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Jochen Beutel, *Dr. iur., Professor*
University of Applied Science in Altenholz/Reinfeld, Germany

Edmunds Broks, *Dr. iur., Docent*
Faculty of Law, University of Latvia, Latvia

Arnis Buka, *Dr. iur., Docent*
Faculty of Law, University of Latvia, Latvia

Christoph Schewe, *Dr. iur., Professor*
University of Applied Science in Altenholz/Reinfeld, Germany

SETTING ASIDE NATIONAL RULES THAT CONFLICT EU LAW: HOW *SIMMENTHAL* WORKS IN GERMANY AND IN LATVIA?

Keywords: *Simmenthal*, national law, conflict, EU law

Summary

At the centre of this article is the *Simmenthal* line of cases of the Court of Justice of the European Union, which establish the duty of every national court or administrative authority not to apply any national law that conflicts with the EU law. The article provides a brief overview of the evolution of the *Simmenthal* case law at the EU level. It then proceeds to assess how *Simmenthal* is applied at national level through comparative analysis of experience from Germany and Latvia. A particular emphasis in that regard is placed on the role of constitutional courts, as well as on the role of administrative authorities. Research from both countries points to a general adherence to the obligation established by *Simmenthal*. However, it also indicates certain discrepancies in national legislation, which obscure strict application of *Simmenthal*, especially for national administrations. Particularly in Latvia administration is not entitled to disapply national law on its own motion, whereas – explicitly following the *Simmenthal* doctrine – it would (theoretically) be entitled to do so in Germany.

Introduction

The 1978 *Simmenthal*[1] judgement of the Court of Justice of the European Union (CJEU, at that time – European Court of Justice) is one of the EU law classics that constructed the constitutional order of the European Union (EU) as we know it today. Building on the earlier case law of *Van Gend*[2] and *Costa*[3] (in which the CJEU pronounced direct effect and primacy of EU law), in *Simmenthal* the CJEU proceeded to spell out the role of national courts in upholding this new legal order. According to *Simmenthal*, every national court has an obligation to protect EU rights of individuals. To fulfil this mandate, national courts of all levels must by themselves set aside any national law that conflicts with the EU law.[4] Consequently, Member States must not limit the power of any national court to immediately disapply national provisions that are incompatible with the EU law.[5]

Thus, *Simmenthal* provided for a fundamental shift in the competences of national courts. Courts of all levels were to apply EU law directly and if they found a national provision that was contrary to EU law, they were to set it aside by themselves, without first turning to a constitutional or any other higher court. This shift was to have a twofold effect. Firstly, it empowered national courts of all levels by entrusting them with a duty to ensure that rights under EU law are protected. Secondly, it also gave the power of judicial review of national law, that in many Member States was reserved only for constitutional or supreme courts, to all national courts.

Over the years, the CJEU has generally remained loyal to *Simmenthal*.[6] In subsequent cases, the Court clarified and somewhat softened the original pronouncement – the primacy of the EU law did not require annulment of conflicting national rules – the courts merely had to disapply the national rule,[7]

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1 CJEU judgement of 7 March 1978 in Case 106/77 Amministrazione delle Finanze dello Stato v. Simmenthal SpA (Simmenthal 2).

2 CJEU judgement of 5 February 1963 in Case 26/62 Van Gend & Loos v. Netherlands Inland Revenue Administration.

3 CJEU judgement of 5 July 1964 in Case 6/64 Flaminio Costa v. E.N.E.L.

4 *Simmenthal,* para. 21: "It follows from the foregoing that 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."

5 *Simmenthal,* para. 22: "Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law."

6 CJEU judgement of 19 November 2009 in Case C-314/08 Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu. See also Pernice I. Costa v. ENEL and Simmenthal: Primacy of European Law. In: Maduro, M. P., Azoulai L. (eds.). The Past and Future of EU Law. London: Hart Publishing, 2010, pp. 47–58.

7 CJEU judgement of 22 October 1998 in joined cases C-10/97 to C-22/97 Ministero delle Finanze v. IN.CO.GE.'90 Srl, para. 20.

whereas in *Melki and Abdeli* the CJEU elaborates on *Simmenthal* and further encourages a certain dismantling of national judicial hierarchies.[8] According to *Melki and Abdeli*, in order to ensure the primacy of EU law, any national court is free to refer to the CJEU any question at any stage of proceedings, even at the end of an interlocutory procedure with a national constitutional court, thereby opening a possibility that CJEU would override the conclusions reached by the constitutional court. However, the practical importance of *Simmenthal* seems to have decreased with national courts opting to focus on the duty of consistent interpretation rather than on the obligation to set aside national rules.

A further issue that emerges from *Simmenthal* is its scope of applicability in terms of subjects that are obliged to set aside conflicting national rules – is it only the courts or administrative authorities as well? The pronouncement from the CJEU in *Simmental* itself states that any provision of a national legal system and any legislative, administrative or judicial practice may not withhold from a *national court* the power to do everything necessary to set aside conflicting national provisions. Thus, the initial *Simmenthal* dictum places the mandate to disapply conflicting national law specifically on national courts – whereas the legislator and the administration are obliged not to prevent courts from discharging this mandate. However, national administrative authorities anyhow and in parallel to the *Simmenthal* mandate – as a combined result of direct effect and primacy of EU law – have the duty to immediately apply directly effective EU law provisions and ensure that these provisions have full effect.[9] In *Costanzo*, the CJEU specifically argues that it would be "contradictory to rule that an individual may rely upon the provisions of a directive [...] in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive *and refrain from applying provisions of national law which conflict with them*" (emphasis added).[10] In subsequent cases, the CJEU has repeatedly confirmed that the duty to disapply conflicting national provisions applies also to national administrative bodies.[11] This preposition is conceptually accepted in both

[8] CJEU judgement of 22 June 2010 in joined cases C-188/10 and C-189/10 Aziz Melki and Sélim Abdeli. In para. 53 of the judgment, the Court states: "In so far as national law lays down an obligation to initiate an interlocutory procedure for the review of constitutionality, which would prevent the national court from immediately disapplying a national legislative provision which it considers to be contrary to EU law, the functioning of the system established by Art. 267 TFEU nevertheless requires that that court be free, first, to adopt any measure necessary to ensure the provisional judicial protection of the rights conferred under the European Union's legal order and, second, to disapply, at the end of such an interlocutory procedure, that national legislative provision if that court holds it to be contrary to EU law."

[9] CJEU judgement of 12 January 2010 in Case C-341/08 Petersen, para. 80.

[10] CJEU judgement of 22 June 1989 in Case 103/88 Costanzo, para. 31.

[11] For a clear endorsement of this duty see CJEU judgement of 15 November 2016 in Case C-628/15 The Trustees of the BT Pension Scheme, para. 54; also CJEU judgement of 29 April 1999 in Case C-224/97 Ciola, para. 26 and 30.

Germany and in Latvia – however, in terms of actual practice, as we shall see, its application remains rather problematic.

The purpose of this article is to assess how the *Simmenthal* doctrine, i.e., the obligation to set aside national law that conflicts with the EU law, actually works in Germany and in Latvia some 40 years after its pronouncement by the CJEU. In particular, the article will explore whether national law in both countries allows courts and administration to disapply national law that conflicts with the EU law. This ability of national courts depends on both direct effect and the recognition of primacy of EU law (more specifically, on the place afforded to the EU law in the hierarchy of national norms), i.e., on the limits that national law attempts to place on the primacy of EU law.

2. *Simmenthal* in Germany

With regard to these aspects, it is worthwhile to analyse how far German courts and administration comply with the *Simmenthal* doctrine. Firstly, this part will focus on the general legal framework (2.1.) before exploring the application by German courts in their corresponding practice (2.2.) and finally, the German administration and its practice (2.3.).

2.1. The corresponding legal framework: The German Grundgesetz

Given that the *Simmenthal* doctrine mainly deals with the obligation for state institutions to apply EU law, the following elaborations will only superficially touch upon the complex relation between German constitutional law and EU law, which involves various decisions of the BVerfG[12] and which has triggered a continuous and controversial scholarly debate. However, it is necessary to indicate some aspects of the constitutional legal framework before briefly dealing with the *Simmenthal* doctrine in court practice, i.e., the use of Art. 267 TFEU by German courts.

In *Simmenthal*, the ECJ ruled:

> *Accordingly, any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community Law by withholding from the national court [...] to set aside national legislative provisions which might prevent Community Rules from having full force and effect are incompatible with those requirements which are the very essence of Community Law*.[13]

[12] Schmitz T. Constitutional jurisprudence in the member states on the participation in the process of European integration, provides a very condensed overview. Available: http://www.iuspublicum-thomas-schmitz.uni-goettingen.de/Lehre/Jurisprudence-on-integration-2.htm [viewed 08.010.2021.].

[13] ECJ, *Simmenthal, supra note* 1, para. 22.

One of the constitutional principles laid down in Art. 20 (3) *Grundgesetz* (GG, German Basic Law), is the so-called *Rechtsstaatsprinzip* which, *inter alia*, implies the legality of all acts of state institutions and which largely corresponds to the *rule of law*.[14] This principle is directed towards all three powers which are explicitly separated, as stipulated in Art. 20 (2), the 2nd sentence GG.

Besides German law, national courts apply EU law. Art. 23 (1) and 24 (1) GG form the legal basis for the Federal Republic of Germany to integrate in international organisations and in the EU. Furthermore, the interpretation of these provisions – particularly 23 (1) GG – holds that, by consenting to the creation of the EU, this act generally comprises the primacy of EU law over German law, as long as it can be derived from the Treaties. Accordingly, with some peculiarities regarding constitutional law, EU law enjoys primacy over German law (laws, regulations and statutes). This is understood as a primacy in application, i.e., conflicting German law is not declared as void but will not be applied when conflicting with EU law.[15]

The architecture of the GG further completes the principle of legality, stipulating in Art. 19 (4) GG:

> *Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph.*

As a consequence of the separation of powers, courts and administration alike are not entitled to autonomously declare the laws of the legislative (*formelle Gesetze*) as void. In most cases, one may assume that judges face a conflict of laws, i.e., that the national judge decides on the mere application of a norm (e.g., when applying the rules of private international law). However, in cases where a law is incompatible with other legal norms, Art. 100 GG facilitates the practical compliance with both the *Rechtsstaatsprinzip* and the separation of powers, in so far as it provides the *Bundesverfassungsgericht* (BVerfG) with the power to declare norms that are deemed to be incompatible with the constitution as void.[16] This procedure thus resembles the preliminary ruling procedure of Art. 267 TFEU in EU law and facilitates the constitutional review of *acts by the state*.

Accordingly, the German system foresees that the BVerfG exclusively holds the competence to declare acts of the legislative as void (*Normenverwerfungskompetenz*). With regard to its competence, the BVerfG is limited to reviewing the legality of German legal acts and their compatibility with the German GG. Consequently, given that EU primary and secondary law does not qualify as

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[14] See Schewe C., Blome T. "The Rule of Law Mechanism" and the Hungarian and Polish Resistance: European Law Against National Identity? Journal of the University of Latvia "Law" No. 14, 2021, pp. 49–67. Available: https://doi.org/10.22364/jull.14 , https://www.apgads.lu.lv/juridiska-zinatne-/-law-nr-14/03 [viewed 08.10.2021.].

[15] BVerfGE 31, p. 145 ff, 173 ff.

[16] Degenhart C. Staatsrecht I, Staatsorganisationsrecht, C.F. Müller, 30. Aufl. 2014, p. 335, para. 837, in case of a conflict with constitutional law, the BVerfG usually declares the corresponding legal act as void in the sense that it becomes invalid *ex tunc,* ibid., p. 343, para. 855 f.

a national legal act, Art. 267 TFEU is the provision applicable for legal review in the case of a conflict of national law with EU law. In theory, there thus is a clear distinction between the competence of the BVerfG regarding the review of the constitutionality of acts and the competence of the CJEU concerning the compatibility of national legal acts with EU law. Accordingly, for courts there is no need for requesting a ruling by the BVerfG when the matter concerns compatibility with EU law.[17]

In practice, however, there may be overlaps, for instance, given that the fundamental rights granted under the GG largely correspond to those of the CFEU and given the fact that legal acts, despite seemingly being enacted by the German legislator, may go back to EU law (for instance, in the case of directives (Art. 288 (3) TFEU). Legal acts thus may have a hybrid nature establishing the competence of both courts, rendering a strict distinction difficult. In this case, there may arise doubts for judges whether a norm conflicts with EU law or constitutional law.[18] In order to avoid that national courts might have to decide on this matter, the BVerfG ruled that these matters may also be subject of Art. 100 (1) GG claims.[19]

With regard to the above, national judges apply EU law in relative independence. If a judge deems that EU law is in conflict with the core provisions of the German *Grundgesetz*, the BVerfG has ruled that this ultimately is a question of German constitutional law.[20] Accordingly, the BverfG is exclusively entitled to decide whether a provision of EU law is not applicable in Germany, or if the respective act is to be seen as an *ultra vires* act.[21] One may take note that a decision in the latter direction leads to a major conflict with EU law in practice, and will thus become a matter of the CJEU.[22] This, however, is not an aspect regarding the application of the *Simmenthal* doctrine.

Despite this aspect, one may conclude that the Germany's system of legal review distinguishes between the compatibility of legal acts with constitutional and EU law, which generally seems to comply with the *Simmenthal* doctrine.

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[17] BVerfGE 31, p. 145 ff, 173 ff.

[18] Regarding these aspects see, e.g., Degenhart C. Staatsrecht I, Staatsorganisationsrecht, C. F. Müller, 30. Aufl. 2014, p. 103, para. 266 ff.

[19] Dederer H.-G. Art. 100 GG. In: Dürig G., Herzog R., Scholz R., Grundgesetz, Kommentar, 95. Auflage, München: Beck 2021, para. 52.

[20] Schweizer M., Dederer H.-G. Staatsrecht III, C. F. Müller, 12. Aufl. 2020, p. 44, para. 160, provide a good overview.

[21] This was the case in BVerfG, Judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15 –, paras. 1, 95 ff, http://www.bverfg.de/e/rs20200505_2bvr085915en.html; for earlier judgments of the BVerfG in a similar direction, see footnote 34 below.

[22] See, for instance: Letters of formal notice, Primacy of EU law: Commission sends letter of formal notice to Germany for breach of fundamental principles of EU law at: https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743 and earlier, CJEU judgement of 17 December 1970 Case 11/70 Internat. Handelsgesellschaft or CJEU judgement of 22 October 1987 in Case 314/85 Foto-Frost v. Hauptzollamt Lübeck-Ost.

2.2. *Simmenthal* in German court practice: The use of Art. 267 TFEU

Regarding the review of the compatibility of German law with EU law, recent statistics seem to illustrate that the bifurcation seems to work in German court practice. In the period 2016–2020, around 20% of all preliminary rulings enacted by the CJEU stem from German courts.[23] This number indicates that judges generally respect the bifurcation illustrated above. Furthermore, more detailed research in databases[24] reveals that, where applicable, German courts quote the *Simmenthal* doctrine and decide the case accordingly. Interestingly, this concerns the first instance courts, as well as the higher and highest courts, indicating a prevailing acceptance of the *Simmenthal* doctrine. Only occasionally the BVerfG itself has requested preliminary rulings of the CJEU. However, it is worth noticing that it fostered the use of Art. 267 TFEU by national judges, insofar as it ruled that the CJEU is to be considered as the lawful judge (*gesetzlicher Richter*) in the sense of Art. 101 (1) sentence 2 GG and that the refusal by a court to request a preliminary ruling may be considered an infringement of the judicial rights protected under the GG.[25]

2.3. *Simmenthal* and the German administration

Besides courts, also the national administration has to apply the law, i.e., including EU law. As far as EU law has a direct effect, it forms part of the German legal order. Accordingly, the German administration is obliged to apply EU law in the same way as it would apply a German national legal provision, provided that EU law does not require specific rules for the application of the law compared to merely internal national cases.[26]

Given that it is generally accepted that, in case of a conflict, EU law prevails over national law, one may assume that German administrative practice usually corresponds to *Simmenthal*. In detail, however, it is contested how the administration should deal with a collision between German and EU

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[23] CJEU, Annual Report – Court of Justice of the European Union 2020, p. 211. Available: https://curia.europa.eu/jcms/jcms/Jo2_7000/en/ [viewed 10.10.2021.].

[24] www.Beck-online.de and www.juris.de.

[25] BVerfG, Beschluss der 2. Kammer des Zweiten Senats vom 06. Oktober 2017 – 2 BvR 987/16 –, para. 3. Available: http://www.bverfg.de/e/rk20171006_2bvr098716.html [viewed 12.10.2021]; recently confirmed by BVerfG, Beschluss der 2. Kammer des Ersten Senats vom 14. Januar 2021 – 1 BvR 2853/19 –, para. 8. Available: http://www.bverfg.de/e/rk20210114_1bvr285319.html [viewed 12.10.2021.].

[26] Comprehensive on the relationship between European Union law and national administration law see: Stelkens. Europaisches Verwaltungsrecht, Europaisierung des Verwaltungsrechts und Internationales Verwaltungsrecht [European administrative law, Europeanization of administrative law and international administrative law]. In: Stelkens P., Bonk H.J., Sachs M. Verwaltungsverfahrensgesetz, München: C.H. Beck, 2018, para. 1 ff.

law.[27] The reason for this dispute is that – as has been noted above regarding German courts – the German administration does not hold the competence to declare legal norms as void. Furthermore, it has been stated above that, only the constitutional courts (also the *Bundesländer* have constitutional courts) are entitled to declare laws – in the sense of acts of parliament – as void, while other courts only may declare other German legal provisions as void, e.g., ordinances (*Satzungen, Rechtsverordnungen*). Therefore, should the administration come to the conclusion that a German act of parliament or a German ordinance is void, it may become problematic to solve the situation. As a general guideline for such cases, the administration is obliged to stay the proceedings and to try internally to ensure that the norm in question is amended or brought into conformity either by the parliament, the competent body or – regarding ordinances – courts.[28] This general guideline, however, does not help in urgent matters.[29]

While this is not precisely what the *Simmenthal* doctrine requires, it illustrates an interesting deviation in Germany between cases without any EU law context (where the administration must not decide on the validity of norms) on the one hand, and in case of a conflict between EU law and German national law (where *Simmenthal* applies) on the other. In that regard, it is important to note that both scenarios are not directly comparable: it is something different to declare a legal norm as void or only not to apply a legal norm in an individual case – as required according to the principle of primacy of European Union law (primacy in application).[30] Similar cases of disapplication of legal norms are also known and generally accepted in other cases, for instance, regarding the rule of *lex specialis and lex posterior*. Furthermore, it has been noted above, that, in case of a collision between European Union law and German legislation, the conflicting German law is not declared as void but will simply not be applied in cases having an EU context.[31]

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[27] See, for instance: Dettner, A. IV. Unionsrecht und nationales Recht. In: Dauses M., Ludwig M. Handbuch des EU-Wirtschaftsrechts, München: C. H. Beck 2021, para. 15; Gärditz, § 35 Verhältnis des Unionsrechts zum Recht der Mitgliedstaaten. In: Rengeling H-W., Middeke A., Gellermann M. (Hrsg.) Handbuch des Rechtsschutzes in der Europäischen Union, München: C. H. Beck, 2014, para. 13; Ruffert, Art. 288 AEUV. In: Callies C., Ruffert M. (Hrsg.). EUV/AEUV, München: C. H. Beck, 2016, para. 73 f., all with further references. See also very critical with regard to competencies of the administration to disapply national norms in case of a conflict with EU law – Semmroth W. DocMorris als Einfallstor für Normverwerfungskompetenz der Verwaltung, NVwZ 2006, p. 1378. Likewise, instructive is Demleitner A. Die Normverwerfungskompetenz der Verwaltung, NVwZ 2009, p. 1525 ff.

[28] See, for example, Demleitner A. Die Normverwerfungskompetenz der Verwaltung, NVwZ 2009, p. 1528. See also with further references Sachs M. VwVfG § 44 Nichtigkeit des Verwaltungsaktes, In: Stelkens P., Bonk H. J., Sachs M. Verwaltungsverfahrensgesetz, München: C. H. Beck, 2018, para. 89 ff.

[29] Demleitner A. Die Normverwerfungskompetenz der Verwaltung, NVwZ 2009, p. 1528 f.

[30] Insofar, see, for example Nettesheim M. Recht der Europäischen Union, München: C. H. Beck, 2021, Art. 1 AEUV para. 79 ff. and, in particular, para. 81.

[31] This can be assumed as generally accepted. See Streinz R. EUV/AEUV, München: C. H. Beck, 2018, Art. 4 EUV para. 37. From EU perspective see, for instance, CJEU judgement of 22 October 1998 in joined Cases C-10/97 to C-22/97 Ministero delle Finanze, para. 21.

Therefore, only if German law is obviously not in accordance with EU law, the administration is obliged to explicitly pronounce the primacy of EU law. A different question is how to deal with critical cases which are not "crystal clear". In these cases – despite the explicit CJEU case law – numerous arguments speak in favour of leaving some discretion to the German administration and rather to apply German national legislation.[32] Accordingly, this might be regarded as a presumption which might be named "*in dubio pro* national law" which, however, *à priori* stands in conflict with the *Simmenthal* doctrine; at the same time, from a different angle, it might also be considered as a consequence following from the principle of subsidiarity. However, so far there do not seem to be completely satisfying solutions for this dilemma.[33] It is usually the administration that bears the risk of incorrectly applying the law and accordingly triggering consequences, such as state liability.

In practice, problematic cases of this type are highly unlikely. One important reason is the fact that the German administration often acts on the basis of internally binding administrative provisions (*Verwaltungsvorschriften*). These originate from specialised institutions within the German administration, are internally binding and regulate the practically most important constellations. Moreover, administrative provisions are continuously monitored and updated. Accordingly, they normally reflect the applicable EU law and ensure that administrative practice does not conflict with EU law. Notwithstanding, there are three particular constellations, in which problematic cases might arise: (1) The competent German administration is not aware of conflicting EU law. (2) There is a misinterpretation of either national law or European Union law, that causes a legally incorrect decision and (3) the application of the law is simply complex in an individual case, wherein – from the perspective of EU law – the administrative body decides incorrectly. All these three cases are not what *Simmenthal* refers to but rather result from the fact that, sometimes, the correct application of the law may be complex.

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[32] See also Gärditz K. F. § 35 Verhältnis des Unionsrechts zum Recht der Mitgliedstaaten. In: Rengeling H-W., Middeke A., Gellermann M. (Hrsg.). Handbuch des Rechtsschutzes in der Europäischen Union, München: C. H. Beck, 2014, para. 13; Ruffert, Art. 288 AEUV. In: Callies C., Ruffert M. (Hrsg.). EUV/AEUV, München: C. H. Beck, 2016, para. 74 f., with further references. Instructive – Demleitner, Die Normverwerfungskompetenz der Verwaltung, NVwZ, 2009, p. 1525 ff.

[33] See in particular Streinz, R. EUV/AEUV, München: C.H. Beck, 2018, Art. 4 EUV para. 39, with a very interesting reference to ECJ cases C-171/07 and C-172/07 (DocMorris II). In these cases *Verwaltungsgericht des Saarlandes* referred to the Court explicitly the following question: "Having regard in particular to Art. 10 EC and to the principle of effectiveness of Community law, is a national authority entitled and obliged under Community law to disapply national provisions it regards as contrary to Community law even if there is no clear breach of Community law and it has not been established by the Court of Justice [...] that the relevant provisions are incompatible with Community law?" (para. 15). This question was finally not answered by ECJ (para. 62). Also Gärditz K. F. § 35 Verhältnis des Unionsrechts zum Recht der Mitgliedstaaten. In: Rengeling H-W., Middeke A., Gellermann M. (Hrsg.). Handbuch des Rechtsschutzes in der Europäischen Union, München: C. H. Beck, 2014, para. 13, and Sachs M. VwVfG § 44 Nichtigkeit des Verwaltungsaktes. In: Stelkens P., Bonk H. J., Sachs M. Verwaltungsverfahrensgesetz, München: C. H. Beck, 2018, para. 89 ff., argue (with further references) in a similar direction.

Accordingly, one may conclude that there are no general conflicts between the *Simmenthal* doctrine and administrative practice in Germany. An (open) conflict could normally only arise in the very rare cases of an *ultra-vires* act of the European Union. It needs to be stressed that this decision may only be taken by the BVerfG, which explicitly ruled to have the sole competence to declare an EU law act as not applicable.[34] One may therefore say that also these rare cases do not – from the perspective of German public administration – incur any conflict with the *Simmenthal* doctrine.

3. *Simmenthal* in Latvia

3.1. General legal framework

The ability of Latvian courts to set aside conflicting national provisions is conditioned by two related aspects: the direct effect of EU law and the extent to which Latvian legal system recognizes the primacy of EU law, i.e., the place afforded to EU law in the hierarchy of Latvian norms.[35] As far as primacy and direct effect are concerned, the obligations of Latvian courts and administration from the perspective of EU law are rather clear. Both courts and administration are to apply EU law to the cases they decide. Should there be a conflict between Latvian and EU law, EU law overrides any provision of Latvian law.[36] Although Latvian courts have never challenged the case law of the CJEU on primacy of EU law, the legal force of EU law within Latvian legal system is ambivalent.

At the statutory level, the main documents that mandate Latvian courts and administration to apply EU law are the three major Latvian procedural laws (Administrative Procedure Law, Civil Procedure Law and Criminal Procedure Law).[37] With Latvia's accession to the EU all three were amended entitling Latvian courts (and administration) to apply EU law, as well as emphasizing the importance of CJEU's case law and the possibility to make a reference for preliminary rulings. These norms in all three procedural laws were constructed as blanket norms with

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[34] See *Bundesverfassungsgericht*, Urteil vom 30. Juni 2009, 2 BvE 2/08 et al., para. 240 and in particular para. 241 (Decision on Treaty of Lisbon) and *Bundesverfassungsgericht*, Urteil vom 12. Oktober 1993, 2 BvR 2134/92 et al., para. 112 (Decision on the Treaty of Maastricht). Regarding the problem, whether and under which circumstances a European Union law is not applicable as it constitutes an *ultra vires* act, see Skouris V. Der Vorrang des Europäischen Unionsrecht vor dem nationalen Recht. Unionsrecht bricht nationales Recht, EuR 2021, p. 3 ff.

[35] Whether primacy of the EU law is an issue of legal force or merely of application is a contested topic, see Avbelj M. Supremacy or Primacy of EU Law – (Why) Does it Matter? European Law Journal, 2011, Vol. 17(6), pp. 744–763.

[36] CJEU judgement of 17 December 1970 in Case 11/70 Handelsgesellschaft; CJEU judgement of 26 February 2013 in Case C-399/11 Melloni.

[37] Administrative Procedure Law. Available in English: https://likumi.lv/ta/en/en/id/55567-administrative-procedure-law [viewed 28.11.2021.]; Civil Procedure Law. Available in English: https://likumi.lv/ta/en/en/id/50500-civil-procedure-law [viewed 28.11.2021.]; Criminal Procedure Law. Available in English: https://likumi.lv/ta/en/en/id/107820-criminal-procedure-law [viewed 28.11.2021.].

direct reference to the EU law itself.[38] However, Latvian Administrative Procedure Law, unlike Civil Procedure Law and Criminal Procedure Law, contains a detailed exposition of the relationship between EU law and national law and therefore deserves a closer examination. For example, Art. 15 of the Latvian Administrative Procedure Law states that:

> *(1) An institution and a court shall apply in the administrative proceedings the external legal acts, provisions of international law and European Union law, and also general principles of law.*
>
> *(4) Provisions of European Union law shall be applied in accordance with the place thereof in the hierarchy of legal force of external legal acts. In applying the provisions of European Union law, an institution and a court shall take into account the case law of the Court of Justice of the European Union.*

Thus Latvian Administrative courts are obliged to apply the EU law in accordance with "the hierarchy of legal force of external legal acts". The ambivalent point is that neither this law nor any other Latvian law specify where exactly the EU law dwells in this hierarchy. There are several Latvian laws that address the hierarchy of norms in the Latvian legal system. For instance, Art. 16 of the Law on the Constitutional Court states that the Constitutional court reviews compatibility of Latvia's international agreements with the Constitution, thus implying supremacy of the Constitution. The same article provides that the Constitutional Court is entitled to review any national law that may be incompatible with Latvia's international agreements, thereby implying primacy of international agreements over national laws. Together, these two propositions suggest that as a matter of Latvian law (at least as far as international treaties are concerned – including EU treaties), they are below Latvia's Constitution, but above any other Latvian legal act. However, the above quoted Art. 15 of the Administrative Procedure Law also states that courts must take into account the case law of the CJEU, which uncompromisingly provides for primacy of EU law over all national law, including over national constitutions.[39]

The reason why the Administrative Procedure Law was left so equivocal is that it needs to reconcile primacy of EU law (stemming from the CJEU case law) with supremacy of Latvia's Constitution (stemming from national legal order itself). Which is the law that ultimately enjoys primacy – EU law or the national constitution – is a perennial question, which is perhaps best left unanswered.[40] The result is a purposefully vague formulation which neither clearly acknowledges primacy of EU law, nor denies it, nor tells Latvian courts what exactly to do when finding a national rule that conflicts with an EU rule. However, the conciliatory

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[38] Similar approach was used by several other post-2004 new Member States – regarding this, see, e.g., Bobek M. Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice. Common Market Law Review, Vol. 45, 2008, pp. 1611–1643.

[39] CJEU judgement of 26 February 2013 in Case C-399/11 *Melloni.*

[40] See Weiler J. Van Gend en Loos: The individual as subject and object and the dilemma of European legitimacy. International Journal of Constitutional Law, Vol. 12(1), 2014, pp. 94–103; Alter K. Establishing the supremacy of European law: The making of an international rule of law in Europe. Oxford: Oxford University Press, 2010.

view of Latvian scholarship is that EU law enjoys primacy over all national law with the exception of foundational constitutional norms.[41] Thus, in terms of actual application of *Simmenthal* doctrine, the primacy of EU law is not an obstacle for Latvian courts to set aside conflicting national rules, except for the narrow category of cases where there would be a conflict with the Latvian Constitution.

Another key provision that determines application of *Simmenthal* doctrine by Latvian courts is Art. 104 of the Administrative Procedure Law. This article provides for an obligation of every administrative court in cases of doubt to verify whether the applicable national legal provision conforms to the legal provisions of higher legal force. In cases when the administrative court comes to the conclusion that indeed there is a conflict between legal provisions, Art. 104 provides two alternative scenarios how an administrative court should proceed. In cases of municipal regulations or governmental regulations, administrative courts have a right not to apply those regulations if they contradict norms of higher legal force. Yet in cases where "a legal provision does not conform with the Constitution or provision (act) of international law, it shall suspend court proceedings in the case and send a substantiated application to the Constitutional Court".

If one interprets "provision (act) of international law" as covering also the EU law, as well, then this provision of the Administrative Procedure Law seems to contradict the *Simmenthal* judgement, since it forces Latvian administrative courts not to apply the EU law immediately, but instead to suspend the proceedings and turn to the Constitutional Court first. However, there are at least two arguments why the Art. 104 of the Administrative Procedure Law should be interpreted as not covering the EU law and, therefore, not breaching the *Simmenthal*. Firstly, Art. 1 of the Administrative Procedure Law provides a definition of the international law, which does not cover the EU law[42], thus suggesting that the obligation to turn to the Constitutional Court does not apply to cases of conflict with EU law. Also, EU law *expressis verbis* is not mentioned anywhere in the text of Art. 104 of the Administrative Procedure Law and the Law in majority of articles (albeit not always)[43] makes a deliberate distinction between international law and EU law.[44]

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[41] Commentary to the Administrative Procedure Law points to primacy of EU law, while at the same time stating that primacy would not apply to the core norms of the Constitution, see: Briede J. (ed.). Administratīvā procesa likuma komentāri. Rīga: Tiesu Namu Aģentūra, 2013, p. 239. This, however, does little to clarify what place in the hierarchy of legal norms is occupied by EU's secondary law, which national courts are also obliged to apply.

[42] Art. 1 of the Administrative Procedure Law: "(7) A provision of international law consists of international agreements binding on Latvia, customary international law, and general principles of international law."

[43] See Art. 11 of the Administrative Procedure Law: "An institution may issue an administrative act or perform an actual action unfavourable to a private person on the basis of the Constitution, laws or the provisions of international law."

[44] The best example here is another part of the same Art. 1 that lists all types of external legal acts: "(5) An external legal act is the Constitution (*Satversme*), laws, Cabinet regulations, and binding regulations of local governments, and also international agreements and original Treaties of the European Union and legal acts issued on the basis thereof."

Secondly, Art. 104 of the Administrative Procedure Law is followed by Art. 104.1, which mirrors Art. 267 of the TFEU and mandates administrative courts to request preliminary rulings from the CJEU. Such placement of articles suggests that in cases when a court finds a conflict between Latvian law and EU, its obligations differ from the standard mode of Art. 104 and the national court in case of doubt must rather turn to CJEU rather than to the Constitutional Court.[45] Thus, it seems that the overall system of the Administrative Procedure Law supports the view that there is no duty for Latvian administrative courts to refer to the Latvian Constitutional Court in cases of conflicts between EU law and Latvian law, and, therefore, the obligations under the Administrative Procedure Law would seem not to contradict *Simmental*. Yet, the very possibility of the above discussion shows that the Administrative Procedure Law is ambivalent both regarding the general status of the EU law in the hierarchy of the Latvian legal system, as well as the duties of administrative courts in the context of their obligation to immediately give full effect to EU law.

3.2. *Simmenthal* in Latvian courts

3.2.1. Administrative courts and courts of general jurisdiction

Regarding the application of the *Simmenthal* doctrine by Latvian administrative, as well as general courts, the examples are rather scarce. On the one hand, there are no cases where Latvian courts would have blatantly ignored the duty to immediately set aside national rules that conflict with EU law. Furthermore, there are no cases where, for instance, administrative courts would have used Art. 104 of the Administrative Procedure Law in relation to the EU law, thereby breaching their obligations under *Simmental*. However, on the other hand, the willingness of Latvian courts to use the *Simmenthal* doctrine in practice remains somewhat doubtful. In accordance with the publicly accessible database of Latvian court judgments and decisions,[46] *Simmenthal* judgement itself has been generally ignored by Latvian courts. There are only 3 judgments where *Simmenthal* is mentioned, and in all three cases the courts do not set aside Latvian laws in favour of directly applicable EU law – the *Simmenthal* is mentioned rather just as a side note reference.[47]

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[45] Such a scenario would, however, potentially create procedural "parallel routes" – when Latvian administrative court deems the provision of the Latvian law to be contrary to both EU law and a provision of higher Latvian law, e.g., a norm of the Latvian law contradicts an EU regulation and the Latvian Constitution. It is unclear whether in such cases administrative courts should use the *Simmenthal* doctrine and pass the judgment by themselves; or if they are under an obligation to stop the proceedings and submit an application to the Latvian Constitutional Court under the Art. 104 of the Administrative Procedure Law.

[46] Available in Latvian: https://manas.tiesas.lv/eTiesasMvc/nolemumi [viewed 28.11.2021.].

[47] See judgement of the Administrative Court of Appeals of 30 October 30 2008 in Case AA43-1111-08/13; judgement of the Administrative Court of Appeals of 29 May 2009 in case AA43-2025-09/11; judgement of the Administrative Department of the Supreme Court of Latvia of 5 March 2009 in Case SKA – 175/2009.

Yet at the same time there generally is no doubt regarding the overall willingness of Latvian courts, especially administrative courts, to use EU law and to adhere to the case law of the CJEU, particularly to the direct and indirect effect of EU law. For instance, in some judgments the Supreme Administrative Court has deployed quite extensive argumentation not only regarding applicable directives, but also has rather accurately elaborated on general principles of how the directives should be used by Latvian courts.[48] An indirect indication that Latvian courts do attempt to give full effect to rights protected under EU law is that courts, especially administrative courts, make extensive use of preliminary rulings procedure. So far, there have been more than 100 references to the CJEU from Latvian courts, which is more than from jurisdictions of comparable size, for example, from Lithuania and Estonia.[49] The absence of actual use of Art. 104 of the Administrative Procedure Law by administrative courts regarding EU law, is another indicator that Latvian courts apply EU law directly and recognize its supremacy rather than turn to the Constitutional Court for annulment of Latvian law that contradicts EU law. However, as in other Member States, the indirect effect of EU law seems to be the preferred option, with Latvian courts choosing rather to avoid direct confrontation between EU law and national law,[50] and to interpret national law in the light of EU law.

3.2.2. The Constitutional Court of Latvia

Regarding the Constitutional Court of Latvia and the *Simmenthal* doctrine, at the first glance there seems to be no room for controversies. As previously mentioned, there are no cases where the administrative courts would have used Art. 104 of the Administrative Procedure Law and made a reference to the Latvian Constitutional Court with a request to evaluate the validity of a Latvian law in light of EU law. Moreover, the Latvian Constitutional Court is well aware of *Simmenthal* and has mentioned the judgment in their request for a preliminary ruling, but in the context of their own duty to use EU law and seeking possible exceptions to the *Simmenthal* doctrine.[51] However, there is no clear case law of the Constitutional Court on particularities of their competence regarding EU law. So far, the Constitutional Court has been silent on whether requests

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[48] Judgment of the Administrative Department of the Supreme Court of Latvia of 24 March 2010 in Case SKA-293/2010. See also Buka A., Bērziņa L. Application of the EU Directives in the Latvian courts: tendencies and challenges. Collected Papers "Constitutional Values in Contemporary Legal Space". Rīga: University of Latvia, 2016.

[49] Data on the number of references for the preliminary rulings collected from the CJEU annual reports (available: https://curia.europa.eu/jcms/jcms/Jo2_11035/rapports-annuels) and from the CJEU case law search form (available: https://curia.europa.eu/juris/recherche.jsf?language=en) [viewed 28.11.2021.].

[50] Rodin S. Back to Square One-the Past, the Present and the Future of the Simmenthal Mandate. European Constitutional Law Network, The 8th Annual Conference. 2010. Available: https://repositorioinstitucional.ceu.es/bitstream/10637/3456/1/back_rodin_2011.pdf [viewed 28.11.2021.].

[51] CJEU judgement of 21 June 2021 in Case C-439/19 Latvijas Republikas Saeima (Soda punkti).

by administrative courts under Art. 104 of the Administrative Procedure Law (suspecting Latvian law to contravene EU law) would breach *Simmenthal*.

Similarly, it is unclear whether the Constitutional Court is entitled to review legality of Latvian law solely on the basis of EU law. The jurisdiction of the Constitutional Court is set out in the Art. 16 of the Constitutional Court Law. The most likely sections of that article, which may imply such jurisdiction, are:

> *The Constitutional Court shall adjudicate matters regarding:*
> [...]
> *3) conformity of other laws and regulations or parts thereof with the norms (acts) of a higher legal force;*
> [...]
> *6) conformity of Latvian national legal norms with those international agreements entered into by Latvia that are not in conflict with the Constitution.*

So far, the Constitutional Court has used EU law in a variety of cases and is rather active in communication with the CJEU (five references for preliminary rulings during the last five years)[52]. However, there are no cases where the Constitutional Court would have used exclusively EU law as the yardstick in its judicial review of national law – all the previous cases that involved EU law issues were adjudicated on the basis of Latvian Constitution or Latvian laws and the EU law was used only as an additional argument. On the other hand, the Constitutional Court has not explicitly denied its right to review the legality of Latvian law in light of EU law. The issue of jurisdiction of the Constitutional Court to perform judicial review of national law with the EU law as the only yardstick deserves separate in-depth analysis and is not the main focus of this article. Taking into account general openness of the Latvian Constitutional Court towards the EU law, one can expect that the future case law will shed light on this grey area of application of the EU law.

3.3. Simmenthal and the Latvian administration

There is no practice (to the best knowledge of authors) of any administrative institution in Latvia which would have made direct reference to the *Simmenthal* doctrine or disapplied Latvian law on its own motion. This is hardly surprising since Latvian Administrative Procedure Law contains a clearly formulated prohibition to do so in the Art. 15:

> *(11) If an institution is required to apply a legal provision but has reasonable doubts as to whether this legal provision is compatible with a legal provision of higher legal force, the institution shall apply such legal provision but shall immediately inform a higher institution and the Ministry of Justice of its doubts by means of a reasoned written report.*

[52] Cases of the Latvian Constitutional Court 2016-04-03, 2018-18-01, 2019-28-0103, 2020-24-01, 2020-33-01.

Therefore, in comparison with courts, a different procedure is set for the administrative authorities in the process of examining the constitutionality of a legal norm, namely, even if there are reasonable doubts as to whether the applicable norm is in conformity with a provision of higher legal force, the authority still must apply that norm.[53] The article is formulated rather broadly and does not distinguish amongst various kinds of legal provisions, therefore, it covers national law, as well as international and EU law.

This provision contradicts the very purpose of *Simmenthal* doctrine. Not only does it preclude administration from following the *Simmenthal*, but it also directly threatens effective application of EU law. Compared with the German approach to the competence of administrative authorities to immediately apply EU law, Latvian approach in effect precludes supremacy and direct effect of EU law until the discrepancy of national law is resolved by the legislator. In contrast German administrative authorities are precluded from declaring legislative norms void, but they are not precluded from disapplying those norms in certain situations, whereas Art. 15(11) of the Latvian Administrative Procedure Law not only prohibits declaring a legislative norm void (which is presumed self-evident and therefore is not even stated in the article), but also contains a prohibition to disapply the national legal provision, even if it contradicts EU law.

It is hard to estimate how big of an issue it is in practice. On the one hand, similarly as with the application of the *Simmenthal* doctrine in practice by courts, Latvian administrative authorities still can use the indirect effect of EU law and do their best in interpreting the Latvian laws in accordance with the EU law – Art. 15(11) of the Latvian Administrative Procedure Law does not preclude that. However, that obviously does not ensure full effectiveness of EU law. What somewhat alleviates the problem is that there is a well-developed internet portal, maintained by the Ministry of Justice, that covers, among other things, topical information on how the EU law has been implemented in Latvia.[54] Additionally, in some areas there are internal guidelines (similarly as in Germany) that help administrative authorities to interpret Latvian laws in accordance with the EU law. Typical institutions of Latvian public administration that use internal guidelines (at times also in areas covered by the EU law) are State Revenue Service, Competition Council, State Data Inspection and Consumer Rights Protection Centre.[55] However, in comparison with Germany, the obligations and culture of applying internal guidelines in Latvia are not that common and developed.

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[53] Briede J. (ed.). Administratīvā procesa likuma komentāri. Rīga: Tiesu Namu Aģentūra, 2013, p. 248.

[54] See: https://www.estiesibas.lv/ [viewed 28.11.2021.].

[55] On detailed analyses of how the system of internal guidelines in Latvia works and what are the challenges in that regard, see: Pastars E., Novicka S., Priekulis J. Iestāžu vadlīnijas – labā prakse vai likuma atrunas principa pārkāpums. Jurista Vārds, 24.01.2017, No. 4(358).

Conclusion

In the case of Germany this research concludes that court practice largely is in conformity with *Simmenthal*. Accordingly, courts frequently refer questions to the CJEU or explicitly refer to the *Simmenthal* jurisprudence. While court practice is relatively well accessible and transparent, it is more difficult to review administration. However, the practice in German administration to work with administrative provisions which are continuously brought in line with developments in EU law, helps to provide overall adherence to the *Simmenthal* doctrine. It is more on an academic level that this analysis has illustrated a dilemma between the strict application of the *Simmenthal* doctrine and German constitutional law. This scenario would eventually require the administration to interfere with the judiciary and thus act contrary to the (German) rule of law.

The analysis with regard to Latvia indicates that, as far as courts are concerned, legislation and court practice generally complies with *Simmenthal* requirements. However, duties of Latvian courts in relation to the application of the EU law (its place in the legal hierarchy and the duty to refer to the Constitutional Court) seem to be purposefully vague. The reason for such ambivalence is that the Latvian Administrative Procedure Law needs to reconcile the primacy of EU law with the supremacy of the Latvian Constitution. The result is an indistinct formulation which neither clearly acknowledges primacy of EU law, nor tells Latvian courts or administration what exactly to do when finding national rule that conflicts with EU law.

One avenue for solving this legislative tentativeness would be to amend the Latvian Administrative Procedure Law. Those amendments could, firstly, attempt to take on the uncomfortable task of defining the place of EU law in the Latvian hierarchy of norms and, secondly, clarify the scope of duty of administrative courts to refer to the Constitutional Court under Art. 104 of the Administrative Procedure Law. Another, alternative solution would be a more conceptual legislative shift mirroring the approach used in the Latvian Civil Procedure Law and Latvian Criminal Procedure Law, which, instead of spelling out the details of interaction between national and EU law, emphasizes the primacy of EU law and the case law of the CJEU. Finally, instead of legislative amendments, the Constitutional Court is in the position to provide in its case law an authoritative interpretation of existing Latvian law in the light of *Simmenthal* and the primacy of EU law.

To conclude, one might wonder whether the *Simmenthal* doctrine needs revision on the EU level by the CJEU itself. Of course, *Simmenthal* line of cases fit within the general framework of the CJEU's efforts to ensure maximum efficiency of EU law and utmost possibilities for individuals to use EU law at the national level. Yet, as the present research shows, the application of the *Simmenthal* doctrine to national administrative authorities, i.e., their duty to disapply national legislation, is a far cry from the reality of national practice and may sit uneasily with the principle of separation of powers.

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