



Plenary sitting

B9-0533/2021

19.10.2021

MOTION FOR A RESOLUTION

to wind up the debate on the statements by the Council and the Commission

pursuant to Rule 132(2) of the Rules of Procedure

on the rule of law crisis in Poland and the primacy of EU law
(2021/2935(RSP))

Gunnar Beck, Jaak Madison, Gerolf Annemans, Laura Huhtasaari, Gilles Lebreton, Jörg Meuthen, Tom Vandendriessche, Harald Vilimsky
on behalf of the ID Group

B9-0533/2021

**European Parliament resolution on the rule of law crisis in Poland and the primacy of EU law
(2021/2935(RSP))**

The European Parliament,

- having regard to Article 5 of the Treaty on European Union (TEU),
 - having regard to Article 267 of the Treaty on the Functioning of the European Union (TFEU),
 - having regard to judgment K 3/21 of the Polish Constitutional Tribunal of 7 October 2021, published in Poland’s official gazette, the *Dziennik Ustaw*, on 12 October 2021,
 - having regard to the judgment of the German Federal Constitutional Court (GFCC) of 5 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16
 - having regard to Decision No 2004-505 DC of 19 November 2004 of the French Constitutional Council,
 - having regard to cases C-6/64, *Costa v Ente Nazionale per L’Energia Elettrica (E.N.E.L.)*¹, C-106/77, *Simmenthal IP*² and C-106/89 *Marleasing*³,
 - having regard to the statement of 8 October 2021 by the President of the Commission,
 - having regard to the statements of 19 October 2021 by the Council and the Commission on the rule of law crisis in Poland and the primacy of EU law,
 - having regard to Rule 132(2) of its Rules of Procedure,
- A. whereas judgment K 3/21 of the Polish Constitutional Tribunal found the provisions of the TEU incompatible with the Polish Constitution on multiple counts; whereas this gives rise to the question of the hierarchy between EU law and Member States’ constitutional law;
- B. whereas, in consequence, the doctrine of the primacy of EU law, which emanates from judges and does not have full Treaty status, is, in any event, confined to those areas of the law which have been conferred upon the EU institutions in accordance with Article 5 TEU;
- C. whereas in *Costa v E.N.E.L.*, the Court of Justice of the European Union (CJEU) held

¹ Judgment of 15 July 1964, *Flaminio Costa v E.N.E.L.*, C-6/64, EU:C:1964.

² Judgment of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, C-106/77, EU:C:1978:49.

³ Judgment of 13 November 1990, *Marleasing SA v La Comercial Internacional de Alimentation SA*, C-106/89, EU:C:1990:395.

that ‘law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question’;

- D. whereas Article 5 TEU states that the EU may only exercise those powers conferred upon it in the Treaties by the Member States and that any powers not so conferred remain with the Member States;
- E. whereas Article 267 TFEU states that the jurisdiction of the CJEU is limited to the interpretation of the EU Treaties and all legislation adopted under them; whereas the CJEU has no jurisdiction to interpret legal issues which fall outside the scope of the powers conferred under Article 5 TEU;
- F. whereas it is the Member States that determine the scope of the EU’s powers under Article 5 TEU, which, logically, includes the power of their courts to define the precise scope of the competences conferred where the language of the Treaties may be ambiguous or otherwise imprecise; whereas the courts in the Member States have the power to review any interpretation of the CJEU if such an interpretation were to extend the powers of the EU beyond those clearly conferred in the Treaties (judicial law-making or competence creep);
- G. whereas the GFCC has consistently emphasised the EU institutions’ lack of democratic legitimacy on the grounds that the peoples of the EU do not represent one common or united demos; whereas each nation within the EU indeed represents such a demos owing to their shared history, common culture and language;
- H. whereas in conflicts between partially, but not wholly, integrated legal orders there may, in many cases, be no praetor to resolve such conflicts, as established by G.W.F. Hegel; whereas, instead, such conflicts can only be resolved by the democratically ordained will of the parties;
- I. whereas any resolution of legal uncertainty in the wording of the powers conferred on the EU must lie within the remit of national courts; whereas any ambiguity in the wording must be to the detriment of the EU;
- J. whereas, by referenda, Denmark rejected the Treaty of Maastricht in 1992, Ireland rejected the Treaty of Nice in 2001, France and the Netherlands rejected the Constitutional Treaty in 2005 and Ireland rejected the Treaty of Lisbon in 2008; whereas, by referenda, Denmark rejected the euro in 2000, Sweden rejected the euro in 2003, Greece rejected the bailout package in 2015, Denmark rejected opting in to certain policy areas with regard to Justice and Home Affairs in 2015, the Netherlands rejected the EU-Ukraine Association Agreement in 2016 and Hungary rejected the imposition of refugee quotas in 2016; whereas, by a referendum, the United Kingdom decided to leave the EU in 2016;
- 1. Takes note of judgment K 3/21 of the Polish Constitutional Tribunal, which rejects the notion of the unrestricted supremacy of EU law, most notably with regard to Polish constitutional law; is concerned about the President of the Commission’s reaction to this decision, who insisted that ‘all rulings by the European Court of Justice are binding on

all Member States' authorities, including national courts [and that] EU law has primacy over national law, including constitutional provisions'; recalls that other national courts have also raised questions regarding the primacy of EU law, including the GFCC and the French Constitutional Council;

2. Notes that both Union competences and Member State competences exist; recalls that Union competences are governed by the law of the Union; emphasises that Member State competences are governed by the laws of the respective Member States;
3. Underlines that the Treaties acknowledge that Union competences are limited; recalls that in accordance with Article 5 TEU, the limits of Union competence are governed by the principle of conferral; concludes that where competences have not been conferred upon the Union, these competences remain with the Member States;
4. Notes that the alleged supremacy of EU law is not explicitly mentioned in the Treaties but only in a declaration thereto, where it is described as primacy, not supremacy, which suggests that it is a rebuttable presumption, rather than an absolute hierarchy, and which in any event must be construed in accordance with the wording of the actual Treaty provisions;
5. Recalls that it was the CJEU in *Costa v E.N.E.L.* that concluded that EU law is supreme; notes, however, that, assuming that this is accepted, it can only apply in areas of EU competence; emphasises that the supremacy of EU law, as stated in *Costa v E.N.E.L.* only applies to law which has been conferred on the EU in the EU Treaties and therefore only in areas of EU competence;
6. Considers that it is natural, given that law is based on language and not on mathematics, that conflicts exist about whether a competence has been conferred upon the Union, since treaties, which are no more than contracts, can never be complete or free from uncertainty; considers, therefore, that there are fields of inescapable ambiguity as to whether an area is governed by Union law or the law of the respective Member States;
7. Recalls that courts have the task of resolving conflicts arising from the ambiguity of and in the law; rejects the EU's claim that its courts are to resolve any conflict about whether a competence has been conferred upon the EU; reminds the Union that it derives all its competences from the Member States, which have yielded some of their competences to the Union;
8. Insists that, in areas of ambiguity, the Member States are to decide whether they have conferred competences upon the EU on the grounds that: i) this is the ordinary meaning of the wording of Article 5 TEU, and ii) any capacity on the part of the EU courts to define the limits of the EU's competences opens the door to competence creep, which is not democratically legitimated by decisions delegated by a demos;
9. Considers that only a national jurisdiction of last resort complies with the principle of democracy when it comes to disputes relating to the limits of the EU's powers; stresses that competence creep by the CJEU would violate the democratic sovereignty of the Member States; warns that, if the EU were to usurp, by ruling of its courts, competences that have not been unambiguously conferred upon the Union in accordance with the constitutional laws of the Member States, it would violate the principle of democracy;

10. Acknowledges that conflicting views about the supremacy of the law may exist, as illustrated by the Polish judgment; considers that these conflicts may de facto not be resolvable if the parties insist on having supremacy themselves without regard to the limits of their democratic legitimacy and the limits of their powers as defined by the Treaties, as illustrated by the statement of the President of the Commission in reaction to the aforementioned judgment; recalls that legal scholars and philosophers such as G.W.F. Hegel have recognised that legal conflicts between international actors may not always be resolvable in law but only through the assertion of states' sovereign rights;
11. Considers that the Union's misguided insistence on the supremacy of its law is a manifestation of its political will to bring about an EU superstate by usurping complete sovereignty; expresses concern about the aspiration to transform the Union into a superstate with a hierarchical superiority of the Union over the Member States; recalls that the Union has on various occasions engaged in similar endeavours; expresses grave concern about such perpetual interference in spheres of Member State competence;
12. Underlines that there is no democratic support for an EU superstate; recalls that the electorate in a number of Member States rejected Treaty changes, as well as the EU Constitutional Treaty; considers that the results of these referenda clearly indicate the continuous lack of support for a sovereign and supreme United States of Europe; suggests that the EU Member States could at any time hold, if they so wished, national referenda on whether their citizens prefer the EU to be transformed into a sovereign superstate; notes with little astonishment that democratic processes are not the preferred tool of any supporter of an EU superstate;
13. Warns the Union that its attempts to create an EU superstate through a judicial or any other backdoor is deeply undemocratic and will give rise to potentially grave negative consequences, while endangering the lasting friendship and cooperation between European nations; opposes any such undemocratic move towards an EU superstate or any other further erosion of the sovereignty of Member States;
14. Reminds the EU that the conferral of powers upon it can be withdrawn at any time, as the EU only exists because of the Member States and not in spite of them; recalls the democratic principle that Member States are sovereign because of the power conferred upon them by their citizens; reiterates that it is the Member States that are sovereign and not the EU;
15. Instructs its President to forward this resolution to the Commission and to the governments and parliaments of the Member States.