



Analysis the legal framework for Open Science in Austria

AN EXPLORATORY STUDY OF THE RELEVANT AREAS OF
LAW

On behalf of the Austrian Federal Ministry of Education, Science and Research
("BMBWF")

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¹ <https://www.lexict.de/ziga-skorjanc.html>.

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machine translation

Executive Summary

The basic idea behind Open Science is that making research results freely accessible and reusable increases their usefulness to the public and promotes innovation and excellence in science. Open Science encompasses several areas, such as scientific publications, research data including metadata, infrastructures and digital reproductions. In particular, in the case of publicly funded research, it is of great importance to make this information available to the public.

In 2022, the Baseline Report commissioned by the Austrian Federal Ministry of Education, Science and Research "Open Access in Transition: Infrastructures, Monitoring and Governance as Key Elements of a Successful Transformation" was published, which clearly shows that many of the unresolved issues surrounding open access and open science are of a legal nature. The principle of "*as open as possible, as closed as necessary*" makes it clear that access must often remain restricted, whether due to copyright and other intellectual property rights, trade and official secrets or the protection of personal data and privacy.

This report identifies and analyses the legal issues surrounding Open Science. The recommendations presented are based on an analysis of the European and Austrian legal situation as well as on interviews and a round table with experts from the field of Open Science.

There is a need for action both in the clarification of the current legal situation and its implementation, as well as in the further development of the European and, in particular, the national legal framework in order to advance open science.

For researchers, it is often not clear in detail when they need to restrict access to research results. From their point of view, legal certainty about when they can access third-party data for research purposes is also essential. Furthermore, there is ambiguity as to which actors can and should implement Open Science. Funding bodies and research organisations are faced with the question of what they are allowed to oblige researchers to do.

At national level, there are unresolved issues regarding the implementation of EU legislation and harmonisation with other legal systems. The lack of harmonisation becomes a particular problem when research takes place internationally or is to be made accessible internationally. In addition, the legal framework is evolving through new EU legislation on data and digitalisation, such as the Data Governance Act, the AI Regulation, the Data Act and the Digital Services Act. This changes existing data governance structures, but in certain cases offers new opportunities for open science. At the same time, these regulatory developments pose a challenge, as there is a great need for information about the new legal framework.

This report first explains the core topics and terms in the field of Open Science and then analyses the legal aspects. The guidelines for scientific practice contained in the report are

based on this analysis of the various areas and are intended to serve as a guide for researchers when implementing Open Science practices (see Chapter 2).

The results of the empirical part of the study are then presented. These are summarised in the following areas: open licences, rights retention strategies, secondary exploitation, data protection and data access (including in particular register research), EU legal acts on data and digitisation, tax law, competition law and the need for information on the legal situation (see Chapter 3).

Finally, recommendations are formulated to respond to the existing need for action. These include proposals for legislative and accompanying non-legislative measures to improve the legal framework for open science (see Chapter 4).

The legal analysis, enriched with the experience of experts, and the formulation of concrete recommendations for action should contribute to the further development of an effective Open Science system.

Chapter 1: Introduction

1. The concept and phenomenon of Open Science

Open science refers to the free accessibility, utilisation and further processing of scientific findings and research data. The aim is to share knowledge and data with all relevant stakeholders as early as sensible and possible in the research process, thereby contributing to the dissemination and application of the latest findings, accelerating the research and innovation process and strengthening creativity and trust in science. In this way, a contribution is also made to increasing Europe's competitiveness.²

The Open Science Network Austria ("OANA") has identified several **main areas of Open Science**. **This study focusses** on Open Access and Open Research Data. Open Access refers to unrestricted and free access to scientific information on the internet using open licences. The relevant scientific information primarily includes scientific publications, but also primary and metadata, source texts and digital reproductions. Open Access is associated with the aim of making the results of publicly funded research publicly accessible to all interested parties. In contrast, the term Open Research Data refers to research data that is created in the course of scientific work, e.g. through digitisation, source research, experiments, measurements, surveys or interviews, and is then made freely accessible for further use via the Internet.³

However, Open Science also includes other elements, namely Open Methods (e.g. Open Source Software), Open Evaluation (e.g. broader participation in the peer review process), Open Infrastructures (e.g. Open APIs), Open Education (in particular the provision of teaching and learning materials as Open Educational Resources under free licences) and Citizen Science in the sense of active citizen participation in scientific research projects.⁴

There are also overlaps with the term open innovation, for which a national strategy has been in place in Austria since 2016.⁵ This refers to the targeted and systematic crossing of the boundaries of organisations, industries and disciplines in order to generate new knowledge and develop new products, services or processes.⁶

Like open innovation, open science is based on the guiding principle of "**as open as possible, as closed as necessary**".⁷ All relevant legal framework conditions such as third-party rights, security, data protection and privacy must be taken into account.⁸ Overall, open science is

² Further information and links are available at <https://www.bmbwf.gv.at/Themen/HS-Uni/Hochschulgovernance/Leitthemen/Digitalisierung/Open-Science.html> and <https://www.osa-openscienceaustria.at/open-science/ueber-open-science/>.

³ OANA, Recommendations for a National Open Science Strategy in Austria (2020), 6f; see also Open Science Definition, <https://www.fosteropenscience.eu/foster-taxonomy/open-science-definition>.

⁴ OANA, Recommendations for a national open science strategy in Austria (2020), 7ff.

⁵ Open Science Policy Austria (2022).

⁶ Open Innovation Strategy (2016), 35; see also <https://openinnovation.gv.at/>.

⁷ OANA, Recommendations for a National Open Science Strategy in Austria (2020), 5 with reference to Art 10 Open Data and PSI Directive.

⁸ Open Science Policy Austria (2022), 1.

proving to be an important prerequisite for guaranteeing the constitutionally guaranteed freedom of science in times of global digital change.⁹

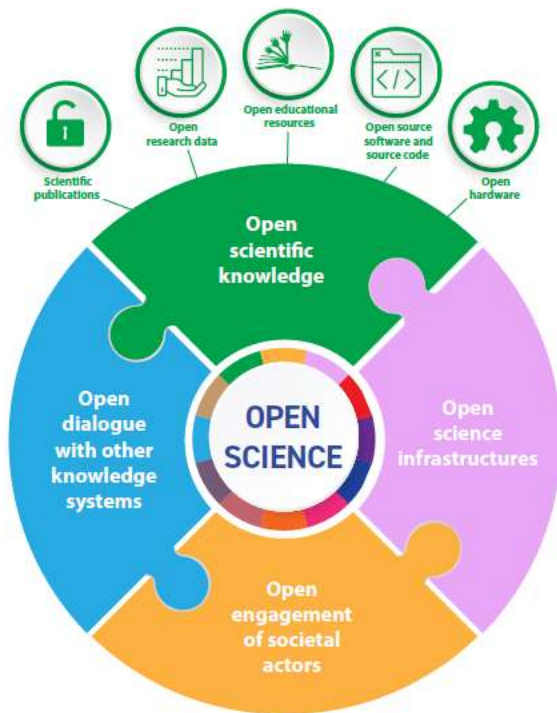


Illustration 1 *Open Science - Definition*; Source: UNESCO Recommendation on Open Science (2021), 11, <https://en.unesco.org/science-sustainable-future/open-science/recommendation>; Licence: CC-BY-SA 3.0 IGO, <https://creativecommons.org/licenses/by-sa/3.0/igo/>.

2. The role of open science in science

Open Science is **not an end in itself**, but opens up new, collaborative and innovative ways of generating knowledge and creating value, and can enable universities and research organisations to fulfil their missions, in particular high-quality research, teaching and innovation, and impact for society, even more efficiently and effectively for the common good.¹⁰ Similarly, there is growing evidence that Open Science can also bring significant benefits to individual researchers compared to more traditional, closed practices by increasing the visibility, discoverability, audience, utilisation and citation of a work, which in turn has a positive impact on careers.¹¹

In 2022, the **Open Science Policy Austria** was adopted, which is based on the international principles of Open Science. In line with the recommendation of the EU's Open Science Policy

⁹ <https://www.bmbwf.gv.at/Themen/HS-Uni/Hochschulgovernance/Leitthemen/Digitalisierung/Open-Science.html>.

¹⁰ <https://www.osa-openscienceaustria.at/open-science/ueber-open-science/>.

¹¹ McKiernan et al, How open science helps researchers succeed (2016), <https://elifesciences.org/articles/16800>; see also FWF, Open Access Testimonials, <https://www.fwf.ac.at/de/forschungsfoerderung/open-access-policy/open-access-fuer-referierte-publikationen/open-access-testimonials>.

Platform¹², the policy is based on eight pillars, which are also the main areas of responsibility for implementing open science principles and practices in science. These are 1) Establishment of rewards and incentives for scientific work, taking into account the Open Science principles (*Rewards and incentives*), 2) Further development of research evaluation and evaluation metrics that take Open Science practices into account (*Research indicators and next-generation metrics*), 3) *Future of scholarly communication*, which ensures that all publicly funded research will be freely accessible to all (*Future of scholarly communication*), 4) Establishment and further development of the European Open Science Cloud (EOSC - *World Wide Web of FAIR Data and Services*), 5) Publication of research data based on the FAIR principles (*Findable, Accessible, Interoperable, Re-usable*), 6) Promotion of scientific integrity and quality assurance, which can be guaranteed in particular by observing standards of good scientific practice and research ethics principles (*Research integrity*), 7) Creation of open science skills and open teaching (*Skills and education*) and 8) Involvement of laypeople and non-scientific persons such as schoolchildren from the interested public in research processes within the framework of citizen science.¹³

In addition, open science was strengthened by the federal government's strategy for research, technology and innovation ("**RTI Strategy 2030**"), which was based on it together with open innovation as an important cross-cutting issue.¹⁴ The strategy also contains a clear commitment to "Horizon Europe" and Austria's active participation in the European Research Area (**ERA**).¹⁵ This represents a further step in the direction of Open Science.¹⁶

Furthermore, the Federal Ministry of Education, Science and Research ("**BMBWF**") supports numerous (**research**) **projects and initiatives** for digital and social transformation at Austria's universities, with which the goals of Open Science should be achieved (e.g. the Austrian Transition to Open Access 2 - AT2OA² project is dedicated to the transformation from closed to open access in scientific publications). Detailed information on the individual projects is available on Digital University Hub.¹⁷

3. Study "Open Access in transition"

In 2022, the study "Open Access in Transition: Infrastructures, Monitoring and Governance as Key Elements of a Successful Transformation" was published. This **baseline report** on the

¹² Open Science Policy Platform is a group of experts that supports and advises the EU Commission in the development of strategies and the practical implementation of the European Open Science Agenda, see https://research-and-innovation.ec.europa.eu/strategy/strategy-2020-2024/our-digital-future/open-science_en.

¹³ Open Science Policy Austria (2022), 4ff.

¹⁴ RTI Strategy 2030, 5.

¹⁵ https://www.bundeskanzleramt.gv.at/themen/forschungskoordination_fti.html.

¹⁶ RTI Strategy 2030, 12f; further information and links are available at <https://www.bmbwf.gv.at/Themen/HS-Uni/Hochschulgovernance/Leitthemen/Digitalisierung/Open-Science/Open-Science-Policy-Austria.html> and

<https://www.bmbwf.gv.at/Themen/HS-Uni/Hochschulgovernance/Leitthemen/Digitalisierung/Open-Science.html>.

¹⁷ <https://www.digitaluniversityhub.eu/dx-initiativen/34-ministeriumsinitiativen>.

open access transformation in science was commissioned by the BMBWF with a view to preparing upcoming strategic decisions for the ERA.¹⁸

The baseline report identifies a need for action, particularly with regard to open administrative infrastructures, the monitoring of open access activities and the design of a robust, international legal framework. A standardised legal framework can support open infrastructures for scientific publications and data and should promote sustainable openness. The negative effects of **many unresolved legal issues** were particularly emphasised, especially in connection with licensing and exploitation (keyword: "rights retention strategy").¹⁹

4. Legal framework

4.1. Legal issues in Open Science

Open Science brings with it new challenges with regard to research ethics and legal regulations such as data protection and security or - as shown in the Baseline Report - with regard to licences and alternative exploitation models.²⁰

According to OANA, three **legal matters** are affected in particular: Copyright, licensing and data protection law.²¹ Copyright law provides an initial framework for the open utilisation of research results. Secondary exploitation rights of authors of scientific contributions are particularly important here. When it comes to licensing and exploitation in the context of open science, there is still legal uncertainty regarding the harmonisation of open licences and the reuse of research results. Data protection law is relevant when disclosing research data.²² General information on the legal framework and governance for research can be found at BMBWF.²³

4.2. Developments at EU level

The EU expressly promotes the open science culture and the reusability of data, as well as open access to publications. Accordingly, open access to publications and open research data in accordance with FAIR principles were anchored in the **Horizon Europe** research and innovation programme - as in Horizon 2020 - as a prerequisite for receiving funding.²⁴

¹⁸ Mayer K., Open Access in Transition: Infrastructures, Monitoring and Governance as Key Elements of a Successful Transformation. Baseline Report for the Austrian Federal Ministry of Education, Science and Research (2022), 11.

¹⁹ Mayer K., Open Access in Transition: Infrastructures, Monitoring and Governance as Key Elements of a Successful Transformation. Baseline Report for the Austrian Federal Ministry of Education, Science and Research (2022), 8, 84ff.

²⁰ Mayer K., Open Access im Wandel: Infrastrukturen, Monitoring und Governance als zentrale Elemente einer erfolgreichen Transformation. Baseline Report for the Austrian Federal Ministry of Education, Science and Research (2022), 72ff; OANA, Empfehlungen für eine nationale Open Science Strategie in Österreich (2020), 5.

²¹ <https://www.oana.at/ueber-open-science/rechtsfragen/>.

²² OANA, Recommendations for a national open science strategy in Austria (2020), 11f.

²³ <https://www.bmbwf.gv.at/Themen/Forschung/Forschung-in-%C3%96sterreich/rechtliche-Rahmenbedingungen-und-Governance.html>.

²⁴ Open Science Policy Austria (2022), 3.

In addition, the **ERA Policy Agenda for 2022-2024** identifies a proposal for an EU legal and regulatory framework for copyright and data suitable for research as one of the priorities.

To this end, **four studies** were published identifying the barriers and challenges to accessing and reusing the results of publicly funded research and innovation for scientific purposes and **proposing legislative and non-legislative measures** to improve the existing legal framework.²⁵

1.	Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), written by Dr Christina Angelopoulos
2.	Study on EU copyright and related rights and access to and reuse of data (2022), written by Martin R.F. Senftleben
3.	Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022), written by Mirelle van Eechoud
4.	Study on the Digital Services Act and Digital Markets Act and their possible impact on research (2022), written by Björn Lundqvist

Furthermore, on 23 May 2023, the Council of the EU adopted conclusions on "Towards high-quality, transparent, open, trustworthy and fair scientific publishing", in which it calls for direct and unrestricted open access to publications from publicly funded research.²⁶ In these conclusions, the Council calls on the EU Commission, among other things, to examine and propose further (legislative) measures at EU level to achieve this goal.²⁷

In order to prepare further proposals for improving the EU legal framework for copyright and data, the EU Commission's Directorate-General for Research and Innovation has commissioned two **further studies**, which should be published in early 2024.

In the area of copyright, a study will be carried out to assess the concrete impact of the EU copyright framework on research, including the collection of data (literature searches, consultations, surveys, etc.), on researchers, funding and research organisations and other stakeholders concerned, including copyright holders.

The other study aims to identify the provisions in specific EU legal acts on data and digitalisation that are relevant for researchers, research institutions, research infrastructures and providers of research services.

²⁵ ERA Policy Agenda 2022-2024, Annex, No. 2; see also a summary of developments in the field of open science in the European Union in OANA, Recommendations for a national open science strategy in Austria (2020), 13ff.

²⁶ <https://www.consilium.europa.eu/de/press/press-releases/2023/05/23/council-calls-for-transparent-equitable-and-open-access-to-scholarly-publications/>

²⁷ EU Council Conclusions on "Towards high-quality, transparent, open, trustworthy and fair scientific publishing", 9616/23 (23.5.2023).

Based on these studies, the EU Commission will develop concrete legislative proposals to improve the EU legal framework for research over the next few years.

4.3. Possible measures at national level

Austria is actively involved in the ERA and has adopted the Austrian Action Plan for the European Research Area 2022-2025 ("**ERA-NAP 2022-2025**"), which comprises twelve initiatives. The measures of the ERA-NAP 2022-2025 are therefore primarily aimed at developments at national level and in the national institutions, but in close cooperation and coordination with the European partners and the European Commission.²⁸

As part of Initiative 1 "Towards open science", the legal and administrative framework conditions for open science in Austria are to be analysed and options for action proposed. Based on this, further concrete measures to be taken should be discussed.²⁹

The legal and regulatory framework for copyright and data is largely predetermined by European law. However, the member states can use the **scope for implementation** that they have in the relevant directives, such as Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society ("InfoSoc Directive"), Directive (EU) 2019/790 on copyright and related rights in the digital single market ("DSM Directive") and Directive (EU) 2019/1024 on open data and the re-use of public sector information ("Open Data and PSI Directive"), in a way that enables and promotes open science practices.

Furthermore, the **opening clauses** in the General Data Protection Regulation ("GDPR")³⁰ can be used to enable the processing of personal data in the context of open science. This applies in particular to data processing for archiving purposes in the public interest, for scientific or historical research purposes or for statistical purposes, for which the principles of purpose limitation and storage limitation have already been relaxed in the GDPR and further simplifications can be created by the national legislator, for example in the form of exemptions from certain data subject rights.³¹ Further exemptions can be provided for the publication of scientific results if this is necessary to harmonise the right to the protection of personal data with freedom of expression and freedom of information.³²

For many other EU legal acts that are adopted in the form of a directly applicable European regulation, **national accompanying provisions** are also required for their implementation. This primarily involves the creation of an administrative and/or institutional framework, such as the designation of the competent national authority.

²⁸ ERA-NAP 2022-2025, 6.

²⁹ ERA-NAP 2022-2025, 13.

³⁰ Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

³¹ Art 5 and Art 89 GDPR.

³² Art 85 para 2 GDPR.

Furthermore, the member states can take **non-legislative measures** to realise the objectives of open science. This is primarily about *awareness building* and *trust* in open science practices through offers such as training and education for researchers as well as various guidelines and FAQs that can serve as orientation for them, for example when publishing data under an open licence.

Finally, the **need to continuously review the legal framework and remove legal hurdles** in order to promote open science practices should be emphasised.³³

5. Study on the legal framework for Open Science in Austria

This **exploratory** study is being prepared as a **follow-up study to the baseline report** and will present the current legal and associated administrative framework conditions for Open Science in Austria and develop recommendations for action and suggestions for improvement.³⁴

As explained in point 4, the relevant areas of law are largely predetermined by European law. When conducting the study, the analyses of the EU legal and regulatory framework for copyright and data commissioned by the EU Commission as part of the European Research Area (ERA) Action 2 are therefore taken into account with regard to how suitable it is for research.

The study deals with topics such as open access, open educational resources, open data, rights to research data, access to research data and data protection. The **focus** of the study was determined on the basis of the expert interviews conducted and the dialogue with various stakeholders (see point 5.1 below).

5.1. Method

The study provides an overview of the national legal framework for open science. The key questions focus on access to scientific publications and to data for research purposes.

In addition to the legal methods used to analyse the legal situation, the views of the scientific community were surveyed in dialogue with the relevant stakeholders (e.g. Open Science Austria, UNIKO, FWF, Statistics Austria). Thematic priorities were identified, obstacles to open scientific practice were determined and suggestions for improvement were collected.

In consultation with the client, the data basis for the study is formed by

- relevant European and national legal sources and case law,
- Interviews conducted with experts,

³³ Federal Ministry of Education and Research (BMBF)/Kultusministerkonferenz (KMK), Open Access in Deutschland - Gemeinsame Leitlinien von Bund und Ländern (2023).

³⁴ ERA-NAP 2022-2025, 13 (Measure 1.3).

- Exchange with the relevant stakeholders (e.g. at the ERA action 2 workshop on "An EU copyright & data legislative framework fit for research: barriers, challenges and potential measures" in February 2023) and
- Selected national, European and international strategy papers, policies and analyses on Open Science.

A total of 9 interviews with 11 experts were analysed using content analysis. This means that interviews were recorded, transcribed and then coded according to subject areas. Individual positions were condensed in the presentation to provide an overview, but their differences were retained.

Furthermore, a Public Round Table on Open Science: Legal Framework and Practical Challenges in the Digital Age was organised in Vienna on 6 July 2023 to raise awareness of the topic and gather further input in the joint discussions.

5.2. Structure of the report

In addition to the description of the methodology, this final report contains an overview of the legal situation, which can serve as a guide for stakeholders, and a list of recommendations.

The report is divided into several chapters. After an introduction in Chapter 1, Chapter 2 contains Open Science guidelines for scientific practice. These guidelines are organised by topic. Part 1 deals with access to scientific publications. Part 2 is dedicated to access to data for research purposes. Other relevant legal issues, such as the impact of the new EU regulation for digital services on research, are presented in Part 3.

Chapter 3 contains the empirical part of the study and reports on the dialogue with the relevant stakeholders. In particular, the expert interviews conducted are analysed and the results ("findings") are presented.

Finally, Chapter 4 formulates and justifies recommendations for improving the legal framework for Open Science in Austria, categorised by subject area.

Chapter 2: Open Science - Guidelines for scientific practice

Part 1: Access to scientific publications

1. Term Open Access

The aim of open access policy is to provide researchers and the general public with access to research data as early as possible and to facilitate their use and re-use. Open access is therefore to be understood as the practice of making **research results** available online to end users free of charge and without restrictions on use and re-use, apart from the possibility of requesting attribution. This includes, for example, innovative publishing approaches made possible by digital technologies, such as preprints, short-format manuscripts, data articles, open peer review, etc.³⁵

This practice helps to improve quality, reduce unnecessary duplication in research, accelerate scientific progress and combat scientific fraud. It also promotes the economy and innovation as a whole.³⁶ For these reasons, the **Austrian Declaration on Open Science** states that open scientific publishing should become the standard approach as soon as possible.³⁷

2. Secondary Publication Right by law

2.1. Background

The author of a publication can exercise their copyright exploitation rights themselves or transfer them to a third party, in particular a **publisher**. Many publishers insist on the transfer of the exclusive or sole rights to the publication so that the author no longer has any exploitation rights to it. Only in a few cases is it agreed that the author retains a (simple) right of use, e.g. for public access on a non-commercial document server such as u:scholar.³⁸

2.2. Austrian regulation

The 2015 amendment to copyright law introduced a "secondary exploitation right for authors of scientific contributions". The aim of this provision is to promote **secondary publications by**

³⁵ Open Science Policy Austria (2022), 2, 11.

³⁶ Open Science Policy Austria (2022), 2.

³⁷ Open Science Policy Austria (2022), 10.

³⁸ <https://openaccess.univie.ac.at/publikationsdienste/uscholar/rechtsfragen/>.

way of open access (Green OA³⁹) and to increase the proportion of research work in scientific repositories.⁴⁰

The online publication of scientific texts and research results that have been published in scientific journals is permitted if at least twelve months have passed since the first publication. Consultation with the publisher or editor is not required. Deviating agreements to the detriment of the author, e.g. in the publishing contract, are invalid.⁴¹

However, there is no legal obligation to make use of the secondary publication right.⁴²

2.3. Requirements for the secondary utilisation of scientific contributions

The secondary exploitation right allows authors to make their scientific contributions available on the Internet irrespective of the transfer of exclusive exploitation rights to publishers or editors and regardless of the terms of the publishing contract. However, several conditions must be met for the author to be able to make use of this right.

1. academic staff. Members of the scientific staff of a research institution that is at least half publicly funded, in particular a public university, are privileged. In addition, the contribution must have been created as part of this activity. If a scientific contribution was created jointly by several persons, the consent of all co-authors must be obtained for secondary utilisation.⁴³ According to the prevailing doctrine, however, it is sufficient if the person publishing the contribution second fulfils the criteria; the non-fulfilment of the criteria by other co-authors (e.g. representatives of practice, research fellows, students, emeritus university professors) is not detrimental.⁴⁴

2. scientific contribution. Only scientific contributions (but not, for example, conference reports) that have appeared in a collection published periodically at least twice a year are included. Such periodic print publications are in particular scientific journals, but not anthologies and conference proceedings, commemorative publications, handbooks and textbooks or other monographs.⁴⁵ Furthermore, scientific contributions published in collections that are exclusively exploited online (e.g. e-journals and other online publications) are currently not covered by the secondary exploitation right.

3. accepted manuscript version. Only the accepted manuscript version may be published. In the literature, this is understood to mean a manuscript version that includes all changes resulting from the acceptance and correction process (e.g. peer review).⁴⁶ Furthermore,

³⁹ <https://open-access.network/informieren/open-access-grundlagen/open-access-gruen-und-gold>.

⁴⁰ <https://openaccess.univie.ac.at/publikationsdienste/uscholar/rechtsfragen/>.

⁴¹ § 37a UrhG; *Homar* in Thiele/Burgstaller UrhG⁴ § 37a Rz 25.

⁴² *Homar* in Thiele/Burgstaller UrhG⁴ § 37a Rz 40.

⁴³ *Bücheler/Kerbler*, Darf ich meinen wissenschaftlichen Beitrag im Internet anbieten? (2022), <https://faq-copyright.at/darf-ich-meinen-wissenschaftlichen-beitrag-im-internet-anbieten/#easy-footnote-5-2222>.

⁴⁴ *Wiebe*, UrhG-Nov 2015 - eine kritische Durchsicht, MR 2015, 239 (244); *Homar* in Thiele/Burgstaller UrhG⁴ § 37a Rz 15f; *aA Appl* in Kucsko/Handig, *urheber.recht*² § 37a UrhG (as of 1 April 2017, rdb.at) Rz 18.

⁴⁵ *Bücheler/Kerbler*, Darf ich meinen wissenschaftlichen Beitrag im Internet anbieten? (2022), <https://faq-copyright.at/darf-ich-meinen-wissenschaftlichen-beitrag-im-internet-anbieten/#easy-footnote-5-2222>.

⁴⁶ *Homar* in Thiele/Burgstaller UrhG⁴ § 37a Rz 24.

references to page breaks or page numbers from the first published version can be included to ensure correct citation.⁴⁷ However, the layout of the article and any additional services provided by the publisher, such as graphics or photographs, are not included.⁴⁸ Accordingly, it is necessary to incorporate corrections made in the course of the galley proof in the version already set into the manuscript version.⁴⁹

4. embargo period. The contribution may only be made available online after twelve months have elapsed since the first publication. Due to the intended protection of the publisher's economic interests, the publication in the collection is to be understood as the first publication triggering the deadline (and not, for example, the pre-print version of the article online via SSRN).⁵⁰

5. publication on the Internet. Online secondary utilisation is permitted by making a contribution available on the Internet. Contributions may be stored in online repositories of academic institutions (e.g. u:scholar and PHAIDRA repository of the University of Vienna, ePubWU repository of the Vienna University of Economics and Business or ePUB repository of the JKU) or made accessible via websites, blogs or on social network profiles (e.g. LinkedIn, ResearchGate). Multiple secondary use is permitted, so the author may upload the article to several repositories in parallel and also make it accessible via his/her website or blog.⁵¹ The prevailing view is that it is also permissible to publish the article in an open access journal.⁵² However, it should be noted that authors are not permitted to provide their works with open licences (e.g. CC BY) because these grant comprehensive rights of use and enable further types of exploitation that are not covered by the secondary exploitation right (see point 3.3 and point 4.1).⁵³

6. no commercial purpose. Secondary utilisation must not be for commercial purposes, i.e. it must not serve to generate direct or indirect economic benefits.⁵⁴ It serves to facilitate access to scientific literature in the sense of open access. As a result, only those secondary utilisations are permitted that are accessible to users free of charge.⁵⁵

7. indication of source. The source of the first publication must be stated in the case of secondary utilisation. In the case of a journal, the source citation requires the name of the journal, the year of publication and the page number. The publisher or editor can also be stated.⁵⁶

⁴⁷ *Appl* in Kucsko/Handig, *urheber.recht*² § 37a UrhG (as of 1 April 2017, rdb.at) Rz 40.

⁴⁸ *Appl* in Kucsko/Handig, *urheber.recht*² § 37a UrhG (as of 1 April 2017, rdb.at) para. 38.

⁴⁹ *Homar* in Thiele/Burgstaller *UrhG*⁴ § 37a Rz 25.

⁵⁰ *Homar* in Thiele/Burgstaller *UrhG*⁴ § 37a Rz 27.

⁵¹ *Homar* in Thiele/Burgstaller *UrhG*⁴ § 37a Rz 45.

⁵² *Homar* in Thiele/Burgstaller *UrhG*⁴ § 37a Rz 41f.

⁵³ *Angelopoulos*, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 55.

⁵⁴ *Homar* in Thiele/Burgstaller *UrhG*⁴ § 37a Rz 28.

⁵⁵ *Homar* in Thiele/Burgstaller *UrhG*⁴ § 37a Rz 44.

⁵⁶ *Homar* in Thiele/Burgstaller *UrhG*⁴ § 37a Rz 49.

2.4. Right to international secondary publication?

According to the prevailing opinion, the secondary exploitation right of authors of scientific contributions pursuant to Section 37a UrhG is a contractual provision, so that the provision only applies **if the contract** under which the author has granted the publisher or editor a right to use the work is **subject to Austrian law**.⁵⁷

The secondary exploitation right is particularly applicable if a publishing agreement does not have an international dimension. This is certainly the case if all (co-)authors as well as the publisher or editor are active in Austria and the respective collection is published in Austria.⁵⁸ If a publisher or editor operating in Austria were to agree with authors on the application of foreign law in order to circumvent the secondary exploitation right, this would be an unauthorised circumvention.⁵⁹ In this case, the authors could still invoke the secondary exploitation right.

If a contract with a publisher or editor is subject to Austrian law, members of the scientific staff of foreign, but at least half publicly funded research institutions can also invoke the secondary exploitation right pursuant to Section 37a UrhG.⁶⁰

In the case of publication on the internet, copyright-relevant utilisation takes place in all countries in which the contribution can be accessed. However, the author's secondary exploitation authorisation is not geographically restricted, so that it is irrelevant whether the associated acts of use take place in Austria or abroad.⁶¹ It is therefore also **not necessary** for the author to take technical measures to ensure that the contribution made available on the internet can only be accessed from Austria (**geo-blocking**).⁶²

In the case of publishing agreements with an international dimension, any choice of law agreements must always be examined.⁶³ However, the agreement of the applicability of foreign law in contracts with foreign publishers or editors is not to be regarded as circumvention.⁶⁴ Whether the secondary exploitation right nevertheless applies in these cases as an overriding mandatory provision within the meaning of Art 9 Rome I Regulation⁶⁵ is disputed in the literature.⁶⁶ A court decision is required to finally clarify this question.

⁵⁷ *Appl* in Kucsko/Handig, *urheber.recht*² § 37a UrhG (as of 1 April 2017, rdb.at) Rz 3; for Germany, see *Soppe* in Götting/Lauber-Rönsberg/Rauer, *BeckOK Urheberrecht* (38th edition, as of 1 February 2023) § 38 UrhG Rz 73.

⁵⁸ *Bücheler/Kerbler*, *Darf ich meinen wissenschaftlichen Beitrag im Internet anbieten?* (2022), <https://faq-copyright.at/darf-ich-meinen-wissenschaftlichen-beitrag-im-internet-anbieten/#easy-footnote-5-2222>.

⁵⁹ *Homar* in Thiele/Burgstaller *UrhG*⁴ § 37a Rz 55.

⁶⁰ *Appl* in Kucsko/Handig, *urheber.recht*² § 37a UrhG (as of 1 April 2017, rdb.at) Rz 19.

⁶¹ *Homar* in Thiele/Burgstaller *UrhG*⁴ § 37a Rz 56.

⁶² *Homar* in Thiele/Burgstaller *UrhG*⁴ § 37a Rz 57.

⁶³ *Bücheler/Kerbler*, *Darf ich meinen wissenschaftlichen Beitrag im Internet anbieten?* (2022), <https://faq-copyright.at/darf-ich-meinen-wissenschaftlichen-beitrag-im-internet-anbieten/#easy-footnote-5-2222>.

⁶⁴ *Homar* in Thiele/Burgstaller *UrhG*⁴ § 37a Rz 55.

⁶⁵ Regulation (EC) No 593/2008 on the law applicable to contractual obligations.

⁶⁶ In favour *Homar* in Thiele/Burgstaller *UrhG*⁴ § 37a Rz 55; in contrast *Appl* in Kucsko/Handig, *urheber.recht*² § 37a UrhG (as of 1 April 2017, rdb.at) Rz 3.

Another way of eliminating this legal uncertainty is to standardise the legal situation at EU level by introducing a European secondary exploitation right (see point 2.5 below).

2.5. Recommendations and preparatory work at EU level

The **EU Commission Recommendation of 25 April 2018 on access to and preservation of scientific information** states that all scientific publications containing the results of publicly funded research should be freely accessible and that innovative companies (especially small and medium-sized enterprises), independent researchers, the public sector, the press and citizens should have the widest possible access to these publications in a transparent and non-discriminatory manner in order to enable innovation, strengthen the public sector and inform citizens.⁶⁷

Furthermore, the EU Commission has recommended to the Member States that **free access to publications** resulting from publicly funded research, regardless of the type of publication (scientific journal, digital infrastructure, multimedia channels and new or experimental methods of scientific communication), should be granted as soon as possible, preferably at the time of publication and in any case no later than six months after publication (no later than twelve months in the social sciences and humanities).⁶⁸

In her **study** commissioned by the EU Commission, *Angelopoulos* comes to the conclusion that the introduction of a harmonised secondary publication right at EU level could prove to be a valuable path towards open access.⁶⁹

According to the study, however, the EU legislator should be aware of its limitations when considering this option. Since the legal nature of the secondary publication right as a moral right, a contractual provision or as a limitation or exception provision has not been clarified - at least under EU law - the potential need to comply with the three-step test under copyright law should be taken seriously.⁷⁰ According to this test, exceptions and limitations may only be applied in certain special cases in which the normal exploitation of the work or other protected subject matter is not impaired and the legitimate interests of the rightholder are not unduly infringed.⁷¹

⁶⁷ Recommendation (EU) 2018/790 of the EU Commission on access to and preservation of scientific information, point 1 para 2 subparas 1 and 6.

⁶⁸ Recommendation (EU) 2018/790 of the EU Commission on access to and preservation of scientific information, point 1 para 2 subpara 2.

⁶⁹ *Angelopoulos*, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 35, 44.

⁷⁰ *Angelopoulos*, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 5, 37ff, 57: "While there is the possibility of declaring the SPR a moral right or a provision of copyright contract law, the potential qualification of the SPR as an exception or limitation to copyright and therefore the need to comply with the three-step test should be taken seriously."

⁷¹ See Art 5 para 5 InfoSoc Directive; *Dokalik* in *Dokalik/Zemann*, Urheberrecht⁸ Art 5 Info-RL (as of 1 October 2022, rdb.at) E 64f.

Even if no exact specifications for the **organisation of secondary publication rights** can be derived from the three-step test, the analysis based on these criteria can serve as a (rough) guide. The characteristics and guidelines identified in the study are described below:⁷²

It is not absolutely necessary to restrict the material scope of application to scientific contributions that are financed with public funds. Other types of scientific works can also be included.

It is not possible to derive a specific percentage of public funding that is required for the secondary publication right to apply. With reference to the Dutch solution, the study suggests not setting a specific percentage.

Furthermore, it is pointed out that, in order to pass the three-step test, the secondary exploitation right must not permit the use of the final version of scientific works (*version of record* - VoR) and must provide for an embargo period. Furthermore, the inclusion of third-party content in the secondary publication should not be permitted unless it is covered by (other) free use of the work.

A retroactive introduction, on the other hand, seems justifiable.

2.6. Further legal reservations in favour of the author.

The secondary exploitation right is systematically linked to the other provisions on reservations in favour of authors. The reservations set out in Sections 34 to 37 UrhG apply **in parallel**, meaning that multiple secondary exploitation is permitted.⁷³

The author of a literary or musical work has the right to include his or her works in a complete overview of his or her intellectual creation. If the exclusive rights to the work have already been transferred to a publisher or other third party, there is, however, a standstill period of 20 years from the respective publication of the works included in a complete survey for inclusion in a complete survey free of charge.⁷⁴

Furthermore, the visual artist is authorised to present his/her works to the public for reference purposes in essays on his/her artistic activity or as a sample of his/her work, although he/she has already granted exclusive rights to others.⁷⁵

Furthermore, the inclusion of a work in a periodical collection (e.g. newspaper, magazine, yearbook, almanac) does not prevent the author from publishing it elsewhere, unless otherwise agreed. However, this restrictive agreement expires by operation of law due to the

⁷² Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 5, 37ff, 57.

⁷³ Appl in Kucsko/Handig, urheber.recht² § 37a UrhG (as of 1 April 2017, rdb.at) para. 60f.

⁷⁴ § 34 UrhG; Burgstaller in Thiele/Burgstaller UrhG⁴ § 34.

⁷⁵ § Section 35 UrhG; Burgstaller in Thiele/Burgstaller UrhG⁴ Section 35.

passage of time, at the latest one year after the end of the calendar year in which the contribution appeared in the collection.⁷⁶

The author is also protected if his/her contribution is accepted for a periodical collection, but this is not published within one year of submission. In this case, the author shall regain his/her full rights after the expiry of this period and may utilise the contribution elsewhere. His/her claim to remuneration remains unaffected.⁷⁷

3. Rights retention strategy ("Secondary Publication Right by contract")

3.1. Open Science guidelines

In accordance with the European Commission Recommendation of 25 April 2018 on access to and preservation of scientific information, research funding organisations managing public funds and academic institutions receiving public funds should be encouraged by Member States to develop **institutional strategies** and implementation plans for the dissemination of and open access to scientific publications.⁷⁸

Following this recommendation, the Austrian Declaration on Open Science calls on all research institutions and agencies to develop and implement open science guidelines.⁷⁹ In particular, research publications resulting from publicly funded projects should be disseminated via open access platforms, whether in journals, books or via an open public repository. Where possible, publication should take place under an open licence.⁸⁰

3.2. Reservation of rights

The implementation of open access and thus the realisation of the goals of open science often fails due to the legal obligations arising from contractual agreements with publishers, editors or other users of scientific works. Many exploiters restrict researchers considerably in the disposal of their own publications through **exclusive publication agreements**.⁸¹

To counteract these restrictions, more and more **funding organisations** are demanding both open access archiving and open access publication in their funding agreements.⁸² To enable open access, these institutions are developing so-called **rights retention** strategies that allow researchers to retain their exploitation rights. If these strategies include an obligation

⁷⁶ § 36 UrhG; *Burgstaller* in Thiele/Burgstaller UrhG⁴ § 36.

⁷⁷ § 37 UrhG; *Burgstaller* in Thiele/Burgstaller UrhG⁴ § 37.

⁷⁸ Recommendation (EU) 2018/790 of the EU Commission on access to and preservation of scientific information, point 2 para. 1.

⁷⁹ Open Science Policy Austria (2022), 10.

⁸⁰ Open Science Policy Austria (2022), 10.

⁸¹ Cf. <https://www.snf.ch/de/33WC4FGNdpxRqPV/news/freier-zugang-umgehend-und-uneingeschraenkt-das-aendert-ab-dem-1-januar-2023>.

⁸² Mayer K., Open Access in Transition: Infrastructures, Monitoring and Governance as Key Elements of a Successful Transformation. Baseline Report for the Austrian Federal Ministry of Education, Science and Research (2022), 76.

for authors and/or other funding recipients to publish Open Access, they are referred to as "**Open Access mandates**".⁸³

Most institutions are guided by **Plan S**, a strategy that was developed and published in 2018 by cOAlition S, a consortium of nineteen national research agencies and funding organisations, the European Commission, seven private foundations and the European Research Council.⁸⁴ This requires researchers who receive public or public-interest research funding to publish their work **under a CC BY licence** in open repositories or in journals accessible to the general public **without any embargo period**. This is intended to accelerate the transformation to full and immediate open access. The publication costs will only be covered by the funding organisations if the publishers adhere to the Plan S rules and leave the authors their further exploitation rights.⁸⁵

The relevant study commissioned by the EU Commission argues that open access mandates are fundamentally compatible with **academic freedom**.⁸⁶ However, in my opinion, caution is required here and the specific form of the respective obligation must be assessed. It should also be considered whether this obligation is imposed on the researchers in the funding agreement for the individual third-party funded project or by the research institution in general for their entire activity.

Austria actively supports Plan S. In line with this commitment, **universities and universities of applied sciences** should also successively implement its principles.⁸⁷ The principle of "*as open as possible, as closed as necessary*" should serve as a guide when designing rights retention strategies. It should be emphasised that open access strategies that do not impose any obligations on researchers (e.g. for secondary publication), but are based on voluntariness, also have great added value because they provide guidance and signal the support of the research institution.

3.3. Necessity of rights retention strategies

Open access can be implemented in different ways. The statutory secondary exploitation right enables the implementation of the green route (Green OA⁸⁸) and facilitates strategies that aim to make a publication freely accessible (second) publication on a repository for an unlimited period of time (see point 2 above).

Research institutions or other exploiters (e.g. funding bodies, open access platforms, operators of repositories) are not originally authorised by the secondary exploitation right.⁸⁹

⁸³ Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 25.

⁸⁴ <https://www.coalition-s.org/addendum-to-the-coalition-s-guidance-on-the-implementation-of-plan-s/>.

⁸⁵ Mayer K., Open Access in Transition: Infrastructures, Monitoring and Governance as Key Elements of a Successful Transformation. Baseline Report for the Austrian Federal Ministry of Education, Science and Research (2022), 28f.

⁸⁶ Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 32f.

⁸⁷ Open Science Policy Austria (2022), 11; see also Government Programme 2020 to 2024, 305.

⁸⁸ <https://open-access.network/informieren/open-access-grundlagen/open-access-gruen-und-gold>.

⁸⁹ Homar in Thiele/Burgstaller UrhG⁴ § 37a Rz 4.

However, the author can transfer the authorisation to exercise the right to them. This means that secondary exploitation is also permitted where the making available is (also) attributed to a third party.⁹⁰

On the other hand, rights retention strategies in accordance with the principles of Plan S cannot be based on the statutory secondary exploitation right, because a secondary publication is only possible after the embargo period has expired.

In addition, according to Plan S, all publications resulting from funding by a cOAlition S organisation must be licensed under Creative Commons Attribution (CC BY) 4.0. Some organisations also accept the CC Zero (CC0) and/or the non-commercial CC BY-ND licence (for the licences, see point 4.2 below).⁹¹ However, the secondary exploitation right does not entitle you to publish the works under an open licence such as CC BY because these licences grant comprehensive rights of use and also enable types of exploitation that are not covered by the secondary exploitation right (see point 2.3 above and point 4.1 below).⁹²

The statutory secondary exploitation right thus differs significantly from the open access mandates under Plan S.⁹³ Due to its narrow scope of application, the secondary exploitation right should be revised and/or supplemented by further measures in order to achieve the objectives of open access.⁹⁴

3.4. Funding organisation

Many research funding organisations now have an open access strategy and in particular demand that embargo periods for scientific publications from third-party funded projects be further shortened or abolished (e.g. EU, FWF).⁹⁵

The European Union in particular promotes open science practices such as open access publications and open research data in accordance with the FAIR principles in its research and innovation programmes such as Horizon 2020 and its direct successor Horizon Europe.⁹⁶

However, if compliance with open science practices becomes a condition for receiving funding, care must be taken to ensure that the necessary funding is provided for the transparent, non-discriminatory publication of research results.⁹⁷

⁹⁰ Homar in Thiele/Burgstaller UrhG⁴ § 37a Rz 43.

⁹¹ Plan S, "Plan S Rights Retention Strategy", <https://www.coalition-s.org/rights-retention-strategy/>.

⁹² Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 55; see also *Appl* in Kucsko/Handig, *urheber.recht*² § 37a UrhG (as of 1 April 2017, rdb.at) para. 53.

⁹³ Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 39.

⁹⁴ *Appl* in Kucsko/Handig, *urheber.recht*² § 37a UrhG (as of 1 April 2017, rdb.at) Rz 11.

⁹⁵ Mayer K., Open Access in Transition: Infrastructures, Monitoring and Governance as Key Elements of a Successful Transformation. Baseline Report for the Austrian Federal Ministry of Education, Science and Research (2022), 11.

⁹⁶ https://research-and-innovation.ec.europa.eu/strategy/strategy-2020-2024/our-digital-future/open-science_de.

⁹⁷ Recommendation (EU) 2018/790 of the EU Commission on access to and preservation of scientific information, point 2 (2) and (3).

The following two examples illustrate the possible **legal mechanisms for rights retention by funding bodies**.

3.4.1. Horizon Europe

In **Horizon 2020**, Open Access was defined as the obligation of project participants to create "open and free access for end users". The publications resulting from the project should at least be able to be read, downloaded and printed online. However, the EU Commission did not provide for any specific licence obligations, but merely recommended the use of Creative Commons or similar licences such as CC BY to grant users additional rights (e.g. the right to copy, distribute, search, link, crawl and exploit).⁹⁸

In the new **Horizon Europe** research framework programme, the European Union has taken a further step towards Open Science⁹⁹ with the implementation of Plan S.¹⁰⁰ In the *grant agreement*¹⁰¹, the funding recipients are obliged to make their publications available under a Creative Commons licence from the start of the project at the latest at the time of publication.¹⁰² This is a so-called **prior obligation within the meaning of Plan S**.¹⁰³

To ensure open access to the results of funded research, Horizon Europe beneficiaries must ensure the following:

1. a machine-readable electronic **copy** of the published version or the final, *peer-reviewed manuscript* accepted for publication is deposited in a trustworthy **repository for scientific materials** at the latest at the time of publication of a publication. Certified repositories (e.g. CoreTrustSeal, nestor Seal DIN31644, ISO16363) and subject- or discipline-specific repositories that are generally used by the scientific community (e.g. ELIXIR deposition databases) are considered trustworthy.¹⁰⁴
2. the publications are made freely accessible **immediately** via the repository. An embargo period is not permitted.
3. publications must be published under the latest version of the Creative Commons Attribution International Public Licence (**CC BY**) or a licence with equivalent rights. In the case

⁹⁸ https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/open-access-obligations-horizon-europe-what-are-cc-licences-2021-11-15_en.

⁹⁹ Cf. Art. 2 no. 5, Art. 14, Art. 39 and EC 7 and EC 8 Regulation (EU) 2021/695 establishing Horizon Europe, the Framework Programme for Research and Innovation, and its rules for participation and dissemination of results.

¹⁰⁰ Mayer K., Open Access in Transition: Infrastructures, Monitoring and Governance as Key Elements of a Successful Transformation. Baseline Report for the Austrian Federal Ministry of Education, Science and Research (2022), 28.

¹⁰¹ Horizon Europe (HORIZON) Euratom Research and Training Programme (EURATOM), "General Model Grant Agreement / EIC Accelerator Contract" (HE MGA - Multi & Mono), Version 1.1, 15.4.2022, https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/common/agr-contr/general-mga_horizon-euratom_en.pdf#page=108.

¹⁰² Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 26f.

¹⁰³ Plan S, "Plan S Rights Retention Strategy", <https://www.coalition-s.org/rights-retention-strategy/>.

¹⁰⁴ FAQ Under Horizon Europe, what is a trusted repository? <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/support/faq/19535?type=:categories=null;tenders=:programme=null;freeTextSearchKeyword=Trusted%20repositories;matchWholeText=true;period=null;status=0;sortQuery=publicationDate;faqListKey=faqSearchTablePageState>.

of monographs and other long text formats, the licence may exclude commercial uses and derivative works (e.g. CC BY-NC, CC BY-ND).

4. information on research results or other tools and instruments required to validate or verify the findings must be made available via the repository.

5 The **metadata** must contain at least the following information: Publication (author(s), title, date of publication, place of publication); Horizon Europe or Euratom funding; name, acronym and number of the project; licensing conditions; persistent identifiers for the publication, the authors involved and, where possible, their organisations and funding. Where applicable, the metadata must include persistent identifiers for all research results or other tools and instruments necessary to validate or verify the findings. The metadata must be made available under a Creative Commons Public Domain Dedication (CC Zero - **CC0**) or equivalent in accordance with the FAIR principles (in particular machine-readable).

Reservation of rights is required. If the results are published elsewhere (e.g. in a specialist journal or as a monograph with a publisher), the beneficiaries (or authors) must reserve sufficient intellectual property rights to fulfil these requirements.¹⁰⁵

It should also be noted that Horizon Europe only reimburses publication fees for peer-reviewed scientific publications in Open Access media.¹⁰⁶

Further information on the Open Science commitments in Horizon Europe can be found in the Annotated Grant Agreement¹⁰⁷, in the **FAQs** on the Funding & Tenders Portal of the European Commission¹⁰⁸ and in the Guide to Intellectual Property Management in Horizon Europe¹⁰⁹.

3.4.2. Fund for the Promotion of Scientific Research ("FWF")

All research results that originate in whole or in part from FWF-funded projects must be made freely accessible on the internet.¹¹⁰ Since 2021, the FWF has required, as specified in the Plan S roadmap, that publications be published without delay under a CC BY licence for the golden or green road.¹¹¹ This obligation is enshrined in the funding guidelines.¹¹²

For peer-reviewed publications (e.g. journal articles) from FWF projects approved before 1 January 2021, the current Open Access Policy continues to apply.¹¹³

¹⁰⁵ Annex 5 to the Horizon Europe GMGA additional obligations for article 17, Open science: open access to scientific publications, 110f.

¹⁰⁶ Annex 5 to the Horizon Europe GMGA additional obligations for article 17, Open science: open access to scientific publications, 110f.

¹⁰⁷ EU Grants, AGA - Annotated Grant Agreement, EU Funding Programmes 2021-2027, Version 1.0 - DRAFT, 1.4.2023, https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/common/guidance/aga_en.pdf.

¹⁰⁸ <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/support/faq>.

¹⁰⁹ https://intellectual-property-helpdesk.ec.europa.eu/ip-management-and-resources/ip-eu-funded-projects_en.

¹¹⁰ <https://www.fwf.ac.at/de/forschungsfoerderung/open-access-policy>.

¹¹¹ Mayer K., Open Access in Transition: Infrastructures, Monitoring and Governance as Key Elements of a Successful Transformation. Baseline Report for the Austrian Federal Ministry of Education, Science and Research (2022), 76.

¹¹² FWF funding guidelines (01.01.2022, version 1), point 13.2 with reference to the Open Access Policy.

¹¹³ https://www.fwf.ac.at/fileadmin/files/Dokumente/Open_Access/FWF_OAPublikationen_2019.pdf.

The current Open Access guidelines for FWF projects approved after 31 December 2020 distinguish between **publications such as journal articles** on the one hand and book publications such as monographs and edited volumes on the other. For the latter, the general rules are relaxed (see below).

1. authors generally have **three publication options** available to them.¹¹⁴ In addition to publication in an open access publication medium (Gold Open Access) and publication in a subscription journal that is part of a transformative open access agreement or in a transformative journal (Hybrid Open Access), publication in a subscription journal and archiving of the accepted manuscript (Green Open Access) is also permitted. However, self-archiving must take place at the time of publication. An **embargo period** - as provided for in the statutory secondary exploitation right - is therefore **not permitted**.

2. the Creative Commons Attribution Licence (**CC BY**) or an equivalent free licence must always be used for publication. In exceptional cases, the FWF may approve the use of the Creative Commons Attribution - Non-commercial licence (CC BY-ND) upon request, which does not permit commercial use of the licensed work.

3 In order to enable authors to fulfil these obligations, the FWF requires, in accordance with Plan S, that **manuscripts** be accompanied **by the following licence notice** ("*Acknowledgement and Copyright*") when they are submitted to a publisher or other user:

- For publications in English: "*This research was funded in whole, or in part, by the Austrian Science Fund (FWF) [Grant number]. For the purpose of open access, the author has applied a CC BY public copyright licence to any Author Accepted Manuscript version arising from this submission.*"
- For publications in German: "*This research was funded in whole or in part by the Austrian Science Fund (FWF) [project number]. For the purpose of open access, the author has granted a Creative Commons Attribution CC BY licence for any accepted manuscript version resulting from this submission.*"

This construct is a so-called **prior licence** within the meaning of Plan S, which requires the application of a CC licence to all future manuscripts from the start of the project.¹¹⁵

It should be emphasised that simply displaying a CC BY licence is not enough. Rather, funding recipients must ensure that their publications or manuscripts remain accessible to the public under the terms of the CC BY licence.¹¹⁶ This should be particularly emphasised in the funding guidelines and the open access policy.

¹¹⁴ FWF, Open Access for Refereed Publications, <https://www.fwf.ac.at/de/forschungsfoerderung/open-access-policy/open-access-fuer-referierte-publikationen>.

¹¹⁵ Plan S, "Plan S Rights Retention Strategy", <https://www.coalition-s.org/rights-retention-strategy/>.

¹¹⁶ Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 27.

For projects with a term of more than five years, the copyright restrictions on the transfer of rights to use future works must also be taken into account (see point 3.5).¹¹⁷

In addition, the FWF requires that publications be deposited **in a repository for long-term archiving from the time of publication**, regardless of the open access option selected. Publications can be deposited in either institutional or discipline-specific repositories. The FWF links to a list of open access repositories that can be selected.¹¹⁸ In the field of social sciences and humanities, the archives ARCHE, GAMS and AUSSDA, which are certified with the Core Trust Seal¹¹⁹, should be mentioned in particular.¹²⁰

Book publications can also be published as an open access publication. Alternatively, however, open access can be ensured by self-archiving the publisher's version or the accepted manuscript in a registered institutional, discipline-specific or open-discipline repository. Self-archiving must take place under a CC BY licence after twelve months of embargo at the latest. The use of the CC BY-NC licence is possible. In addition, long-term archiving of the publication and information on the metadata in the FWF e-book library is required.¹²¹

3.5. Research facilities

Publicly funded research institutions should develop institutional strategies to achieve the goals of Open Science.¹²² In contrast to the rights retention strategies of funding organisations, the existing open access strategies of research institutions do not generally contain any open access mandates (see e.g. University of Graz¹²³, Paris Lodron University of Salzburg¹²⁴ and University of Vienna¹²⁵). Rather, they have **the character of a recommendation**, which is due to the fact that research institutions want to avoid a possible restriction of the freedom of publication and academic freedom of their members.

The framework conditions for rights retention at research institutions are analysed below. In particular, the question of whether open access obligations can be introduced is addressed.

¹¹⁷ § 31 UrhG; Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 28ff.

¹¹⁸ <https://v2.sherpa.ac.uk/opensoar/>.

¹¹⁹ <https://www.coretrustseal.org/>.

¹²⁰ Reiter-Pázmándy, Data Access for the Social Sciences in Austria. Open Data, Closed Data, Research Infrastructures and Re-Use, Austrian Journal of Political Science, 1/2021, 16.

¹²¹ Open Access for peer-reviewed book publications, <https://www.fwf.ac.at/de/forschungsfoerderung/open-access-policy/open-access-fuer-referierte-buchpublikationen#c25849>.

¹²² Recommendation (EU) 2018/790 of the EU Commission on access to and preservation of scientific information, point 2 para. 1.

¹²³ <https://ub.uni-graz.at/de/forschen-publizieren/open-access-policy-der-universitaet-graz/>.

¹²⁴ <https://www.plus.ac.at/universitaetsbibliothek/services/open-access/oa-leitbild-plus/>.

¹²⁵ <https://openaccess.univie.ac.at/oa-basisinfos/oa-policy-der-uni-wien/>.

3.5.1. Holder of the rights to scientific publications

The author is the person who has created a work. In principle, he/she is entitled to the exploitation rights to his/her work. **Only in exceptional cases are the employer entitled to the exploitation rights to a work of the employee.** ¹²⁶

Special legal provisions exist only for computer programmes and database works.¹²⁷ If a computer program is created by an employee in fulfilment of his/her official duties, the employer is entitled to an unrestricted right to use the work, unless otherwise agreed.¹²⁸ The same applies to database works created by employees in fulfilment of their official duties.¹²⁹ However, it must be examined on a case-by-case basis whether there is an official obligation to develop software or create a database. Unlike employees in the IT centre, this may not always be the case in the scientific field.¹³⁰

Furthermore, there is no automatic transfer of exploitation rights to works created within the scope of an employment relationship. The employer is reliant on being **granted corresponding rights of use under collective or individual agreements.**¹³¹

The utilisation of intellectual property in the university sector is regulated in the **UG**.¹³² Accordingly, "[e]ach member of the university has the right to publish his or her own academic or artistic work independently".¹³³ The right to publish is mandatory and cannot be waived or restricted in advance in the employment contract with the university.¹³⁴ It is an expression of the fundamental right to academic freedom¹³⁵, which also includes the right to unhindered publication of research results.¹³⁶

Furthermore, the UG does not contain any special provisions for the utilisation of copyrighted works that deviate from the UrhG.¹³⁷ Similarly, there are no relevant provisions in the collective agreement for university employees.¹³⁸

On the other hand, **contracts of employment** - including those with the university's academic and artistic staff - generally provide for the transfer of all (utilisation) rights to the works created by the employees in fulfilment of their official duties. In some employment contracts,

¹²⁶ *Burgstaller* in Thiele/Burgstaller UrhG⁴ § 34 Rz 43.

¹²⁷ *Bücheler* in Kucsko/Handig, *urheber.recht*² § 24 UrhG (as of 1 April 2017, rdb.at) para. 37.

¹²⁸ § Section 40b UrhG.

¹²⁹ § Section 40f (3) UrhG.

¹³⁰ *Nowotny* in Perthold-Stoitzner, UG^{3.01} § 106 (as of 1 December 2018, rdb.at) Rz 1.

¹³¹ *Bücheler* in Kucsko/Handig, *urheber.recht*² § 24 UrhG (as of 1 April 2017, rdb.at) Rz 37ff.

¹³² As far as can be seen, the Universities of Applied Sciences Act and the Private Universities Act do not contain any comparable provisions.

¹³³ § Section 106 para. 1 sentence 1 UG.

¹³⁴ *Nowotny* in Perthold-Stoitzner, UG^{3.01} § 106 (as of 1 December 2018, rdb.at) Rz 1.

¹³⁵ Art 17 Basic Law of 21 December 1867 on the general rights of citizens for the kingdoms and states represented in the Imperial Council ("StGG").

¹³⁶ *Grimm* in Pfeil/Grimm/Schöberl, *Personalrecht der Universitäten*² § 106 UG (as of 1 October 2021, rdb.at) Rz 1.

¹³⁷ *Nowotny* in Perthold-Stoitzner, UG^{3.01} § 106 (as of 1 December 2018, rdb.at) Rz 1.

¹³⁸ Collective agreement for university employees 2023, version with 15th AMENDMENT AND 16th AMENDMENT, <https://uniko.ac.at/organisation/dachverband/kollektivvertrag/>.

however, the publishing rights for print and online publications of academic works are expressly excluded.¹³⁹

Furthermore, in the case of works created by the employee in fulfilment of official duties, a conclusive (implied) granting of rights in favour of the employer is to be assumed, unless otherwise agreed. According to the transfer of purpose theory, however, the employer is only granted rights insofar as this corresponds to the purpose of the employment relationship.¹⁴⁰ The employer must prove that the employee has actually performed his or her work in fulfilment of his or her official duties.¹⁴¹

Part of the **official duties** of academic and artistic staff is indisputably to contribute to the fulfilment of tasks in research and the development and development of the arts as well as teaching ("research and teaching duties").¹⁴²

However, it is disputed whether the writing of copyright-protected works such as monographs and scientific articles is part of the official duties.¹⁴³ According to the Administrative Court, no obligation for university lecturers to publish academic works can be derived from the legally standardised official duties. It is up to them to decide whether or not to make their own research work accessible to the public. This is derived from the freedom of science, which includes not only the choice of research subject and research method but also the recording and publication of the results.¹⁴⁴

However, despite this decision, some in the literature argue that the research obligation also entails a publication obligation for academic and artistic staff because academic and artistic publications are a key parameter for research output and are a central criterion in the performance agreements and in the annual intellectual capital report. The publication obligation is also explicitly standardised in many of the universities' good scientific practice guidelines.¹⁴⁵ In my opinion, however, this refers to a general obligation that does not include the publication of specific research results and cannot lead to the transfer of rights in individual cases.¹⁴⁶

¹³⁹ For the University of Vienna, see *Amini/Huß*, *Lehren mit (digitalen) Medien* (1.2.2017), 41; and information on patents and service inventions: "By signing the employment contract, you as a university professor grant the University of Vienna all property and intellectual property rights to the work you have performed within the scope of your official duties; at the same time, you grant the University of Vienna exclusive and irrevocable rights of use that are unlimited in terms of time, space and subject matter if a full transfer of rights is not legally possible. **Exceptions:** - Publishing rights for print publications of scientific works - Expert opinions based on ad personam research assignments of third parties", <https://neue-professuren.univie.ac.at/informationen-fuer-berufungskandidatinnen/professur-allgemeine-rahmenbedingungen/patente-und-diensterfindungen/>.

¹⁴⁰ *Burgstaller* in Thiele/Burgstaller *UrhG*⁴ § 34 Rz 44 with reference to OGH 4 Ob 182/04z.

¹⁴¹ *Bücheler* in Kucsko/Handig, *urheber.recht*² § 24 *UrhG* (as of 1 April 2017, rdb.at) Rz 39.

¹⁴² *Grimm* in Pfeil/Grimm/Schöberl, *Personalrecht der Universitäten*² § 105 UG (as of 1 October 2021, rdb.at) Rz 3.

¹⁴³ *Amini/Huß*, *Teaching with (digital) media* (1.2.2017), 35.

¹⁴⁴ VwGH 27. 6. 2012, 2011/12/0172; *Grimm* in Pfeil/Grimm/Schöberl, *Personalrecht der Universitäten*² § 106 UG (as of 1 October 2021, rdb.at) Rz 2.

¹⁴⁵ *Grimm* in Pfeil/Grimm/Schöberl, *Personalrecht der Universitäten*² § 106 UG (as of 1 October 2021, rdb.at) Rz 2.

¹⁴⁶ *Baumann/Krahn/Lauber-Rönsberg*, *Research Data Management and Law* (2021), 40.

As a result, in my opinion, it can generally be assumed that while the rights to teaching and learning materials are transferred to the research institution, the rights to scientific publications remain with the employees.¹⁴⁷

However, the question of the exact scope of service obligations cannot be answered in general terms, but must always be assessed on the basis of the individual case and the specific circumstances.¹⁴⁸

3.5.2. Open Access mandates for scientific publications?

Even if the rights to scientific publications lie with the researchers, this does not necessarily mean that they are free to decide whether and how to publish their scientific publications. In particular, researchers must take into account the rights retention strategies of the funding organisations in the case of scientific publications resulting from **third-party funded projects**. It is therefore essential that research institutions do not create obligations that make it more difficult to fulfil the open access mandates of funding bodies.

An open access obligation compatible with the principles of Plan S can generally be introduced for employees of a research institution by means of a statutory or (collective) contractual provision. Possible **legal mechanisms for rights retention** include both a transfer of rights to the research institution, so that it itself ensures open access to a scientific publication, and a publication obligation for researchers (see point 3.4 above).

3.5.2.1. Transfer of rights to scientific publications

The UG already contains special regulations for service inventions within the meaning of the Patent Act 1970 ("PatG"). All inventions that arise in the context of research projects or projects for the development and opening up of the arts at the university with university resources or through the university know-how of employees are to be qualified as service inventions.¹⁴⁹ This includes service inventions by all employees of the university, regardless of the type of employment or service relationship.¹⁵⁰

The University has a **legal right to seize** the service invention. If the University wishes to claim the service invention in its entirety or a right to use it, the Rectorate must inform the inventor of this before the expiry of three months. Otherwise, the inventor shall have the sole right of utilisation.¹⁵¹ In order for the University to be able to exercise its right of utilisation, a **reporting obligation** is provided for. Every service invention must be reported to the Rectorate without delay.¹⁵²

¹⁴⁷ Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 31.

¹⁴⁸ Amini/Huß, Teaching with (digital) media (1.2.2017), 41f.

¹⁴⁹ § Section 7 (3) PatG; Grimm in Pfeil/Grimm/Schöberl, Personalrecht der Universitäten² Section 106 UG (as of 1 October 2021, rdb.at) Rz 7.

¹⁵⁰ § Section 106 para. 2 UG; Grimm in Pfeil/Grimm/Schöberl, Personalrecht der Universitäten² Section 106 UG (as of 1 October 2021, rdb.at) margin no. 8.

¹⁵¹ § 106 para 3 UG.

¹⁵² § 106 para 3 UG.

Once the invention has been taken up by the university, the university and the inventor must jointly ensure the transfer of rights in third-party funded projects.¹⁵³ The inventors are entitled to appropriate remuneration, which is due upon receipt of the realisation proceeds.

¹⁵⁴

In addition to patentable inventions, there are other commercially exploitable results of university research and development such as technologies without intellectual property rights (e.g. published cell lines, antibodies, plasmids, mouse models, methods, research reagents, secret technical knowledge) to which the right of seizure does not apply. Further special regulations exist in the area of design protection, semiconductor protection and plant variety protection as well as for computer programmes and databases. In order to safeguard the university's rights to research and development results, it is recommended that regulations on notification, utilisation, rights of use and remuneration in accordance with Section 106 (2) and (3) UG be established by means of guidelines issued by the Rectorate or provisions in the statutes.¹⁵⁵

The legal regulation of the right of access means that no separate contractual agreement is required to grant the employer the rights to the service inventions.¹⁵⁶ However, since the publication of scientific publications is not generally an official obligation of the researcher, extending the right of access to these would be inappropriate and probably a violation of the freedom of science.

It should also be noted that the purpose of the special provisions under patent law for service inventions is to protect the employee. In particular, appropriate remuneration should be ensured in the event that the invention is transferred to the employer.¹⁵⁷ Such protection vis-à-vis the employer is not necessary in the case of scientific publications.

Furthermore, the statutory publication right ensures that university members can publish their own scientific or artistic work independently (see above).¹⁵⁸ However, this provision probably only relates to the first publication and therefore does not necessarily prevent an original assignment or transfer of the **secondary exploitation right** to the research institution.

¹⁵⁹

However, in the case of a (collective) contractual transfer of exploitation rights to the scientific publications that a researcher produces within the scope of his/her employment to the research institution, the copyright provisions on **future works must** also be observed. If the

¹⁵³ *Grimm* in Pfeil/Grimm/Schöberl, Personalrecht der Universitäten² § 106 UG (as of 1 October 2021, rdb.at) Rz 11; aA *Nowotny* in Perthold-Stoitzner, UG^{3.01} § 106 (as of 1 December 2018, rdb.at) Rz 3: In the context of contract research pursuant to § 26 and § 27 para. 1 no. 3 UG, the ex lege right of recourse does not apply.

¹⁵⁴ *Grimm* in Pfeil/Grimm/Schöberl, Personalrecht der Universitäten² § 106 UG (as of 1 October 2021, rdb.at) Rz 12.

¹⁵⁵ *Grimm* in Pfeil/Grimm/Schöberl, Personalrecht der Universitäten² § 106 UG (as of 1 October 2021, rdb.at) margin no. 13.

¹⁵⁶ *Burgstaller*, Österreichisches Patentrecht² EINSCHUB: DIENSTERFINDUNGEN IM HOCHSCHULBEREICH (as of 1 July 2021, rdb.at) Pkt 1.2.

¹⁵⁷ *Burgstaller*, Österreichisches Patentrecht² § 7 Patentgesetz (as of 1 July 2021, rdb.at) E 1 (OGH 05 February 1985, 4 Ob 5/85 - GRUR-Int 1986, 624 ff).

¹⁵⁸ § Section 106 para. 1 sentence 1 UG.

¹⁵⁹ *Appl* in Kucska/Handig, urheber.recht² § 37a UrhG (as of 1 April 2017, rdb.at) margin no. 11 (FN 24).

author undertakes to grant another party exclusive or exclusive rights ("rights of use") - which are required for publication under an open licence (see point 4.1 below) - to all works that are not specified in detail or only in terms of genre, which he/she will create within a period exceeding five years, he/she may unilaterally terminate this blanket grant of rights after the expiry of five years.¹⁶⁰

In addition to the restriction of scientific freedom, this mandatory right of termination represents a further almost insurmountable hurdle for the rights retention strategies of research institutions, which provide for a so-called prior licence for the scientific publications of researchers (see point 3.4 above).¹⁶¹

However, an independent transfer of the authorisation to exercise the statutory secondary exploitation right to future works would probably not be affected by the right of termination. Rights retention strategies according to the principles of Plan S cannot, however, be based on the statutory secondary exploitation right (see point 3.3 above).

3.5.2.2. Publication obligation for scientific publications

In addition to the right of access discussed above, the UG recognises a **statutory publication obligation** for positively assessed diploma theses, master's theses and dissertations.¹⁶² This obligation must be fulfilled by submitting them to the library of the university at which the academic degree is awarded. The university's statutes may stipulate that the publication must be made in electronic form in a publicly accessible repository.¹⁶³

The reason for the introduction of this regulation was that only a small fraction of the works were published and therefore it was hardly possible to analyse the content of these works. Furthermore, plagiarism in published work can be detected more easily.¹⁶⁴

However, students have a subjective right to exclude the use of the delivered copies for a maximum of five years after delivery if they can credibly demonstrate that important legal or economic interests would be jeopardised.¹⁶⁵ This provision primarily enables the work to be utilised as a commercial publication.

A significant difference to an open access mandate in accordance with the principles of Plan S is that the work is made available free of charge, but not under a Creative Commons or equivalent free licence.¹⁶⁶ However, the current mode of publication is sufficient to fulfil the purpose of the law.

¹⁶⁰ § 31 UrhG.

¹⁶¹ Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 29, 54.

¹⁶² § 86 UG.

¹⁶³ Perthold-Stoitzner in Perthold-Stoitzner, UG^{3.01} § 86 (as of 1 December 2018, rdb.at) Rz 1.

¹⁶⁴ Perthold-Stoitzner in Perthold-Stoitzner, UG^{3.01} § 86 (as of 1 December 2018, rdb.at) Rz 1.

¹⁶⁵ § Section 86 para. 4 UG; Perthold-Stoitzner in Perthold-Stoitzner, UG^{3.01} Section 86 (as of 1 December 2018, rdb.at) margin no. 4f.

¹⁶⁶ Cf. e.g. FAQ u:theses and HoPla, Which rights/licences are granted? "Creative Commons licences are granted in most open access repositories. However, as these can no longer be changed or withdrawn after publication, u:theses deliberately refrains from granting licences.", <https://utheses.univie.ac.at/about>.

Furthermore, it is not appropriate to extend the legal obligation to publish to researchers because they usually publish (or endeavour to publish) their scientific publications. However, researchers should be supported in voluntarily depositing complete versions of their scientific publications in the university's own repositories and publication archives, provided there are no legal obstacles to this.

However, a **secondary publication obligation** for researchers could be provided for in order to fully utilise the benefits of this legal instrument. This obligation can either be provided for by law or introduced by the research institutions through a so-called prior obligation (see point 3.4 above).

3.6. Patent application and open access publications

Inventions in all fields of technology are patentable, provided they are new, are not obvious to a person skilled in the art from the prior art and are industrially applicable.¹⁶⁷

An invention is considered new if it does not form part of the state of the art. The state of the art is everything that has been made available to the public before the priority date of the application.¹⁶⁸

A publication is therefore only **prejudicial to novelty** if it was made before the application was filed, because it was already prior art on the day before the application was filed. However, if the invention applied for is also published on the day the application is received, there is no prior publication "prejudicial to novelty". Material published on or after the priority date (post-published material) is irrelevant.¹⁶⁹

Furthermore, publication is only prejudicial to novelty if the invention is made accessible, i.e. can be analysed and reproduced by a person skilled in the art.¹⁷⁰

The university's right of access is in **tension** with the right of publication because the possibility of patent protection may be lost as a result of publication (see point 3.5 above). However, as employees, the researchers are subject to a confidentiality obligation under patent law for the duration of the right of access period in order to maintain the novelty and thus patentability of the service invention.¹⁷¹ If the right of access is exercised, the employee is obliged to exercise his/her right of publication in agreement with the university and any third-party funders in order to enable the optimisation of patent protection (e.g. through secret further development).¹⁷²

¹⁶⁷ § 1 PatG.

¹⁶⁸ § 3 PatG.

¹⁶⁹ *Burgstaller*, Austrian Patent Law² § 3 Patent Act (as of 1 July 2021, rdb.at) pt. 1.

¹⁷⁰ *Burgstaller*, Austrian Patent Law² § 3 Patent Act (as of 1 July 2021, rdb.at) E 9.

¹⁷¹ § Section 13 PatG; *Burgstaller*, Österreichisches Patentrecht² EINSCHUB: DIENSTERFINDUNGEN IM HOCHSCHULBERICH (as of 1 July 2021, rdb.at) Pkt 1.1.

¹⁷² *Nowotny* in Perthold-Stoitzner, UG^{3.01} § 106 (as of 1 December 2018, rdb.at) Rz 4; *Grimm* in Pfeil/Grimm/Schöberl, Personalrecht der Universitäten² § 106 UG (as of 1 October 2021, rdb.at) Rz 4.

Open Science is compatible with the commercial exploitation of research results through patenting. However, a patent must be applied for before an open access publication. Commercial use and other restrictions such as data protection regulations, privacy, confidentiality or trade secrets are also recognised as legitimate confidentiality interests of the data owner in the case of open data.¹⁷³

3.7. Excursus: Open access agreements with publishers

The baseline report describes how the financing of the publication process is shifting **from acquisition and subscription costs to publication costs** in the course of the open access transformation. Initially, the focus was on so-called offsetting contracts, in which it is calculated what is read and what is published, and then the publication costs are deducted from the reading costs. In the meantime, so-called read and publish (RAP) agreements have become more common, in which a fee is agreed for "reading" or access to the journals and a further fee for publishing in these journals. Increasingly, publishers' data analysis services are also becoming the subject of open access agreements.¹⁷⁴

Another development is the so-called **big deals**, where subscriptions are no longer taken out for individual magazines, but rather large packages that provide access to many or even all of a publisher's digital magazines or publications.¹⁷⁵

In connection with open access agreements, the lack of transparency of contracts, which is partly due to non-disclosure agreements, and the market power of large publishers are repeatedly criticised. There are also fears of lock-in effects for research institutions in the case of data analysis services.¹⁷⁶

The **EU Commission** therefore recommends publishing **information on agreements** between public organisations or groups of such organisations and publishers. This should support market transparency and fair competition. This applies in particular to the so-called big deals and the corresponding offsetting agreements. In order to obtain transparent, optimal conditions for open access to publications, including re-use, the EU Commission also recommends **joint negotiations** with publishers.¹⁷⁷

In accordance with this recommendation, open access agreements are negotiated with major publishers for Austrian universities, research institutes and other educational institutions by the Austrian Academic Media Co-operation (**KEMÖ**).¹⁷⁸

¹⁷³ EU Commission, FAQ Funding & Tenders Portal, Are the requirements for open science and exploitation conflicting in Horizon Europe?, <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/support/faq/19532>.

¹⁷⁴ Mayer K., Open Access in Transition: Infrastructures, Monitoring and Governance as Key Elements of a Successful Transformation. Baseline Report for the Austrian Federal Ministry of Education, Science and Research (2022), 26f, 33f, 42.

¹⁷⁵ Mayer K., Open Access in Transition: Infrastructures, Monitoring and Governance as Key Elements of a Successful Transformation. Baseline Report for the Austrian Federal Ministry of Education, Science and Research (2022), 33.

¹⁷⁶ Mayer K., Open Access in Transition: Infrastructures, Monitoring and Governance as Key Elements of a Successful Transformation. Baseline Report for the Austrian Federal Ministry of Education, Science and Research (2022), 82f.

¹⁷⁷ Recommendation (EU) 2018/790 of the EU Commission on access to and preservation of scientific information, point 1 para 2 subpara 5 and point 2 para 5.

¹⁷⁸ <https://www.kemoe.at/open-access/informationen-und-kontakte>.

As with publishing agreements, **freedom of contract** also applies in principle to open access agreements.¹⁷⁹ However, the dispositive general provisions of the ABGB are supplemented by copyright contract law, in particular by mandatory reservations in favour of the author (see point 2.6 above).¹⁸⁰

A **statutory transparency obligation** for open access agreements would, by its very nature, be a provision under copyright contract law and should therefore be enshrined in the Copyright Act. However, contract law regulations only apply if the contract is subject to Austrian law. In the case of contracts with foreign publishers, it would therefore have to be examined on a case-by-case basis whether a choice of law has been made in favour of Austrian law. It is doubtful whether the transparency obligation would apply as an overriding mandatory provision within the meaning of Art 9 Rome I Regulation if foreign law were applicable. A final clarification would be reserved to the courts (see point 2.5 above).

4. Open Educational Resources (OER) and open licences

4.1. Free educational resources

Open Educational Resources (OER) are **free educational resources** that are made available for free use, editing and redistribution.¹⁸¹

The UNESCO Paris Declaration (2012) clarifies the term. According to this, OER are "teaching, learning and research resources in the form of any medium, digital or otherwise, that are in the public domain or published under an open licence that permits free access, use, adaptation and redistribution by others without or with minor restrictions."¹⁸² Individual materials (e.g. streaming videos, podcasts) as well as complete courses, books or multimedia applications can therefore be made available as OER.¹⁸³

As with open access, open content and open source software, the term "open" in OER refers to copyright-protected works whose further use is permitted by the rights holders under an "open" licence.¹⁸⁴ The **principle of open licensing** operates within the existing framework of copyright law, as defined by relevant international agreements, and respects the authorship of a work.¹⁸⁵ This aspect of knowledge transfer is also inextricably linked to open science and an open society per se. The concept of open data is also closely linked to the dissemination of knowledge.¹⁸⁶

¹⁷⁹ See, for example, basic information on publishing contracts, including information on the Austrian model publishing contract, <https://www.literaturhaus.at/index.php?id=6921>.

¹⁸⁰ Schopper in Fenyves/Kerschner/Vonkilch (eds.), ABGB: Großkommentar zum ABGB - Klang-Kommentar - §§ 1165 to 1174, Werkvertrag³ (2020) zu § 1172, 1173 ABGB Rz 4.

¹⁸¹ <https://www.openeducation.at/was-sind-oer/>.

¹⁸² Paris Declaration on OER (2012), UNESCO World Congress on Open Educational Resources, Paris, 20-22 June 2012.

¹⁸³ German Commission for UNESCO, What are Open Educational Resources? And other frequently asked questions about OER (2013).

¹⁸⁴ Kreutzer/Lahmann, Legal Issues in Open Science (2nd edition, 2021), 57.

¹⁸⁵ Paris Declaration on OER (2012), UNESCO World Congress on Open Educational Resources, Paris, 20-22-6.2012.

¹⁸⁶ Open Science Policy Austria (2022), 11.

The "opening up" of protected content requires the use of standard licences, which are available in large numbers and in different variants for free use. The following **licence types** can be distinguished according to the licensed content:

- Open Content licences for licensing content of any kind (such as photos, texts, graphics, videos);
- Open source licences for the licensing of computer programs in any form; and
- Open Data licences for the licensing of databases (e.g. Open Database Licence).¹⁸⁷

Open licences are used to grant comprehensive rights of use to the respective protected object (image, text, software, etc.). Only the rights holder is authorised to do this, so only the author or the holder of exclusive rights of use ("rights of use") can be the **licensor**.¹⁸⁸ Open licences are usually irrevocable.

4.2. Licences from Creative Commons

4.2.1. An overview for scientific practice¹⁸⁹

Creative Commons ("CC") licences have established themselves as the **standard** for open content licences. Each licence consists of a legally binding contractual text ("*licence*"), a short version of the licence terms for non-lawyers ("*deed*") and a machine code for the automatic recognition of licences by search technologies ("*machine readable version of licence*").¹⁹⁰

¹⁸⁷ Kreutzer/Lahmann, Legal Issues in Open Science (2nd edition, 2021), 58.

¹⁸⁸ Kreutzer/Lahmann, Legal Issues in Open Science (2nd edition, 2021), 66.

¹⁸⁹ For further questions, see Škorjanc, **Open Education Austria - FAQ Urheberrecht (as of 17 February 2023), part Creative Commons licences**, available at <https://www.openeducation.at/oer-faqs/>.

¹⁹⁰ Borski/Fischer/Muß-Merholz/Kreutzer/Sewerin, Freie Lizenzen - einfach erklärt, Ein Leitfaden für die Anwendung freier Lizenzen in der Bertelsmann Stiftung (2017), 24.

The CC licences have **four licence modules**. The restrictions of the NC, ND and SA modules are legal reservations. This corresponds to the Creative Commons motto "*some rights reserved*".¹⁹¹



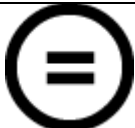

Licence module	Abbreviation	Description of the
	BY	<i>Attribution</i> - The author of a work must be named as he/she specifies.
	NC	No commercial use (<i>non-commercial</i>) - Rights for commercial use must be clarified individually with the rights holder.
	ND	<i>No derivatives (no derivatives)</i> - Rights for editing must be clarified individually with the rights holder.
	SA	Distribution under the same conditions (<i>share alike</i>) - Adaptations may only be published under the same or comparable licence conditions ("copyleft" principle)








Illustration 2 Four licence modules of CC licences

Six different CC licences are made up of the combinations of the four licence modules. In addition, Creative Commons offers the "unconditional licence" CC Zero (CC0), which is actually a public domain declaration. With this declaration, the rights holder wants to remove as many restrictions on use as possible.¹⁹² This is seen as an effective waiver of all copyright exploitation rights.¹⁹³ In recent years, the CC BY licence variant has established itself as the standard for open access publishing of scientific articles.

¹⁹¹ Kreutzer/Lahmann, Legal Issues in Open Science (2nd edition, 2021), 60.

¹⁹² Kreutzer/Lahmann, Legal Issues in Open Science (2nd edition, 2021), 73f.

¹⁹³ Kucsko/Zemann, CC0 1.0 Universal - Assessment of the waiver and the granting of a licence in the context of the fallback clause under Austrian law (2017), point 2.4.4.

CC - Lizenzen	Bedingungen der Weiterverw.	Namensnennung	Vervielfältigung	Verbreitung	Öffentliche Zugänglichmachung	Bearbeitung	Kommerzielle Nutzung	Weitergabe
 bedingungslose Lizenz „no rights reserved“ CC Zero		+	+	+	+	+		Generell erlaubt
 Namensnennung CC BY	!	+	+	+	+	+		Generell erlaubt
 Namensnennung - Keine Bearbeitung CC BY-ND	!	+	+	+		-	+	Generell erlaubt
 Namensnennung - Nichtkommerziell CC BY-NC	!	+	+	+	+		-	Generell erlaubt
 Namensnennung - Nichtkommerziell - Keine Bearbeitung CC BY-NC-ND	!	+	+	+		-	-	Generell erlaubt
 Namensnennung - Nichtkommerziell - Weitergabe unter gleichen Bedingungen CC BY-NC-SA	!	+	+	+	+		-	Nur unter gleichen Bedingungen
 Namensnennung - Weitergabe unter gleichen Bedingungen CC BY-SA	!	+	+	+	+		+	Nur unter gleichen Bedingungen

Zeichenerklärung: ! ... Muss auf jeden Fall erfolgen + ... Ist erlaubt - ... Ist verboten

Illustration 3 CC licences at a glance; source: Open Learn Ware Team of TU Darmstadt, http://www.e-learning.tu-darmstadt.de/werkzeuge/openlearnware/lehrmaterial_veroeffentlichen/cc_lizenzen/index.de.jsp; licence: CC BY-SA 3.0 DE, <https://creativecommons.org/licenses/by-sa/3.0/de/>.

The licences are represented by abbreviations or pictograms that are attached to the work and quickly provide information about the conditions that the author has set for the further use of his/her work. Various **forms of presentation** are possible for abbreviations or pictograms.¹⁹⁴

¹⁹⁴ Borski/Fischer/Muß-Merholz/Kreutzer/Sewerin, Freie Lizenzen - einfach erklärt, Ein Leitfaden für die Anwendung freier Lizenzen in der Bertelsmann Stiftung (2017), 24.



Abbreviation	CC BY-NC-SA
Written licence notice	Creative Commons Attribution - Non-commercial - Share alike
Pictogram	
Pictogram with icons	

Illustration 4 Representation of CC licences

4.2.2. Checklist for licensors before publication

Before publishing a work under a free licence, some important points should be clarified which are of great importance for the success of the licensing and simplify the further use of works.¹⁹⁵

1. licence selection. The choice of the "right" licence depends on the individual case. It should be borne in mind that every additional licence module and every additional licence obligation creates legal uncertainty. Such legal uncertainties discourage use. Some institutions also specify certain licence types for their own publications, for example on the basis of their own open access policy.¹⁹⁶ Creative Commons provides the "Licence chooser" tool on its website, which can provide guidance.¹⁹⁷

2. rights clearance. The licensor must hold the exclusive rights to the work in order to be allowed to publish the work under a free licence. In the case of combined works (e.g. text and image), it is necessary to clarify the rights for all works and parts of works.¹⁹⁸ Caution is advised in the case of secondary publications by publishers. If a work was first published by a publisher, the exclusive rights of use have usually been transferred. In this case, a secondary publication under an open licence is not permitted without the consent of the publisher, unless the author has reserved this right when transferring the rights.¹⁹⁹

3. licence notice. The work contains a licence notice as a pictogram and a link to the licence conditions.²⁰⁰

4. author's designation and title. The author may determine whether and with which designation (e.g. pseudonym) he/she is named in the work. This information must also be

¹⁹⁵ This checklist is based on *Borski/Fischer/Muuß-Merholz/Kreutzer/Sewerin*, Freie Lizenzen - einfach erklärt, Ein Leitfaden für die Anwendung freier Lizenzen in der Bertelsmann Stiftung (2017), 24 (Infobox 6).

¹⁹⁶ *Kreutzer/Lahmann*, Legal Issues in Open Science (2nd edition, 2021), 62.

¹⁹⁷ <https://creativecommons.org/choose/>.

¹⁹⁸ *Borski/Fischer/Muuß-Merholz/Kreutzer/Sewerin*, Freie Lizenzen - einfach erklärt, Ein Leitfaden für die Anwendung freier Lizenzen in der Bertelsmann Stiftung (2017), 24 (Infobox 6).

¹⁹⁹ *Kreutzer/Lahmann*, Legal Issues in Open Science (2nd edition, 2021), 66.

²⁰⁰ *Borski/Fischer/Muuß-Merholz/Kreutzer/Sewerin*, Freie Lizenzen - einfach erklärt, Ein Leitfaden für die Anwendung freier Lizenzen in der Bertelsmann Stiftung (2017), 18ff.

retained when the work is reused, if it has been provided. It is also advisable to use a meaningful title that is clearly recognisable as such.²⁰¹

5. licence compatibilities. If you combine different third-party content that is subject to different CC licences, or third-party content and your own content, to create a new, uniform work, the CC licences must be "compatible". The problem of licence compatibility only arises with work combinations in which several works are inseparably combined to form a whole.²⁰² Further information on licence compatibility can be found on the Creative Commons website.²⁰³

6. observance of other rights. Personal rights such as the right to one's own image and the right to confidentiality under data protection law of persons appearing in images and/or sound must be observed when publishing the work. The necessary consents must be obtained and documented.²⁰⁴

7. file formats. The work must be provided in a common file format for further use. If works are made up of several components (e.g. texts, figures and tables), it makes sense to provide them in such a way that they can be edited separately, especially if they are made available under different licences.²⁰⁵ Another important aspect is the accessible design of documents and information.

8. metadata. In order to optimise reuse, the work must be provided with metadata such as details of the title and author, description of the work (e.g. with abstract), licence information, date of creation and date of modification as well as keywords that make it easier to find.²⁰⁶

4.3. Open Source Software (OSS)

Open Science does not only include the open provision of data and research results. As part of Open Methods, software used for research should also be made available under an open licence.²⁰⁷

Unlike in the area of open content, where CC licences have established themselves as the standard, there is a vast number of **open source licences** to choose from for software. The licences can be divided into **three main categories**.²⁰⁸

²⁰¹ Borski/Fischer/Muuß-Merholz/Kreutzer/Sewerin, Freie Lizenzen - einfach erklärt, Ein Leitfaden für die Anwendung freier Lizenzen in der Bertelsmann Stiftung (2017), 24 (Infobox 6).

²⁰² Borski/Fischer/Muuß-Merholz/Kreutzer/Sewerin, Freie Lizenzen - einfach erklärt, Ein Leitfaden für die Anwendung freier Lizenzen in der Bertelsmann Stiftung (2017), 25f.

²⁰³ <https://creativecommons.org/faq/#can-i-combine-material-under-different-creative-commons-licenses-in-my-work>.

²⁰⁴ Borski/Fischer/Muuß-Merholz/Kreutzer/Sewerin, Freie Lizenzen - einfach erklärt, Ein Leitfaden für die Anwendung freier Lizenzen in der Bertelsmann Stiftung (2017), 24 (Infobox 6).

²⁰⁵ Borski/Fischer/Muuß-Merholz/Kreutzer/Sewerin, Freie Lizenzen - einfach erklärt, Ein Leitfaden für die Anwendung freier Lizenzen in der Bertelsmann Stiftung (2017), 23.

²⁰⁶ Borski/Fischer/Muuß-Merholz/Kreutzer/Sewerin, Freie Lizenzen - einfach erklärt, Ein Leitfaden für die Anwendung freier Lizenzen in der Bertelsmann Stiftung (2017), 23.

²⁰⁷ Kreutzer/Lahmann, Legal Issues in Open Science (2nd edition, 2021), 63.

²⁰⁸ Kreutzer/Lahmann, Legal Issues in Open Science (2nd edition, 2021), 63.

The main distinguishing feature between the categories is the so-called **copyleft effect**. Further developments of the software must be released under the same licence conditions. When publishing updates, patches or forks of software, the source code of the software elements derived from open source software must be disclosed. The same applies if copyleft software is to be fully or partially integrated into other software or distributed together with other programmes. This principle was the model for the SA module - redistribution under the same conditions - in CC licences.²⁰⁹

Description of the ²¹⁰		Licences
1st category	Licences with strict copyleft	
All further developments may only be distributed under the original licence. This also applies to certain combinations of software components.	GNU General Public Licence (GPL) - Version 3 (GPL-3.0) and Version 2 (GPL-2.0): Most popular copyleft licence.	
	GNU Affero General Public Licence (AGPL) - Version 3 (AGPL-3.0); variant of the GPL that is aimed at programmes that run on a server.	
2nd category	Licences with limited copyleft	
In principle, further developments must be distributed under the original licence. However, the copyleft code combination only applies in special cases that are more or less clearly defined.	GNU Lesser General Public Licence (LGPL) - Version 3 (LGPL-3.0) and Version 2.1 (LGPL-2.1): End users of software are only permitted to modify the LGPL software parts. These are usually used in proprietary software in the form of a dynamic programme library (e.g. DLL) in order to enable the necessary separation between proprietary and open source LGPL parts.	
	Mozilla Public Licence (MPL) - Version 2 (MPL-2.0): Modified or copied source code files must still be published under the MPL, but may be used together with proprietary code in a programme.	
3rd category	Licences without copyleft (permissive licences)	
Permissive licences do not contain any restrictions regarding modifications, further developments and code combinations.	MIT Licence (MIT): The most simply formulated and one of the most permissive licences.	
	Berkeley Software Distribution Licence (BSD): Very permissive, but with further requirements regarding the reuse of names and advertising (protection of the product or brand name).	
	Apache Licence - Version 2.0 (Apache-2.0): Clear definitions of the terms and concepts used in the licence text. Is therefore considered business-friendly.	

Illustration 5 Open source licences at a glance (selection)

²⁰⁹ Kreutzer/Lahmann, Legal Issues in Open Science (2nd edition, 2021), 63.

²¹⁰ Kreutzer/Lahmann, Legal Issues in Open Science (2nd edition, 2021), 64f.

Further information on open source licences can be found in the repository of the Institute for Legal Issues of Free and Open Source Software (**ifrOSS**), which contains a three-digit number of different licences.²¹¹

4.4. Open Data licences

In most legal systems, there are rights to (processed) data that prohibit third parties from using them without express permission. In order to enable **open data uses of research data**, licences are therefore required that "open" these data so that they can be freely used, reused and shared by anyone (see Part 2, point 2 below). Even if it is not clear whether such IP rights are applicable to the data, it is important to specify a licence in order to provide clarity.²¹² When publishing data, the **FAIR principles** (Findable, Accessible, Interoperable, Re-usable) should be followed (see Part 2, point 1 below).

Many organisations, including public administration and educational institutions, use Creative Commons licences to make data available.²¹³ As a rule, the CC BY 4.0 licence is used.²¹⁴ Furthermore, the CC0 is particularly important as a public domain declaration in order to maximise reuse. However, CC does not recommend using its NC and ND licences for databases intended for scientific use.²¹⁵

The licences of the Open Knowledge Foundation, especially the Open Database Licence, are also widely used in the field of open data.²¹⁶ There are also numerous other open data licences.²¹⁷ You can find more information about the licensing of data here.²¹⁸

Description of the		Licences
1st category	Creative Commons licences ²¹⁹	
CC Zero - CC0 1.0 Universal ²²⁰	The widest possible waiver of all copyrights and neighbouring rights to the database and its content.	
CC Attribution - CC BY 4.0 ²²¹	The CC BY 4.0 can be used for the licensing of databases that are subject to copyright and, where applicable, the sui generis neighbouring right for databases. The latter prohibits the reproduction	

²¹¹ <https://ifross.github.io/ifrOSS/Lizenzcenter>.

²¹² *Open Knowledge Foundation*, Open Data Handbook, How can I (as a public authority, administration, organisation, ...) actually open data? available at <http://opendatahandbook.org/guide/de/how-to-open-up-data/>.

²¹³ <https://creativecommons.org/about/program-areas/open-data/>.

²¹⁴ See e.g. <https://www.data.gv.at/en/data/data-publication-guide/> and <https://www.parlament.gv.at/researchieren/open-data/daten-und-lizenz/index.html>.

²¹⁵ https://wiki.creativecommons.org/wiki/Data#Frequently_asked_questions_about_data_and_CC_licenses.

²¹⁶ *Kreutzer/Lahmann*, Legal Issues in Open Science (2nd edition, 2021), 48.

²¹⁷ <https://opendefinition.org/licenses/api/>.

²¹⁸ *Ball*, How to Licence Research Data (2014), <https://alexball.me.uk/docs/ball2011hr?style=plain>.

²¹⁹ https://wiki.creativecommons.org/wiki/Data#Frequently_asked_questions_about_data_and_CC_licenses.

²²⁰ Examples - User: https://wiki.creativecommons.org/wiki/CC0_use_for_data.

²²¹ Examples - User: https://wiki.creativecommons.org/wiki/Data_and_CC_licenses.

	and re-use of essential parts of a database (including the frequent extraction of non-essential parts). In contrast to copyright law, it is not the originality but the investment of the producer that is protected. The individual contents of the database are covered by the licence if they are protected by copyright.
2nd category	Open Data Commons²²²
Open Data Commons Open Database Licence (ODbL) - "Attribution Share-Alike for data/databases"	Open Data Commons licences were developed specifically for the use of databases and not for other types of material. They only apply to the sui generis neighbouring right for databases and the copyright to the database structure. However, they do not apply to the individual contents of the database.
Open Data Commons Attribution Licence (ODC-By) - "Attribution for data/databases"	
Open Data Commons Public Domain Dedication and Licence (PDDL) - "Public Domain for data/databases"	
Database Contents Licence (DbCL)	For this reason, a very simple licence was also created for the content of the database, which can be used in conjunction with the database licences. However, other licences can also be used for the content.

Illustration 6 Open Data licences at a glance (selection)

5. Text and data mining for the purpose of scientific research

5.1. Implementation in Austria

The 2021 amendment to copyright law introduced **free use of works** for text and data mining ("TDM") into the Copyright Act. Text and data mining in the sense of the automated (computer-aided) evaluation of copyrighted (digital) information sources (texts, sounds, images or data) for scientific or artistic research as well as for personal use is permitted.²²³

The Austrian regulation takes into account, for example, the need to archive results for the purpose of verifiability and is generally seen as an important step towards greater legal certainty and access to knowledge and its (machine) reusability.²²⁴

The free use of works is based on an exception to adapt to the digital environment in Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market ("DSM Directive"),

²²² <https://opendatacommons.org/faq/licenses/>.

²²³ Homar in Thiele/Burgstaller UrhG⁴ § 42h.

²²⁴ Mayer K., Open Access in Transition: Infrastructures, Monitoring and Governance as Key Elements of a Successful Transformation. Baseline Report for the Austrian Federal Ministry of Education, Science and Research (2022), 76f.

the implementation of which, however, gives the Member States a certain amount of room for manoeuvre in terms of implementation and design (see Chapter 1, point 4.3).²²⁵

5.2. Requirements for the free use of works²²⁶

TDM is a technique for the **automated analysis** of texts and data in digital form, which can be used to obtain information about patterns, trends and correlations, among other things.²²⁷ Such processes often involve the reproduction of copyrighted content and extractions from databases.²²⁸

1. research organisations, cultural heritage institutions and individual researchers. Acts by natural or legal persons that take place within the framework of the activities of a favoured research institution or cultural heritage institution are privileged. This includes any act of utilisation that can be attributed to the institution.²²⁹

A research institution is defined as an institution whose i) primary objective is scientific or artistic research or research-led teaching and ii) which is not profit-oriented in its activities, reinvests all profits in its scientific or artistic research or is profit-oriented and operates within the framework of a state-recognised mandate in the public interest and iii) in which a company that has a decisive influence on the institution does not have preferential access to the results of scientific research.²³⁰ Cultural heritage institutions are publicly accessible libraries or museums, archives or institutions active in the field of film or audio heritage.²³¹

Research activities within the framework of **public-private partnerships** are also included. In future, research organisations and cultural heritage institutions will therefore also be able to use companies or for-profit research institutions to carry out TDM, including the use of their technical tools and personnel.²³²

In addition, individual non-commercial researchers are also authorised to reproduce copyright-protected works within the framework of TDM for their own research projects. Students who write scientific papers are also considered individual researchers.²³³

2. acts of use for text and data mining. Privileged organisations and persons may reproduce a copyright-protected work (e.g. text, image, database) within the framework of TDM for the purposes of scientific and artistic research if there is lawful access to this work (e.g. creation

²²⁵ Art 3 and Art 4 DSM Directive; see already Recommendation (EU) 2018/790 of the EU Commission on access to and preservation of scientific information, point 1 para 2 subparas 3 and 4.

²²⁶ See also Škorjanc, **Open Education Austria - FAQ Urheberrecht (as at 17 February 2023), New Technologies section**, available at <https://www.openeducation.at/oer-faqs/>.

²²⁷ Art 2 no 2 DSM Directive; 42h para 1 and para 6 UrhG.

²²⁸ Zemann/Zhang, Preview: Copyright Amendment 2021, *ecolex* 2021/634, 974 (977).

²²⁹ ErläutRV 1178 BlgNR 27. GP 26.

²³⁰ § Section 42h (3) UrhG.

²³¹ § Section 42 (7) UrhG.

²³² § 42h para. 4 UrhG; ErläutRV 1178 BlgNR 27. GP 27; *Homar* in Thiele/Burgstaller UrhG⁴ § 42h Rz 16, 80ff.

²³³ § Section 42h (1) last sentence UrhG; *Homar* in Thiele/Burgstaller UrhG⁴ Section 42h Rz 17f.

of a data corpus by downloading works from the Internet, taking photographs or screenshots or scanning).²³⁴

3. lawful access. However, copyright law does not grant a right of access to works for the purpose of TDM. Rather, lawful access to a work is the prerequisite for authorised use.²³⁵ However, it is irrelevant whether the work has already been published, whether the licence also covers TDM for research purposes or whether this is contractually excluded.²³⁶

In particular, access on the basis of a contractual agreement between rights holders and research organisations or cultural heritage institutions (e.g. subscription to a database) and open access to content (e.g. to a repository) are deemed to be lawful access. In the case of subscriptions by research organisations or cultural heritage institutions, the persons who belong to these organisations or institutions and use the subscription are deemed to have lawful access. In addition, the CC licence conditions generally permit reproduction within the framework of TDM.²³⁷

Access to content that is freely available on the internet is also considered lawful.²³⁸ However, when content on the internet is considered "freely available" is not discussed further.²³⁹ The literature takes the view that works that are made available on the internet by the rights holders or with their consent are also lawfully accessible for the purposes of TDM if no express authorisation to use the work is associated with this and this is also not implied from the provision (even in the case of an indication that reproduction is expressly not permitted). According to this doctrine, public profiles on social networks that are made available with or without a licence are lawfully accessible and may be exploited. However, works that can only be accessed by overcoming password protection or are made available via file-sharing networks are not legally accessible.²⁴⁰

4. archiving. The storage and retention of reproductions of copyrighted works created within the framework of TDM requires appropriate security measures. Measures such as encryption and password protection can be considered.²⁴¹ The security measures are appropriate if the copies are stored in a secure environment. The purpose of the precautions is to prevent unauthorised use.²⁴²

Furthermore, archiving may only take place for the purposes of scientific research, including the verification of scientific findings. This includes the validation and review of research

²³⁴ § Section 42h (1) UrhG, EC 14 DSM Directive; *Homar* in Thiele/Burgstaller UrhG⁴ Section 42h para. 24.

²³⁵ ErläutRV 1178 BlgNR 27. GP 26.

²³⁶ § Section 42h (5) UrhG; *Homar* in Thiele/Burgstaller UrhG⁴ Section 42h para. 52, 57.

²³⁷ OER FAQ, May I use text and data mining (TDM) methods on CC-licensed content? <https://oer-faq.de/faq/darf-ich-auf-cc-lizenzierte-inhalte-text-und-data-mining-verfahren-tdm-anwenden/> (last accessed on 28 August 2023).

²³⁸ EG 14 DSM-RL.

²³⁹ *Forgó/Paspalj*, Die Umsetzung der Urheberrechtsrichtlinie in Österreich in Hoffberger-Pippan/Ladeck/Ivankovics (eds.), Digitalisierung und Recht, Jahrbuch 2022, 60.

²⁴⁰ *Homar* in Thiele/Burgstaller UrhG⁴ § 42h Rz 54ff.

²⁴¹ *Homar* in Thiele/Burgstaller UrhG⁴ § 42h Rz 45ff.

²⁴² EG 15 DSM-RL.

results, but also the performance of follow-up research.²⁴³ The research purpose also limits the permitted retention period.²⁴⁴

5. working group and review of quality. Reproductions made for research purposes may be made available to a defined group of persons for the purpose of joint scientific research, i.e. within the framework of a research group, or for the purpose of reviewing the scientific quality (methodology, results) also to individual third parties, e.g. in the case of a peer review in the course of a publication, insofar as this is justified for the pursuit of non-commercial purposes.²⁴⁵

Outside of closed research groups and quality control, making copies of copyrighted works publicly available is not permitted. This means that making them available for further use by other researchers ("**open data**"), e.g. as part of the European Science Cloud, is not permitted. Only the research results obtained from the analysis and information gathering may be made accessible.²⁴⁶

6. measures for the security and integrity of the networks and databases. Rightholders may restrict TDM for scientific and artistic research only by taking measures to ensure the security and integrity of the networks and databases in which the works or other subject-matter are stored. However, these restrictions may not go beyond what is necessary to achieve this objective.²⁴⁷ Measures to ensure that only authorised persons have access to the networks or databases and measures that prevent or restrict the automated searching, copying or evaluation of content, such as the verification of IP addresses, user authentication (e.g. password entries) or other controls of access authorisations, the exclusion of web crawlers and captchas, may be justified in individual cases due to the potentially high number of access and download requests.²⁴⁸

7. personal use. Furthermore, an exception without restriction to research purposes has been provided to allow TDM for personal use where there is lawful access to the work. Personal use includes use for private, non-commercial purposes as well as professional use for commercial purposes by natural or legal persons (e.g. profit-orientated companies and the persons working for them).²⁴⁹

However, there is no own use if a reproduction is to be made available to the public. It therefore depends on whether the reproductions made in the course of the TDM are made available to an undefined group of addressees consisting of a larger number of persons.

²⁴³ *Homar* in Thiele/Burgstaller *UrhG*⁴ § 42h Rz 44.

²⁴⁴ § Section 42h (2) *UrhG*; ErläutRV 1178 BlgNR 27. GP 27.

²⁴⁵ § Section 42h (2) *UrhG*.

²⁴⁶ *Homar* in Thiele/Burgstaller *UrhG*⁴ § 42h Rz 79.

²⁴⁷ § Section 42h (5) *UrhG*.

²⁴⁸ EC 16 DSM Directive; *Homar* in Thiele/Burgstaller *UrhG*⁴ § 42h Rz 59ff, 87f.

²⁴⁹ *Homar* in Thiele/Burgstaller *UrhG*⁴ § 42h Rz 37f, 90.

However, it is harmless if the research results are published in the sense of information on patterns, trends and correlations.²⁵⁰

In contrast to TDM for scientific purposes, however, the rights holder can effectively object to the reproduction for personal use, whereby a machine-readable reservation of use is required for content published online. A reservation in the metadata of a work, in the legal notice or in the terms and conditions of a website or database is sufficient.²⁵¹ In addition, the storage of reproductions made is only permitted for as long as this is necessary for the purposes of data analysis and information retrieval.²⁵²

²⁵⁰ *Homar* in Thiele/Burgstaller UrhG⁴ § 42h Rz 39f.

²⁵¹ *Homar* in Thiele/Burgstaller UrhG⁴ § 42h Rz 63ff, 86.

²⁵² § Section 42h (6) UrhG; ErläutRV 1178 BlgNR 27. GP 28 .

Part 2: Access to data for research purposes

1. Open data: concept and principles

Open data is data that can be used, redistributed and reused by anyone without restriction. Governments, companies and private individuals can use open data to create social, economic and ecological added value.²⁵³

In order to be able to tackle societal challenges efficiently and holistically, it is essential to be able to access, merge and reuse data from different sources across sectors and disciplines.²⁵⁴ UNESCO also emphasises the synergies between open data and artificial intelligence in tackling global challenges.²⁵⁵

To enable their use beyond the original research project, **research data** such as statistics, test results, measurements, observations from fieldwork, survey results, interview recordings and images as well as associated metadata, specifications and other digital objects relating to research data must be made findable and available online with the highest possible precision and granularity and, if possible, in open, machine-readable formats. This should ensure the interoperability, reusability and accessibility of research data. Publication should take place via institutional repositories or thematic archives, which will subsequently be integrated into the European Open Science Cloud.²⁵⁶

One of the core tasks of Open Science is therefore the publication of research data in accordance with the **FAIR principles** (Findable, Accessible, Interoperable, Re-usable).²⁵⁷ These principles serve as guidelines for the optimal preparation of research data for subsequent use and should be taken into account in the context of research data management and in the creation of research data management plans. However, FAIR does not mean that research data is available without restriction. However, the reasons for any restrictions must be stated.²⁵⁸

The main contents of the individual principles are²⁵⁹

Findable. Metadata and data should be easy to find. Machine-readable metadata in particular is essential for this.

Accessible. Users must be informed about how they can access the data, including authentication and authorisation if necessary.

²⁵³ <https://data.europa.eu/elearning/de/module1/#/id/co-01>.

²⁵⁴ EC 27 Open Data and PSI Directive.

²⁵⁵ UNESCO, Open data for AI - What now? (2023), 40.

²⁵⁶ Open Science Policy Austria (2022), 6.

²⁵⁷ GO FAIR, FAIR Principles, <https://www.go-fair.org/fair-principles/>.

²⁵⁸ <https://rdm.univie.ac.at/de/forschungsdatenmanagement/fair-und-care-prinzipien/>.

²⁵⁹ GO FAIR, FAIR Principles, <https://www.go-fair.org/fair-principles/>.

Interoperable. Data usually needs to be integrated with other data. In addition, the data must be interoperable with software applications or workflows for analysing, storing and processing.

Re-usable. To optimise the reuse of data, metadata and data must be well described so that they can be replicated and/or combined in different environments.

According to the Austrian Declaration on Open Science, all data originating from publicly funded research should be published in accordance with these principles so that they can be reused for commercial and non-commercial purposes.²⁶⁰ **More information** on the FAIR principles can be found here.²⁶¹

However, it should be noted that **research data must be distinguished from scientific publications** in which the results of scientific research are presented and commented on (see Part 1 above).²⁶²

You can find more information about Open Data in the e-learning programme of the European data portal "data.europa.eu"²⁶³ and in the Open Data Handbook.^{264,265}

2. Rights to research data ("Assignment")

2.1. Background

A fundamental legal question when dealing with research data is to whom it should be assigned. For (research) data management, it is particularly relevant who has the **authority to decide on publication** (e.g. time, form) **and the modalities of subsequent use by third parties** (e.g. licence).²⁶⁶

In the scientific context, the question of who is the author and possibly the originator of research data is also of particular importance due to the reputation that may be associated with it.

²⁶⁰ Open Science Policy Austria (2022), 8.

²⁶¹ EU Commission, Guidelines on FAIR Data Management in Horizon 2020 (Version 3.0, 26 July 2016); FORCE11, The FAIR Data Principles, <https://force11.org/info/the-fair-data-principles/> and Wilkinson/Dumontier/Aalbersberg/et al, The FAIR Guiding Principles for scientific data management and stewardship. *Sci Data* 3, 160018 (2016), <https://doi.org/10.1038/sdata.2016.18>.

²⁶² EC 27 Open Data and PSI Directive.

²⁶³ <https://data.europa.eu/elearning/de/#/id/co-01> or <https://www.data.gv.at/infos/e-learning-module-zu-open-data/>.

²⁶⁴ <https://opendatahandbook.org/guide/de/what-is-open-data/>.

²⁶⁵ For a definition of research data and principles of open data, see also Concordat on Open Research Data (UK, 2016).

²⁶⁶ Baumann/Krahn/Lauber-Rönsberg, *Research Data Management and Law* (2021), 23.

2.2. Property rights to research data

2.2.1. Protectability of research data

The question of whether research data falls under the protection of intellectual property is complex and depends on the type of data and the conditions under which it is generated, structured and used.²⁶⁷

The threshold for copyright protection of data is relatively low in the European Union.²⁶⁸

Copyright protection is granted to original intellectual creations in the fields of literature, sound art, visual arts and cinematography.²⁶⁹ The scope of protection therefore includes sensually perceptible manifestations of the creative human mind that have a unique character that distinguishes them from similar products ("individuality" or "originality").²⁷⁰ In contrast, mere information is not protected by copyright.

No special requirements are placed on the level of creativity ("level of work"), so that creations of low creativity are also included in copyright protection.²⁷¹ According to case law, even a sentence fragment consisting of eleven words can be protectable if it reflects a sufficient degree of creative decisions.²⁷²

Particularly comprehensive, dual protection exists for **databases** ("*broad dual protection*").²⁷³ Databases are legally defined as collections of works, data or other independent elements that are organised systematically or methodically and are individually accessible by electronic means or otherwise. A computer programme used for the creation or operation of an electronically accessible database is not part of the database.²⁷⁴

Databases are protected by copyright as collective works if they are an original intellectual creation as a result of the selection or arrangement of the material (database works).²⁷⁵ The object of protection of a database work is the structure of the database and not the individual content such as texts, photos, figures, film and music sequences or other data (e.g. vehicle registration plates). The database work is therefore legally treated as a separate work alongside the elements it contains. If individual elements or parts of the database work already constitute a copyright-protected work in their own right, the authorisation of the database creator is required in addition to the authorisation of the creator of all works used.²⁷⁶

²⁶⁷ Lipton, Open Scientific Data - Why Choosing and Reusing the Right Data Matters (2020), Chapter 7: Legal Issues Arising in Open Scientific Data, 2.

²⁶⁸ Lipton, Open Scientific Data - Why Choosing and Reusing the Right Data Matters (2020), Chapter 7: Legal Issues Arising in Open Scientific Data, 21.

²⁶⁹ § Section 1 UrhG.

²⁷⁰ *Bernsteiner* in Thiele/Burgstaller UrhG⁴ § 1.

²⁷¹ *Bernsteiner* in Thiele/Burgstaller UrhG⁴ § 1 Rz 43ff.

²⁷² *Bernsteiner* in Thiele/Burgstaller UrhG⁴ § 1 Rz 2 with reference to the Infopaq decision (C-5/08) of the ECJ.

²⁷³ Lipton, Open Scientific Data - Why Choosing and Reusing the Right Data Matters (2020), Chapter 7: Legal Issues Arising in Open Scientific Data, 7.

²⁷⁴ § Section 40f (1) UrhG.

²⁷⁵ § Section 40f (2) UrhG.

²⁷⁶ *Feil* in Thiele/Burgstaller UrhG⁴ § 40f Rz 37ff, 49.

A (simple) database is also protected if a substantial investment in terms of type or scope was required for the procurement, verification or presentation of its content (**sui generis neighbouring right**).²⁷⁷ Both intellectual property rights can exist in parallel.²⁷⁸

The object of protection of a (simple) database is not the structure, but only the database as a whole and as a manifestation of the intangible asset that has been produced with substantial investment.²⁷⁹ The labour involved in compiling the database is protected before a substantial part of the content is taken over.²⁸⁰

However, any existing rights to the content of the database are not affected.²⁸¹ The sui generis neighbouring right does not cover the content included in the database itself or the database itself as the sum of this content.²⁸²

Research data may also include photographs, moving images (videos) and audio recordings.²⁸³ In addition to any copyright protection, the producer of the recording or sound carrier has a neighbouring right for these protected objects.²⁸⁴

Raw (non-personal) data, on the other hand, is not protected. In particular, there is **no data ownership** (under civil or intellectual property law) for data that is neither protected by copyright nor ancillary copyright. For this reason, the trade in raw data is in practice (exclusively) organised by contracts and determined by technical restrictions imposed by the data owner (e.g. proprietary formats or encryption).²⁸⁵

2.2.2. Categories of research data

A general and abstract legal assessment of the protectability of data is not possible. However, the following **case groups can be** formed on the basis of various categories of research data, which enable a generalised assessment:

1. qualitative research data. Qualitative research data may contain extensive texts, images, drawings, sound recordings or video sequences. In this case group, it must be checked on a case-by-case basis whether the data is protected by copyright and/or neighbouring rights. In order to minimise risk, intellectual property protection should be assumed in ambiguous cases and if a case-by-case examination is not possible.²⁸⁶

²⁷⁷ § Section 76c (1) UrhG.

²⁷⁸ § Section 76c (3) UrhG.

²⁷⁹ Feil in Thiele/Burgstaller UrhG⁴ § 76c Rz 32ff.

²⁸⁰ Feil in Thiele/Burgstaller UrhG⁴ § 40f Rz 31ff.

²⁸¹ § Section 76c (4) UrhG.

²⁸² Feil in Thiele/Burgstaller UrhG⁴ § 76c Rz 43.

²⁸³ EC 27 Open Data and PSI Directive.

²⁸⁴ §§ Sections 73ff UrhG for light and moving images and Section 76 UrhG for sound recordings.

²⁸⁵ Forgó in Forgó/Zöchling-Jud, Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter, 20th ÖJT Vol. II/1, 362, with reference to Communication of the EU Commission, Building a European Data Economy, COM(2017) 9 final, 11f; Lipton, Open Scientific Data - Why Choosing and Reusing the Right Data Matters (2020), Chapter 7: Legal Issues Arising in Open Scientific Data, 15.

²⁸⁶ Baumann/Krahn/Lauber-Rönsberg, Research Data Management and Law (2021), 27ff.

2 Quantitative research data. With regard to individual pieces of information, quantitative research data such as measurement data are generally not eligible for copyright protection. In this respect, only the compilation of the data as a database work or as a (simple) database can be considered for protection.²⁸⁷

3. metadata. Metadata is descriptive information that ensures the interpretability and automatic usability of the research results (see Part 1, point 3.4 above). It can be divided into bibliographic or administrative, content-describing and structure-describing data. This data is often systematised according to certain schemes (e.g. METS, LMER) and stored in digital form (e.g. as .csv or .xml) together with the research data.

Standardised metadata is generally not protected by copyright. Protection can only be considered in exceptional cases if the metadata contains longer text sections or image descriptions or questionnaires that may be protected as database works. Collections of metadata may also be protected as databases.²⁸⁸

2.3. Holder of the rights to research data

When determining the (original) rights holder, a distinction must be made according to the respective property right.

1. copyright. The author of (research) data protected by copyright is the researcher as the person who created it ("creator"). In principle, they are entitled to the exploitation rights to their work. The employer is only entitled to these in exceptional cases.²⁸⁹

There are no relevant regulations in the collective agreement for university employees.²⁹⁰ However, **employment contracts** - including those with academic and artistic staff at the university - generally include the transfer of all (usage) rights to the work performed by employees in fulfilment of their official duties.²⁹¹ In addition, a conclusive (implied) granting of rights in favour of the employer would be possible.²⁹²

²⁸⁷ Baumann/Krahn/Lauber-Rönsberg, Research Data Management and Law (2021), 27.

²⁸⁸ Baumann/Krahn/Lauber-Rönsberg, Research Data Management and Law (2021), 35f.

²⁸⁹ Burgstaller in Thiele/Burgstaller UrhG⁴ § 34 Rz 43.

²⁹⁰ Collective agreement for university employees 2023, version with 15th AMENDMENT AND 16th AMENDMENT, <https://uniko.ac.at/organisation/dachverband/kollektivvertrag/>.

²⁹¹ For the University of Vienna, see Amini/Huß, Lehren mit (digitalen) Medien (1.2.2017), 41; and information on patents and service inventions: "By signing the employment contract, you as a university professor grant the University of Vienna all property and intellectual property rights to the work you have performed within the scope of your official duties; at the same time, you grant the University of Vienna exclusive and irrevocable rights of use that are unlimited in terms of time, space and subject matter if a full transfer of rights is not legally possible. **Exceptions:** - Publishing rights for print publications of scientific works - Expert opinions based on ad personam research assignments of third parties", <https://neue-professuren.univie.ac.at/informationen-fuer-berufungskandidatinnen/professur-allgemeine-rahmenbedingungen/patente-und-dienstleistungen/>.

²⁹² Burgstaller in Thiele/Burgstaller UrhG⁴ § 34 Rz 44 with reference to OGH 4 Ob 182/04z; Büchele in Kucsko/Handig, urheber.recht² § 24 UrhG (as of 1 April 2017, rdb.at) Rz 39.

The official duties of academic and artistic staff include not only participation in teaching, but also in the fulfilment of tasks in research or the development and development of the arts ("research and teaching duties").²⁹³

In contrast to scientific publications, however, in my opinion the copyright exploitation rights to research data are generally transferred to the **research institution as the employer**, as is also the case with teaching and learning materials (see Part 1, point 3.5 above).

However, the researchers retain the **moral rights**, in particular the right to be named as the author.²⁹⁴ In the case of literary and cinematographic works, the author also has the right of first mention as long as the essential content has not been published with his/her consent.²⁹⁵ If research data is published by the research institution, this right is exhausted.

However, it is unclear whether the statutory publication right under the UG, which guarantees university members the independent publication of their own scientific or artistic work, also applies to the (first) publication of research data.²⁹⁶ Even in this case, university members as employees are obliged by their duty of loyalty to coordinate the time of publication with the university and any third-party funders so that this does not result in a publication that is detrimental to patenting by violating the novelty requirement and, if necessary, the contractually agreed transfer of exploitation rights to third-party funders is thwarted (see Part 1, point 3.6 above).²⁹⁷

2. database works (1st layer). The author is the person who provides the intellectual performance of arranging or selecting.²⁹⁸ In the case of database works, the special statutory provisions for computer programmes apply mutatis mutandis.²⁹⁹ The **employer is** therefore entitled to an unrestricted right to use a database work if it was created by an employee in fulfilment of his/her official duties. Any other agreement is possible.³⁰⁰ This right to use the work may be transferred by the employer to another person without the author's consent.³⁰¹

3. sui generis neighbouring right for databases (2nd layer). Irrespective of whether the database as such or its content is eligible for copyright or other special legal protection, a sui generis neighbouring right exists in the database if a substantial investment in terms of type or scope was required for the procurement, verification or presentation of its content.³⁰²

²⁹³ Grimm in Pfeil/Grimm/Schöberl, Personalrecht der Universitäten² § 105 UG (as of 1 October 2021, rdb.at) Rz 3.

²⁹⁴ § Section 20 (1) UrhG: "The author determines whether and with which copyright designation the work is to be labelled."

²⁹⁵ § Section 14 (3) UrhG: "Public communication of the content of a literary or cinematographic work is reserved to the author as long as neither the work nor its essential content has been published with the author's consent."

²⁹⁶ § Section 106 para. 1 sentence 1 UG.

²⁹⁷ Grimm in Pfeil/Grimm/Schöberl, Personalrecht der Universitäten² § 106 UG (as of 1 October 2021, rdb.at) Rz 4.

²⁹⁸ Feil in Thiele/Burgstaller UrhG⁴ § 40g Rz 5.

²⁹⁹ § Section 40f (3) UrhG.

³⁰⁰ § Section 40b UrhG.

³⁰¹ § Section 40c UrhG.

³⁰² § Section 76c (1) and (3) UrhG.

The investment consists of the use of considerable human, technical or financial resources to create the database. The costs of data generation as an activity upstream of database production ("investment not eligible for recognition") are not to be taken into account.³⁰³

The person entitled to protection is the maker of the database who has made the essential investment. Natural and legal persons are equally eligible as database producers. The decisive factor is who bears the investment risk for the procurement, verification or presentation of the database content. Employees and contractors therefore do not fall under the definition of producers because they do not bear any economic risk.³⁰⁴ As a result, the research organisation as the **employer** is entitled to the property right.

The database producer has the exclusive right to extract and re-utilise the entire database or a substantial part of it in terms of type or scope.³⁰⁵ The materiality may result from the relationship to the volume of the entire database or from the investment associated with this part of the database.³⁰⁶ The repeated and systematic exploitation of insignificant parts of the database shall be deemed equivalent to such acts of exploitation if these acts conflict with the normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.³⁰⁷

The property right to databases expires fifteen years after completion of the production of the database or its publication if the database is published before the end of this period.³⁰⁸ However, by regularly updating and revising the database, the producer can obtain protection for an unlimited period of time.³⁰⁹

4. light and running images. Light or motion picture protection arises in the person of the producer. In principle, the producer is the physical person who takes the photograph or motion picture, regardless of whether they carry out these activities for themselves or on behalf of and for the account of third parties. In the case of commercially produced photographs, the owner of the company is deemed to be the producer.³¹⁰

However, the neighbouring right can be transferred by means of a contractual agreement.³¹¹ It can be assumed that a transfer of all (usage) rights to the light and motion pictures created by the employees in fulfilment of their official duties to the research institution is agreed in the **employment contracts** (see above). In addition, it also applies to photographs and moving images that the maker who produces an image on behalf of another person

³⁰³ *Feil* in Thiele/Burgstaller UrhG⁴ § 76c Rz 12, 19ff.

³⁰⁴ § 76d para. 1 UrhG; *Feil* in Thiele/Burgstaller UrhG⁴ § 76d Rz 6ff mwN.

³⁰⁵ § Section 76d (1) UrhG; *Feil* in Thiele/Burgstaller UrhG⁴ Section 76d Rz 9ff.

³⁰⁶ *Feil* in Thiele/Burgstaller UrhG⁴ § 76d Rz 16f.

³⁰⁷ § Section 76d (1) UrhG.

³⁰⁸ § Section 76d (4) UrhG.

³⁰⁹ § 76c para. 2 UrhG; *Feil* in Thiele/Burgstaller UrhG⁴ § 76c Rz 40; *Lipton*, *Open Scientific Data - Why Choosing and Reusing the Right Data Matters* (2020), Chapter 7: Legal Issues Arising in Open Scientific Data, 8.

³¹⁰ § 74 para. 1 UrhG; *Homar* in Thiele/Burgstaller UrhG⁴ § 74 Rz 8ff.

³¹¹ § Section 74 (2) and (5) UrhG.

conclusively grants the client the right to use the photograph for the purpose for which it was commissioned.³¹²

5. sound carrier. Sound carriers include records, music cassettes, magnetic tapes, CDs, (external or internal) hard discs, memory sticks or servers, etc.³¹³ Anyone who records acoustic processes for their reproducible reproduction on a sound carrier is entitled to protection. The producer of a sound carrier is the natural or legal person who provides the organisational, economic and technical services associated with the production of the sound carrier. In the case of commercially produced sound recordings, the owner of the company is deemed to be the producer.³¹⁴

Whether the researcher or the research organisation is to be regarded as the producer must be assessed on a case-by-case basis. However, the ancillary copyright of the producer of the sound recording is transferable, so that, as in the case of light and motion pictures, it can be assumed that all (usage) rights to the sound recordings created by the employees in fulfilment of their official duties are transferred to the research institution.

6 Raw data. The authority to decide on the publication and use of raw data does not result from a positive allocation of exclusive rights under intellectual property law, but from the contractual agreements.³¹⁵

Insofar as raw data is generated by the researchers in fulfilment of their official duties, it can be assumed that a transfer of all (usage) rights to this data to the research institution is agreed in the **employment contracts**. In my opinion, a conclusive (implied) granting of rights in favour of the employer is also possible.

As a result, the clarification of rights to data is much more complex than the clarification of copyright and related rights to scientific publications (see Part 1, point 2 and point 3 above).³¹⁶

On the one hand, the research data may contain objects that are protected by copyright or ancillary copyright (see point 2.2 above). On the other hand, it is not always clear who owns these intellectual property rights to data.³¹⁷

For these reasons, it is necessary to develop strategies for research data management in order to achieve the goals of Open Science (see point 3 below).

³¹² *Homar* in Thiele/Burgstaller UrhG⁴ § 74 Rz 117ff.

³¹³ *Homar* in Thiele/Burgstaller UrhG⁴ § 76 Rz 5.

³¹⁴ § 76 para. 1 UrhG; *Homar* in Thiele/Burgstaller UrhG⁴ § 76 Rz 15ff.

³¹⁵ *Forgó* in *Forgó/Zöchling-Jud*, Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter, 20th ÖJT Vol. II/1, 362, with reference to Communication of the EU Commission, Building a European Data Economy, COM(2017) 9 final, 11f; *Lipton*, Open Scientific Data - Why Choosing and Reusing the Right Data Matters (2020), Chapter 7: Legal Issues Arising in Open Scientific Data, 15.

³¹⁶ *Lipton*, Open Scientific Data - Why Choosing and Reusing the Right Data Matters (2020), Chapter 7: Legal Issues Arising in Open Scientific Data, 10.

³¹⁷ *Lipton*, Open Scientific Data - Why Choosing and Reusing the Right Data Matters (2020), Chapter 7: Legal Issues Arising in Open Scientific Data, 10.

3. Data management strategy

3.1. Necessity of data management strategies

In order to achieve the research objectives, it is crucial to determine the conditions under which research data and other data may be used and published by researchers for their own research (see point 2.1 above).³¹⁸

Insofar as the rights of the respective data providers exist, these may only be used if the rights holder has permitted this (e.g. through a licence) or if a corresponding legal permission exists.³¹⁹

3.1.1. Free use of third-party data for research purposes

Statutory usage authorisations are provided for as exceptions to the exclusive rights of authors and neighbouring rights holders. These limitations to the exploitation rights are referred to as "free use of works". In these cases, the act of utilisation does not require the consent of the rights holder.

In the area of research, the following authorisations are particularly relevant:

1. right to quote. For the purpose of discussing their content, works protected by copyright may be used in the context of quotations to the extent necessary and appropriate. Individual works may be included as scientific quotations in a scientific work forming the main subject matter after their publication. The medium used does not necessarily have to be a linguistic work, but can also be a collective work such as a catalogue raisonné.³²⁰

2. reproduction for own non-commercial research use. Natural or legal persons such as companies or administrative organisations may make individual copies on paper or paper-like media for their own, i.e. non-public, commercial or non-commercial use.³²¹ These copies may also be used for commercial research purposes.³²²

For personal use for the purposes of non-commercial scientific research, individual reproductions may also be made on other analogue or digital media. Therefore, for example, analogue originals may also be scanned and files downloaded from the Internet, reproduced by means of a screenshot, copied from other storage media or stored in non-public storage environments (intranet, cloud storage). These reproductions may also be made accessible to a non-public group of recipients such as a closed research group.³²³

³¹⁸ Baumann/Krahn/Lauber-Rönsberg, Research Data Management and Law (2021), 127.

³¹⁹ Baumann/Krahn/Lauber-Rönsberg, Research Data Management and Law (2021), 127ff.

³²⁰ § Section 42f para. 1 no. 1 UrhG; *Bernsteiner* in Thiele/Burgstaller UrhG⁴ Section 42f para. 51ff.

³²¹ § Section 42 (1) UrhG; *Homar* in Thiele/Burgstaller UrhG⁴ Section 42 para. 62.

³²² *Homar* in Thiele/Burgstaller UrhG⁴ § 42 Rz 67.

³²³ § Section 42 (2) UrhG; *Homar* in Thiele/Burgstaller UrhG⁴ Section 42 para. 67f.

The storage of copies is also permitted after completion of the research project, in particular if this is necessary to validate the research carried out.³²⁴

3. use of database works for research purposes. In the case of database works, the right to a copy for personal use is generally excluded.³²⁵

In the field of non-commercial scientific research, however, individual copies of both electronically and non-electronically accessible database works may be produced on paper and any other medium (e.g. also digitised).³²⁶

4. use of (simple) databases for research purposes. The reproduction of a substantial part of a published database for the purposes of scientific research is permitted to an extent justified by the purpose, provided it is not for profit and the source is acknowledged.³²⁷ This privilege applies to electronic and non-electronic databases.³²⁸

On the other hand, non-essential parts of electronic databases may be reproduced for any purpose as long as there is no repeated or systematic reproduction (see point 2.3 above).³²⁹

5 Photographs and motion pictures. The protection of photographs and motion pictures does not extend further than the copyright protection of photographic and cinematographic works.³³⁰ The provisions on the right to quote and reproduction for own non-commercial research purposes therefore apply accordingly (see above).

6. phonograms. Any natural person may, for private use and neither for direct nor indirect commercial purposes, record a reproduction made with the aid of a phonogram on a phonogram and make individual copies of it.³³¹ In addition to private copies, reproductions for own non-commercial research use are also permitted.³³²

7 Text and data mining. The 2021 Copyright Amendment introduced free use of works for text and data mining ("TDM") into the Copyright Act. Text and data mining in the sense of the automated (computer-aided) evaluation of copyrighted (digital) information sources (texts, sounds, images or data) for scientific or artistic research as well as for personal use is permitted (see Part 1, point 5 above).³³³

8. long-term archiving by libraries, archives and similar institutions. Public collection institutions such as museums, libraries (including school and monastery libraries), archives or similar institutions may make reproductions for their own use of collections. This basically consists of inclusion in a separate archive, i.e. an organised collection of existing works

³²⁴ *Homar* in Thiele/Burgstaller *UrhG*⁴ § 42 Rz 69.

³²⁵ § Section 40h (1) *UrhG*.

³²⁶ § 40h para. 2 *UrhG*; *Feil* in Thiele/Burgstaller *UrhG*⁴ § 40h Rz 28ff.

³²⁷ § Section 76d (3) *UrhG*.

³²⁸ *Feil* in Thiele/Burgstaller *UrhG*⁴ § 76d Rz 49.

³²⁹ *Feil* in Thiele/Burgstaller *UrhG*⁴ § 76d Rz 48.

³³⁰ § Section 74 (7) *UrhG*; *Homar* in Thiele/Burgstaller *UrhG*⁴ Section 74 para. 61.

³³¹ § Section 76 (4) *UrhG*.

³³² *Homar* in Thiele/Burgstaller *UrhG*⁴ § 76 Rz 58.

³³³ *Homar* in Thiele/Burgstaller *UrhG*⁴ § 42h.

operated by one or more institutions for purely internal use. However, this does not include reproductions for inclusion in an archive that is also accessible to external persons. These institutions may also make back-up copies and reproductions of unpublished or out-of-print works. When pursuing economic or commercial purposes, the own collection use is reduced to paper copies for inclusion in an archive that is only accessible internally.³³⁴

Cultural heritage institutions include libraries, museums, archives and film or sound heritage institutions.³³⁵ These institutions are authorised to make reproductions for the purpose of preserving cultural heritage. Reproduction serves preservation purposes, for example, if the perceptibility or quality is jeopardised by technical obsolescence or damage to the original data carriers, but also if the reproduction is necessary for the purpose of insuring works.³³⁶

When setting up archives for audiovisual media, the free use of works must also be taken into account when transferring already published works on image and sound carriers to federal scientific institutions.³³⁷

Research in an international environment. The use of free works has only been harmonised to a certain extent in European copyright law. For this reason, there can be considerable differences even within the European Union.³³⁸

If research data are to be placed in a repository and are intended to be accessible both in Austria and abroad, this means that, in addition to Austrian copyright law, the law of all other countries in which the repository is accessible must also be applied (see Part 1, point 2.4).³³⁹

In his **study** commissioned by the EU Commission, *Senftleben* proposes the extension of the free use of works for the purposes of scientific research in European copyright law. Legal permission should cover both reproduction and communication to the public, including making available to the public, for the purposes of research, and would enable researchers to meet the open access and open data requirements of research funding programmes such as Horizon Europe.³⁴⁰

Member States should be obliged to implement this derogation in order to ensure harmonised application in all Member States and comparable conditions for research teams in different countries.³⁴¹

Irrespective of this proposal, neither a harmonisation of the free use of works nor the introduction of the country of origin principle for cross-border uses³⁴² can be expected in the

³³⁴ § Section 42 (7) sentence 1 UrhG; *Homar* in Thiele/Burgstaller UrhG⁴ Section 42 para. 30/1f.

³³⁵ *Homar* in Thiele/Burgstaller UrhG⁴ § 42 Rz 11/1f.

³³⁶ § Section 42 para. 7 sentence 3 as well as Z 1 and Z 2 UrhG; *Homar* in Thiele/Burgstaller UrhG⁴ Section 42 para. 11, 29 30.

³³⁷ § Section 56a UrhG; *Feil* in Thiele/Burgstaller UrhG⁴ Section 56a.

³³⁸ *Baumann/Krahn/Lauber-Rönsberg*, Research Data Management and Law (2021), 133.

³³⁹ *Baumann/Krahn/Lauber-Rönsberg*, Research Data Management and Law (2021), 134.

³⁴⁰ *Senftleben*, Study on EU copyright and related rights and access to and reuse of data (2022), 5 with reference to Art 5 para 3 lit a InfoSoc Directive and Art 9 lit b Directive 96/9/EC on the legal protection of databases.

³⁴¹ *Senftleben*, Study on EU copyright and related rights and access to and reuse of data (2022), 4ff.

³⁴² § Section 42g (3) UrhG for cross-border digital use in teaching and learning.

foreseeable future. Therefore, it is **still** necessary in many cases to conclude contractual agreements on the use of works in order to avoid legal risks.³⁴³

3.1.2. Data provided on a contractual basis

Researchers may be provided with research and other data by companies, public institutions or other researchers and research organisations on the basis of contractual agreements.

As a rule, a contractual agreement also exists if data from public authorities or other institutions is made available for free download on the Internet via a repository for research results or as part of an open data policy.³⁴⁴

The specific contractual conditions can be freely designed in each individual case.³⁴⁵ **Open data licences** (see Part 1, point 4.4 above), which ensure free access to research data, are particularly suitable for licensing. This is an essential component of open science and contributes to the further development and improvement of science as a whole.

Research funders, research institutions and other data providers can ensure free and open access to research data in electronic form through data management strategies. These strategies should also recommend the use of an open data licence.

3.2. Further use of research data in the possession of researchers, research institutions or research funding organisations

3.2.1. No legal right to publication

Open Data and PSI Directive³⁴⁶ from 2019 contains a regulation on research data for the first time and creates certain obligations for research institutions (within and outside universities) as data providers or data controllers as well as rights for them as data users.³⁴⁷

Research data resulting from scientific research activities financed by **public funds** or co-financed by public and private organisations must be made openly available for both commercial and non-commercial re-use in accordance with the principle of "open data by default" and in line with the **FAIR principles** (see point 1 above).³⁴⁸

However, when publishing data, the principle of "**as open as possible, as closed as necessary**" means that the intellectual property rights of third parties, the protection of privacy and personal data, confidentiality, legitimate business interests such as trade secrets, as well as national security, defence and public security must be taken into account.³⁴⁹ In

³⁴³ Baumann/Krahn/Lauber-Rönsberg, Research Data Management and Law (2021), 134.

³⁴⁴ Baumann/Krahn/Lauber-Rönsberg, Research Data Management and Law (2021), 127.

³⁴⁵ Baumann/Krahn/Lauber-Rönsberg, Research Data Management and Law (2021), 128.

³⁴⁶ Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information.

³⁴⁷ van Echoud, Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022), 8.

³⁴⁸ Art 10 (1) and EC 28 Open Data and PSI Directive.

³⁴⁹ Art 10 (1) and EC 28 Open Data and PSI Directive.

particular, data, know-how and/or information in any form and of any kind that was in the possession of private parties before the start of a research project within the framework of a public-private partnership is exempt from the obligation to make it accessible.³⁵⁰

In order to avoid administrative burdens, the obligations for data providers should only apply to research data that **has already been made publicly accessible** by researchers, research institutions or research funding organisations **via an institutional or thematic archive**. In particular, they should not result in additional costs for retrieving the datasets or require additional maintenance of the data.³⁵¹

The member states must provide national strategies to support the availability of research data. To implement this requirement, the "Open Science Policy Austria" (Austrian Policy on Open Science and the European Open Science Cloud) was adopted on 23 February 2022 in the course of a joint Council of Ministers presentation (see Part 1, point 3.1 above).³⁵² The strategy for open access to publicly funded research data is aimed at both **research institutions** and **funding bodies**.³⁵³

The Open Data and PSI Directive **was implemented** by the Information Reuse Act 2022 ("IWG 2022").³⁵⁴ This defines research data as documents in digital form that are **not scientific publications** and that are collected or generated in the course of scientific research activities and used as evidence in the research process or that are generally considered necessary in the research community for the validation of research findings and results (see point 1 above).³⁵⁵

The definition of the term document is broad. Any content or any part thereof, irrespective of the form of the data carrier (e.g. paper, electronic form and sound, image or audiovisual recording) is eligible. Databases are also included.³⁵⁶

The IWG 2022 covers research data whose creation was financed with public funds, which are in the possession of researchers, research institutions or research funding organisations, even if they do not qualify as a public body or public enterprise, and which have already been made publicly accessible by them via an institutional or thematic archive.³⁵⁷ An application for re-utilisation is therefore not envisaged.³⁵⁸

³⁵⁰ Recommendation (EU) 2018/790 of the EU Commission on access to and preservation of scientific information, point 3 para 2 subpara 1.

³⁵¹ Art 10 para 2 and EC 28 Open Data and PSI Directive.

³⁵² ErlautRV 1571 BlgNR 27. GP 3.

³⁵³ Art 10 (1) and EC 28 Open Data and PSI Directive.

³⁵⁴ Federal Act on the Further Use of Information from Public Authorities, Public Companies and Research Data.

³⁵⁵ § Section 4 no. 9 IWG 2022; EC 27 Open Data and PSI Directive.

³⁵⁶ § 4 Z 6 IWG 2022; ErlautRV 1571 BlgNR 27. GP 12.

³⁵⁷ § Section 2 (1) no. 3 IWG 2023.

³⁵⁸ § Section 6 (7) IWG 2022; *van Eechoud*, Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022), 21: "This regime is meant to reduce the administrative burden on research organisations and individual researchers that could otherwise be confronted with "requests for access" to research data".

The scope of the IWG 2022 with regard to research data therefore differs significantly from that for documents held by public bodies or public companies. Publication is not required for these documents.³⁵⁹

However, it should be noted that the **IWG 2022 does not establish a right of access to documents or their (initial) publication.**³⁶⁰ However, if there is no statutory access regulation in a substantive law (e.g. Environmental Information Act), an obligation to publish research data may arise from a funding agreement (see point 3.3 below), from the rules of good scientific practice, according to which the traceability of data and results must be guaranteed, or from the internal law of the research institution (see point 3.4 below).³⁶¹

3.2.2. Modalities of further use

Researchers, research institutions and research funding organisations as data controllers must allow the **re-use of** publicly funded research data in their possession that has already been made publicly accessible via an institutional or thematic archive **for commercial and non-commercial purposes.**³⁶²

When determining which documents are in the possession of a person or institution, the **authorisation** to approve further use or to make the documents available for further use is taken into account.³⁶³

The following framework conditions apply to the further use of research data:

1. free of charge. Research data subject to the IWG 2022 must be made available for re-use free of charge.³⁶⁴

2. licence. Researchers, research institutions and research funding organisations may make the re-use of documents subject to objective, proportionate and non-discriminatory conditions which are justified by an objective in the public interest, provided that they do not unnecessarily restrict the possibilities of re-using the documents and do not hinder competition.

As far as possible and appropriate, they must use standard licences.³⁶⁵ A standard licence is a set of predefined conditions for reuse that are available in digital format and are preferably compatible with open and internationally standardised public licences available online.³⁶⁶ The most widely used standard licence for public sector documents in Austria is the open, international standard licence Creative Commons with attribution CC BY 4.0 (see Part 2, point

³⁵⁹ ErlautRV 1571 BlgNR 27. GP 3.

³⁶⁰ § 2 para 2 IWG 2022; ErlautRV 1571 BlgNR 27. GP 3.

³⁶¹ *Baumann/Krahn/Lauber-Rönsberg*, Research Data Management and Law (2021), 21.

³⁶² § Section 5 (4) IWG 2022.

³⁶³ § 4 Z 3 IWG 2022; ErlautRV 1571 BlgNR 27. GP 11.

³⁶⁴ § Section 8 (1) IWG 2022.

³⁶⁵ § 10 IWG 2022.

³⁶⁶ § 4 Z 5 IWG 2022.

4.4 above).³⁶⁷ See also the EU Commission's Guidelines on recommended standard licences, datasets and fees for the re-use of documents (2014/C 240/01) of 24 July 2014.

3. practical precautions. Researchers, research institutions and research funders must make lists of the most important documents available online to facilitate the search for documents that are available for further use and must make the most important documents available online in an open and machine-readable format with the associated metadata and link them to the internet portal data.gv.at. In addition, information must be made available on request.³⁶⁸

4. non-discrimination. Comparable categories of re-use must be treated equally by researchers, research institutions and research funding organisations with regard to the conditions of use. Categories of re-utilisation are comparable if the purpose of the re-utilisation or the end product intended by the re-utilisation is the same or at least similar.³⁶⁹

Documents held by researchers, research institutions and research funding organisations other than research data are excluded from the scope of the Act.³⁷⁰ In addition, the further use of research data held by federal states, municipalities, associations of municipalities and institutions is regulated on a federal state legal basis in the federal states' information re-use laws (see point 4.1 below).³⁷¹

3.3. Funding organisations

The EU Commission's recommendation of 25 April 2018 on access to and preservation of scientific information proposes that an obligation to draw up a data management plan and the principle of free access to research data ("*as open as possible, as restricted as necessary*") be included in **funding agreements** for projects that generate research data³⁷²

Building on this, one of the goals of the Austrian Declaration on Open Science is to implement a **mandatory open access dissemination mandate** for all data that has already been made accessible as part of publicly funded projects.³⁷³

However, exceptions to this obligation apply to professional secrets, statistical secrets, business secrets, personal data, works protected by copyright and data considered sensitive for reasons of national security, national defence or public safety and health (see point 3.2 above).³⁷⁴

³⁶⁷ ErlautRV 1571 BlgNR 27. GP 12, 20.

³⁶⁸ § Section 11 (2) IWG 2022.

³⁶⁹ § 12 IWG 2022; ErlautRV 1571 BlgNR 27. GP 22.

³⁷⁰ § Section 3 para. 1 no. 10 and no. 11 IWG 2022.

³⁷¹ § Section 3 (1) no. 3 IWG 2022; links to the provincial laws <https://www.usp.gv.at/it-geistiges-eigentum/informationsweiterverwendung.html>.

³⁷² Recommendation (EU) 2018/790 of the EU Commission on access to and preservation of scientific information, point 4 para. 2.

³⁷³ Open Science Policy Austria (2022), 8.

³⁷⁴ Open Science Policy Austria (2022), 6.

3.3.1. Horizon Europe

In its research and innovation programmes such as Horizon 2020 and its direct successor Horizon Europe, the European Union promotes open science practices such as open access publications and research data management (see Part 1, point 3.4 above).³⁷⁵

In the **Horizon Europe** research framework programme, *grant* recipients are obliged in the *grant agreement*³⁷⁶ to handle the digital research data generated as part of the project responsibly and in accordance with the **FAIR principles**.³⁷⁷

As part of data management, beneficiaries in Horizon Europe must take the following measures:³⁷⁸

1. a data management plan ("**DMP**") must be drawn up and regularly updated.
2. the data must be deposited in a trustworthy **repository as** soon as possible and within the deadlines specified in the DMP. Certified repositories (e.g. CoreTrustSeal, nestor Seal DIN31644, ISO16363) and subject- or discipline-specific repositories that are generally used by the scientific community (e.g. ELIXIR deposition databases) are considered trustworthy.³⁷⁹
3. the deposited data must be made accessible as soon as possible and within the deadlines specified in the DMP under the latest version of the Creative Commons Attribution International Public Licence (**CC BY**) or the Creative Commons Public Domain Dedication (**CC0**) or a licence with equivalent rights. However, the principle of "*as open as possible, as closed as necessary*" results in exceptions to open access. This is not to be granted if legitimate interests of the beneficiary/beneficiaries, also with regard to commercial use, or other restrictions, in particular competition interests of the EU or obligations from the Grant Agreement, conflict with this. If open access to individual or all data is not granted, this must be justified in the DMP.
4. information on research results or other tools and instruments required for the reuse or validation of the data must be made available via the repository.
- 5 The **metadata** must contain at least the following information: Datasets (description, date of deposit, author(s), repository and embargo period); Horizon Europe or Euratom funding; name, acronym and number of the project; licensing conditions; persistent identifiers for the dataset, the authors involved and, if possible, their organisations and funding. Where applicable, the metadata must include persistent identifiers for associated scientific

³⁷⁵ https://research-and-innovation.ec.europa.eu/strategy/strategy-2020-2024/our-digital-future/open-science_de.

³⁷⁶ Horizon Europe (HORIZON) Euratom Research and Training Programme (EURATOM), "General Model Grant Agreement / EIC Accelerator Contract" (HE MGA - Multi & Mono), Version 1.1, 15.4.2022, https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/common/agr-contr/general-mga_horizon-euratom_en.pdf#page=108.

³⁷⁷ Senftleben, Study on EU copyright and related rights and access to and reuse of data (2022), 58ff.

³⁷⁸ Annex 5 to the Horizon Europe GMGA additional obligations for article 17, Open science: open access to scientific publications, 111f.

³⁷⁹ FAQ Under Horizon Europe, what is a trusted repository? <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/support/faq/19535?type=:categories=null;tenders=:programme=null;freeTextSearchKeyword=Trusted%20repositories;matchWholeText=true;period=null;status=0;sortQuery=publicationDate;faqListKey=faqSearchTablePageState>.

publications and other research outputs. The metadata must be made available under a Creative Commons Public Domain Dedication (CC Zero - **CC0**) or equivalent - insofar as legitimate interests or restrictions are safeguarded - in accordance with the FAIR principles (in particular machine-readable).

Further information on the Open Science commitments in Horizon Europe can be found in the Annotated Grant Agreement³⁸⁰, in the **FAQs** on the Funding & Tenders Portal of the European Commission³⁸¹ and in the Guide to Intellectual Property Management in Horizon Europe³⁸².

3.3.2. Fund for the Promotion of Scientific Research ("FWF")

All research results that originate in whole or in part from FWF-funded projects must be made freely accessible on the Internet.³⁸³ This obligation is enshrined in the funding guidelines (see Part 1, point 3.4 above).³⁸⁴

For FWF projects approved after 1 January 2019, the Open Access Guidelines for Research Data, which regulate **open access** to research data and similar materials, apply.³⁸⁵

- 1. the data management plan (DMP)** must describe how data and its metadata are collected, organised, stored, published, shared and archived for a specific project. It must also explain how the **FAIR principles** are complied with.³⁸⁶
- 2. mandatory.** Open access is mandatory for research data on which the scientific publications of the project are based. This includes all data required to reproduce and verify the results of the publications, including the associated metadata. This data should be published as soon as possible, but at the latest together with the corresponding scientific publication. If open access to these data is not or only partially possible for legal, ethical or other reasons, this must be justified in the DMP.
- 3. optional.** The creation of open access to all other research data from a project is at the discretion of the project management. This includes curated data that cannot be directly assigned to a publication or raw data, including the associated metadata.
- 4. research data must be archived in institutional, discipline-specific or cross-disciplinary repositories** (e.g. Zenodo, Dryad, Open Science Framework). The selected repositories must be listed in re3data. In addition, certified repositories (e.g. CoreTrustSeal) and those that fulfil the "Criteria for the Selection of Trustworthy Repositories" of Science Europe are expressly recommended.

³⁸⁰ EU Grants, AGA - Annotated Grant Agreement, EU Funding Programmes 2021-2027, Version 1.0 - DRAFT, 1.4.2023, https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/common/guidance/aga_en.pdf.

³⁸¹ <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/support/faq>.

³⁸² https://intellectual-property-helpdesk.ec.europa.eu/ip-management-and-resources/ip-eu-funded-projects_en.

³⁸³ <https://www.fwf.ac.at/de/forschungsfoerderung/open-access-policy>.

³⁸⁴ FWF funding guidelines (01.01.2022, version 1), point 13.2 with reference to the Open Access Policy.

³⁸⁵ <https://www.fwf.ac.at/de/forschungsfoerderung/open-access-policy/open-access-fuer-forschungsdaten#c16323>.

³⁸⁶ <https://www.fwf.ac.at/de/forschungsfoerderung/open-access-policy/forschungsdatenmanagement>.

5. the data must be stored in such a way that it can be reused without restriction. They must therefore be made available under the latest version of the Creative Commons Attribution International Public Licence (**CC BY**) or a licence with equivalent rights. Deposited datasets must be citable via a persistent identifier (e.g. DOI).

6. **acknowledgement.** In the case of research data, for example, the following note should be included in the metadata: "*Austrian Science Fund (FWF): Project number*".

Further information can be found in the FAQs on the data management plan.³⁸⁷

3.4. Research institutions

3.4.1. Open data in science

One of the core tasks of Open Science is the publication of research data in accordance with the FAIR principles (see point 1). In the area of universities and other research institutions, the focus should be on **largely unrestricted publication** for those scientific activities that were predominantly financed with public funds. However, the decision as to which research data is published must be made taking into account the respective strategic approach to intellectual property and its utilisation ("*as open as possible, as restricted as necessary*").³⁸⁸

According to publicly available information, 9 of the 22 public universities in Austria have already adopted a guideline or policy for research data management.³⁸⁹ These policies are partly based on a **model policy** that was developed as part of the Horizon 2020 project LEARN.³⁹⁰

In contrast to scientific publications (see Part 1, point 3.5 above), it can be summarised with regard to research data that the data generated by researchers are **usually** legally or contractually assigned **to the research institution** (see point 2.3 above). This means that the authority to decide on publication and the modalities of subsequent use by third parties also lies with the research institution. Researchers are assigned the role of data administrator.³⁹¹

3.4.2. Open Access mandates for research data

According to the UG, one of the guiding principles of universities in the fulfilment of their tasks is to ensure good scientific practice and academic integrity.³⁹² Good academic practice means complying with legal regulations, ethical standards and the current state of

³⁸⁷ <https://www.fwf.ac.at/de/forschungsfoerderung/faq/faq-zur-projektphase/faq-zum-datenmanagementplan>.

³⁸⁸ Open Science Policy Austria (2022), 6.

³⁸⁹ <https://forschungsdaten.info/fdm-im-deutschsprachigen-raum/oesterreich/fdm-policies/>.

³⁹⁰ <https://learn-rdm.eu/en/about/>.

³⁹¹ Lipton, Open Scientific Data - Why Choosing and Reusing the Right Data Matters (2020), Chapter 7: Legal Issues Arising in Open Scientific Data, 11.

³⁹² § 2 Z 3a UG.

knowledge in the respective discipline within the framework of the tasks and objectives of the respective institution.³⁹³

According to the guidelines of the Austrian Agency for Research Integrity on Good Scientific Practice ("**GWP Guidelines of the OeAWI**"), the standards of good scientific practice include in particular the precise recording and documentation of the scientific procedure and the results in order to ensure the repeatability of the investigations.

Part of this documentation obligation is also the collection of **primary and original data (processed raw material), which is** comprehensible to third parties, fully recorded and documented. Insofar as these data and documents (e.g. laboratory journals) serve as the basis for publications, they must be **stored** on durable and secure data carriers in the scientific institution in which they were created, taking into account the relevant deadlines in the respective field of research, insofar as this is necessary for the purpose of verifying the selected method and the results obtained.³⁹⁴

The legal significance of the guiding principles under the UG lies primarily in the fact that the university's governing bodies must orientate their actions on them.³⁹⁵ However, researchers are generally obliged to comply with good academic practice by the guidelines of the Rectorate. In addition, this obligation is usually also confirmed in the employment contracts.³⁹⁶

In order to ensure the reproducibility of the scientific procedure and research results, it is recommended that research institutions establish an open access mandate for research data, which stipulates the **publication of research data in accordance with the FAIR principles** (see point 1 above).

However, there should only be an obligation to publish research data to the extent that this is necessary to ensure good scientific practice. In accordance with the principle of "*as open as possible, as closed as necessary*", researchers should also be able to refrain from publishing under an open licence (e.g. CC BY) and to **restrict** or completely exclude **access to archived data if there** are legal, ethical or other documented reasons for not doing so.³⁹⁷ In addition to the legitimate business interests of the research institution and the researchers, national security, national defence and public safety must also be taken into account (see point 3.2).³⁹⁸ With regard to the freedom of science, researchers should also be able to restrict open access if there is a legitimate interest.³⁹⁹

³⁹³ § Section 51 para. 2 no. 33 UG.

³⁹⁴ § Section 2(1)(1) GWP guidelines of the OeAWI (2016).

³⁹⁵ *Faulhammer* in Perthold-Stoitzner, UG^{3.01} § 2 (as of 1 December 2018, rdb.at) Rz 3.

³⁹⁶ *Baumann/Krahn/Lauber-Rönsberg*, Research Data Management and Law (2021), 62f.

³⁹⁷ See for the institutional repository PHAIDRA definitions and FAQ on the RDM Policy of the University of Vienna, question 2.

³⁹⁸ Art 10 para 1 and EC 28 Open Data and PSI Directive; *van Eechoud*, Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022), 25.

³⁹⁹ *van Eechoud*, Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022), 43.

Corresponding regulations on research data management can be established by **guidelines of the Rectorate** or by provisions in the statutes.⁴⁰⁰ Such a procedure appears to be permissible within the framework of the general autonomy of the statutes.⁴⁰¹

When structuring the open access mandate, however, it must be taken into account that in the case of externally funded projects, the agreements made with the funding body on access to and storage of research data must be given priority (see point 3.3 above).

3.4.3. Design of the guideline on research data management

When designing the guideline, the modalities for the reuse of research data that have already been made publicly accessible via an institutional or thematic archive, as defined in the IWG 2022, must be taken into account.

Research data should therefore be made available free of charge and, as far as possible, under an open (standard) licence. In addition, practical precautions must be taken to facilitate the search for the data (see point 3.2 above).

These considerations result in the following key contents of a data management strategy:

- 1. scope of application.** The policy should regulate the collection, processing, utilisation, storage and further use of research data and apply to all persons working at the research institution (e.g. researchers, employees, students and visiting researchers). Other relevant topics and areas can also be regulated.
- 2. rights of use.** As a rule, the rights to research data are held by the research institution, which is why researchers must be authorised to use the data. In particular, researchers should be entitled to publish and make accessible the research data they generate in repositories under open licences and licences for scientific use (see above).
- 3. handling of the research data.** The data must be made accessible in accordance with the **FAIR principles** and provided with persistent identifiers. Special regulations may be provided for the handling of personal data, in particular when processing special categories of personal data such as health data and other sensitive data (e.g. a data clearing house). Data processing must always comply with the guidelines for safeguarding good scientific practice.
- 4. publication and archiving.** The archived data should at least be made accessible to other persons working at the research institution with a legitimate interest (e.g. for further research, validation, traceability and quality assurance). The requirements of the funding bodies or publishers of scientific journals must be observed.

Embargo periods that are linked to project reports or deliverables or to the publication of publications, for example, should be permissible in principle.

⁴⁰⁰ *Grimm* in Pfeil/Grimm/Schöberl, Personalrecht der Universitäten² § 106 UG (as of 1 October 2021, rdb.at) margin no. 13.

⁴⁰¹ § Section 5 UG i.V.m. Art 81c para. 1 B-VG; *Kucsko-Stadlmayer* in Perthold-Stoitzner, UG³ Art 81c B-VG (as of 1 October 2016, rdb.at) Rz 11.

Research data in which there is a continuing scientific or historical research interest, with which statistical purposes are pursued or in the archiving of which there is another public interest must be archived, but at least all research data on which a publication is based and which are necessary for the traceability of the results.

The research data must be stored in a trustworthy institutional, discipline-specific or cross-disciplinary repository or archiving system that guarantees an appropriate level of IT security (see point 3.3 above). If an external repository is used, a reporting obligation to the research institution may be stipulated. If appropriate, parallel archiving in the institutional repository may also be prescribed.

5. retention period. Longer-term retention without deletion periods is to be favoured. In cases where indefinite retention is not possible, the Directive should provide for a minimum retention period (e.g. 10 years from publication of the research results or from completion of the research activity concerned).⁴⁰² The deletion or destruction of research data and associated records must be documented (e.g. in a deletion log).

6 Licensing. Where permissible and not in conflict with any legitimate interests, research data should be made accessible under an open licence (e.g. CC BY).⁴⁰³ Metadata should be placed in the public domain as far as possible (e.g. CC0).

7. responsibility - researchers. Researchers must draw up a data management plan (**DMP**) and are (primarily) responsible for compliance with institutional, contractual and legal requirements. In addition, they must ensure the continued use of research data after the end of the project or after the end of their work at the research institution, in particular by archiving data (see above). These tasks are to be performed by the project management or the data steward designated by it.

8. responsibility - research organisation. The research institution must create the conditions for researchers to fulfil their data management strategy. In addition to the provision of guidelines, infrastructures for the collection, storage and long-term archiving of research data and associated records (e.g. institutional repository), templates for DMPs, advice and training on research data management and other research support services can be offered. Information on existing support programmes, tools and services is available on the forschungsdaten.info portal.⁴⁰⁴

⁴⁰² On the subject of permissible storage, see also *Wirth*, Die Pflicht zur Löschung von Forschungsdaten - Urheber- und Datenschutzrecht im Widerspruch zu den Erfordernissen guter wissenschaftlicher Praxis?, ZUM 64 (8/9), 585-592.

⁴⁰³ *van Echoud*, Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022), 25.

⁴⁰⁴ <https://forschungsdaten.info/fdm-im-deutschsprachigen-raum/oesterreich/fdm-unterstuetzung/> [and https://forschungsdaten.info/fdm-im-deutschsprachigen-raum/oesterreich/technische-infrastrukturen/](https://forschungsdaten.info/fdm-im-deutschsprachigen-raum/oesterreich/technische-infrastrukturen/).

The following **examples** can be used as a guide when designing your own institutional data management strategy:

1.	Research Data Management ("RDM") Policy of the University of Vienna including FAQ on the policy, https://rdm.univie.ac.at/de/fdm-policy-und-faq/
2.	Policy for research data management at MedUni Vienna, https://www.meduniwien.ac.at/web/rechtliches/policy-fuer-forschungsdatenmanagement/
3.	Regulations for the management of research data, results and software at the Austrian Centre for Digital Humanities and Cultural Heritage of the Austrian Academy of Sciences (ACDH-CH), https://www.oeaw.ac.at/de/acdh/what-we-offer/data-policy

3.5. Research groups

Guidelines or agreements on the handling of research data and data management plans are useful not only at institutional level, but also in (larger) research and working groups, in order to avoid ambiguities.⁴⁰⁵

Among other things, it is necessary to regulate who is authorised to use which data (e.g. internal use, publication, rights of access) and to what extent there are restrictions on the use of data in individual cases. The latter may result in particular from the confidentiality agreements.⁴⁰⁶

In cross-institutional agreements (e.g. in consortium agreements) or agreements between a research institution and a (retired) employee, several parties may be granted non-exclusive rights of use.⁴⁰⁷

When drafting the agreements, the data management requirements of the funding organisations and any specifications at the level of the research institution must be taken into account (see point 3.3 above and point 3.4 above).

⁴⁰⁵ Baumann/Krahn/Lauber-Rönsberg, Research Data Management and Law (2021), 61.

⁴⁰⁶ Baumann/Krahn/Lauber-Rönsberg, Research Data Management and Law (2021), 61.

⁴⁰⁷ Baumann/Krahn/Lauber-Rönsberg, Research Data Management and Law (2021), 61.

4. Access to information for research purposes - Access to public sector data

4.1. Access to information from the public sector and public companies ("open government data")

4.1.1. Open Government Data in Austria

The idea behind Open Government Data ("OGD") is the publication of data collected by the administration (e.g. business life, geography, weather, patents, tourism, education, economy, social affairs) to enable its use by citizens, companies, research institutions and other organisations.⁴⁰⁸

In the interests of national visibility and transparency, **data.gv.at**, as the central "Austria" catalogue, records the metadata of the decentralised data catalogues of the Austrian administration and makes them available for retrieval. The datasets made available on this portal include OGD and open administrative data as well as other public sector information.

⁴⁰⁹

Open administrative data is **non-personal information** that has been collected, created or paid for by public authorities and is made available to the public voluntarily and free of charge. It is often provided in the form of **aggregated data**, i.e. abstract or statistical data derived from personal data.⁴¹⁰ By contrast, public sector information also includes other documents from public bodies that must be made available in accordance with the IWG 2022.⁴¹¹

⁴⁰⁸ <https://www.ris.bka.gv.at/UI/Ogd.aspx> and <https://www.usp.gv.at/it-geistiges-eigentum/informationsweiterverwendung.html>.

⁴⁰⁹ <https://www.data.gv.at/infos/zielsetzung-data-gv-at/>.

⁴¹⁰ <https://www.data.gv.at/infos/governance/>.

⁴¹¹ <https://www.data.gv.at/infos/zielsetzung-data-gv-at/>.

The framework conditions for Open Government Data, including the relevant principles, were described in a white paper by the Cooperation Open Government Data Austria⁴¹²⁴¹³. In addition, further information on Open Government Data is available at data.gv.at:⁴¹⁴

1.	Guide to open data ⁴¹⁵
2.	Guide "Open data analysis - making better decisions" ⁴¹⁶
3.	Guide "Open Data Governance - On the way to a data-driven organisation" ⁴¹⁷

4.1.2. Legal framework for the further use of information

In its **European data strategy**, the EU Commission announced the creation of a cross-sector governance framework for data access and utilisation.⁴¹⁸ A first step in this direction was the revision of the Public Sector Information Directive ("PSI").⁴¹⁹

Open Data and the PSI Directive were implemented in the IWG 2022 and in nine provincial laws due to the legal competences involved.⁴²⁰ The aim of these laws is to promote the use of open data in line with the principle of "**open by design and by default**" and to facilitate the reuse of documents, in particular to support the creation of new information products and services.⁴²¹

1. scope of application. The IWG 2022 primarily obliges public bodies.⁴²² Public sector bodies must allow the re-use of documents in their possession that were created as part of their public mandate for commercial and non-commercial purposes.⁴²³ However, in line with the principle of "*as open as possible, as closed as necessary*", there are numerous exceptions (see point 3.2 above).

Since the amendment, public companies and research data have been included in the scope of the law.⁴²⁴ Only public companies from certain utility sectors such as water, energy, transport, postal services, passenger transport, aviation or shipping are affected, and only to

⁴¹² <https://www.data.gv.at/infos/cooperation-ogd-oesterreich/>.

⁴¹³ *Cooperation OGD Austria*, Framework for Open Government Data Platforms (Version 1.2.0/08 November 2016).

⁴¹⁴ <https://www.data.gv.at/infos/links/> and <https://www.data.gv.at/infos/>.

⁴¹⁵ <https://www.data.gv.at/2023/07/04/neuer-open-data-leitfaden-erschiene/>.

⁴¹⁶ <https://www.data.gv.at/infos/analyse/>.

⁴¹⁷ <https://www.data.gv.at/infos/governance/>.

⁴¹⁸ Communication from the European Commission, A European Data Strategy, COM(2020) 66 final, 15ff.

⁴¹⁹ Directive 2013/37/EU amending Directive 2003/98/EC on the re-use of public sector information; <https://digital-strategy.ec.europa.eu/de/policies/psi-open-data>.

⁴²⁰ <https://www.usp.gv.at/it-geistiges-eigentum/informationsweiterverwendung.html>.

⁴²¹ § 4 Section 1 IWG 2022; EC 16 Open Data and PSI Directive.

⁴²² § 4 Z 1 IWG 2022; *Haidinger*, die kurzmeldung, *Dako* 2022, 96.

⁴²³ § 5 (1) in conjunction with. § 3 para. 1 no. 1 IWG 2022.

⁴²⁴ § 2 para. 1 no. 2 in conjunction with. § 3(1)(2) IWG 2022 and Section 2(1)(3) in conjunction with Section 10 IWG 2022. § SECTION 10 IWG 2022.

the extent that they provide services in the general interest on the basis of binding (statutory) regulations and are not directly exposed to competition.⁴²⁵

Public companies are not obliged to allow the reuse of documents. However, if reuse is permitted voluntarily or if there is a special legal obligation to enable reuse, the requirements of the IWG 2022 must be applied.⁴²⁶

Documents in the possession of the Austrian Broadcasting Corporation (ORF) and its subsidiaries that serve to fulfil the public service mandate are completely excluded from the scope of the IWG 2022 in accordance with the requirements of the Open Data and PSI Directive.⁴²⁷

2. principles. The IWG 2022 is intended to create a level playing field for all parties interested in reuse, eliminate unjustified market and competitive distortions and provide market participants with greater legal certainty.⁴²⁸

The IWG does not contain any obligation for public bodies to authorise the further use of their documents and therefore does not establish a right of access to documents.⁴²⁹

Instead, the existing access regulations will continue to be used as a basis. In addition to the duty to provide information pursuant to Art. 20 B-VG (see point 4.5 below), the substantive laws can be considered as a legal basis. These may expressly stipulate that documents must be published or made accessible upon request (see e.g. Environmental Information Act).⁴³⁰

Public bodies are also not obliged to create or adapt documents or provide extracts from documents if this would involve a disproportionate effort that goes beyond simple processing.⁴³¹ Therefore, only existing documents or data that have already been created in the course of ongoing "business activities" are affected.⁴³²

3. application for re-use. If the documents are not actively made available anyway, applications for the re-use of documents can be submitted to public bodies. However, this option is not available to public companies, educational institutions, researchers, research institutions or research funding organisations.⁴³³

The application must be submitted in writing (e.g. by e-mail) to the public authority that holds the requested document, i.e. the authority authorised to approve the further use.⁴³⁴ A decision

⁴²⁵ Horn, Recast of the Directive on the re-use of public sector information (PSI II Directive), jusIT 2020/1, 2.

⁴²⁶ § Section 5 (3) IWG 2022; ErlautRV 1571 BlgNR 27. GP 15.

⁴²⁷ § Section 3 (1) no. 8 IWG 2022.

⁴²⁸ <https://www.usp.gv.at/it-geistiges-eigentum/informationsweiterverwendung.html>.

⁴²⁹ § Section 2 (2) IWG 2022.

⁴³⁰ ErlautRV 1571 BlgNR 27. GP 3.

⁴³¹ § Section 7 (2) IWG 2022.

⁴³² Horn, Recast of the Directive on the re-use of public sector information (PSI II Directive), jusIT 2020/1, 2.

⁴³³ § Section 6 (1) and (7) IWG 2022; Horn, Recast of the Directive on the re-use of public sector information (PSI II Directive), jusIT 2020/1, 2.

⁴³⁴ § Section 6 (1) IWG 2022.

on the application must be made within four weeks of receipt of the application, unless the applicable access regulation provides for a specific time limit for processing.⁴³⁵

The public sector body may make the requested documents available to the applicant in whole or in part for further use, submit a contract or licence offer to him/her to specify conditions, or inform him/her in writing that his/her request will not be granted, stating the reasons.⁴³⁶

The ordinary courts have jurisdiction to decide on legal disputes concerning the further use of documents.⁴³⁷ In the event of a (partial) rejection of the application or in the event of default, litigation is open.⁴³⁸ The term "application" is not to be understood in the sense of an application under the AVG, but as an enquiry or request for further use under private law.⁴³⁹

4. modalities of further use. The documents shall be made available in all existing formats or languages and, insofar as this does not require disproportionate effort, as open data by electronic means in open, machine-readable, accessible, retrievable and reusable formats together with the associated metadata. Both the formats and the metadata must comply as far as possible with internationally recognised formal, open standards.⁴⁴⁰

In addition, the disclosure of documents must in principle be free of charge and without restrictions or conditions, unless these are objective, proportionate, non-discriminatory and justified on grounds of public interest.⁴⁴¹

5. obligation to publish "high-quality data sets". A special regulation for "high value datasets" is new.⁴⁴² These are documents whose re-use is associated with important benefits for society, the environment and the economy, in particular due to their suitability for the creation of value-added services, applications and new, high-quality and decent jobs, as well as due to the number of potential beneficiaries of the value-added services and applications based on these datasets.⁴⁴³

These data sets must always be made available free of charge, machine-readable, via application programming interfaces (API) and, if necessary, as a mass download.⁴⁴⁴

Annex I of the Open Data and PSI Directive contains a **list of thematic categories of high quality datasets**, including geospatial, earth observation and environment, meteorology, statistics, business and business ownership, and mobility.

⁴³⁵ § Section 6 (3) IWG 2022.

⁴³⁶ § Section 6 (3) IWG 2022; ErlautRV 1571 BlgNR 27. GP 16.

⁴³⁷ § 15 IWG 2022.

⁴³⁸ ErlautRV 1571 BlgNR 27. GP 25.

⁴³⁹ ErlautRV 1571 BlgNR 27. GP 16.

⁴⁴⁰ § 7 IWG 2022; *van Echoud*, Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022), 15.

⁴⁴¹ §§ 8ff IWG 2022; *Horn*, Recast of the Directive on the re-use of public sector information (PSI-II Directive), *jusIT* 2020/1, 3.

⁴⁴² *Haidinger*, the newflash, *Dako* 2022, 96.

⁴⁴³ § 4 Z 10 IWG 2022.

⁴⁴⁴ ErlautRV 1571 BlgNR 27. GP 24; *Horn*, Recast of the Directive on the re-use of public sector information (PSI-II Directive), *jusIT* 2020/1, 4.

The EU Commission has issued an **implementing regulation** with a list of certain high-quality data sets held by public authorities or public companies. This regulation also defines the modalities for publication and further use or conditions (licences).⁴⁴⁵ The regulation is applicable **from 9 June 2024**.

For more information, see the EU Commission's questions and answers on high-quality datasets.⁴⁴⁶

4.2. New regulations for data exchange - overview

A key challenge from the perspective of researchers as data users is the need for more comprehensive access rights to data (sources) from both the public and the private sector, because data from large technology companies is of crucial importance for the progress of academic research in many disciplines (e.g. media studies, behavioural research, economics, law).⁴⁴⁷

In addition to the recast of the PSI Directive, the **European data strategy** therefore proposed further European legal acts to create a cross-sectoral governance framework for data access and use.⁴⁴⁸

The **complex interplay** of the various legal acts is particularly evident in the area of promoting data access through the new EU legal acts.

When determining the applicable legal act, it depends on whether the data is held by a public body, a private company, a gatekeeper defined as such or a health service, whether the data is protected or unprotected and whether it is personal or non-personal.⁴⁴⁹

⁴⁴⁵ Commission Implementing Regulation (EU) 2023/138 of 21 December 2022 establishing certain high quality datasets and the modalities of their publication and re-use.

⁴⁴⁶ <https://digital-strategy.ec.europa.eu/de/faqs/high-value-datasets-questions-and-answers>.

⁴⁴⁷ van Echoud, Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022), 10.

⁴⁴⁸ Communication from the European Commission, A European Data Strategy, COM(2020) 66 final, 15ff.

⁴⁴⁹ Knyrim/Urban, DGA, DMA, DSA, DA, AI-Act, EHDS - an overview of the European data strategy (Part I), Dako 2023/30, 55.

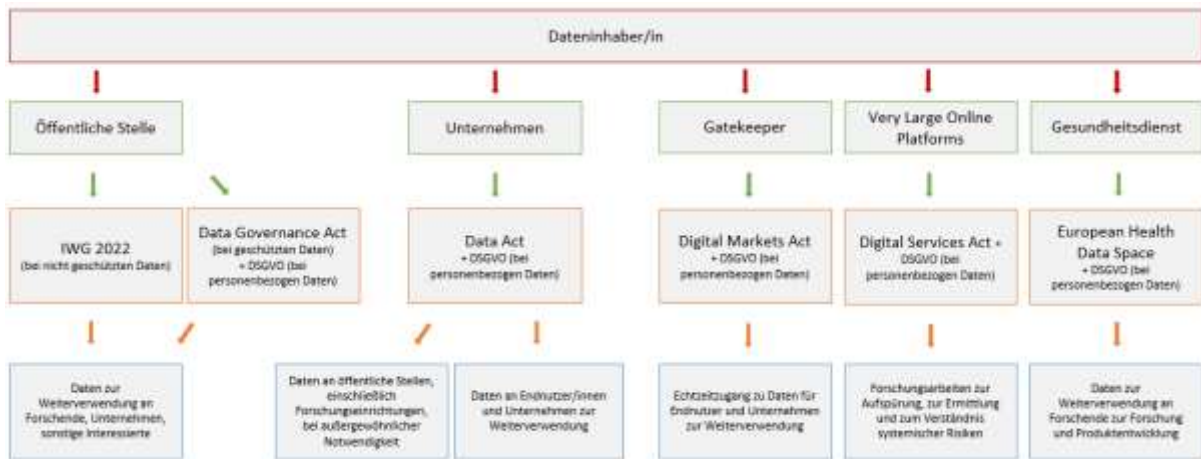


Illustration 7 Overview of the scope of application of PSI, DGA, Data Act, DMA, DSA, EHDS and GDPR; source: Knyrim/Urban, DGA, DMA, DSA, DA, AI-Act, EHDS - an overview of the European data strategy (Part I), Dako 2023/30, 56.

The European data strategy can only be implemented with appropriate data governance and structures in the public sector. The aim at national level is to establish and structurally anchor a strategic and effective team for data management and data policy. In order to pool resources, responsibility for the national data strategy and the **national implementation** of the European data strategy has been transferred to the Federal Ministry of Finance ("BMF").⁴⁵⁰

A national data strategy will be developed at the BMF in the coming months.⁴⁵¹ The position paper "Data Excellence: Strategies for Austria" from 2022, which was commissioned by the Council for Research and Technology Development, should serve as a guideline for the design.⁴⁵²

4.3. Data Governance Act

The Data Governance Act ("DGA")⁴⁵³ promotes data sharing and innovation in the EU by increasing the general availability of data for business and science and creating an EU data market and EU data space. The DGA came into force on 23 June 2022 and **has been in force since 24 September 2023**.

⁴⁵⁰ BMF, press release of 26 July 2023, <https://www.bmf.gv.at/presse/pressemeldungen/2023/juli/tursky-datenstrategie.html> and https://www.ots.at/presseaussendung/OTS_20230726_OT0013/tursky-bundesregierung-einigt-sich-auf-europaeische-datenstrategie.

⁴⁵¹ BMF, press release of 26 July 2023, <https://www.bmf.gv.at/presse/pressemeldungen/2023/juli/tursky-datenstrategie.html> and https://www.ots.at/presseaussendung/OTS_20230726_OT0013/tursky-bundesregierung-einigt-sich-auf-europaeische-datenstrategie.

⁴⁵² https://www.ots.at/presseaussendung/OTS_20221128_OT0018/oesterreich-braucht-eine-nationale-datenstrategie.

⁴⁵³ Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act).

4.3.1. Regulatory content

In order to achieve these objectives, the DGA regulates several topics.⁴⁵⁴ The main contents of the regulation are⁴⁵⁵

1. further use of protected data. Conditions are set for the re-use of data of certain categories of data held by public authorities (see below).

2. data intermediary services - notification and supervision framework. Data intermediary services must register with a national body before commencing their activities. This national body, which has yet to be appointed, must confirm applications for the establishment of data intermediary services within one week, provided that the applications are correct and complete.⁴⁵⁶ The supervisory framework applies to services that aim to establish **business relationships** between an indefinite number of data subjects or data owners on the one hand and data users on the other, by technical, legal or other means, in order to enable data sharing.⁴⁵⁷

3. data altruism registration system. A public register of recognised data altruism organisations shall be established.⁴⁵⁸ These organisations must themselves be **non-profit-making** and legally independent of any organisation that pursues profit-making objectives.⁴⁵⁹ Entry in the register is voluntary.⁴⁶⁰ In order to facilitate "data donations", a European consent form for data altruism is being developed.⁴⁶¹ In addition, Member States may establish rules to assist data subjects in voluntarily making personal data held by public sector organisations available for data altruism.⁴⁶²

In addition, a **European Data Innovation Board** will be established. This expert group will support the EU Commission, among other things, in the development of a uniform practice for the processing of applications for re-use and with regard to the applicable requirements for providers of data brokerage services and recognised data altruistic organisations.

The DGA also regulates international access to and the **international transfer of non-personal data**.⁴⁶³ This is intended to ensure that such a transfer does not violate EU or Member State law.⁴⁶⁴

⁴⁵⁴ <https://digital-strategy.ec.europa.eu/de/policies/data-governance-act-explained>.

⁴⁵⁵ van Eechoud, Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022), 26.

⁴⁵⁶ Art 10ff DGA; Knyrim, Der Data Governance Act und seine Schnittmenge mit der DSGVO, *Dako* 2023/29, 53.

⁴⁵⁷ Art 2 para 11 DGA.

⁴⁵⁸ Art 17 DGA.

⁴⁵⁹ Art 18 DGA.

⁴⁶⁰ Art 1 and Art 19 DGA.

⁴⁶¹ Art 25 DGA.

⁴⁶² Art 16 DGA.

⁴⁶³ Art 31 DGA.

⁴⁶⁴ van Eechoud, Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022), 26.

4.3.2. Extension of the existing legal regime for reuse

1 Scope of application. Chapter II of the DGA regulates the re-use of certain **categories of protected data** held by public sector bodies. These rules apply to data that is subject to commercial confidentiality, including trade, professional and company secrets, statistical confidentiality or the protection of the intellectual property of third parties, or that is personal data.⁴⁶⁵

This **supplements the previous legal regime of the Open Data and PSI Directive and the IWG 2022** because protected data is excluded from the scope of application. However, the DGA only applies to digital data.⁴⁶⁶ For example, personal data that is not processed automatically in a file system is therefore not covered by reuse.⁴⁶⁷

As under Open Data and the PSI Directive, data in the possession of public broadcasters and their branches that serve the fulfilment of a public broadcasting mandate do not fall within the scope of application.⁴⁶⁸

2. principles. The DGA **does not** establish an obligation for public authorities to **make data available for re-use**. It is still up to the national legislator to establish an obligation to reuse public sector data (see point 4.1 above).⁴⁶⁹ Furthermore, the DGA does not release public sector bodies from their confidentiality obligations under Union or national law.⁴⁷⁰

When reusing protected data, **the preservation of the protected character must be ensured**.⁴⁷¹ Further use is therefore only permitted if the intellectual property rights and confidentiality of the protected information are protected.⁴⁷² Accordingly, national and European legal acts that regulate data protection, such as the DSG, DSGVO, e-Privacy Directive, data protection provisions in the TKG, take precedence over the DGA.⁴⁷³

3. conditions for further use. Public sector bodies may attach various conditions to the re-use of data in order to ensure the protection of the data.⁴⁷⁴ They may grant access only on condition that the personal data is anonymised or that confidential business information, including trade secrets or content protected by intellectual property rights, is modified, aggregated or redacted using another method of disclosure control.⁴⁷⁵ Where this is not

⁴⁶⁵ Art 3 para 1 DGA.

⁴⁶⁶ Art 2 Z 1 DGA.

⁴⁶⁷ Art 2 Z 1 DGA; Art 2 para 1 GDPR; *Knyrim*, Der Data Governance Act und seine Schnittmenge mit der DSGVO, *Dako* 2023/29, 52.

⁴⁶⁸ Art 3 para 2 lit b DGA; Art 3 para 2 lit i Open Data and PSI Directive.

⁴⁶⁹ Art 1 para 2 DGA; EC 11 DGA.

⁴⁷⁰ Art 1 para 2 DGA; *Knyrim/Urban*, DGA, DMA, DSA, DA, AI-Act, EHDS - an overview of the European data strategy (Part I), *Dako* 2023/30, 57.

⁴⁷¹ Art 5 para 3 DGA.

⁴⁷² Art 5 para 5, para 7 and para 8 DGA.

⁴⁷³ Art 1 para 3 DGA; Art 3 para 3 DGA; *Knyrim/Urban*, DGA, DMA, DSA, DA, AI-Act, EHDS - an overview of the European data strategy (Part I), *Dako* 2023/30, 57.

⁴⁷⁴ Art 5 para 3 and para 5ff DGA.

⁴⁷⁵ Art 5 para 3 lit a DGA.

possible, the public sector body shall use its best endeavours to assist potential re-users in obtaining the consent of the data subjects or the permission of the data owners.⁴⁷⁶

In addition, they may provide that access to the data must take place in a secure processing environment or in compliance with high security standards in certain physical premises, unless remote access is authorised.⁴⁷⁷

The conditions for re-use must be non-discriminatory, transparent, proportionate and objectively justified and must not serve to hinder competition.⁴⁷⁸ Compared to Open Data and the PSI Directive, the DGA leaves more room for manoeuvre for charging fees.⁴⁷⁹ If public sector bodies charge fees, they must take measures such as fee reductions to incentivise the re-use of data for non-commercial purposes such as scientific research and by SMEs and start-ups.⁴⁸⁰

Public sector bodies shall make the conditions for the authorisation of re-use and the procedure for applying for it publicly available via the **central information point**, which is yet to be established or designated.⁴⁸¹ This shall provide potential reusers electronically with a searchable inventory list with an overview of all available data resources and relevant information with a description of the available data, including at least the data format, the scope of the data and the conditions for reuse ("data map").⁴⁸² Following the example of the Swiss Federal Statistical Office, this should also function as an interoperability platform through which the data can also be accessed and analysed and which contributes to the harmonisation of metadata standards.⁴⁸³ The EU Commission will set up a Europe-wide central access portal with this information.⁴⁸⁴

To **support** public sector bodies in granting access to the re-use of data, each Member State must designate one or more **competent bodies** that may be responsible for specific sectors (e.g. national and sectoral data stewards).⁴⁸⁵ Member States may set up new public bodies or entrust existing public bodies or their internal services with this task (e.g. national statistical institutes or the federal accounting centre). The competent bodies must have adequate legal, financial, technical and human resources, including the necessary technical expertise, to fulfil the tasks assigned to them.⁴⁸⁶

⁴⁷⁶ Art 5 para 6 DGA.

⁴⁷⁷ Art 5 para 3 lit b and para 4 DGA.

⁴⁷⁸ Art 5 para 2 DGA.

⁴⁷⁹ *van Echoud*, Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022), 27.

⁴⁸⁰ Art 6 para 4 DGA; EC 25 DGA.

⁴⁸¹ Art 5 para 1 DGA in conjunction with Art 8 DGA.

⁴⁸² Art 8 para 2 DGA.

⁴⁸³ Position paper "Data excellence: Strategies for Austria" (2022), 25.

⁴⁸⁴ Art 8 para 4 DGA.

⁴⁸⁵ Position paper "Data excellence: Strategies for Austria" (2022), 25.

⁴⁸⁶ Art 7 DGA.

4. application for further use. The request can be submitted to the public authority or to the central information centre. The latter is authorised to receive requests or applications relating to the further use of data and to forward them to the competent public authorities.⁴⁸⁷

The competent public authorities must take a decision on the request for further use of the data within two months of receipt of the request.⁴⁸⁸ National law must provide for a legal remedy. It is permissible to provide for the jurisdiction of the ordinary courts, as in the IWG 2022.⁴⁸⁹

Access to data may also be granted by the competent authorities insofar as they are authorised to do so by sectoral Union law or national law.⁴⁹⁰

4.3.3. Applicability to research institutions and research infrastructure

In contrast to the Open Data and PSI Directive, the DGA does not differentiate between research data and other data.⁴⁹¹

Research institutions and research funding organisations may be set up as public bodies or bodies governed by public law and in this case are subject to the re-use provisions of the DGA. These organisations are considered to be "hybrid entities" that only fall within the scope of the regulation in relation to their function as a research institution. This is because it does not apply to data held by cultural organisations such as libraries or educational institutions.⁴⁹²

In addition, the sharing of data between researchers for non-commercial research purposes is not subject to the provisions on the re-use of certain categories of protected data held by public sector bodies. This also applies to data held by a research organisation that is part of a specific public-private association whose main purpose is research.⁴⁹³

As a result, most data held by research organisations is excluded from the scope of application. Even if public research organisations have protected categories of data that are subject to the DGA, they can decide for themselves whether or not to allow re-use. If they decide to do so, they must comply with the re-use rules.⁴⁹⁴

Examples of data brokerage services include data marketplaces where companies can make data available to others and orchestrators of ecosystems for data sharing.⁴⁹⁵ Data brokerage services, on the other hand, are not services with which no business relationships are to be

⁴⁸⁷ Art 8 para 2 DGA.

⁴⁸⁸ Art 9 para 1 DGA.

⁴⁸⁹ Art 9 para 2 DGA.

⁴⁹⁰ Art 7 para 2 DGA; EC 26 DGA.

⁴⁹¹ *van Eechoud*, Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022), 28, 30.

⁴⁹² EG 12 DGA.

⁴⁹³ EG 12 DGA.

⁴⁹⁴ *van Eechoud*, Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022), 29.

⁴⁹⁵ EG 28 DGA.

established, such as archives or **repositories** to enable the reuse of scientific research data in accordance with the principles of open access.⁴⁹⁶

Supporting scientific research is one of the objectives of the provisions on data altruism.⁴⁹⁷ In particular, this practice should contribute to the creation of sufficiently large data sets to enable data analyses and machine learning across borders in the European Union.⁴⁹⁸

4.4. Data Act

4.4.1. Status of the legislative process

On 27 June 2023, the European Parliament and the Council of the EU reached a political agreement on the Data Act (DA) proposed by the EU Commission in February 2022.⁴⁹⁹ The votes in Parliament will now follow. However, amendments to the text are no longer possible.⁵⁰⁰

The DA is expected to be adopted in the first quarter of 2024. The DA will take effect from the 20th month after its entry into force, i.e. **probably in Q4 2025**. The obligation to make generated data accessible must be fulfilled twelve months after the DA takes effect.⁵⁰¹

The final text has not yet been published in the Official Journal of the European Union, so the explanations are based on the compromise text on the Data Act as agreed on 27 June 2023 ("kDA").

4.4.2. Regulatory content

The DA is a complex piece of legislation that regulates a range of different topics. The focus is on the rights of access to data and the corresponding obligations for data owners and cloud providers, particularly in the commercial sector. Some of these topics may also be relevant for research.⁵⁰²

1. obligation to provide data to public authorities due to exceptional necessity. This obligation applies in particular to companies as data controllers (see below).

2. obligation to make product and associated service data accessible to the user. The DA relates to data applications in industry and the Internet of Things (IoT) and is intended to enable remote data access and fair data usage.⁵⁰³

⁴⁹⁶ EG 29 DGA.

⁴⁹⁷ Art 2 Z 16 DGA.

⁴⁹⁸ EG 45 DGA.

⁴⁹⁹ Proposal for a Regulation on harmonised rules for fair access to and use of data (Data Law), COM(2022) 68 final.

⁵⁰⁰ https://ec.europa.eu/commission/presscorner/detail/de/ip_23_3491.

⁵⁰¹ Art 42 kDA: "It shall apply from 20 months after [the date of entry into force of this Regulation]. The obligation resulting from Article 3(1) shall apply to products and those services related to them placed on the market after 12 months after the date of application of this Regulation."

⁵⁰² van Eechoud, Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022), 32.

⁵⁰³ Knyrim/Urban, DGA, DMA, DSA, DA, AI-Act, EHDS - an overview of the European data strategy (Part II), Dako 2023/40, 76.

Users of networked devices and associated services that generate data are granted extensive rights to use data. They should be able to access data directly on the product or via interfaces. Access should be free of charge and, where appropriate, in real time in a common, machine-readable format.⁵⁰⁴

If the user cannot access the data directly from the product or the connected service, the data owners must provide the user with *readily available data* and the metadata required to interpret and use this data.⁵⁰⁵

In addition, users should be able to share this *readily available data* with third parties. At the request of a user or a party acting on behalf of a user, the data owner shall make the data available without delay.⁵⁰⁶

The right of access does not extend to "downstream" information, i.e. information that is derived or obtained from the data generated directly by the product or service.⁵⁰⁷

The primary addressees of the regulation are manufacturers of networked products and providers of related services as data controllers. It is irrelevant whether a product is used on the basis of a purchase, rental or leasing contract.⁵⁰⁸ They must design their products and services simply and securely and - where relevant and appropriate - enable direct access to the data (**data accessibility by design**).⁵⁰⁹ In addition, data controllers must provide pre-contractual information similar to that required by the GDPR.⁵¹⁰

The obligations to transfer data supplement the provisions of the GDPR on **data portability**.⁵¹¹ However, these regulations do not apply to micro or small companies or to products that a medium-sized company has had on the market for less than a year.⁵¹²

It should also be noted that the sui generis neighbouring right does not apply to (simple) databases containing data obtained or generated during the use of a product or related service in order not to hinder the exercise of users' rights.⁵¹³ This clarification in the DA, which can be seen as positive from a research perspective, is in line with the established case law

⁵⁰⁴ Art 3 kDA; *Knyrim/Urban*, DGA, DMA, DSA, DA, AI-Act, EHDS - an overview of the European data strategy (Part II), Dako 2023/40, 76.

⁵⁰⁵ Art 4 para 1 kDA.

⁵⁰⁶ Art 5 kDA; *Knyrim/Urban*, DGA, DMA, DSA, DA, AI-Act, EHDS - an overview of the European data strategy (Part II), Dako 2023/40, 76.

⁵⁰⁷ *van Eechoud*, Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022), 34.

⁵⁰⁸ Art 3 para 2 kDA.

⁵⁰⁹ Art 3 para 1 kDA; *Knyrim/Urban*, DGA, DMA, DSA, DA, AI-Act, EHDS - an overview of the European data strategy (Part II), Dako 2023/40, 76.

⁵¹⁰ *Knyrim/Urban*, DGA, DMA, DSA, DA, AI-Act, EHDS - an overview of the European data strategy (Part II), Dako 2023/40, 76.

⁵¹¹ Art 20 GDPR; *Knyrim/Urban*, DGA, DMA, DSA, DA, AI-Act, EHDS - an overview of the European data strategy (Part II), Dako 2023/40, 76.

⁵¹² Art 7 kDA.

⁵¹³ Art 35 kDA.

of the ECJ, according to which *machine-generated raw data* does not fall within the scope of sui generis database protection (see point 2.2 above).⁵¹⁴

3. fair, reasonable and non-discriminatory (FRAND) licences for data access and use between companies. If a data controller is obliged to provide data to a data recipient, this is done on fair, reasonable and non-discriminatory terms and in a transparent manner.⁵¹⁵ The data controller may request reasonable consideration, including a profit margin, for the provision of the data.⁵¹⁶

Accordingly, unfair terms that are unilaterally imposed on another company, in particular with regard to the exclusion and limitation of liability, legal remedies, proportionate use of data or excessively short notice periods, are not permitted.⁵¹⁷

The EU Commission will draw up **non-binding model contract terms** for data access and use to help parties draw up and negotiate contracts with balanced contractual rights and obligations.⁵¹⁸

In addition, the DA contains regulations on **switching between data processing services**, in particular cloud services, and the associated data portability. Providers must remove certain contractual, commercial, technical and organisational obstacles.⁵¹⁹

In addition, participants in data rooms that offer data or data services to other participants must fulfil requirements for the **interoperability** of data and the mechanisms and services for data sharing.⁵²⁰

Like the DGA, the DA contains specific provisions on **international public access and transfer of non-personal** data. Providers of data processing services shall take all appropriate technical, legal and organisational measures, including contractual arrangements, to prevent international transfers of, or international public access to, non-personal data stored in the Union where this would be contrary to Union or national law.⁵²¹

4.4.3. Data access for research?

The DA **does not** contain **any special regulations for access to and use of data** for the purposes of scientific research. Researchers must therefore obtain the data as third parties from users of the products or associated services or from public bodies in connection with exceptional needs. It is questionable whether this can ensure sufficiently broad access to data in practice to enable scientifically sound analyses.⁵²²

⁵¹⁴ Senftleben, Study on EU copyright and related rights and access to and reuse of data (2022), 47ff.

⁵¹⁵ Art 8 kDA.

⁵¹⁶ Art 9 kDA.

⁵¹⁷ Art 13 kDA; *Knyrim/Urban*, DGA, DMA, DSA, DA, AI-Act, EHDS - an overview of the European data strategy (Part II), *Dako* 2023/40, 76.

⁵¹⁸ Art 34 kDA.

⁵¹⁹ Art 23ff kDA.

⁵²⁰ Art 28ff kDA.

⁵²¹ Art 27 kDA.

⁵²² Senftleben, Study on EU copyright and related rights and access to and reuse of data (2022), 48, 52.

In certain exceptional cases, in particular to deal with a public emergency, a public authority may request data from the data controller, including private companies, which it needs to fulfil its statutory tasks in the public interest, provided that this data is not available on the market at market prices and the data is needed immediately. The public body must prove that there is an **exceptional need** to use the requested data.⁵²³

The data received may be passed on to persons or organisations for the purpose of conducting scientific research and analyses or to national statistical offices and Eurostat for the compilation of official statistics. These institutions must be non-profit organisations or act within the framework of a legally recognised task of public interest. The data owner from whom the data was obtained must be informed of the disclosure.⁵²⁴

The data received may only be used in a manner that is compatible with the purpose for which it was requested.⁵²⁵ They may also not be made available for further use in accordance with the provisions of the IWG 2022 or the DGA.⁵²⁶

4.5. From the duty to provide information to freedom of information

4.5.1. General obligation to provide information

All bodies entrusted with federal, provincial and municipal administration tasks, as well as the bodies of other public corporations, are obliged under the Federal Constitution Act ("B-VG") to provide information on matters within their sphere of activity, provided that this does not conflict with a statutory duty of confidentiality.⁵²⁷

However, this obligation to provide information is not a constitutionally guaranteed right, but merely an objective constitutional obligation of the competent ordinary legislator to regulate the scope and procedure of the obligation to provide information in more detail and to provide for a **subjective right to information**.⁵²⁸

In fulfilment of this mandate, the Federal Act on the Duty of the Federal Administration to Provide Information ("Duty to Provide Information Act - APG") was enacted. In addition, the Federal Principles Act on the Duty to Provide Information of the Administration of the Federal States and Municipalities ("Basic Principles Act on the Duty to Provide Information") was

⁵²³ Art 14ff kDA; *Knyrim/Urban*, DGA, DMA, DSA, DA, AI-Act, EHDS - an overview of the European data strategy (Part II), *Dako* 2023/40, 76.

⁵²⁴ Art 21 kDA.

⁵²⁵ Art 21 para 3 kDA in conjunction with. Art 19 kDA.

⁵²⁶ Art 21 para 3 kDA in conjunction with. Art 17 para 3 kDA.

⁵²⁷ Art 20 para 4 B-VG.

⁵²⁸ *Muzak*, B-VG⁶ Art 20 (as of 1 October 2020, rdb.at) Rz 21 with reference to VwGH 18. 8. 2017, Ra 2015/04/0010.

enacted.⁵²⁹ The provincial regulations are largely based on those of the APG in the implementation of the Basic Principles of the Duty to Provide Information Act.⁵³⁰

The federal and state laws on the obligation to provide information regulate the **general obligation of administrative bodies to provide information**.⁵³¹ Both natural and legal persons are entitled to information. A special relationship between the requested information and the sphere of interest of the person requesting the information is generally not required. However, it may be relevant when assessing whether there is a reason for refusal.⁵³² For other state bodies, the regulations on administrative assistance apply as *lex specialis*.⁵³³

Information must be provided on matters of public administration as well as private sector administration, but not on matters of jurisdiction and legislation. The duty to provide information is limited to the respective local and material jurisdiction of the requested body. Furthermore, the duty to provide information relates to information that is available to the authority. Beyond this, there is no obligation to obtain information in order to fulfil a request for information.⁵³⁴

The information must be provided without undue delay, but at the latest within eight weeks of receipt of the request for information.⁵³⁵ In order to enable legal protection, a decision must be issued upon request if the information is not provided.⁵³⁶

However, the obligation to provide information is restricted by constitutional and statutory **confidentiality obligations**. Such obligations arise in particular from official secrecy,⁵³⁷ the fundamental right to data protection⁵³⁸ and the duty of confidentiality under tax law⁵³⁹.⁵⁴⁰

Furthermore, laws on the duty to provide information also standardise restrictions. According to these, no information is to be provided if it could significantly impair the fulfilment of other administrative tasks, if the information is otherwise directly accessible or if the request for information is unreasonable.⁵⁴¹

Furthermore, the laws on the obligation to provide information regularly stipulate that they do not apply in cases in which special obligations to provide information are standardised in other laws. Such special statutory duties to provide information therefore remain unaffected

⁵²⁹ Wieser in Korinek/Holoubek/Bezemek/Fuchs/Martin/Zellenberg (eds.), *Österreichisches Bundesverfassungsrecht* (4th ed. 2001) on Article 20 para. 4 B-VG Rz 4.

⁵³⁰ Muzak, B-VG⁶ Art 20 (as of 1 October 2020, rdb.at) para. 21.

⁵³¹ Wieser in Korinek/Holoubek/Bezemek/Fuchs/Martin/Zellenberg (eds.), *Österreichisches Bundesverfassungsrecht* (4th ed. 2001) on Article 20 para. 4 B-VG Rz 6.

⁵³² Muzak, B-VG⁶ Art 20 (as of 1 October 2020, rdb.at) Rz 22 mwN.

⁵³³ Art 22 B-VG.

⁵³⁴ Muzak, B-VG⁶ Art 20 (as of 1 October 2020, rdb.at) Rz 23 mwN.

⁵³⁵ § 3 APG.

⁵³⁶ § Section 4 APG; Muzak, B-VG⁶ Art 20 (as of 1 October 2020, rdb.at) Rz 25.

⁵³⁷ Art 20 para 3 B-VG.

⁵³⁸ § 1 para 1 DSG.

⁵³⁹ § 48a BAO.

⁵⁴⁰ Muzak, B-VG⁶ Art 20 (as of 1 October 2020, rdb.at) Rz 24 mwN.

⁵⁴¹ Muzak, B-VG⁶ Art 20 (as of 1 October 2020, rdb.at) Rz 24; § 2 APG.

and take precedence over the federal and state laws on the duty to provide information in their scope of application.⁵⁴²

In practice, **official secrecy** in particular often leads to a refusal to provide information. Only secret facts that have become known to the institution exclusively due to its official activities are subject to secrecy. A fact is only secret if its knowledge relates to a closed or closable circle of persons.⁵⁴³ In addition, the existence of a duty of confidentiality requires an interest in secrecy. Secrecy must be required in the interest of maintaining public peace, order and security, comprehensive national defence, foreign relations, in the economic interest of a public body, for the preparation of a decision or in the overriding interest of the parties (e.g. third-party rights to intellectual property, protection of privacy and personal data).⁵⁴⁴ Whether such an interest justifies a duty of confidentiality in a specific case must be determined by weighing up the interests involved.⁵⁴⁵

4.5.2. Transparency obligation

Bodies entrusted with federal, provincial and municipal administration tasks are also obliged to publish **studies, expert opinions and surveys** that they have commissioned from 1 January 2023, including their costs, in a manner that is accessible to everyone.⁵⁴⁶

Only studies, expert opinions and surveys that have been prepared on the basis of a contractual relationship under private law are covered.⁵⁴⁷ There is no de minimis limit, which means that all studies, expert opinions and surveys must be published.⁵⁴⁸

According to the explanatory notes, the publication obligation covers "*works provided by third parties in return for payment that involve the provision of intellectual services. In addition to studies, expert opinions and surveys, this also includes mission statements, concepts, publications, advertising brochures, other publications and similar items.*"⁵⁴⁹ From a teleological point of view, these terms are to be understood broadly for the purpose of promoting transparency.⁵⁵⁰

⁵⁴² Wieser in Korinek/Holoubek/Bezemek/Fuchs/Martin/Zellenberg (eds.), Österreichisches Bundesverfassungsrecht (4th ed. 2001) on Article 20 para. 4 B-VG Rz 6.

⁵⁴³ Muzak, B-VG⁶ Art 20 (as of 1 October 2020, rdb.at) para. 16.

⁵⁴⁴ Art 20 para 3 B-VG.

⁵⁴⁵ Muzak, B-VG⁶ Art 20 (as of 1 October 2020, rdb.at) para. 17.

⁵⁴⁶ Art 20 para 5 B-VG in conjunction with Art 151 para 67 B-VG.

⁵⁴⁷ Miernicki, Die Veröffentlichungspflicht von Informationen der Verwaltungsorgane, ÖJZ 2022/158, 1135f.

⁵⁴⁸ Fuchs/Ziniel, Public procurement law, transparency and confidentiality - an ongoing issue with new dynamics, ZVB 2023/6, 18.

⁵⁴⁹ AB 1642 BlgNR 27. GP 2; Fuchs/Ziniel, Vergaberecht, Transparenz und Geheimhaltung - ein Dauerthema mit neuer Dynamik, ZVB 2023/6, 18.

⁵⁵⁰ Fuchs/Ziniel, Public procurement law, transparency and confidentiality - an ongoing issue with new dynamics, ZVB 2023/6, 18.

Particularly in the case of surveys, but also studies and expert opinions, I therefore believe that not only the results, but also all **data** collected as part of the project should be published.⁵⁵¹

The rights to this data as part of the commissioned work are generally (implicitly) transferred to the client, unless otherwise agreed (see point 2.3 above).⁵⁵² Nevertheless, it is advisable to provide for a corresponding grant of rights in the contract.

Publication can take place e.g. via the respective website of the institution or via a central website for several institutions.⁵⁵³ The collected data should preferably be published as open government data on data.gv.at or on relevant repositories (e.g. AUSSDA - The Austrian Social Science Data Archive, see point 3.3 above).

Publication must be omitted if this is necessary for reasons of official secrecy (see above). If publication is partially possible, it must be made to this extent.⁵⁵⁴ However, there is no subjective right or legal claim to the publication of these documents.⁵⁵⁵

This provision implements part of the drafts for a Freedom of Information Act, which provide for a publication obligation for studies, expert opinions and surveys commissioned by administrative bodies.⁵⁵⁶

4.5.3. Freedom of Information Act

A central project of the 2020-2024 government programme⁵⁵⁷ is the **abolition of official secrecy** and the introduction of a constitutional right of access to information. The aim is to initiate a paradigm shift by making state transparency the rule and secrecy the exception.⁵⁵⁸ A corresponding ministerial draft⁵⁵⁹ to amend the Federal Constitutional Law and enact a Freedom of Information Act was already under review in the first half of 2021.⁵⁶⁰

A (new) government bill was published on 6 October 2023.⁵⁶¹ According to this draft, the current constitutional provisions regarding official secrecy and the administration's general duty to provide information, including the duty of transparency, should be repealed and replaced by a constitutional duty to actively publish information via an information register as a metadata register at www.data.gv.at as well as a constitutionally guaranteed right (fundamental right) to access government and certain corporate information. The

⁵⁵¹ *Miernicki*, Die Veröffentlichungspflicht von Informationen der Verwaltungsorgane, ÖJZ 2022/158, 1134.

⁵⁵² *Bücheler* in *Kucsko/Handig*, urheber.recht2 § 24 UrhG (as of 1 April 2017, rdb.at) Rz 24.

⁵⁵³ AB 1642 BlgNR 27. GP 2; *Fuchs/Ziniel*, Vergaberecht, Transparenz und Geheimhaltung - ein Dauerthema mit neuer Dynamik, ZVB 2023/6, 18.

⁵⁵⁴ *Miernicki*, Die Veröffentlichungspflicht von Informationen der Verwaltungsorgane, ÖJZ 2022/158, 1137f.

⁵⁵⁵ *Miernicki*, Die Veröffentlichungspflicht von Informationen der Verwaltungsorgane, ÖJZ 2022/158, 1139.

⁵⁵⁶ *Miernicki*, Die Veröffentlichungspflicht von Informationen der Verwaltungsorgane, ÖJZ 2022/158, 1139.

⁵⁵⁷ https://www.dievolkspartei.at/Download/Regierungsprogramm_2020.pdf.

⁵⁵⁸ ErläutRV 2238 BglNR 27. GP, 1.

⁵⁵⁹ 95/ME XXVII. GP.

⁵⁶⁰ *Fuchs/Ziniel*, Public procurement law, transparency and confidentiality - an ongoing issue with new dynamics, ZVB 2023/6, 20.

⁵⁶¹ <https://www.parlament.gv.at/gegenstand/XXVII/I/2238>.

constitutional provisions on freedom of information are to be implemented in a federal law on access to information (Freedom of Information Act - IFG).⁵⁶²

However, there are several reasons for secrecy. Among other things, secrecy may be necessary for compelling reasons of integration or foreign policy, in the interests of national security, comprehensive national defence or the maintenance of public order and security, for the preparation of a decision, to prevent significant economic or financial damage to a regional authority or other self-governing body or to safeguard the overriding legitimate interests of another party.⁵⁶³

According to the draft, the material changes should enter into force eighteen months after the end of the day of the announcement and only apply to information of general interest that arises from the date of entry into force. Information of general interest that has arisen earlier may be published in accordance with the aforementioned provision, but there is no obligation to do so under the government bill.⁵⁶⁴ The new regulations will therefore come into force in 2025 at the earliest. A two-thirds majority is required to amend the constitution.

5. Research data protection - Presentation of the problem

5.1. Data protection as the legal limit of Open Science?

With the institutionalisation of Open Science, we are at a key moment where we need to define the rules that will shape Open Science, taking into account the legitimate interests of confidentiality and data sharing.⁵⁶⁵

In order to strike **a balance** between the freedom of science and the fundamental right to the protection of personal data, the GDPR provides for facilitations in several places for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes.⁵⁶⁶

In addition, Art. 89 GDPR contains opening clauses that allow the Union legislator and national legislators to provide for exceptions to certain data subject rights.⁵⁶⁷

These opening clauses were not implemented centrally.⁵⁶⁸ In the area of science and research, the framework conditions for data processing were regulated in the **Research Organisation**

⁵⁶² ErläutRV 2238 Bglnr 27. GP, 1.

⁵⁶³ Art 22a as amended by RV 2238 Bglnr.

⁵⁶⁴ Art 151 para 68 B-VG and § 20 IFG as amended by RV 2238 Bglnr.

⁵⁶⁵ Phillips/Knoppers, *Whose Commons Data Protection as a Legal Limit of Open Science* (2019), *The Journal of Law, Medicine & Ethics*, 47 (2019), 110.

⁵⁶⁶ Löffler in Knyrim, *DatKomm Art 89 GDPR* (as of 1 October 2018, rdb.at) para. 1 with reference to Art 5 para. 1 lit b and e, Art 9 para. 2 lit j, Art 14 para. 5 lit b, Art 17 para. 3 lit d GDPR.

⁵⁶⁷ Löffler in Knyrim, *DatKomm Art 89 DSGVO* (as of 1 October 2018, rdb.at) Rz 2.

⁵⁶⁸ Löffler in Knyrim, *DatKomm Art 89 DSGVO* (as of 1 October 2018, rdb.at) refers, for example, to § 7 para. 3 BundesarchivG (see ErläutRV 65 Bglnr 26. GP 3), Section 15 (1) BStatG (see ErläutRV 65 Bglnr 26. GP 6), Section 10a (3) BildDokG, Section 280 (6) BDG 1979, Section 6 (5) ApokG 2001, Section 5 (8) GehaltsskassenG 2002, Section 24d (3) SMG.

Act ("FOG"). These special provisions are earmarked.⁵⁶⁹ Only the following processing purposes are favoured:

1. scientific or historical research purposes. These terms are not defined by law. The term "scientific research purposes" is to be **interpreted broadly** and includes processing for the purposes of technological development and demonstration, basic research, applied research and privately funded research. Scientific research purposes should also include studies carried out in the public interest in the field of public health.⁵⁷⁰ Historical research also includes genealogy ("genealogical research"). It should be noted that this GDPR does not apply to deceased persons.⁵⁷¹ In contrast to archiving purposes, the existence of a public interest in the processing is not mandatory.⁵⁷²

2. statistical purposes. Statistical purposes means any operation of collection and processing of personal data necessary for the performance of statistical analyses and the production of statistical results. These statistical results may be further used for various purposes, including scientific research purposes. However, it is assumed that the results of processing for statistical purposes are not personal data but **aggregated data** and that these results or personal data are not used for measures or decisions relating to individual natural persons.⁵⁷³ As with scientific or historical research purposes, the existence of a public interest is not mandatory.⁵⁷⁴

3. archiving purposes in the public interest. Not all archive purposes are recorded, but only those that are in the public interest. Archives of private organisations are also included if they are dedicated to topics of public interest.⁵⁷⁵ The Federal Archives Act ("BundesarchivG") defines archiving as the collection, transfer, safekeeping, preservation, maintenance, organisation, indexing, utilisation and making usable of federal archival material for research into the past and present, for other research and science, for legislation, jurisdiction, administration and for the legitimate interests of citizens.⁵⁷⁶

If processing serves another purpose at the same time, the exceptions only apply to processing for the above-mentioned purposes.⁵⁷⁷

In addition, the **Data Protection Act** ("DPA") contains provisions on the lawfulness of the processing of data for the privileged purposes and on the more detailed circumstances under which the processing is authorised (see point 5.5 below). These regulations are applicable unless the FOG contains specific provisions.⁵⁷⁸

⁵⁶⁹ § 1 para 3 subpara 1 FOG.

⁵⁷⁰ EG 159 GDPR.

⁵⁷¹ EC 160 GDPR.

⁵⁷² *Löffler* in Knyrim, *DatKomm* Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 21.

⁵⁷³ EC 162 GDPR

⁵⁷⁴ *Löffler* in Knyrim, *DatKomm* Art 89 GDPR (as of 1 October 2018, rdb.at) para. 28.

⁵⁷⁵ *Löffler* in Knyrim, *DatKomm* Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 18.

⁵⁷⁶ § 2 Z 5 BundesarchivG.

⁵⁷⁷ Art 89 para 4 GDPR.

⁵⁷⁸ § Section 2a Z 9 FOG; *Löffler* in Knyrim, *DatKomm* Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 8.

The **further processing of** personal data for archiving purposes in the public interest, for scientific or historical research purposes or for statistical purposes is not considered incompatible with the original purposes ("purpose limitation").⁵⁷⁹ However, it must first be checked whether the purposes can also be achieved by using anonymous data. If this is possible, only such data may be processed.⁵⁸⁰ In order to create legal certainty, the FOG stipulates that the further processing of personal data for favoured purposes does not constitute processing for unauthorised purposes.⁵⁸¹

According to the FADP, even in cases where the processing of personal data for the purposes of scientific research or statistics is permitted in personal form, the personal reference must be encrypted immediately if pseudonymised personal data can be used in individual phases of the scientific or statistical work ("**priority of pseudonymisation**"). Unless expressly provided otherwise by law, the personal reference of the data must be completely removed as soon as it is no longer necessary for the scientific or statistical work ("principle of storage limitation").⁵⁸²

5.2. FOG - Legal basis for data processing

The FOG regulates the most important use cases of authorised processing activities in the area of research.⁵⁸³ Section 2 contains provisions on the implementation of the GDPR and supplementary provisions for data processing for archiving purposes in the public interest, scientific or historical research purposes and statistical purposes within the meaning of Art 89 GDPR (see point 5.1 above).

The FOG defines "**research and experimental development** activities" as part of the favoured purposes. These are activities that are novel, creative, uncertain in terms of the end result, systematic and transferable or reproducible.⁵⁸⁴

The law is based on the internationally established definition of the Frascati Manual. It covers three areas of activity, namely basic research, applied research and experimental development.⁵⁸⁵ **Exploratory data analysis**, which serves to formulate hypotheses, is also covered.⁵⁸⁶ This definition therefore corresponds in principle to the broad definition of scientific research purposes in the GDPR.⁵⁸⁷

The performance of research and experimental development activities is a central feature of **scientific institutions**.⁵⁸⁸ These are defined in the FOG as natural persons, groups of persons and legal entities that pursue favoured purposes in accordance with Art 89 GDPR, i.e. in

⁵⁷⁹ Art 5 para 1 lit b GDPR.

⁵⁸⁰ Art 89 para 1 GDPR.

⁵⁸¹ § Section 2d (4) FOG; *Löffler* in *Knyrim*, *DatKomm Art 89 GDPR* (as of 1 October 2018, rdb.at) para. 42.

⁵⁸² § Section 7 (5) DSG; *Löffler* in *Knyrim*, *DatKomm Art 89 GDPR* (as of 1 October 2018, rdb.at) Rz 93ff.

⁵⁸³ § Section 2d (7) FOG; *Löffler* in *Knyrim*, *DatKomm Art 89 GDPR* (as of 1 October 2018, rdb.at) para. 39.

⁵⁸⁴ § 2b Z 10 FOG.

⁵⁸⁵ OECD, *Frascati Manual 2015*, 48; *ErläutRV 68 BglNR 26. GP*, 26.

⁵⁸⁶ OECD, *Frascati Manual 2015*, 53.

⁵⁸⁷ *Löffler* in *Knyrim*, *DatKomm Art 89 GDPR* (as of 1 October 2018, rdb.at) Rz 24 with reference to EG 159 GDPR.

⁵⁸⁸ *Löffler* in *Knyrim*, *DatKomm Art 89 GDPR* (as of 1 October 2018, rdb.at) Rz 27.

particular carry out research and experimental development activities, regardless of whether this is done for non-profit purposes or not, or in a university, company or non-university context.⁵⁸⁹ This therefore includes both research institutions and companies. The decisive factor is that the activities are carried out according to scientific methods (see above).⁵⁹⁰ Foreign scientific institutions also fall within the scope of the FOG.⁵⁹¹

The qualification as a scientific institution is crucial because numerous facilitations of the FOG apply to them, such as the authorisation to use **sector-specific personal identifiers** ("bPK") and to conduct register research.⁵⁹² The use of bPKs is intended to provide suitable guarantees for the rights and freedoms of data subjects due to the fact that bPKs are different for different areas of public administration and cannot be derived directly from master data.⁵⁹³

A **catalogue of basic appropriate measures** must be complied with for all privileged data processing based on the FOG.⁵⁹⁴ In particular, the provision provides for the following technical and organisational measures ("TOMs"): Logging obligation (Z 1), obligation of employees to keep data secret ("data secrecy" Z 2), restriction of processing to purposes of the FOG (purpose limitation Z 3), data subjects must not suffer any material disadvantages from the processing or experience any unfavourable treatment ("prohibition of discrimination" Z 4) and prohibition of publication of bPK (Z 6).⁵⁹⁵

1. general legal basis (*Grundtatbestand*). Scientific institutions may process "all personal data in any case, in particular in the context of big data, personalised medicine, biomedical research, biobanks and transfer to other scientific institutions and processors" for eligible purposes if they comply with certain requirements.⁵⁹⁶ If these are met, special categories of personal data such as **health data** may also be processed. The reference to big data makes it clear that the linking of data - including publicly accessible data and/or data collected for other purposes - is permitted.⁵⁹⁷

The use of bPK instead of names is one way of providing appropriate safeguards to protect the fundamental rights and interests of data subjects. Furthermore, this requirement can be met by the use of other unique identifiers or generally by any form of **pseudonymisation**.⁵⁹⁸

Even directly personal processing of all personal data is permitted as long as it is not published or is only published in anonymised or pseudonymised form.⁵⁹⁹ This provision therefore also represents an explicit and general legal basis for **big data** in the scientific field,

⁵⁸⁹ § 2b Z 12 FOG.

⁵⁹⁰ ErläutRV 68 Bglnr 26. GP, 26.

⁵⁹¹ ErläutRV 68 Bglnr 26. GP, 27.

⁵⁹² *Löffler* in Knyrim, DatKomm Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 27.

⁵⁹³ *Löffler* in Knyrim, DatKomm Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 103; ErläutRV 68 Bglnr 26. GP 32.

⁵⁹⁴ § 2d para 1 FOG; Explanatory Memorandum 68 Bglnr 26. GP, 31.

⁵⁹⁵ *Löffler* in Knyrim, DatKomm Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 40; ErläutRV 68 Bglnr 26. GP 31f; ErläutRV 1098 Bglnr 27. GP 17.

⁵⁹⁶ § Section 2d (2) no. 1 FOG.

⁵⁹⁷ ErläutRV 68 Bglnr 26. GP, 32.

⁵⁹⁸ ErläutRV 68 Bglnr 26th GP, 33; *Löffler* in Knyrim, DatKomm Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 105.

⁵⁹⁹ ErläutRV 68 Bglnr 26th GP, 32f; *Löffler* in Knyrim, DatKomm Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 105.

because the complexity of big data algorithms often prevents processing in pseudonymised form.⁶⁰⁰

It is also clarified that the processing operations required for anonymisation or pseudonymisation may be carried out in any case if this does not involve the disclosure of directly personal data to third parties. Conversely, the disclosure of indirectly personal data is harmless.⁶⁰¹

If data processing is based on this legal basis, additional data security measures must be implemented. Among other things, the scientific institution must refer to the use of this legal basis in the data protection declaration published online and provide for a clear distribution of responsibilities, access and access authorisations.⁶⁰²

Unless otherwise specified, the **basic restriction on the disclosure of personal data** applies to all processing described below in accordance with FOG. These processing operations may therefore only be based on indirectly personal data and may not result in the disclosure of directly personal data.⁶⁰³ A natural person is directly identifiable mainly by name and publicly available identification numbers (e.g. UID).⁶⁰⁴

2. open science, including citizen science. By Open Science, FOG means strategies and procedures that aim to consistently exploit the opportunities of digitisation in order to make all components of the scientific process openly accessible, comprehensible and reusable via the Internet.⁶⁰⁵ The aim of open science is to improve the quality of research and utilise funding more efficiently.⁶⁰⁶ Citizen science is seen as a part of open science.⁶⁰⁷

For **data donations** for research purposes as part of open science and citizen science projects, the right to erasure is restricted.⁶⁰⁸ If personal data is provided voluntarily, it may be processed for the type, scope and duration expressly communicated at the start of the project. Their deletion is only permitted if this does not compromise the project objectives and the methodological, in particular statistical, requirements for scientific work.⁶⁰⁹

If personal **data of third parties** are made available in the context of open science and citizen science projects, their processing is permitted for the type, scope and duration expressly communicated at the beginning of the project if the data are based on observations or measurements in public spaces or if the data are pseudonymised.⁶¹⁰

⁶⁰⁰ ErläutRV 68 BglNR 26. GP, 33.

⁶⁰¹ § Section 2d para 2 subpara 1 lit d FOG; ErläutRV 68 BglNR 26. GP, 33.

⁶⁰² § Section 2d (1) no. 5 FOG.

⁶⁰³ ErläutRV 68 BglNR 26. GP, 32.

⁶⁰⁴ § Section 2d para. 2 no. 3 FOG; *Schild in Wolff/Brink/v. Ungern-Sternberg, BeckOK Datenschutzrecht* (45th edition; as of 1 August 2023) Art 4 para. 16 et seq.

⁶⁰⁵ § 2b Z 9 FOG.

⁶⁰⁶ ErläutRV 68 BglNR 26. GP, 25.

⁶⁰⁷ § 2b Z 4 FOG.

⁶⁰⁸ ErläutRV 68 BglNR 26. GP, 47.

⁶⁰⁹ § Section 2i (4) FOG.

⁶¹⁰ § Section 2i (5) FOG.

Observations are to be understood as targeted (human) perceptions, while measurements are to be understood as the assignment of numbers to objects and events. If video recordings are required for the purposes of Open Science or Citizen Science, these data must be pseudonymised.⁶¹¹

Cancellation must not result in the project objectives not being achieved or the scientific validity of the project being impaired.⁶¹²

3. broad consent. Another legal basis for the processing of all personal data, including health data in particular, is *broad consent*. This is a legal basis that is modelled on "classic" consent.⁶¹³

What is required is a voluntary, informed, unambiguous declaration of intent or other confirmatory act of consent to the processing, whereby the indication of a purpose may be made by indicating a research area, several research areas, research projects or parts of research projects.⁶¹⁴

Compared to consent, the requirements for the specificity of the declaration of intent are therefore lower. The Austrian version of the "Fields of Science and Technology (FOS) Classification" can be used as a classification for research fields. The indication of the research area is already specific enough using classifications with a single-digit code (e.g. natural sciences or human medicine, health sciences). Furthermore, the specification of data recipients is not mandatory.⁶¹⁵

4. comparison and analysis of image data. For favoured purposes, both the automated comparison of personal data obtained from images with other personal data and the analysis of personal data obtained from images using special categories of personal data (e.g. biometric data, health data) is permitted as a selection criterion. However, the data processing must be carried out by scientific institutions and the processing must not result in the publication of personal data.⁶¹⁶

5. exception to the storage limitation. It is clarified that personal data may be stored and, if necessary, otherwise processed for favoured purposes without restriction, provided that no time limits are provided for by law.⁶¹⁷ The provisions that provide for a maximum storage period take precedence as special provisions (but not those that only provide for a minimum storage period).⁶¹⁸

6. raw data. Compliance with the guidelines of good scientific practice is also an elementary component of all scientific work. These require primary data such as measurement results,

⁶¹¹ ErläutRV 68 BlgNR 26. GP, 47.

⁶¹² § Section 2i (5) FOG.

⁶¹³ ErläutRV 68 BlgNR 26. GP, 35.

⁶¹⁴ § 2d para 3 FOG.

⁶¹⁵ Löffler in Knyrim, DatKomm Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 106; ErläutRV 68 BlgNR 26. GP 36.

⁶¹⁶ § Section 2d (8) FOG; explanatory memorandum 68 BlgNR 26. GP 37.

⁶¹⁷ § 2d para 5 FOG.

⁶¹⁸ Löffler in Knyrim, DatKomm Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 107; ErläutRV 68 BlgNR 26. GP, 36.

cell cultures, material samples, archaeological finds and questionnaires to be stored even after specific investigations have been completed so that scientific investigations can be repeated or reviewed (see point 3.4 above).⁶¹⁹

For this reason, raw data that has been processed as the basis for activities for a favoured purpose and the corresponding research material (e.g. biological, genetic, geological or other samples, image, film, audio or video material) may be stored for at least 10 years from the publication of the results of these activities to prove compliance with good scientific practice and for a maximum of 30 years for the assertion, exercise and defence of legal claims and may otherwise be processed.⁶²⁰

7. repositories. In order to create the necessary data basis for scientific research as well as statistical and archival work, scientific institutions may set up and operate repositories. The legal protection of repositories is not only intended to follow the principle of open access, but also to ensure that scientific projects can be continued decades after researchers have left.⁶²¹

According to FOG, scientific institutions may in particular collect, archive and systematically record research material and process all data, including publications in electronic form, which are necessary to ensure optimal access to data and research material.⁶²²

Those responsible for repositories may also provide personal data directly to other scientific institutions if they comply with the following conditions.⁶²³

The scientific institutions that require access to directly personal data must prove their status as scientific institutions to the scientific institutions that are responsible for the repositories.

The scientific institutions responsible for the repositories must demonstrably inform the other scientific institutions about the obligations under the FOG and the GDPR and take precautions to ensure that these obligations are met.⁶²⁴ To fulfil this obligation, the operator of the repository must, for example, carry out random internet searches to check whether other scientific institutions that have been granted access to the repository are publishing personal data.⁶²⁵

In addition, a declaration must be obtained from other scientific institutions that no corrective measures, such as prohibition of certain data processing, have been taken against them by data protection authorities in the last three years.⁶²⁶

8. biobanks. The FOG provides an explicit legal basis for biological sample and data collections, in particular biobanks. According to this, the processing of personal data in the

⁶¹⁹ Löffler in Knyrim, DatKomm Art 89 GDPR (as of 1 October 2018, rdb.at) para. 95.

⁶²⁰ § Section 2 f (3) no. 1 FOG.

⁶²¹ ErläutRV 68 BgINR 26th GP, 40; Löffler in Knyrim, DatKomm Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 111.

⁶²² § Section 2f (1) FOG; Explanatory Memorandum 68 BgINR 26. GP, 40.

⁶²³ ErläutRV 68 BgINR 26. GP, 41.

⁶²⁴ § Section 2 f (2) Z 1 and Z 2 FOG.

⁶²⁵ Löffler in Knyrim, DatKomm Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 111; ErläutRV 68 BgINR 26. GP, 40.

⁶²⁶ § Section 2 f (2) no. 3 FOG.

context of biological sample and data collections is authorised for reasons of public interest in the area of public health, such as protection against serious cross-border health threats or to ensure high quality and safety standards in healthcare and for medicinal products and medical devices.⁶²⁷ It is therefore not necessary to obtain separate consent from the data subject.⁶²⁸

Appropriate and specific measures to safeguard the fundamental rights and interests of the data subjects include the fastest possible pseudonymisation if the purposes of the processing can still be fulfilled, as well as compliance with appropriate data security measures.⁶²⁹

9. technology transfer. Technology transfer is the provision of technical knowledge by scientific institutions for commercial application or utilisation.⁶³⁰ FOG provides for an exception to the obligations of data controllers and the rights of data subjects if the processing of personal data is necessary to maintain the functionality of the technology to be transferred and the design of the technology ensures that third parties do not gain knowledge of the transferred data.⁶³¹

10. data transfers within the EU. The provisions of the FOG also authorise the transfer of data to scientific institutions and other privileged recipients such as funding bodies as well as the transfer of knowledge and technology within the European Union.⁶³² Standard data protection clauses can be concluded for data transfers to third countries if there is no adequacy decision by the EU Commission for the country in question.⁶³³

Furthermore, the FOG standardises that **the rights of data subjects do not apply** if this is likely to render impossible or seriously impair the achievement of favoured purposes. The exception relates to the data subject's right of access (Art. 15 GDPR), the right to rectification (Art. 16 GDPR), the right to erasure or the right to be forgotten (Art. 17 GDPR), the right to restriction of processing (Art. 18 GDPR), the right to data portability (Art. 20 GDPR) and the right to object (Art. 21 GDPR).⁶³⁴

According to the legislative materials, the fulfilment of the purposes is likely to be rendered impossible if the exercise of the data subject's rights would lead to a subsequent change in the research results. An initial impairment is deemed to exist if the fulfilment of obligations in connection with data subjects' rights would involve a disproportionate effort for data controllers. fulfilment of obligations in connection with data subjects' rights would involve a disproportionate effort for data controllers. Both must be assessed on a case-by-case basis.⁶³⁵

⁶²⁷ § Section 2 f (4) FOG.

⁶²⁸ ErläutRV 68 BgINR 26. GP, 41.

⁶²⁹ § Section 2 f (4) FOG.

⁶³⁰ § 2b Z 11 FOG.

⁶³¹ § Section 2i (1f) FOG with reference to Art. 12 to 22 and Art. 34 GDPR.

⁶³² § 2j FOG.

⁶³³ § Section 38a para 4 FOG; Explanatory Memorandum 68 BgINR 26. GP, 49.

⁶³⁴ § 2d para 6 FOG.

⁶³⁵ *Löffler* in Knyrim, DatKomm Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 46; ErläutRV 68 BgINR 26. GP, 37.

5.3. Research with register data and statistical data

5.3.1. Register research

Registry data is particularly valuable for research for several reasons. Linking information from registries can provide researchers with valuable new insights into common diseases such as cardiovascular disease, cancer and depression. In addition, the use of registries leads to better research results because they are based on a larger proportion of the population.⁶³⁶

The **legal basis for** register-based research is anchored in the FOG and the Federal Statistics Act 2000 ("BStatG"). The aim of these provisions is to make as much data as possible from official statistics and registers provided for by federal law available to scientific institutions for research and experimental development activities. According to the FOG, the right to register research exists regardless of whether the register in question contains personal data or not.⁶³⁷ This includes the **granting of access to the data**, not the provision of the data for the purposes of register research.⁶³⁸

1. registers. Certain scientific institutions shall be granted access to data in electronic form for favoured purposes by controllers who keep **registers provided for by federal law**.⁶³⁹ Access may only be granted to **indirectly personal data** where it is not possible to identify data subjects or companies by name, address or by means of a publicly accessible identification number.⁶⁴⁰

Registers are understood to mean all directories, databases or similar applications or processing platforms, not just publicly accessible registers. For a register to be deemed to be provided for by federal law, a provision in federal law stating that such a register should exist is sufficient. A more detailed formulation by ordinance is harmless.⁶⁴¹

An exception exists for the registers that are kept in the areas of jurisdiction and of lawyers and notaries within the scope of the respective legal sphere of activity, as well as for the criminal register.⁶⁴²

2 Authorised institutions. The right to conduct register research in accordance with the FOG only applies to scientific institutions that are authorised to use sector-specific personal identifiers, i.e. are generally entitled to request that their data be assigned sector-specific personal identifiers.⁶⁴³

The FOG contains a **list** of scientific institutions that are authorised ex lege to use the sector-specific personal identifiers and to conduct register research. Such scientific institutions

⁶³⁶ EG 157 GDPR.

⁶³⁷ ErläutRV 68 BgINR 26. GP, 33f.

⁶³⁸ ErläutRV 1098 BlgNR 27. GP 18f.

⁶³⁹ § Section 2d (2) no. 3 FOG.

⁶⁴⁰ § Section 2d (2) no. 3 FOG.

⁶⁴¹ ErläutRV 68 BgINR 26. GP, 34.

⁶⁴² § Section 2d (2) no. 3 FOG.

⁶⁴³ § Section 2d para 2 subpara 3 lit c FOG; Explanatory Memorandum 68 BgINR 26th GP, 27, 35.

include universities, universities of applied sciences, the Institute of Science and Technology - Austria, the Austrian Academy of Sciences and Gesundheit Österreich GmbH.⁶⁴⁴

Other scientific institutions can apply to the Federal Minister for Climate Action, Environment, Energy, Mobility, Innovation and Technology for **confirmation** that they carry out research and experimental development activities and are therefore authorised to use sector-specific personal identification numbers. The confirmation can be issued for a maximum period of five years. The confirmation can be extended at any time.⁶⁴⁵

3. material requirements. In order to maintain the proportionality of the right to register research, additional appropriate and specific measures are provided for, which must be complied with in order to obtain access to register data.

The processing may only be carried out for the purposes of **life and social sciences** and must serve a public interest.⁶⁴⁶

The register must be listed in an **ordinance** in accordance with the FOG ("Register Research Ordinance"). These ordinances are to be issued by the Federal Minister of Education, Science and Research in agreement with the respective competent federal minister or the other register-keeping body, in particular social insurance institutions (responsible parties who are not subject to instructions under constitutional law).⁶⁴⁷ On 28 October 2022, the BMBWF was the first ministry to release its own register data for research purposes by means of an ordinance. Other BMBWF register data has been accessible as statistical microdata in the **Austrian Micro Data Center** ("AMDC") since 1 July 2022 due to the legal basis, such as the Education Documentation Act.⁶⁴⁸

Furthermore, the **costs** of providing the register data in electronic form must be **reimbursed**. The costs to be reimbursed are to be regulated in more detail in the respective Register Research Ordinance.⁶⁴⁹

For register research, either a **comparison with existing data or a full extract** can be requested. If a comparison is to be carried out, the corresponding external BPK must be provided when applying for the data to be made available.⁶⁵⁰ Only the AMDC may link register data with other datasets, whereby this must not result in the identification of the data subjects.⁶⁵¹

⁶⁴⁴ § Section 2c (1) FOG.

⁶⁴⁵ § Section 2c (2ff) FOG; ErläutRV 68 BglnR 26th GP, 29f; *Kotschy*, Registerforschung nach der Novelle 2021 zum FOG, zfhr 2022, 139 (142).

⁶⁴⁶ § Section 2d para 2 subpara 3 lit a FOG.

⁶⁴⁷ § Section 2d para. 2 no. 3 lit a FOG in conjunction with. § Section 38b FOG.

⁶⁴⁸ Austrian Research and Technology Report (2023), 17f.

⁶⁴⁹ § Section 2d para. 2 no. 3 lit d FOG in conjunction with. § Section 38b FOG.

⁶⁵⁰ § Section 2d (2) no. 3 lit e FOG; Explanatory Memorandum 68 BglnR 26th GP, 35

⁶⁵¹ § Section 31a (3) in conjunction with Section 31 (5); *Kotschy*, Registerforschung nach der Novelle 2021 zum FOG, zfhr 2022, 139 (144).

For applications aimed at **linking statistical and register research data**, the requirements for access to statistical and register research data must be met cumulatively.⁶⁵²

4. application. In their application for access to register data, scientific institutions must state the reasons why the research project can only be carried out in this way, which natural persons are to be granted access to the data, to which datasets access is to be granted, which methods of analysis are to be used and which results are intended from the research project.⁶⁵³

When processing register data, only the natural persons named in the application may access this data in order to strengthen personal responsibility.⁶⁵⁴ Furthermore, organisations must appoint a data protection officer before using registers.⁶⁵⁵

5. access to register data. When granting access to data, data controllers who maintain registers provided for by federal law must comply with Sections 31a and 31b BStatG and remove personal identifiers other than **bPK**.⁶⁵⁶ The name details can be replaced by bPK-BF-FO and by the coded external bPK, for the AMDC the coded bPK AS (official statistics).⁶⁵⁷

The AMDC was set up as a one-stop shop for register research at the Austrian Federal Statistical Office ("**Statistics Austria**").⁶⁵⁸ It started operations on 1 July 2022.⁶⁵⁹ In addition to register data, all microdata used directly by Statistics Austria to produce statistical results are available in the AMDC (see below). In addition, scientific institutions can contribute their own data in order to link them with the microdata offered.⁶⁶⁰

The content of the application for access to register data, also with regard to the scientific institutions using the data, is checked by Statistics Austria.⁶⁶¹ The latter must communicate the result of the review and the information on which data from the respective register are required for the research project to the respective register-keeping organisation.⁶⁶²

The decision on granting online access to these data is the responsibility of the centre keeping the register. Once authorisation has been granted, Statistics Austria must prepare the register data - possibly linked to statistical data - for remote access and grant this access to the scientific institution concerned.⁶⁶³

⁶⁵² § 31b BStatG.

⁶⁵³ § Section 2d para 1 no. 5 lit k FOG.

⁶⁵⁴ § Section 2d (1) no. 5 lit l FOG; Explanatory Memorandum 68 BlgNR 26. GP 31f.

⁶⁵⁵ § Section 2d para 1 no. 5 lit c FOG.

⁶⁵⁶ § Section 2d (1) no. 6a FOG.

⁶⁵⁷ Explanatory memorandum 1098 BlgNR 27. GP 18.

⁶⁵⁸ Explanatory memorandum 1098 BlgNR 27. GP 18.

⁶⁵⁹ <https://www.bmbwf.gv.at/Themen/Forschung/Forschung-in-%C3%96sterreich/Strategische-Ausrichtung-und-beratende-Gremien/Leitthemen/Registerforschung.html>.

⁶⁶⁰ <https://www.statistik.at/services/tools/services/amdc-mikrodaten-fuer-die-wissenschaft/mikrodatennutzung-fragen-und-antworten>.

⁶⁶¹ Kotschy, Register research after the 2021 amendment to the FOG, zfhr 2022, 139 (144).

⁶⁶² § Section 31a para. 1 subparas. 1 to 5 BStatG; explanatory memorandum 1098 BlgNR 27. GP 13.

⁶⁶³ § Section 31a para. 1 no. 6 BStatG; Explanatory NotesRV 1098 BlgNR 27. GP 13.

A contract must be concluded between the scientific organisation and Statistics Austria for the respective research project. Among other things, the scientific institution must undertake that the data will be used exclusively for the designated research project, that the data used will not be passed on to third parties or used for other purposes, that the research results will not allow any conclusions to be drawn about identifiable data subjects, that all data security measures will be complied with and that only persons who have undertaken in writing to comply with statistical confidentiality will be granted access.⁶⁶⁴ The sample agreement on granting remote access to the AMDC and the sample declaration of commitment for researchers are available on the Statistics Austria website.⁶⁶⁵

6. legal protection. In the event of a refusal of access to data by an organisation maintaining the register, the scientific institution may take legal action to enforce its right to register research. The Federal Administrative Court is responsible for deciding on applications.⁶⁶⁶

5.3.2. Scientific access to statistical data

Within the limits set by the GDPR, Union or Member State law defines the statistical content, the access control, the specifications for the processing of personal data for statistical purposes and the appropriate measures to safeguard the rights and freedoms of data subjects and to **ensure statistical confidentiality**.⁶⁶⁷

1. according to Regulation (EC) No 223/2009 of 11 March 2009 on European Statistics ("**EU Statistics Regulation**"), (European) statistics are quantitative and qualitative, aggregated and representative information describing a mass phenomenon in a population under consideration.⁶⁶⁸ This regulation contains provisions on the confidentiality of European statistics and guarantees the protection of personal data during their compilation.⁶⁶⁹

According to the EU Statistics Regulation, "confidential data" are protected if they allow the direct or indirect identification of statistical units and thus disclose individual information.⁶⁷⁰ A statistical unit is the basic observation unit, i.e. a natural person, household, economic operator or other enterprise to which the data relate.⁶⁷¹ This therefore also includes data on legal persons.

Direct identification means the identification of a statistical unit by means of its name or address or by means of a publicly available identification number.⁶⁷² Identification by other means is referred to as indirect identification.⁶⁷³ When deciding whether a statistical unit is

⁶⁶⁴ 31a para 3 in conjunction with § 31 para 6; *Kotschy*, Registerforschung nach der Novelle 2021 zum FOG, zfhr 2022, 139 (144).

⁶⁶⁵ <https://www.statistik.at/services/tools/services/center-wissenschaft/austrian-micro-data-center-amdc>.

⁶⁶⁶ § Section 2k (5) FOG; Explanatory Memorandum 1098 BlgNR 27. GP 14.

⁶⁶⁷ EC 162 GDPR; see also EC 163 GDPR and Art 338 (2) TFEU.

⁶⁶⁸ Art 3 para 1 EUStatistics Regulation.

⁶⁶⁹ EC 163 GDPR; EC 22 EU Statistics Regulation; *Löffler* in Knyrim, DatKomm Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 29.

⁶⁷⁰ Art 3 para 7 EUStatistics Regulation.

⁶⁷¹ Art 3 para 6 EUStatistics Regulation.

⁶⁷² Art 3 para 9 EUStatistics Regulation.

⁶⁷³ Art 3 para 10 EUStatistics Regulation.

identifiable, all means that could reasonably be used by a third party to identify the statistical unit shall be taken into account.⁶⁷⁴

The EU Commission (Eurostat) and the National Statistical Institutes ("NSIs") may, within their respective areas of competence, **grant researchers, who carry out statistical analyses for scientific purposes, access to confidential data that allow only indirect identification of the statistical units.** In the case of data transmitted to the EU Commission (Eurostat), the consent of the NSI or the other national authority that provided the data is required.⁶⁷⁵

The procedure for granting access is regulated in the Implementing Regulation on access to confidential data for scientific purposes.⁶⁷⁶ First, the research organisation wishing to apply for access must be recognised by EUROSTAT as a regular research organisation. This organisation can submit a research proposal in which the type of confidential data requested for scientific purposes must be specified. The application will be checked to ensure that it is in order. In this case, access will be granted either by the EU Commission (Eurostat) or by another access organisation accredited by the EU Commission (Eurostat), provided that the national statistical authority concerned, which transmitted the data, gives its authorisation.⁶⁷⁷

2. in national law, the term statistics is understood to mean methodologically "scientific statistics", as only under this condition can privileged treatment be objectively justified. Apart from this, however, this term is intended to cover both so-called "official statistics" and other statistics that are carried out using scientific methods.⁶⁷⁸

The admissibility of personal and company-related surveys and scientific access to statistical data are regulated in the **BStatG**.⁶⁷⁹ These special statutory provisions take precedence over the general provisions of the FADP.⁶⁸⁰

Statistics Austria shall grant access to non-personal and non-business-related statistical data ("anonymised statistical data") to technically suitable persons and scientific institutions for scientific purposes.⁶⁸¹ In doing so, data security measures must be applied that make it impossible to determine personal and company-related data by means that can be reasonably applied and to store personal and company-related statistical data on external data carriers.⁶⁸² Use cases for this are standardised anonymised individual data sets that are made available as scientific use files, as well as data sets in the Safe Centre or for controlled remote computing.⁶⁸³

⁶⁷⁴ Art 3 para 7 EU Statistics Regulation.

⁶⁷⁵ Art 23 EU Statistics Regulation; EC 26 EU Statistics Regulation.

⁶⁷⁶ Commission Regulation (EU) No 557/2013 implementing Regulation (EC) No 223/2009 on European statistics as regards access to confidential data for scientific purposes.

⁶⁷⁷ Art 3ff Regulation (EU) No 557/2013.

⁶⁷⁸ ErläutRV 1664 BglnR 25. GP, 12.

⁶⁷⁹ § 5 and § 31 BStatG.

⁶⁸⁰ Löffler in Knyrim, DatKomm Art 89 GDPR (as of 1 October 2018, rdb.at) para. 31.

⁶⁸¹ § Section 31 (1) BStatG; Explanatory Memorandum 1098 BlgNR 27. GP 7.

⁶⁸² § Section 31 (2) BStatG.

⁶⁸³ *Statistics Austria*, Statistical confidentiality in publications and when passing on data (V.05, 16.3.2022), 10.

Furthermore, from 1 July 2022, Statistics Austria must grant access to statistical data in the **AMDC, where it is** not possible to identify the data subjects by name, address or by means of a publicly accessible identification number, by means of remote access via secure online access by providing a virtual desktop infrastructure (VDI) with two-factor authentication and access logging.⁶⁸⁴

Access to indirectly personal or company-related statistical data may only be granted to **accredited scientific institutions**. The research project must be described in detail in the access application.⁶⁸⁵

The principle of data minimisation applies to the scientific use of statistical data and a final review of the results of the research project is required in order to rule out conclusions about statistical units.⁶⁸⁶

The scientific institutions involved in the research project and their members are subject to statistical confidentiality. Therefore, the storage of confidential data on external data carriers, the photographing, copying or making a screen copy of confidential data or the use of confidential data for purposes other than scientific purposes is not permitted.⁶⁸⁷ Furthermore, researchers may not derive any commercial benefit from the use of the data.⁶⁸⁸

5.4. Research with health data and genetic data

The GDPR defines **health data as** a special category of personal data relating to the physical or mental health of a natural person, including the provision of healthcare services, and from which information about their health status is derived.⁶⁸⁹ This includes, but is not limited to, information about the natural person collected in the course of registration for and provision of healthcare services, and numbers, symbols or identifiers assigned to a natural person to uniquely identify that natural person for health purposes.⁶⁹⁰

Another special category of personal data is defined as **genetic data**. These are defined as personal data relating to the inherited or acquired genetic characteristics of a natural person, which provide unique information about the physiology or health of that natural person and which have been obtained in particular from the analysis of a biological sample from the natural person concerned.⁶⁹¹ They may in particular be obtained by chromosome, deoxyribonucleic acid (DNA) or ribonucleic acid (RNA) analysis or analysis of another element providing equivalent information.⁶⁹²

⁶⁸⁴ *Statistics Austria*, Statistical confidentiality in publications and when passing on data (V.05, 16.3.2022), 10.

⁶⁸⁵ § Section 31 (6) to (9) BStatG; <https://www.statistik.at/services/tools/services/amdc-mikrodaten-fuer-die-wissenschaft/mikrodatennutzung-fragen-und-antworten>.

⁶⁸⁶ *Statistics Austria*, Statistical confidentiality in publications and when passing on data (V.05, 16.3.2022), 11.

⁶⁸⁷ *Statistics Austria*, Statistical confidentiality in publications and when passing on data (V.05, 16.3.2022), 11.

⁶⁸⁸ *Löffler* in Knyrim, *DatKomm* Art 89 GDPR (as of 1 October 2018, rdb.at) para. 32.

⁶⁸⁹ Art 4 Z 15 GDPR.

⁶⁹⁰ EC 35 GDPR.

⁶⁹¹ Art 4 no. 13 GDPR.

⁶⁹² EG 34 GDPR.

In a study by Gesundheit Österreich GmbH, "around 25 relevant federal laws were identified" and their provisions regarding the processing of health data were analysed.⁶⁹³

The **electronic health record** ("ELGA") is a particularly important source of data in the healthcare sector. The legal basis for data processing in ELGA is regulated in the Federal Act on Data Security Measures in the Processing of Electronic Health Data and Genetic Data ("Health Telematics Act 2012 - GTelG 2012"). Section 4 (§§ 13 et seq.) and a corresponding ordinance on the implementation and further development of ELGA ("ELGA-Verordnung 2015 - ELGA-VO 2015") are particularly relevant.⁶⁹⁴

According to GTelG 2012, ELGA is an information system that makes ELGA health data available to all authorised ELGA health service providers and ELGA participants in electronic form, regardless of location and time (undirected communication).⁶⁹⁵

ELGA health data is a special term for a subset of health data and genetic data, namely those personal data that may be essential for the further treatment, care or ensuring the continuity of care of ELGA participants, for example discharge letters, laboratory findings, diagnostic imaging findings and medication data.⁶⁹⁶

In principle, only ELGA healthcare service providers have access to ELGA healthcare data.⁶⁹⁷ The GTelG 2012 does not contain a legal basis for access to ELGA data for favoured purposes in accordance with Art 89 GDPR.

Rather, the GTelG 2012 contains an explicit **processing prohibition**. Accordingly, the request, access to and processing of ELGA health data made available by ELGA is prohibited, inter alia, for other natural and legal persons who are not expressly authorised to do so under the GTelG 2012, as well as for all purposes that are not expressly specified as permissible in the GTelG 2012.⁶⁹⁸ This ban on processing is a measure to protect the fundamental rights and interests of the data subjects.⁶⁹⁹

However, the **Genetic Engineering Act** ("GTG") provides a legal basis for genetic analyses on humans for scientific purposes and for training. These may only be carried out on de-identified samples.⁷⁰⁰ In parallel, the provisions of the FOG on biobanks in particular are applicable.⁷⁰¹

⁶⁹³ Degelsegger-Márquez, Health data in Austria - an overview (2021), III.

⁶⁹⁴ BMASGK, Protection of sensitive data, Position of Health Sections VIII and IX of the BMASGK (2019), 17.

⁶⁹⁵ § 2 Z 6 GTelG 2012.

⁶⁹⁶ § Section 2 Z 9 GTelG 2012; BMASGK, Protection of Sensitive Data, Position of Health Sections VIII and IX of the BMASGK (2019), 18.

⁶⁹⁷ § Section 13 (2) GTelG 2012 in conjunction with. § Section 2 no. 10 GTelG 2012.

⁶⁹⁸ § Section 14 (3) no. 9 GTelG 2012.

⁶⁹⁹ BMASGK, Protection of sensitive data, Position of Health Sections VIII and IX of the BMASGK (2019), 18.

⁷⁰⁰ § Section 66 (1) and (2) GTG.

⁷⁰¹ § 66 para 3 GTG.

The **European Health Data Space** ("EHDS") is intended to provide a legal basis for access to health data for research in the future. To implement this, the EU Commission has submitted a proposal for a regulation on the European Health Data Space in 2022.⁷⁰²

The EHDS aims to enable better primary and secondary utilisation of electronic health data. In addition, regulations for manufacturers and providers of so-called EHR systems (electronic health record systems) are planned.⁷⁰³

The EU Commission's proposal envisages that the **secondary use of electronic health data** (HealthData@EU) will be possible in a wide range of areas. Further use in research and for the training of AI systems is expressly envisaged.⁷⁰⁴ Although negotiations have already begun in the Council of the EU and the EU Parliament, it is currently not possible to predict⁷⁰⁵ when a political agreement will be reached.

5.5. Other national legal bases for data processing for research purposes

Data processing in the area of research can also be based on provisions other than the FOG, and it is also possible to obtain authorisation from the data protection authority ("DPA").⁷⁰⁶ Obtaining authorisation can create legal certainty for planned processing activities, for example, if it is doubtful whether the requirements of the FOG will be met.⁷⁰⁷

1. processing of publicly accessible, already collected or pseudonymised data. In the case of data processing for favoured purposes that are **not** aimed at **personal results** (e.g. statistical results), the controller may process all personal data that is publicly accessible (e.g. land register, telephone directories, central population register, Internet), that he/she has legitimately collected for other investigations (e.g. research project or specific statistical survey) or for other purposes, or that he/she has pseudonymised. The data controller may process all personal data that he/she has legitimately collected for other investigations (e.g. research project or specific statistical survey) or other purposes or that are pseudonymised personal data for him/her and the data controller cannot determine the identity of the data subject by legally permissible means.⁷⁰⁸

2. processing other types of data or obtaining personal results. In the case of other data processing for favoured purposes, personal data may only be processed on the basis of special legal authorisations, with the consent of the data subject or with the approval of the DPO.⁷⁰⁹

⁷⁰² COM(2022) 197 final.

⁷⁰³ *Knyrim/Urban*, DGA, DMA, DSA, DA, AI-Act, EHDS - an overview of the European data strategy (Part II), *Dako* 2023/40, 78.

⁷⁰⁴ *Knyrim/Urban*, DGA, DMA, DSA, DA, AI-Act, EHDS - an overview of the European data strategy (Part II), *Dako* 2023/40, 78.

⁷⁰⁵ <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:52022PC0197> and <https://www.europarl.europa.eu/legislative-train/theme-promoting-our-european-way-of-life/file-european-health-data-space>.

⁷⁰⁶ *Löffler* in *Knyrim*, *DatKomm* Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 39.

⁷⁰⁷ DSB 7.6.2018, DSB-D202.207/0001-DSB/2018.

⁷⁰⁸ § Section 7 (1) DSG; *Löffler* in *Knyrim*, *DatKomm* Art 89 GDPR (as of 1 October 2018, rdb.at) margin no. 63ff.

⁷⁰⁹ § 7 para 2 DSG.

Special statutory authorisations are contained, for example, in Section 56(1)(7) Security Police Act, Cancer Statistics Act, Section 2d(7) FOG, Section 9(2) Education Documentation Act, Section 219(4) Code of Civil Procedure, Section 13a Criminal Records Act, Section 16b Registration Act and Section 66 Genetic Engineering Act. The authorisation may also be contained in a (national) ordinance.⁷¹⁰

3. authorisation of the DPO. At the request of the person(s) responsible for the research, the DPO may grant authorisation to process personal data for privileged purposes if obtaining the consent of the data subject is impossible due to their unavailability or otherwise involves a disproportionate effort, there is a public interest in the requested processing (e.g. in the case of publicly funded research projects) and the professional suitability of the person(s) responsible is credibly demonstrated. The DPA can make the authorisation subject to the fulfilment of conditions and requirements.⁷¹¹ For example, in a recent decision, the DPA granted a leading (non-university) research centre for the automotive and rail industry permission, subject to conditions, to collect and evaluate personal data in the form of (video) recordings in public places in public road, bus and rail transport within Austria as part of a scientific research project for the purpose of developing test data for algorithms in the field of (partially) autonomous driving and to increase road safety and vehicle safety.⁷¹²

If special categories of personal data, e.g. health data, are to be collected, there must be an important public interest in the investigation. An important public interest can also arise from the fact that a topic has not yet been scientifically investigated or has hardly been investigated at all and life-saving findings can be derived from the results of investigations.⁷¹³ The processing of special categories of personal data may only be carried out by persons who are subject to a statutory duty of confidentiality or whose reliability is otherwise credible, for example due to their work for a generally recognised research institution, instruction on data secrecy or contractual obligation.⁷¹⁴

An application must be accompanied by a declaration signed by the person authorised to dispose of the data files from which the personal data is to be determined that he/she will make the data files available to the person responsible for the investigation.⁷¹⁵

4. notification and consultation of data subjects. A further special regulation exists for the provision of address data of a specific group of data subjects for the purpose of notifying or interviewing them.⁷¹⁶ If an impairment of the confidentiality interests of the data subjects is unlikely in view of the selection criteria for the group of data subjects and the subject matter of the notification or survey, the transfer of address data is permitted by law in certain unobjectionable cases and no consent is required. In other cases, the DPO may, on a case-

⁷¹⁰ Thiele/Wagner, Praxiskommentar zum Datenschutzgesetz (DSG)² § 7 (as of 1 February 2022, rdb.at) Rz 29.

⁷¹¹ § Section 7 (3) DSG; Löffler in Knyrim, DatKomm Art 89 GDPR (as of 1 October 2018, rdb.at) para. 73ff.

⁷¹² DSB 21. 6. 2023, 2022-0.930.971.

⁷¹³ Löffler in Knyrim, DatKomm Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 79.

⁷¹⁴ Löffler in Knyrim, DatKomm Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 80.

⁷¹⁵ § 7 para 4 DSG.

⁷¹⁶ § 8 DSG.

by-case basis, weigh up the interests between the rights and freedoms of the data subjects and the purpose to be achieved by the notification or survey and determine whether the transfer is authorised or not.⁷¹⁷

machine translation

⁷¹⁷ Löffler in Knyrim, DatKomm Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 7, 117ff.

Part 3: Other relevant legal issues

1. Tax law - VAT on electronic publications and related services

Since 1 January 2020, the **reduced tax rate** of 10% also applies to electronic publications and parts thereof that do not consist entirely or essentially of video or music content or are used for advertising purposes.⁷¹⁸ The aim of the legislator was to put the taxation of electronic publications on an equal footing with the supply of physical printed works in terms of the tax rate.⁷¹⁹

The decisive factor for the application of the reduced tax rate is that the electronic publication essentially fulfils the same function as the physical printed work. However, some functions of electronic publications that cannot originally be attributed to physical printed works are not detrimental to the application of the reduced tax rate. These are the comment function of articles in an online forum, the search function in electronic journals, accompanying video content (e.g. interviews) or interactive graphics, links within an electronic publication and links to Internet addresses as well as the possibility of making notes on the text.⁷²⁰

In the opinion of the tax authorities, however, search databases are not electronic publications, as the focus here is on access to search archives and therefore a different service.⁷²¹

The same problem arises with open access agreements that cover not only the purchase and subscription of (electronic) publications, but also other services. For example, so-called Read and Publish (RAP) agreements, in which a fee is agreed for "reading" or access to journals and a further fee for publishing in these journals (see Part 1, point 3.7 above), only the portion of the fee attributable to the reading component is subject to the reduced tax rate.⁷²²

Taxation at the standard tax rate instead of the reduced tax rate has a noticeable financial impact, particularly for non-genuinely tax-exempt service recipients such as universities, because VAT becomes the final cost factor due to the lack of input tax deduction authorisation.⁷²³

⁷¹⁸ § 10 para 2 no. 9 in conjunction with Annex 1 no. 33 UStG 1994.

⁷¹⁹ *Pernegger* in Melhardt/Tumpel (ed.), UStG (3rd ed., 2021), § 10, XIII Electronic Publications, margin no. 486.

⁷²⁰ UStR 2000 margin no. 1340f.

⁷²¹ UStR 2000 margin no. 1340.

⁷²² *Mayer K.*, Open Access in Transition: Infrastructures, Monitoring and Governance as Key Elements of a Successful Transformation. Baseline Report for the Austrian Federal Ministry of Education, Science and Research (2022), 81.

⁷²³ *Mittendorfer/Pollak/Streicher*, VAT rate on "search databases" (Part II), taxlex 2021/68, 315.

2. Restrictions under competition law

The framework of copyright and data protection law is supplemented by **behavioural control** through competition law, in particular antitrust law. This remains the ultima ratio in order to protect access interests that can arise as a result of power-sharing and concentrations.⁷²⁴

The "essential facilities doctrine" under antitrust law prohibits the denial of non-discriminatory access to essential facilities on reasonable terms for reasons that restrict competition. Individual large publishers can develop significant market potential if they are able to prevent the opening of derived markets, e.g. for electronic products, altogether.⁷²⁵

If publishers enter a new market, antitrust law examines whether a pricing policy is abusive as part of market power control. However, a dominant market position is a prerequisite here. Price control can play a role in databases in particular if there is a concentration of content.⁷²⁶

With these mechanisms, it is conceivable to enforce access under appropriate conditions through individual subjective access rights modelled on media law regulations.

3. Digital Services Act - impact on research

3.1. Basics

The Digital Services Act ("DSA")⁷²⁷ regulates the obligations of digital services that act as intermediaries and provide consumers with access to goods, services and content. This includes online marketplaces in particular.⁷²⁸

All **intermediary services** offered to users established or located in the Union are subject to the DSA, irrespective of the place of establishment of the provider of those intermediary services.⁷²⁹ An intermediary service may be a "mere conduit" in a communications network, a "caching" service or a "hosting" service consisting of storing information provided by a user on his/her behalf.⁷³⁰

In addition to facilitating liability for the providers of these services, the establishment of a **tiered system of due diligence obligations** is a key point of the new legislation. In addition to obligations that apply to all intermediary services, additional obligations are provided for

⁷²⁴ Peifer, Wissenschaftsmarkt und Urheberrecht: Schranken, Vertragsrecht, Wettbewerbsrecht, GRUR 2009, 22 (23f).

⁷²⁵ Peifer, Wissenschaftsmarkt und Urheberrecht: Schranken, Vertragsrecht, Wettbewerbsrecht, GRUR 2009, 22 (28).

⁷²⁶ Peifer, Wissenschaftsmarkt und Urheberrecht: Schranken, Vertragsrecht, Wettbewerbsrecht, GRUR 2009, 22 (28).

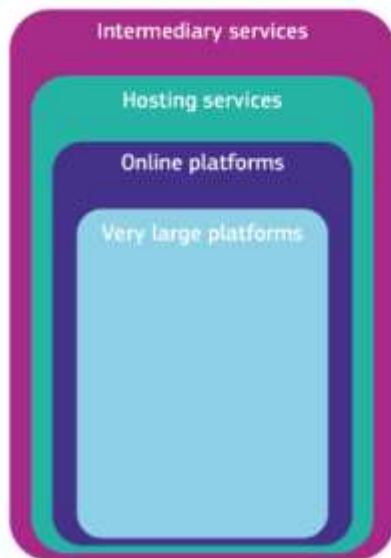
⁷²⁷ Regulation (EU) 2022/2065 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Act).

⁷²⁸ EU Commission, FAQ: Digital Services Act (25 April 2023), point 1, https://ec.europa.eu/commission/presscorner/detail/de/qanda_20_2348.

⁷²⁹ Art 2 para 1 DSA.

⁷³⁰ Art 3 lit g DSA.

hosting services, online platforms and very large online platforms with 45 million or more users ("VLOPs").⁷³¹



- **Vermittlungsdienste**, die über ein Infrastruktur-Netz verfügen: Internetanbieter, Domännennamen-Registrierstellen, darunter:
- **Hosting-Dienste** wie Cloud- und Webhosting-Dienste, darunter:
- **Online-Plattformen**, die Verkäufer und Verbraucher zusammenbringen, wie Online-Marktplätze, App-Stores, Plattformen der kollaborativen Wirtschaft und Social-Media-Plattformen.
- **Sehr große Online-Plattformen** bergen besondere Risiken für die Verbreitung illegaler Inhalte und für Schäden in der Gesellschaft. Für Plattformen, die mehr als 10 % der 450 Millionen Verbraucher/innen in Europa erreichen, sind besondere Vorschriften vorgesehen.

Illustration 8 Which providers are covered by the DSA?; Source: EU Commission https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_de; Licence: CC BY 4.0, <https://creativecommons.org/licenses/by/4.0/deed.de>.

The due diligence obligations for VLOPs such as Apple AppStore, Wikipedia and YouTube as well as for Bing and Google Search as very large online search engines ("VLOSEs") came into force on 25 August 2023. These are supervised by the EU Commission.

Until the other provisions of the DSA become applicable on 17 February 2024, a Digital Services Coordinator ("DSC") must be established by law at national level or an authority must be legally entrusted with the tasks provided for in the DSA.⁷³² The DSC has the task of cooperating with other competent authorities at national and European level and ensuring consistency.

3.2. Applicability to research institutions and research infrastructure

The DSA does not contain a general exception for organisations that do not provide commercial services.⁷³³ When assessing whether the DSA applies to research institutions, repositories or researchers, the term intermediary service must be analysed.

Information society services" are eligible as intermediary services.⁷³⁴ These are defined as any service generally provided electronically at a distance **for a fee** and at the individual

⁷³¹ WKÖ, Digital Services Act (DSA) in force, new rules for electronic commerce apply from 17 February 2024, <https://www.wko.at/service/wirtschaftsrecht-gewerberecht/digital-services-act-dsa.html>.

⁷³² WKÖ, Digital Services Act (DSA) in force, new rules for electronic commerce apply from 17 February 2024, <https://www.wko.at/service/wirtschaftsrecht-gewerberecht/digital-services-act-dsa.html>.

⁷³³ Lundqvist, Study on the Digital Services Act and Digital Markets Act and their possible impact on research (2022), 4, 23.

⁷³⁴ Art 3 lit g DSA.

request of a recipient.⁷³⁵ This therefore covers a wide range of **economic activities** that take place online.⁷³⁶

As remuneration is required, providers who are not commercially active are excluded from the scope of the DSA. However, the concept of remuneration is interpreted broadly in the case law of the European Court of Justice ("ECJ"). It also covers services that are not remunerated by those who receive them.⁷³⁷ Advertising financing is therefore also sufficient.⁷³⁸

Universities, repositories and other scientific institutions may therefore also fall within the scope of the DSA if hosting services for research results and data constitute an economic activity. Whether such a service constitutes an economic activity or a public service **must be examined on a case-by-case basis**.⁷³⁹

If data is created, collected and stored in databases or on platforms for sharing or reuse on the basis of a legal obligation or a legal mandate, this is generally not to be regarded as an economic or commercial activity. Therefore, public organisations will often be excluded from the scope of application.⁷⁴⁰

3.3. Access to platform data for research

The **VLOPs and VLOSEs** have a special duty of accountability to the public, which cannot be guaranteed solely through transparency reports in which, for example, the illegal content reported on the platform and the handling of these reports are specifically reported.

For this reason, a possibility is also provided for researchers to gain access to certain data. Access will be granted solely for the purpose of conducting research that contributes to the detection, identification and **understanding of systemic risks** (e.g. dissemination of illegal content, adverse impact on electoral processes and public security).⁷⁴¹

Researchers can obtain access to data via the DSC. a **two-stage procedure** is provided for this.⁷⁴² First, researchers must submit an application for authorisation to the DSC at the place of establishment of the service provider (usually Ireland) for certain research questions specified in the application.⁷⁴³ Alternatively, the application can also be submitted to the DSC of the Member State of the research organisation, which forwards it together with an initial assessment to the DSC at the place of establishment.⁷⁴⁴ Prerequisites for being granted the

⁷³⁵ Art 3 lit a DSA in conjunction with Art 1 para 1 lit b Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services.

⁷³⁶ EC 18 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce - E-Commerce Directive").

⁷³⁷ EC 18 E-Commerce Directive.

⁷³⁸ F. Hofmann in Hofmann/Raue, NK-DSA, Art 3 Rz 8ff.

⁷³⁹ Lundqvist, Study on the Digital Services Act and Digital Markets Act and their possible impact on research (2022), 9, 17.

⁷⁴⁰ Lundqvist, Study on the Digital Services Act and Digital Markets Act and their possible impact on research (2022), 8ff.

⁷⁴¹ Art 40 para 4 DSA.

⁷⁴² Kaesling in Hofmann/Raue, NK-DSA, Art 40 Rz 32.

⁷⁴³ Art 40 para 8 DSA.

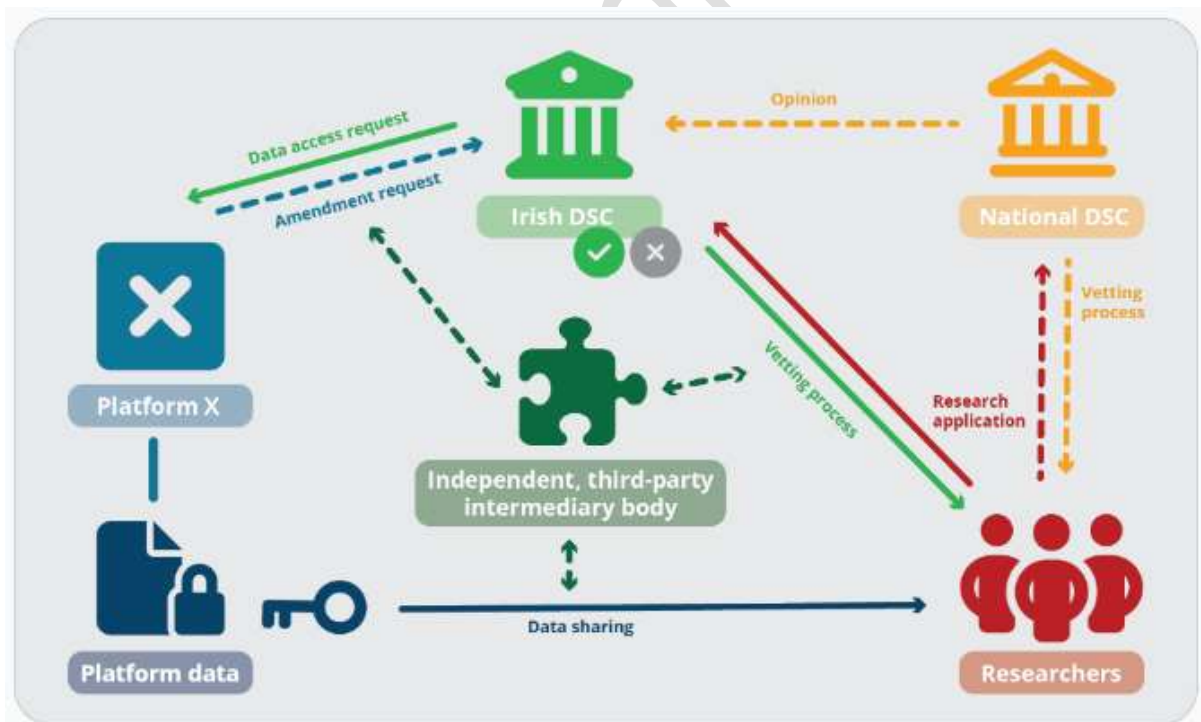
⁷⁴⁴ Art 40 para 9 DSA.

status of an authorised researcher include, among other things, affiliation to a research institution (see Part 1, point 5.2 above), independence from commercial interests and the free accessibility of research results.⁷⁴⁵ If necessary, the EU Commission can provide for independent advisory mechanisms to support the transfer of data in a delegated act.⁷⁴⁶

If the request is granted, the DSC at the place of establishment shall forward the request for data access to the providers of VLOPs and VLOSEs. They may ask the DSC to amend the order if they do not have access to the data or if granting access to the data would lead to significant weaknesses in the security of their service or in the protection of confidential information, in particular business secrets.⁷⁴⁷ However, any requests for modification must include proposals for one or more alternatives for granting access to the requested data or to other data that are appropriate and sufficient for the purposes stated in the request.⁷⁴⁸

The DSC shall decide on the change request and notify the provider of the decision in question and any amended order with the fulfilment deadline.⁷⁴⁹ Providers must grant access to data via suitable interfaces, including online databases or application programming interfaces.⁷⁵⁰ No compensation is provided for the providers.⁷⁵¹

The EU Commission will further specify the conditions for the transfer of data to researchers by means of supplementary **delegated acts**.



⁷⁴⁵ Art 40 para 8 DSA.

⁷⁴⁶ Art 40 para 13 DSA.

⁷⁴⁷ Art 40 para 5 DSA.

⁷⁴⁸ Art 40 para 6 DSA.

⁷⁴⁹ Art 40 para 6 DSA.

⁷⁵⁰ Art 40 para 7 DSA.

⁷⁵¹ *Kaesling* in Hofmann/Raue, NK-DSA, Art 40 Rz 71.

Illustration 9 How do researchers get access to platform data; Source: AlgorithmWatch, A guide to the EU's new rules for researcher access to platform data by John Albert, <https://algorithmwatch.org/en/dsa-data-access-explained/>; Licence: CC BY 4.0, <https://creativecommons.org/licenses/by/4.0/deed.de> .

There is also a special provision for researchers' access to **data that is publicly available through the online interface** (e.g. website, mobile apps) of VLOPs and VLOSEs providers.⁷⁵² This data includes, for example, aggregated interactions with content from public pages, public groups or public figures, including perception and interaction data, such as the number of reactions, shares and comments from users of the service.⁷⁵³ Providers must not prevent researchers from using this data for research purposes and must grant them access without delay.⁷⁵⁴

4. Digital Markets Act - Impact on research

4.1. Area of application

While the Digital Services Act primarily applies to medium-sized and large online platforms, the Digital Markets Act ("DMA")⁷⁵⁵ supplements competition law and limits the power of dominant digital groups.⁷⁵⁶

The scope of the DMA includes gatekeepers that provide centralised platform services (e.g. operating systems, web browsers, search engines, social networks) to business users established in the Union or end users established or residing in the Union.⁷⁵⁷

The Commission must designate companies that offer central platform services as gatekeepers if they exceed certain thresholds, including an annual turnover of at least EUR 7.5 billion.⁷⁵⁸

The DMA is therefore **not applicable to** universities, repositories and other academic institutions. However, it cannot be ruled out per se that one of the commercial giants in the higher education sector will develop into a gatekeeper in the future.⁷⁵⁹

4.2. Data access for research?

The DMA imposes several obligations on gatekeepers in relation to the **use of user data**.

In competition with commercial users, gatekeepers may not use any non-publicly accessible data that is generated or provided in connection with the use of their services (prohibition of

⁷⁵² Art 40 para 12 DSA in conjunction with Art 3 lit m DSA; *Kaesling* in Hofmann/Raue, NK-DSA, Art 40 para 78.

⁷⁵³ EG 98 DSA.

⁷⁵⁴ Art 40 para 12 DSA; EC 98 DSA; *Kaesling* in Hofmann/Raue, NK-DSA, Art 40 para 91ff.

⁷⁵⁵ Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

⁷⁵⁶ <https://www.bundesregierung.de/breg-de/schwerpunkte/europa/eu-regeln-online-plattformen-1829232> and https://wien.arbeiterkammer.at/interessenvertretung/arbeitsdigital/EinEuropafuerdasdigitaleZeitalter/Digital_Markets_Act.html.

⁷⁵⁷ Art 1 para 2 in conjunction with Art 2 no 2 DMA.

⁷⁵⁸ Art 3 para 4 DMA.

⁷⁵⁹ *Lundqvist*, Study on the Digital Services Act and Digital Markets Act and their possible impact on research (2022), 22.

use for downstream markets). This includes all aggregated and non-aggregated data generated by commercial users that can be derived from or collected by the commercial activities of commercial users or their customers from the relevant services, including click, enquiry, view and voice data.⁷⁶⁰

All end users and third parties authorised by them must be granted effective portability of the data provided by the end user or generated by its use free of charge upon request.⁷⁶¹

In addition, commercial users and third parties authorised by them must be granted effective, high-quality and permanent real-time access to aggregated and non-aggregated data, including personal data provided or generated in connection with the use of their services, free of charge upon request.⁷⁶²

The combination of these obligations establishes a right of access for commercial users.⁷⁶³ However, the DMA **does not** provide for an **independent right of access to data for researchers or research institutions**.⁷⁶⁴

5. Artificial Intelligence Act - impact on research

5.1. Status of the legislative process

The EU Commission published its proposal for the Artificial Intelligence Act ("AI Regulation") in April 2021.⁷⁶⁵ The Council of the EU adopted its common position ("*general approach*") on the AI Regulation on 6 December 2022. In addition, the members of the EU Parliament agreed on a common position on the AI Regulation in June 2023. The three institutions have entered the final negotiation phase with their respective positions. As soon as they have reached a compromise, the law can be passed.⁷⁶⁶

5.2. Area of application

The AI Regulation will prohibit certain practices in the field of artificial intelligence (e.g. social scoring) and establish harmonised rules for the placing on the market, putting into service and use of artificial intelligence systems ("AI systems") in the EU. At the heart of the regulation will be the special requirements for high-risk AI systems and the obligations of the operators of such systems. Transparency requirements will be defined for other AI systems that are intended to interact with natural persons.⁷⁶⁷

⁷⁶⁰ Art 6 para 2 DMA.

⁷⁶¹ Art 6 para 9 DMA.

⁷⁶² Art 6 para 10 DMA.

⁷⁶³ Lundqvist, Study on the Digital Services Act and Digital Markets Act and their possible impact on research (2022), 21.

⁷⁶⁴ Lundqvist, Study on the Digital Services Act and Digital Markets Act and their possible impact on research (2022), 22.

⁷⁶⁵ Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union acts, COM(2021) 206 final.

⁷⁶⁶ <https://algorithmwatch.org/de/ai-act-erklaert/>.

⁷⁶⁷ EU Commission, Artificial Intelligence - Excellence and Trust, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/excellence-and-trust-artificial-intelligence_de.

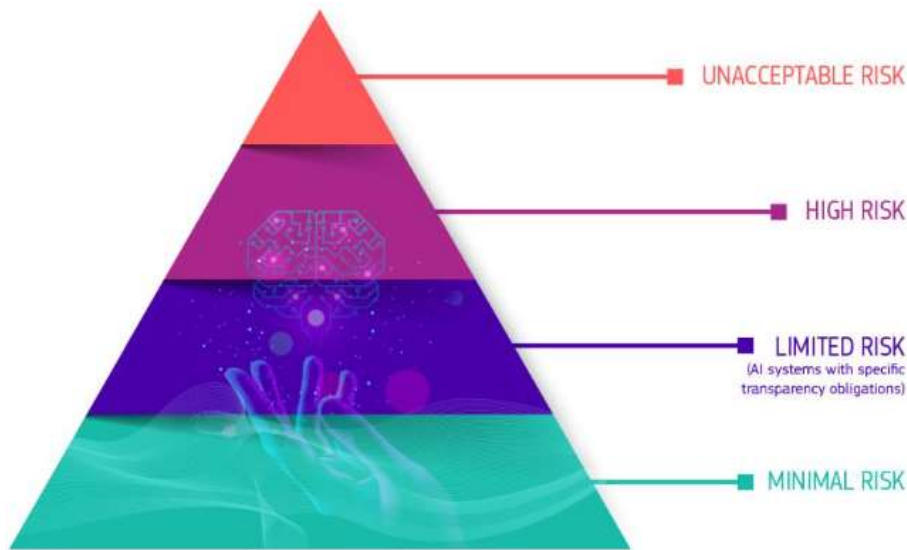


Illustration 10 AI Regulation - A risk-based approach; Source: EU Commission, <https://digital-strategy.ec.europa.eu/de/policies/regulatory-framework-ai>; Licence: CC BY 4.0, <https://creativecommons.org/licenses/by/4.0/deed.de>.

The EU Commission's draft only contains a substantive reference to research. EC 16 allows research for legitimate purposes in connection with prohibited AI systems, provided that this research does not result in the use of the AI system in human-machine relationships that cause harm to natural persons and if this research is carried out in accordance with recognised ethical standards for scientific research.

In contrast, the general approach of the Council of the EU provides for **explicit exemptions** for the research sector so that research and development activities are not undermined and the freedom of science is respected. According to the general approach, the AI Regulation should therefore not apply to AI systems and their results that are developed and put into operation solely for the purposes of scientific research and development, nor to research and development activities relating to AI systems.⁷⁶⁸

According to the common position of the EU Parliament, the AI Regulation should help to support research and innovation, not hinder **research and development activities** and safeguard the freedom of scientific research. This draft also provides for explicit exemptions for research, testing and development activities.⁷⁶⁹ In addition, a regulation to promote AI research and development to support socially and environmentally beneficial outcomes is proposed.⁷⁷⁰

⁷⁶⁸ Council of the EU, General Approach - Artificial Intelligence Act, 14954/22 (25/11/2022), Art 2 (6) and (7) and EC 12b.

⁷⁶⁹ Amendments of the European Parliament of 14 June 2023 to the proposal of the AI Regulation, COM(2021)0206 - C9-0146/2021 - 2021/0106(COD), Art 2 para 5d, EC 2f.

⁷⁷⁰ Amendments of the European Parliament of 14 June 2023 to the proposal of the AI Regulation, COM(2021)0206 - C9-0146/2021 - 2021/0106(COD), Art 54a.

5.3. AI real-world laboratories ("regulatory sandboxes")

As a measure to promote innovation, the drafts of the AI Regulation provide for the establishment of AI laboratories by the competent authorities of one or more Member States or by the European Data Protection Supervisor.

Such regulatory sandboxes are tools that provide a controlled environment to facilitate the development, testing and validation of innovative AI systems for a limited period of time before they are placed on the market or put into operation.⁷⁷¹

The development, testing and validation in the controlled environment is carried out under the direct supervision and guidance of the competent authorities to ensure compliance with the requirements of the AI Regulation and, where applicable, other legislation supervised in the context of the real-world laboratory.

In the case of AI real-world laboratories, the focus is therefore on the **compliance of innovative products with legal requirements**, rather than on enabling research and development activities.

For the legal implementation options for AI real-world laboratories, see an expert report commissioned by the German Federal Ministry for Economic Affairs and Climate Protection.⁷⁷²

6. IT security in the research sector

6.1. Basic requirements

The legal regulation of IT security is the subject of a wide range of different legal provisions at both European and national level.⁷⁷³

All public and private bodies that process personal data must comply with the **IT security requirements under data protection law**. The GDPR requires the implementation of appropriate technical and organisational measures (e.g. pseudonymisation or encryption of data) to ensure a level of protection appropriate to the risk. The measures must be determined taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons.⁷⁷⁴

⁷⁷¹ European Parliamentary Research Service, Artificial intelligence act and regulatory sandboxes, Briefing 17-06-2022, [https://www.europarl.europa.eu/thinktank/de/document/EPRS_BRI\(2022\)733544](https://www.europarl.europa.eu/thinktank/de/document/EPRS_BRI(2022)733544).

⁷⁷² Noerr, Analysis of the potential and legal implementation possibilities of AI real-world laboratories at European and national level with special consideration of the European Commission's draft AI legal framework (as of 25 January 2023), <https://www.bundesregierung.de/breg-de/suche/ki-reallabore-2164576>.

⁷⁷³ Kipker in Kipker, Cybersecurity (2020) Ch 1 para. 17 et seq.

⁷⁷⁴ Art 32 GDPR.

The general responsibility and liability standards for management bodies of legal entities and other institutions, from which **organisational duties** arise, are another important legal basis for the IT-related specification of duties.⁷⁷⁵

When implementing IT security measures, research institutions should be guided by established **technical regulations** (ISO 27001, Austrian Information Security Manual, BSI basic protection).

6.2. Research as a critical sector

The most important legal source in IT security law is the Federal Act to Ensure a High Level of Security of Network and Information Systems ("**Network and Information System Security Act** - NISG"), which implements the European NIS Directive from 2016.⁷⁷⁶ The NISG contains obligations for operators of essential services in the energy, transport, banking, financial market infrastructure, healthcare, drinking water supply and digital infrastructure sectors, as well as for providers of digital services and public administration organisations.

As part of the implementation of the EU Cybersecurity Strategy, IT security is being increasingly regulated and the NIS Directive is being replaced by Directive (EU) 2022/2555 on measures for a high common level of cybersecurity across the Union ("**NIS 2 Directive**"). This modernises the existing legal framework to keep pace with increasing digitalisation and the changing cybersecurity threat landscape and contains numerous legal measures to increase the overall level of cybersecurity in the EU.⁷⁷⁷ The directive must be transposed into national law by **17 October 2024**.

One of the most important planned changes is the extension of the scope of application to new facilities and sectors. A distinction is now made between essential and important facilities.⁷⁷⁸

Important entities are all entities that are not categorised as material but can be assigned to one of the roles in the important or material sectors or carry out such activities. In addition to Annex I, Annex II, which defines the sectors of the important organisations, is therefore also important.⁷⁷⁹ In this, **research is categorised as another critical sector**.⁷⁸⁰

Research institutions are recognised as important institutions in the critical research sector.⁷⁸¹ These are defined as an organisation whose primary objective is to carry out applied research or experimental development with a view to using the results of this research for **commercial purposes**. Commercial purposes are understood to mean the manufacture or

⁷⁷⁵ Kiefner in Gabel/Heinrich/Kiefner, Rechtshandbuch Cyber-Security (2019), ch. 2 para. 7 et seq.

⁷⁷⁶ Directive (EU) 2016/1148 concerning measures to ensure a high common level of security of network and information systems across the Union.

⁷⁷⁷ Burgstaller, Current Events and Developments in Information Law, ZIIR 2023, 140.

⁷⁷⁸ Art 3 para 1 and para 2 NIS 2 Directive.

⁷⁷⁹ Voigt/Bastians, Neue europarechtliche Anforderungen an die IT-Sicherheit, CR 12/2022, 768 (770).

⁷⁸⁰ Annex II Z 7 NIS-2 Directive.

⁷⁸¹ Annex II Z 7 NIS-2 Directive.

development of a product or process, the provision of a service or its commercialisation. Educational institutions are expressly excluded from this definition.⁷⁸²

However, Member States may extend the scope of application to **educational establishments**, in particular if they carry out critical research activities.⁷⁸³

The NIS 2 Directive provides comprehensive and very specific risk management measures and reporting obligations for security incidents that may have a significant impact on the provision of their services for the significant and important organisations covered.⁷⁸⁴

7. Citizen Science - special legal problems?

Citizen science has become increasingly important in recent years.⁷⁸⁵ Within the framework of citizen science, scientific projects are carried out with the support or entirely by interested amateurs. They formulate research questions, report observations, carry out measurements, analyse data and/or write publications.⁷⁸⁶ A key aspect of Citizen Science is the **dialogue and networking between science and society, particularly with schools**.⁷⁸⁷

There are many legal and ethical issues to consider in citizen science projects.⁷⁸⁸ In practice, this leads to major uncertainties. Copyright, data protection and insurance cover are considered to be particularly relevant for the planning, implementation and completion of citizen science projects.⁷⁸⁹

The relevant legal topics therefore largely overlap with the topics that are important for Open Science, so that reference is made to the corresponding explanations in this chapter.

Special rules for the deletion of personal data in the context of open science and citizen science projects are provided for in the Research Organisation Act ("FOG").⁷⁹⁰ The deletion of own personal data that has been provided voluntarily is only permitted if the project line or the scientific validity of the project is not impaired.⁷⁹¹ In addition, the processing of personal data of third parties that is provided is permitted as long as the data is based on observations or measurements in public spaces or these are pseudonymised (see Part 2, point 5 above).⁷⁹²

⁷⁸² Art 6 Z 41 NIS-2 Directive; EC 36 NIS-2 Directive.

⁷⁸³ Art 2 para 5 lit b NIS-2 Directive.

⁷⁸⁴ Voigt/Bastians, Neue europarechtliche Anforderungen an die IT-Sicherheit, CR 12/2022, 768 (770 ff).

⁷⁸⁵ <https://citizenscience.univie.ac.at/>.

⁷⁸⁶ <https://www.citizen-science.at/eintauchen/was-ist-citizen-science>.

⁷⁸⁷ <https://www.bmbwf.gv.at/Themen/Forschung/Forschung-und-%C3%96ffentlichkeit/CiSc.html>.

⁷⁸⁸ EU Commission, Mutual Learning Exercise on Citizen Science Initiatives - Policy and Practice Final Report (2023), 12.

⁷⁸⁹ Museum für Naturkunde, Guidelines for Legal Issues in Citizen Science Projects (2020), 6.

⁷⁹⁰ In § 2b Z 4 FOG, "citizen science" is defined as open science that also involves people other than scientists.

⁷⁹¹ § Section 2i (4) FOG; Explanatory Memorandum 68 BlgNR 26. GP 47.

⁷⁹² § Section 2i (4) and (5) FOG; Erläuterung 68 BlgNR 26th GP 47; Löffler in Knyrim, DatKomm Art 89 GDPR (as of 1 October 2018, rdb.at) Rz 114.

Insurance cover is a special case. The main questions here are how the citizen scientist is insured against personal injury and who is liable in the event of damage.⁷⁹³ These risks can only be limited by taking out appropriate insurance policies.

Further information can be found in the guidelines for legal issues in Citizen Science projects, which were commissioned by the German Museum of Natural History.⁷⁹⁴ The expert opinions on which the guide is based can be consulted for more in-depth information. Although these were drawn up on the basis of the German legal situation, they nevertheless provide good orientation.

1.	Euler, Ellen (2020): Intellectual Property and Copyright in Citizen Science Projects. Brief report: https://doi.org/10.7479/hg5s-yk82
2.	Schneider, Uwe K. (2020): Data protection and personal rights in citizen science. Brief legal opinion for the Museum für Naturkunde, Berlin: https://doi.org/10.7479/akea-zg02
3.	Gromek, Gereon (2020): Expert opinion on insurance cover in citizen science projects: https://doi.org/10.7479/1g8j-t559

For further information, please refer to two national initiatives in the field of Citizen Science, the Centre for Citizen Science and the "Österreich forscht!" platform.⁷⁹⁵

⁷⁹³ *Museum für Naturkunde*, Guidelines for Legal Issues in Citizen Science Projects (2020), 14f.

⁷⁹⁴ *Museum für Naturkunde*, Guidelines for legal issues in citizen science projects (2020).

⁷⁹⁵ <https://zentrumfuercitizenscience.at/de/> and <https://www.citizen-science.at/>.

Chapter 3: Expert interviews and public round table

The aim of this study is to analyse the legal with the input of experts enriched. This allows an overview of the legal issues relating to open science in practice to be presented. Together with the legal analysis, the results of the empirical part are incorporated into the recommendations in Chapter 4.

This chapter presents the methodology and the results of the empirical part of the study in detail.

1. Methodology

In the course of this study, 9 interviews with a total of 11 experts (3 persons present in one interview) conducted. The interviews were conducted via Zoom, each lasting approximately one hour. The interviews were recorded and transcribed. The interviewpartners were as follows:

- Doruk Akpolat LL.M., representative and legal advisor of the KEMÖ office and the Austrian Library Association.
- Lothar Hahn, General Secretariat, Data Protection Officer, Federal Ministry of Education, Science and Research
- HR Mag. Brigitte Kromp, Head of the Austrian Central Library for Physics and Departmental Library for Chemistry and representative of the co-operation partners of the Austrian e-Media Co-operation (KEMÖ)
- Rita Pinhasi, MA, representative of the Cooperation Committee of the KEMÖ
- Dr Andreas Rauber, Associate Professor in Data Science, Vienna University of Technology
- Katharina Rieck, MA MA, Open Science and Publication Costs, Austrian Science Fund FWF
- Alea López de San Román, MA MA, Legal & Policy Officer, EU Commission
- Caroline Schober, Vice-Rector for Research and International Affairs; Co-Chairwoman of the Research Forum of the Austrian University Conference; Chairwoman of Open Science Austria, Medical University of Graz
- Martin Semberger, EU and International Market Strategies, Federal Ministry of Labour and Economy
- Dr Michael Strassnig, Programme Manager, Vienna Science and Technology Fund WWTF and research platform "Register Research"
- Prof Dr Tobias Thomas, Director General, Statistics Austria

In the following presentation of the data and results, the participants are not mentioned by name and the statements and opinions are therefore not attributed to individual participants.

The survey was conducted using **the qualitative method of expert interviews**, which aim to gather the expertise and experience of people in their professional environment. The following questions served as **guidelines** during the semi-structured interviews:

1. Describe your field of activity and how the topic of Open Science affects your day-to-day work.
2. How does the implementation of Open Science work in your experience/field of activity?
3. What existing attempts to implement Open Science are you aware of and to what extent were they successful? What hurdles have existing attempts failed to overcome?
4. What do you see as the problems in the area of Open Science? In particular for your area of activity/work, what difficulties do you encounter?
5. What measures do you consider necessary at Austrian level? And at EU level?

In addition to the interviews, a public panel discussion ("**Public Round Table**") was held on 6 July 2023 with the following experts (see Annex 1 to the study)⁷⁹⁶

- Prof. Dr Ronald Maier, Vice-Rector for Digitalisation and Knowledge Transfer, University of Vienna
- Barbara Sanchez Solis, Head of the Centre for Research Data Management, Vienna University of Technology
- Univ.-Prof. Dr Petra Schaper Rinkel, Rector of the University of Applied Arts in Vienna
- Dr Michael Strassnig, Programme Manager, Vienna Science and Technology Fund WWTF and research platform "Register Research"

The roundtable was organised and moderated by Dr Katja Mayer (University of Vienna) and Dr Žiga Škorjanc (University of Vienna) in cooperation with the Federal Ministry of Education, Science and Research. The roundtable was not recorded; instead, a detailed report was written, which is also analysed here.

From the interviews and the roundtable, problem areas relating to the implementation of Open Science and the proposed solutions were identified and analysed, with a focus on legal aspects. The topics that were identified, can be categorised, in no particular order, as follows:

- Open licences
- Rights retention strategy
- Secondary utilisation
- Data protection and data access (incl. register research in particular)
- EU legal acts on data and digitalisation

⁷⁹⁶ <https://young-digital-law2023.univie.ac.at/public-round-table/>.

- Tax law
- Competition law
- Need for clarification of the legal situation

The most important topics identified by the participants are presented below.

2. Identified topics

2.1. Open licences

In seven out of nine interviews open licences were mentioned as an important topic in the field of open science. There are internationally standardised open licences (e.g. Creative Commons licences, Open Database Licence), which allow datasets and software to be made publicly available. Two participants pointed out that researchers do not always want to make their research available under an open licence and that publicly funded research is therefore often behind a paywall. However, it should be emphasised that not all of the experts interviewed had the impression that researchers were reluctant to choose CC BY or other open licences. There would only be uncertainties and a strong need for clarification about the legal situation, as described in point 2.8 below.

This results in this then leads to Problems with the selection of open licences: *"If I don't use a non-commercial licence, then any company, including Google and Apple and Meta, can use the content for anything they want."* If universities are to be supported in making more research openly available, then *"they must also be given the option of keeping the commercial licences with them and that the data is only made available for academic activities."*

Problems also arise where large quantities of data sets are used under Creative Commons licences. If a dataset has a CC BY licence, this means in principle that the dataset can be used but must be cited, which is difficult to implement with larger datasets.

This naming of the source may be useful in order to demonstrate whether sources are trustworthy, whether sources are trustworthy, experts interviewed call for this process to be modernised: *"We still think very much in terms of old processes. In the past, citations were made by printing them on paper. Today, nobody reads it through anymore, it's done by machines. I can have these citation points calculated by machines, so it doesn't have to be read by people, but can be analysed automatically."*

2.2. Rights retention strategy

There are different approaches to implementing the requirement for open access with a CC BY licence. One variant is the rights retention strategy, which enables authors to exercise their rights to their manuscripts in order to deposit a copy in a repository after publication and grant free access to it. According to several participants, this access is currently still causing uncertainty, particularly as rights retention often conflicts with the contracts that

researchers or institutions have with publishers and there is no national legal regulation that would allow the secondary exploitation right to take effect.

The universities and other research institutions are hesitant in doing so, institutional rights retention strategies because there is no legal clarification to date. It should not be the case that universities or researchers have to fear being sued by publishers if they publish something using "rights retention". In the interviews, it was therefore primarily suggested that the framework conditions for rights retention strategies should be regulated at national level.

One of the interviewees pointed out that the rights retention strategy can and is implemented particularly well by third-party funding organisations. However, one of the participants also pointed out that the requirement from funding bodies to implement rights retention puts great pressure on researchers, possibly restricting where they can publish and thus influencing career opportunities.

2.3. Secondary utilisation

Secondary exploitation and secondary publication rights as a copyright issue were discussed several times in interviews and the further development of secondary publication rights in the European Union was explicitly put forward twice by the participants as a legislative proposal. Uncertainties arise in particular in cross-border situations such as consortium agreements and other contracts with publishers.

According to one of the participants, three areas in particular play a role in relation to secondary exploitation, namely copyright, new EU legislation on data and contractual obligations arising in publicly funded research, for example through the Horizon Europe Grant Agreements.

The experts see no legal problem in integrating the secondary to integrate the secondary exploitation right into funding agreements: "*The legal basis is freedom of contract*". This helps to ensure that publicly funded research does not remain under lock and key: "*If we are talking about publicly funded research projects [...], the general public also has a right to the research results.*"

However, it seems doubtful whether individual institutions can also introduce a secondary utilisation obligation via employment contracts with their employees. This is a much-discussed question in the area of academic freedom. Reference is made here to the current developments in Germany, where the Federal Constitutional Court will deal with the secondary utilisation obligation in the statutes of the University of Konstanz this year.

2.4. Data protection and data access

Data protection was raised as an issue by the experts in seven interviews and also in the roundtable. Under the principle of "*as open as possible, as closed as necessary*", which is

defined in the Open Data and PSI Directive⁷⁹⁷, data protection is a possible reason for limiting access to data.

Data protection and open science could therefore be seen as opposites. However, they are usually presented by the experts as *"two sides of the same coin"*. For example, according to one participant, data protection officers on the one hand and open data officers on the other must be part of the strategy of public institutions. Both open science and data protection urge the development of a national or institutional data strategy: *"That is also one of my premises, that the increased engagement with data actually leads to better enforcement of the GDPR, our rights and a better and trustworthy handling of data in general."*

Researchers need the simplest possible solutions to access data. Researchers would also usually have no interest in tracing individual data and would only need to have access to data in order to be able to conduct research with it. Therefore, one suggestion is *"to host data where it is stored securely, where it is managed responsibly, where someone will ensure that the data remains available. The data should not and does not have to be held by the researcher."*

The register research regulated in the Austrian Research Organisation Act and the Federal Statistics Act has been addressed several times. An amendment to both laws (Research Organisation Act and Federal Statistics Act) created the framework conditions for the implementation of the Austrian Micro Data Center ("AMDC") in 2021, with the aim of *"providing data protection-compliant remote access to microdata"*. According to the experts interviewed, one of the advances achieved is that *"this microdata can be linked in a pseudonymous form"*. Responsibility is transferred to research organisations, which are prohibited from using this data for the purpose of re-identifying individuals.

Six participants mentioned a need for improvement in this area, particularly with regard to the availability of data in the AMDC. However, this requires regulations from individual ministries as a basis, of which there is currently only one; that of the Federal Ministry of Education, Science and Research. A *"great potential"* of the AMDC has therefore *"not yet been utilised"*. Further potential, that has not (yet) been utilised here is seen by one of the participants in the fact that only the federal database should be made available and not that of the federal states or municipalities.

The choice of current research priorities strongly reflects which data is available. The availability of data from different areas would therefore stimulate research in these areas: *"A broader range of topics would be very desirable and can be achieved by simply successively releasing further registers via FOG and treating or linking them at the AMDC, so that further subject areas can then simply be better covered."* So recommends one of the experts recommends the development of a clear data strategy in order to decide, which data we as a society need for further use. The interviewees emphasise other areas where improved access

⁷⁹⁷ Art 10 Directive (EU) 2019/1024 on open data and the re-use of public sector information.

to data would be a priority, namely judicial data, corporate data, wealth distribution, VAT data and insurance data.

In six interviews, health data is particularly emphasised or addressed as a separate topic area. Data from the health sector is accessible via registers provided for by federal law within the meaning of the FOG. It can often be interesting to compare this data with, for example, the socio-demographic data from Statistics Austria. One problem area, One problem area that one of the participants sees here is the differences in the access criteria for register data and statistical data: *"FOG data access [is] more liberal, so theoretically companies that are active in research could also receive register data. However, since Statistics Austria's accreditation process [is] actually focussed on scientific research at university level [and is therefore] much more restrictive, there are slight divergences that may cause problems in practice, especially if you then want to link register data with Statistics Austria."* It is therefore necessary to standardise the access requirements.

In general access to data is decided via an accreditation process as a research organisation. This accreditation process is viewed critically by one participant in relation to health data: *"Accreditation as a research organisation for data access should be viewed strictly. At micro data level, I would actually be in favour of stricter accreditation, because organisations that come from the context of lobbying and think tanks are now also accredited"*.

The European Health Data Space is also mentioned in this context, which will probably significantly change how health data is accessed in the coming years. One participant criticised the fact that *"the European Health Data Act makes hardly any distinction between commercial and scientific players. There should be a scientific privilege. When it comes to access to health data for companies, I am sceptical as to whether this is a good thing."*

In general, health data is criticised for not having enough data available and that certain population groups may be underrepresented, as health data in Austria is mainly collected using opt-in procedures. Apart from the general lack of data, opt-in processes have the major problem of a so-called "selection bias". This describes a statistical error that occurs primarily when a sample is analysed that is not representative of the entirety of the data. For example, opt-in procedures would only include people who are already relatively well covered and who have a relatively high level of health awareness. Certain groups, on the other hand, are systematically overlooked. For example, three of the experts are explicitly in favour of an opt-out system (as already exists in other countries) in various contexts: On the one hand, this is proposed in the context of health data, and on the other for all public sector data. However, according to one interviewee, fear and scientific scepticism play a major role in health data in particular, leading to the fact that a lot of data is not even available and some groups are not included in the data, making it difficult to identify national priorities, capacities and gaps.

2.5. EU legal acts on data and digitalisation

In addition to the GDPR, the participants will present other issues and problems in the area of data and digitalisation. Prominent among these are the Data Act, the Digital Governance Act, the Digital Services Act and the Open Data Directive. These introduce new requirements for member states but, according to one interviewee, also offer new opportunities for researchers. For example, *"Article 40 of the DSA, [which] regulates data access for verified scientists"*.

The Data Act comes in five interviews mentioned and is perceived by the experts as a positive development in the direction of access to non-personal data. However, according to one participant, establishing the data economy, as is the plan with current EU data initiatives, will be *"an extreme challenge for the Austrian context."* The effective implementation of the Data Act, Data Governance Act and European Health Data Space, which offer many new opportunities, will be crucial at national level. *"In Austria, we are basically still facing this paradigm shift, according to which all data should be open and accessible."*

One of the participants emphasises that it is not necessary to wait and see what happens at EU level, but that better solutions could be introduced at national level at an early stage (*"where Scandinavian countries are ahead, for example"*).

2.6. Tax law

Two interviews also discuss the tax law issues associated with open science. Since an amendment to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (*"VAT Directive"*), it has been possible to tax not only print publications but also electronic publications at a reduced rate.

This option was initially not implemented as widely in Austria as in Germany, for example, because the tax authorities argued that electronic publications not only replace print products, but also offer greater benefits, in particular search and filter functions, and should therefore not be taxed at a reduced rate.

However, the opinion is gradually gaining ground that scientific journals, for example, which offer free-access search functions but then have articles behind a paywall, are only replacing the print product with this payment, namely access to the article. As a result, these journals would also benefit from the reduced VAT.

However, open science was not considered in this discussion from the outset, which is why the problem now arises that the *"publishing"* component of open access agreements is not taxed at a reduced rate as a service. It is therefore positive that *"this reduced VAT on electronic literature has finally been implemented. But it's actually too late again and we should now have looked at open access publishing and tried to ensure that this reduced VAT rate is also available there."*

2.7. Competition law

Some interviews discuss whether there are competition law problems in connection with open science, especially when universities join forces to negotiate better publishing conditions. In general no problem is identified here in Austria.

2.8. Need for clarification of the legal situation

Where the legal situation is unclear or has possibly not been sufficiently communicated, this may lead to misunderstandings or problems in the implementation of Open Science. Further clarification on various legal topics is proposed as a non-legislative measure in seven out of nine interviews.

There are already misunderstandings about open science in general: *"One of the things where we always have to argue very strongly and where there is a need for explanation outside is what open science actually is, because it doesn't mean that [...] all results are available to everyone for free."* Furthermore is most frequently referred to a need for clarification in relation to two areas: Use of open licences and data protection.

2.9. Questions outside the legal field

The study focusses on the legal aspects of Open Science. However, for the sake of completeness, non-legal issues are also addressed. These are not discussed in detail here, but in a brief digression we present the topics that were mentioned most frequently in the interviews and at the roundtable.

Of course, this often relates to the implementation of legal measures. One participant explains: *"Even the best legal basis is of no help if there are no concrete implementation provisions, no corresponding sanctions or no follow-up of any kind."*

The questions, that are mainly addressed in the interviews and in the panel discussion are, are infrastructure, institutional and financial framework conditions, the evaluation of scientific work and awareness-raising.

2.9.1. Infrastructure

Most interviewees argue that more could be done to implement open science even with the existing legal basis. This is, among other things, a question of infrastructure. This is about *"creating infrastructure that allows open science to be practised with highly sensitive data, be it privacy-sensitive or IPR/economically sensitive data"* and doing this as far as possible, without researchers with too many requirements too many requirements. *"It's actually our job to find and provide solutions that make it easy for researchers."*

It is also often forgotten that security measures and sensitive data are not the only challenges for the infrastructure. For (extremely) large amounts of data (e.g. satellite data), the transition to "data visiting environments" has been recommended. These are infrastructures that allow researchers to access data without downloading it and without having to worry about data

management. According to another interviewee, security measures can already be implemented very well in the background and access can be restricted as required.

As far as open access repositories are concerned, there is also a need for better infrastructure, the participants argue. It is currently difficult to determine which repositories fulfil high quality and security criteria, which in turn makes it difficult for researchers to make data available in open access. Examining and strengthening the security of repositories is therefore also an important point in terms of infrastructure.

2.9.2. Institutional capacities and financial framework

The implementation of Open Science depends on the funding and capacities of the institutions. Important and frequently mentioned players here are university and non-university research organisations, funding bodies, Statistics Austria and the AMDC, the federal government and companies involved in research. Specifically, two experts that positions such as data stewards or open data officers be promoted at a political and institutional level: *"Laws and European regulations are good. But I think we need the people who bring the individual pieces together, we need the financial resources."*

In addition, the question arises the question of who can afford data access. Expensive data access generally means that young researchers do not have access: *"In the area of doctoral training, the costs are currently prohibitive. [...] Particularly if you want a new, younger cohort of researchers to emerge who will deal with this topic, become experts and [develop] new methods, I cannot rely on the fact that it is enough if there are 15 large financial projects in Austria. There needs to be a broader approach and it also needs to play a certain role in education."*

The preservation and expandability of structures such as the AMDC are also a financial issue. Funding is needed, for example, to further improve the search and filtering options for metadata or to make more anonymous data available. Similarly, some of the costs of licences and software, which the AMDC needs for each project, This makes access more difficult for young researchers without third-party funding. Suggestions are therefore, for example, special calls for proposals for young researchers or regulations in the performance agreement of the universities to ensure a kind of basic funding for AMDC research.

The references to financial measures and the possible expansion of institutional capacities show how much room for manoeuvre is also available within the current European and Austrian legal framework.

2.9.3. Monitoring and evaluation of scientific work

The further development of open science has consequences for the expectations placed on researchers and the evaluation of their work. It is often expected that open access is published. This is often also a requirement in funding agreements. However, this can be problematic for individual careers if the most important scientific journals in the relevant field are not open access (such as *Science* and *Nature* mentioned in one of the interviews).

It is therefore necessary to rethink quality criteria and requirements for researchers and institutions at the same time as Open Science progresses.

2.9.4. Raising awareness

In addition to the implementation of new measures, several interviews also suggested raising awareness of the current legal framework. Research institutions and funding organisations are in a good position to create awareness. One person suggests that funding organisations should focus on awareness-raising rather than monitoring in order to promote the implementation of open science. This is mainly due to the fact that researchers are generally motivated and interested in implementing open science, it is just a matter of addressing uncertainties and creating the right framework conditions.

Chapter 4: Recommendations for improving the legal framework for Open Science in Austria

As part of this exploratory study, proposals for **legislative and non-legislative measures** to improve the existing legal framework for Open Science in Austria were developed on the basis of the elaborations in Chapter 2 "Open Science - Guidelines for scientific practice" and the empirical findings presented in Chapter 3.

The proposals for legislative and non-legislative measures are categorised by topic. However, some proposals for non-legislative measures are summarised across topics.

These recommendations should serve as a **starting point for further steps** to improve the legal framework for Open Science in Austria.

1. Legislative measures - recommendations for action by topic

1.1. Access to scientific publications (Chapter 2, Part 1)

Recommendations on the statutory secondary exploitation right	
Legislative measures	
<ul style="list-style-type: none"> Extension of the scope of application to all members of a research institution at least half of which is publicly funded 	<ul style="list-style-type: none"> Extension of the scope of application to all scientific works, in particular monographs
<ul style="list-style-type: none"> Restriction to "published" works should be dropped 	<ul style="list-style-type: none"> Enabling the open access secondary publication of research data
<ul style="list-style-type: none"> Clarification that a version with the same content as the final version may be published in its own formatting 	<ul style="list-style-type: none"> Embargo period shortened to six months

Recommendations on rights retention strategies	
Legislative measures	
<ul style="list-style-type: none"> Mandatory introduction of open science strategies at institutional level 	<ul style="list-style-type: none"> Legal basis for rights retention strategies of research institutions
<ul style="list-style-type: none"> Right of research institutions to secondary publication on institutional repositories 	<ul style="list-style-type: none"> Authorisation to include accompanying provisions on the exercise of the right to secondary publication in the statutes of the research institution

Non-legislative measures	
<ul style="list-style-type: none"> Free and open access to scientific publications in electronic form 	<ul style="list-style-type: none"> FAQs explaining rights retention strategies
<ul style="list-style-type: none"> Linking institutional repositories and publication archives 	<ul style="list-style-type: none"> Provision of additional resources for negotiating and enforcing open access agreements with publishers

Recommendations on Open Educational Resources (OER) and open licences

Non-legislative measures	
<ul style="list-style-type: none"> Licensing OER under copyleft licences should not be the default option 	<ul style="list-style-type: none"> No obligation to use copyleft licences in rights retention strategies
<ul style="list-style-type: none"> Using innovative OER formats 	<ul style="list-style-type: none"> OER tutorials to click through about publishing under an open licence
<ul style="list-style-type: none"> Integration of OER tutorials into the basic qualification for beginners at research institutions 	

Recommendations for text and data mining

Legislative measures	
<ul style="list-style-type: none"> Clarify conditions for lawful access 	<ul style="list-style-type: none"> Allow researchers to circumvent copy protection measures that restrict the free use of works
Non-legislative measures	
<ul style="list-style-type: none"> Development of so-called "best practices" 	

1.1.1. Secondary Publication Right by law

1. General. From the perspective of Open Science, the current regulation is inadequate in many respects. Although the introduction of a harmonised secondary publication right at EU level is (cautiously) advocated in the relevant study, there is currently no timetable for its introduction (see Chapter 2, Part 1, Point 2.5).⁷⁹⁸ The national legislator should therefore not

⁷⁹⁸ Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 55.

wait for these developments, but rather eliminate the existing inadequacies by **amending § 37a UrhG**.

2. Extension of the personal scope. Currently, only members of the scientific staff of a privileged research institution are benefiting from this provision. This group includes (university) professors, university lecturers, academic staff in research and teaching as well as doctors in their specialist training. It is irrelevant whether the position is full-time or part-time and whether the position of the author is financed via the basic funding of the research institution or via third-party research funding.⁷⁹⁹

However, contributions from students, research fellows, general staff such as library staff, private lecturers, university professors emeriti and retired university professors are not included as they do not belong to academic staff. Also excluded are contributions by authors who are involved in research as part of a contract for services.⁸⁰⁰

In order to enable the privileged research institutions to realise open science practices and to make (already published) research results available to a broader (specialist) public by means of open access, the personal scope of application of the secondary exploitation right should be extended to **all members** of a research institution that is at least half publicly funded. § 94 of the Universities Act 2002 ("UG") can be used as a guide to determine the privileged group of persons.

3. Extension of the material scope of application - scientific output. The legal basis for secondary publication only covers scientific contributions that have been published in a periodical print publication. In order to realise the goals of Open Science, an extension to monographs and contributions published in non-periodic anthologies (Festschriften, Kongressschriften) is necessary. De lege feranda, all **scientific works**, including computer programmes and database works, should therefore be covered by the secondary exploitation right if they were created for scientific purposes.

Furthermore, scientific works that are first published in e-journals or as online publications should not be penalised in comparison to works that have appeared in print publications. Particularly in the scientific environment, works are often only published online, therefore the **restriction to "published" works** should be **dropped**. Instead, the focus should be on the publication of a work as any form of public disclosure.⁸⁰¹

Furthermore, secondary publication via open access should not only be possible for scientific articles and monographs, but also for **research data**. However, related rights, in particular the sui generis protection of databases, are currently not included.⁸⁰² In order to enable the

⁷⁹⁹ *Homar* in Thiele/Burgstaller UrhG⁴ § 37a Rz 10 with reference to §§ 94 para. 2, § 97 para. 1 sentence 2 and § 100 para. 1 sentence 3 UG.

⁸⁰⁰ *Homar* in Thiele/Burgstaller UrhG⁴ § 37a Rz 11.

⁸⁰¹ Cf. on the term e.g. *Thiele* in Thiele/Burgstaller UrhG⁴ § 14 Rz 34.

⁸⁰² *Homar* in Thiele/Burgstaller UrhG⁴ § 37a Rz 18f.

open access secondary publication of data (databases) on the Internet, related rights should be included in the scope of application of § 37a UrhG.

4. Modalities of secondary use. Secondary exploitation may only take place in the "accepted manuscript version" in order to protect the publisher's legitimate interests in its publishing performance. However, this provision also reduces the benefit and thus the attractiveness of the secondary exploitation right. If this is the final version of the manuscript sent to the publisher or editor - i.e. the version that goes straight to typesetting - it remains unclear how subsequent corrections by the editor, proofreader and imprimatur should be handled.⁸⁰³

According to the correct view, however, the author not only has the right to secondary use of a final draft version, but can also use **a version with the same content as the final version in their own formatting**.⁸⁰⁴ A corresponding clarification by the legislator, for example in the legislative materials to an amendment of the secondary publication right, would be desirable.

Furthermore, in the case of secondary exploitation, the expiry of the twelve-month embargo period must be awaited. This **embargo period** is due to the (justified) interest of the publisher or editor in ensuring that amortisation of the publishing investment remains possible.⁸⁰⁵ However, the secondary exploitation right becomes less attractive the more time passes because the article has lost its topicality before secondary exploitation is possible. This can play a role in the STEM subjects in particular.⁸⁰⁶

For this reason, the duration of the embargo period was considered too long both in the review process and (since then) in the literature.⁸⁰⁷ A reduction to six months seems justifiable because it still guarantees a certain degree of protection for publishers. A complete abolition of the embargo period, on the other hand, would (probably) lead to a violation of the three-step test under copyright law (see Chapter 2, Part 1, point 2.5 above).⁸⁰⁸

It should also be noted that a distinction between scientific disciplines, for example STEM subjects on the one hand and humanities and social sciences on the other, is possible, but appears to require justification.⁸⁰⁹ On the other hand, it is not advisable to define the embargo period as a "reasonable time" because such a formulation would lead to uncertainty in the scientific community. In this case, (extensive) clarifications would be required in the legislative

⁸⁰³ Appl in Kucsko/Handig, urheber.recht² § 37a UrhG (as of 1 April 2017, rdb.at) margin no. 38f.

⁸⁰⁴ Appl in Kucsko/Handig, urheber.recht² § 37a UrhG (as of 1 April 2017, rdb.at) para. 39.

⁸⁰⁵ Appl in Kucsko/Handig, urheber.recht² Section 37a UrhG (as of 1 April 2017, rdb.at) para. 41.

⁸⁰⁶ Appl in Kucsko/Handig, urheber.recht² Section 37a UrhG (as of 1 April 2017, rdb.at) para. 43.

⁸⁰⁷ Wiebe, UrhG-Nov 2015 - a critical review, MR 2015, 239 (245).

⁸⁰⁸ Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 5, 43f, 46f, 55:

"While there is the possibility of declaring the SPR a moral right or a provision of copyright contract law, the potential qualification of the SPR as an exception or limitation to copyright and therefore the need to comply with the three-step test should be taken seriously."

⁸⁰⁹ Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 35, 44.

materials.⁸¹⁰ A generalized regulation would also appear justified insofar as the law cannot cover all special circumstances.⁸¹¹

1.1.2. Rights retention strategy ("Secondary Publication Right by contract")

1. Open science strategies at institutional level. In the Austrian Declaration on Open Science, funding bodies and research institutions are called upon to develop Open Science guidelines (see Chapter 2, Part 1, Point 3.1).

In order to comply with the EU Commission's recommendation of 25 April 2018 on access to and preservation of scientific information and to ensure that open science strategies are actually developed at institutional level, a legal obligation to introduce them could be provided for. This should be aimed at funding bodies that manage public funds and research institutions that are at least half publicly funded.⁸¹²

This obligation could be enshrined in the Research Organisation Act ("FOG") or the Research Funding Act ("FoFinaG"). Alternatively, the legal bases of the individual institutions could also be considered, such as the Research and Technology Funding Act ("FTFG"), the Research Promotion Companies Act ("FFGG"), the Universities Act 2002 ("UG") or the Universities of Applied Sciences Act ("FHG").⁸¹³ Implementation as a contractual obligation in the performance agreements with the universities in the development and financing plans is possible.

The content of an institutional strategy can also be defined. Part of this can also be a **rights retention strategy**. However, it should be left to the individual institutions themselves to decide whether or not to introduce open access mandates (see chapter 2, part 1, point 3.2).

2. Rights retention strategies of research institutions - legal certainty. The responsibility for implementing rights retention strategies lies primarily with the authors themselves. The aim of rights retention strategies is not to assert the "privileges" of research institutions. Rather, it is about enabling and supporting researchers to apply open science practices.

To ensure that the research institutions can fulfil their role with legal certainty, the power or authorisation to issue a rights management strategy in the form of guidelines from the rectorate or provisions in the statutes should be enshrined in the law.

This **legal basis** could be included in § 106 UG. A comparable provision for universities of applied sciences, private colleges and universities, teacher training colleges and other non-university research institutions such as the Austrian Academy of Sciences, the Institute of Science and Technology - Austria and the Ludwig Boltzmann Institutes should be included

⁸¹⁰ Cf. Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 35, 44.

⁸¹¹ Wiebe, UrhG-Nov 2015 - a critical review, MR 2015, 239 (245).

⁸¹² Open Science Policy Austria (2022), 10.

⁸¹³ For the legal basis, see <https://www.bmbwf.gv.at/Themen/Forschung/Forschung-in-%C3%96sterreich/rechtliche-Rahmenbedingungen-und-Governance.html> and <https://www.bmbwf.gv.at/Themen/HS-Uni/Hochschulsystem/Gesetzliche-Grundlagen.html>.

in the relevant higher education laws and laws by which the non-university research institutions were founded.⁸¹⁴ It would also be possible to include a provision in the UrhG for all research institutions that are at least half publicly funded.

Every rights retention strategy is in tension with the researchers' freedom to publish and must therefore be designed proportionately. In addition, the principles of copyright law must be observed so that the strategy can be implemented in practice.

3. Rights retention strategies - use of open licences? In its Plan S, the cOAlition S calls for researchers who receive public or public-interest research funding to publish their works under a CC BY licence in publicly accessible repositories or in generally accessible journals without a retention period (see Chapter 2, Part 1, Point 3.2).

Open licences such as CC BY licences grant comprehensive rights of use to the respective protected object. These rights can only be granted by the author or a holder of exclusive rights to use the work ("rights of use").⁸¹⁵ In addition, open licences are usually irrevocable. As a result, **control over the licensed work** is largely relinquished.

Funding bodies and research institutions should therefore under no circumstances be legally obliged to include **specific licence obligations** in their rights retention strategies. Each institution should be able to decide autonomously whether the use of open licences in the publication of scientific publications becomes part of its rights retention strategy.

In my opinion, it is crucial that scientific publications are accessible to third parties freely and free of charge in electronic form.⁸¹⁶

4. Rights retention strategies of research institutions - organisation. The fundamental right of academic freedom is considered by the Constitutional Court to be a "special case of the right to freedom of expression" and includes the freedom to proclaim, share and publish scientific theorems and research findings.⁸¹⁷

The central importance of academic freedom today lies in the interface between free science and legally regulated university organisation.⁸¹⁸ Individual **freedom of research and publication** at the university is generally specified by the subject to be represented, but can hardly be restricted by service regulations.⁸¹⁹

⁸¹⁴ For the legal basis, see <https://www.bmbwf.gv.at/Themen/Forschung/Forschung-in-%C3%96sterreich/rechtliche-Rahmenbedingungen-und-Governance.html> and <https://www.bmbwf.gv.at/Themen/HS-Uni/Hochschulsystem/Gesetzliche-Grundlagen.html>.

⁸¹⁵ *Kreutzer/Lahmann*, Legal Issues in Open Science (2nd edition, 2021), 66.

⁸¹⁶ Cf. on Horizon 2020 <https://www.horizont2020.de/einstieg-open-access.htm>.

⁸¹⁷ EU Council Conclusions on "Towards high-quality, transparent, open, trustworthy and fair scientific publishing", 9616/23 (23 May 2023), 5; *Muzak*, B-VG⁶ Art 17 StGG (as of 1 October 2020, rdb.at), para. 2.

⁸¹⁸ *Muzak*, B-VG⁶ Art 17 StGG (as of 1 October 2020, rdb.at) Rz 1.

⁸¹⁹ *Hammer* in Korinek/Holoubek/Bezemek/Fuchs/Martin/Zellenberg (eds.), *Österreichisches Bundesverfassungsrecht* (12th ed. 2016) on Article 17 para. 1 StGG margin no. 37.

When designing a rights retention strategy, it must be taken into account that any restriction of academic freedom, including the freedom to publish, must be necessary and proportionate to protect another legal interest.⁸²⁰

The statutory publication right ensures the independence of university members in the first publication of their own scientific or artistic work. In principle, however, an original allocation or transfer of the **secondary exploitation right** to the research institution is possible (see chapter 2, part 1, point 3.5).⁸²¹

The allocation of the statutory secondary exploitation right to the research institution is to be assessed in a similar way to the obligation to exercise it from the point of view of academic freedom, because in both cases the author's disposition power is restricted.

In Germany, a case on the **compatibility of a secondary publication obligation with academic freedom** ("Causa Konstanz") is currently pending before the Federal Constitutional Court. According to the Baden-Württemberg State Higher Education Act, universities must oblige members of their academic staff by statute to exercise the statutory right to non-commercial secondary publication after a period of one year following initial publication for academic articles that have been produced as part of their official duties and have appeared in a collection that is published periodically at least twice a year. The statutes must also regulate the cases in which secondary publication may be waived in exceptional cases. The statutes may also stipulate that the secondary publication must be made on an institutional repository.⁸²² In the case in question, it is not the State Higher Education Act that is being contested, but the University of Konstanz's "Statutes on the exercise of secondary academic publication rights".⁸²³ A decision is expected in 2023.⁸²⁴

In the following, an alternative design of the rights retention strategy for research institutions is proposed, which represents a (probably still) milder but equally suitable means with regard to the freedom of science and offers authors greater legal certainty.⁸²⁵

Research institutions may be granted the **right to publish scientific publications (exclusively) on the institutional repository** or publication archive of the research institution

⁸²⁰ Muzak, B-VG⁶ Art 17 StGG (as of 1 October 2020, rdb.at) Rz 5.

⁸²¹ § Section 106 para. 1 sentence 1 UG; *Appl* in Kucsko/Handig, urheber.recht2 Section 37a UrhG (as of 1 April 2017, rdb.at) margin no. 11 (FN 24).

⁸²² § Section 44 (6) of the Baden-Württemberg Higher Education Act.

⁸²³ Cf. e.g. <https://www.forschung-und-lehre.de/politik/streit-ueber-das-recht-zur-zweitveroeffentlichung-geht-nach-karlsruhe-97>; <https://www.uni-konstanz.de/universitaet/aktuelles-und-medien/aktuelle-meldungen/aktuelles/open-access-satzung-auf-juristischem-pruefstand>; <https://www.faz.net/aktuell/feuilleton/forschung-und-lehre/baden-wuerttemberg-entrechtet-seine-wissenschaftlichen-autoren-13988149.html> or <https://irights.info/artikel/zweitveroeffentlichungsrecht-bundesverfassungsgericht-konstanz/31878>.

⁸²⁴ See no. 32 to 2 BvL 3/18, https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresvorausschau/2023/vorausschau_2023_node.html;jsessionid=FBBB4F2082533B3DC8B27D1ACF566B30.internet951.

⁸²⁵ See another proposal in Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 6: "More finely tuned solutions might help strike the right balance. For example, taking inspiration from RRS and OA mandates, legislators may consider granting employer-universities ownership subject to an obligation to provide an exclusive licence to employee-authors to decide when and where to publish, on condition that such publication occurs under OA terms."

or on comparable third-party repositories **within the scope of the authors' statutory secondary exploitation rights**.

In my opinion, this would be a legal assignment of the partial authorisation to exercise, which is derived from the legal secondary exploitation right of researchers, but does not restrict their rights. The author could post the publication in parallel in another repository or upload it to an open access platform because multiple secondary utilisation is permitted (see Chapter 2, Part 1, point 2.3).

The exercise of the secondary exploitation right would be attributed to the research institution in the case of secondary publication on the institutional repository, so that the research institution would also be responsible for any infringement of third-party rights such as publishers or editors. This would also make it possible for the research institution to conduct model lawsuits without risk for the author.

The authorisation for secondary publication should be **linked to the statutory secondary exploitation right as amended** (e.g. by reference to § 37a UrhG in the legal text). Secondary publication by the research institution would therefore only be possible under the same conditions (e.g. accepted manuscript, embargo period, privileged scientific publications). Accordingly, research institutions that are at least half publicly funded would currently be entitled to secondary publication.

The research institutions should also be authorised to provide for the **accompanying regulations** for the exercise of the secondary publication right **in the statutes**. In particular, a notification obligation for researchers should be provided for. They would have to submit the manuscripts and metadata to a corresponding service centre of the research institution (e.g. Open Access Office). Processing could take place via an online platform using electronic forms and input masks (e.g. as an extension of the u:cris portal). The statutes should also regulate the cases in which secondary publication can be waived in exceptional cases, including the relevant procedure.

The legal basis could be inserted into the UG and other relevant higher education laws as well as laws establishing other non-university research institutions (see above). An amendment to the UrhG would also be possible.

5. Rights retention strategies - FAQs. Funding organisations and research institutions should clearly articulate their rights retention strategies. In addition, clear communication is required to ensure that researchers know and understand their obligations, such as open access mandates. In particular, this should prevent researchers from entering into contradictory obligations (e.g. towards funding organisations and publishers).⁸²⁶ One effective tool is the creation of FAQs to explain rights retention strategies.

⁸²⁶ Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 28, 54.

6. Linking institutional repositories and publication archives. In order to ensure open access and, above all, to improve the findability of open access publications, institutional repositories and publication archives on which the secondary publication of scientific publications by the research institutions is to take place (e.g. u:scholar and PHAIDRA repository of the University of Vienna, ePubWU repository of the Vienna University of Economics and Business or ePUB repository of the JKU) should be linked with each other.⁸²⁷

7. Negotiating and enforcing open access agreements with publishers. In order to increase the transparency of open access agreements, the disclosure of contracts and costs for scientific communication services should be implemented in negotiations (see Chapter 2, Part 1, Point 3.7). The disclosure of data, in particular standardised metadata, should also be demanded. It should be noted that the information situation can be improved both through standardisation of the parameters to be collected and joint data maintenance as well as through transparent interfaces and automated data exchange.⁸²⁸

To achieve these goals, additional expertise should be developed within and between the consortia through human resources that enable the examination of very specific legal issues (e.g. clauses on data use and data protection in tracking) and enforcement in the event of misleading or other unfair business practices by publishers or abuse of their dominant market position. Further suggestions for improving contract negotiations are included in the baseline report (e.g. use of toolkits for negotiating transformative agreements).⁸²⁹

1.1.3. Open Educational Resources (OER) and open licences

1. Licences with the “copyleft” principle. Many OER are only available under copyleft licences, in particular Creative Commons Attribution-Share Alike (CC BY-SA) licences. This means that users of the licensed works may only publish their adaptations and further developments under the same or comparable licence conditions (“copyleft” principle; see chapter 2, part 1, point 4.2 and point 4.3).

However, these requirements result in restrictions for the further use of the licensed works, because the compatibility of the licences must be taken into account, especially when combining with other works (e.g. use of a graphic from an OER brochure in an educational video). Licensing OER under copyleft licences should therefore not be the default option.

Furthermore, the decision whether to use a copyleft licence should always be made by the author or producer of a licensed work (e.g. an educational video). Neither research institutions nor funding bodies should prescribe the use of copyleft licences in their rights retention strategies.

⁸²⁷ See already Open Science Policy Austria (2022), 11.

⁸²⁸ Mayer K., Open Access in Transition: Infrastructures, Monitoring and Governance as Key Elements of a Successful Transformation. Baseline Report for the Austrian Federal Ministry of Education, Science and Research (2022), 82f.

⁸²⁹ Mayer K., Open Access in Transition: Infrastructures, Monitoring and Governance as Key Elements of a Successful Transformation. Baseline Report for the Austrian Federal Ministry of Education, Science and Research (2022), 82f.

2. Tutorials to click through. There are already numerous FAQs, Q&As and Wikis on licensing with Creative Commons licences in particular. Nevertheless, knowledge about the use of open licences is not yet widespread in the (general) scientific community, which in practice leads to considerable uncertainty when it comes to licensing.

This knowledge gap can be closed by innovative OER formats. The creation of interactive OER in the form of click-through tutorials with use cases and licensing examples seems particularly promising to me. The tutorial should deal in particular with the topics from the "Checklist for licensors before publication" (see chapter 2, part 1, point 4.2).

These OER can be part of the basic qualification for newcomers at the research institutions⁸³⁰ and the basic training for tutors and study assistants.⁸³¹

1.1.4. Text and data mining for the purpose of scientific research

1. Lawful access. The prerequisite for any text and data mining is lawful access to the reproduced work.⁸³² According to the DSM Directive, lawful access is access to content on the basis of an open access strategy or through contractual agreements between rights holders and research organisations or cultural heritage institutions, e.g. through subscriptions, or by other lawful means. In addition, access to content that is freely available on the internet is considered lawful access (see Chapter 2, Part 1, point 5.2).⁸³³

If research institutions or cultural heritage institutions have lawful access on the basis of a contractual agreement with the rights holders, this also applies in favour of the persons belonging to the institutions.⁸³⁴ However, this **institutional authorisation** should also apply to researchers from other institutions in the case of joint research projects (e.g. in international consortia). § 42h UrhG should therefore clarify that it is sufficient if one of the institutions involved in the research project has lawful access.⁸³⁵

Furthermore, it should be clarified that all works published on the internet by the rights holders or with their consent are deemed to be **"freely available" on the internet** and may be used within the framework of TDM. The standard for when an average researcher can assume that the works have been published with the consent of the rights holder can be specified using examples (e.g. content can be accessed via the author's personal profile on social networks such as LinkedIn or ResearchGate). However, there is no lawful access if it is obvious from the circumstances that the content would be published without the consent of the rights holder (see Chapter 2, Part 1, point 5.2).

2. Copy protection measures. In principle, rights holders can use effective technical measures (e.g. use of passwords, unlock codes, serial numbers, encryption) to prevent copyright

⁸³⁰ Cf. <https://ctl.univie.ac.at/angebote-fuer-lehrende/hochschuldidaktische-qualifizierung/basisqualifizierung/>.

⁸³¹ Cf. <https://ctl.univie.ac.at/angebote-fuer-studierende/qualifizierung-fuer-studentische-multiplikatorinnen/basisausbildung-fuer-tutorinnen-und-studienassistentinnen/>.

⁸³² *Homar* in Thiele/Burgstaller UrhG⁴ § 42h Rz 50.

⁸³³ EC 14 DSM Directive; ErlRV 1178 BlgNR 27. GP 27.

⁸³⁴ EC 14 DSM Directive; ErlRV 1178 BlgNR 27. GP 27.

⁸³⁵ *Senftleben*, Study on EU copyright and related rights and access to and reuse of data (2022), 6, 43ff, 67.

infringements.⁸³⁶ However, it must be ensured that the exercise of the free use of works is also guaranteed when works are secured by technical protection measures.⁸³⁷

The authorised parties therefore have a claim enforceable in civil court to the removal of copy protection measures that prevent TDM. However, unauthorised circumvention is not permitted.⁸³⁸

In order to avoid the prohibitive costs and duration of legal disputes in the research sector, researchers can be granted the right to circumvent technical protection measures if the rights holders do not ensure that the free use of the work remains effective for scientific or artistic research.⁸³⁹

3. Best practices. Both in determining appropriate security measures for storage and retention and in determining the permissible measures for the security and integrity of networks and databases, reference is made to so-called "best practices" (see Chapter 2, Part 1, point 5.2).

In both cases, the measures are considered appropriate if they have been recognised as best practice by representative associations of rights holders on the one hand and research institutions or cultural heritage institutions on the other.⁸⁴⁰ Representative associations include, in particular, associations or interest groups of authors and neighbouring rights holders, research institutions, researchers, libraries or collection institutions.⁸⁴¹

In order to increase legal certainty for researchers, such best practices should be developed. On the part of the research institutions, the Austrian University Conference ("uniko") or the Austrian Electronic Media Co-operation ("KEMÖ") in particular could negotiate with the collecting societies or the Chamber of Commerce. The dialogue should be supported by the BMBWF.

⁸³⁶ *Feiel* in Thiele/Burgstaller UrhG⁴ § 90c Rz 24.

⁸³⁷ § Section 90c (6) UrhG; *Feiel* in Thiele/Burgstaller UrhG⁴ Section 90c para. 36.

⁸³⁸ *Homar* in Thiele/Burgstaller UrhG⁴ § 42h Rz 100.

⁸³⁹ *Senftleben*, Study on EU copyright and related rights and access to and reuse of data (2022), 6, 25f, 41ff, 67.

⁸⁴⁰ § Section 42h (2) and (5) UrhG.

⁸⁴¹ *Homar* in Thiele/Burgstaller UrhG⁴ § 42h Rz 48, 62.

1.2. Access to data for research purposes (Chapter 2, Part 2)

Recommendations on rights to research data	
Legislative measures	
<ul style="list-style-type: none"> • Explicit legal basis for the transfer of rights to research data 	<ul style="list-style-type: none"> • No introduction of data ownership
Non-legislative measures	
<ul style="list-style-type: none"> • Information and counselling services on rights to research data 	

Recommendations for data management strategies	
Legislative measures	
<ul style="list-style-type: none"> • Mandatory introduction of data management strategies at institutional level 	<ul style="list-style-type: none"> • Legal basis for data management strategies of research institutions
Non-legislative measures	
<ul style="list-style-type: none"> • The principle of "as open as possible, as closed as necessary" must be observed 	<ul style="list-style-type: none"> • Infrastructure, research support services and funding
<ul style="list-style-type: none"> • FAQs to explain data management strategies 	<ul style="list-style-type: none"> • Guidelines for the creation of internal guidelines for research groups

Recommendations on access to information for research purposes	
Legislative measures	
<ul style="list-style-type: none"> • Clarification of when research data is considered publicly accessible via an archive 	<ul style="list-style-type: none"> • Expansion of the scope of application with regard to further research data
<ul style="list-style-type: none"> • Open data officer for research institutions 	<ul style="list-style-type: none"> • Establishment of sectoral information centres in accordance with the DGA
<ul style="list-style-type: none"> • Bundling of supervisory competences according to DGA and DA 	<ul style="list-style-type: none"> • Clarification that not only studies, expert opinions and surveys, but also the data collected must be published
<ul style="list-style-type: none"> • Introduction of a Freedom of Information Act 	<ul style="list-style-type: none"> • Freedom of Information Officer

Non-legislative measures	
<ul style="list-style-type: none"> Guidelines for differentiating between the various roles of universities (teaching, research, libraries) 	<ul style="list-style-type: none"> Extensive implementation of open government data approaches
<ul style="list-style-type: none"> Expansion of cross-institutional research infrastructure 	

Recommendations on research data protection	
Legislative measures	
<ul style="list-style-type: none"> Issuing further register research regulations in accordance with FOG 	<ul style="list-style-type: none"> Enabling access to register data from the healthcare sector for research purposes
<ul style="list-style-type: none"> Introduce regulation modelled on register research in the area of the judiciary 	<ul style="list-style-type: none"> Enable research with data from the registers kept by states and municipalities
<ul style="list-style-type: none"> Access to register data for research areas other than life and social sciences 	<ul style="list-style-type: none"> The term "scientific institution" in the BStatG and the FOG should be standardised
Non-legislative measures	
<ul style="list-style-type: none"> Promotion of register research by young researchers 	<ul style="list-style-type: none"> Creation of an independent national medical data centre

1.2.1. Rights to research data ("allocation")

1. Transfer of rights to research data - legal certainty. The rights to the data generated by the researchers generally lie with the research institution. These rights are often only transferred to the research institution by service contract (or at best by implication) (see Chapter 2, Part 2, Point 2.3).⁸⁴²

A **legal clarification** that the transfer of rights to research data can be effectively agreed in service contracts would eliminate the uncertainties in practice. The legal basis could be included in § 106 UG. A comparable provision for universities of applied sciences, private universities and private universities, teacher training colleges and other non-university research institutions such as the Austrian Academy of Sciences, the Institute of Science and Technology - Austria and the Ludwig Boltzmann Institute should be included in the relevant

⁸⁴² Lipton, Open Scientific Data - Why Choosing and Reusing the Right Data Matters (2020), Chapter 7: Legal Issues Arising in Open Scientific Data, 11.

higher education laws as well as laws by which the non-university research institutions were founded.⁸⁴³ An amendment to the UrhG would also be possible.

2. Data ownership should not be introduced. Raw data that is not protected by copyright or related rights is not currently subject to data ownership (see Chapter 2, Part 2, Point 2.2).⁸⁴⁴

Against the background of the ABGB, the discussion about the "ownership" of data cannot be about full rights to tangible objects and their reproduction in the digital world, but primarily about the allocation of rights, in particular rights of access to and control over information.⁸⁴⁵

However, such information access issues are not to be dealt with in the ABGB, but in intellectual property law, data protection law and freedom of information law. Therefore, the creation of a (national) data law in general civil law is currently not appropriate.⁸⁴⁶

3. Information and counselling services. Clarifying rights to research data is complex. On the one hand, research data may contain objects that are protected by copyright or related rights. On the other hand, it is not always clear who the owner(s) of these intellectual property rights to data is/are (see Chapter 2, Part 2, Point 2.3).⁸⁴⁷

Examining the protectability of research data requires (in-depth) knowledge of intellectual property law, so that such an assessment by the researchers themselves is probably only possible if the research institution provides appropriate information and advice. Shifting the assessment to supporting units such as the legal department, the Open Access Office or the Centre for Research Data Management would hardly be possible, not only for capacity reasons. This is because the researchers have the relevant background knowledge about the specific research data and have the best overview of the people involved, their contributions and any agreements.⁸⁴⁸

1.2.2. Data management strategy

1. Data management strategies at institutional level. In the Austrian Declaration on Open Science, funding bodies and research institutions are called upon to develop Open Science

⁸⁴³ For the legal basis, see <https://www.bmbwf.gv.at/Themen/Forschung/Forschung-in-%C3%96sterreich/rechtliche-Rahmenbedingungen-und-Governance.html> and <https://www.bmbwf.gv.at/Themen/HS-Uni/Hochschulsystem/Gesetzliche-Grundlagen.html>.

⁸⁴⁴ *Forgó* in *Forgó/Zöchling-Jud*, Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter, 20th ÖJT Vol. II/1, 362, with reference to Communication of the EU Commission, Building a European Data Economy, COM(2017) 9 final, 11f; *Lipton*, Open Scientific Data - Why Choosing and Reusing the Right Data Matters (2020), Chapter 7: Legal Issues Arising in Open Scientific Data, 15.

⁸⁴⁵ *Forgó* in *Forgó/Zöchling-Jud*, Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter, 20th ÖJT Vol. II/1, 387f.

⁸⁴⁶ *Forgó* in *Forgó/Zöchling-Jud*, Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter, 20th ÖJT Vol. II/1, 388ff.

⁸⁴⁷ *Lipton*, Open Scientific Data - Why Choosing and Reusing the Right Data Matters (2020), Chapter 7: Legal Issues Arising in Open Scientific Data, 10.

⁸⁴⁸ *Baumann/Krahn/Lauber-Rönsberg*, Research Data Management and Law (2021), 61.

guidelines (see Chapter 2, Part 1, Point 3.1). These should also extend to research data financed with public funds.⁸⁴⁹

To make data management planning a standard scientific practice at an early stage of the research process in which data are collected or generated, data management strategies should be developed at institutional level.

Data management strategies should therefore be developed at the institutional level to make data management planning standard scientific practice at an early stage of the research process in which data is collected or generated.

The obligation to develop institutional strategies could be anchored in the Research Organisation Act ("FOG") or the Research Funding Act ("FoFinaG"). Alternatively, the legal bases of the individual institutions could also be considered, such as the Research and Technology Promotion Act ("FTFG"), the Research Promotion Companies Act ("FFGG"), the Universities Act 2002 ("UG") or the Universities of Applied Sciences Act ("FHG").⁸⁵⁰ Implementation as a contractual obligation in the performance agreements with the universities in the development and financing plans is possible.

2. Data management strategies of research institutions - legal certainty. In my opinion, the strategies for research data management can be defined within the framework of the general statute autonomy by regulations of the rectorate or by provisions in the statutes (see chapter 2, part 2, point 3.4).

In order to increase legal certainty for research institutions, the legislator should enshrine the power or authorisation to issue a data management strategy in law. The legal basis could be included in the UG and other relevant higher education laws as well as laws establishing other non-university research institutions (see above).

3. Data management strategies - design. By defining institutional strategies for the management of research data, free and open access to research data in electronic form should be guaranteed (see Chapter 2, Part 2, Point 3.1).⁸⁵¹

However, the principle of "*as open as possible, as closed as necessary*" must always be observed. Even with an open access mandate for research data, it must therefore be possible for researchers to refrain from publishing under an open licence (e.g. CC BY) and to restrict or completely exclude access to archived data if there are legal, ethical or other documented reasons for not doing so (see Chapter 2, Part 2, Point 3.4).

⁸⁴⁹ Art 10 (1) and EC 28 Open Data and PSI Directive.

⁸⁵⁰ For the legal basis, see <https://www.bmbwf.gv.at/Themen/Forschung/Forschung-in-%C3%96sterreich/rechtliche-Rahmenbedingungen-und-Governance.html> and <https://www.bmbwf.gv.at/Themen/HS-Uni/Hochschulsystem/Gesetzliche-Grundlagen.html>.

⁸⁵¹ Recommendation (EU) 2018/790 of the EU Commission on access to and preservation of scientific information, point 4 para. 1.

4. Infrastructure, research-supporting services and funding. The research institutions must create the conditions for researchers to fulfil the institutional data management strategy (see Chapter 2, Part 2, Point 3.4).

They should provide researchers with technical infrastructures for the collection, storage and long-term archiving of research data and associated records (e.g. institutional repository) as well as various services for the implementation of research data management (e.g. data stewardship and RDM consulting) within the limits of their financial resources.

Part of the institutional strategies must also include the provision of the necessary financial resources for data management.⁸⁵² These should be subsidised as project costs or covered by an open data or open access publication fund of the research institution.

5. FAQ on strategies at institutional level. Data management policies should be clearly formulated and communicated to ensure that researchers know and understand their obligations. One effective means is to create FAQs with guidance on how to proceed with research data management. In addition, researchers should be supported in acquiring solid skills for planning data management and building digital infrastructures for accessing and preserving research data.⁸⁵³

6. Guidelines for the creation of internal agreements for research groups. In order to avoid uncertainties, it also makes sense for (larger) research and working groups to draw up internal guidelines or agreements on the handling of research data (see Chapter 2, Part 2, Point 3.5).

Research institutions should favour the creation of guidelines in the institutional data management strategy and provide researchers with guidelines for the creation of such agreements. In addition, examples and templates can be developed.

In particular, the guidelines can regulate the subsequent use of existing data, the documentation, the storage of files, protection against data loss and misuse, the selection of data worthy of retention as well as the long-term archiving and publication of research data.⁸⁵⁴ For further structuring options, see the standard templates for a consortium agreement in Horizon Europe (e.g. DESCAs Model Consortium Agreement).⁸⁵⁵

1.2.3. Access to information for research purposes

1. Research data - clarification of the scope of application. The IWG 2022 regulates the further use of research data that has already been made publicly accessible by researchers,

⁸⁵² Recommendation (EU) 2018/790 of the EU Commission on access to and preservation of scientific information, point 4 para. 3.

⁸⁵³ Recommendation (EU) 2018/790 of the EU Commission on access to and preservation of scientific information, point 4 para 4.

⁸⁵⁴ *Service Team Research Data of Leibniz Universität Hannover, Handreichung - Interne Richtlinien zum Umgang mit Forschungsdaten erstellen, Empfehlungen zu Abläufen, Aufbau und Inhalten (V3.2, 23.11.2022), 3ff.*

⁸⁵⁵ <https://www.ffg.at/europa/heu/recht-finanzen/konsortialvertrag>.

research institutions or research funding organisations via an institutional or thematic archive.⁸⁵⁶

The Open Data and PSI Directive contains no restriction, for example, to certified data repositories or European research infrastructures, so it can be assumed that the obligations arise regardless of whether research data is archived in institutional, discipline-specific or cross-disciplinary repositories (see Chapter 2, Part 2, point 3.2).

The decisive factor is that the research data *has been "made publicly accessible"* via an archive. However, the question as to what constitutes making available to the public is not regulated.⁸⁵⁷

For systematic reasons, it is advisable to interpret this term in the same way as in (European) copyright law. Accordingly, making available to the public means the communication of works to the public in such a way that they are accessible to members of the public from places and at times of their choice.⁸⁵⁸

According to the ECJ, an act of making available exists if a user grants the public access to the relevant content in full knowledge of the consequences of their behaviour.⁸⁵⁹

According to case law, the public comprises an indeterminate number of potential addressees and must also consist of a sufficiently large number of persons.⁸⁶⁰ Access must be made available in a suitable manner "*to persons in general*". Access must therefore "*not be restricted to specific persons*" who belong to a private group.⁸⁶¹

To ensure legal certainty, the national legislator should clarify in the IWG 2022 when research data is considered to be publicly accessible via an archive.⁸⁶²

2. Research data - extension of the scope of application. According to the Open Data and PSI Directive, Member States may also extend the scope of application to research data that has been made publicly available through data infrastructures other than archives or repositories. In this case, the requirements for re-use would also apply to research data made publicly available through freely accessible publications, as an attached file to an article, to a data paper or to a paper in a data journal.⁸⁶³

⁸⁵⁶ § Section 2 (1) no. 3 IWG 2022.

⁸⁵⁷ *van Eechoud*, Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022), 21.

⁸⁵⁸ Art 3 para 1 InfoSoc Directive.

⁸⁵⁹ *Thiele/Petz* in *Thiele/Burgstaller* § 18a Rz 12 with reference to ECJ C-610/15 [*Stichting Brein/Ziggo*] Rz 24ff mwN.

⁸⁶⁰ *Thiele/Petz* in *Thiele/Burgstaller* § 18a para. 12 with reference to ECJ C-161/17 [*Renckhoff*] para. 22; ECJ C-466/12 [*Svensson*] para. 21.

⁸⁶¹ *Thiele/Petz* in *Thiele/Burgstaller* § 18a Rz 12 with reference to ECJ C-117/15 [*Reha Training*] Rz 42; ECJ C-135/10 [*SCF*] Rz 85.

⁸⁶² *van Eechoud*, Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022), 43.

⁸⁶³ EC 28 Open Data and PSI Directive.

Extending the scope of application by utilising the scope for implementation is to be welcomed in the spirit of the objectives of Open Science. Clarification of the term "making available to the public" is also necessary in this case (see above).

In my opinion, this extension is justified because the principle of "*as open as possible, as closed as necessary*" is taken into account through far-reaching exemptions from the disclosure obligation.⁸⁶⁴ In particular, sensitive data that is not accessible, especially for reasons of national security, national defence, public safety, statistical confidentiality or because it contains business secrets (such as trade secrets, professional confidentiality, company secrets) or is otherwise subject to confidentiality, is also exempt from further use.⁸⁶⁵

3. University libraries - differentiation between the various roles of universities. In principle, the IWG 2022 does not apply to documents held by cultural institutions (such as orchestras, operas, ballets and theatres).⁸⁶⁶ However, libraries, including university libraries, museums and archives fall within the scope of the Act because these institutions hold extensive, valuable information assets.⁸⁶⁷

However, unlike other public sector bodies, these organisations only have to comply with the obligations for data controllers in relation to documents in their possession to which they hold intellectual property rights if they allow the re-use of these documents.⁸⁶⁸ Authorisation may be given voluntarily, or the obligation to allow re-use may arise from other laws.⁸⁶⁹

This special regulation also applies to university libraries. A higher education institution is defined as a public body that offers post-secondary education programmes leading to an academic degree.⁸⁷⁰ If a higher education institution is also active in the field of research, it is to be regarded as a **hybrid organisation**. The special regulation for libraries therefore does not apply in their function as research institutions and with regard to their research data (see chapter 2, part 2, point 3.2).⁸⁷¹ In addition, documents held by universities as educational institutions are excluded from the scope of the Open Data and PSI Directive unless they are research data.⁸⁷²

However, the distinction between the different roles of universities (teaching, research, libraries) causes difficulties (e.g. B. if a library operates a repository for research data).⁸⁷³ Until a final clarification at European level, the universities and other higher education institutions, e.g. within the framework of uniko and in coordination with the BMBWF, could draw up a

⁸⁶⁴ Horn, Recast of the Directive on the re-use of public sector information (PSI II Directive), jusIT 2020/1, 2.

⁸⁶⁵ § Section 3 (1) no. 5 IWG 2022.

⁸⁶⁶ § Section 3 (1) no. 9 IWG 2022.

⁸⁶⁷ ErlautRV 1571 BlgNR 27. GP 8.

⁸⁶⁸ § Section 5 (2) IWG 2022.

⁸⁶⁹ ErlautRV 1571 BlgNR 27. GP 15.

⁸⁷⁰ § Section 4 (4) IWG 2022.

⁸⁷¹ EC 28 Open Data and PSI Directive.

⁸⁷² § Section 3 (1) no. 10 IWG 2022.

⁸⁷³ van Eechoud, Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022), 22f, 43.

joint position on the application of the IWG 2022 in the higher education sector and make it available to the individual institutions in the form of guidelines.

4. Open data officers for research institutions. Public bodies and public companies must "appoint at least one open data officer who has sufficient resources to fulfil his or her tasks appropriately".⁸⁷⁴ Additional officers can also be appointed for specific areas of responsibility.⁸⁷⁵

In their function as the central contact person in the public body or public enterprise concerned, this person must ensure that open data is identified, made available and reused.⁸⁷⁶

Open data officers take internal steps to implement open government and should always be located in a suitable organisational unit that is responsible for designing the data processes.⁸⁷⁷

For the implementation of Open Science, the formalisation of the role of the Open Data Officer and a clear **institutional anchoring** also at research institutions are expedient. The legal obligation to appoint an open data officer should therefore be extended to research institutions.

Institutional open data officers as "Chief Data Officers" are to be seen in their role as the "single point of contact" for open data at the research institution and must work closely with the data protection officer. Their tasks include training employees to sensitise them to the handling of open data and providing advice in connection with the provision of open data. In particular, they must work towards compliance with the requirements of the IWG 2022.⁸⁷⁸

Open data officers must be involved in the creation of the institutional data management strategy, including guidelines (see Chapter 2, Part 2, Point 3.4). They must conduct an annual review of the publication of datasets and of datasets and the sharing of datasets that are suitable for publication in order to assess the effectiveness of the strategy.⁸⁷⁹

For larger research institutions, however, it will not be sufficient to appoint an open data officer for the entire institution, so **data stewards** should be appointed as additional data officers for specific areas of responsibility.⁸⁸⁰ In the sense of a "decentralised" model for data stewardship, these can be appointed per faculty or other organisational unit. Additional data stewards can be appointed in research groups and/or projects that work with particularly high-quality or sensitive data.⁸⁸¹

⁸⁷⁴ § Section 11 (3) IWG 2022.

⁸⁷⁵ ErlautRV 1571 BlgNR 27. GP 21.

⁸⁷⁶ § Section 11 (3) IWG 2022.

⁸⁷⁷ ErlautRV 1571 BlgNR 27. GP 22.

⁸⁷⁸ ErlautRV 1571 BlgNR 27. GP 21.

⁸⁷⁹ ErlautRV 1571 BlgNR 27. GP 21.

⁸⁸⁰ ErlautRV 1571 BlgNR 27. GP 21; Position paper "Datenexzellenz: Strategien für Österreich" (2022), 26.

⁸⁸¹ *Dyché/Polisky*, 5 Models for Data Stewardship, SAS Best Practices white paper (2020); *Plotkin*, Data Stewardship An Actionable Guide to Effective Data Management and Data Governance (2nd ed., 2021).

They must support the open data officer in the fulfilment of his/her tasks and are functionally part of his/her team, even if they are organisationally located in a different organisational unit. They represent an important link between the Open Data Officer and the researchers.

Data stewards should be particularly involved in the creation of an internal data catalogue. In this catalogue, those data records or parts thereof that are suitable for publication are to be identified, in particular in compliance with data protection regulations and the legal precautions for the protection of company, business and statistical secrets as well as the protection of third party intellectual property rights and public security requirements (e.g. state security, national defence, protection of critical infrastructure).⁸⁸²

5. Open government data - comprehensive re-use of information. In the area of re-use policy, a minimum level of harmonisation in the European Union is required to ensure that public data is available for re-use in accordance with and without prejudice to the relevant access rules in the internal information market.⁸⁸³

The Open Data and PSI Directive "*encourages*" Member States to go beyond the minimum standards of the Directive and to authorise more extensive re-use of publicly funded data.⁸⁸⁴ From the perspective of the European legislator, overfulfilment is therefore not undesirable "gold plating".

In order to enable the widest possible use of the data collected by the administration through researchers, as much data as possible should be made available in accordance with the principles of open government data (see Chapter 2, Part 2, Point 4.1).

In this sense, it would also be possible to apply the regulations for public companies to private companies that provide services of general interest.⁸⁸⁵

6. Cross-institutional research infrastructure. In addition to participation in European research infrastructures, the establishment or expansion of discipline-specific or cross-disciplinary repositories for research and other data is of particular importance for improving the findability of data.⁸⁸⁶ As already emphasised in the Open Science Policy Austria, synergies can arise between open science and open data initiatives.⁸⁸⁷

7. sectoral information centres under the DGA - administration, health and research. Member States must ensure that all relevant information relating to the re-use of certain categories of protected data held by public sector bodies is available and easily accessible through a central information point (see Chapter 2, Part 2, point 4.3). As an information point,

⁸⁸² ErlautRV 1571 BlgNR 27. GP 21.

⁸⁸³ EC 18 Open Data and PSI Directive.

⁸⁸⁴ EC 19 and EC 20 Open Data and PSI Directive.

⁸⁸⁵ EC 19 Open Data and PSI Directive.

⁸⁸⁶ <https://forschungsinfrastruktur.bmbwf.gv.at/de>.

⁸⁸⁷ Open Science Policy Austria (2022), 9.

Member States may either establish a new body or organisation or designate an existing body or organisation.⁸⁸⁸

The central information centre can be linked to sectoral, regional or local information centres.⁸⁸⁹ In order to improve the data ecosystem of public bodies, it is recommended that sectoral information centres be set up which are responsible, for example, for administrative or official data, health data and research data. The Austrian Micro Data Centre ("AMDC") or Statistics Austria as its operator can be named as the sectoral information point for research data.

8. Competent authorities under the DGA and DA. In addition to a central information point and, where appropriate, other information points and one or more competent authorities to assist public bodies in granting access to the re-use of data, each Member State must provide for the competent authority responsible for data intermediary services and the competent authority responsible for the registration of data altruistic organisations (see Chapter 2, Part 2, point 4.3). For this purpose, either one or more new authorities may be established or existing authorities may be designated. The tasks can be performed by the same authority.⁸⁹⁰ This solution is strongly recommended.

Furthermore, each Member State must designate one or more competent authorities that are responsible for the application and enforcement of the DA. Here too, one or more new authorities may be established or existing authorities may be entrusted with the tasks under the DA. If several competent authorities are established or designated, a *data coordinator* must be appointed among them in order to facilitate cooperation between the competent authorities and to support the bodies subject to the standard in the application of the DA (see Chapter 2, Part 2, point 4.4). With regard to the processing of personal data, the data protection authority ("DPA") remains the competent supervisory authority for monitoring the application of the DA.⁸⁹¹

The supervisory competences under both legal acts should be bundled at national level in one authority. The experience and expertise of Statistics Austria as the National Statistical Institute (NSI) could be utilised. Furthermore, modelled after the telecommunications and media sector, a new "Authority for Data Exchange" could be established as a collegial authority and alongside a "Data" department of the Rundfunk und Telekom Regulierungs-GmbH associated with this authority.

The fact that the European Data Innovation Board will perform tasks in accordance with both the DGA and the DA also speaks in favour of uniform implementation at national level.⁸⁹²

⁸⁸⁸ Art 7 para 1 DGA.

⁸⁸⁹ Art 7 para 1 DGA.

⁸⁹⁰ Art 26 DGA.

⁸⁹¹ Art 31 kDA.

⁸⁹² Art 30 DGA; Art 34a kDA.

It should be noted that according to the EU Commission's proposal for a regulation on the European health data space of 3 May 2022 ("EHDS"), one or more access points for health data must also be designated.⁸⁹³ Upon request, these bodies must grant access to electronic health data for secondary use (e.g. research, training of AI algorithms).⁸⁹⁴ As soon as a political compromise is reached on this legal act, it should be examined in detail whether a national medical data centre should be established or whether the competent authority under the DGA and DA should be entrusted with these tasks.

9. Transparency obligation under the Constitution - clarification with regard to data. It cannot be inferred from the constitutional text that the constitutional legislator intended to provide for a publication obligation for all commissioned written work.⁸⁹⁵

According to the wording of the law, the publication obligation refers to studies, expert opinions and surveys.⁸⁹⁶ The explanatory notes clarify that "in any case" paid works provided by third parties that involve the provision of intellectual services are subject to the publication obligation.⁸⁹⁷

In my opinion, therefore, not only the results of the project should be published, but also all data collected during the study, the expert opinion or the survey.⁸⁹⁸ In my opinion, the collection of this data is part of the agreed intellectual output.

The proactive publication obligation is crucial for research access to this data, which is why legal clarification is recommended.

10 Freedom of Information Act. In the Open Data and the PSI Directive and the DGA, it is still up to the national legislator to establish an obligation to reuse public sector data in the form of a Freedom of Information Act.⁸⁹⁹

From a research perspective, the existing obligation to provide information is inadequate. On the one hand, information is only to be provided on request; on the other hand, in many cases it is not provided at all due to official secrecy (see Chapter 2, Part 2, Point 4.5).

The right of access to information plays a particularly important role for qualitative research (e.g. political science, historical research), which is why the introduction of an IFG is to be favoured.

⁸⁹³ Art 36 Proposal of the EU Commission for a Regulation on the European Health Data Space, COM(2022) 197 final.

⁸⁹⁴ *Knyrim/Urban*, DGA, DMA, DSA, DA, AI-Act, EHDS - an overview of the European data strategy (Part II), *Dako* 2023/40, 78.

⁸⁹⁵ *Fuchs/Ziniel*, Public procurement law, transparency and confidentiality - an ongoing issue with new dynamics, *ZVB* 2023/6, 18.

⁸⁹⁶ Art 20 para 5 B-VG.

⁸⁹⁷ AB 1642 BlgNR 27. GP 2; *Fuchs/Ziniel*, Vergaberecht, Transparenz und Geheimhaltung - ein Dauerthema mit neuer Dynamik, *ZVB* 2023/6, 18.

⁸⁹⁸ *Miernicki*, Die Veröffentlichungspflicht von Informationen der Verwaltungsorgane, *ÖJZ* 2022/158, 1134.

⁸⁹⁹ *Knyrim/Urban*, DGA, DMA, DSA, DA, AI-Act, EHDS - an overview of the European data strategy (Part I), *Dako* 2023/30, 57.

The involvement of the data protection authority to advise and support the bodies and institutions obliged to provide information is to be welcomed.⁹⁰⁰ In order to further facilitate the practical implementation of the IFG, this role should be expanded and assigned to a *Commissioner for Freedom of Information*, who can act as a competence centre, advice centre and possibly as a body for alternative dispute resolution between citizens and authorities in the event that information is not released.⁹⁰¹

Public access to official documents can be considered a public interest and is therefore also taken into account in the GDPR. Personal data in documents should be publicly disclosable where this is provided for in Union or Member State law. This legislation should harmonise public access to official documents and the re-use of public sector information with the right to the protection of personal data.⁹⁰²

The right of access to information should only include access to the personal data of third parties if the applicant's interest in information outweighs the third party's legitimate interest in excluding access to information or if the third party has consented.⁹⁰³

1.2.4. Research data protection

1. Enable access to further registers. The FOG forms the legal basis for register-based research. On this basis, the registries can enable scientific institutions to process non-personal and indirectly personal data contained in registers provided for by federal law. The respective register suitable for register-based research must be specified in a register-based research regulation in accordance with § 38b FOG (see Chapter 2, Part 2, Point 5.3).

These regulations are to be issued in agreement with the responsible federal minister.⁹⁰⁴ The BMBWF was the first ministry to release its own register data with the BMBWF Register Research Regulation of 28 October 2022.⁹⁰⁵

Other government departments should gradually open up the registers they keep by issuing corresponding regulations. In particular, register data required for economic and health research should be made available. Although a lot of company data is already available from Statistics Austria, there is a lack of data to adequately measure the efficiency of public funding, for example. In the health sector, only cancer registry data and some COVID data are currently available in the AMDC (see below). It should be noted that data is also released from registers that are not maintained by ministries, but by subordinate authorities, agencies and other organisations.

⁹⁰⁰ § Section 15 IFG as amended by RV 2238 BgINR.

⁹⁰¹ <https://www.informationsfreiheit.at/was-wir-wollen/kernforderungen-fuer-ein-informationsfreiheitsgesetz/>.

⁹⁰² Art 86 GDPR, EC 154 GDPR.

⁹⁰³ Rohner in Knyrim, DatKomm Art 86 GDPR (as of 1 December 2022, rdb.at) Rz 8.

⁹⁰⁴ § Section 2d para. 2 no. 3 lit b FOG in conjunction with. § Section 38b FOG.

⁹⁰⁵ Ordinance of the Federal Minister of Education, Science and Research on registers suitable for register research in the sphere of activity of the Federal Ministry of Education, Science and Research (Register Research Ordinance BMBWF - RFV BMBWF).

If the current model of releasing the registers suitable for register research by regulation does not lead to sufficient availability of register data for research, a legal obligation can be provided for to open the registers according to the principle "as open as possible, as closed as necessary" (see Chapter 2, Part 2, point 4.1).

2. Improve access to health data for research purposes. There are numerous registers in the healthcare sector that hold valuable data, the analysis of which offers considerable added value.

The recitals to the GDPR therefore state that by linking information from registries, researchers can obtain new insights of great value in relation to common diseases such as cardiovascular diseases, cancer and depression. It also emphasises that research results obtained through registries provide solid, high-quality evidence that can form the basis for the development and implementation of knowledge-based policies, improve the quality of life of many people and improve the efficiency of social services.⁹⁰⁶ For these reasons, as much data as possible from the health sector should be made available for research purposes.

The legislative materials on the FOG state that access to data within the scope of the General Social Insurance Act must be granted, as there is no provision in this Act that excludes register research.⁹⁰⁷ The provisions of the FOG on register research also apply to the area of the Farmers' Social Insurance Act, the Civil Servants' Health and Accident Insurance Act and the Commercial Social Insurance Act.⁹⁰⁸ The registers kept by the **social insurance agencies** under these laws are registers suitable for register research and can be made available by means of a register research regulation.

The FOG expressly stipulates that in the case of **ELGA health data**, scientific institutions can request access to indirectly personal data from the ELGA Ombudsman's Office.⁹⁰⁹ The provisions on register research also constitute a lex posterior to the explicit processing prohibition under the Health Telematics Act 2012 (see Chapter 2, Part 2, Point 5.4). Registry research with ELGA health data made available by ELGA is therefore permissible.⁹¹⁰

Access to register data from the healthcare sector can be granted via AMDC. However, it is recommended that a **new, independent medical data centre** be set up instead, which can serve as a technical interface. This can also be tasked with the preparation of medical data for further use (e.g. removal of personal identifiers) and the linking of data from different registers.⁹¹¹

⁹⁰⁶ EG 157 GDPR.

⁹⁰⁷ ErläutRV 68 BgLNr 26. GP, 17.

⁹⁰⁸ § 2a FOG.

⁹⁰⁹ § Section 2d (2) no. 3 FOG.

⁹¹⁰ BMASGK, Protection of sensitive data, Position of Health Sections VIII and IX of the BMASGK (2019), 26.

⁹¹¹ Initiative to create an independent national medical data centre (16.5.2021).

3. Judiciary. The registers kept in the area of the judiciary and the criminal register are excluded from the scope of register research.⁹¹²

This is justified by the fact that the special and legally protected purposes of data processing in connection with the activities of the judiciary require specific regulations on the conditions under which the processed data may be passed on to third parties. These regulations are contained in § 219 (4) of the Code of Civil Procedure, § 77 (2) of the Code of Criminal Procedure and § 13a of the Criminal Records Act.⁹¹³

According to these provisions, at the request of the management of recognised scientific institutions, the register-keeping bodies may in principle transmit personal data by providing information, inspecting files of proceedings or the criminal register and making copies for evaluation for non-personal scientific work. This is a form of access to files or registers for scientific, historical, statistical or comparable purposes.⁹¹⁴

In order to enable research with larger data sets (e.g. to evaluate the effectiveness of individual legislative measures or to identify socio-economic correlations), a regulation modelled on register research should be introduced in the area of the judiciary, which enables central access to pseudonymised data from the registers concerned for non-personal evaluation for the privileged purposes in accordance with Art 89 GDPR.

4. Registers of states and municipalities. The FOG regulates access to registers that are provided for by federal law. This includes not only publicly accessible registers, but also all directories, databases or similar applications or processing platforms.⁹¹⁵

This regulation should be extended to all registers maintained by public bodies. In particular, registers that are kept by states, municipalities, associations of municipalities and other organisations as responsible bodies on the basis of state law should also be included. The term "public body" in the FOG should be extended accordingly.⁹¹⁶

5. Extension to other research areas. According to the FOG, the processing of register data is only permitted for the purposes of life and social sciences. It must also serve a public interest.⁹¹⁷ These terms are not legally defined in the FOG, which means that it can be difficult to draw precise boundaries in individual cases. Unlike social sciences, life sciences are also not defined in the Austrian version of the "Fields of Science and Technology (FOS) Classification".⁹¹⁸

⁹¹² § Section 2d (2) no. 3 FOG; Explanatory Memorandum 68 Bglnr 26th GP, 34.

⁹¹³ ErläutRV 68 Bglnr 26. GP, 34.

⁹¹⁴ *Oshidari* in Fuchs/Ratz, WK StPO § 77 (as of 1 August 2019, rdb.at) Rz 6ff.

⁹¹⁵ § Section 2d (2) no. 3 FOG; Explanatory Memorandum 68 Bglnr 26th GP, 34.

⁹¹⁶ § Section 2b no. 8 FOG in conjunction with. § Section 4 para. 1 IWG 2022; see also Section 3 para. 1 no. 3 IWG 2022.

⁹¹⁷ § Section 2d para 2 subpara 3 lit a FOG.

⁹¹⁸ <https://vocabs.acdh.oeaw.ac.at/oefos/de/>.

According to the legal materials, this explicit restriction on use represents an appropriate guarantee for the protection of the confidentiality interests of the persons concerned.⁹¹⁹ However, it is not clear why the confidentiality interests of the data subjects in the humanities (e.g. history) and the natural and technical sciences should weigh so much more heavily than in the life and social sciences as to make register research inadmissible.

The regulation of register research should therefore be extended to all areas of research. The requirement already provided for that the processing must serve a public interest, in particular that it must fulfil an objective in accordance with Art 23 (1) GDPR, also represents an appropriate guarantee in these cases. In addition, the application for access to register data must explain why the research project can only be carried out in this way (see Chapter 2, Part 2, point 5.3).

6. Standardisation of the access requirements. The regulation of access to register data by scientific institutions in accordance with the FOG is based on the provision for access to statistical data by the scientific community.⁹²⁰

However, the term "scientific institution" is defined differently for access to statistical data and to register data in accordance with the FOG.⁹²¹ The criteria for recognising research institutions under the BStatG are based on the relevant provisions of the Implementing Regulation with regard to access to confidential data for scientific purposes, which the EU Statistics Regulation specifies.⁹²² In contrast, the FOG is based on the permissibility of the use of sector-specific personal identifiers.

In order to avoid practical problems, especially when linking statistical and register research data, these divergences should be eliminated, as the data do not show any substantial differences that would justify different treatment. It is advisable to use the term used in the BStatG in order to ensure consistency with the regulations on access to European statistical data.

In addition, it is recommended that the requirements for access to statistical data and register data in accordance with the FOG be standardised in the BStatG.

7. Supporting young scientists. For the provision of statistical data and register data in accordance with the FOG, a cost reimbursement is to be paid, which is to be determined according to the principle of cost recovery.⁹²³ These costs can be prohibitive for individual researchers. Young researchers in particular are dependent on funding. They should therefore receive targeted support in order to build up expertise and capacities for registry research.

⁹¹⁹ ErläutRV 68 Bglnr 26. GP, 35 with reference to point 7.6.c of the BKA-VD circular on the legal design of interventions in the fundamental right to data protection, BKA-810.016/0001-V/3/2007.

⁹²⁰ Explanatory memorandum 1098 BlgNR 27. GP 13.

⁹²¹ Explanatory memorandum 1098 BlgNR 27. GP 13.

⁹²² ErläutRV 1098 BlgNR 27. GP 10; Art 4 Commission Regulation (EU) No 557/2013 implementing Regulation (EC) No 223/2009 on European statistics as regards access to confidential data for scientific purposes.

⁹²³ § 31 para. 1, 3 and 14 BStatG; § 2d para. 2 no. 3 lit d FOG in conjunction with § 38b FOG. § Section 38b FOG.

1.3. Other relevant legal issues (Chapter 2, Part 3)

Other recommendations	
Legislative measures	
<ul style="list-style-type: none"> Application of the reduced tax rate of 10% to databases 	<ul style="list-style-type: none"> Designation of an existing authority with the role of Digital Services Coordinator under the DSA
<ul style="list-style-type: none"> Do not extend the scope of the NIS 2 Directive to educational institutions 	
Non-legislative measures	
<ul style="list-style-type: none"> Behavioural control through competition law 	<ul style="list-style-type: none"> Creation of data pools with usage data of commercial users according to DMA
<ul style="list-style-type: none"> Design of the funding programmes taking into account the AI Regulation 	<ul style="list-style-type: none"> Liability and accident insurance for Citizen Scientists

1. Reduced tax rate for databases. According to the tax authorities, the reduced tax rate should not apply to the provision of database access (see chapter 2, part 3, point 1).

In contrast, the literature (convincingly) argues that at least the provision of access to original full-text databases is subject to the reduced tax rate as a uniform service consisting of the main and ancillary service if the focus is on access to electronic publications and not the acquisition of additional functions. The wording of the law makes no statement about the taxation of database access and therefore does not contradict this interpretation.⁹²⁴

If one follows the view of the tax authorities, electronic publications that are made available outside of a database would be subject to the reduced tax rate. However, if the same publication is made available via database access, this would result in the application of the standard tax rate. The application of different tax rates depending on the form of purchase (purchase via a database or as an individual subscription) could influence the distribution of electronic publications by publishers and thus violate the principle of neutrality.⁹²⁵

In order to eliminate the legal uncertainty regarding the applicable VAT rate and to avoid a de facto discrimination of electronic publications, the provision of access to databases containing a large number of electronic books, newspapers or journals or parts thereof should be (expressly) subject to the reduced VAT rate in the UStG, as is the case in Germany.⁹²⁶

⁹²⁴ § Section 10 para. 2 no. 9 in conjunction with. Annex 1 Z 33 UStG; *Mittendorfer/Pollak/Streicher*, VAT rate on "research databases" (Part II), taxlex 2021/68, 316ff.

⁹²⁵ *Mittendorfer/Pollak/Streicher*, VAT rate on "search databases" (Part II), taxlex 2021/68, 317f.

⁹²⁶ § Section 12 (2) no. 14 dUStG; *Pernegger* in *Melhardt/Tumpel* (ed.), UStG (3rd ed., 2021), Section 10, XIII Electronic Publications, margin no. 505.

However, according to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ("VAT Directive"), Member States may only apply a reduced rate to electronically supplied services to the extent that they are listed in Annex III.⁹²⁷

There is only a legal basis under EU law for the tax reduction for electronic publications. The reduced tax rate may therefore not be applied to electronically supplied services if their functions clearly go beyond those of traditional (physical) media products and do not represent an additional function subordinate to access to electronic publications.⁹²⁸

It would therefore require an authorisation under EU law to be able to generally subject the services bundled in the open access agreements to the reduced tax rate. This extension of the scope of application would be in line with the objective of the reduced tax rate and is to be favoured. The reduced tax rate for books, newspapers and magazines has a cultural objective. It serves in a comprehensive sense to promote the education of EU citizens through reading, be it fiction or non-fiction, be it political, specialised or entertaining newspapers and magazines.⁹²⁹

2. Enforcement of competition law. Competition law, in particular antitrust law, currently has a certain, but rather low relevance in the area of open science. However, this will increase with the increasing concentration in the publishing industry and the development of new markets, particularly for electronic database products (see Chapter 2, Part 3, Point 2).⁹³⁰

In the EU, antitrust law is traditionally enforced under administrative law through stop orders and fines imposed by competition authorities and courts ("public enforcement"). Complaints from affected parties are also possible, leading to the initiation of official proceedings.

In addition, it is possible to enforce antitrust law before the civil courts on the basis of private actions for damages or nullity ("private enforcement").

3. Coordinator for digital services under the DSA. Until the other provisions of the DSA become applicable on 17 February 2024, the Member States must designate one or more competent authorities responsible for the supervision of providers of intermediary services and the enforcement of the DSA. One of the competent national authorities must be designated as the Digital Services Coordinator ("DSC") (see Chapter 2, Part 3, point 3.1).⁹³¹

The competent authorities are the Austrian Communications Authority ("KommAustria"), the Telekom-Control Commission ("TKK"), the Federal Competition Authority ("BWB"), the Data Protection Authority ("DSB") and the Federal Office of Metrology and Surveying (BEV), as

⁹²⁷ *Mittendorfer/Pollak/Streicher*, VAT rate on "search databases" (Part I), taxlex 2021/68, 285.

⁹²⁸ Art 98 para 2 subpara 2 in conjunction with Annex III Z 6 VAT Directive; *Mittendorfer/Pollak/Streicher*, VAT rate on "search databases" (Part II), taxlex 2021/68, 317f.

⁹²⁹ *Pernegger* in Melhardt/Tumpel (ed.), UStG (3rd ed., 2021), Section 10, XIII Electronic Publications, para. 493; ECJ 7 March 2017, RPO, C-390/15, para. 45 with reference to the Opinion of the GA Kokott, 8 September 2016, RPO, C-390/15, para. 56.

⁹³⁰ *Peifer*, Wissenschaftsmarkt und Urheberrecht: Schranken, Vertragsrecht, Wettbewerbsrecht, GRUR 2009, 22 (27f).

⁹³¹ Art 49 DSA.

part of the network of consumer authorities of the European Union.⁹³² An (excessive) fragmentation of responsibilities should be avoided wherever possible.⁹³³

It is recommended that the role of the DSC be assigned to an existing authority. As KommAustria and its associated Media Division of the Austrian Regulatory Authority for Broadcasting and Telecommunications is already responsible for the supervision of video-sharing platforms, communication platforms and large platforms pursuant to the UrhG, it could be designated as the DSC.⁹³⁴

This solution is also proposed in the ministerial draft of the Coordinator for Digital Services Act, which was published on 23 October 2023.⁹³⁵ The review period runs until 12 November 2023.⁹³⁶

4. Data pools with usage data in accordance with the DMA. Researchers are not to be regarded as commercial users within the meaning of the DMA and therefore have no independent right of access to usage data (see Chapter 2, Part 3, point 4.2). Such access would also not be attractive, as commercial users could only receive data that originates from their own activities on the platforms.

However, commercial users could nominate a research organisation as a third party that has the right to access the data that the respective commercial user has generated on a platform. In this way, research organisations could create data pools that could also be shared with other organisations for research purposes.⁹³⁷

5. Indirect effects of the AI Act. It is to be expected that the final version of the AI Act will contain far-reaching exemptions for research and development activities, so that the direct impact on scientific research will be limited (see Chapter 2, Part 3, Point 5.2).

However, the requirements for high-risk AI systems in particular will also have to be taken into account in research and development so that the developed systems can be used in practice. Particularly in the area of applied research, research funders can integrate these requirements into relevant funding programmes.

6. Do not extend the scope of the NIS 2 Directive to educational institutions. The NIS 2 Directive defines research as a critical sector and subjects research organisations to strict IT security obligations. However, the definition of research organisation only covers organisations whose primary objective is to carry out applied research or experimental

⁹³² The BEV is responsible for the following areas (among others): Unfair, i.e. in particular misleading or aggressive commercial practices, prohibition of geo-blocking and price labelling in general and for prices for air travel, <https://www.bev.gv.at/Themen/Verbraucherschutz.html>.

⁹³³ *epicenter.works*, Platform regulation and hate online - DSA vs. KoPL-G (23 November 2022), <https://epicenter.works/content/platformregulierung-und-hass-im-netz-dsa-vs-kopl-g>.

⁹³⁴ https://www.rtr.at/medien/was_wir_tun/plattformen/Startseite_Plattformen.de.html.

⁹³⁵ <https://www.parlament.gv.at/gegenstand/XXVII/ME/302>.

⁹³⁶ [https://www.bmj.gv.at/ministerium/gesetzesentwuerfe/Entw%C3%BCrfe-2023/Entwurf-f%C3%BCr-ein-DSA-Begleitgesetz-\(DSA-BegG\).html](https://www.bmj.gv.at/ministerium/gesetzesentwuerfe/Entw%C3%BCrfe-2023/Entwurf-f%C3%BCr-ein-DSA-Begleitgesetz-(DSA-BegG).html).

⁹³⁷ *Lundqvist*, Study on the Digital Services Act and Digital Markets Act and their possible impact on research (2022), 22.

development with a view to using the results of this research for commercial purposes (see Chapter 2, Part 3, point 6.2).

Educational institutions are explicitly excluded from the definition of a research organisation. However, Member States may decide that the requirements of the NIS 2 Directive also apply to certain educational establishments, in particular if they carry out critical research activities. This option should not be utilised in order not to burden educational establishments with excessive obligations and costs.

7. Citizen Science - liability and accident insurance cover. In Citizen Science projects, the question of insurance cover arises, in particular whether the Citizen Scientist is insured against damage to his/her person and whether he/she is liable in the event of damage (see Chapter 2, Part 3, Point 7).⁹³⁸

Statutory accident insurance offers a certain degree of protection, especially if the researchers (e.g. teachers) are employed by an institution as part of the project. However, it does not apply to independent work. Damage caused by the citizen scientist to other persons is also not insured.⁹³⁹ Insurance cover must therefore be clarified in advance, especially for projects that are carried out on a voluntary basis or in the researchers' free time.⁹⁴⁰

First and foremost, it is the funding organisations that should provide appropriate insurance cover for the projects they fund. If no other insurance cover exists, it may be possible to make use of the liability and accident insurance policies taken out by the federal states for volunteers.⁹⁴¹ When taking out insurance, however, care should be taken to ensure that the insurance cover also applies to citizen scientists.

Alternatively, the BMBWF can take out a special nationwide liability and accident insurance policy for citizen scientists, modelled on the volunteer insurance policies. This insurance should be subsidiary and only apply if there is no other insurance cover (e.g. private liability insurance).⁹⁴²

⁹³⁸ *Museum für Naturkunde*, Guidelines for Legal Issues in Citizen Science Projects (2020), 14f.

⁹³⁹ *Museum für Naturkunde*, Guidelines for Legal Issues in Citizen Science Projects (2020), 14f.

⁹⁴⁰ OeAD, Citizen Science, Research with Schools, 39.

⁹⁴¹ See for example <https://www.graz.at/cms/beitrag/10242696/8212385/Ehrenamtsversicherung.html> or <https://www.burgenland.at/themen/vereine/haftpflicht-und-unfallversicherungsschutz-im-ehrenamt/>.

⁹⁴² *Museum für Naturkunde*, Guidelines for Legal Issues in Citizen Science Projects (2020), 17.

2. Non-legislative measures - cross-thematic recommendations for action

Cross-thematic recommendations	
Non-legislative measures	
<ul style="list-style-type: none"> • Support and help shape harmonisation of the legal situation at EU level 	<ul style="list-style-type: none"> • Offer information materials and training courses
<ul style="list-style-type: none"> • Open Science Services for researchers, including counselling 	<ul style="list-style-type: none"> • Legal protection for researchers in open science practices

1. Harmonisation of the legal situation at EU level. The diversity of the relevant regulations creates a legal landscape that is difficult for funding organisations and research institutions to navigate. Against this background, (further) harmonisation at EU level may prove beneficial.⁹⁴³

Areas such as the granting of rights to future works and the free use of works for research purposes were proposed for further harmonising measures by the European legislator.⁹⁴⁴

The standardisation of the legal situation at EU level can also (partially) eliminate legal uncertainty regarding the territorial scope of application of a regulation, because Union law is (at least) applicable in all Member States of the European Union. This problem was discussed, for example, in connection with the introduction of a European secondary exploitation right (see Chapter 2, Part 1, point 2.4).⁹⁴⁵

For these reasons, harmonisation should be supported and actively shaped.

2. Publicising, awareness and knowledge. Funding bodies, research organisations and other public institutions should develop information services, OER materials and awareness-raising measures to improve researchers' and students' knowledge of open science. In particular, education and training should be offered to support researchers at all career stages in the implementation of open science practices.⁹⁴⁶ These should focus in particular

⁹⁴³ Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 30f.

⁹⁴⁴ Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 30f.

⁹⁴⁵ Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 47ff.

⁹⁴⁶ Recommendation (EU) 2018/790 of the EU Commission on access to and preservation of scientific information, point 8 para 2 subpara 1.

on the strategic handling of researchers' intellectual property when providing open access to their scientific publications.⁹⁴⁷

3. Further develop open science services for researchers. In order to support researchers in the event of legal uncertainties in connection with open science practices, funding bodies, research institutions and other public institutions should further develop their research support services in the direction of open science services via open access offices, centres for research data management and similar bodies. Counselling services should be complemented by guidelines, FAQs and other instructions for researchers.⁹⁴⁸

4 Legal protection for researchers. Open science practices are associated with legal risks. Open access publications in particular can lead to legal disputes with publishers or editors. In addition, other persons may assert violations of licence, copyright, data protection or personal rights.

A "guarantee system" for researchers can therefore be introduced as part of the Open Science Services. They should receive legal support in the event of disputes and, in particular, be represented in court. In addition, authors should be protected against monetary claims (e.g. licence fees) and legal costs.⁹⁴⁹

⁹⁴⁷ EU Council Conclusions on "Towards high-quality, transparent, open, trustworthy and fair scientific publishing", 9616/23 (23.5.2023), 8.

⁹⁴⁸ Recommendation (EU) 2018/790 of the EU Commission on access to and preservation of scientific information, point 1 para 2 subpara 2.

⁹⁴⁹ Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022), 56.

Annex 1: Report "Public Round Table Open Science - Legal Framework and Practical Challenges in the Digital Age"

Public Round Table

Open Science: Legal Framework and Practical Challenges in the Digital Age

6 July 2023, Young Digital Law Conference, Vienna

Panellists:

[Barbara Sanchez Solis](#), Head of Centre for Research Data Management, TU Vienna

[Michael Strassnig](#), Deputy Managing Director of Vienna Science and Technology Fund GmbH (WWTF) & Programme Manager, founding member of the [Platform Registerforschung](#)

[Petra Schaper Rinkel](#), Professor of Science and Technology Studies of Digital Transformation, Director Idea Lab - The Interdisciplinary Digital Lab of the University of Graz⁹⁵⁰

[Ronald Maier](#), Vice-Rector for Digitalisation and Knowledge Transfer, University of Vienna

Hosted by:

[Katja Mayer](#), Research Platform Governance of Digital Practices, University of Vienna

[Žiga Škorjanc](#), Department of Innovation and Digitalisation in Law, University of Vienna

in cooperation with the [Austrian Federal Ministry of Education, Science and Research](#)

With advancements in Artificial Intelligence (AI) and their inherent capability for autonomous learning and the creation of synthetic content, there arises a distinct need for systematic and transparent methodologies of knowledge production. [Open Science](#) and Open Research Data stand out as avenues that prioritise transparency in knowledge dissemination and interpretation. Open Science, rooted in principles of thorough methodologies, accountability, and reproducibility, seeks to reevaluate and refine traditional research practices. The values of inclusivity, equity, and shared knowledge underpin this approach, thus, the principles of Open Science have the potential to contribute to better law-making, particularly in the digital sphere.

However, Open Science, while offering a range of advantages to the academic community and beyond, simultaneously introduces a range of legal challenges. A primary consideration is the reconciliation of transparency and accessibility with the protection of intellectual property and adherence to established copyright laws, especially within the academic

⁹⁵⁰ Now Rector of the University of Applied Arts in Vienna

sector's competitive dynamics. Beyond these primary legal concerns are more nuanced issues pertaining to data protection, competition dynamics, contractual stipulations, and governance of infrastructures. As global discussions around digital rights and new data legislative frameworks evolve, opportunities emerge to draw from existing experiences and develop nuanced, effective solutions, as also indicated by the [ERA Policy Agenda](#). The public round table at the conference [Young Digital Law 2023: Bias in Lawmaking](#) in Vienna gathered stakeholders to dissect and discuss these legal and practical complexities associated with Open Science. In response to the findings of the 2021 study titled "[Open Access in Transition](#)", commissioned by the BMBWF, the roundtable delved deeper into the nuanced practicalities encountered at the confluence of various legal domains associated with the implementation of Open Science. This discourse serves as an imperative juncture, intertwining legal studies, science and technology policy, and research organisation. The perspectives and insights gleaned from stakeholders actively engaged in open science are instrumental in refining our comprehension and guiding the strategies we adopt.

In her opening statement, Petra Schaper Rinkel commenced by expressing concerns over the bureaucratic burden perceived in open science. Furthermore, she highlighted the necessity for implementing property rights at a constitutional level when dealing with open data, cautioning against the potential relinquishing of proprietary research data on expansive commercial platforms. Schaper Rinkel strongly advocated for a discussion on data ownership in academic research to further the progression of science as a common good.

Ronald Maier emphasised that the core of science lies in the pursuit of truth. He elaborated on the University of Vienna's advantageous position in offering digital research infrastructures and also being part of inter-university efforts to collaborate and share these infrastructures. Maier spotlighted the important role of data stewards and data curation for long term preservation and sound informed consent procedures. He underscored the importance of ensuring data access isn't monopolised by large corporations and highlighted the inherent legal challenges in data management, copyright issues concerning open data, and advocated for open science as an essential medium for credible research that is both excellent and relevant.

Barbara Sanchez Solis provided insights into the Center for Research Data Management at the TU Wien, stating that while foundational groundwork has been laid for legal awareness, there remains scope for refinement. She demystified research data management, emphasising the many benefits of data management plans for researchers even though they come with some effort. Sanchez Solis pointed out that while funders mandate open data and research plans, research data management shouldn't be conflated with open and F.A.I.R. data, however effective data management is the basis for it. She also noted a lack of training in legal and ethical challenges in science in general in academic curricula.

In his opening statement, Michael Strassnig delved into the intersections of AI, authorship, and legality. He emphasised that the notion of authorship and the attached legal norms vary significantly across regions, such as between the US and Europe. Strassnig cited a prominent publisher's standpoint on AI, highlighting the publisher's stance against AI's recognition as authors. He posed critical questions about future implications of AI-driven authorship,

especially in the context of legal scholarship. Strassnig further dissected the aspect of transparency, referencing its frequent citation in regulations like the GDPR and AI Act. He questioned the institutional preparedness to handle such transparency mandates. Lastly, he underscored the burgeoning concern of public knowledge privatisation. This is not merely manifest in commercial research infrastructures or research information systems but is also evident in contemporary AI methodologies, which frequently train on data amassed from a plethora of public sources.

Discussion: Institutional Autonomy and Open Science: Legal Implications and Infrastructure Needs

The discussion following the initial statements focused on the autonomy of research institutions in the realm of open science and their interaction with existing legislative frameworks. Žiga Škorjanc posed an initial inquiry regarding institutions' preference between adhering to existing legislation or creating autonomous guidelines. Sanchez Solis posited that universities exert considerable discretion in shaping the extent of internal openness. Notably, with regard to data, there arise intricate queries. For instance, when does data attain a level worthy of copyright protection, akin to the German concept of "Werkhöhe"?

Strassnig responded with concerns about institutionalising the necessary infrastructure to bolster open science, emphasising the intertwined relationship between infrastructure and adequate funding. He argued for a judicious allocation of funds for data management, coupled with clear criteria for data retention and removal. Furthermore, a pertinent inquiry remains: To what extent should we allocate resources towards data management such that it yields genuine benefits, rather than pursuing it as a mere formality?

Maier provided an observation on the reluctance of research institutions to impose burdensome obligations that could detract from core research activities. Citing AI products like ChatGPT as examples, he alluded to the complexities of ascertaining data origins and navigating potential third-party rights. He warned of the potential pitfalls of entangling researchers in too many bureaucratic procedures-procedures which not only impose more stringent standards than those faced by commercial entities but also demand a range of legal services, many of which remain inaccessible to the research community.

Schaper-Rinkel advocated for an expansive public open data infrastructure, suggesting the potential of harnessing technologies controlled by tech conglomerates for open data initiatives. She emphasised the significance of intertwining legal frameworks with pragmatic solutions for data infrastructure and championed public ownership as a means to democratise data access, thereby broadening the discourse to encompass broader societal ramifications.

Audience Inquiries on Open Science Practices

1. **Knowledge Transfer Modalities:** In response to an inquiry about general knowledge transfer, Maier identified three potential trajectories that deviate from the open science model: university-originated spin-offs, research partnerships in which collaborating

firms retain intellectual property (IP) rights, and prospective alliances focusing on research findings. In alternative contexts, collaborative strategies are viewed as more desirable. Nevertheless, in every scenario, there should be contemplation of integrating at least some elements of open science.

2. **Data Management & Stakeholder Engagement:** A subsequent inquiry delved into the strategies for engaging diverse stakeholders in data management. Sanchez Solis elucidated that many universities maintain local instances of data repositories. Internal infrastructure significantly streamlines the process of imparting data management to researchers, equipped with tools to ensure compliance with legal stipulations for open science, such as prominence, licensing, and documentation.
3. **Publishing Houses & Open Access:** Another question revolved around the "big deal" subscription with publishers, as they are expensive and it is not always clear how they are used in the end. In addressing the role and response of publishing houses to open access, Strassnig emphasised the commercial dynamics always at play, hinting at potential monopolistic tendencies. He envisages publishers morphing into providers (Maier: "big integrators") for the whole scientific workflow, harvesting all the knowledge, not only published results. Schaper-Rinkel accentuated this concerning perspective: the potential for publishers to amass more data about research and researchers than even the research institutions or governments themselves.
4. **Open Access and academic reward systems:** Škorjanc delved into the tension between promoting open access research and its possible ramifications on one's academic trajectory. Strassnig underscored the significance of metadata produced during the publication process, positing it could rival the inherent value of the research content. Maier concurred, suggesting that greater availability of data pertaining to, and originating from, a researcher could enhance their visibility and consequently bolster their academic standing.
5. **The Evolution of Academic Publishing:** A narrative about the resignation of an editorial board of a highly prestigious journal and the long tradition of open access movements in Latin America prefaced the query on the feasibility of reimagining academic open access publishing. Strassnig postulated that the current fee-based publishing system, rooted in the quest for reputation via prestigious journals, might persist. Ronald Maier, however, speculated on the evolving business models of publishers, potentially hinting at their unsustainability. He posited that increasing data accessibility could herald the entry of unconventional players in the publishing domain, potentially redefining peer review mechanisms. Sanchez Solis mentioned an EU initiative, "[COARA](#)" aiming to reform researcher assessments. Schaper-Rinkel highlighted the dichotomy between university management's preference for established, albeit costly, publisher contracts and the challenges faced by nascent open access initiatives due to these contractual obligations. Katja Mayer referred to the "diamond open access" publishing model as a more sustainable public model. Diamond Open Access is a publication model where neither authors nor readers incur fees. These journals, community-driven and academically led, cater to diverse, small-scale, multilingual scholarly groups, epitomising bibliodiversity.

6. **IP Rights and University-Publisher Dynamics:** A subsequent, somewhat freeform discussion revolved around the tensions between publishers, universities, and researchers' legal uncertainties, such as secondary publication rights, embargo durations, and exploitation rights, among others. Ronald Maier highlighted the societal basis of universities, underscoring their status as public knowledge institutions. While not driven by commercial objectives, they can still foster initiatives like startups. Sanchez Solis argued that universities justifiably exert control over the exploitation rights of the research they support.

In wrapping up the discussion the topic of open science was linked to the "third mission" of universities. The "third mission" refers to the deliberate application and transfer of academic knowledge to address societal challenges, encompassing technology and innovation partnerships with both public and private entities. Maier reminded attendees of the overarching societal objective that drives many researchers, highlighting the necessity for acknowledging and rewarding those who extend their work beyond purely academic confines. Schaper-Rinkel reiterated the urgent requirement for robust public infrastructure that facilitates open data access, pointing to the current reliance on large commercial platforms. Strassnig revisited an earlier contention, emphasising that challenges related to open access should not merely be thrust upon individual researchers but warrant attention and intervention at the political echelon. Sanchez Solis articulated a crucial need in the realm of digital service implementation: specialised legal expertise. She asserted the complexity of legal intersections in this domain, suggesting the potential role of "data lawyers" who would comprehensively navigate these intricate waters.

Finally, Katja Mayer summarised the expansive terrain covered during the session. She remarked on the multifaceted legal dimensions enveloping open science as "multi-domain knowledge." Throughout the discussion, the recurring themes ranged from evolving reward systems and fears of excessive bureaucratisation to concerns surrounding AI's potential misuse. She also spotlighted the repeated calls for the establishment of a solid public infrastructure with sustainable resources and governance, with specific mentions of data stewardship and long-term storage. The dialogue explored the multifaceted challenges anticipated to shape the future of open science, underscoring the necessity of an ethical and secure foundation for open research. Attendees highlighted the significance of comprehensive legal frameworks to grant researchers distinct legal guidance and to concurrently nurture public confidence in scientific outcomes. Furthermore, the discussions acknowledged digital technology's dual role as an enabler and determinant in the sphere of Open Science. In conclusion, we trust that the discourse nurtured understanding and endorsement of Open Science within the legal academic sphere. It aimed to steer the community amidst the nuanced legal intricacies of digital research approaches, with the aspiration of establishing a foundation for a more transparent, inclusive, accessible, and legally consistent open science framework.

List of abbreviations

aA	of another view
ABGB.....	Austrian Civil Code
Abs.....	Paragraph
AGB.....	Terms and Conditions
AMDC.....	Austrian Micro Data Centre
APG.....	Disclosure Act
API.....	application programming interfaces
Art.....	Article
AVG.....	General Administrative Procedure Act 1991
B-VG	Federal Constitutional Law
BAO.....	Federal Tax Code
BEV	Federal Office of Metrology and Surveying
BlgNR.....	Supplement to the stenographic records of the National Council
BMBWF	Federal Ministry of Education, Science and Research
BMF.....	Federal Ministry of Finance
bPK.....	sector-specific personal identifiers
BSI	Federal Office for Information Security
BStatG	Federal Statistics Act 2000
BundesarchivG	Federal Archives Act
BWB	Federal Competition Authority
BY	attribution
CC	Creative Commons
i.e.	that means
DA	Data Act
DGA	Data Governance Act
DIN	German Institute for Standardisation
DMA.....	Digital Markets Act
DMP	data management plan
DOI	Digital Object Identifier
DSA	Digital Services Act
DPA.....	Data protection authority
DSG	Data Protection Act
GDPR.....	General Data Protection Regulation
DSM DIRECTIVE	Directive (EU) 2019/790 on copyright and related rights related rights in the Digital Single Market
dUStG.....	German VAT Act
e-Privacy Directive	Directive 2002/58/EC concerning the processing of personal data

and the protection of privacy in electronic communications sector

EHDS	European Health Data Space
ELGA.....	Electronic health records
ELGA-VO 2015	Regulation of the Federal Minister of Health on the Implementation and further development of ELGA
EOSC	European Open Science Cloud
ERA	European Research Area
ERA-NAP	European Research Area - National Action Plan
ErläutRV	explanatory notes to a governmental bill
etc	et cetera
EU (EC).....	European Union (European Community)
EU Statistics Regulation.....	Regulation (EC) No 223/2009 of 11 March 2009 on European statistics
EuGH	European Court of Justice
FAIR.....	Findable, Accessible, Interoperable, Re-usable
FAQ	Frequently asked questions
RDM.....	Research Data Management
FFGG.....	Research Promotion Companies Act
FHG	Universities of Applied Sciences Act
FoFinaG.....	Research Financing Act
FOG	Research Organisation Act
FOS	Fields of Science and Technology
FTFG	Research and Technology Promotion Act
RTI.....	research, technology and innovation
FWF	Austrian Science Fund
GA	Grant Agreement
GmbH.....	Limited liability company
GP.....	Legislative period
GTelG 2012	Health Telematics Act 2012
GTG.....	Genetic Engineering Act
GWP	Good scientific practice
i.V.m	in conjunction with
IFG	Freedom of Information Act
InfoSoc Directive.....	Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society
IoT.....	Internet of Things
ISOInternational	Organisation for Standardisation
IT	information technology

IWG 2022	Information Reuse Act 2022
kDA	Compromise text of the Data Act
DSC	Digital Services Coordinator
KEMÖ	Kooperation E-Medien Österreich
AI	Artificial intelligence
AI Act	Artificial Intelligence Act
SMEs	Small and medium-sized enterprises
KommAustria	Kommunikationsbehörde Austria
lit	litera
STEM	Science, Technology, Engineering, Mathematics
mwN	with further references
VAT Directive	Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax
NC	non-commercial
ND	no derivatives
NIS 2 Directive	Directive (EU) 2022/2555 on measures for a high common level of cybersecurity across the Union
NISG	Network and Information System Security Act
OA	Open Access
OANA	Open Science Network Austria
OER	Open Educational Resources
OGD	Open Government Data
OGH	Supreme Court
Open data and PSI Directive	Directive (EU) 2019/1024 on open data and re-use of public sector information
PatG	Patent Act 1970
Rn	Margin number
Rome I	Regulation (EC) No. 593/2008 on the law applicable to contractual obligations
Rz	Margin digit
SA	Share Alike
StGG	Basic Law of 21 December 1867 on the General Rights of Nationals
TDM	Text and data mining
TKG	Telecommunications Act 2021
TKK	Telekom-Control-Commission
UG	University Act 2002
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNIKO	University Conference
UrhG	Copyright Act

UStG VAT Act
uU under certain circumstances
VfGH Constitutional Court
cf. compare
VLOP Very Large Online Platform
VLOS EVery Large Online Search Engine
VwGH Supreme Administrative Court
Z Number
e.g. for example

machine translation

Bibliography

Amini/Huß, Teaching with (digital) media (1.2.2017).

Angelopoulos, Study on EU copyright and related rights and access to and reuse of scientific publications, including open access; Exceptions and limitations, rights retention strategies and the secondary publication right (2022).

Ball, How to Licence Research Data (2014),
https://www.dcc.ac.uk/sites/default/files/documents/publications/reports/guides/How_To_License_Research_Data.pdf.

Baumann/Krahn/Lauber-Rönsberg, Research Data Management and Law (2021).

BMASGK, Protection of sensitive data, Position of Health Sections VIII and IX of the BMASGK (2019).

BMF, press release of 26 July 2023,
<https://www.bmf.gv.at/presse/pressemeldungen/2023/juli/tursky-datenstrategie.html>
and https://www.ots.at/presseaussendung/OTS_20230726_OT0013/tursky-bundesregierung-einigt-sich-auf-europaeische-datenstrategie.

Borski/Fischer/Muß-Merholz/Kreutzer/Sewerin, Freie Lizenzen - einfach erklärt, Ein Leitfaden für die Anwendung freier Lizenzen in der Bertelsmann Stiftung (2017).

Bücheler/Kerbler, Darf ich meinen wissenschaftlichen Beitrag im Internet anbieten? (2022),
<https://faq-copyright.at/darf-ich-meinen-wissenschaftlichen-beitrag-im-internet-anbieten/#easy-footnote-5-2222>.

Federal Ministry of Education and Research (BMBF)/Kultusministerkonferenz (KMK), Open Access in Deutschland - Gemeinsame Leitlinien von Bund und Ländern (2023).

Burgstaller, Aktuelle Ereignisse und Entwicklungen zum Informationsrecht , ZIIR 2023, 140

Burgstaller, Austrian Patent Law² (as of 1 July 2021, rdb.at).

Concordat on Open Research Data (UK, 2016).

Cooperation OGD Austria, Framework conditions for Open Government Data Platforms (Version 1.2.0/08 November 2016).

Degelsegger-Márquez, Health data in Austria - an overview (2021).

German Commission for UNESCO, What are Open Educational Resources? And other frequently asked questions about OER (2013).

Dokalik/Zemann, Urheberrecht⁸ (as of 1 October 2022, rdb.at).

Dyché/Polisky, 5 Models for Data Stewardship, SAS Best Practices white paper (2020).

ERA Policy Agenda 2022-2024 .

European Parliamentary Research Service, Artificial intelligence act and regulatory sandboxes, Briefing 17-06-2022,
[https://www.europarl.europa.eu/thinktank/de/document/EPRS_BRI\(2022\)733544](https://www.europarl.europa.eu/thinktank/de/document/EPRS_BRI(2022)733544).

EU Commission, FAQ: Digital Services Act (25.4.2023), point 1,
https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2348.

EU Commission, FAQ Funding & Tenders Portal, Are the requirements for open science and exploitation conflicting in Horizon Europe?, <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/support/faq/19532>.

EU Commission, Guidelines on FAIR Data Management in Horizon 2020 (Version 3.0, 26 July 2016).

EU Commission, Artificial Intelligence - Excellence and Trust,
https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/excellence-and-trust-artificial-intelligence_de.

EU Commission, Mutual Learning Exercise on Citizen Science Initiatives - Policy and Practice Final Report (2023).

EU Grants, AGA - Annotated Grant Agreement, EU Funding Programmes 2021-2027, Version 1.0 - DRAFT, 1.4.2023, https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/common/guidance/aga_en.pdf.

Fenyves/Kerschner/Vonkilch, ABGB: Großkommentar zum ABGB - Klang-Kommentar - §§ 1165 to 1174, Werkvertrag³ (2020).

FORCE11, The FAIR Data Principles, <https://force11.org/info/the-fair-data-principles/>.

Funding guidelines of the FWF (01.01.2022, Version 1).

Forgó/Paspalj, Die Umsetzung der Urheberrechtsrichtlinie in Österreich in Hoffberger-Pippan/Ladeck/Ivankovics (eds.), Digitalisierung und Recht, Jahrbuch 2022.

Forgó/Zöchling-Jud, Das Vertragsrecht des ABGB auf dem Prüfstand: Überlegungen im digitalen Zeitalter, 20th ÖJT Vol. II/1.

RTI Strategy 2030.

Fuchs/Ratz, Vienna Commentary on the Code of Criminal Procedure (as of 1 August 2019, rdb.at).

Fuchs/Ziniel, Public procurement law, transparency and confidentiality - an ongoing issue with new dynamics, ZVB 2023/6, 18.

FWF, Open Access Testimonials, <https://www.fwf.ac.at/de/forschungsfoerderung/open-access-policy/open-access-fuer-referierte-publikationen/open-access-testimonials>.

FWF, Open Access for Refereed Publications, <https://www.fwf.ac.at/de/forschungsfoerderung/open-access-policy/open-access-fuer-referierte-publikationen>.

FWF, Open Access for peer-reviewed book publications, <https://www.fwf.ac.at/de/forschungsfoerderung/open-access-policy/open-access-fuer-referierte-buchpublikationen#c25849>.

GO FAIR, FAIR Principles, <https://www.go-fair.org/fair-principles/>.

Götting/Lauber-Rönsberg/Rauer, BeckOK Urheberrecht (38th edition, status: 01/02/2023).

Haidinger, the newsflash, Dako 2022, 96.

Hofmann/Raue, NomosKommentar Digital Services Act (2023).

Horizon Europe (HORIZON) Euratom Research and Training Programme (EURATOM), "General Model Grant Agreement / EIC Accelerator Contract" (HE MGA - Multi & Mono), Version 1.1, 15.4.2022, https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/common/agr-contr/general-mga_horizon-euratom_en.pdf#page=108.

Horizon Europe FAQ, what is a trusted repository? <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/support/faq/19535?type=;categories=null;tenders=:programme=null;freeTextSearchKeyword=Trusted%20repositories;matchWholeText=true;period=null;status=0;sortQuery=publicationDate;faqListKey=faqSearchTablePageSate>.

Horn, Recast of the Directive on the re-use of public sector information (PSI II Directive), jusIT 2020/1.

Initiative to create an independent national medical data centre (16.5.2021).

Kiefner, Chapter 2 Corporate Law, in Gabel/Heinrich/Kiefner (eds.), *Rechtshandbuch Cyber-Security* (2019) .

Kipker, Chapter 1 Fundamentals and Structures, in *Kipker* (ed.), *Cybersecurity* (2020).

Knyrim, The Data Governance Act and its intersection with the GDPR, *Dako* 2023/29.

Knyrim, *Der DatKomm - Praxiskommentar zum Datenschutzrecht* (as of 1 December 2022, rdb.at).

Knyrim/Urban, DGA, DMA, DSA, DA, AI-Act, EHDS - an overview of the European data strategy (Part I), *Dako* 2023/30.

Knyrim/Urban, DGA, DMA, DSA, DA, AI-Act, EHDS - an overview of the European data strategy (Part II), *Dako* 2023/40.

Korinek/Holoubek/Bezemek/Fuchs/Martin/Zellenberg, *Österreichisches Bundesverfassungsrecht* (12th ed. 2016).

Korinek/Holoubek/Bezemek/Fuchs/Martin/Zellenberg, *Österreichisches Bundesverfassungsrecht* (4th ed. 2001).

Kotschy, *Registerforschung nach der Novelle 2021 zum FOG*, *zFhr* 2022 , 139.

Kreutzer/Lahmann, *Legal Issues in Open Science* (2nd edition, 2021).

Kucsko/Handig, *urheber.recht* ² (as at 1 April 2017, rdb.at).

Kucsko/Zemann, *CC0 1.0 Universal - Assessment of the waiver and the granting of a licence in the context of the fallback clause under Austrian law* (2017).

Lipton, *Open Scientific Data - Why Choosing and Reusing the Right Data Matters* (2020).

Lundqvist, *Study on the Digital Services Act and Digital Markets Act and their possible impact on research* (2022).

Mayer K., *Open Access in Transition: Infrastructures, Monitoring and Governance as Key Elements of a Successful Transformation. Baseline Report for the Austrian Federal Ministry of Education, Science and Research* (2022).

McKiernan et al, *How open science helps researchers succeed* (2016), <https://elifesciences.org/articles/16800>.

Melhardt/Tumpel, Value Added Tax Act (3rd edition, 2021).

Miernicki, Die Veröffentlichungspflicht von Informationen der Verwaltungsorgane, ÖJZ 2022/158.

Mittendorfer/Pollak/Streicher, Umsatzsteuersatz auf "Recherchedatenbanken" (Part I), taxlex 2021/68 , 257.

Museum für Naturkunde, Guidelines for legal issues in citizen science projects (2020).

Muzak, B-VG⁶ (as of 1 October 2020, rdb.at).

Noerr, Analysis of the potential and legal implementation possibilities of AI real-world laboratories at European and national level with special consideration of the European Commission's draft AI legal framework (as of 25 January 2023), <https://www.bundesregierung.de/breg-de/suche/ki-reallabore-2164576>.

OANA, Recommendations for a national open science strategy in Austria (2020).

OECD, Frascati Manual 2015.

OER FAQ, May I use text and data mining (TDM) methods on CC-licensed content? <https://oer-faq.de/faq/darf-ich-auf-cc-lizenzierte-inhalte-text-und-data-mining-verfahren-tdm-anwenden/> (last accessed on 28 August 2023).

Open Knowledge Foundation, Open Data Handbook, How can I (as an authority, administration, organisation, ...) actually open data, <http://opendatahandbook.org/guide/de/how-to-open-up-data/>.

Open Science Policy Austria (2022).

Open Innovation Strategy (2016).

Austrian Action Plan for the European Research Area 2022-2025.

Austrian Research and Technology Report (2023).

Paris Declaration on OER (2012), UNESCO World Congress on Open Educational Resources, Paris, 20-22 June 2012.

Peifer, Wissenschaftsmarkt und Urheberrecht: Schranken, Vertragsrecht, Wettbewerbsrecht, GRUR 2009 , 22.

Perthold-Stoitzner, Universities Act^{3.01} (as at 1 December 2018, rdb.at).

Perthold-Stoitzner, Universities Act³ (as at 1 October 2016, rdb.at).

Pfeil/Grimm/Schöberl, Personalrecht der Universitäten² (as of 1 October 2021, rdb.at).

Phillips/Knoppers, Whose Commons Data Protection as a Legal Limit of Open Science (2019), *The Journal of Law, Medicine & Ethics*, 47 (2019), 106.

Plan S, "Plan S Rights Retention Strategy", <https://www.coalition-s.org/rights-retention-strategy/>.

Plotkin, Data Stewardship An Actionable Guide to Effective Data Management and Data Governance (2nd edition, 2021).

Position paper "Data excellence: Strategies for Austria" (2022).

Council of the EU, General approach - Artificial Intelligence Act, 14954/22 (25/11/2022).

Reiter-Pázmándy, Data Access for the Social Sciences in Austria. Open Data, Closed Data, Research Infrastructures and Re-Use, *Austrian Journal of Political Science*, 1/2021, 16.

EU Council Conclusions on "Towards high-quality, transparent, open, trustworthy and fair scientific publishing", 9616/23 (23.5.2023).

Senftleben, Study on EU copyright and related rights and access to and reuse of data (2022).

Service Team Research Data of Leibniz Universität Hannover, Handreichung - Interne Richtlinien zum Umgang mit Forschungsdaten erstellen, Empfehlungen zu Abläufen, Aufbau und Inhalten (V3.2, 23.11.2022).

Škorjanc, Open Education Austria - FAQ Copyright (as of 17 February 2023), part Creative Commons licences, <https://www.openeducation.at/oer-faqs/>.

Statistics Austria, Statistical confidentiality in publications and when passing on data (V.05, 16.3.2022).

Thiele/Burgstaller, Copyright Act ⁴ (2022).

Thiele/Wagner, Practical Commentary on the Data Protection Act (DSG)² (as of 1 February 2022, rdb.at).

UNESCO, Open data for AI - What now? (2023).

van Eechoud, Study on the Open Data Directive, Data Governance and Data Act and their possible impact on research (2022).

Voigt/Bastians, Neue europarechtliche Anforderungen an die IT-Sicherheit, CR 12/2022, 768.

Wiebe, UrhG-Nov 2015 - a critical review, MR 2015, 239.

Wilkinson/Dumontier/Aalbersberg/et al, The FAIR Guiding Principles for scientific data management and stewardship. Sci Data 3, 160018 (2016), <https://doi.org/10.1038/sdata.2016.18>.

Wirth, Die Pflicht zur Löschung von Forschungsdaten - Urheber- und Datenschutzrecht im Widerspruch zu den Erfordernissen guter wissenschaftlicher Praxis?, ZUM 64 (8/9), 585.

WKÖ, Digital Services Act (DSA) in force, new rules for electronic commerce apply from 17 February 2024, <https://www.wko.at/service/wirtschaftsrecht-gewerberecht/digital-services-act-dsa.html>.

Zemann/Zhang, Preview: Urheberrechts-Novelle 2021, ecolex 2021/634 , 974.