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A way forward? protecting academic and scientific freedom in the EU

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Protecting Academic and Scientific Freedom in the EU

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A Way Forward?

While included in the EU Charter of Fundamental Rights (CFR), academic and scientific freedom were for years hardly a focus for the EU. This no longer holds true. On 29 November 2023, the European Parliament invited stakeholders to discuss the state of academic freedom in Europe (STOA conference), including the role of the EU in its legal protection. The conference intertwines with two important developments, both driven by the EP. First, on 22 November 2023, the EP adopted its proposals for the amendment of the Treaties, with some relevant for academic freedom protection. Earlier this month, on 17 January 2024, the EP approved the Report calling on the Commission to initiate a legislative proposal on the promotion of the freedom of scientific research in the EU and providing recommendations on its content. In this blog post, we briefly discuss these two EP calls aimed at enhanced protection of academic and scientific freedom to assess to what extent they address the concerns raised by various stakeholders.

Current Protection of Academic Freedom

Academic and scientific freedom are explicitly protected by Article 13 CFR, but multiple stakeholders see this protection as insufficient. Two arguments feature prominently. First, according to Article 51(1) CFR, its provisions are addressed to EU institutions and to the Member States only when they act within the scope of Union law, which narrows the room for Commission-led infringement proceedings against a Member State (see the so-called CEU case). The Charter cannot extend the EU's competences which are limited in the fields discussed. Article 6 TFEU sets out a supporting EU competence in relation to education, with harmonisation explicitly prohibited by Article 165(4) TFEU, and Article 4 TFEU a shared competence in relation to research. Second, Article 13 CFR is said to offer no guidance on how to understand and safeguard academic and scientific freedom, again arguably with implications for initiating infringement proceedings. The Commission is alleged to be hesitant as many attacks on academic freedom remain indirect and a uniform understanding of its

scope is lacking. Additionally, while the freedom can be found in some EU policy documents or even recitals of the Horizon Europe and Erasmus+ Regulations (the relevance of which remains unclear), there is no secondary legislation on these issues.

Two interrelated problems have therefore been raised at the STOA conference. First, it should be easier (for the EU institutions) to take action against Member States regarding academic freedom violations (with a focus placed on infringement proceedings). Second, EU law needs a more detailed definition of what academic and scientific freedom entail. We shall now look at the EP proposals and ask to what extent they are addressing these problems.

The EP's Proposals

In essence, two calls aimed at enhanced protection of academic freedom can be heard at the EP: one for secondary legislation, and one for Treaty amendments, with the latter presented at the STOA conference as the ultimate goal to guarantee its full protection in the EU.

The proposals for the amendment of the Treaties are threefold. First, promotion and protection of 'institutional and individual academic freedom' is to be added to the list of objectives of the Union (Amendment 8 to Article 3 TEU). Second, academic and scientific freedom are to be explicitly added to the research provisions of the Treaty. Proposed Amendment 152 (to Article 179(1) TFEU) reads that 'the Union shall have the objective of strengthening its scientific and technological bases [...] while promoting all the research activities deemed necessary by virtue of other Chapters of the Treaties *and respecting and promoting academic freedom and the freedom to conduct scientific research and teach*'. Third, proposed Amendment 76 (to Article 4(2)(kc) TFEU) adds education to the catalogue of EU shared competences. This reflects multiple stakeholders' conviction that there is a need for a more far-reaching competence in education if academic freedom in the EU is to be protected fully.

In the meantime, the EP wishes to see further action within the current Treaty framework. It requests the Commission, based on the existing TFEU provisions on research, to submit a proposal for a binding, legislative act on the freedom of scientific research – construed as narrower than, yet a 'constituent' part of, academic freedom. The EP provides its own recommendations for definitions which are said to build on the Bonn Declaration on Freedom of Scientific Research (2020) and the proposal for a Council Recommendation on a European framework to attract and retain research, innovation and entrepreneurial talents in Europe (2023). This would be a first piece of EU secondary legislation dealing explicitly with such matters.

So, are the proposed solutions adequate to address the stakeholders' concerns? As it is often the case with legal acts, the devil is in the details. The answers depend on, first, the type of Treaty amendment (now clarified by the EP proposals) and, second, the exact

content of any future legislation. We shall therefore highlight to what extent the proposals might realise the EP's ambitions.

Three Different Treaty Amendment Proposals

Regarding Treaty change, three different amendments are proposed. The first amendment to Article 3 TEU adds academic freedom to the list of the EU's objectives. However, Article 3 TEU does not impose self-standing obligations on Member States nor does it confer rights on individuals, having mostly interpretative value for related Treaty provisions. While Article 352 TFEU allows the Union to take action to attain one of the objectives set out in the Treaties where no other legal basis exists, it is no exception to the principle of conferral and shall not entail harmonisation of Member States' laws that would otherwise be excluded – which is currently the case in education. At the same time, specific provisions on research already exist and do not require the Article 352 TFEU route. In itself, this amendment does not seem to address the concerns raised by the stakeholders.

The second amendment to Article 179(1) TFEU introduces an explicit objective of the EU to respect and promote scientific and academic freedom while building the European Research Area. In our opinion, this does not immediately go beyond what Article 13 CFR already requires from EU institutions. The amendment does not suggest the introduction of a new, separate Treaty right applicable to individual rights holders (and co-existing next to the Charter right), which would remove the need for the Charter route.

The third amendment to Article 4(2)(kc) TFEU promises much more. It proposes creating a shared competence for education. This would allow the EU to adopt legislation explicitly covering the educational dimension of academic freedom, not just freedom of scientific research. To clarify the scope and nature of their protection, the EU institutions would nevertheless have to take a legislative action based on this new legal basis.

Towards A Legislative Definition of Freedom of Scientific Research

Such legislative action is currently called for by the EP within the remit of the Treaties as they stand, Articles 182(5) and 179(1) TFEU. The call is accompanied by recommendations for defining the freedom of scientific research, clarifying the rights (but curiously not obligations) of individual researchers, rights and obligations of research institutions, and governmental obligations in that regard. The detailed evaluation of these recommendations is beyond the scope of this blog post. The point we would like to make here is that this EP initiative moves forward in addressing the stakeholders' concern of lacking guidance on the definition of the freedom of scientific research and on the rights and obligations flowing from it. It sets out in quite some detail the constitutive elements of scientific freedom. In doing so, while building on the two mentioned EU policy initiatives, it likely also introduces its own additions and

normative choices. Some of them may prove controversial or in need of qualification, especially as no distinction is made between research conducted in private (including commercial) as opposed to public institutions.

Two examples serve to illustrate the point. First, the recommendations introduce a right for researchers to participate in institutional decision-making (which goes beyond the EU policy documents referred to). (How) would the position change in the private as opposed to the public sphere? Second, the EP perceives competitive advantages as potentially legitimate limits of scientific freedom. Is that the case for (researchers in) all types of research institutions, also the public ones? (On the challenge of commercialisation of academia see [*Kosta \(2023\)*](#).) These are just some of the questions with potentially far-reaching consequences that will need to be answered in the legislative process. Still, this initiative is clearly a step forward in advocating for legally binding legislative (as complementary to judicial) guidance on the scope of scientific freedom in the EU.

Implications for the Principle of Conferral

One further point relates to potential implications for the principle of conferral. In particular, the Union only has limited competence to legislate on education which encompasses activities such as teaching. The EP recommendations seek to tread carefully between this limited competence and the demands of effective protection of scientific research. The EP proposal correctly notes:

while the freedom of scientific research has its independent value, within the framework of modern universities the freedom of scientific research is inseparable from the freedom to teach. This means that, given the legal base of the proposal and the core competences of the Union on research, and with due respect to the limited competences of the Union to legislate on education, the proposal should aim to protect the fullest possible scope of intramural dissemination.

What ‘intramural dissemination’ means in this context is up for debate. However, for the protection of scientific research to be effective it must include at least *some* research-based educational activities. While the proposal should focus on freedom of research more narrowly, the EP clearly acknowledges this interdependency. It thereby seems to conceptually endorse the unity between teaching and research that was at the core of the original understanding of *Wissenschaftsfreiheit*. Considering this unity, typically reflected in the institutional frameworks of research universities, effective protection of research activities will arguably necessarily spill over into *some* educational matters. The proposal should thus set out the basic parameters of the freedom to teach and the extent to which it is inextricably linked to freedom of research. However, the principles of conferral and subsidiarity necessarily limit the Union’s competence with regards to the more detailed substantive dimensions of teaching. The EU legislature might here be required to leave the matter to the

Member States, also in the implementation of the proposed legislation. Whatever the outcome, we submit that the TFEU provisions on research offer a solid legal basis for EU intervention.

What can secondary legislation do?

There is still a long way before we know the exact text of any future secondary legislation. What one needs to pay attention to is indeed the detail of the definition provided (does it provide more detail than existing EU and ECHR case law?); the degree of guidance on the resolution of conflicts between different rights holders (individuals and institutions) and between academic/scientific freedom and other fundamental rights; and the scope of discretion left to Member States in the implementation of the EU legislation. As recognised by the EP, legislation in such fields – given differences between educational and research systems – is not easy to implement. The type of legal instrument chosen may but (depending on its exact content) need not play an important role in this regard. In any case, future secondary legislation can provide guidance on how to understand and safeguard both scientific and academic freedom. This would offer a more solid backing to any action of the Commission, while also create an opening for bottom-up enforcement of EU law via the preliminary reference procedure.

Conclusion

If the existing opportunities of EU law are fully utilised, the tools for academic freedom protection at the disposal of EU political and judicial institutions will significantly broaden. The effectiveness of this protection might hinge more on the exact content of future secondary legislation, especially as the chances for any Treaty amendment are slim. While the lack of competence in education currently poses a constraint on EU action, this does not mean that academic freedom is barred from being legislated upon, even if the regulation of teaching must be limited. Nevertheless, the duties imposed on authorities by such legislation will surely reinforce – even if less directly – academic freedom at large. Any potential inclusion of education in the EU's catalogue of shared competences will then open more room for legislative action. However, the research provisions already contained in TFEU – indicated as a legal basis by the EP – may be just sufficient to offer a constructive way forward to guarantee the protection of scientific (and academic) freedom in the Union.

Editor's Note: Some corrections were made after the text was first published to include a more detailed discussion of the amendment to Article 3 TEU.

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