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The Democratic Justification of Academic Freedom in EU Law: Article 13 of the EU Charter, the Rule of Law Toolbox, and the Scope for EU Action

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The democratic justification of academic freedom – Academic freedom and Article 2 TEU values (democracy, the rule of law) – Potential implications for the application of the EU rule of law toolbox – Complementary protection of academic freedom – Preliminary remarks on future proposals

INTRODUCTION

Article 13 of the EU Charter of Fundamental Rights, one of the foundational EU legal acts, reads: ‘The arts and scientific research shall be free of constraint. Academic freedom shall be respected’. Until now, this remains the only legally binding pronouncement on academic and scientific freedom in EU law. The provision has not been extensively analysed in the legal literature, perhaps because academic freedom in the EU was long taken for granted. However, research indicates that the overall state of academic freedom in the EU is ‘eroding’, with a systemic decline observed in Hungary and accompanying this member state’s broader process of democratic backsliding.¹ Indeed, the rule of law and academic

¹P. Maassen et al., ‘State of Play of Academic Freedom in the EU Member States: Overview of de Facto Trends and Developments’, Panel for the Future of Science and Technology (STOA) of the European Parliament (2023), p. III, [https://www.europarl.europa.eu/stoa/en/document/EPRS_STU\(2023\)740231](https://www.europarl.europa.eu/stoa/en/document/EPRS_STU(2023)740231), visited 14 May 2025.

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freedom are often seen as intertwined,² with some commentators suggesting that ‘they must both be cultivated simultaneously’.³ This arguably applies to protection of democracy as well, reflecting its long-recognised interdependence with the rule of law and fundamental rights.⁴ Recent developments concerning Hungary confirm that these relationships might lie in the background of academic freedom questions raised *as a matter of EU law*.⁵ Yet, despite the increasing interest of EU policy-makers and a growing number of initiatives,⁶ there is still no clear vision how the EU could (better) protect academic freedom. Stakeholders often perceive the current legal framework as lacking and call for the Commission to propose new legislation.⁷ However, these discussions have not so far scrutinised in more detail the place of academic freedom protection within the existing EU tools for the protection of democracy and the rule of law, nor how these can be coordinated with or complemented by future academic freedom instruments. This article reflects therefore on three interrelated questions.⁸ What is the relationship between academic freedom and the rule of law or democracy under EU law specifically? How can the existing EU rule of law toolbox be mobilised for academic freedom protection, and with what implications? Finally, where could various instruments – both existing and proposed – best complement each other? This article argues that it is time to reflect on the place of academic freedom within the EU values with reference to its democratic justification recognised in the broader literature. It also discusses what consequences this might have for the EU’s action under the current framework and how it might inform future legislative and non-legislative proposals in the relevant fields.

²E.g. N. Ramanujam and V. Wijenayake, ‘The Bidirectional Relationship Between Academic Freedom and Rule of Law: Hungary, Poland and Russia’, 14 *Hague Journal on the Rule of Law* (2022) p. 27; P. Bárd, ‘The Rule of Law and Academic Freedom or the Lack of It in Hungary’, 19 *European Political Science* (2020) p. 87.

³Ramanujam and Wijenayake, *supra* n. 2, p. 46.

⁴E.g. S. Carrera et al., ‘The Triangular Relationship between Fundamental Rights, Democracy and Rule of Law in the EU – Towards an EU Copenhagen Mechanism’, Directorate-General for Internal Policies, European Parliament (2013), https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET%282013%29493031_EN.pdf, visited 14 May 2025.

⁵See ECJ 6 October 2020, Case C-66/18, *European Commission v Hungary*, concerning the so-called ‘Lex CEU’ or the recent challenge to the Council’s conditionality decision 2022/2506 suspending the Erasmus+ and Horizon Europe funds for some Hungarian institutions, currently pending: General Court, Case T-115/23, *Debreceni Egyetem v Council*.

⁶See, for example, activities of the European Parliament’s Forum for Academic Freedom, <https://www.europarl.europa.eu/stoa/en/ep-academic-freedom>, visited 14 May 2025.

⁷European Parliament resolution of 17 January 2024 with recommendations to the Commission on promotion of the freedom of scientific research in the EU (2023/2184(INL)).

⁸This article develops ideas first introduced in O. Ceran, ‘EU Values and the EU’s Rule of Law Action: What Place for Academic Freedom?’, *TRAFO – Blog for Transregional Research*, 17 October 2024, <https://doi.org/10.58079/12in2>, visited 14 May 2025.

ACADEMIC FREEDOM IN THE EU: AN INSUFFICIENT LEGAL TOOLBOX?

Academic and scientific freedom are explicitly protected by Article 13 of the Charter. However, this protection is often seen as insufficient, for two main reasons.⁹ First, it is not clear how to understand the freedoms under Article 13. The Explanations to the Charter link this provision to Article 10 of the European Convention on Human Rights (on general freedom of expression) – freedom recognised as distinct from academic freedom in the EU Charter (compare Articles 11 and 13 of the Charter). The Court of Justice has discussed the content of Article 13 only once, in the so-called *Lex CEU* case concerning amendments to the Hungarian higher education law that *de facto* targeted the Central European University.¹⁰ The Court of Justice stated in rather broad terms that Article 13 encompasses both an individual and an institutional dimension of academic freedom, as well as the corresponding duties of the member states to protect them.¹¹ The judgment, therefore, went beyond the existing jurisprudence of the European Court of Human Rights, referenced therein, insofar as it explicitly afforded academic freedom protection to institutions (see also Article 52(3) of the Charter). However, it still leaves open many questions about the scope of the freedom and its limits. This includes the distinction between scientific and academic freedom,¹² the scope of positive obligations imposed in this context, or the relationship between Articles 11 (freedom of expression), 13 (academic freedom), and 14 (the right to education) of the Charter.¹³ The content of Article 13 of the Charter shall further be interpreted in line with the constitutional traditions common to the member states (Article 52(4) of the Charter), many of which explicitly afford protection to academic or scientific freedoms. However, comparative research on this topic is scarce, not necessarily conclusive, and does not immediately provide answers as to how these traditions should inform the content of Article 13.¹⁴ Therefore, while both the member states and the EU itself

⁹See also V. Kosta and O. Ceran, 'A Way Forward?: Protecting Academic and Scientific Freedom in the EU', *Verfassungsblog*, 29 January 2024, <https://verfassungsblog.de/a-way-forward/>, visited 14 May 2025.

¹⁰For circumstances of the case see Z. Enyedi, 'Democratic Backsliding and Academic Freedom in Hungary', 16 *Perspectives on Politics* (2018) p. 1067.

¹¹*European Commission v Hungary*, *supra* n. 5, paras. 226-227.

¹²While one can plausibly see the two concepts as distinct, the article uses the term 'academic freedom' as an umbrella term encompassing also elements of scientific freedom, unless explicitly stated otherwise.

¹³See also O. Ceran and Y. Guerra, 'The Council's Conditionality Decision as a Violation of Academic Freedom?', *Verfassungsblog*, 28 March 2023, <https://doi.org/10.17176/20230328-195232-0>, visited 14 May 2025.

¹⁴See V. Kosta and O. Ceran, 'EP Academic Freedom Monitor 2024: Overview of de jure Academic Freedom Protection', Panel for the Future of Science and Technology (STOA) of the

have a clear duty not to violate Article 13 under Article 51(1) of the Charter, the nature and scope of their obligations have not been fully clarified. Given the often indirect or contextual nature of academic freedom attacks, this lack of clarity is argued to make any EU enforcement action difficult and easily contestable.

Second, the scope of application of the EU Charter remains limited, in line with its Article 51(1). The Charter is addressed to EU institutions and to the member states only when they act within the scope of Union law. The literature already noted that in principle this allows for Article 13 of the Charter to be invoked within the scope of various ‘traditional’ strands of EU law (see ‘Infringement proceedings’ below) but cannot extend the EU’s competences, constrained in the field discussed. Article 4 TFEU sets out a shared competence in relation to research, and Article 6 TFEU a supporting EU competence in relation to education, with harmonisation explicitly prohibited by Article 165(4) TFEU.¹⁵ There are also, at this moment, no provisions of EU secondary legislation regulating academic freedom directly. Nevertheless, the flagship EU instruments in the area – the Erasmus+ and the Horizon Europe Regulations – make reference to academic freedom. The Horizon Regulation says that ‘the Programme should promote the respect of academic freedom in all countries benefiting from its funds’ (Recital 72), and under the Erasmus+ Programme ‘it should be ensured that academic freedom is respected by the countries receiving funds’ (Recital 64). While there must be a difference between promotion of academic freedom envisaged by the former and a form of conditionality suggested by the latter, the tangible consequences of these recitals remain unclear and no academic freedom action has been taken in reference to these Regulations.¹⁶ There are also other policy initiatives, some of which can be classified as ‘soft law’, on academic and/or scientific freedom, both in the EU¹⁷ or within the broader Bologna Process behind the European Higher Education Area.¹⁸ Nevertheless, both ‘hard’ and ‘soft’ instruments on academic freedom are somehow fragmented and still leave

European Parliament (2025). On the last point, see V. Kosta (ed.), *Academic Freedom: Constructing its Content for EU Law* (Cambridge University Press, forthcoming).

¹⁵For more detail see Kosta and Ceran, *supra* n. 14, section 5.

¹⁶See, for example, the reference to the recital in the parliamentary question on the Turkish government’s violations of academic freedom and the answer given by the European Commission: ‘Parliamentary Question – E-000655/2022’, https://www.europarl.europa.eu/doceo/document/E-9-2022-000655_EN.html, visited 14 May 2025. See also other questions to the Commission: E-002715/2022, E-001446/2022, E-003927/2021.

¹⁷E.g. Bonn Declaration on Freedom of Scientific Research adopted at the Ministerial Conference on the European Research Area on 20 October 2020 in Bonn.

¹⁸European Education and Culture Executive Agency/Eurydice, ‘The European Higher Education Area in 2024: Bologna Process Implementation Report’ (2024) ch. 3, <https://data.europa.eu/doi/10.2797/483185>, visited 14 May 2025.

much to be clarified in terms of understanding and enforcement of academic freedom in EU law.

Considering these difficulties, stakeholders have discussed the need for a more specific legislation on academic freedom or aspects thereof.¹⁹ The European Parliament recently called on the Commission to initiate a legislative proposal on the promotion of the freedom of scientific research in the EU, based on Article 182(5) in conjunction with Article 179(1) TFEU. The degree to which new legislation can resolve the challenges identified is yet to be seen. Nevertheless, the European Parliament resolution also recognises scientific freedom as ‘an essential element of democracy’ and the failure to protect it as ‘a serious abdication of its responsibility to uphold the rule of law in the Union’. A closer scrutiny of what this nature of scientific (or academic) freedom can mean for EU law – regarding the understanding of the rights protected by Article 13 of the Charter, their current enforcement, and any future proposals – is timely.

ACADEMIC FREEDOM AND ITS PLACE AMONG EU VALUES

While academic freedom increasingly features on the EU’s agenda, the theoretical reflection on the topic is still scarce. As observed by Kosta, only a few scholars have investigated it in depth, leaving much to be explored about the ‘underlying rationale(s)’ of academic freedom in the EU context.²⁰ For the purposes of this article it is sufficient to note that academic freedom is typically grounded in the truth-seeking mission of academia as a self-evident good, irrespective of other implications (the so-called epistemological justification).²¹ This justification has, however, been both rejected for and complemented by socio-political justifications that link academic freedom to some other needs of society – for example its essential role in democratic life.²² This article does not attempt to discuss the different justifications and their normative consequences in an exhaustive manner. EU legal scholars are already investigating how the different justifications may come together (or apart) in Article 13 of the Charter.²³ However, any such investigation requires a prior reflection on the relevance and implications of different justifications in their own right – notwithstanding which

¹⁹The stakeholders have also called for a Treaty revision, but this is unlikely in the immediate future and is not discussed in this article. See Kosta and Ceran, *supra* n. 9.

²⁰V. Kosta, ‘NWO Research Proposal: The EU Fundamental Right to “Freedom of the Arts and Sciences”: Exploring the Limits on the Commercialisation of Academia (AFITE)’ (2020), <https://hdl.handle.net/1887/3656689>, visited 14 May 2025.

²¹*Ibid.*

²²*Ibid.*

²³*Ibid.*

of them are ultimately accepted as normatively desirable. Embracing this normative ambiguity, the article draws attention to the fact that the democratic justification of academic freedom can plausibly be considered part of EU law, presupposing a particular relationship between academic freedom, democracy and the rule of law in EU law specifically. Subsequently, if accepted, a deeper engagement with academic freedom's place among these EU values can lead to a reinterpretation of the existing legal tools and factor into the design of new instruments.

The nature of the democratic justification of academic freedom

The literature recognises that many questions about the scope and nature of academic freedom are determined by the vision(s) or justification(s) thereof to which one adheres.²⁴ Some of them (such as 'is academic freedom a constitutional right?' or 'does it attach to an institution?')²⁵ have already been explicitly resolved in EU law, the first by EU legislators (Article 13 of the Charter) and the second by the Court of Justice (the *CEU* judgment). However, many others remain open. Therefore, before trying to uncover whether EU law embraces the democratic justification of academic freedom and to what extent, it is necessary to outline what it entails. Three interdependent dimensions of such justification have been previously conceptualised and discussed in the literature.²⁶ First, academic freedom plays a role in education and fosters the democratic culture – alternatively 'the culture of the rule of law'²⁷ – or the development of 'a democratic citizen'.²⁸ Second, academic freedom – due to the sector's focus on the discovery of truth – allows the verification of truth claims with the added benefit for the democratic marketplace of ideas.²⁹ Lastly, but in relationship to this truth-seeking mission,³⁰ academic freedom allows the sector to fulfil the role of a watchdog of governmental action, holding public authorities accountable.³¹

²⁴S. Fish, *Versions of Academic Freedom: From Professionalism to Revolution* (University of Chicago Press 2014) p. 7.

²⁵*Ibid.*

²⁶See also *ibid.*, ch. 3.

²⁷Ramanujam and Wijenayake, *supra* n. 2, p. 38.

²⁸Fish, *supra* n. 24, p. 45.

²⁹E.g. R. Uitz, 'Academic Freedom as a Human Right? Facing up to the Illiberal Challenge', draft prepared for the Bonavero Center's discussion group meeting on 9 February 2021 (Oxford University) p. 8, https://www.law.ox.ac.uk/sites/default/files/migrated/draft_3_academic_freedom_as_a_human_right_uitz_febr_2020.pdf, visited 14 May 2025.

³⁰M.P. Lynch, 'Academic Freedom and the Politics of Truth', in J. Lackey (ed.), *Academic Freedom* (Oxford University Press 2018).

³¹E.g. D. Kaye, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (A/75/261)' (United Nations 2024) para. 20, <https://docu>

It can be considered a ‘rebel right’³² and its role ‘similar to the courts, the media and civil society organisations in that academia too acts as a check on unfettered power through scientific research and critical thinking’.³³ This is exactly why Ramanujam and Wijenayake argue that, as both the rule of law and academic freedom have the objective to keep power in check, ‘[e]ach is a *sine qua non* for the existence of the other’ and they ‘must both be cultivated simultaneously’.³⁴ Insofar as institutional academic freedom claims strongly rely on individual ones,³⁵ arguments of this nature can be raised in both dimensions.

While potentially attractive, some authors not only question the premise on which this alliance is built but also highlight its perils. Conceptually, none of the three dimensions is said to be exclusive to academia – there are other ways to educate and inform citizens,³⁶ or to hold governments accountable.³⁷ Therefore, the role of academia should not be overstated when competing interests need to be weighed against each other.³⁸ Others argue that the democratic justification does not replace the epistemological one (the pursuit of truth), but rather must depend on and be complementary to it.³⁹ Many other objectives are also put forward for European research and education and might have repercussions for the understanding of freedoms granted to them, e.g. the realisation of a competitive EU economy.⁴⁰ This is to be expected, as it is not particularly unusual for a freedom to protect various interests.⁴¹ However, different justifications of academic freedom might pull in different directions. Fish, an author extensively discussing different ‘versions’ of academic freedom, warns that ‘once academic freedom is justified because of its supposed contribution to democracy, the question put to it changes, no longer how will this or that version of academic freedom advance the doing of academic work, but how will this or that version of

ments-dds-ny.un.org/doc/UNDOC/GEN/N20/197/86/PDF/N2019786.pdf?OpenElement, visited 14 May 2025.

³²Uitz, *supra* n. 29, p. 6.

³³Ramanujam and Wijenayake, *supra* n. 2, p. 43; Kaye, *supra* n. 31, para. 10.

³⁴Ramanujam and Wijenayake, *supra* n. 2, p. 46.

³⁵E. Barendt, *Academic Freedom and the Law: A Comparative Study* (Hart Publishing 2010) ch. 3.

³⁶For a critical discussion of privileging academic speech outside academia see e.g. J. Komárek, ‘Freedom and Power of European Constitutional Scholarship’, 17 *EuConst* (2021) p. 422 at p. 435; Barendt, *supra* n. 35, p. 19.

³⁷Fish, *supra* n. 24, p. 47.

³⁸*Ibid.*

³⁹Lynch, *supra* n. 30.

⁴⁰E.g. V. Kosta, ‘The Commercialisation Challenge to Academic Freedom: A Matter for EU Law’, *European Law Blog*, 11 December 2023, <https://www.europeanlawblog.eu/pub/the-commercialisation-challenge-to-academic-freedom-a-matter-for-eu-law/release/1>, visited 14 May 2025.

⁴¹See also Fish, *supra* n. 24, p. 7; Barendt, *supra* n. 35, p. 72.

academic freedom advance the project of democracy'.⁴² In other words, the democratic justification is external to academia and does not capture its main purpose.⁴³ This is particularly relevant if one recognises that there are many possible academic freedom threats, also beyond the rule of law context (e.g. from the private sector).⁴⁴

This brief overview already demonstrates the complexity of the picture. In some contexts, the democratic justification might support arguments for granting academia wider protection. It can arguably reinforce the institutional claims as both the educational and the watchdog role are supported by the organised (institutional) nature of the activities. On the other hand, the epistemological and democratic justifications may prompt different answers to questions about how accountable universities should be to the public, and to what extent they are entitled to public support (regarding the choice of research topics, funding, or other matters). Moreover, it seems justified to assume that the democratic justification, insofar as it builds on the truth-seeking mission of academia, depends on the epistemological one.⁴⁵ Therefore, the protection of academic freedom and democracy or the rule of law, while it should be 'simultaneous',⁴⁶ might not be synonymous in all contexts or in light of different types of threats. This is an important puzzle not only for theoretical accounts, but potentially also for the EU's practice, as it will influence our understanding of what is acceptable vis-à-vis Article 13 of the Charter. Both the choice of type(s) of enforcement actions as well as the design of new instruments should therefore be a result of a conscious reflection on the nature of academic freedom in EU law. This article constitutes one step in this direction, focusing on the rule of law context, but also highlights how different visions of academic freedom might feed into such choices.

Academic freedom, democracy, and the rule of law under EU law

Historians of European education note that 'without the idea of the university as an institution creating and diffusing knowledge and *democratic* values in a way which is intrinsically international, this policy history of [EU] higher education could not have existed' (emphasis added).⁴⁷ Indeed, similar pronouncements can be found in contemporary policy documents issued by all major EU institutions:

⁴²Fish, *supra* n. 24, p. 44.

⁴³*Ibid.*

⁴⁴E.g. Kosta, *supra* n. 40.

⁴⁵Lynch, *supra* n. 30, p. 31-32.

⁴⁶Ramanujam and Wijenayake, *supra* n. 2, p. 46.

⁴⁷A. Corbett, 'Ideas, Institutions and Policy Entrepreneurs: Towards a New History of Higher Education in the European Community', 38 *European Journal of Education* (2003) p. 315 at p. 326.

the European Commission, the European Parliament, and the Council of the European Union.⁴⁸ On the other hand, *legal* statements to that effect are harder to find and rarely direct. Recital 1 to the Erasmus+ Regulation references the value of EU investments in education for ‘a more democratic Union’. The role of academics in a democratic public discourse underpins their inclusion in the recent EU Directive on strategic lawsuits against public participation (the EU Anti-SLAPP Directive).⁴⁹ The critical role of academia ‘in a given political system’ is also recognised by the European Court of Human Rights as constituting one of the rationales for guaranteeing academics’ freedom to disseminate their opinions.⁵⁰ The Court of Justice in the *Lex CEU* case does not discuss academic freedom in the context of democracy as such, but makes a reference to the jurisprudence of the European Court of Human Rights and the Council of Europe Recommendation 1762(2006) that explicitly recognise such links. Therefore, while the democratic justification cannot be fully foreign to EU law either, in light of Article 52(3) of the Charter, the exact degree and dimensions of its relevance have not been scrutinised in more detail, be it in EU legislation or the Court of Justice’s jurisprudence. This can open questions as to whether the existing accounts of the democratic justification of academic freedom, rooted in the national democratic context, remain relevant for the EU. However, while the Union’s constitutional set-up is unique, democracy remains part of the EU’s political philosophy and legal vocabulary. As demonstrated by the statements of EU institutions, the EU also recognises the basic premises of the democratic justification (education of ‘democratic citizens’, verification of truth claims, and stronger accountability structures) as inherently valuable. Therefore, even if the Union context might prompt different answers to some specific questions, this vision of academic freedom can inform the interpretation of Article 13 of the Charter as well.

Against this background, the analysis of the relationship between academic freedom and democracy or the rule of law can arguably be grounded in the foundational provisions of the Treaties, specifically Article 2 TEU that outlines EU values.⁵¹ Article 2 TEU reads: ‘The Union is founded on the values of respect

⁴⁸ See the examples in Ceran, *supra* n. 8.

⁴⁹ Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings.

⁵⁰ ECtHR 27 May 2014, Nos. 346/04 and 39779/04, *Mustafa Erdoğan and Others v Turkey*, para. 40. For a more nuanced assessment of the Court’s rationale see K. Kovács, ‘Academic Freedom in Europe: Limitations and Judicial Remedies’, 14 *Global Constitutionalism* (2024) p. 8-10.

⁵¹ See Ceran, *supra* n. 8. For early suggestions to this effect see also T.D. Ziegler, ‘Using EU Citizenship to Protect Academic Freedom: An Alternative Method’, in D. Kostakopoulou and D. Thym (eds.), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar Publishing 2022) p. 184 at p. 197.

for human dignity, freedom, democracy, equality, the rule of law and respect for human rights . . .'. Academic freedom is not explicitly mentioned in this provision. However, it falls within its scope as one of human rights – and specifically also one of the 'freedoms' – recognised by the EU Charter itself.⁵² Moreover, as I have already argued in more detail elsewhere,⁵³ the 'thick' understandings of democracy or the rule of law under Article 2 TEU, widely accepted in EU law,⁵⁴ justify the inclusion of (certain aspects of) academic freedom also under these value-concepts. In a recent publication on '70 years of EU law', the Legal Service of the European Commission included academic freedom among the Charter provisions which give expression to the EU value of democracy.⁵⁵ While 'not [to] be considered as representative of the European Commission's official position',⁵⁶ this inclusion reflects the same sentiment that underlines many EU policy documents – but in the specific context of Article 2 TEU. A connection to Article 2 TEU values has been asserted also for Article 14 of the Charter (right to education),⁵⁷ with its arguably close (but to be established in detail) relationship to academic freedom. Against this background, academic freedom can be seen as instrumental to the protection of democracy, with violations of the former potentially indicating a (risk of) breach of the latter. Whether this assessment gains broader acceptance beyond the realm of scholarly reflections is to be seen, but it opens a new door for Commission-led actions in this area.

The relationship between academic freedom and the rule of law under EU law is arguably less clear. However, the rule of law is generally considered to assume respect for the other values enshrined in Article 2 TEU.⁵⁸ Such a view is accepted

⁵²European Commission, *70 Years of EU Law: A Union for Its Citizens* (Publications Office of the European Union 2022) p. 51, <https://data.europa.eu/doi/10.2880/02622>, visited 14 May 2025; see also Ziegler, *supra* n. 51, p. 197.

⁵³Ceran, *supra* n. 8.

⁵⁴E.g. Y. Bouzora, 'The Value of Democracy in EU Law and Its Enforcement: A Legal Analysis', 8 *European Papers* (2023) p. 809 at p. 813; L. Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law', 14 *Hague Journal on the Rule of Law* (2022) p. 107 at p. 122 ff; M. Klamert and D. Kochenov, 'Article 2 TEU', in M. Kellerbauer et al. (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019).

⁵⁵European Commission, *supra* n. 52, p. 52; for an implicitly opposite assessment see Bouzora, *supra* n. 54, p. 831–832.

⁵⁶European Commission, *supra* n. 52, p. 7.

⁵⁷T. Perišin, 'Changing the European Union Through Education: What Can the European Union Do for Education, and What Can Education Do for the European Union?', in T. Čapeta et al. (eds.), *The Changing European Union: A Critical View on the Role of Law and the Courts* (Hart Publishing 2022) p. 147 at p. 158.

⁵⁸Bouzora, *supra* n. 54, p. 811. See also the Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based (COM/2003/0606 final).

also in the broader European legal space. For example, the Venice Commission recognises that there is ‘a great deal of overlap’ between respect for the rule of law and respect for human rights.⁵⁹ In the Commission’s view, ‘rule of law connotations’ can be ascribed to rights such as freedom of expression that ‘permits criticism of the government of the day’,⁶⁰ a sentiment expressed arguably by the inclusion of media freedom in the EU Rule of Law Reports.⁶¹ If one accepts the basic premises of the democratic justification of academic freedom set out above, this right should arguably be seen as having ‘rule of law connotations’ too. At the same time, the European Commission often conceptualises the value of the rule of law more narrowly, in reference to Articles 47 and 48 of the Charter, Article 19(1)(2) TEU, Article 7 TEU, and the Rule of Law Conditionality Regulation.⁶² From this narrower perspective, neither primary nor secondary law would provide for a clear legal link between academic freedom and the rule of law. Nevertheless, their protection intersects in at least two dimensions. First, all the rule of law safeguards, such as independent judiciary, necessarily also reinforce academic freedom protection (as is the case with other fundamental rights).⁶³ Second, some factual situations amounting to violations of academic freedom might simultaneously violate the rule of law, predominantly in cases involving institutional issues of a systemic nature. This is illustrated by recent changes to the governance of Hungarian higher education institutions, which have been placed under the management of ‘public interest trusts’. The change has prompted doubts about not only institutional autonomy, but also the non-application of public procurement and conflict-of-interest rules, and a lack of transparency in fund management – issues seen as threats to legal certainty and indicative of arbitrary executive power.⁶⁴ Hence, notwithstanding the lack of clarity regarding this relationship on a conceptual level, protection of both academic freedom and the rule of law respectively can indeed be mutually reinforcing. It is, therefore, worthwhile exploring how they can be usefully mobilised together in the EU’s action.

ACADEMIC FREEDOM IN EU LAW: THE RULE OF LAW TOOLBOX AND BEYOND

Having located academic freedom within the EU values specifically, it is now time to investigate what their relationship(s) might mean for EU action. Given the lack

⁵⁹Report on the rule of law – Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011) para. 59.

⁶⁰*Ibid.*, para. 6.

⁶¹See ‘The “soft law” tools’ below.

⁶²E.g. European Commission, *supra* n. 52, p. 52.

⁶³See e.g. Recital 6 of the Rule of Law Conditionality Regulation.

⁶⁴See also ‘EU funding and the economic leverage of the EU’ below.

of specific instruments for academic freedom protection, the analysis covers both the classic tools of EU law as well as the specific instruments of the EU rule of law toolbox. It encompasses various preventive, enforcement, and corrective measures and includes both substantive and procedural remarks.⁶⁵ Due to the focus of this article, the discussion is nevertheless selective. It concerns already existing instruments that have proven to be or might become relevant for the questions pursued in this article. The rule of law toolbox in particular has grown in recent years and has been widely discussed, but not all tools are applicable to academic freedom, even if the (legal) infrastructure they concern (e.g. independent judiciary in the EU Justice Scoreboard) matters for academic freedom guarantees more broadly. Importantly, the article does not explore options for decentralised enforcement on the national level (e.g. via the preliminary reference procedure or through direct and indirect effect). However, some of the remarks made below regarding interpretation of substantive provisions of EU law can be relevant for such decentralised action as well.

The 'soft law' tools

Recent years have seen a gradual rise in EU developments that can be classified as academic freedom soft law.⁶⁶ However, while they provide evidence of the EU's commitment and might support the interpretation of academic freedom in EU law, none of such instruments is currently designed to provide for systematic reporting and preventive dialogue activities known from the EU rule of law toolbox.⁶⁷ The effectiveness of these 'soft law' tools is often seen as limited in cases involving non-cooperative member states, as they do not have an enforcement or corrective nature as such.⁶⁸ Nevertheless, dialogue via such tools might produce the desired effects, depending also on their exact profile.⁶⁹ Even at the current stage of the EU's legal development, one can argue that some aspects of academic freedom could be discussed more explicitly and extensively under the existing tools. For example, this could happen under the current key thematic areas of the

⁶⁵On the classification of the rule of law tools see C. Fasone, 'Final Remarks on Dissensus Affecting the EU Rule of Law Procedures. Future Research Paths', in C. Fasone et al. (eds.), *EU Rule of Law Procedures at the Test Bench: Managing Dissensus in the European Constitutional Landscape* (Springer Nature Switzerland 2024) p. 283 at p. 283-288.

⁶⁶See the overview in 'Academic Freedom Policymaking at the European Union' (30 September 2022), <https://sareurope.eu/sar-resources/academic-freedom-policymaking/>, visited 14 May 2025.

⁶⁷For an overview see Fasone et al., *supra* n. 65, Part III.

⁶⁸D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality', 11 *EuConst* (2015) p. 512 at p. 532.

⁶⁹O. Ştefan, 'Preserving the Rule of Law Through Transnational Soft Law: The Cooperation and Verification Mechanism', 16 *Hague Journal on the Rule of Law* (2024) p. 671.

Rule of Law Report such as media pluralism and freedom (e.g. in reference to how member states implement the Anti-SLAPP Directive, applicable also to academics)⁷⁰ or other institutional issues related to checks and balances (e.g. regarding independence of authorities competent in academic matters).⁷¹ It has also been tentatively suggested that the Charter could be applicable to national legal acts implementing EU soft law or recommendations issued under such tools,⁷² opening new avenues for academic freedom action (e.g. via the infringement proceedings).

Infringement proceedings

Infringement proceedings (Articles 258-260 TFEU) are one of the classical tools of EU law enforcement, widely discussed also in the context of democratic backsliding. Practice has shown that they can be usefully mobilised for academic freedom. The only – but very prominent – example of such an action is the proceedings launched by the Commission against Hungary in 2018, resulting in the so-called *Lex CEU* judgment. Most of the 244 paragraphs of the judgment discuss trade, only 35 paragraphs discuss fundamental rights,⁷³ and none the rule of law or democracy. However, as observed by commentators, ‘there is no doubt that the question of academic freedom and the wider issue of democratic backsliding in Hungary are at the heart of this case’.⁷⁴ Finding a violation of Article 13 of the Charter, the Court strengthened the protection of academic freedom in a context that had been previously recognised as a rule of law issue by the Venice Commission.⁷⁵ Against this background, there are several observations to be made regarding the mutual amplification of academic freedom and the EU values of democracy and rule of law in infringement proceedings.

First, if enforcement of academic freedom is seen as an indirect enforcement of EU values, then any infringement action in this context can be seen as having a wider aim. Article 13 of the Charter is not characterised by some of the

⁷⁰See ‘EU: Call for Strengthened Rule of Law’, *ARTICLE 19*, 28 March 2024, <https://www.article19.org/resources/eu-call-for-strengthened-rule-of-law/>, visited 14 May 2025.

⁷¹‘European Rule of Law Mechanism: Methodology for the Preparation of the Annual Rule of Law Report’, https://commission.europa.eu/system/files/2023-07/63_1_52674_rol_methodology_en.pdf, visited 14 May 2025.

⁷²Stefan, *supra* n. 69, p. 688.

⁷³V. Kosta and D. Piqani, ‘Where Trade and Academic Freedom Meet: Commission v. Hungary (LEX CEU)’, 59 *CML Rev* (2022) p. 813.

⁷⁴*Ibid.*

⁷⁵Hungary. Opinion 891/2017 on Act XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education’ (Venice Commission 2017), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)022-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)022-e), visited 14 May 2025.

shortcomings identified in reference to the enforcement of EU values via infringement proceedings, e.g. the fact that many structural issues cannot be framed as violations of individual rights.⁷⁶ While arguably not all-encompassing in nature, Article 13 clearly covers an institutional dimension of academic freedom⁷⁷ and might allow relevant threats of a more systemic nature to be addressed. On the other hand, it is often alleged that the scope of application of the Charter and the lack of explicit legislation on academic freedom obstruct enforcement action on EU level. However, the *Lex CEU* case demonstrates that Article 13 of the Charter as such can be invoked within the scope of various ‘traditional’ strands of EU law.⁷⁸ Although academic freedom has no explicit basis in the Treaties or secondary law provisions, the proceedings can be grounded first and foremost in EU free movement law.⁷⁹ Also, public procurement law or competition law can in some circumstances provide an anchor for such action,⁸⁰ with the latter’s relevance as a rule of law tool discussed in the literature.⁸¹ Some aspects of academic freedom are embedded in the newly adopted EU Anti-SLAPP Directive that protects academics against manifestly unfounded or abusive court proceedings on account of public participation.⁸² Further, the literature puts forward arguments – so far untested in practice – for an extended reading of the scope of application of the Charter in general,⁸³ or for deriving academic freedom protection directly from provisions on EU citizenship.⁸⁴ It is true, however, that the link to EU law is not always easy to establish due to the limited EU competence and the predominantly public character of higher education and research institutions in Europe.⁸⁵ For example, changes in the governance structures of higher education institutions, an academic freedom matter that might accompany broader processes of democratic backsliding, do not have an

⁷⁶L.D. Spieker, ‘Breathing Life into the Union’s Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis’, 20 *German Law Journal* (2019) p. 1182 at p. 1187.

⁷⁷*European Commission v Hungary*, *supra* n. 5.

⁷⁸See J. Vrielink et al., ‘Challenges to Academic Freedom as a Fundamental Right’ (LERU Advice Paper, League of Research Universities 2023) p. 9-10, <https://www.leru.org/publications/challenge-s-to-academic-freedom-as-a-fundamental-right>, visited 14 May 2025.

⁷⁹*Ibid.*

⁸⁰E.g. A. Gideon, *Higher Education Institutions in the EU: Between Competition and Public Service* (TMC Asser Press 2017).

⁸¹K.J. Cseres, ‘The Role of Competition Law in Defending Rule of Law Values in the EU’, in Fasone et al., *supra* n. 65, p. 261.

⁸²Directive (EU) 2024/1069, *supra* n. 49.

⁸³E.g. A. Jakab, ‘The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States’, in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) p. 187.

⁸⁴Ziegler, *supra* n. 51.

⁸⁵Vrielink et al., *supra* n. 78, p. 11. See also the considerations in Ziegler, *supra* n. 51.

obvious connection to EU law. Further, much of EU law is rooted in economic activity.⁸⁶ In such circumstances, assessments of whether the conditions for EU law to apply are met might require a detailed case-by-case analysis of the funding and operational structures of the institution(s).⁸⁷ It is outside of the scope of this article to discuss such matters in detail. Nevertheless, higher education might indeed fall within the scope of EU law more frequently than initially alleged,⁸⁸ with consequences for the protection of other EU values as well. Their mutual relationships might also, however, become relevant beyond that.

Some authors have suggested that Article 2 could be enforced autonomously, also where it is not 'directly linked with the competences and policy areas of the Union'.⁸⁹ Whether this is the case is currently an open question.⁹⁰ However, if accepted, it could clearly – as discussed above – have consequences for academic freedom protection. Further, it has been argued (in reference to the existing jurisprudence on Article 19 TEU) that a combined reading of Article 2 TEU and a specific provision concretising the values leads to a 'mutual amplification', as 'the specific provision of EU law ... translates Article 2 TEU into a specific legal obligation, [and] the operationalized Article 2 TEU triggers and determines the scope of application of the specific provision'.⁹¹ This has been suggested to be possible for EU Charter rights in some exceptional circumstances as well,⁹² and therefore could lead to a circumvention of the consistently alleged limited scope of application of Article 13 of the Charter. Nevertheless, some (non-authoritative) publications from the Commission suggest that 'for any value that finds its concrete expression solely in fundamental rights granted by the Charter, Article 51(1) thereof must prevail'.⁹³ However, were there any other rules of primary or secondary EU law that express the value in question, it could 'be argued that the specific value establishes a general *conditio sine qua non* (essential condition) for a Member State's participation in EU policies in a similar way to that of effective judicial control [Article 19 TEU]'.⁹⁴ The Court of Justice confirmed that Article 19(1) TEU is applicable 'independent of whether or not, in the individual case, the national authorities and hence, in judicial review, the judiciary are

⁸⁶Gideon, *supra* n. 80, p. 38-39.

⁸⁷*Ibid.*, p. 39.

⁸⁸Vrielink et al., *supra* n. 78, p. 9-10.

⁸⁹Klamert and Kochenov, *supra* n. 54, p. 25.

⁹⁰See the ongoing infringement proceedings against Hungary where Art.2 TEU was used as a self-standing legal basis: ECJ Case C-769/22, *European Commission v Hungary*.

⁹¹Spieker, *supra* n. 76, p. 1205-1206.

⁹²*Ibid.*, p. 1206.

⁹³European Commission, *supra* n. 52, p. 38.

⁹⁴*Ibid.*

implementing EU law'.⁹⁵ Perhaps this could be prospectively said also about academic freedom as an essential condition for a member state's participation in EU research and educational programmes. Such an argument will be applicable *if* academic freedom gets embedded into the primary or secondary EU law more strongly, but the interplay of the existing EU law provisions (including recitals) on research and higher education and Article 2 TEU values could also be explored further in this context.

Lastly, the effectiveness of infringement proceedings should be assessed in reference to the consequences they bring and other tools available. In the rule of law context, they have often been seen as suboptimal for addressing broader systemic issues due to the focus on individual violations of EU law.⁹⁶ As discussed above, this might be less of an issue in academic freedom cases. What could naturally be explored further in this context are 'systemic' infringement procedures.⁹⁷ A judgment of the Court of Justice finding a violation of EU law obliges a member state to take the necessary measures to rectify the situation, has a clear signalling value, and contributes to the development of EU law. At the same time, the Court can also impose financial penalties in circumstances indicated in Article 260(2) and 260(3). While the EU does not have the power to collect unpaid penalties by force, the Commission can offset penalties against various payments owed by the EU to the member state in question,⁹⁸ adding to the coercive power of this EU enforcement action. Such features of infringement proceedings should, therefore, be considered when they are compared with other available tools.

Article 7 TEU

Article 7 TEU contains a three-dimensional enforcement procedure for cases where there is a (risk of) 'serious and persistent breach' by a member state of the values referred to in Article 2 TEU specifically. The problems of its application, owing to its political nature, are widely known and have been discussed in various contexts.⁹⁹ While the procedures under Article 7(1) TEU have been initiated a few times, Article 7(3) TEU has never been triggered to impose sanctions on a member state due to the high threshold of existence of a serious breach under Article 7(2) TEU. However, academic freedom was raised in the context of application of this provision in 2018 and in 2022 when the European Parliament

⁹⁵Ibid.

⁹⁶E.g. Spieker, *supra* n. 76, p. 1182.

⁹⁷See Ziegler, *supra* n. 51, p. 198.

⁹⁸See P. Pohjankoski, 'Rule of Law with Leverage: Policing Structural Obligations in EU Law with the Infringement Procedure, Fines, and Set-Off', 58 *CML Rev* (2021) p. 1341.

⁹⁹E.g. Bouzora, *supra* n. 54, p. 834-836.

called the Council to trigger Article 7(1) TEU against Hungary.¹⁰⁰ Academic freedom was one of the issues behind the alleged clear risk of a serious breach of the EU founding values (Article 2 TEU), described as ‘the fundamental democratic principle of educational freedom’. Therefore, despite the broadly discussed shortcomings, a brief comment on the relevance of this provision for the scope of action on academic freedom – should the political will ever arise – is warranted.

As Article 7 TEU applies to all values encompassed by Article 2 TEU, its application could clearly extend to academic freedom (see ‘Academic freedom and its place among EU values’ above). The strength of Article 7 TEU in the context of academic freedom is that it is accepted to extend beyond the scope of application of the Charter, or even the principle of conferral, and hence offers a unique opportunity to exert academic freedom pressures outside the traditional confines of the Treaties.¹⁰¹ Its relationships with democracy or the rule of law might also have consequences for the substantive conditions for the application of Article 7 TEU, as the criterion of seriousness of the breach depends on its purpose and result. The Commission recognises that the breach might concern groups that are vulnerable due to their status, e.g. minorities or immigrants,¹⁰² but one could also argue that this particular attention should be given to groups that are vulnerable due to their role/position versus other EU values such as democracy, e.g. journalists or academics. While it is enough for one of the values to be at risk, a simultaneous breach of several values embedded in Article 2 TEU could be evidence of the seriousness of the breach, and at least some categories of academic freedom threats could be framed in reference to other values as well. Procedurally, Article 7(1) TEU allows the Council to issue recommendations to the member state in question, potentially becoming part of the dialogue on academic freedom in the EU (see the comments on the EU soft law tools above). Different types of sanctions can be imposed under Article 7(3) TEU (economic or non-economic, sector-specific or not) and the choice is left to the discretion of the Council.¹⁰³ This allows the Council to select sanctions following a strategic balancing of various interests, including the internal balancing of institutional and individual rights protected by academic freedom.

¹⁰⁰European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)); European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)).

¹⁰¹D. Kochenov, ‘Article 7 TEU’, in Kellerbauer et al., *supra* n. 54, p. 88 at p. 92.

¹⁰²Communication from the Commission (COM/2003/0606 final), *supra* n. 58, para. 1.4.3.

¹⁰³Kochenov, *supra* n. 101, p. 97.

EU funding and the economic leverage of the EU

Funding plays an important role in the promotion and enforcement of EU values and fundamental rights. What illustrates the increased attention paid to this aspect of EU action is, for example, the most recent annual report on the application of the EU Charter of Fundamental Rights – dedicated (for the first time) directly to this topic.¹⁰⁴ The Report also mentions funding contributing to promoting respect for Article 13 of the Charter, such as that distributed under the Erasmus+ and Horizon Europe Regulations or some projects under the European Social Fund+.¹⁰⁵ The use of such EU funding must respect the general rules on the implementation of the EU budget. Fundamentally, Article 6(3) of the new Financial Regulation¹⁰⁶ provides that ‘Member States and the Commission shall ensure compliance with the Charter of Fundamental Rights of the European Union . . . and shall respect the Union values enshrined in Article 2 TEU relevant in the implementation of the budget’. To ensure this compliance, the EU has established several conditionality regimes, two of which are particularly interesting in the context of this article: the Common Provisions Regulation, referencing fundamental rights, and the Rule of Law Conditionality Regulation, centred on this EU value specifically.¹⁰⁷ The Regulations represent two different types of conditionality and their detailed analyses can be found elsewhere.¹⁰⁸ This discussion will, therefore, highlight only some of their respective characteristics that reveal interesting questions about the implications of EU conditionality in the context of academic freedom specifically.

The Common Provisions Regulation applies to specific funds, including the European Social Fund+ mentioned above. It determines, among others, the

¹⁰⁴Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Funding to promote, protect and enforce fundamental rights 2024 (COM/2024/456 final).

¹⁰⁵*Ibid.*, p. 13-16 and the Annex, p. 5-6.

¹⁰⁶Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union (recast).

¹⁰⁷Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy and Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. Conditionality is inbuilt in many EU law instruments, many of which involve funds supporting research and education sectors, for example also the Recovery and Resilience Facility Regulation under which some funds have been suspended to Hungary. While not of core relevance, the comments made here can also in principle be applicable to other instruments.

¹⁰⁸Fasone et al., *supra* n. 65, Part IV.

horizontal requirements applicable to such funds, including compliance with the EU Charter throughout the whole cycle of the implementation of the funds.¹⁰⁹ The Commission oversees implementation and reimburses expenditure, unless decided otherwise due to insufficient fulfilment of the conditions (see Article 15 of the Regulation). On the other hand, the objective of the Rule of Law Conditionality Regulation is the protection of the EU budget in the context of rule of law deficiencies, as defined in Article 2(a) of the Regulation. The reach of the Rule of Law Conditionality Regulation is broader, encompassing also the Horizon Europe and Erasmus+ funds (not covered by the Common Provisions Regulation). That the two conditionality regimes might also come together in the academic freedom context has been confirmed by the application of the Regulations to Hungary. The suspension of funds under both Regulations was based on substantively overlapping factual circumstances regarding the governance model of research and higher education institutions: in reference to Article 13 of the Charter explicitly under the Common Provisions Regulation¹¹⁰ and in reference to the rule of law due to ‘concerns regarding the non-application of public procurement and conflict of interest rules to “public interest trusts” and the entities managed by them, and the lack of transparency with regard to the management of funds by those trusts’ under the Rule of Law Conditionality Regulation.¹¹¹ Several comments can, therefore, be made about the use and interplay of these tools in cases of academic freedom concerns.

First, compliance with Article 13 of the Charter under the Common Provisions Regulation can be incentivised directly, within its scope, supporting other EU values as well.¹¹² This is rather straightforward, with the interpretation of the Common Provisions Regulation horizontal enabling conditions closely tied to the understanding of the scope and nature of academic freedom – prospectively drawing from its democratic justification as well. Second, while the relationship between academic freedom and the rule of law is not entirely clear, one can argue that the Rule of Law Conditionality Regulation could be further infused with academic freedom considerations. The Regulation itself recognises that ‘the rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU’ (Article 2(a)). The Court of Justice stated that:

¹⁰⁹See also Annex III to the Common Provisions Regulation, *supra* n. 107.

¹¹⁰See L. Detre et al., ‘Comparing Three Financial Conditionality Regimes and Their Application to Hungary: The Conditionality Regulation, the Recovery and Resilience Facility Regulation, and the Common Provisions Regulation’ (SSRN, 26 October 2023) p. 31-32, <https://papers.ssrn.com/abstract=4613941>, visited 14 May 2025.

¹¹¹Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary.

¹¹²E.g. C. Fasone and M. Simoncini, ‘Recent Trends and Ambiguities of Conditionality as an Instrument of the EU Internal Governance’, in Fasone et al., *supra* n. 65, p. 207 at p. 216.

respect for those values and principles – in so far as they form part of the very definition of the value of ‘the rule of law’ contained in Article 2 TEU or, as is apparent from the second sentence of that article, are *closely linked to a society that respects the rule of law* – may be required in the context of ... the contested regulation. (emphasis added)¹¹³

It remains a somehow open question which values are sufficiently closely linked to the rule of law to influence the interpretation of the Regulation. In reference to the Court’s judgment¹¹⁴ and guidelines from the Commission,¹¹⁵ fundamental rights do not seem to constitute part of the Regulation’s definition of the rule of law. However, it is not excluded that the scope of the Regulation could be extended by recognising these close links in some circumstances.

This suggestion might prove controversial from the point of view of legal certainty regarding the scope of situations that qualify as breaches of the rule of law (Article 4(2) of the Regulation). The Court of Justice indeed argued that Article 4(2) is of an exhaustive nature.¹¹⁶ However, the argument does not suggest extending the scope of application to some undefined ‘other’ situations with only opaque relevance to the EU budget. Rather, it is directly related to the more defined notions included in Article 4, such as the ‘proper functioning of effective and transparent financial management and accountability system’. For example, the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel and the CoE Recommendation Cm/Rec(2012)7 – both previously referenced in the *Lex CEU* judgment – emphasise financial accountability of academic institutions, requiring an adequate balance between the degree of self-governance and funding accountability.¹¹⁷ The ‘proper

¹¹³ECJ 16 February 2022, Case C-156/21, *Hungary v European Parliament and Council of the European Union*, para. 136; ECJ 16 February 2022, Case C-157/21, *Republic of Poland v European Parliament and Council of the European Union*, para. 154.

¹¹⁴*Hungary v European Parliament and Council of the European Union*, *supra* n. 113, para. 229; *Poland v European Parliament and Council of the European Union*, *supra* n. 113, para. 324.

¹¹⁵Communication from the Commission. Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget (C(2022) 1382 final) para. 12, https://commission.europa.eu/document/download/0cd06dc0-92be-4802-8637-9b2d4799c3fe_en?filename=c_2022_1382_3_en_act_part1_v7.pdf, visited 14 May 2025.

¹¹⁶*Hungary v European Parliament and Council of the European Union*, *supra* n. 113, paras. 252–259.

¹¹⁷The 1997 UNESCO Recommendation Concerning the Status of Higher Education Teaching Personnel, <https://en.unesco.org/about-us/legal-affairs/recommendation-concerning-status-higher-education-teaching-personnel>, visited 14 May 2025; the CoE Recommendation CM/Rec(2012)7 of the Committee of Ministers to member States on the responsibility of public authorities for academic freedom and institutional autonomy, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17469&lang=en>, visited 14 May 2025.

functioning . . . of accountability system’ could therefore be interpreted in light of such provisions. The interpretation of such a standard in light of a fundamental right would not be unusual, given that the same has been said about ‘effective judicial review’ and Article 47 of the Charter.¹¹⁸ Additionally, this might help to address some challenges resulting from the limited scope of application of the Charter as the Court of Justice considers all situations covered by the Regulation to ‘relate to the implementation of the budget and thus fall within the scope of EU law’.¹¹⁹ Further, the ‘sound financial management of the Union budget’ protected by the Regulation encompasses the principle of effectiveness ‘which concerns the extent to which the objectives pursued are achieved through the activities undertaken’ (Article 33(1)(c) of the Financial Regulation). One can plausibly argue that many EU objectives pursued via relevant funding (research excellence, quality education, etc.) cannot be achieved without a sufficient degree of academic freedom. Until such issues are addressed, the sound financial management of the budget remains affected. The suggested understandings of the breaches of the rule of law and the sound financial management of the EU budget might therefore support the effective application of the Regulation in academic contexts – and complement the measures that can be taken under the Common Provisions Regulation in relation to other funds.

At the same time, the Union’s economic leverage has been the most controversial aspect of its action for the protection of the rule of law, democracy, and fundamental rights. While it carries significant political power, it also implies what some have labelled as ‘trading’ values for EU funds.¹²⁰ It might also lead to an unequal distribution of rights among EU citizens, raising questions about its relationship with solidarity – yet another EU value.¹²¹ This is no less true in the academic context. Conditionality is inherently tied to funding, and funding is a powerful tool to both empower and disempower academics and academic institutions that remain predominantly state-funded in most (if not all) member states. This has been often observed in the context of democratic struggles.¹²² Various soft law and policy documents draw attention to this challenge and/or the

¹¹⁸*Hungary v European Parliament and Council of the European Union*, *supra* n. 113, para. 249.

¹¹⁹M. Fisicaro, ‘Protection of the Rule of Law and “Competence Creep” via the Budget: The Court of Justice on the Legality of the Conditionality Regulation: ECJ Judgments of 16 February 2022, Cases C-156/21, Hungary v Parliament and Council and C-157/21, Poland v Parliament and Council’, 18 *EuConst* (2022) p. 334.

¹²⁰E.g. L. Fromont and A. Van Waeyenberge, ‘Trading Rule of Law for Recovery? The New EU Strategy in the Post-Covid Era’, 27 *European Law Journal* (2021) p. 132.

¹²¹E.g. Fisicaro, *supra* n. 119, p. 348.

¹²²For example, developments in Hungary demonstrate that funds can be taken away from certain programs (e.g. gender studies) or institutions (e.g. budget cuts to the Hungarian Academy of Sciences).

need to use public funding as a tool of support, including the CoE Recommendation Cm/Rec(2012)7 previously referenced in the *Lex CEU* case.¹²³ This is relevant to preserving both the democratic and the epistemological missions of academia, as neither can be realised without sufficient funding that respects the autonomy of the sector. In the EU context, the European Parliament's Recommendation of 29 November 2018 on Defence of academic freedom in the EU's external action¹²⁴ observed that 'cuts in public funding ... and the subsequent need for alternative sources of income puts academic freedom at risk, particularly when such external funding originates from autocratic regimes abroad' (Point L), and hence EU funding should aid institutions that support students and scholars at risk (Point T). Whether Article 13 of the Charter can be said to impose positive obligations in this regard remains to be seen, but the answer notwithstanding, the multi-level EU context creates new structures to incentivise member states' compliance as well as to offer relevant support to holders of academic freedom rights.

Naturally, the significance of EU funding in the academic sector should not be overestimated. The EU is not responsible for structural funding of research or higher education to the extent of allowing it to determine the fate of national academies at large. At the same time, however, EU funding has by now evolved into a 'parallel system'¹²⁵ deeply intertwined with national ones. It facilitates research and educational mobility, might be tied to national evaluation schemes, and carries a significant symbolic value as well. Because of that, refusals or suspensions of funds might have important – even if financially marginal – consequences for the sector, the nature of which will also depend on the type of conditionality and the funds involved. Such decisions might limit the available funding base of those potentially already subjected to (or at risk of) financial coercion from the member state, limiting the available scopes of freedom and autonomy. It might not be a coincidence that in its proposal on Rule of Law Conditionality Regulation,¹²⁶ the Commission named Erasmus students and researchers as first two examples of individual beneficiaries of EU funding that should not bear the consequences of funding suspensions. This is also why member states remain responsible for the implementation of the affected EU

¹²³E.g. the CoE Recommendation CM/Rec(2012)7, *supra* n. 117; Kaye, *supra* n. 31, para. 56.

¹²⁴European Parliament recommendation of 29 November 2018 to the Council, the Commission and the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy on Defence of academic freedom in the EU's external action (2018/2117(INI)).

¹²⁵Kovács, *supra* n. 50, p. 19.

¹²⁶Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (COM/2018/324 final) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A0324%3AFIN>, visited 14 May 2025.

funds and should cover any obligations from their own budgets (Article 5(2)). However, as recent Hungarian developments demonstrate, this becomes less straightforward when non-cooperative member states are involved, potentially leading to prolonged periods of uncertainty for institutions and individuals alike. Such alternative funding: might not arrive in a timely manner – thereby forcing a factual opt-out from EU programmes; might come with its own constraints; or might be welcomed with suspicion by external partners.¹²⁷ These situations echo some of the concerns voiced by the European Parliament Recommendation of 29 November 2018 on Defence of academic freedom in the EU's external action¹²⁸ and can have both a short- and a long-term chilling effect,¹²⁹ potentially beyond the immediate scope and objectives of such decisions.

None of the above is to invalidate the application of EU conditionality mechanisms to the academic sector as such. They are necessary for the protection of the EU budget and, as already recognised, its implementation must respect EU values also in this context.¹³⁰ Where academic institutions are compromised, channelling EU funding into them might also both perpetuate detriments to institutional autonomy and be misused for violations of individual academic freedoms. However, when conditionality measures are considered and implemented, the interplay of risks and benefits for academic freedom in reference to both its institutional and individual dimensions is complex and dependent on circumstances. In practice, an incentivising action directed at a Member State (or specific institutions) might have significant consequences for the situation of individuals. The European Court of Auditors observed that application of conditionality to the Erasmus+ exchange is as an example of potential negative effects on EU citizens ‘in the short term’. The Court did not elaborate how to deal with such risks, but recommended the Commission to regularly ‘monitor the impact of the rule-of-law-related measures’.¹³¹ Whether all

¹²⁷ See the comments in e.g. ‘Viktor Orbán Blasts Brussels for Erasmus+ and Horizon Europe “Blackmail”’, *ScienceBusiness*, 9 October 2024, <https://sciencebusiness.net/news/research-and-innovation-gap/viktor-orban-blasts-brussels-erasmus-and-horizon-europe-blackmail>, visited 14 May 2025; ‘Erasmus Ban “Regretful” but MEPs Agree the EU Must Safeguard Academic Freedom in Hungary’, *ScienceBusiness*, 18 January 2024, <https://sciencebusiness.net/news/universities/erasmus-ban-regretful-meps-agree-eu-must-safeguard-academic-freedom-hungary>, visited 14 May 2025.

¹²⁸ European Parliament recommendation of 29 November 2018 (2018/2117(INI)), *supra* n. 124.

¹²⁹ E.g. ‘New Survey Unveils Hidden Costs of EU-Hungary Tussle over Research Funding’, *ScienceBusiness*, 29 August 2024, <https://sciencebusiness.net/news/horizon-europe/new-survey-unveils-hidden-costs-eu-hungary-tussle-over-research-funding>, visited 14 May 2025.

¹³⁰ Kovács, *supra* n. 50, p. 19.

¹³¹ European Court of Auditors, ‘Special Report 03/2024: The Rule of Law in the EU. An Improved Framework to Protect the EU's Financial Interests, but Risks Remain’ (2024) para. 33,

such effects will always be short-term and whether they can be managed efficiently within the existing frameworks remains to be seen. With trade-offs inherent in any such action,¹³² there may be good reasons to prioritise actions focusing on systemic or institutional issues, often overlapping with rule of law problems, over other concerns. However, blocking EU funds to protect EU values might in some cases raise fundamental rights questions in itself and, as a complementary consideration, involve issues relating to the EU's own academia-related policy objectives. Proportionality of such measures will not always be a given and its assessment might require engagement with the various dimensions of academic freedom.¹³³ Such issues should therefore be considered in the process of selecting and implementing the available tools, within the broad discretion enjoyed by the Commission.

PRELIMINARY POINTERS ON NEW PROPOSALS: THE EU RULE OF LAW TOOLBOX AND BEYOND

This overview shows that academic freedom enforcement at the EU level can be leveraged in reference to its relationship with democracy or the rule of law, subsequently serving the protection of these EU values. However, it also demonstrates that a few gaps or tensions remain. Some can be addressed within the existing frameworks, as discussed above, but other might require new proposals. In the context of the rule of law toolbox, the literature has long recognised the need to streamline and coordinate different – existing and new – instruments.¹³⁴ This remains relevant also for academic freedom protection. New tools should be developed in a coordinated manner, doing justice to calls for a ‘simultaneous’ cultivation of academic freedom and democracy or the rule of law. Without attempting to be exhaustive, it is therefore worthwhile briefly discussing what types of new proposals could further the EU's objectives in the fields in question.

Preventive measures and ‘soft law’ tools

The existing EU rule of law toolbox can be mobilised for the protection of academic freedom. However, little attention has been given to the explicit embedding of academic freedom within the toolbox. This is perhaps

https://www.eca.europa.eu/ECAPublications/SR-2024-03/SR-2024-03_EN.pdf, visited 14 May 2025.

¹³²Detre et al., *supra* n. 110, p. 51.

¹³³See also Kovács, *supra* n. 50, p. 19; Detre et al., *supra* n. 110, p. 7.

¹³⁴Fasone, *supra* n. 65, p. 289.

understandable as its revision is unlikely to happen in the nearest future.¹³⁵ Nevertheless, the inclusion of academic freedom in the Rule of Law Reports, suggested by some stakeholders, could prove to be an exception.¹³⁶ The rationale behind it is rooted in the democratic justification of academic freedom and analogous to that underlying the presence of media pluralism and freedom in the reports: sustaining pluralism and overseeing governmental action. Interestingly, if the reports were extended to cover the EU's own rule of law (as advocated for),¹³⁷ they could also engage with some questions about the consequences of the EU's own actions regarding academic freedom.¹³⁸ The use of this tool should also be explored in coordination with general EU 'soft law'-making tools available under Article 288 TFEU or, within the educational field specifically, under Article 165(4) TFEU.¹³⁹ Work on guiding principles for fundamental academic values is reported to be already ongoing at the EU Commission's Directorate General for Education and Culture.¹⁴⁰ The European Parliament has commissioned various monitoring reports as part of its work on the academic freedom portfolio.¹⁴¹ The EU Commission is said to be currently working on a monitoring mechanism for the European Research Area specifically, to assess how EU member states are fulfilling the obligations arising from the Bonn Declaration on Freedom of Scientific Research.¹⁴² A new monitoring mechanism is also being developed as part of the Bologna Process in the broader European Higher

¹³⁵L. Pech, 'The Future of the Rule of Law in the EU', *Verfassungsblog*, 14 December 2023, <https://verfassungsblog.de/the-future-of-the-rule-of-law-in-the-eu/>, visited 14 May 2025.

¹³⁶Scholars at Risk Europe: Submission to the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE) Own-Initiative Report on the Commission's 2020 Rule of Law Report', <https://www.tandfonline.com/doi/full/10.1080/23322969.2017.1307093>, visited 14 May 2025; D. Craciun et al., 'EP Academic Freedom Monitor 2023' (Panel for the Future of Science and Technology (STOA), European Parliament 2024) p. 10, [https://www.europarl.europa.eu/RegData/etudes/STUD/2024/757798/EPRS_STU\(2024\)757798_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2024/757798/EPRS_STU(2024)757798_EN.pdf), visited 14 May 2025.

¹³⁷See e.g. CEU Democracy Institute Rule of Law Clinic, 'Rule of Law beyond the EU Member States: Assessing the Union's Performance' (Central European University, Democracy Institute 2024) <https://ruleoflawclinic.com/wp-content/uploads/2024/10/Rule-of-Law-beyond-the-EU-Member-States-CEU-DI-RoLCLinic.pdf>, visited 14 May 2025.

¹³⁸See the questions raised in Kosta, *supra* n. 40; Ceran and Guerra, *supra* n. 13.

¹³⁹Another form of what can be considered 'soft law' is the open method of coordination, frequently used in education: 'Open Method of Coordination - EUR-Lex', <https://eur-lex.europa.eu/EN/legal-content/glossary/open-method-of-coordination.html>, visited 14 May 2025.

¹⁴⁰L. Matei and G. D'Aquila, 'Newly Emerging Frameworks of Reference and Conceptual References for Academic Freedom: Institutional, National, Regional, and Global', in A. Curaj et al. (eds.), *European Higher Education Area 2030: Bridging Realities for Tomorrow's Higher Education* (Springer Nature Switzerland 2025) p. 531 at p. 536-537.

¹⁴¹Maassen et al., *supra* n. 1; Craciun et al., *supra* n. 136.

¹⁴²Matei and D'Aquila, *supra* n. 140, p. 536.

Education Area.¹⁴³ The exact nature and content of these new mechanisms are unknown at the moment, but the rule of law reporting could rely on such sources and draw from the results of various monitoring initiatives. It can be suggested, however, that the EU mandate to discuss academic freedom and issue recommendations under the Rule of Law Reports – in reference to its democratic justification – is broader than that provided by the Treaty provisions on research or education. All soft law and proposals on monitoring should, in any case, be assessed in reference and comparison to each other.

Another related strand of potential EU action concerns the creation of enabling frameworks for academic freedom stakeholders, building on the experiences concerning civil society organisations. The important role played by such organisations in the protection of Article 2 TEU values has been recognised by the Commission.¹⁴⁴ However, outside of the consultations in the preparation of the Rule of Law Reports, such organisations have limited pathways to a meaningful participation in the relevant proceedings, e.g. under Article 7 TEU.¹⁴⁵ This is equally true – if not more so – for academia. While a lot of attention and financial resources have in recent years been devoted by EU institutions to empowering civil society – in other words ‘supporting the social pillar of the rule of law’¹⁴⁶ – initiatives with such explicit aims do not exist in the academic sector. This could be remedied in various ways. For example, the legal and administrative infrastructure that exists within the European Research Area and the European Higher Education Area might provide natural channels for some capacity-building activities via information and technical assistance in case of threats. Further, the Academic Freedom Monitor 2023, commissioned by the European Parliament, advocates for a European Platform for Academic Freedom. This body could ‘support further exchange, awareness, and mutual understanding on what academic freedom implies, and . . . function as a forum and clearing house for good practices of protecting and securing academic freedom’.¹⁴⁷

From this perspective, more attention could also be paid to the Fundamental Rights Agency. While the Agency’s focus is assistance and expertise relating to

¹⁴³Ibid.

¹⁴⁴See, for example, the two Communications from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: ‘Rule of Law Report: The rule of law situation in the European Union’ (COM/2023/800 final) and ‘Strategy to strengthen the application of the Charter of Fundamental Rights in the EU’ (COM/2020/711 final).

¹⁴⁵CEU Democracy Institute Rule of Law Clinic, *supra* n. 137, p. 17–18.

¹⁴⁶M. Skóra, ‘How to Improve the EU’s Rule of Law Toolbox’ (2023) p. 7, <https://library.fes.de/pdf-files/bueros/bruessel/20380.pdf>, visited 14 May 2025.

¹⁴⁷Craciun et al., *supra* n. 136, p. 8.

fundamental rights,¹⁴⁸ these clearly embed or relate to the values mentioned in Article 2 TEU. Many scholars have therefore argued for a stronger mandate or engagement of the Agency in the application of the rule of law toolbox.¹⁴⁹ Its materials are already used in the preparation of the Rule of Law Reports.¹⁵⁰ However, the Agency has so far directly engaged with academic freedom to an extremely limited extent.¹⁵¹ Against this background, the Report from the Our Rule of Law Academy suggests that the Fundamental Rights Agency and its Fundamental Rights Platform – a civil society network for exchange and collaboration on fundamental rights issues – could explicitly include academic stakeholders and facilitate coordination between different monitoring and policy initiatives within the Union and beyond.¹⁵² The direct embedding of these stakeholders in the activities of the Agency, feeding into its reporting, could also prospectively lessen the administrative burden on both the Commission and the member states in the preparation of the Rule of Law Reports, limiting the number of stakeholders to be consulted separately. The organisational framework of the Agency already allows for thematic consultations, expert meetings, or ad hoc working groups¹⁵³ that could accommodate ‘a European Platform for Academic Freedom’ in a functional sense.

Better integration of academic freedom in the existing research and higher education (funding) instruments

The embedding of academic freedom in the EU flagship instruments on research and education, the Horizon and Erasmus+ Regulations, is another potential

¹⁴⁸Art. 2 of the Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights.

¹⁴⁹E.g. G.N. Toggenburg and J. Grimheden, ‘Upholding Shared Values in the EU: What Role for the EU Agency for Fundamental Rights?’, 54 *Journal of Common Market Studies* (2016) p. 1093; L. Pech and J. Grogan, ‘Upholding the Rule of Law in the EU: What Role for FRA?’, in R. Byrne and H. Entzinger (eds.), *Human Rights Law and Evidence-Based Policy* (Taylor and Francis 2019) p. 219.

¹⁵⁰European Rule of Law Mechanism: Methodology for the Preparation of the Annual Rule of Law Report’, *supra* n. 71.

¹⁵¹Academic freedom is mentioned very briefly in EU Fundamental Rights Agency, ‘Fundamental Rights Report 2021 – The Coronavirus Pandemic and Fundamental Rights: A Year in Review’ (2021), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-fundamental-rights-report-2021_en.pdf, visited 14 May 2025. See also Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Funding to promote, protect and enforce fundamental rights 2024 (COM/2024/456 final) discussed above in the context of funding.

¹⁵²R. O’Donovan et al. (mentored by G. de Búrca and V. Kosta), ‘Academic Freedom’, in *How to Save European Democracy? Report from the Our Rule of Law Academy* (2023) p. 65–66, <https://www.ourruleoflaw.eu/academy-report>, visited 14 May 2025.

¹⁵³Fundamental Rights Platform – Terms of Reference (Decision of the FRA Director, INST/001/2020, 3 June 2020).

avenue to strengthen academic freedom.¹⁵⁴ This is due to the key role that these framework programmes play in European research and higher education. As already mentioned, both Regulations make a reference to academic freedom in their recitals, but these have not so far resulted in concrete action in defence of academic freedom. It has, therefore, been argued that academic freedom should be included in the Regulations' enacting terms more strongly.¹⁵⁵ However, it can be noted that the Regulations set out the framework programmes first and foremost – they do not regulate substantive conditions in which institutions and individuals operate. Nevertheless, as they elaborate on eligibility and participation in the (funding) programmes, as well as set out their priorities, they can incentivise academic freedom action. This incentivising power can be conceived in three dimensions, encompassing proposals by various stakeholders. First, the EU could decide to introduce specific funding streams for projects on academic freedom, strengthening awareness and complementing the EU-wide knowledge base.¹⁵⁶ Second, it could incentivise strengthening of institutional structures and policies.¹⁵⁷ Several different ways to embed academic freedom more strongly within the Horizon activities have recently been explored in a report commissioned by the European Parliament, e.g. an introduction of institutional 'academic freedom plans' as an eligibility criterion.¹⁵⁸ These suggestions require further fine-tuning,¹⁵⁹ but they can become a tool to draw attention to the core relevance of academic freedoms to the respective programmes' objectives, such as scientific excellence or quality education. They could also support capacity-building, as discussed above. Nevertheless, they will likely fall short where systemic issues resulting from a broader democratic crisis in a member state are involved.

The third pathway to be explored in the context of the programmes is also a specific *academic freedom* conditionality.¹⁶⁰ Such conditionality – be it included in these Regulations or in a separate instrument related to them – could draw from

¹⁵⁴Craciun et al., *supra* n. 136, p. 10.

¹⁵⁵*Ibid.*

¹⁵⁶*Ibid.*, p. 11.

¹⁵⁷*Ibid.*, p. 10.

¹⁵⁸B. Blasi, 'Horizon Europe: Protecting Academic Freedom: Strengthening and Improving Implementation of Recital 72' (European Parliamentary Research Service (STOA) 2024) p. 37-38, <https://data.europa.eu/doi/10.2861/049140>, visited 14 May 2025.

¹⁵⁹For example, the institutional academic freedom plan as an eligibility criterion is suggested to encompass institutional autonomy. However, institutional autonomy has to do with the relationship with and guarantees from the state, with institutions having arguably a limited agency in shaping its scope set out in national law.

¹⁶⁰Discussion remarks made by Christian Ehler, MEP and STOA Chair, at the STOA high-level conference 'How to provide enforceable protection for academic freedom at EU level?' that took place on 28 November 2022 in Brussels; 'EP Academic Freedom Monitor 2024: Key Findings and

the monitoring and reporting activities discussed above. It could complement the existing EU financial conditionality tools, in particular outside their scope of application. Despite the EU's constrained competences, such a mechanism could be grounded in financial provisions of the Treaties, similarly to the Rule of Law Conditionality Regulation. This suggestion is supported by the interpretation of the 'sound financial management of the Union budget' introduced above and draws from both the democratic and the epistemological justification of academic freedom in the context of the programmes' objectives. However, conditions in such a mechanism would have to be clearly defined, directly connected, and limited to the actions and funds encompassed by the programmes. Such a mechanism will arguably be difficult to design considering the many different systems across the Union and the highly contextual nature of many academic freedom issues – but might not be impossible. At the same time, while the use of this new type of conditionality could support the protection of the budget and other EU objectives, it would not be free of the challenges discussed in the context of the other funding conditionalities. Therefore, it can be argued that implementation of conditionality measures in this sector – targeted at a member state – should be preceded by a detailed contextual assessment, identifying the exact source and nature of violations, and potentially accompanied by mitigating measures accounting for situations of various academic freedom rights-holders. Such mitigating measures might be seen as an example of a 'solidarity mechanism to support European researchers', mentioned in the recent proposal of the European Parliament (see below).¹⁶¹ Applicable in principle to all conditionality frameworks, they could also provide a framework to fully synchronise the democratic EU action with the more epistemological – albeit functional to its democratic mission – needs of the academic sector.

New legislative proposals on academic freedom matters

The idea of the EU introducing separate legislation on academic freedom is hardly new. Different substantive provisions,¹⁶² drafting methods,¹⁶³ or legal bases¹⁶⁴ for such an instrument have been discussed. The proposals are always constrained by the EU competence – shared in research and limited in education¹⁶⁵ – with

Policy Options' (2025), [https://www.europarl.europa.eu/stoa/en/document/EPRS_BRI\(2025\)765776](https://www.europarl.europa.eu/stoa/en/document/EPRS_BRI(2025)765776), visited 23 May 2025, Policy option 5.

¹⁶¹European Parliament resolution of 17 January 2024 (2023/2184(INL)), *supra* n. 7, point 8.

¹⁶²E.g. T. Karran, 'Academic Freedom in Europe: Time for a Magna Charta?', 22 *Higher Education Policy* (2009) p. 163 at p. 186.

¹⁶³Ziegler, *supra* n. 51, p. 199.

¹⁶⁴Vrielink et al., *supra* n. 78, p. 10.

¹⁶⁵See 'Academic freedom in the EU: an insufficient legal toolbox?' above.

different suggestions put forward for different types of frameworks. The recent European Parliament recommendations suggest grounding a future proposal in Article 182(5) in conjunction with Article 179(1) TFEU (on research).¹⁶⁶ As argued elsewhere,¹⁶⁷ the proposal will have to carefully navigate between the limited competences but has a potential to significantly strengthen the protection of many aspects of academic freedom in the EU. However, the interdependent nature of research work and other academic activities within the frameworks of most contemporary higher education institutes must lead to *some* spill-over into *some* educational matters.¹⁶⁸ The recommendations also contain other normative suggestions that may prove controversial, but decisions on which will likely prove crucial for the EU's vision of academic freedom – and for the future framework's suitability to contribute to the protection of broader EU values.

Among many other points, the recommendations discuss governmental obligations – including the EU levels of government. Interestingly, the European Parliament emphasises that 'ensuring freedom of scientific research means that governmental bodies have to actively create all the preconditions needed for the exercise [of] all aspects of the freedom . . . as well as long term, reliable and stable institutional financing'.¹⁶⁹ In these recommendations, scientific freedom is conceived to consist not only of a negative freedom ('freedom from') but also has a positive side, requiring 'enabling framework conditions' to be put in place.¹⁷⁰ These paragraphs clearly hint at positive obligations of not only member states, but also the EU itself. While their nature must necessarily vary between the different levels of government, such normative choices at the EU level should reflect both the essence of freedoms protected by Article 13 of the Charter as well as the nature of the broader EU legal apparatus. The exact content of any future legislative proposal is of course unknown at this moment, but the drafters could draw from the debates surrounding the EU rule of law action – hopefully allowing for the different instruments to complement each other in realisation of the academic freedom objectives. Additionally, some legislation aimed at the protection of academic freedom could also be introduced in reference to freedom of establishment or freedom to provide services,¹⁷¹ e.g. drawing from the experiences around the European Media Freedom Act. Due to the prohibition of

¹⁶⁶Ibid.

¹⁶⁷Kosta and Ceran, *supra* n. 9.

¹⁶⁸Ibid.

¹⁶⁹European Parliament resolution of 17 January 2024, *supra* n. 7, points 16–20.

¹⁷⁰Ibid., point 21.

¹⁷¹As suggested in Vrielink et al., *supra* n. 78, p. 10.

harmonisation of education (Article 165(4) TFEU), it would need to be more limited in comparison and likely focus on private institutions. However, a stronger protection of the private sector may also contribute to the safeguarding of academic pluralism, given the structural vulnerability of the public sector.

Lastly, as already mentioned, the proposal includes a reference to a ‘solidarity mechanism to support European researchers’.¹⁷² The mechanism could be envisaged either in a self-standing way or in combination with other tools at the EU’s disposal, in particular conditionality measures. In the latter case, it could provide a framework for mitigating some of the challenges discussed above. Such a framework should be flexible – accounting for different scopes, objectives, natures, or scales of different funding strands – and leave a significant margin of discretion to EU institutions. Some of the funds have a stronger individual dimension and might potentially be easier to decouple from the compromised institutional structures.¹⁷³ Alternatively, in cases where specific institutions remain autonomous despite governmental attacks, some funding could bypass national intermediaries, as advocated for in the context of the rule of law measures and the capacity-building of civil society organisations.¹⁷⁴ It has previously been observed that ‘[f]unding organisations can also establish principles and procedures recognising their own responsibility for academic freedom, similarly to do-no-harm approaches in development cooperation’.¹⁷⁵ Such approaches generally require the assessment of the intended and unintended impact of funding (or any other) decisions on the existing issues, in order to limit or avoid further negative effects. While so far these suggestions have not been framed with the EU system in mind, the EU clearly creates various opportunities for exerting pressure and providing support that might be relevant in this context. The experiences with existing solidarity frameworks for scholars at risk from third countries can help in understanding and addressing the tensions within the EU,¹⁷⁶ as can the broader debates surrounding developments involving Hungary.

¹⁷²European Parliament resolution of 17 January 2024 (2023/2184(INL)), *supra* n. 7, point 8.

¹⁷³Proposals put forward in the context of the suspended Erasmus+ funds can be seen in this light. See e.g. ‘MEP Suggests Novel Approach to Lifting the Horizon Europe Funding Ban on Hungarian Universities’, *ScienceBusiness*, 8 November 2023, <https://sciencebusiness.net/news/horizon-europe/mep-suggests-novel-approach-lifting-horizon-europe-funding-ban-hungarian>, visited 14 May 2025.

¹⁷⁴E.g. Skóra, *supra* n. 146, p. 7-8.

¹⁷⁵K. Kinzelbach et al., ‘Global Data on the Freedom Indispensable for Scientific Research: Towards a Reconciliation of Academic Reputation and Academic Freedom’, 26 *The International Journal of Human Rights* (2022) p. 1723 at p. 1736.

¹⁷⁶D. Gusejnova et al., ‘Rewarding Mobility? Towards a Realistic European Policy Agenda for Academics at Risk’, 12 *Comparative Migration Studies* (2024) p. 4 at p. 16.

CONCLUSIONS

Nothing has dominated the EU legal and political discourse in the past few years as much as the rule of law crisis in some member states. Hence, it is not surprising that the crisis found its way into the EU's research and higher education space. Nevertheless, while the developments concerning Hungary specifically have been widely discussed, relatively little attention has been given to a systematic discussion of academic freedom as a fundamental right more broadly. The current debates about its protection in the EU are therefore largely a product of political urgencies, with all the gaps and tensions that they entail, rather than a comprehensive reflection. They echo similar observations on the development of the rule of law toolbox.¹⁷⁷ At the same time, historians of EU higher education noted long ago that 'the opportunities to change or modify the EC vision of higher education most often lay in the dynamics of the larger EU'.¹⁷⁸ This is arguably true also for research.¹⁷⁹ This article argues, therefore, that a comprehensive reflection on the meaning of academic freedom in EU law, currently ongoing,¹⁸⁰ must also assess its relationship to democracy and/or the rule of law *as EU legal values*. This is equally true for the application of the existing EU rule of law tools. A closer attention to how old and new instruments can complement each other should be a starting point for all analyses and proposals, even if individual tools have different primary objectives. In reference to various proposals put forward, this article highlights some pathways that might be pursued to strengthen and complement the existing frameworks – and some questions that might need to be answered in the process. While normative disagreements on the exact shape and interpretation of the various instruments will likely persist, a conscious reflection on the complementary nature of academic freedom and other EU values is timely and may serve as a starting point for future debates on both the best course of EU action and the most normatively desirable understanding of academic freedom as an EU fundamental right.

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¹⁷⁷Fasone, *supra* n. 65, p. 289.

¹⁷⁸A. Corbett, 'Higher Education as a Form of European Integration: How Novel Is the Bologna Process?', 15 *ARENA Working Papers* (2006) p. 326.

¹⁷⁹For example, the recent focus on the EU's strategic autonomy prompts more engagement with dual-use research projects.

¹⁸⁰Kosta, *supra* n. 20.

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