

3

Conflicts and Integration: Revisiting *Costa v ENEL* and *Simmenthal II*

HERWIG CH HOFMANN

This short Chapter revisits the cases of *Costa v ENEL*⁴⁹ and *Simmenthal II*⁵⁰ and their effect on the development of the specific nature and the constitutional order of the EU. *Costa v ENEL* and *Simmenthal II* are cases well known for their impact on defining the legal parameters which govern the legal system of the EU/EC. These cases are true classics in the history of case law of the ECJ and thus have been discussed to great detail in legal writing. I will not attempt within this Chapter to do justice to the nuances and the ongoing debates in this literature. Instead, this Chapter will focus on a more rarely addressed but nonetheless central aspect of the cases: it will argue that the specific contribution of *Costa v ENEL* and *Simmenthal II* to the development and definition of the Community legal system arises from a fruitful and productive tension. This tension results from a dichotomy between, on one hand, a rule of conflicts, and, on the other, the notion of the integration of legal systems.

Initially, the principle of supremacy, as outlined in these cases, seems to be establishing a hierarchy of norms between EC and national law. It introduces a conflicts rule giving precedence to Community law over national legal provisions in cases of conflict.⁵¹ The cases, however, equally establish the notion of integration, which, according to *Costa v ENEL* and *Simmenthal II*, is based on the E(E)C Treaty having ‘created its own legal system’ which upon entry into force ‘became an *integral part* of the legal systems of the Member States’⁵² and is ‘applicable in the territory of each of the Member States’.⁵³

The establishment of the principle of supremacy therefore has not led simply to the superimposition of a new level of public power over that of the Member States. The ECJ’s approach in its case law from *Costa v ENEL* to *Simmenthal II* led to a unique system of shared sovereignty, in which hierarchic relations are only elements within a wider

⁴⁹ Case 6/64 *Costa v ENEL* [1964] ECR 585.

⁵⁰ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA (Simmenthal II)* [1978] ECR 629.

⁵¹ This is the point of view from which the cases had predominantly been discussed in the first 20 years after *Costa v ENEL*. See, eg, Samkalden, ‘Annotation *Costa v ENEL* 6/64’ [1964] *CML Rev* 213–20; MA Dausès, ‘Anmerkung zu Urteil des EuGH vom 9 März 1978’ RS 106/77 [1978] *Juristenzeitung* 512–13; D Carreau, ‘Droit communautaire et droits nationaux: concurrence ou primauté?’ [1978] *Revue Trimestrielle de Droit Européen* 381–418; D Freestone, ‘The Supremacy of Community Law in National Courts’ 42 *MLR* [1979] 220–3; G Droesse, ‘Das *Simmenthal II*-Urteil des EuGH in der italienischen Rechtsprechung und Literatur’ [1983] *Europarecht* 272–83; B de Witte, ‘Retour à “Costa”: La primauté du droit communautaire à la lumière du droit international’ [1984] *Revue Trimestrielle de Droit Européen* 425–54.

⁵² Case 6/64 *Costa v ENEL* [1964] ECR 585, para 8 (emphasis added).

⁵³ Case 106/77 *Simmenthal II* [1978] ECR 629, para 17.

Herwig CH Hofmann

structure of jointly exercising public powers. The Chapter is committed to exploring this unique method of sharing sovereignty within the tension between *conflicts* and *integration*.

Supremacy as a Rule of Conflict

One of the essential legal issues the founding Treaties' texts had not explicitly addressed was whether the traditional rules of public international law could be applied within the Community legal system. In other words, whether the ECSC and E(E)C Treaties had created a new kind of legal order, which was a third type of law not fitting into the traditional dualism of national and public international law.⁵⁴

It was thus left to the ECJ to analyse these questions in greater detail. Initially, the European Court of Justice was cautious. In an early staff case arising under the ECSC, *Humblet v Belgian State*,⁵⁵ the Court found that it 'is evident from the Treaty' which has the 'force of law in the Member States' that where Member State's legislative or administrative measures are 'contrary to Community law', a Member State is obliged 'to rescind the measure in question'.⁵⁶ Essentially, although the Court in *Humblet* found that ECSC law took 'precedence over national law', it left it to the Member States to define in which way Community law could take effect in Member States.⁵⁷ *Humblet* was thus based on a rather 'traditional' public international law understanding of the conflicts question of the relation of Community law to the law of the Member States.

The change of parameters came in the case of *Costa v ENEL* in which the Court held a firm position in what Advocate General Lagrange had characterised as a question of the constitutional relations between the Community and the Member States.⁵⁸ The Court found that Member States had delegated to the Community the power to define the relationship between Community law and the law of the Member States. The reasoning given by the Court is well known: Community law 'stemming from the Treaty' was 'an independent source of law' which could not 'be overridden by domestic legal provisions, however framed'.⁵⁹ In contrast to *Humblet*, *Costa v ENEL* establishes that the Community

⁵⁴ This can be explained by the fact that the Treaties of Paris and Rome were created against a background of sovereign states in Europe. Under the classic notion of territorial sovereignty states acted either in the framework of national law or public international law. Public international law was the 'law of contracts' between sovereign states.

⁵⁵ Case 6/60 *Humblet v Belgian State* [1960] ECR English special edition 559.

⁵⁶ Case 6/60 *Humblet v Belgian State* [1960] ECR English special edition 559, at 569. In *Humblet* the notion of supremacy of Community law was discussed before *Van Gend en Loos* had established direct effect of EC law.

⁵⁷ One could argue that when understanding 'force of law' in *Humblet* as referring to law in general and not as a 'loi formelle', *Humblet* was in fact a first step towards a non-traditional understanding of the role of Community law vis-à-vis Member State law (to this effect see: B de Witte, 'Retour à "Costa": La primauté du droit communautaire à la lumière du droit international' [1984] *Revue Trimestrielle de Droit Européen* 425–54 at 426). Generally, however, the earlier commentators seem to have understood the relevance of the term to stand for law in the more narrow sense of a 'loi formelle', which indicates a more traditional reading of the case in line with public international law. See, eg, H-P Ipsen, *Europäisches Gemeinschaftsrecht* (Tübingen, Mohr, 1972), 296.

⁵⁸ Opinion of Advocate General Maurice Lagrange in Case 6/64 *Costa v ENEL* [1964] ECR 1171 (French edition).

⁵⁹ Case 6/64 *Costa v ENEL* [1964] ECR 585, para 13. It subsequently would be 'impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity' (para 10). The ECJ summarised that '[t]he transfer by the states from their domestic legal

Costa v ENEL and Simmenthal

legal order itself defines when and how it takes precedence over the law of the Member States. This is *Costa v ENEL*'s well-understood central innovation to the former strict dichotomy of public international law on one hand and national law on the other. With the integration of Community law 'into the laws of each Member State',⁶⁰ precedence was given to co-operatively created law over unilateral acts of the Member States.

The principles established in *Costa v ENEL* were confirmed and further developed in the case law of the ECJ, most notably in *Simmenthal II*.⁶¹ Based on *Costa v ENEL*, the Court in *Simmenthal II* held that 'in accordance with the principle of precedence of Community law', EC law can 'render automatically inapplicable any conflicting provision' of law of the Member States.⁶² Member States were obliged to 'set aside' national law 'which might prevent Community rules from having full force and effect'⁶³ because Community law was 'an integral part of' 'the legal order applicable in the territory of each of the Member States'.⁶⁴

From this perspective, the case law from *Costa v ENEL* to *Simmenthal II* transformed the understanding of how conflicts between Community law and Member States' law would be decided. The cases established an autonomous vertical Community rule of conflicts: they declared the supremacy of any provision of Community law, including single case decisions of administrative nature, over any form of Member State law, including general principles of national constitutional law. Community law thus itself defines its rank within the legal system of its Member States.

The goal of this transformation was openly stated in *Costa v ENEL* and *Simmenthal II*. Community law, which was collectively established through the Community method, was given primacy over unilaterally set national law, precisely with the goal to empower EC law to confer rights and obligations not only on states as subjects of public international law but also on individuals. If states could unilaterally, through their constitutional provisions or otherwise, impede the exercise of the rights of individuals, such rights would not exist. The innovative factor of the Community legal organisation and one of its arguments for supremacy is thus the joint exercise of powers as shared sovereignty.⁶⁵ Through this approach, the cases of *Costa v ENEL* and *Simmenthal II* had become essential building blocks in integrating EC law into national law and the central move towards what is often loosely referred to as 'constitutionalisation'.

system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail' (para 14).

⁶⁰ Case 6/64 *Costa v ENEL* [1964] ECR 585, para 9. Community law in this sense consists of explicit 'provisions which derive from the Community' but also 'and more generally the terms and the spirit of the Treaty'.

⁶¹ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA (Simmenthal II)* [1978] ECR 629.

⁶² It further stated that EC law precludes 'the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions'. Case 106/77 *Simmenthal II* [1978] ECR 629, para 17.

⁶³ Case 106/77 *Simmenthal II* [1978] ECR 629, para 22.

⁶⁴ 'Any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law' 'would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States ... and would thus imperil the very foundations of the Community' (Case 106/77 *Simmenthal II* [1978] ECR 629, para 17).

⁶⁵ Article I-6 of the Treaty establishing a Constitution for Europe thus includes an explicit reference to the principle of supremacy as restatement of established case law.

Herwig CH Hofmann

Integration

Integration leading away from public international law towards the Community system of shared sovereignty changed the EC as much as the Member States. The former evolved from an international treaty to a legal order of a constitutional nature. The latter gradually opened themselves to the exercise of public power from outside their territory. Thereby, the old dichotomy of public international law and national law with its distinguishing feature of territorial reach of national law became increasingly less important. The dichotomy was replaced by an evolving network of structures for the exercise of public power in a system of shared sovereignty. The first and most visible aspect thereof was the creation of a judicial network of courts. The second aspect of shared sovereignty, the integration of the legislative and executive power, became increasingly structured in networks which have often evolved beyond formally set rules in the founding Treaties. Both developments are aspects of the important element of 'integration' which was stressed in *Costa v ENEL* and *Simmmenthal II*, but continues to receive much less attention than the conflicts rule of supremacy. I will address these two aspects of integration separately.

Judicial Network

The development of shared sovereignty through a network of courts is exceptionally well exemplified by *Costa v ENEL* and *Simmmenthal II*. As many of the important cases in the EC legal history, both reached the ECJ as references for a preliminary ruling under Article 234 EC (ex Article 177). In both cases the defendants argued primarily procedural aspects calling into question the right of national courts to request a preliminary ruling.

In *Costa v ENEL*, the Italian government had submitted that the reference for preliminary ruling was 'absolutely inadmissible' because the referring Italian court was not entitled to issue a decision to stay procedures and to refer the question to the ECJ directly on Article 234 EC. Instead, it was obliged to apply Italian law, which only allowed for preliminary references to the Italian Constitutional Court.⁶⁶ The ECJ answered rather categorically with a general statement on the nature of E(E)C law. It held that the question whether the national court could directly rely on Article 234 EC (ex 177) for a reference for preliminary ruling was governed by Community law. Otherwise, as was already noted above, unilaterally set national law would be capable of overriding Community law.⁶⁷ This pattern was repeated in *Simmmenthal II*,⁶⁸ where the Court held that the right of requesting

⁶⁶ For the background of the Italian courts' multiple requests for references, see Samkalden, 'Annotation *Costa v ENEL* 6/64', [1964] *CML Rev* 213–20 at 214.

⁶⁷ Case 6/64 *Costa v ENEL* [1964] ECR 585, paras 10, 14: it would be 'impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity' (para 10). The 'transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail' (para 14).

⁶⁸ The Amministrazione delle Finanze dello Stato had argued that according to Italian constitutional law, Italian legislative provisions violating EC law were unconstitutional. Only the Italian Constitutional Court had

Costa v ENEL and Simmenthal

a preliminary reference cannot be impeded by Member States' law because such provisions would risk creating unequal application of Community law in the Member States. As a result, courts from all levels would have the right to refer cases to the ECJ for preliminary ruling under Community law.

In *Costa v ENEL* and *Simmenthal II*, the ECJ thereby reinforced the importance and role of a network of courts established by Article 234 EC (ex 177) with the goal of holding both European and national actors accountable. It was thus assured that the relations between the courts were non-hierarchic in so far as national law could not—against the explicit wording of Article 234 EC—request the exhaustion of national remedies prior to a request for preliminary ruling by the ECJ. The result is a system in which the national judge is also a Community judge and supremacy of Community law does not imply inferiority of national courts. Equally, the ECJ, in cases of a request for preliminary ruling, only decides the Community law aspects of cases. The final decision of the case rests with a national judge. By establishing a rule of conflicts and reinforcing the role of a network of courts, *Costa v ENEL* and *Simmenthal II* strengthened the jurisdictions of both the national courts and the ECJ vis-à-vis the executive powers. Also, in some dimensions, individuals were put on the same level as Member States. Individuals were empowered by Article 234 EC in combination with the principles of supremacy and direct effect to enforce Community law and to request the review of the compliance of national provisions with Community law.

Executive Networks

The second and more hidden element of integrating legal systems arising from the interpretation of Community Law established in *Costa v ENEL* and confirmed in *Simmenthal II* is the role of executive networks for joint exercise of shared sovereignty. Unlike the judicial network, the executive network was the product of a rather fluid and evolutionary development in several historic phases. This is the real legacy of *Costa v ENEL*'s notion of declaring Community law an 'integral part of the legal systems of the Member States'.⁶⁹ The effect of this opening of Member States to the exercise of public power from outside of their territory might be illustrated in a simplified step-by-step presentation by looking at vertical, horizontal and diagonal integration.

Vertical Integration

The main effect of the principle of supremacy established by the ECJ in *Costa v ENEL* and *Simmenthal II* initially was to establish a rule for vertical conflicts between Community and national law. This vertical conflicts rule held that any form of directly applicable Community law would render inapplicable conflicting national law irrespective of its rank

the right to declare unconstitutional and thus set aside acts of Italian law. Therefore the Pretore de Susa was obliged to refer the case to the Italian Constitutional Court and not to the ECJ (Case 106/77 *Simmenthal II* [1978] ECR 629, para 6).

⁶⁹ Case 6/64 *Costa v ENEL* [1964] ECR 585, para 8.

Herwig CH Hofmann

in the national hierarchy of norms.⁷⁰ This general principle of vertical conflicts has, in principle, been accepted by the courts of the Member States.⁷¹

However, despite *Costa v ENEL* and *Simmenthal II*'s effect to open the Member States' legal systems, implementation of law was still state-bound. The effects of the exercise of public power from the European level remained limited to the individual Member State. The national legal heritage, of which supranational law had become part, was still exercised exclusively within the territory of each individual Member State.⁷²

The vertical nature of this conflicts rule makes it seem, therefore, at first sight that a hierarchical relationship between EU/EC law and Member State law had been created by *Costa v ENEL* and *Simmenthal II*. This, however, would be a simplistic and incomplete reading as the reality is more complex. Supremacy of EU/EC law developed over time into a far less hierarchic and more network oriented structure.

Horizontal Integration

The second major development was the 'horizontal' opening of Member States' legal systems. Since the mid 1970s, ECJ case law increasingly focused on the obligation of the Member States to mutually recognise legal acts of other Member States, especially where such was necessary to allow for the exercise of fundamental freedoms within the EC.⁷³ Mutual recognition led to trans-territorial effect of the law of one Member State in another Member State. That effect was ordered by Community law and thus necessarily based on the notion of supremacy. The *Simmenthal* cases powerfully demonstrate this. The *Simmenthal* saga straddles both the horizontal and the vertical aspect of supremacy. In *Simmenthal I*, the underlying question was whether in order to allow for the exercise of the free movement of goods, the Italian authorities were obliged to *horizontally* recognise a veterinary certificate issued by the French authorities.⁷⁴ EC law therefore required, in a 'horizontal conflicts' case, that the law of France have effect in Italy. After the ECJ in a preliminary ruling had affirmed this, *Simmenthal*

⁷⁰ It is, however, important to recall that European law was acceptable to Member States *inter alia* because it was not completely alien to the national systems. In European integration, states allowed public power to be exercised also from outside of their legal systems under the condition of being able to participate in its creation and implementation. Member States' executives had become key figures in agenda setting, the legislative procedures as well as the creation of common rules for implementation. With deepening integration to which there is no opt-out, Member States were accepting EC law only because they were fully integrated into the legislative and implementing process (JHH Weiler, 'The transformation of Europe', 100 *Yale Law Journal* [1991] 2403–83 at 2413–23).

⁷¹ The latter in some instances requiring only an exceptional *ultra vires* role in reviewing the ECJ. For an overview see K Lenaerts and P Van Nuffel, *Constitutional Law of the European Union*, 2nd edn (London, Thomson Sweet & Maxwell, 2006), paras 17–015–17–046. This interpretation of EU/EC law has equally not been challenged in any of the many Treaty amendments from the Single European Act to the Treaty of Nice. In Article I-6 of the Treaty establishing a Constitution for Europe, the primacy rule was explicitly spelt out.

⁷² In administrative terms, this corresponded to the model of implementation and indirect administration of Community law in each and every Member State separately. C Joerges, 'The Legitimacy of Supranational Decision Making' [2006] 44 *Journal of Common Market Studies* [2006], 779–802 at 791–3.

⁷³ This horizontal opening is most closely associated with Case 120/78 *Rewe Central AG (Cassis de Dijon)* [1979] ECR 649, which required Member States to mutually accept each other's legislative and administrative decisions in the absence of harmonising legislation from the European level (paras 8, 14).

⁷⁴ Case 35/76 *Simmenthal I* [1976] ECR 1871 then provided for the obligation of a Member State to accept the veterinary certificates of another Member State in the case of an investigation procedure harmonised by a directive.

Costa v ENEL and Simmenthal

II was a case about the consequences of such a ruling on Italian law. The local judge, the Pretore de Susa, needed to know whether he had the right to set aside Italian law which had been found to be incompatible with EC law.⁷⁵ As a result, the ECJ found that the supremacy of Community law obliged Member States to allow for trans-territorial effect of other Member States' law within their legal system. Thereby, Member States had opened their territory to the application of public power not only from the Community level, but also horizontally from other Member States.⁷⁶

The Move Towards an Integrated Legal System—The Age of Subsidiarity as Conflicts Rule

An often unnoticed element of the cases of *Costa v ENEL* and *Simmenthal II* is that they laid the ground for establishing the fabric of the Community legal system not only by means of a hard supremacy rule of conflicts, but also through a unique system of integration of law from multiple levels. In the process of deepening and widening European integration, additional and more sophisticated tools became necessary to avoid the emergence of too many situations of hard conflicts between national and Community law. Instead of creating rules for solving such conflicts, the idea was to prevent them through, for example, the principle of subsidiarity.⁷⁷ Subsidiarity initially was designed as a kind of a meta-principle for the vertical distribution of legislative powers between the European and the national levels.⁷⁸ In reality however, subsidiarity played a much less important role in the distribution of legislative competences. Instead, the invocation of the principle of subsidiarity practically much more heavily influenced the distribution of powers between legislation and implementation. The emergence of subsidiarity as a constitutional notion thereby historically goes hand in hand with the development of a system of decentralised yet co-operative administrative structures. These forms of co-operation have mostly taken the form of executive networks with participants from the Member States, the Community institutions and private parties.⁷⁹

⁷⁵ Case 35/76 *Simmenthal I* [1976] ECR 1871; Case 106/77 *Simmenthal II* [1978] ECR 629, para 3.

⁷⁶ Horizontal effect can also mean an effect of law applied between private parties. The horizontal effect due to the primacy of EU/EC law arises not only between states but also between individuals. A national measure might for example be inapplicable in the relation between individuals of one or of several Member States, not only if it is incompatible with Community law in substance. It may also be inapplicable if it was adopted violating procedural rules laid down by Community law for the adoption of national provisions. See: C-441/93 *Pafitis* [1996] ECR I-1347, C-194/94 *CIA Security International* [1996] ECR I-2201, paras 45–54; C-443/98 *Unilever Italia* [2000] ECR I-7535, paras 31–52 and C-159/00 *Sapod Audic* [2002] ECR I-5031, paras 48–52. See for limitations of this rule C-226/97 *Lemmens* [1998] ECR I-3711, para 35.

⁷⁷ Subsidiarity was designed to add an additional level of control for the exercise of public power in the EU. Article 5(2) EC.

⁷⁸ The ECJ rarely entered into an in-depth debate over the merits of subsidiarity-related arguments—mainly due to respect for the legislative discretion of the Community legislator. This made subsidiarity a legally rather weak tool. See eg C-84/94 *Working time directive* [1996] ECR I-5755; C-233/94 *Deposit guarantee schemes* [1997] ECR I-2405; C-376/98 *Germany v EP and Council (Tobacco advertising)* [2000] ECR I-8419; C-377/98 *Biotechnological Inventions* [2001] ECR I-7079. A more thorough analysis was only undertaken in C-154/04 *Alliance for Natural Health* of 12 July 2005, paras 101–6.

⁷⁹ See for further details the contributions to HCH Hofmann and A Türk (eds), *EU Administrative Governance* (London, Edward Elgar, 2006) and M Egeberg, 'Europe's Executive Branch of Governments in the Melting Pot: An Overview' in M Egeberg (ed), *Multilevel Union Administration* (London, Palgrave, 2006) 1–16.

Herwig CH Hofmann

The impact of this development becomes clearer when taking a step back and looking at the emergence of the integrated executive. In the EU-specific system of integration, executive activity goes beyond implementing activity.⁸⁰ It also expands to administrative co-operation in agenda setting⁸¹ and policy making⁸²—in all phases of the ‘policy cycle’. Structures of integrated executive for all three policy phases operate in large parts beyond the institutions and procedures established by the founding treaties. They have developed in an evolutionary way differing in each stage of the policy cycle and in each policy area, creating a rich diversity of administrative actors on the European levels and their forms of interaction.⁸³ As a consequence of these developments, the originally more or less distinct vertical and horizontal relations between the European level and the Member States as well as between Member States’ law have been transformed into a network of complex relationships.⁸⁴

European integration has therefore led to an opening of the Member States to the exercise of public power from outside of their territory, be this from the European level or from other Member States. At the same time, their branches of government are involved in the creation, implementation and adjudication of European law and other Member States’ Europeanised law. Member State and EU structures are thus not only subject to EU/EC law, they also jointly create and implement it. This is now a central notion to EU/EC law of being an integral part of Member State law. This network structure is the essence of the notion of shared sovereignty and the supremacy of co-operatively created Community law over unilateral and Member States’ acts.

⁸⁰ In this phase, institutions’ activities range from single case decisions and preparatory acts thereof to acts of administrative rule-making and the amendment of specific provisions in legislation where so authorised. In many policy areas, the development of the integration of EU and national administrative proceedings has led to ‘composite proceedings’ to which both national and EU administrations contribute. Diverse structures undertake implementation decisions and administrative rule-making in the various policy areas. Amongst these developments are ‘Comitology’ committee procedures, in certain policy areas expanded to what is now known as the ‘Lamfalussy’ procedures. Agencies and their administrative networks play an ever-increasing role. Implementing networks may also include private parties acting as recipients of limited delegation. Administrative networks that have been created and adapted to the needs of each policy area integrate the supranational and national administrative bodies within structures designed to conduct joint or co-ordinated action. In practice, these forms of co-operation consist of obligations of different intensity. They range from obligations to exchange information either on an ad hoc or on a permanent basis to network structures which have been developed to include forms of implementation such as individually binding decisions.

⁸¹ In the phase of agenda setting, national administrations can play a central role in shaping the Commission’s policy initiatives. This takes place mainly through expert groups which are generally composed of national civil servants, but also independent experts. These groups are used to test ideas, build coalitions of experts and pre-determine policy incentives later to be formally presented by the Commission as initiative.

⁸² The presence of the national executive actors in the EU’s decision-making process is mostly felt within the Council working parties supporting COREPER. Here, the national civil servants have to balance their national mandate against the need to reach a consensus in pursuance of EU tasks. Such interaction, albeit to a lesser extent, also exists through the ‘Open Method of Co-ordination’.

⁸³ See with more detail: HCH Hofmann and A Türk (eds) *EU Administrative Governance* (London, Edward Elgar, 2006).

⁸⁴ Also, structures have been developed which link European networks with participants from non-EU Member States.

Costa v ENEL and Simmenthal

Conclusion: Conflicts and Integration—The Future of Supremacy within a Network

The concentration on supremacy as a central element of vertical conflicts provision gave birth to an understanding of the EU/EC as a multi-level legal system in which the EU/EC legal order has been superimposed on the Member States' legal systems. Questions of constitutionalisation of the legal order have therefore often been viewed from the perspective of the relation between these two distinct yet hierarchically linked legal systems. However, when looking at the evolving network structure of exercising public power within the EU, it seems that the content and impact of these cases would be severely underestimated if they were only reviewed for this 'vertical' dimension. Instead, the content and the effect of *Costa v ENEL* and *Simmenthal II* go far beyond that. They did not only allow for a network of courts, in which any level of Member States' courts were able to interact with the ECJ on the European level under Community rules. This essentially allowed individuals to effectively challenge the validity of EC law as well as the compliance of Member State rules with EC law. The latter reflects the needs of individuals in pluralistic societies, whose interests are not necessarily limited to the territorial limits of single Member States. The cases also led a dynamism requiring the reinforcement and development of networks of the executive branches of power. The effect of this was an exercise of public power not in two separate levels but instead in a more integrated system. The integration of the new Community legal order into the national legal systems thus prompted the development of elaborate network structures for integration of Member States' and Community interests. Most of the developments have taken place in forms not established by the treaties. This leads to a view of the European law not in the form of two superimposed structures with one being the European level⁸⁵ and the other being the Member States, each exercising public power only within their respective territories and competencies. Instead, the European legal system has evolved into a three-dimensional structure with complex vertical, horizontal and composite relations of the actors therein. This has consequences not only for our understanding of the role of the EU/EC and the Member States in Europe but also for the analysis of key aspects such as accountability.

It might be too early to determine the true effect of the developments spurned by *Costa v ENEL* and *Simmenthal II* due to the fact that the process of integration is continuing in directions which had not been envisaged in prior times. It is a continuing evolutionary process with a dynamic institutional development. Without the dichotomy of, on one hand, supremacy and, on the other hand, judicial, legislative and executive integration, one could have imagined a much less vibrant, more intergovernmental and more compartmentalised approach to 'integration through law'. The strength of the current integration process was initiated with the parallel approach of creating both conflicts rules as well as fostering procedural and substantive legal integration. This is the remaining legacy of *Costa v ENEL* and *Simmenthal II*.

⁸⁵ With the territorial reach of the EU as described in Article 299 EC.