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## The commercialisation challenge to academic freedom: a matter for EU law

*By Vasiliki Kosta*

The illiberal challenge to academic freedom emanating from national governments, and notably in Hungary, has brought [the topic of academic freedom to the spotlight also in EU law](#).

Increased EU institutional activity followed, including the launch of the [European Parliament STOA Forum for Academic Freedom \(STOA Forum\)](#), which has as one of its tasks to monitor academic freedom in the Member States. Following its launch last year, it had its [high-level annual conference](#) at the end of last month (29 November 2023). This initiative is to be welcomed. It provides a platform for assessing and discussing academic freedom challenges occurring at the Member State level and possible solutions facilitated by the EU level. However, there remains a blind spot in the academic freedom debates as currently conducted at EU level: the commercialisation challenge to academic freedom which can potentially emanate from the EU or implicate EU activity. That challenge cannot be seriously debated in the absence of a deeper understanding of the content of Article 13 of the EU Charter of Fundamental Rights ('CFR').

### Academic freedom has entered the spotlight in EU affairs

For the longest time academic freedom and freedom of scientific research, enshrined in Article 13 CFR, received practically no or very little attention in both scholarship and practice. Matters changed with the [Lex CEU case](#) and subsequent ECJ [judgment](#) in

*Commission v Hungary*, finding a violation of Article 13 CFR. This amounted to the first – and so far, only – judicial pronouncement of this EU fundamental right, recognising that it comprises three dimensions: an individual dimension linked to expressive freedoms; an institutional dimension, including a guarantee that universities cannot be deprived of their organisational structures; and an obligation resting on the state to respect and protect academic freedom. This judgment clarified that Article 13 CFR goes beyond freedom of expression and that the second sentence of this provision (‘academic freedom shall be respected’) is justiciable.

The judgment also coincides with the beginning of EU institutional activity for protecting and promoting scientific and academic freedom. These are some examples: in 2020, the European Commission published its [Communication on the European Democracy Action Plan](#), stating that ‘academic freedom in higher education institutions is [...] at the core of all higher education policies developed at EU-level.’ In 2021, a reference to academic freedom featured for the first time in the [European Commission’s Annual Report](#) on the application of the Charter (even if not a very substantial one). The STOA Forum followed in 2022 and this year, in August 2023, the European Parliament published a [Draft Report](#) (that just [went through EP Committee ITRE](#)), requesting the Commission to propose an act which further defines freedom of scientific research and rights and obligations flowing from it – a point that was highlighted several times during the STOA high-level conference. So, there is an overall EU institutional awakening on the matter, and the spotlight is now on a wider gamut of potential academic freedom challenges across the EU’s Member States, including Western Europe.

### **Challenges to academic and scientific freedom at Member State level**

This year’s STOA high-level conference was based on the monitoring report investigating [the state of play of academic freedom in the EU Member States](#) that found an overall erosion, albeit to varying degrees. The report identified six challenges:

- first, political interferences in assessing which subjects qualify as ‘scientific’, what can be taught, and researched, with gender studies and gender critical theories being a prominent target of attack;
- second, governmental interferences threatening institutional autonomy, which take, for example, the form of new sector laws that allow governments to interfere in institutional affairs;
- third, institutional leadership and management threats to academic freedom; these are said to be marked by executive forms of leadership and management. The associated threats can affect different dimensions of academic freedom such as

expressive freedoms of academics but also questions of self-governance, or academic labour conditions;

- fourth, growing civil society threats to academics, which are especially expressed through social media. Examples are attacks on academics when they participate in public debates with given scientific perspectives (e.g., on climate change); when they run counter certain political programmes; when they are expressing certain political, social, cultural perspectives (e.g., on identity issues); or when they are providing scientific knowledge to be used in political decision-making.
- fifth, increasing private sector threats to academic freedom, for example, through a growing use of SLAPPS (strategic lawsuits against public participation) and the increased private sector funding of scientific research.
- sixth, threats to academic self-governance, labour conditions and financial conditions under which academics must operate.

All these listed threats except for the first one (political repression of certain strands of teaching and research) and the fourth one (civil society threats to academic freedom) can be linked to or have elements that relate to a phenomenon we term 'the commercialisation' of academia, as conceptualised and used in the [AFITE project](#).

### **The challenge of commercialisation and its tension with academic freedom**

Building on existing literature in sociology (by authors such as [Slaughter & Leslie](#) or [Münch](#)), higher education studies, history and national law, we conceptualise 'commercialisation' as including three elements. First, universities are or behave like actors on a market: they can either engage in for-profit activities themselves or in competition, at institutional or faculty level, for securing external money (Slaughter & Leslie). This can take, for example, the form of competing for external grants, contracts and students and the raising of tuition fee. Second, universities are organised according to corporate management principles– also known as 'New Public Management' ([Mager](#)). This involves the transfer of corporate management techniques to the public sector, in our case, higher education. What gets introduced in practice is so-called 'efficiency' – meaning in essence 'cost-efficiency' – with an emphasis on being frugal with resources and introducing performance-based budgeting. This, in turn, leads to increased reporting; paradoxically here, 'red tape' can increase in the name of efficiency and the introduction of measurable performance indicators, amounting largely to quantitative measuring. Third, commercialisation entails a functional understanding of the academic system. Namely, that it should serve politico-economic interests (Mager) and follow the rationality of those other systems of society rather than its own rationality ([Grimm](#)).

Importantly, commercialisation operates against a context of cuts in public spending for higher education institutions. It touches the core of what it means to provide and receive

university education and to conduct research and may have a direct impact on science itself, the autonomy of the scientific system and its members. For example, when research agendas are being primarily set by external funding schemes and not the free choices of the researchers; when those funding schemes tend to fund the fashionable topics of the times, thereby potentially stifling rather than advancing sciences; when seeking to make research culture generate more and so-called 'more useful' results leads in fact to constraining rather than to advancing critical and original thought. [Commercialisation has been identified as a potential threat to academic freedom in German legal scholarly debates for at least as early as the 2000s](#). However, so far, this debate has not been prominently conducted in EU law and as regards the EU's own activities.

### The relevance of EU law

At first sight, one may doubt that EU law, and Article 13 CFR, would be implicated in the above questions. The EU has only a complementary competence in education as harmonisation is excluded (Article 165(1) and (4) TFEU). Yet there are two principal ways in which the EU can become implicated: firstly, through its activities in its European Education Area and its involvement in the European Higher Education Area (EHEA), including the Bologna process. Secondly, through the European Research Area (ERA).

As regards education, the EU can, of course, take action which impacts national education policies by using other functional powers, through case law on the internal market freedoms (e.g., [Boriss Cilevičs, para. 59](#)), through supporting measures (e.g., the ERASMUS programme) or by means of the open method of coordination ([Garben](#)). When the EU acts on education via one of these indirect routes, or when Member State action on education falls within the scope of EU law (as in *Commission v. Hungary*), the Charter is applicable.

One initiative that has been identified as both 'Europeanising' higher education policies and pushing towards commercialisation is the Bologna process. Almost two decades ago, social science literature pointed out that the European Commission assumed a key role in this by linking the Bologna process with the 'European Research Area' and the European Council's 'Lisbon Strategy' (2000) ([Keeling 2006](#)). This policy is said to have endorsed a specific view of universities: they were perceived as organisations that participate in and compete on an open market; their activities become measurable, are supposed to be economically beneficial and should correspond to labour market and industry needs. In this worldview of academia, 'knowledge is produced and then traded. Education is represented as a product, the researcher as a manufacturer, the student as a consumer, and ECTS credits as the "currency of exchange"' (Keeling 2006).

At the time of these debates, academic freedom was institutionally, by and large, a neglected topic. Today, awareness is increasing. For example, the European Commission proclaimed in its [2022 Communication on a European Strategy of Universities](#) that '[e]nsuring academic freedom in higher education institutions is at the core of all higher education policies developed at EU level, as well as in the Bologna Process.' And, in the EHEA, the [Working Group on Fundamental Values](#) is tasked with developing 'a comprehensive framework to further the monitoring and implementation of the fundamental values of the EHEA in the higher education systems of its members', which includes academic freedom. It remains to be seen to what extent this new awareness will lead to reflections on the question of EU policies as stimulating or contributing to commercialisation, and to what extent that may be in tension with academic freedom.

In matters of research, the EU has a much stronger competence. The establishment of the ERA in which researchers, scientific knowledge and technology circulate freely is a Treaty requirement under the Lisbon Treaty (Article 179(1) TFEU). The legal basis is at least open to a form of instrumentalist view of science. It makes clear that the functional objective of ERA is to strengthen the Union's scientific and technological bases and encourage them to become more competitive. In the past, this has been seen and construed as a basis for economic development. Today, the [political agenda](#) is to renew ERA, with 'the ambition to create a single, borderless *market* [emphasis added] for research, innovation and technology across the EU'. And, the motivation for this renewal is to find responses to the 'enormous societal, ecological and economic challenges' the Union is facing. Whatever the political agenda of a given time however, ERA must be construed in light of the normative standard enshrined in Article 13 CFR – a standard that can call into question a purely functional view of science or one that seeks to organise science based on a market rationale.

Much like in the field of education, recent policy attempts to re-launch ERA have incorporated academic freedom considerations. For example, the [2021 Council Conclusions](#) on the future governance of the European Research Area foresee a deepening of the ERA through academic freedom protection. Just like in the field of education, also here it is yet to be seen whether the potential of commercialising academia via EU laws and policies and its tension with Article 13 CFR will remain a blind spot.

During the STOA high-level conference, MEP Ehler remarked that, in the ERA policy agenda regarding academic freedom, the current focus is primarily on [foreign \(state-level\) interferences](#) while the EP monitor shows that *national* interferences with academic freedom form the main threat across the Union. But attention should also be paid to the *EU level*/itself. However, to conduct a meaningful debate on this topic, one needs a deeper understanding of the content of Article 13 CFR – a right that, while more frequently invoked today, remains under-investigated in EU law.