

Secondary open access publishing: a right and an obligation

Proposal to introduce legal mechanisms

Considering that open science, and in particular open access to scientific publications, facilitates sharing and collaboration, accelerates the process of discovery, improves the quality of research, makes science more transparent, and enhances its economic and social impact, these practices have been encouraged and promoted by governments and funding bodies. However, in addition to policies and incentives, it is necessary to remove the remaining barriers to the sharing and dissemination of knowledge.

In the European Union (EU), access to knowledge has become a strategic priority, recognized as an essential driver for the future of innovation and competitiveness in the European economic area. Two recent high-level reports reinforce this orientation. The Letta Report ("Much More than a Market") warns of the EU's loss of competitiveness vis-à-vis other economic blocs and proposes a strategic vision for the future of the internal market, placing knowledge at the heart of the European strategy for promoting innovation, sustainable growth, and competitiveness. Among its proposals, it highlights the creation of a "fifth freedom" of the European Union, in addition to the traditional freedoms of movement of people, goods, services, and capital: the free movement of knowledge—covering research, innovation, education, and knowledge transfer—without barriers or disciplinary or artificial limitations.

Similarly, the Draghi Report ("The Future of European Competitiveness") highlights the central role of universities and research centers in European economic development, but identifies difficulties in the transition from innovation to the commercialization of new products and services. Both reports point to difficulties in accessing and reusing scientific research information and data.

In Portugal, as in most European countries, a significant part of the research that generates knowledge is financed with public funds. In this context, it is essential to ensure, through legislation, that scientific output resulting from publicly funded research is open and freely accessible.

One of the main obstacles to open access is the traditional model of scientific publication. Publishing contracts are the main tool for regulating access to research results. In these contracts, as a condition of publication, the author, the most vulnerable contracting party, typically transfers the economic rights granted to them under copyright law to the publisher and rarely retains the right to republish their publications in open access.

Secondary publication, whether as a right or an obligation, has been legally enshrined in a growing number of European countries (namely Austria, Germany, Belgium, Bulgaria, Slovenia, Spain, and France) as an effective legal mechanism to address existing barriers to open access.

The right of secondary publication refers to the possibility of republishing (“secondary”) a scientific publication already published (primary publication) by a publisher. It represents a concrete manifestation of fundamental rights and constitutes a fundamental step towards achieving a more just and inclusive knowledge society, capable of facing the challenges of the 21st century.

The right of secondary publication allows authors to retain the right to make their published works available in open access. The obligation of secondary publication requires that the results of publicly funded research be republished on open access platforms. The introduction of these mechanisms into the national legal system ensures that the results of publicly funded research remain accessible and reusable by both the scientific community and the general public.

Article 1

Definitions

For the purposes of this law, the following definitions apply:

- (a) “Funding beneficiary” means the individual or legal entity, public or private, to whom public research funding is allocated;
- (b) “Funding entity” means a legal person that awards public funding for research;
- (c) “Publicly funded research” means research funded, in whole or in part, by public funds;
- (d) “Scientific publication” means any work or other material protected by copyright or related rights, of a scientific nature, such as, for example, articles, conference papers, books, book chapters, monographs, drawings, photographs, videographic works, phonographic works, multimedia objects, reports, master's theses, and doctoral theses;
- (e) “Open access platform” means a repository or other means that allows immediate and free online access, as well as the use and reuse, generally without restrictions, of scientific publications under an appropriate open license.

Article 2

Right of secondary publication¹

- (1) The author of a scientific publication resulting from publicly funded research retains the right to make it available to the public immediately after publication on an open access platform.
- (2) The right provided for in paragraph 1 is inalienable and non-waivable.
- (3) This article applies to the final published version.
- (4) Contractual provisions contrary to this article shall have no effect.

¹ This article is partly based on Commission Recommendation (EU) 2018/790.

Article 3

Secondary publication obligation²

- (1) Scientific publications resulting from publicly funded research shall be made available to the public, immediately after publication, on an open access platform.
- (2) The obligation laid down in paragraph 1 shall be fulfilled by the beneficiary of the funding.
- (3) Beneficiaries of funding shall ensure that they retain the rights necessary to comply with the obligation laid down in paragraph 1.
- (4) This Article shall apply to content included in the scientific publication that is subject to copyright or related rights of third parties, provided that the use is authorized by the third party or permitted by law, in particular under the right of quotation or other free uses.
- (5) Contractual provisions contrary to this Article shall have no effect.

Article 4

Rights and obligations of the funding body

- (1) The funding entity shall inform the beneficiaries of public funding of the rights and obligations provided for in Articles 2 and 3 of this law.
- (2) The funding body shall implement the appropriate and necessary mechanisms to promote compliance with the obligation laid down in Article 3 by the beneficiaries of the funding.
- (3) The funding entity for scientific publications resulting from publicly funded research has the right to make them available to the public on an open access platform after a period of X days following their publication [without them being made available to the public on an open access platform] [without the author or beneficiary of the funding making them available to the public on an open access platform].
- (4) The funding entity wishing to exercise the right provided for in the previous paragraph shall consult the beneficiary of the funding on the appropriate open license under which the funding entity may make the scientific publication resulting from publicly funded research available to the public.

² This article is partly inspired by Spanish and Slovenian legislation. See Article 37 of Law 14/2011 of June 1, 2011, on Science, Technology, and Innovation (Ley 14/2011, de 1 de junio, de la Ciencia, la Tecnología y la Innovación (LCTI)), available at <https://www.boe.es/eli/es/l/2011/06/01/14/con>, and Article 3 of the Decree on the conduct of scientific research in accordance with the principles of open science (U R E D B O o izvajanju znanstvenoraziskovalnega dela v skladu z načeli odprte znanosti), available at https://www.uradni-list.si/_pdf/2023/Ur/u2023059.pdf.