have precedence over subsequent domestic law provisions that are incompatible with them. | Simmenthal, Commission | Followed by the AG and the CJEU |

[50] Simmenthal's submission, 20.

[51] Ibid 21.

[52] Commission's submission, 5.

[53] Ibid 10.

[54] Ibid 14, Simmenthal's submission, 14.

### 3.2.2 Narrative and arguments: the added value of the *dossier*

A close reading of the *dossier* definitely allows us to have a more comprehensive understanding of the historical and legal context in which the ruling took place.

First, the *dossier* allows us to appreciate the different narrative styles of the parties involved and the abilities of their lawyers. For instance, in their submissions Simmenthal and the Commission gave significant room to the description of the evolution of the ICC case law on the principle of precedence. This actually was the real starting point of their reasoning.

They recalled how the Italian Court was initially reluctant to recognise the precedence of EU law in the Italian legal system and how this 'cold' approach was then completely reversed[55] a few years later (in 1973) by the same Court, which justified the limitations on Italian legislative sovereignty under Article 11 of the Italian Constitution. Such a description was functional to show the alleged 'contradiction' of the ICC: accepting, on the one hand, the precedence of EU law, but then advocating for exclusive jurisdiction over conflicts between domestic provisions and EU law. This narrative can now be taken into account through access to the *dossier*.

Particularly interesting is, in my view, the legal narrative style of the team of lawyers defending Simmenthal (which also included the future judge of the CJEU, Antonio Tizzano). These lawyers offered, *inter alia*, a 'legal operator'[56] perspective on the case which describes the difficulties that individuals (and their lawyers) would have had if the solution advanced by the ICC had been followed. This is another element on which the *dossier* adds clarity.

Second, by reading the *dossier* we have a complete overview of the arguments submitted by the parties. Some of these arguments were not included in the public material already available, which until recently only consisted of the opinion of the AG and the final ruling of the CJEU. The possibility to access the *dossier* sheds light on the different perspectives from which all the actors involved were looking at the case at that time. For instance, thanks to the HAEU now we know that Simmenthal relied on the jurisprudence of the German Constitutional Court to try to convince the CJEU. Plus, its team of lawyers used even the (unusual) case of the 'Pretore di Roma' (referring the ICC first and the CJEU later) to demonstrate that the ICC solution was concretely problematic.

However, we can also notice, as outlined in the table above, that the CJEU ignored most of the 'practical' arguments presented by Simmenthal and the Commission, e.g. the one arguing that the mandatory referral to the ICC would have been detrimental for the length of the proceedings. This shows that the more 'theoretical' arguments submitted—focusing on the constitutional principles of the EU—were sufficient to justify the final outcome of the case.

Regarding the sources, the parties as well as the Commission, the AG and the Court mainly relied on the case law of the CJEU and Treaty provisions. However, they all also relied, to different extents (apart from the CJEU), on the case law of the ICC, which was extremely relevant to illustrate the working of the 'Italian constitutional solution' to the issue. Nevertheless, this aspect was already clear in the publicly available material, as the AG reported the main arguments used by the parties.

Furthermore, the *dossier* adds clarity on the **use of non-EU law sources**. Indeed, Simmenthal also referred to decisions issued by Italian ordinary courts ('Corte di Cassazione' but also the 'Pretore di Roma') and even mentioned the case law of the German Constitutional Court (reference ultimately disregarded by the CJEU). Despite such references, the Court did not take them into account in its reasoning and completely disregarded them.

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[55] Ibid 8. See ICC, judgment n. 183, 27 December 1973.

[56] See arguments preceded by an asterisk in the table at p. 17.

Another 'secret' disclosed by the *dossier*—a surprisingly curious one—is provided by the document at p. 48 of the PDF version. Here, the Bar of Naples certifies that one of Simmenthal's lawyers, namely Antonio Tizzano, was a qualified lawyer in Italy. Tizzano qualified only one year before the case was brought to the CJEU and he was still quite young at that time (37 years old).

However, considering the content of the already available documents, the overall added value of the *dossier* is 'moderate'. In my view the *dossier* could be of some interest for Italian legal scholars (or generally speaking, scholars interested in Italian constitutional law), who may gain some insights into the 'constitutional conception' of the Union that Italian lawyers and institutions had at that time. Plus, the *dossier* may also allow for a better understanding of the role that lawyers and practitioners had in the development of EU law. All the main arguments of the parties were reported by the AG in his opinion and his reasoning—quite similar to the ones of the Commission—were followed to a large extent by the Court. This made the already publicly available material sufficient to have a quite comprehensive understanding of the case, even without accessing the *dossier*.

### 3.2.3 The reasoning of the parties and of the intervenor

All the parties involved in the case mainly relied on a teleological/systemic line of reasoning. As aforementioned, Simmenthal and the Commission made broad references to the EU legal order as being a 'new order of international law', whose Treaties and laws conferred rights and obligations not only on the Member States, but also on their citizens. This line of reasoning ended up being the one that resonated with the Court and was followed to a very large extent by the EU judges and the AG. Therefore, the *dossier* also adds clarity on the role played by lawyers in the development of EU law, given that the reasoning advanced by Tizzano and his team ended up being the most convincing one.

Conversely, the Commission in its observations particularly stressed the 'constitutional' dimension of the case: it mentioned the importance of Article 5 of the Treaty and of the *Rewe* case law[57] of the CJEU, which enshrined the principle of judicial protection in the EU. However, the Court did not pay much attention to these specific constitutional references in its judgment. The length of the judgment does not do justice to the richness of the arguments submitted by the parties.

Even the Italian Government adopted a teleological reasoning, albeit with a a different '*telos*' in mind. In this respect, from the reading of its arguments we can infer that the Government had a completely different idea of precedence and sovereignty. It seemed to understand the EU as a community whose legislation did not have to encroach upon national constitutional traditions, but rather preserve the legislative competences of the Member States even in the fields covered by EU law.

### 3.2.4 The CJEU and the arguments submitted

As I already argued, the Court did not take into account some of the 'practical' arguments submitted by the parties and it basically ignored all the arguments that it chose not to follow. Perhaps, the Court decided to focus only on the 'constitutional dimension' of the questions referred. In my view, this shows, once again, how much the Court 'appreciates' the procedure established under Article 267 TFEU, allowing the EU judiciary to play the role it seems to like the most: the one of Constitutional Court of the EU.

[57] Case C-33/76, *Rewe v Landwirtschaftskammer für das Saarland* [1976] ECLI:EU:C:1976:188.

As proof of this, the Court appeared to disregard some questions on purpose, not engaging in lengthy discussions on practicalities and cases coming from Constitutional Courts not involved in the case. Conversely, the CJEU in *Simmenthal*, first, quickly dealt with the question of admissibility. Then, it went 'straight to the point' and delivered a very short ruling (only 29 paragraphs), in which it made use of a teleological reasoning that strongly reaffirmed the principles of precedence and direct effect of EU law.

## 4. Concluding remarks

In this final section of the report I will lay down five concluding remarks, emphasising which, in my view, are the most important take-aways from consulting the *dossier*.

### *4.1 Different angles*

The HAEU *dossier* allows us to look at the *Simmenthal* case from a different perspective, or—to be more precise—from a number of different perspectives. Indeed, by looking into the submissions of the parties, we can not only discover all the legal arguments brought before the Court, but we can also genuinely get the different 'visions of Europe' underlying each party's submission. In this regard, it is interesting to shed light, once again, on the reasoning of the Italian Government, which had in mind not simply a different legal tool to solve a conflict of laws problem, but an opposing idea of the EU as a supranational legal order.

From a distinct angle, we can appreciate the 'implicit vision' behind Simmenthal's defence strategy. I stress 'implicit' because the lawyers did not take any definitive position in the concluding part of their observations, but they ended their document with a legal and political 'wish'. They hoped for a 'Europe of individuals', where these are given concrete proof of real and immediate protection of their interests derived from EU law.[58] To give concrete examples of the implications that the ruling could have had on individuals, Tizzano and his team referred to practical issues that legal operators would face if the solution proposed by the Italian Government had to be followed.

### *4.2 The CJEU's judicial activism*

The ICC and the Italian Government were clearly hostile toward a supranational legal order where domestic courts could immediately give full application to EU law provisions pursuant to the principle of direct effect. This was counterbalanced by the CJEU's courage (see point iv). In fact, such courage by the Court is unsurprising , especially if we consider the vast case law where the EU judiciary has found itself to rule on the EU-Member State relationship. For instance, the Court had already shown its willingness to depart from the literal wording of the Treaties and adopt more 'pro-EU' interpretations in *Costa v Enel*, *Van Gend en Loos* and *Rewe*. The EU judiciary confirmed this approach in many following cases.[59]

### *4.3 The Constitutional Court of the EU*

The Court has usually used its judicial discretion in preliminary references dealing with private enforcement of EU rights at national level. This shows how much the Court welcomes the procedure laid down under Article 267 TFEU, being the one allowing the Court to truly play the role of the Constitutional Court of the EU. In *Simmenthal* this is proven by the way the Court

[58] Simmenthal's submission, 22.

[59] See *supra*, Part I § 3.

(and the AG) handled the question on 'admissibility'. Although potentially 'irrelevant' for the national court, according to the AG the case offered a unique 'opportunity of throwing light upon this fundamental question of Community law'.[60] Therefore, the Court had to rule on it.

Indeed, in the making of preliminary rulings, the CJEU can benefit from a more expeditious procedure[61] and focus on questions of interpretation rather than facts. This is also proven by the type of legal reasoning (typically teleological) adopted in cases focusing on the 'judicial dialogue' with national courts and the relationship between the EU and its Member States.

### *4.4 Audacious and arbitrary*

The *Simmenthal dossier* also proves that the CJEU's audacity may come at the expense of more arbitrary reasoning. In spite of the silence of the Treaties on precedence and direct effect of EU law as well as of the reluctance showed by the Italian authorities, the Court proved to be 'audacious' in its continuing advancement of the European legal integration process after *Costa v Enel* and *Van Gend En Loos*, which granted immediate and uniform application to EU law when it came into conflict with national provisions.

However, reading the parties' submissions has allowed us to notice that the Court arbitrarily ignored some of the arguments—even those which could have strengthened its reasoning[62]—without providing further explanation. For instance, the Court ignored the 'purely internal situation' argument submitted by the Italian Government, as well as the arguments presented by *Simmenthal* on the practical issues that lawyers in Italy were already facing at the time of the ruling. Similarly, the Court ignored the references made by the parties to sources other than EU law (e.g. the jurisprudence of the German Constitutional Court) and ended up delivering a very short ruling, focusing only on some of the arguments presented.

Many EU legal scholars have already tried to explain when and why the Court makes use of a given kind of reasoning in its jurisprudence. The availability of procedural *dossiers* offers the opportunity to look at the Court's reasoning through different lenses and pursue unexplored and fascinating research pathways.

### *4.5 Who is the addressee?*

The (arbitrary) teleological reasoning of the Court offered in *Simmenthal* triggers the (final) fundamental question of 'who is the real addressee of the ruling?'. In this respect, by not directly engaging with

- the Italian Government on the arguments referring to the domestic solution advanced by the ICC;
- Simmenthal on the practical problems potentially stemming from that same solution;

the Court sent a clear message to the ICC (and probably also to the other Constitutional Courts). In its 'message', the CJEU ignored the alleged advantages that an ICC's decision would have brought, as well as all those practicalities, which mattered only to the legal practitioners bringing cases at national level. In fact, the Court's focus was on the relationship between the EU and its Member States. For this reason, it carefully selected those arguments most relevant for its reasoning. Not surprisingly such arguments concerned the way the EU legal order must be constructed and understood and, most importantly, to what extent the

[60] See *supra*, Part I § 2.

[61] Compared to the one established under Article 263 TFEU.

[62] See table p. 15.

national constitutional traditions were permitted to influence the uniform application of EU law in all the Member States.