The EU fundamental right to' freedom of the arts and sciences' exploring the limits on the commercialisation of academia (AFITE)

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GRANT APPLICATION – NWO TALENT PROGRAMME – VIDI SCHEME 2020

Research Project: 'The EU fundamental right to 'freedom of the arts and sciences': exploring the limits on the commercialisation of academia' ('AFITE')

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Research Proposal

Section: A description of the proposed research

The below text constitutes part 2.a. of section 2 (Research Proposal) of the application. It describes the proposed research including the overall aim and key objectives (part 2.a.1). It excludes the research plan (part 2a.b.) and knowledge utilisation (part 2b) of this section.

Overall aim and key objectives

The academic system is increasingly being 'commercialised', potentially in an accelerated manner due to the Covid-19 pandemic which is putting a strain on public funds. EU laws and policies on the 'European Education Area' (including the Bologna process) and on the 'European Research Area' (research funding) have the potential to contribute to a state of commercialisation of academia in EU Member States. They should measure up to the applicable EU constitutional standard enshrined in Art. 13 CFR ('freedoms of the arts and sciences'), but the content of that standard is as yet unknown.

We use the term 'commercialisation' broadly, drawing from literature in sociology, especially on 'academic capitalism', public law and history, to include an understanding of three elements: first, that higher education institutions adopt market and market-like behaviours (they are directly involved in for-profit activities or need to secure external moneys for instance, through grants or the raising of tuition fees) (Slaughter & Rhoades 2004; Mager 2006); second, that they are organised according to corporate management principles (e.g. the increased emphasis on discipline, cost-efficiency, and measurable quantitative indicators (Lorenz, 2012, Mager

2006)); and third, that the academic system assumes *in its essence* a functional role: to serve politico-economic interests (Mager 2006,) and thus follow the rationality of other systems of society rather than its own rationality (Grimm 2006, Luhman 1974).

The Covid-19 crisis has upended the higher education sector and has hit very visibly Universities in jurisdictions that are, as a result of 'commercialisation', strongly reliant on external monies (EIU Report, 2020). It is predicted that this crisis will increase the pressure to rely on external monies, and with that to demonstrate direct societal benefits (Ritzen, 2020), plausibly pushing further a functional understanding of academia. As the pandemic is rapidly transforming Universities through its stark impact on teaching, admissions and financing (FT, Jack and Smyth, 2020), this moment should be seized to make conscious decisions, in line with constitutional benchmarks, on the future course of this sector.

The process of commercialisation touches the core of what it means to provide and receive University education and to conduct academic research. Ultimately, it may have a direct impact on science itself (Münch 2016). Critical voices have argued that commercialisation has the potential to violate freedom of scientific research and academic freedom (Albrecht 2009, Fraenkel-Haeberle 2016).

'Freedom of scientific research and academic freedom' provide a protective shield of autonomy where science (meaning all branches of scholarship, not just natural sciences) can fulfil its purpose and commercialisation, so the argument goes, has the capacity to break this shield. One can debate philosophically at what point the shield is broken and when compromises need to be made. One can also debate what the function of science is, why it is important to safeguard it, and how commercialisation relates to that. If science has a truth-finding function and if that is a requirement for the functioning of democracies then its obstruction by means of commercialisations infringes a fundamental democratic value (Lackey 2018 discussing Lynch 2018).

As the commercialisation of academia keeps augmenting, and due to the current pandemic may do so more rapidly, those are fundamental questions we cannot afford to ignore.

It is imperative to know – in any given legal system – what stance public law takes on these questions. The philosophical justification for protecting freedom of scientific research and academic freedom will inform the question where the legal limits lie to commercialisation and when those are transgressed.

Increasingly, this is a question of EU law and yet EU law remains vague: we have a fundamental right that may set limits to commercialisation – the 'freedom of the arts and sciences' enshrined in Art. 13 of the Charter of Fundamental Rights of the EU ('Charter', 'CFR'). However, in the absence of case law, we do not know its content. We do not know its underlying rationale (its philosophical justification), what substantive guarantees it enshrines, or where the possibilities for justification of a violation lie. Thus, the overall aim of this project is to find out, what limits – if any – Art. 13 CFR poses on the commercialisation of academia.

Key Objectives

To meet this overall aim, this project works towards three objectives:

1. Establishing the content of Art. 13 CFR
2. Exploring the relationship between 'commercialisation' and Art. 13 CFR: what limits does Art. 13 CFR (as defined in 1.) pose to commercialisation in theory?
3. Testing concrete laws and policies for compliance with Art. 13 CFR (as defined in 1.)

(1.) Art. 13 CFR is drafted in concise terms: "The arts and scientific research shall be free of constraint. Academic freedom shall be respected." The Explanations relating to the Charter, to be taken into account in its interpretation (Art. 52(7) CFR), are equally concise: "This right is deduced primarily from the right to freedom of thought and expression. It is to be exercised having regard to Article 1 and may be subject to the limitations authorised by Article 10 of the ECHR [the European Convention on Human Rights]." The Court of Justice of the EU (CJEU) has not adjudicated on Art. 13 CFR so far, although we find a first reference in a recent Advocate General Opinion (Case C-66/18 *European Commission v Hungary*). The European Commission ('Commission') has equally never analysed Art. 13 CFR in its annual reports on the application of the Charter (beginning in 2010). Therefore, it is far from clear what this provision entails, and especially English-speaking literature on the topic is extremely scarce – it is usually being dealt with as a concise part of a Commentary on the EU Charter (Sayers 2014 in English, Jarass 2016 in German), not in-depth and pointing to the elusiveness of this right. Given that this freedom is central for the functioning of Universities (LERU Report 2010), establishing its definition is mandatory and constitutes our first objective. The text of the article includes two distinct concepts using different language: scientific freedom *"shall be free from constraint",* whereas academic freedom *shall be respected.* This raises questions about what the two concepts mean, their scope, and the obligations that follow from it. We need to note here the distinction between rights and principles in the Charter (Art. 52(5) CFR), the latter being non-justiciable; but the Charter imposes obligations and binds all its addressees irrespective of the question of justiciability (Kosta 2019, Lock 2019).

The classic CJEU-approach (now enshrined in Art. 6(3) TEU) to derive the content of fundamental rights is to draw from the constitutional traditions common to the Member States and international human rights treaties, the ECHR constituting "a special source of inspiration" (Case 4/73 *Nold*). The LERU-report (2010) employed a similar technique when "present[ing] a vision of the main dimensions on the scope of academic freedom", however it did not conduct this exercise to derive the content of Art. 13 CFR and is not in-depth. We will employ its comparative technique to investigate the content of Art. 13 CFR but in an improved fashion: we investigate what elements and dimensions of freedom of scientific research and academic freedom are protected in international human rights law and in national jurisdictions (studying four jurisdictions in-depth) but also what the underlying rationale is for such protection. We thereby "create" the content of Art. 13 CFR by looking at commonalities and differences in terms of scope of the right in the systems studied but also by creating the underlying rationale (philosophical justification) for Art. 13 CFR, from which we can draw 'EU autonomous

content'. Creating "autonomous content" is important given the limits of a classic comparative constitutional approach: the large divergence among the Member States in terms of constitutional entrenchment of this right (Gärditz, 2016; Karran & Mallison 2017) creates well-known problems such as how to decide whether to choose the minimum or maximum level of protection when deriving the EU standard (Bessselink 1998, Claes & de Visser 2013). There is very little comparative work on national jurisdictions on academic freedom certainly in the English-speaking literature (Barendt 2010, in English stands out; much less in-depth, in German: Groß 1992; on 'freedom of scientific research' Spigno, Max Plank Encyclopedia of Comparative Constitutional Law (2018), and even less comparative work that seeks to establish the content of Art. 13 CFR (Germelmann 2016, in German). This project will conduct an in-depth comparative assessment of four EU Member States: Germany, UK, Italy and Greece. We will take account of the specificities of conducting comparative constitutional research in order to "produce" EU law (Claes and de Visser 2012). We will pay special attention to the ECHR. We note that there is no explicit entrenchment of freedom of scientific research and academic freedom in ECHR case law but the ECtHR has brought cases concerning these matters within the ambit of Art. 10 ECHR (e.g. *Taner Akcam v Turkey* 2011; *Hertel v Switzerland* 1998).

In creating the underlying rationale for Art. 13 CFR we ask what the underlying rationale(s) in comparative constitutional traditions and international treaties is/are and complement that by adding philosophical work on what can constitute a philosophical justification. In the English-speaking literature there is "[s]urprisingly little philosophical work squarely on the topic of academic freedom" (Lackey 2018), although the topic is gaining attention recently (Lackey, 2018, Williams 2016, Hudson and Williams 2016). The conventional justification of academic freedom is the discovery of truth (Mill, 1863, Dewey 1902, Dworkin 1996), but philosophers are debating this. Dworkin argues for a complementary ethical justification in addition to a truth-based justification. Menand (1992) (discussed in Lackey 2018) and Rorty (1996) reject an epistemological justification of academic freedom, while Lynch (2018) argues that the socio-political justification of academic freedom in fact depends rather than replaces the epistemological justification.

(2.) Once we have defined the content of Art. 13 CFR we explore its relationship with commercialisation. There is a growing strand of literature in sociology on 'commercialisation' and 'academic capitalism' (indicative: Slaughter & Leslie (1997), Slaughter & Rhoades 2004, Münch 2014, Münch 2016, Jessop 2018), according to which "[U]niverities act less like centers of disinterested education and research and more like economic enterprises that aim to maximize their revenues and/or advance the economic competitiveness of the spaces in which they operate" (Jessop 2018). Our starting point is our tripartite definition of 'commercialisation' (1. adoption of market/market-like behaviours of higher education institutions 2. organisation based on corporate management principles 3. endorsement of a functional understanding of science). We will further refine these categories to distil in more detail the distinct sources, characters and consequences of commercialisation. We will then juxtapose them to our understanding of Art. 13 CFR (as established in 1.), including its philosophical justification.

The question whether commercialisation could amount to a violation of academic freedom has been asked in German *legal* scholarship (Mager 2006, Hendler 2006, Albrecht 2009, Fraenkel-Haeberle 2016)), but importantly has not been debated in relation to EU fundamental rights law. This project will commence a new debate on academic freedom and commercialisation, which is appropriate to the EU context.

(3.) Our final objective is to test concrete laws and policies for compliance with Art. 13 CFR as defined in (1.). We will select EU laws and policies and national measures based on indicators for commercialisation which we will create based on the tripartite definition of commercialisation provided above. The EU has the potential to contribute to the commercialisation of academia through its activities in the Higher Education Area. The Commission's central role in the Bologna Process and its influence on national level commercialisation has been discussed in social science literature (Keeling 2006) and in EU law literature (Garben 2009, Garben 2012). Importantly, even though the Commission is acting here outside the legal framework of the EU, it is clear since the *Ledra Advertising* case (C-8/15 P to C-10/15 P) that as an EU institution it is still bound by the EU Charter. Regarding the 'European Research Area' some policy documents are articulated along the lines of commercialisation, e.g. when the Commission proclaims that the ability to move to the next level of innovation in Europe "will depend on the capacity to push European universities to *be more entrepreneurial*" (COM 2018, emphasis added). A very direct and impactful way of shaping research and the way it is organised at national level is through the EU's ambitious and large-scale funding programmes. The upcoming Horizon Europe programme was initially proposed at 96 bn. €, although noticeably cut due to the pandemic with major implications for universities that are heavily reliant on these external funds. These funding programmes need to comply with Art. 13 CFR in their organisation and operation, which is why the Commission has included a (succinct) Art. 13 CFR compatibility recital in its proposal for a Regulation establishing Horizon Europe (COM Proposal 2018), though not indicating what Art. 13 CFR-compliance entails. But even in running a 'science appropriate' funding scheme, the EU may breach Art. 13 CFR, when the scheme operates against a national context that itself is incompatible with Art. 13 CFR. Does the EU in those situations incur responsibility for 'aiding or assisting' national authorities that act contrary to Art. 13 CFR even though they themselves may not be bound by that provision in their actions that fall 'outside the scope of EU law' (Case C 617/10 *Fransson*)? We would draw here inspiration from the international law concept of 'derivative responsibility' (ILC 2001, ILC 2011, Crawford 2013). Or could the EU breach positive obligations that may arise from Art. 13 CFR regarding its contribution to national schemes that are contrary to Art. 13 CFR? Whether such obligations could exist in EU law has only very recently been considered (Fink 2018, Fink 2019), and is an important yet under-investigated question of EU fundamental rights law, which we aim to tackle.

Groundbreaking Nature of the Research

This project breaks new ground in EU fundamental rights law in creating the content of a Charter provision that is largely unknown. It advances knowledge in comparative constitutional

law by choosing an understudied object of comparison with the aim “to produce” EU law (Art. 13 CFR). It also advances knowledge in practical philosophy, where there is little work dealing squarely with academic freedom.

This project is innovative because of its inter-disciplinary approach: It meets its objective by bringing together the legal-doctrinal method, law-in-context, comparative constitutional law, practical philosophy, sociology, and higher education studies and law.

Its societal relevance is undeniable: it provides a tool for assessing the legal *status quo* (Art. 13 CFR) and shows how that tool can be operationalised. If aspects of the *status quo* are illegal that calls for changes on how education and science policies are conducted in Europe and provides a normative yardstick for how to formulate future policies.