# The Council's Conditionality Decision as a Violation of Academic Freedom?

**Olga Ceran & Ylenia Guerra**

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On 15 December 2022, the Council suspended various EU budgetary commitments towards Hungary, the first application of the so-called Rule of Law Conditionality Regulation. It thereby also froze access to Erasmus+ and Horizon Europe funds for 21 Hungarian universities that remain under the management of public interest trusts. The decision, driven by concern about Hungary's failure to apply public procurement and conflict of interest rules to these trusts and ensure their transparent management of EU funds, evoked particularly strong reactions. While the Commissioners clarified that entities run by the trusts can still participate in the selection procedures, they will only become eligible for an award once the measures have been lifted. As such, these Hungarian universities, including their scholars and students, are effectively denied access to EU funds for the time being.

The Hungarian government has suggested it might challenge the decision for violating academic freedom. Notwithstanding its irony given the government's deconstruction of the higher education system, this could prompt the CJEU to clarify the scope of protection afforded to beneficiaries under the Regulation as well as the relationship between the new conditionality regime and fundamental rights, specifically academic freedom enshrined in Article 13 CFR. The latter has been analysed only once before in the Hungarian (!) *CEU* case where the Court found that a law restricting the operation of the Central European University violated Article 13. Against this backdrop, we discuss some questions raised by the Council's decision regarding the protection of beneficiaries and academic freedom more broadly. Without questioning the legitimacy of the EU's rule of law action, we suggest that debates about conditionality in this context – including the assessment of the Council's decision – would benefit from a deeper engagement with the rights and interests of final beneficiaries. This engagement should reflect a conceptualisation of the EU's understanding of and responsibility for academic freedom. This is particularly relevant given the link between academic freedom and the rule of law.

## THE CONDITIONALITY REGULATION: WHAT PLACE FOR BENEFICIARIES?

The Conditionality Regulation's impact on the interests of the final recipients of EU funds has rarely been analysed, despite some reservations raised in the legislative process. In its proposal, the Commission had clarified that 'individual beneficiaries of EU funding, such as Erasmus students, researchers [...], cannot be considered responsible for such breaches [of the rule of law],' and thus should not bear their consequences. Therefore, when conditionality measures are adopted, Member States remain responsible for the implementation of the affected EU funds and should cover any obligations towards final beneficiaries under EU programmes from their own budgets. The Regulation also requires the Commission to provide guidance and tools for the beneficiaries to communicate any breach of these obligations. However, there are doubts whether this framework effectively protects the beneficiaries. The conditionality mechanism will be used against Member States already struggling to uphold their EU law commitments and their inability or unwillingness to meet such obligations leaves few effective remedies to beneficiaries.

This is clearly illustrated by the case in question. While the suspension of funds targets selected government entities, neither students nor academics can function outside of their institutions, if only due to the construction of the EU programmes. The EU frame-

work allows to address some adverse effects on final beneficiaries. For example, individual Horizon Europe applicants will be 'informed about the available options to mitigate the consequences', including the possibility to change host institutions. Institutionally, the targeted universities might join certain EU programmes as associated partners who do not receive funds. However, not all activities under the programmes lend themselves equally to readily available solutions (including many Erasmus+ activities) and in some cases the measures might lead to an exclusion from the programme. Alternative mechanisms, such as an EU body taking over the management of funds, have not been explored by the Commission. As such, different beneficiaries might be affected to varying degrees. While Hungary announced that it will cover the lost funds, some question the long-term sustainability of this solution as well as its broader consequences for Hungarian (and European) research and education.

The EU is certainly justified in protecting its budget, even where this might adversely impact beneficiaries' interests. Yet, some measures might carry more costs – financial or otherwise – than others, all for Member States, individual beneficiaries or the EU at large. Whether and how much responsibility the EU bears for individual beneficiaries remains an open question. However, EU institutions must comply with the Charter when applying conditionality measures. While not all interests will warrant protection or reflect a fundamental right, the lack of a more detailed assessment of beneficiaries' interests remains problematic. An explicit engagement with such interests and the Charter might be an opportunity to ultimately strengthen the legitimacy of the measures, both in the case at hand and at large (see broader remarks in Baraggia and Bonelli (2022)).

## ACADEMIC FREEDOM: WHAT FREEDOM FOR WHOM?

Do the interests affected by the Council's decision give rise to Article 13 CFR claims? There is little discussion on the content of academic freedom in EU law, although the topic is gaining traction in EU policy. While the Explanations to the Charter bind Article 13 to Article 10 of the ECHR (freedom of expression), the *CEU* judgment broadened the concept to protect also an institutional dimension of academic freedom from state intervention. The state is indeed considered as the 'the principal duty bearer in the academic freedom matrix', but – as Article 13 CFR binds EU institutions (Article 51(1) CFR) – the EU has undoubtfully become a duty bearer alongside Member States, within the scope of EU law. However, it remains less clear what kind of duties it bears.

Academic freedom has traditionally been perceived as negative freedom, protecting scholars and institutions from external interference. It is broadly agreed to encompass freedom of teaching and research, as well as certain self-governance freedoms. These should include the freedom to apply for participation in available funding and cooperation schemes, including EU programmes, both for academics and academic institutions (see e.g. Recital 38 of the Erasmus+ Regulation). It is less straightforward what Article 13 grants to students whose freedom is rarely discussed in the literature. One commentator saw the European student mobility as a 'revival' of the Humboldtian understanding of academic freedom. Alternatively, students' academic freedom is often tied to the right to education, as enshrined in Article 14(1) CFR. Inspired by the Advocate General's Opinion in Case C-391/20, one could argue that Article 14 encompasses not only a choice of a more intense use of foreign languages in higher education – which was suggested to be implicit in the provision – but also participation in an Erasmus+ programme. While this suggestion is contentious, the limits of a more positive reading of Article 14 (e.g. recognizing the link between education and EU values) and the relationship between academic freedom and the right to education are yet to be determined. However, if one accepts at least some of the claims above, then Charter rights are *a priori* restricted by the Council's decision as those willing to participate might be prevented from doing so.

Nevertheless, while academic freedom might include a choice to participate in an available programme, this does not necessarily entail a positive claim to be able to do so under any circumstances.

Participation and funding have always been conditional in a broad sense, both for institutions and individuals, with the conditions ranging from formal to substantive (e.g. eligibility requirements, the Erasmus+ Charter accreditation, and so on). Students can participate in the Erasmus+ exchange if their university offers such an opportunity and they meet its institutional requirements. Structural conditions always affect academic freedom *somehow,* but not all conditions amount to rights restrictions, and many of the latter should easily be justified. Moreover, academic freedom does not presuppose freedom from *any* responsibilities or accountability. For example, the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel and the CoE Recommendation on 'Academic freedom and university autonomy' – both previously referenced by the CJEU – emphasise financial accountability of academic institutions and professional obligations of academics, requiring a balance between the degree of self-governance and funding accountability or respect for human rights. The scope of freedom is thus tied to some corresponding duties. While Hungarian scholars and students should hardly be held accountable for the current situation, the validity of institutional academic freedom claims raised against the Council's decision, where such accountability is said to be lacking, remains uncertain. What conditions constitute legitimate restrictions of academic freedom and how to conceptualize accountability as part thereof under EU law – both at large and in the context of conditionality measures- are open questions.

## ACADEMIC FREEDOM AND THE COUNCIL'S DECISION

Even if the Council's decision restricts Article 13, it could still be justified. After all, academic freedom is not an absolute right under the Charter, and the protection of the Union's financial interests should count as a legitimate reason to limit certain freedoms. If the EU is a duty bearer in the academic freedom matrix, it might even be obliged to ensure that appropriate accountability rules *for EU funds* are effectively in place, especially when they can simultaneously target phenomena that counter this freedom. Both the Horizon Europe and Erasmus+ programmes are explicitly subject to the EU's financial regulations. Nonetheless, the analysis of proportionality is challenging due to the multi-actor nature of the matrix and the varying interests of beneficiaries affected under different the EU programmes. It is unclear how to weigh the rights and obligations of Hungarian institutions that need to function within the national legal framework characterized by the rule of law deficiencies. Similar difficulties exist regarding the balancing of the rights of individuals and the obligations of institutions as they derive from different dimensions of academic freedom and are affected more or less directly. Answers to these questions will need to reflect not only on the measures' suitability to protect the EU's financial interests and the specific situations of final beneficiaries, but also, perhaps most importantly, on the close relationships between conditionality and the rule of law, and between the rule of law and academic freedom. The conceptualization of these relationships with reference to the competing interests at stake is hardly irrelevant for the assessment of the measures.

## WHAT CONDITIONALITY CAN OR CANNOT DO?

The Hungarian case highlights problems that have plagued the conditionality regime from the outset. Some say that the measure has worked – the Hungarian government announced that politicians will resign from the university boards. Others criticize it both as too much – due to its effect on students – and too little, because of its limited ability to restore the institutional autonomy. While the Council's decision is strictly speaking about the protection of the financial interests of the Union in the context of rule of law deficiencies, it also implicates the interests of the academic community. There is still no clarity on how to assess or protect the interests of final beneficiaries of EU funds, especially if Hungary will not comply fully with its obligations under the Regulation. This is particularly relevant if such interests give rise to fundamental rights claims under Article 13 CFR. Moreover, the Regulation uses access to funding as an incentive to safeguard the rule of law, but the relationship between the rule of law and the protection of the

EU budget remains opaque. If we see academic freedom as linked to the rule of law, any analysis of such an incentivizing action should recognize the EU's own responsibility for academic freedom, though it is unclear what this responsibility should entail (see broader comments about academic freedom as a funding condition in Kinzelbach, Saliba and Spannagel (2022), p. 1736). While conditionality measures cannot do it all, they would benefit from an explicit engagement with these fundamental issues. How, if at all, is the EU obliged to protect Hungarian students or scholars? Should the Council be satisfied only with more far-reaching changes in the management of Hungarian universities? And what would it mean for the proportionality of the measures? Getting these questions right might be equally relevant for the Hungarian rule of law, Hungarian universities, and the EU conditionality action at large.

## ABOUT THE AUTHORS

**Olga Ceran**
Olga Ceran is a Postdoctoral Researcher at the Europa Institute of Leiden University, the Netherlands (AFITE Project) and a Re:constitution Fellow 2023/2024.Olga Ceran is a Postdoctoral Researcher at the Europa Institute of Leiden University, the Netherlands (AFITE Project) and a Re:constitution Fellow 2023/2024.
**Ylenia Guerra**
Ylenia Guerra is a Postdoctoral Researcher in Constitutional Law at the Luiss Guido Carli University (Rome).

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