



Freedom of Art and Autonomy of Cultural Institutions in Hungary

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I. Key Findings

In the course of the autocratic development in Hungary, the country's civic space and cultural landscape have been significantly impacted. Artists and cultural professionals, who use their artistic and cultural means to create spaces for societal debate, are increasingly under pressure by the systematic elimination of cultural institutions' autonomy. The Orbán administration's means for the dismantling of cultural diversity and pluralism in the field of arts consists of (1) reshaping the organizational structure of cultural institutions, (2) appointing cultural administrators on the basis of political affiliation, and (3) redirecting resources to government-conform institutions and artists.

These policies are in violation of the freedom of art. The Hungarian Constitution and the Charter of Fundamental Rights of the European Union (CFR) expressly recognize a freedom of art, while other human rights instruments - like the European Convention of Human Rights (ECHR) - do not explicitly mention it but derive the freedom of art from the freedom of expression. Although the fundamental right does not prescribe a specific form of organization, the organizational structure of theaters, universities and museums must ensure that artistic autonomy can unfold and that influences outside the realm of art are excluded.

The facts outlined in this report describe grave violations of the institutional component of the freedom of art. Yet, it remains a difficult task to address these violations in front of a competent complaint body. Forcing infringement procedures on EU level might prove difficult, given the EU's limited competences in the field of culture and the automated complaint procedures. Against the background of political willingness, it will be helpful to also appeal to MEPs and Commissioners.

There is also the possibility to formulate a communication to the UN Special Rapporteur, which already conducted a very instructive country visit to Poland, commenting on the encroachment on the autonomy of cultural institutions.

A legal intervention - including complaints to the EU Commission and communication to the UN Special Rapporteur - should be accompanied by publicity work to unfold its full effect.

II. Context

Autocratic development in Hungary

The election victory of the Fidesz party in 2010, gaining a two third majority in parliament, marked the beginning of an autocratic development and of the erosion of the rule of law in the still young democracy. Various reports and statements of international organizations and civil society actors point out the dramatic democratic deficit and severe social problems resulting from Viktor Orbán's extending control of multiple areas of civil life.¹ In an attempt to annihilate any opposition, cultural institutions and artists are targeted by his oppressive policies. While the breach of EU law and fundamental values has been slowly picked up by EU's institutions - and numerous infringement proceedings have taken and are taking place - the deterioration of the situation for civil society continues.

Reactions at EU level

On EU level a number of proceedings against Poland and Hungary are taking place.² It is mostly the **Commission**, which claims the failure to fulfil obligations under the treaty before the ECJ in an Article 258 TFEU infringement proceeding.³ Lately, **Member States** have been intervening to support the Commission and might start their own infringement proceedings according to Article 259 TFEU.⁴

Also, the **European Parliament** adopted a resolution calling on the Council to determine, pursuant to Article 7(1) TEU,⁵ the existence of a clear risk of a serious breach by Hungary of

¹ See European Commission, *2020 Rule of Law Report - Country Chapter on the rule of law situation in Hungary* (SWD(2020) 316 final), 30 September 2020, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602582109481&uri=CELEX%3A52020SC0316>; "The Guardian view on Viktor Orbán's laws: controlling culture - Editorial", 11 December 2019, available at: <https://www.theguardian.com/commentisfree/2019/dec/11/the-guardian-view-on-viktor-orban-laws-controlling-culture>, last visited 29 January 2021.

² See "Sue and Let Sue" by Maximilian Steinbeis, *Verfassungsblog*, 04 December 2020, available at: <https://verfassungsblog.de/sue-and-let-sue/>

³ C-66/18, *Commission v Hungary (Higher Education)*, 6 October 2020;
C-78/18, *Commission v Hungary (Transparency of associations)*, 18 June 2020;
C-791/19, *Commission v Poland (disciplinary regime for Polish courts)*, 8 April 2020;

⁴ The Dutch parliament obliged its government to start an Article 258 TFEU infringement proceedings against Poland, see "The enemy within? Article 259 and the Union's Intergovernmentalism" by Guillermo Íñiguez, *The New Federalist*, 12 December 2020, available at:

<https://www.thenewfederalist.eu/the-enemy-within-article-259-and-the-union-s-intergovernmentalism?lang=fr>.

⁵ Infographic of the European Parliament about Article 7 TEU proceedings, available at: <https://www.europarl.europa.eu/news/en/headlines/eu-affairs/20180222STO98434/rule-of-law-concerns-how-t-he-eu-can-act-infographic>.

the values on which the Union is founded,⁶ which might lead to the country losing its membership rights (e.g. voting rights in the Council). The Article 7 (1) TEU proceeding has never been used before and is ongoing (as of January 2021). Hungary is seeking the annulment of that resolution in front of the ECJ - the Court has yet to decide on its merits.⁷

Starting 1 January 2021, a new “**rule of law mechanism**” is in place, which allows the Council - acting by a qualified majority on the proposal of the European Commission - to stop payments from the EU budget to member states that misuse (i.e. corruption in the distribution of money) the allocated EU money, including when the judiciary is dismantled in a way that an independent examination of the distribution process is not guaranteed. The mechanism will not be applied until the ECJ has examined it. In the meantime, the Commission is focussing on investigating corruption and nepotism in Hungary and Poland, to apply the mechanism retroactively, once the ECJ has pronounced its judgement.⁸

Regarding the **Hungarian culture law** - a law, which severely violates the freedom of art and expression - a MEPs of the Progressive Alliance of Socialists and Democrats (S&D) posed a **parliamentary question** to the Commission on 20 January 2020, asking the Commission’s position on the matter.⁹ The Commission replied on 4 March 2020, stating that it did take notice of the culture law and is examining, whether it is in breach of EU law:

“The Charter of Fundamental Rights of the European Union, which applies to Member States only when they are implementing EU law, recognises indeed the freedom of expression and the freedom of the arts and sciences as fundamental rights (Articles 11 and 13 of the Charter). According to Article 6 of the Treaty on the Functioning of the European Union, the Union only has a competence to carry out actions to support, coordinate or supplement actions of the Member States in the field of culture. The Commission is therefore committed to ensure, within the remit of its competences, the respect of the freedom of expression and the autonomy of cultural institutions, both in terms of self-government and in terms of funding. Should the legal assessment of the law in question reveal non-conformity with EU law, the Commission recalls that, in its role as Guardian of the Treaties, it may take necessary action, including where appropriate infringement procedures. In addition, the Commission would like to note that all EU

⁶ Founding values as outlined in Article 2 TEU: Respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

⁷ C-650/18, *Hungary v European Parliament*, ongoing.

⁸ See “*Vera Jourova im Interview*”, Hoppe/Siebenhaar, in: Handelsblatt, 02.02.2021, available at: <https://www.handelsblatt.com/politik/deutschland/vera-jourova-im-interview-eu-kommissarin-wir-werden-uns-auf-den-kampf-gegen-korruption-und-vetternwirtschaft-konzentrieren/26874364.html?ticket=ST-571072-0J7Ia9pLfUjXRJluuBYX-ap2>.

⁹ Parliamentary questions to the Commission, P-000279/2020, 20.01.2020, Subject: New law on culture in Hungary, Petra Kammerevert (S&D), Hannes Heide (S&D), Domènec Ruiz Devesa (S&D), Łukasz Kohut (S&D), Predrag Fred Matić (S&D), Klára Dobrev (S&D), Csaba Molnár (S&D), Attila Ara-Kovács (S&D), Sándor Rónai (S&D), István Ujhelyi (S&D), Pina Picierno (S&D), Birgit Sippel (S&D), Lara Wolters (S&D), Julie Ward (S&D), Massimiliano Smeriglio (S&D), Dietmar Köster (S&D), available at: https://www.europarl.europa.eu/doceo/document/P-9-2020-000279_EN.html.

Member States must abide by the relevant EU legislation and the rules concerning state funding.”¹⁰

An infringement procedure regarding the culture law has not yet been initiated by the Commission.¹¹

III. Facts: Violations of Institutional Autonomy in Hungary

The Orbán regime considers culture important only as a means that helps achieve its political goals and has to that end imposed an unprecedented system of governmental control over Hungary’s cultural institutions.¹² As a result, institutional autonomy, as the basis for the enjoyment of freedom of the art, is eliminated and the existence of cultural institutions and the livelihood of dissenting artists are threatened. Institutions and artists are forced to align with governmental policies and engage in self-censorship whenever they depend on public funding - which is the case for almost all cultural institutions and many artists.

The facts outlined below are not an exhaustive list of encroachments on the freedom of art but merely exemplary for the Orban administration's attempt to bring the Hungarian cultural landscape into line and eliminate any form of dissent and opposition. This enforced conformity with the government’s policy is achieved by constitutional and legislative reforms, which:

1. Reshape the organizational structure of cultural institutions
 - 1.1. Integrating cultural institutions into ministries (NKA)
 - 1.2. Entrusting private entities, loyal to the regime, with public tasks (MMA)
 - 1.3. Centralizing the management of the cultural sector (National Cultural Council)
 - 1.4. Privatizing higher education institutions (SZFE)
2. Put in place cultural administrators on the basis of political affiliation
 - 2.1. National Theatre: Attila Vidnyánszky
 - 2.2. Petöfi Museum of Literature (PIM): Szilárd Demeter
 - 2.3. Directors of municipal theatres
3. Redirecting resources to government-conform institutions and artists

¹⁰ P-000279/2020, Answer given by Ms Gabriel on behalf of the European Commission, 04.03.2020, available at: https://www.europarl.europa.eu/doceo/document/P-9-2020-000279-ASW_EN.html.

¹¹ See full list of infringement procedures against Hungary here: https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=false&active_only=0&noncom=0&r_dossier=&decision_date_from=&decision_date_to=&EM=HU&title=&submit=Search.

¹² See “Hungary turns its back to Europe”, p.5.

1. Reshaping the organizational structure of cultural institutions

1.1. Integrating the National Culture Fund (NKA) in Ministry

In 2010, the previously independent National Culture Fund (NKA) was integrated to the “Ministry of Human Capacities” (EMMI). Since the reform, the Minister - currently Miklós Kásler - holds the position of president of the NKA. The Minister decides directly on the distribution of 50% of the NKA’s funds to applicants (“ministerial frame”). The other 50% are distributed according to the decision of the NKA’s boards, which in turn is appointed with the involvement of the Minister of Human Capacities. As a result, the Minister has full control over the distribution of funds, which finance institutions, individuals and projects in the field of culture.

1.2. Entrusting the right-wing Hungarian Academy of Arts (MMA) with public tasks

In 2010 the Orbán administration entrusted the previously private entity Hungarian Academy of Arts (MMA) with the public task “to facilitate the prevalence and protection of the values of Hungarian and universal culture, the respect of the traditions of Hungarian arts and the birth of new and significant artistic works”.¹³ By appointing a private entity loyal to the government to carry out public tasks and providing it with immense resources (see 3.), any semblance to institutional autonomy was undermined. The MMA is represented in every jury, board and committee, which decides on the distribution of public grants in the field of art. Together with the Ministry of Human Capacities it holds a two third majority in each of these decision-making bodies.

In 2014 the Hungarian Constitutional Court found that the provision, entrusting the MMA with the national task to promote the arts, was in violation of the Constitution.¹⁴ The Court held that the organizational structure of the MMA - especially its biased requirements for membership - violated the freedom of art under Article X of the Constitution, and the principle of neutrality and pluralism guaranteeing the freedom of art.¹⁵ Yet, the MMA has not been restructured but has hardened its political bias.

¹³ Website of the Hungarian Academy of Arts (MMA), statement available at: <https://www.mma.hu/web/en/about>.

¹⁴ Judgement of the Hungarian Constitutional Court regarding AZ ALKOTMÁNYBÍRÓSÁG 18/2014. (V. 30.) AB HATÁROZATA a Magyar Művészeti Akadémiáról szóló 2011. évi CIX. törvény 7. §-a alkalmazásával összefüggő alkotmányos követelmény megállapításáról.

¹⁵ Judgement of the Hungarian Constitutional Court (18/2014) concerning the foundation of the Hungarian Arts Academy, para 22.

1.3. Establishing a centralized control of the cultural sector - National Cultural Council

In a widely protested and internationally criticized “culture law”¹⁶, adopted on 10 December 2019, the government established a centralized National Cultural Council responsible for determining a unified strategic direction of various segments of culture.¹⁷ The director of the National Cultural Council is directly appointed by the government. The Council determines, which institutions are culturally significant enough to receive state funding.

1.4. Privatizing the University of Theatre and Film Arts (SZFE)

In September 2020, a legislative reform transferred the University of Theatre and Film Arts in Budapest (SZFE) to a private foundation.¹⁸ The Orbán government appointed a board of trustees, staffed on a solely ideological basis, without including a single name recommended by the SZFE staff.¹⁹ The SZFE was privatized after other previously state-owned universities had undergone the same procedure. All privatized universities have been subordinated to a board of trustees, consisting of government-friendly economic and political actors, appointed by the government. The privatization of the SZFE was accompanied by immense national and international protests and expressions of solidarity with the ousted academic staff.²⁰

¹⁶ Act on strategic cultural institutions, 10 December 2019, “2019. évi CXXIV. törvény a Nemzeti Kulturális Tanácsról, a kultúrstratégiai intézményekről, valamint egyes kulturális vonatkozású törvények módosításáról”, available at: <https://net.jogtar.hu/jogszabaly?docid=A1900124.TV&searchUrl=/gyorskereso>.

¹⁷ See “Theaters in Hungary Feel the Chill of Viktor Orban’s Culture War”, Palko Karasz in: The New York Times, 13.12.2019, available at: <https://www.nytimes.com/2019/12/13/arts/hungary-theater-orban.html>; “The Guardian view on Viktor Orbán’s laws: controlling culture - Editorial” in: The Guardian, 11.12.2019, available at: <https://www.theguardian.com/commentisfree/2019/dec/11/the-guardian-view-on-viktor-orban-laws-controlling-culture>; “Hungary passes law tightening grip on country’s theaters”, Felix Schlagwein in: dw, 12.12.2019, available at: <https://www.dw.com/en/hungary-passes-law-tightening-grip-on-countrys-theaters/a-51642455>; “Hungarians rally against government’s bid to tighten cultural control”, Daniel McLaughlin, in: The Irish Times, 09.12.2019, available at: <https://www.irishtimes.com/news/world/europe/hungarians-rally-against-government-s-bid-to-tighten-cultural-control-1.4109875>.

¹⁸ Act concerning the University of Theatre and Film Arts, 2020. évi LXXII. törvény a Színház- és Filmművészetért Alapítványról, a Színház- és Filmművészetért Alapítvány és a Színház- és Filmművészeti Egyetem részére történő vagyonjuttatásról, available at: <https://net.jogtar.hu/jogszabaly?docid=a2000072.tv>.

¹⁹ See “Free country, free university – students at Hungary’s University of Theatre and Film Arts protest against restricted academic freedom”, Anna Frenyó - Heinrich Böll Stiftung, 18.09.2020, available at: <https://www.boell.de/en/2020/09/18/free-country-free-university-students-hungarys-university-theatre-and-film-arts-protest>.

²⁰ See “Hungary’s students are making a last stand against Viktor Orbán’s power grab”, George Szirtes in: The Guardian, 14.09.2020, available at: <https://www.theguardian.com/commentisfree/2020/sep/15/hungary-students-viktor-orban-university-theatre-budapest>; “Heads of Hungary’s top arts university quit amid fears of state control”, Than/Fenyó, in: Reuters, 31.08.2020, available at: <https://www.reuters.com/article/us-hungary-politics-education-theatre-idUSKBN25R264>; “Solidarity with

2. Appointing cultural administrators on the basis of political affiliation

The list of political appointments of cultural administrators is long and reaches into all areas of the culture life, including literature, theatre, music, fine arts and the film industry. Even conservative cultural administrators find themselves being attacked when giving space to artists not entirely aligned with the governmental ideology and are replaced with cadres, which often lack the professional ability or experience necessary for the position.²¹ Two of the more striking and prominent example of this practice are the following:

2.1. National Theater

In 2013, the contract with the internationally acknowledged artistic director of the National Theatre of Hungary, Robert Alföldi, was prematurely dissolved. The Orbán administration had repeatedly castigated Mr. Alföldi for his political views and his homosexuality and finally deprived him of his position as the National Theatre's director.²² Instead it appointed Attila Vidnyánszky, who follows a pro-government line, embodying the government's enthusiasm for patriotism and a nominal Christianity.²³

2.2. Petöfi Museum of Literature (PIM)

In 2018, Szilárd Demeter, a ministerial commissioner and one of Orbán speech writers, was appointed director of the Petöfi Museum of Literature (PIM). Demeter triggered an international wave of outrage, when he called the government's scapegoat George Soros a "liberal Führer" who wanted to persecute Hungarians and Poles, stating that: "toxic gas flows from the capsule of a multicultural open society."²⁴ Since Demeter's takeover, the PIM gained power in the field of culture by equipping it with significant state funding for distributing grants to writers.²⁵

Students of Budapest University of Theatre and Film Arts", Akademie der Künste, 08.09.2020, available at: https://www.adk.de/de/news/index.htm?we_objectID=61550.

²¹ See "State of Artistic Freedom 2019. Whose narratives count?", Freemuse Report 2019, p. 84, available at: <https://freemuse.org/wp-content/uploads/2019/03/saf-2019-online.pdf>.

²² See "Politics Spills Onto Stage in Budapest", Jonathan Levi in: The New York Times, 04.04.2013, available at: https://www.nytimes.com/2013/04/05/arts/05iht-angels05.html?pagewanted=all&_r=0.

²³ See "Hungary's students are making a last stand against Viktor Orbán's power grab", George Szirtes in: The Guardian, 14.09.2020, available at: <https://www.theguardian.com/commentisfree/2020/sep/15/hungary-students-viktor-orban-university-theatre-budapest>.

²⁴ See "George Soros: Orbán turns to familiar scapegoat as Hungary rows with EU", Shaun Walker in: The Guardian, 05.12.2020, <https://www.theguardian.com/world/2020/dec/05/george-soros-orban-turns-to-familiar-scapegoat-as-hungary-rows-with-eu>.

²⁵ <https://hungarianspectrum.org/2020/01/23/viktor-orban-entrusts-hungarian-culture-to-the-far-right/>

2.3. Directors of municipal theatres

Since the Fidesz party won municipal elections in 2006, it sacked directors and boards of provincial theatres and replaced them by local Fidesz-appointed figures.²⁶ In the culture law from December 2019, this practice was institutionalized by requiring municipal theatres, which applied for state funding, to let the central government appoint the director of the respective theatre, otherwise the municipal theatre is not eligible for state funding.²⁷

3. Arbitrary funding and intransparent allocation procedures

An important way of pressuring institutions and artists into conformity is through funding.

- As mentioned under 2.3., municipal theatre only receive funding, if they agree to the appointment of theatre directors through the central government.
- The entire allocation by the Ministry for Human Capacities (EMMI) for independent theatre and dance organisations and the hosting theatres cooperating with them has been 773 million HUF (~ 2 million EUR) per year, while the government-conform National Theatre (see 2.1.) alone has received a triple of that sum (2 billion HUF = ~ 5.6 million EUR).²⁸
- The Talent Development in the Carpathian Basin Ltd. (KMTG), a national writing training center established by the state in 2015, received 1.4 billion HUF (~ 4 million EUR) in 2018, without providing information - for "data protection reasons" - on who received its grants nor who decided which authors would get the grants and on what basis.²⁹ In comparison, the annual budgetary support for the largest Hungarian organisation of writers, the Hungarian Writers' Association, receives 100 million HUF (~ 300.000 EUR) annually.
- By far the best-funded cultural institution is the Hungarian Academy of Arts (MMA, see 1.2.), with 10 billion HUF (30 million EUR) annually. Yet, the organisation has not succeeded - even with the enormous amount of financial resources - in gaining real cultural significance.³⁰

²⁶ See "Hungary's students are making a last stand against Viktor Orbán's power grab", George Szirtes in: The Guardian, 14.09.2020, available at: <https://www.theguardian.com/commentisfree/2020/sep/15/hungary-students-viktor-orban-university-theatre-budapest>.

²⁷ See "Inside Europe: Hungary passes 'culture law'", Stefan Bos in: dw, 20.12.2019, available at: <https://www.dw.com/en/inside-europe-hungary-passes-culture-law/av-51739613>.

²⁸ See "Hungary turns its back to Europe - Dismantling culture, education, science and the media in Hungary 2010-2019", Bajomi et al., 2020, p. 57.

²⁹ See "State of Artistic Freedom 2019. Whose narratives count?", Freemuse Report 2019, p. 85, available at: <https://freemuse.org/wp-content/uploads/2019/03/saf-2019-online.pdf>.

³⁰ See "Hungary turns its back to Europe - Dismantling culture, education, science and the media in Hungary 2010-2019", Bajomi et al., 2020, p. 55.

IV. Substantive Law

1. General Remarks - Freedom of Art³¹

The freedom of art is not only freedom from interference, it is also endangered by inadequate organizational structures and procedures. The state institutionalizes artistic work and spheres of activity in a variety of ways in exhibitions, in the theater, in art and music academies, competitions, etc. Structurally, the autonomy of cultural institutions has to be respected; functionally, it is about the course of proceedings in conformity with fundamental rights.

Organizational Component

As in the fields of broadcasting and science, the following sentence applies: If the state lends institutions to the arts, these institutions must be designed in a way that is "appropriate to the arts". Although the fundamental right does not prescribe a specific form of organization, the organizational structure of theaters, universities and museums must also ensure that artistic autonomy can unfold and that influences outside the realm of art - for example, through staff representatives and supervisory bodies - are limited to labor law and economic conditions without affecting the actual core of the artistic work. If art is essentially a personal and individual process, decentralized decision-making structures that are open to participation correspond best to artistic freedom; hierarchical or purely economically managed structures endanger art. Decentralization is also a structural guarantee for diversity.

Procedures

As with other fundamental rights, the freedom of art today depends in many ways on procedures organized by the state. They concern, for example, the awarding of art prizes, admission to exhibitions, the awarding of commissions, admission to an art academy. Procedures relevant to the arts in the state, university and municipality must be organized in a way that is open to participation, those affected must be heard, artistic expertise must be given sufficient influence on the decision-making process and proper justification must be given.

³¹ See "§ 101 Kunstfreiheit", Hufen in: Merten/Papier, *Handbuch der Grundrechte in Deutschland und Europa*, 2011, Rn. 138ff.

2. Hungary

Article X Constitution of Hungary

(1) Hungary shall ensure the freedom of scientific research and artistic creation, the freedom of learning for the acquisition of the highest possible level of knowledge and, within the framework laid down in an Act, the freedom of teaching.

(2) The State shall have no right to decide on questions of scientific truth; only scientists shall have the right to evaluate scientific research.

(3) Hungary shall protect the scientific and artistic freedom of the Hungarian Academy of Sciences and the Hungarian Academy of Arts. Higher education institutions shall be autonomous in terms of the content and the methods of research and teaching; their organisation shall be regulated by an Act. The Government shall, within the framework of the Acts, lay down the rules governing the management of public institutes of higher education and shall supervise their management.

3. European Union: The Charter of Fundamental Rights

3.1. Scope of application

Member states are only bound by the Charter of Fundamental Rights (CFR) when implementing EU law (Art. 51 CFR). The ECJ established that national authorities would be bound by EU fundamental rights:

1. when implementing/giving effect to a Regulation, Decision or Directive (*Wachauf*)
2. when limiting one of the Treaty free movement rights (*ERT; Schmidberger*)
3. when a general unional obligations to act exists (*Åkerberg Fransson*) → disputed

In fields where the Union does not have harmonising competence, the application of EU law to national law is seen as constitutionally problematic in that it might result in a competence 'creep'.³² Although the EU considers itself a community of values, its core competence remains limited to the single market. A legal intervention must therefore at some point have a link to the internal market and prove a cross-border nature.³³ Still, the underlying facts themselves do not have to be of a cross-border nature, it only matters that the measure or act somehow affects intra-Community trade.³⁴

³² See "The interpretation of Art. 51 CFR", Directorate General for Internal Policies, 2016, p. 9, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL_STU\(2016\)556930_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL_STU(2016)556930_EN.pdf).

³³ *Dassonville Formula*: "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be regarded as measures having an effect equivalent to quantitative restrictions."

³⁴ See "*Der grenzüberschreitende Sachverhalt – Der Yeti des Europarechts*", André Lippert, ZEUS 3/2014, p. 277,

When a stronger interest of the EU is at stake (internal market; EU integration), the CFR is more likely to be applied also to national measures; when the Member State acts on the basis of EU coordination measures, the CFR applies (if at all) only in extreme cases; in all other cases, the CFR will most likely not apply. The mere fact that the subject matter of a national legislative proposal falls within an area in which the European Union has powers is not sufficient to render EU fundamental rights applicable.³⁵

EXCURSUS: EU Competence in the Field of Culture and Arts

Article 167 TFEU defines the role of the EU in the area of culture: it supports, coordinates or supplements the actions of member countries but includes no competence to implement harmonisation legislation (= supporting NOT harmonizing competence).

Primary Law

- Introduction TEU: “drawing inspiration from the cultural, religious and humanist inheritance of Europe”
- Art. 3 TEU: aim is to “respect its rich cultural and linguistic diversity, and [...] ensure that Europe’s cultural heritage is safeguarded and enhanced”
- Art. 6 TFEU: EU’s competences in the field of culture
- Art. 167 TFEU: governs EU action in the cultural field
- Art. 13 CFR: Freedom of the arts and sciences

DG EAC - COMMISSION

Mariya Gabriel (Bulgarian nationality, European People’s Party) is currently the Commissioner responsible for the cultural and creative sectors. The Commission department in charge of culture is the Directorate-General for Education, Youth, Sport and Culture (DG EAC). DG EAC promotes EU level action in this field, covering cultural and creative sectors including cultural heritage, develops policies based on gathered data and evidence and manages the EU programme for culture - the Creative Europe programme.

CULT - PARLIAMENT

MEP Sabine Verheyen is the chair of the EP’s Committee on Culture and Education (CULT), which is responsible for the cultural aspects of the Union such as the dissemination of culture, cultural heritage, cultural and linguistic diversity, as well as for education, audiovisual policy, information and media policy, the cultural and educational aspects of the information society, youth and sports.³⁶

³⁵ ECJ, C-198/13, *Víctor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gobierno de España en Alicante) and Others*, 10 July 2014, para. 46. See, however, the far reaching suggestion by [GA Sharpston in her opinion](#) in C-34/09, 30 September 2010, para 163, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf#page=39&zoom=100,56.442, p. 66.

³⁶ <https://www.europarl.europa.eu/committees/en/cult/about>

On two occasions in 2020, the ECJ found Hungarian legislation in breach of EU law, where the relevant provisions clearly aimed at the internal control of civil society but had effects on the internal market. In *Commission v Hungary (Transparency of associations)* the ECJ found that the restrictions imposed on the financing of NGOs by persons outside of Hungary was in breach of the free movement of capital (Article 63 TFEU). In *Commission v Hungary (Higher Education)* the ECJ held that a regulation, which was in breach of a WTO agreement (GATS) resulted in a breach of EU law because the GATS form part of EU law. The fact that the ECJ adopted the Attorney General's and the Commission's argument in the matter, shows its general willingness - at least in the case of Hungary - to rule on provisions, where the hindrance of the internal market is not the main but rather a side effect. With regards to Hungary's culture law, no infringement procedure has been initiated.

C-78/18

Commission v Hungary (Transparency of associations)

18 June 2020

The restrictions imposed by Hungary on the financing of civil organisations by persons established outside that Member State do not comply with EU law.

The Court held that, by imposing obligations of registration, declaration and publication on certain categories of civil society organisations directly or indirectly receiving support from abroad exceeding a certain threshold and providing for the possibility of applying penalties to organisations that do not comply with those obligations, Hungary had introduced discriminatory and unjustified restrictions with regard to both the organisations at issue and the persons granting them such support. Those restrictions run contrary to the obligations on Member States in respect of the free movement of capital laid down in Article 63 TFEU and to Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union, on the right to respect for private and family life, the right to the protection of personal data and the right to freedom of association.³⁷

³⁷ Court of Justice of the European Union Press Release, No 73/20 Luxembourg, 18 June 2020 Judgment in Case C-78/18 Commission v Hungary, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-06/cp200073en.pdf>.

C-66/18³⁸

Commission v Hungary (Higher Education)

6 October 2020

The conditions introduced by Hungary to enable foreign higher education institutions to carry out their activities in its territory are incompatible with EU law.

I. Facts

The Hungarian Parliament adopted in April 2017 an amendment to the country's Higher Education Act of 2011, which in effect expelled the Central European University (CEU), founded by U.S. billionaire George Soros, from Hungary. Although the relevant provision did not apply to Member States of the EU but only to third countries, the Commission argued that the provision was in breach of EU law, as it violated the GATS (WTO agreement), which in turn forms part of EU law. Additionally, other provisions of the law were alleged to be in violation of the freedom of establishment, and of the freedom of the arts and the right to education.

II. Held

1. Applicability of the Charter

In accordance with Article 258 TFEU, an action for failure to fulfil obligations can have as its subject only the finding of a failure to comply with obligations under EU law. (para 13) So far as the actions of the Member States are concerned, the scope of the Charter is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only 'when they are implementing Union law'. (para 212) In the present case, first (...) the GATS forms part of EU law. It follows that, when the Member States are performing their obligations under that agreement (...) they must be considered to be implementing EU law, within the meaning of Article 51(1) of the Charter. (para 213)

2. Violation of Charter Rights

[T]he Court considers it helpful (...) to take into consideration the content of Recommendation 1762 (2006), adopted by the Parliamentary Assembly of the Council of Europe (...) from which it is apparent that academic freedom also incorporates an institutional and organisational dimension, a link to an organisational structure being an essential prerequisite for teaching and research activities. Also relevant is point 18 of the [UNESCO] Recommendation concerning the status of higher-education teaching personnel (...) according to which 'autonomy is the institutional form of academic freedom and a necessary precondition to guarantee the proper fulfilment of the functions entrusted to higher-education teaching personnel and institutions'. (para 227)

³⁸ C-66/18, Commission v Hungary, 6 October 2020, paras. 68ff.; C-13/00, Commission v Ireland, 19 March 2002.

[I]t must be held that the measures at issue are capable of endangering the academic activity of the foreign higher education institutions concerned within the territory of Hungary and, therefore, of depriving the universities concerned of the autonomous organisational structure that is necessary for conducting their academic research and for carrying out their educational activities. Consequently, those measures are such as to limit the academic freedom protected in Article 13 of the Charter. (para 228)

3.2. Article 13 CFR - Freedom of the arts and sciences

“The arts and scientific research shall be free of constraint. Academic freedom shall be respected.”

The official explanations to the Charter derive the freedom of art and science in Article 13 CFR from the freedom of thought and the freedom of expression.³⁹ In addition, reference is made to the limitation objectives of Art.10 (2) ECHR. This corresponds to the fact that the freedom of art is not explicitly listed in Art.10 ECHR, but is understood as a concretization of freedom of expression.

The bearers of artistic freedom can be natural persons, regardless of nationality, but also legal persons and associations of persons.⁴⁰ An encroachment on fundamental rights occurs when a party subject to fundamental rights regulates the protected activities of art or science in a burdensome manner or indirectly or factually obstructs them in a significant way. The freedom of the arts is interfered with not only by measures against certain artists, but also by an impairment of the independence of a cultural institution.⁴¹

The ECJ’s arguments regarding the Hungarian higher education law, stating that “autonomy is the institutional form of academic freedom and a necessary precondition to guarantee the proper fulfilment of the functions entrusted to higher-education teaching personnel and institutions” and that an “autonomous organisational structure [...] is necessary for conducting [...] academic research and [...] carrying out [...] educational activities” are also applicable to the freedom of art.

³⁹ See EXPLANATIONS RELATING TO THE CHARTER OF FUNDAMENTAL RIGHTS (2007/C 303/02), available here: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007X1214\(01\)&from=de](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007X1214(01)&from=de).

⁴⁰ See Jarass GrCh, 4. Aufl. 2021, EU-Grundrechte-Charta Art. 13 Rn. 6.

⁴¹ See Jarass GrCh, 4. Aufl. 2021, EU-Grundrechte-Charta Art. 13 Rn. 11-12.

4. Council of Europe: The European Convention on Human Rights

Article 10 ECHR, Freedom of expression / Artistic expression

The ECHR does not explicitly mention the freedom of art but it is recognized that Article 10 ECHR also includes freedom of the press, freedom of information, freedom of broadcasting, and freedom of art and science.⁴² Case law regarding Article 10 ECHR and the freedom of art is exclusively related to “artistic expression” and state limitation (including censoring of specific performances and artists) of artistic expression alleging insult and defamation. There is no mention of institutional guarantees and the autonomy of institutions as a prerequisite to enjoy the freedom of art and science.⁴³

The CoE published a “Manifesto on the Freedom of Expression of Arts and Culture in the Digital Era” on 10 November 2020, stating the importance of freedom of art for democracy and societal debate: “Freedom of expression, including artistic freedom, is globally (Europe’s) most significant and consequential export. Article 10 of the Convention protects the right to Freedom of Expression, including freedom of artistic expression.”⁴⁴

5. United Nations

Relevant international treaty provisions with regard to the freedom of art, are the following:

Article 19 ICCPR (freedom of expression / artistic expression)

Article 15 ICESCR

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

⁴² See “Security, Creativity Tolerance and their Co-existence: The New European Agenda on Freedom of Artistic Expression”, Freemuse, 2020, pp. 19ff.

⁴³ See “Guide on Article 10 of the European Convention on Human Rights”, Council of Europe/European Court of Human Rights, 2020, available at: https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf.

⁴⁴ See “Manifesto on the Freedom of Expression of Arts and Culture in the Digital Era”, Council of Europe, available at: <https://rm.coe.int/manifesto-on-the-freedom-of-expression-of-arts-and-culture-in-the-digi/1680a056a2>.

4. *The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.*

While not specifically related to Article 15 ICESCR, the General Comment on Article 13 ICESCR states that “The enjoyment of academic freedom requires the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities. Self-governance, however, must be consistent with systems of public accountability, especially in respect of funding provided by the State. Given the substantial public investments made in higher education, an appropriate balance has to be struck between institutional autonomy and accountability. While there is no single model, institutional arrangements should be fair, just and equitable, and as transparent and participatory as possible.”⁴⁵

In addition, a number of UNESCO conventions are in place, among them the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which was signed and ratified by the EU as a whole.⁴⁶

The Special Rapporteur in the field of cultural rights made the following statements related to the autonomy of cultural institutions:

- “State cultural policies need to take artistic freedoms into consideration, in particular when establishing criteria for selecting artists or institutions for State support, the bodies in charge of allocating grants, as well as their terms of reference and rules of procedure. The system in place can help to avoid undue government influence on the arts.”⁴⁷
- “States should ensure the participation of representatives of independent associations of artists in decision-making related to art, and refrain from nominating or appointing cultural administrators or directors of cultural institutions on the basis of their political, religious or corporate affiliation.”⁴⁸
- “In addition, scientific freedom involves respecting the autonomy of higher education institutions and the freedom of faculty and students to, inter alia, express opinions about the institution or system in which they work, and to fulfil their

⁴⁵ <https://undocs.org/E/C.12/1999/10>, paras. 38-40. E/C.12/1999/10, paras. 38-40, IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS General Comment No. 13 (Twenty-first session, 1999) The right to education (article 13 of the Covenant)

⁴⁶ See 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, available at: https://en.unesco.org/creativity/sites/creativity/files/convention2005_basictext_en.pdf#page=18

⁴⁷ See “Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed - The right to freedom of artistic expression and creativity”, A/HRC/23/34, 14.03.2013, para. 71, available at: <https://undocs.org/en/A/HRC/23/34>.

⁴⁸ See “Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed - The right to freedom of artistic expression and creativity”, A/HRC/23/34, 14.03.2013, para. 89h, available at: <https://undocs.org/en/A/HRC/23/34>.

functions without discrimination or fear of repression by the State or any other actor.”⁴⁹

- “A prerequisite for [the implementation of Article 15 ICESCR] is ensuring the preconditions for everyone to continuously engage in critical thinking and have the opportunity and means to investigate and contribute new knowledge, regardless of frontiers. Those rights require that States take the necessary steps for the “conservation, the development and the diffusion of science and culture” (article 15 (2)), “respect the freedom indispensable for scientific research and creative activity” (article 15 (3)) and “recognize the benefits to be derived from... international contacts and co-operation in the scientific and cultural fields” (article 15 (4)).”
- “In a large number of cases, States resort to imposing restrictions authorized under international law in inappropriate or abusive ways, favouring some worldviews over others. Consequently, stakeholders lose confidence in State institutions, leading to a loss of credibility of Governments, including when they legitimately impose limitations in accordance with articles 19 (3) or 20 of ICCPR. This effect is amplified when rules are ambiguous and procedures are not transparent.”⁵⁰

Note also the country report of the ST to Poland from 2020, dedicating one chapter to the “Independence of cultural institutions and media”.⁵¹

V. Complaints Bodies

1. EU-Level

Find a full guide on complaint procedures on EU level here:

https://unece.org/DAM/env/pp/Media/CEE_Bankwatch_complaint_mechanisms.pdf

1.1. Commission’s Infringement Procedure

The European Commission can be contacted about any measure (law, regulation or administrative action), absence of measure or practice by a country of the European Union allegedly against Union law. As a consequence the Commission might decide to initiate an

⁴⁹ See “Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed - The right to enjoy the benefits of scientific progress and its applications”, A/HRC/20/26, 14.05.2012, para. 40, available at: <https://undocs.org/en/A/HRC/20/26>.

⁵⁰ See “Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed - The right to freedom of artistic expression and creativity”, A/HRC/23/34, 14.03.2013, para. 41, available at: <https://undocs.org/en/A/HRC/23/34>.

⁵¹ “Visit to Poland - Report of the Special Rapporteur in the field of cultural rights”, A/HRC/43/50/Add., 12.05.2020, available at: <https://undocs.org/en/A/HRC/43/50/add.1>.

infringement procedure. The complaint is filed through the Commission website:

https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/

Complaints to EC on infringement of the Community law can be made only in cases in which there are legal obligations of a Member state that are not fulfilled and in which it is possible to provide clear evidence of this. Sending a complaint to the EC is a way to make the Commission active on the issue and to press national authorities.

1.2. The Committee on Petitions of the European Parliament

Any natural or legal person, residing in the EU, has the right (Article 227 TFEU) to submit a petition to the European Parliament about the application of Union law. Petitions are submitted by post or online via the European Parliament's website. Petitions submitted to the Petitions Committee must be relevant to the activities of the European Union, but may be about a matter of general concern, an individual complaint, or a request for the Parliament to take a stance on a matter of public interest, so the Petitioning Mechanism has perhaps the broadest scope of all the mechanisms.

1.3. European Ombudsman

The Ombudsman can only deal with cases which are directly related to the work of the EU institutions, so it is not appropriate to complain to the Ombudsman about the actions of the Hungarian government, even if they concern EU law.

2. United Nations

2.1. Communication to the Special Rapporteur

Individual Communications should be sent to the Special Rapporteur in the field of cultural rights, Karima Bennoune.⁵²

The mandate of the SR is to “give greater visibility to cultural rights in the human rights system, and to foster a better understanding of the severity of their violations, and of the opportunity of their realisation for all.” In her last year's country report on Poland, Ms. Bennoune discusses the autonomy of cultural institutions in Poland, giving many examples for the violation of the principle of autonomy, which could be easily used for the case of Hungary. Additionally,

⁵² Karima Bennoune was appointed UN Special Rapporteur in the field of cultural rights in October 2015. Ms. Bennoune grew up in Algeria and in the United States. She is Professor of Law and Martin Luther King, Jr. Hall Research Scholar at the University of California-Davis School of Law, where she teaches human rights and international law, <https://www.ohchr.org/EN/Issues/CulturalRights/Pages/SRCulturalRightsIndex.aspx>.

2.2. Communication to the Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights (CESCR) may consider individual communications alleging violations of the International Covenant on Economic, Social and Cultural Rights, which in the present case would concern violations of Article 15 ICESCR. Hungary has not signed the Optional Protocol, therefore there is no possibility for a complaint procedure of in front of this body.