

# Transformative Agreements: Overview, Case Studies, and Legal Analysis

Natalia Gruenpeter, Nikodem Rycko, Krzysztof Siewicz, Jakub Szprot

# **Transformative Agreements: Overview, Case Studies, and Legal Analysis**

**Case Studies:**

**Ralf Schimmer, Colleen Campbell (Germany)**

**Anna Lundén, Britt-Marie Wideberg (Sweden)**

**Nina Karlstrøm, Nils Andenæs (Norway)**

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Editing  
Natalia Gruenpeter, Jakub Szprot

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Agnieszka Skowerska



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# Introduction

This report aims to present the current situation regarding ‘transformative agreements’ which ‘are meant to enable a swift and irreversible shift away from the subscription model on a global scale, affecting the financial and operational changes required for a fully open access publishing paradigm’<sup>1</sup> from the factual and legal point of view, as well as to provide some recommendations in this area. In chapter one, we place transformative agreements in the context of Plan S; in chapter two, we outline the current state of negotiations and agreements between scientific institutions and publishers in various countries; in chapter three, we provide legal analysis of the agreements from the ESAC Transformative Agreement Registry; in chapter four, we present three case studies (Germany, Norway, Sweden); finally, chapter five is devoted to recommendations.

# Plan S and Transformative Agreements

This chapter provides the context and main principles of Plan S, with particular focus on possible strategies to encourage subscription publishers to transition to open access as outlined in 'The Guidance on the Implementation of Plan S'.

\*

Plan S was launched on 4 September 2018 by cOAlition S, a group of national research funding organisations, with the support of the European Commission and the European Research Council (ERC). The aim is to move towards the immediate open access publication of all scientific articles resulting from public or private grants provided by national, regional and international research councils and funding bodies. Initially, it was supposed that Plan S would come into force on 1 January 2020 but due to further developments and public feedback the implementation was postponed by a year.

Plan S is based on ten principles that address various aspects of future open access publishing.<sup>2</sup> According to the first principle, authors or their institutions will retain copyright to their publications that should be published under an open licence, preferably CC-BY. Other principles include the following: developing a set of criteria and requirements for the high-quality and Plan S compliant open access journals, open access platforms, and open access repositories, regulating and standardising publication fees, encouraging various stakeholders to align their strategies, policies, and practices, notably to ensure transparency, monitoring compliance as well as assessing research outputs based on its intrinsic value. Also, one of the principles defined the scope of Plan S: in its current form it applies only for scholarly articles; not monographs and book chapters.

Plan S also took up the subject of transformative arrangements which are understood as a means of transitioning from a subscription-based model of scientific publishing to full and immediate open access. A framework for aligning strategy towards the process of transformation was also provided in Plan S Principles, point 8: 'The Funders do not support the "hybrid" model of publishing. However, as a transitional pathway towards full open access within a clearly defined timeframe, and only as part

of transformative arrangements, Funders may contribute to financially supporting such arrangements'.<sup>3</sup> The rationale for this transition was explicitly expressed in a preamble to Plan S, signed by Marc Schiltz, President of Science Europe on 4 September 2018. The preamble emphasised some relevant points, derived largely from the ethos of science and a 'collective duty of care for the science system as a whole'<sup>4</sup>, and called for regaining ownership of the rules governing the dissemination of scientific information and responsibility for the proper usage of the public funds. The document laid the foundations for further work on building an alliance of funders and stakeholders committed to working together and shaping scientific publishing in a way that responds to the demands of the digital world. It stressed that the subscription-based model is outdated and no longer justifiable: 'There is no valid reason to maintain any kind of subscription-based business model for scientific publishing in the digital world, where Open Access dissemination is maximising the impact, visibility, and efficiency of the whole research process'.<sup>5</sup> At the same time, it recognised the publisher's role as a service provider that may charge fair value for services such as reviewing, editing or disseminating research information.

Universities' and libraries' involvement in the ongoing negotiations with large publishing houses was mentioned in the preamble as one of the circumstances that demands a decisive step towards the elimination of paywalls in science. This provided a relevant context for developing a future direction: 'We acknowledge that the "transformative" type of agreements, where subscription fees are offset against publication fees, may contribute to accelerate the transition to full Open Access. Therefore, it is acceptable that, during a transition period that should be as short as possible, individual funders may continue to tolerate publications in "hybrid" journals that are covered by such a "transformative" type of agreement. There should be complete transparency in such agreements and their terms and conditions should be fully and publicly disclosed'.<sup>6</sup>

At this point, cOAlition S did not give the exact definition of 'transformative' type of agreements but emphasised two important conditions:

- specified transition period;
- transparency in agreements.

Also, it is important to note the distinction between 'transformative agreements' (or: 'transformative' type of agreements) and 'transformative arrangements'. Insofar as the former term had already been widely used and discussed, the latter was more general and required further clarification.

The draft of 'Guidance on the Implementation of Plan S' was released and opened to public consultation in November 2018. The document clarified Plan S provisions, turning the initial set of ten principles into detailed guidance for implementation, which indicated three main roads for Plan S compliance, accompanied by detailed requirements:

- publication in open access journals or platforms;
- deposit of Versions of Record (VoR) or Author Accepted Manuscript (AAM) in open access repositories without embargo;
- publication in 'hybrid' journals only under transformative agreements.



The 'Guidance on the Implementation of Plan S' contained a list of various open access initiatives and services, indicated as important resources and partners in working towards a transition to open access. Among these, for example, were the Directory of Open Access Journals (DOAJ), Directory of Open Access Repositories (OpenDOAR), Committee on Publication Ethics (COPE) or Open Access Infrastructure for Research in Europe (OpenAIRE) and Efficiency and Standards for Article Charges (ESAC). The latter initiative, established in 2014, provided an important framework for collecting and sharing information on the uptake of transformative agreements around the world as well as for developing recommendations for transformative agreements and efficient workflows in the management of open access Article Processing Charges.

The document also contained a separate paragraph on transformative agreements: 'cOAlition S recognises models that avoid non-transparent and non-fair pricing, such as "offsetting" and "read and publish" models as a way of achieving compliance with Plan S during a transition period. cOAlition S will require that the details of such agreements are listed on a website to ensure transparency, and encourages consortia to develop shared requirements for this. cOAlition S intends to collaborate with the Efficiency and Standards for Article Charges (ESAC) initiative to ensure registration and dissemination of agreements'.<sup>7</sup>

Existing transformative agreements were acknowledged and new agreements, concluded after 2020, were expected to fulfil the following conditions:

- the contracts (including costs) of such agreements need to be made publicly available;
- contract negotiations need to be concluded before the end of 2021, and contracts may not last for longer than three years;
- the negotiated agreements need to include a scenario that describes how the publication venues will be converted to full open access after the contract expires.<sup>8</sup>

On 31 May 2019, cOAlition S released a revised version of the 'Plan S Principles and Implementation Guidance', which maintained the fundamental principles, including the statement that 'funders will not support publication in hybrid (or mirror/sister) journals unless they are part of a transformative arrangement with a clearly defined endpoint'.<sup>9</sup> The paragraphs under point 11, as quoted above, have been deleted as the transformative agreements issues gained new wording. The 'Rationale for the Revisions' contained the following conclusion drawn from the consultations with various stakeholders: 'the coalition must provide support for a range of paths to full and immediate Open Access'. It also stated: 'Plan S is open to other forms of transformative arrangement which take forward other models of transformation which may be better suited to some publishers, or initiated by publishers as part of their support for a time-bound move to full and immediate Open Access'.<sup>10</sup>

One of the important changes has been the adoption of a broader concept of 'transformative arrangements', one which would open a wider array of possible strategies for subscription publishers to transition to open access.<sup>11</sup> All are considered temporary and transitional; it was stated that in cases 'where cOAlition S members

provide funding to support publication fees of journals covered by such arrangements, this funding will cease on the 31 December 2024'. The document outlined three possible strategies:

- transformative agreements;
- transformative model agreements;
- transformative journals.

Transformative agreements were described as strategies aiming to 'systematically withdraw financial support of paywalled publishing venues and reinvest those funds to support Open Access publishing'. This definition follows the findings of the Max Planck Digital Library published in a White Paper<sup>12</sup> in April 2015. Also, cOAlition S once again confirmed its support for the global Open Access 2020 Initiative (OA2020) and the ESAC Initiative: cOAlition S encouraged institutions and consortia to develop new transformative agreements and declared that it will financially support agreements after 1 January 2021 where they adhere to the ESAC Guidelines.

Transformative model agreements will be developed for those publishers and journals which are not currently engaged in transformative agreements, especially smaller society presses.

Transformative journals were defined by three key elements: gradually increased share of open access content, subscription costs offset by income from payments for publishing services (to avoid double payments), and a clear commitment to transition to full open access within an agreed timeframe.

No further details regarding those strategies were given at the time of release of the revised version of the 'Plan S Principles and Implementation Guidance'.

Recent advances in this area include updating criteria for Transformative Journals<sup>13</sup> and launching a form for applying for this status.<sup>14</sup> Although the strategy for Transformative Journals exceeds the scope of this report it is worth mentioning as a promising instrument for some journals and publishers. Initially, it was proposed by Springer Nature in May 2019.<sup>15</sup>

Updated criteria for Transformative Journals along with the rationale for the changes were published on 8 April 2020 after a review of the responses to the public consultation conducted between November 2019 and January 2020. The Rationale stated that: 'Like the other Transformative Arrangements, Transformative Journals are designed to provide a means for researchers to continue publishing results from projects funded by cOAlition S organisations in a wide variety of journals, whilst ensuring that the final, published version is fully Open Access. Journals that adopt this approach will demonstrate their commitment to move to a fully Open Access model'.<sup>16</sup> The framework for this commitment, however, underwent a substantial change. cOAlition S has:

- changed the threshold when a journal must flip to full open access from 50% of to 75% and removed the commitment to flip by December 2024;

- reduced the annual growth target for the proportion of content which must be published in open access from 8% to at least 5% in absolute terms and at least 15% in relative terms, year-on-year;
- simplified the guidance and removed all the 'recommended additional criteria'.<sup>17</sup>

In Frequently Asked Questions, cOAlition S has clarified that the general rule for all transformative arrangements was sustained and 'funding for Transformative Journals will cease at the end of 2024, at which time we will also end support for other types of Transformative Arrangements, such as Read and Publish agreements'.<sup>18</sup> As stated in the Guidance to the Implementation of Plan S, cOAlition S members may, but are not obliged to, provide funding to support publication fees of journals covered by transformative arrangements.

The cOAlition S funders can also participate in negotiations and agreements. Examples of such engagement are presented in the next part of the report. The impact of Plan S is also briefly mentioned in the case studies for those countries where the funders had signed Plan S (Norway, Sweden).

# Overview of Selected Transformative Agreements

This chapter of the report outlines the current state of negotiations between institutions and publishers in selected countries. It does not aim to provide a full and comprehensive analysis of the transformation of today's scholarly journals from the subscription system to open access publishing models. Instead, it serves as a brief description of the actions taken in order to accelerate the transition in various European countries and in the United States of America. Countries were selected on the basis of the following criteria: (1) the availability of an explicit strategy for negotiations, usually expressed as a set of principles and objectives (this is relevant for European countries), and (2) the availability of information on official web pages (sometimes separate ones have been set up to provide information on agreements and negotiations). Germany, Norway and Sweden were selected for more detailed case studies which are available in a further part of this report. In those countries where the funding agency is a member of cOAlition S, additional information about the funder's involvement in the negotiating process has been given. Every effort has been made to ensure that the information provided in this part of the report is accurate and current. Given the limited scope of this overview, it is not possible nor necessary to give complete and in-depth coverage of all agreements. Nevertheless, we hope that it will prove useful both as a brief summary of the current situation and as a basis for the following parts of this report.

## Austria

In Austria<sup>19</sup>, the large-scale transformation of scientific communication to open access is carried out as part of the 'Austrian Transition to Open Access' (AT2OA) project that ran from January 2017 to December 2020. Contracts with publishers are negotiated by the Austrian Academic Library Consortium which has been testing and developing various models, such as: Offsetting Deals, Read and Publish Deals and Switch (Subproject 2: Funding for transitional open access business models).<sup>20</sup> As 2020 began, agreements with the following publishers came into force:

- American Chemical Society – this will enable corresponding authors to publish open access free of charge;
- Cambridge University Press – this will enable corresponding authors to publish open access free of charge;
- Emerald – the existing agreement has been renewed, combining access

to Emerald content with the possibility of publishing open access free of charge. Corresponding authors will benefit from this arrangement;

- IOP Publishing – the existing agreement has been renewed, combining access to IOPscience extra with the possibility of publishing open access free of charge. Austrian researchers will have the chance to have their Article Publication Charge (APC) paid by their funder or research institute;
- Taylor and Francis – the existing agreement has been renewed, combining access to the Taylor and Francis platform with the possibility of publishing open access free of charge. Austrian researchers will have the chance to have their Article Publication Charge (APC) paid by their funder or research institute.

All details are listed on the Austrian Academic Library Consortium website.<sup>21</sup>

There are also two agreements concluded outside of the Austrian Academic Library Consortium: with Frontiers (2018) and Elsevier (2020). The latter is a one-year pilot agreement arranged as part of the AT2OA project. This enables corresponding authors affiliated with the participating member institutions to choose to publish open access at no additional cost in more than 1,700 Elsevier hybrid journals, and at a 15% APC discount in 300 Elsevier gold open access journals.<sup>22</sup>

The Austrian Science Fund (FWF), Austria's central funding organisation for basic research, is a member of cOAlition S and takes an active role in promoting open access. FWF is also engaged in close collaboration with Austrian libraries to negotiate agreements with publishers.<sup>23</sup>

The open access agreement with Springer that was renewed in 2019 comprises 34 Austrian research institutions and the FWF Austrian Science Fund.<sup>24</sup> It enables researchers and students in Austria to publish peer-reviewed research articles in open access in more than 1,900 Springer journals without additional fees.

## Finland

Negotiations in Finland<sup>25</sup> are conducted by FinELib, a consortium of Finnish universities, universities of applied sciences, research institutions and public libraries, operating at the National Library of Finland. The consortium has set up a webpage for posting all the latest information on ongoing negotiations and agreements as well as general open access news, principles and goals.<sup>26</sup> The objectives for negotiations include achieving a quick transition towards open access, without any additional costs for the scientific community, keeping costs under control, offsetting publication costs against subscription costs and defining licencing principles. The specific aim is that publishers commit to offering Creative Commons licences (CC-BY 4.0).<sup>27</sup>

The most recent agreements (2020) have been reached with IEEE/IET Electronic Library, SAGE, Wiley and Taylor & Francis.<sup>28</sup> The one-year agreement with IEEE covers online use of the IEL-database, ensures access to journals, conference proceedings and standards mainly in the fields of electrical engineering and computer science and includes a small number of free OA-tokens to be used in IEEE's fully open access

journals.<sup>29</sup> Both the SAGE and Wiley agreements were concluded for a period of three years (2020–2022), cover open access to journal collections as well as open access publishing and are publicly available.<sup>30</sup>

According to FinELib, the Wiley agreement will result in full transition to open access: 'In year 2020 approximately 53% of articles published by the researchers of the subscribing institutions can be published Open Access and in years 2021-2022 the coverage is approximately 100% of articles'.<sup>31</sup> The deal covers 22 member organisations of the FinELib consortium. The SAGE agreement will enable corresponding authors affiliated with participating institutions to publish an unlimited number of articles open access in hybrid journals and with 20% discount in SAGE's full open access journals.<sup>32</sup>

The Taylor & Francis agreement covers access to the journals in the Science & Technology and/or Social Science & Humanities collections according to the choice of the subscribers. Organisations subscribing to the same collection also have access to the Taylor & Francis core journal subscriptions of these organisations. It also contains the right for the subscribers to publish 442 articles open access during each year of the agreement.<sup>33</sup>

The long-term contract with Elsevier, which expires in December 2020, provides for a 2.25% annual price increase and a 50% discount on article processing charges in over 1,500 Elsevier hybrid journals and over 100 full open access journals. The content and value of the contract are publicly available.<sup>34</sup>

A list of all agreements, including ones that were concluded before 2020, is available on the website.<sup>35</sup>

## Germany

In Germany, the German Rectors' Conference was tasked by the Alliance of German Science Organisations to establish Projekt DEAL, responsible for negotiating transformative agreements with the three largest commercial publishers of scholarly journals: John Wiley & Sons, Springer Nature, and Elsevier. The objectives of negotiations include: providing immediate open access publication of all new articles by authors from German institutions, securing permanent full-text access to the publisher's complete journal portfolio and establishing fair and reasonable pricing for the publisher's services.<sup>36</sup>

The first agreement was concluded in 2019 with Wiley, the third largest publisher of German research in terms of the number of articles published annually by scholars and scientists affiliated with German institutions. It covers the period 2019–2021, with an optional renewal for 2022. Participating institutions receive perpetual access to electronic journals published by Wiley and the option of purchasing printed journals at a discounted price (for institutions that had such an option in their previous Wiley contract). Publishing open access include two components: a 'hybrid', or transformative, component (publishing and reading in subscription journals) secures a PAR (Publish and Read) fee of EUR 2,750 that will remain unchanged over the course of the



three-year agreement, a fully open access component introduces an overall discount of 20% on the list price of APCs (article processing charges) of fully open access journals.

The agreement with Springer Nature covers the period 2020–2022 with the option to renew for one further year. It offers participating institutions access to the publisher's journal portfolio and enables open access publishing of articles in Springer Nature journals.<sup>37</sup> 'All of the key benchmarks achieved in the DEAL-Wiley agreement are replicated in the Springer Nature agreement, including the PAR fee, again, set at EUR 2,750 which marks cost neutrality with respect to previous subscription spending' – as stated in the case study included in the report.<sup>38</sup>

In both agreements, the default licence for open access publications is CC-BY; however, some journals may offer other Creative Commons licences.

An agreement with Elsevier has not been reached, with formal negotiations suspended in July 2018. Subsequently, nearly 200 universities and research institutions across Germany have cancelled their agreements with Elsevier, as contracts came up for renewal at the end of 2018 and 2019. Many scientists have resigned from their editorial activities for Elsevier in order to support the negotiations.<sup>39</sup>

Projekt DEAL has not been mandated to negotiate further agreements with other publishers. A more detailed analysis of transformative agreements in Germany can be found in the case studies chapter.

## Hungary

Negotiations with publishers are coordinated at the national level by the Hungarian Electronic Information Service National Programme (EISZ)<sup>40</sup> operating at the Library and Information Centre of the Hungarian Academy of Sciences. In December 2018, the EISZ Programme Board prepared the declaration that defined principles for transitional open access agreements. The aim is to 'facilitate a full transition to Open Access in a sustainable, cost-neutral way', as declared in the preamble.<sup>41</sup> Six principles have been formulated to encapsulate this vision. Among them are the requirements for constraining costs of the current subscription model in order to lead to a purely publication-based open access model, publishing open access articles without further delay and without any additional costs, using a CC-BY licence, following ESAC workflow recommendations, making the agreements transparent and publicly available and granting perpetual access to content published in subscription journals. The programme board mandated EISZ to sign national-level agreements for journal collections only in cases where the above principles are met and become apparent in the licences. The rationale for developing this strategy has been extensively described in the article 'The Time of Big Deals Is Over: on the Importance of the Transition to Open Access'.<sup>42</sup>

Recently, agreements with Cambridge University Press, IOP Publishing and the American Chemical Society have been signed. The new Read and Publish agreement with Cambridge University Press covers the APCs for affiliated corresponding authors

from 17 participating institutions who wish to publish in the hybrid journals of those collections that are subscribed to by the consortium's member institutions. The articles are published under CC-BY, CC-BY-NC-SA and CC-BY-NC-ND licences.<sup>43</sup> The agreement with IOP Publishing enables corresponding authors affiliated with EISZ consortium member institutions to publish in IOPP journals under an open licence (CC-BY) with no barriers and no APCs for qualifying articles at the point of publication as well as have reading access to 70 IOPP journals.<sup>44</sup> A transformative open access pilot agreement with the American Chemical Society (ACS) enables corresponding authors affiliated at the seven consortium member institutions to publish under an open access licence in ACS journals (publishing costs are covered by the 'read and publish' arrangement) and benefit from full-text access to the ACS journal portfolio and Chemical & Engineering News.<sup>45</sup>

A new three-year agreement with Elsevier was signed on 31 October 2019 after negotiations and signing a memorandum of understanding earlier in June 2019.<sup>46</sup> According to the agreement conditions, researchers affiliated to EISZ consortium member institutions across Hungary have access to 16 million publications from over 2,500 journals published by Elsevier and its society partners on ScienceDirect, and are eligible to publish their research open access without researchers having to pay an APC. All open access articles will be published with a choice of two reuse licences: CC-BY or CC-BY-NC-ND.<sup>47</sup>

More specific information on open access agreements are available on the EISZ website.<sup>48</sup>

## Netherlands

Negotiations in the Netherlands<sup>49</sup> carried out by the Association of Universities in the Netherlands (VSNU) and UKB (the consortium of university libraries and the National Library of the Netherlands) are one key element of the five-pillars-strategy developed by the VSNU.<sup>50</sup> The aim is to transform former subscription contracts to open access agreements at no extra cost. Agreements with the following publishers came into force in 2020:

- IOP Publishing – covers publishing open access (with a CC-BY licence) without any costs in 42 hybrid journals by this publisher;
- Walter de Gruyter – covers publishing open access, with a CC-BY licence, without any costs in 305 hybrid journals and with a 20% discount in the full open access journals;
- Brill – covers publishing open access without any costs in a total of 317 hybrid and full open access journals;
- SAGE – enables publishing open access without any costs in hybrid journals and offers a 20% discount in the full open access journals;
- Elsevier – a previous agreement with Elsevier expired at the end of 2018. Due to ongoing negotiations, this agreement was extended for six months until the end of June 2019. A new agreement covers the period 2020–2024 and assumes no publishing costs for Dutch authors in more than 2200 'hybrid' and full open access journals; authors can opt for a CC-BY licence.



Also, in May 2020, Elsevier and Dutch research institutions (The Association of Universities in the Netherlands, The Netherlands Federation of University Medical Centres, The Dutch Research Council) formed a national open science partnership. It will last until December 2024 and include ‘publishing and reading services as well as the joint development of new open science services for disseminating and evaluating knowledge’.<sup>51</sup>

An overview of all current agreements is presented on the Dutch website providing information for academics about the advantages of open access for publicly financed research.<sup>52</sup>

Transformative agreements have accelerated the growth in the number of open access articles in recent years. In 2019, a milestone was reached as more than 10,000 open access articles were made available through transformative agreements.<sup>53</sup>

The Netherlands Organisation for Scientific Research (NWO) is part of cOAlition S. NWO is not participating in the negotiations with publishers and does not contribute financially but set rules for funding which are compliant with Plan S. In the statement issued in January 2019, UKB emphasised the importance of Plan S as ‘a vehicle to accelerate open access’ and an important point of reference for concluding transformative agreements: ‘We expect that 70% of our peer-reviewed articles will be open access in the short term by continuing our negotiations of transformative license deals. In our future publishers’ deals, we will strive to meet Plan S requirements for transformative agreements’.<sup>54</sup>

## Norway

In Norway, national negotiations with scientific publishers are carried out by Unit – The Norwegian Directorate of ICT and Joint Services in Higher Education and Research. Negotiations are in line with ‘National goals and guidelines for open access to research articles’ launched in 2017. The goal is to make all publicly funded Norwegian research articles openly available by 2024.

The principles for the negotiations are as follows:

- articles with corresponding authors from Norway shall be openly available at the time of publishing;
- publishing open access shall not increase total costs;
- licence agreements, costs and business models must be fully transparent;
- perpetual access to content published in subscription journals must be granted;
- agreements should demonstrate a move towards models where the costs are related to the volume of Norwegian institutions article publishing output.<sup>55</sup>

In 2020, agreements with the following publishers came into force:

- Springer Nature – three-year agreement (2020–2022) enables authors affiliated with participating institutions to publish their articles open access at no cost in hybrid journals and have full access to all Springer subscription journal content;<sup>56</sup>
- Taylor & Francis – three-year agreement (2020–2022) enables corresponding

authors based at participating institutions to publish open access in Taylor & Francis and Routledge Open Select (hybrid) journals at no cost to the author. Some journals require an additional APC if an article is to be published open access;<sup>57</sup>

- SAGE – three-year agreement (2020–2022) enables corresponding authors to publish articles open access free of charge in subscription hybrid journals and to receive a 20% discount on the prevailing APC in gold open access journals;<sup>58</sup>
- Cambridge University Press – three-year agreement (2020–2022) enables corresponding authors to publish open access in the publisher’s hybrid and pure open access journals. A few society journals are not included in the agreement;
- Institute of Physics – one-year agreement (2020). Authors based at participating institutions can publish their articles open access at a discounted APC;<sup>59</sup>
- De Gruyter – one-year agreement (2020) allows researchers based at NTNU and UiT to publish a number of articles open access in De Gruyter subscription journals at no extra cost;<sup>60</sup>
- Frontiers – three-year agreement (2020–2022) enables corresponding authors based at participating institutions to publish in Frontiers titles with a 10% discount;<sup>61</sup>
- Oxford University Press – three-year agreement (2020–2022) enables corresponding authors to publish open access free of charge in the publisher’s hybrid journals. Pure open access journals are not included in the agreement.<sup>62</sup>

The pilot agreement with Elsevier ends in December 2020. It enables reading access for Norwegian researchers and open access publishing at no additional cost. Not all journals are included in the agreement. Open access publishing under this agreement complies with the Norwegian Government’s national goals and guidelines for open access to research articles, as stated on the Elsevier website.<sup>63</sup> The agreement with Wiley is also currently in place until December 2021. This allows corresponding authors from a Norwegian institution participating in the Unit agreement to publish open access in any of Wiley’s fully open access journals or subscription journals that offer OnlineOpen (hybrid journals) at no cost to the author. As stated on the Wiley website, open access publishing under this agreement complies with the Norwegian Government’s national goals and guidelines for open access to research articles and the European joint initiative OA2020.<sup>64</sup>

All agreements are listed on the Openaccess.no website.<sup>65</sup> The case studies chapter provides a more detailed analysis of transformative agreements in Norway.

## Sweden

In Sweden, negotiations concerning agreements with publishers are carried out by Bibsam, the Swedish library consortium, administered by the National Library of Sweden, on behalf of Swedish universities, university colleges, governmental agencies and research institutes. The main objectives in any negotiation are as follows:

- immediate open access to all articles published by the publisher for researchers affiliated to participating organisations (both in hybrid and fully open access journals);

- continued reading access for participating organisations to all journals published by the publisher;
- sustainable price model that enables a transition to open access and allows for the redirection of revenue streams.

Additional information on Swedish open access goals and guidelines is available on the National Library of Sweden website.<sup>66</sup>

In 2020, agreements with the following major publishers came into force:

- Elsevier – three-year (2020–2022) pilot agreement that enables reading access for Swedish researchers and open access publishing at no additional cost to the author in applicable Elsevier journals. Two key elements of the publishing conditions cover: (1) unlimited open access publishing in Elsevier’s hybrid and fully gold titles, society journals, and fully gold Cell Press and The Lancet titles; and (2) a pilot centred around open access publishing of 100 articles per year in Cell Press hybrid journals, which covers the entire consortium’s publication output in these journals. ‘The publication output within the agreement is expected to be approximately 3,800 articles per year’ – as stated in a Bibsam press release.<sup>67</sup> This is the largest agreement in the Bibsam consortium, and accounted for 35% of the turnover in 2017;
- Wiley – three-year (2020–2022) agreement gives authors affiliated with participating Swedish Bibsam institutions the right to publish in Wiley’s fully gold open access or Wiley’s hybrid OnlineOpen journals at no further charge to the author. Publishing is limited and depends on the availability of sufficient funds in eligible Bibsam institutions’ Wiley Open Access Accounts;<sup>68</sup>
- SAGE – three-year (2020–2022) agreement enables corresponding authors to publish articles open access free of charge in subscription hybrid journals and to receive a 20% discount on the prevailing APC in gold open access journals;
- American Chemical Society – under the three-year agreement, authors affiliated with participating institutions will receive full article publishing charge support to publish journal articles under an open access licence.<sup>69</sup>

Among the agreements concluded prior to 2020 are two agreements with Springer: one is a read and publish agreement covering Springer hybrid journals (Springer Compact), the other covers publications in Springer Nature’s fully open access journals.<sup>70</sup> Both cover a three-year period (2019–2021) and enable corresponding authors affiliated with participating institutions to publish their articles open access at no cost to them.

The case studies chapter provides a more detailed analysis of transformative agreements in Sweden.

# Switzerland

Negotiations for revising the agreements with publishers are part of implementing Switzerland's National Open Access Strategy adopted by swissuniversities (the Rectors' Conference of the Swiss Universities).<sup>71</sup> Responsible for carrying out negotiations on behalf of swissuniversities with the three biggest publishing houses is a mandated negotiation team which includes representatives of rectors, researchers, library directors and staff members of the Consortium of Swiss Academic Libraries. All other national negotiations for open access agreements are conducted by the Consortium of Swiss Academic Libraries. The aim is to transition to open access in a cost-neutral way, through so-called Read and Publish agreements, which guarantee access to a publisher's licensed journals and cover the costs for open access publication. All scientific publications that come from public funding should be available in open access by 2024 at the latest. As stated on the website 'swissuniversities publicised its negotiation strategy and objectives and the make-up of its negotiating team at the beginning of 2018. Since 2020, the Swiss National Science Foundation has also been part of the renewed negotiating team.'<sup>72</sup>

The negotiating strategy is outlined in a factsheet available on the swissuniversities website.<sup>73</sup> The principles for negotiations are as follows:

- licences and open access are closely linked;
- no open access, no price increases;
- transparency of the licence contracts;
- guaranteeing long-term access to content that is already licensed;
- usage data should contain open access;
- cost neutrality;
- minimising the administrative burden.

Existing consortium agreements with Elsevier, Springer Nature and Wiley expired at the end of 2019. At that point, there were no Read and Publish contracts for 2020 ready to be signed, and relationships with publishers were described in the press release issued on December 17, 2019.<sup>74</sup>

After signing a memorandum of understanding, a four-year agreement with Elsevier was reached in 2020. It covers publishing open access across the majority of Elsevier's gold and hybrid journals, scaling up to 100% by 2023, which is considered a milestone with regard to the national open access strategy of swissuniversities, which aims to achieve 100% open access by 2024.

Furthermore, a Read and Publish agreement with Springer Nature starting on 1 July 2020 was signed by the consortium. The compact agreement covers publishing in most journals hosted on SpringerLink and is another big step towards reaching the declared aim. The negotiations with Wiley are progressing following the declared intentions provided in the memorandum of understanding.<sup>75</sup>

# United Kingdom

Transformative agreements in the United Kingdom are negotiated by Jisc Collections. After developing its first transformative agreement with Springer Nature, Jisc Collections started negotiations with all major publishers to ensure further agreements. All of these must meet the following requirements established by UK academic institutions and sector agencies, working alongside Jisc Collections:

- agreements must reduce and constrain costs;
- agreements must be transitional;
- agreements must aid compliance with funder mandates;
- agreements must be transparent;
- OA content must be discoverable, and agreements must support improvements in service and workflow for authors and administrators.<sup>76</sup>

As stated on the Jisc Collections website, the requirements (revised in June 2020) apply to agreements negotiated in 2020 and are aligned with the LIBER principles for publisher negotiations, the principles of Plan S, and the objectives of the OA2020 global initiative to accelerate the transition to open access.<sup>77</sup>

In 2020, agreements with the following major publishers came into force:

- Wiley – four-year Read and Publish agreement (2020–2023) enables authors affiliated with UK institutions participating in Wiley’s Jisc agreement to publish in any of Wiley’s fully gold open access or Wiley’s hybrid (subscription) OnlineOpen journals with no further open access costs to the author (subject to the availability of sufficient funds and approval from eligible institutions’ Wiley Open Access Account holders);<sup>78</sup>
- SAGE (2020-2022) – covers both access and publishing open access free of charge in subscription journals in the Premier, IMechE and the RSM journal collections, which offer hybrid open access publishing and a 20% discount on the APC for gold open access journals. It applies to all authors affiliated with UK institutions who are members of the consortium;<sup>79</sup>
- Cambridge University Press – a three-year deal covers both access and publishing open access;<sup>80</sup>
- ACM OPEN Journals Agreement (2020–2022) – covers access to the ACM Digital Library and publishing open access (with the option of a CC-BY licence) without additional fees for corresponding authors affiliated with participating institutions. The agreement is compliant with all known funder mandates, including ESAC Guidelines and Plan S;<sup>81</sup>
- IOP Publishing – a four-year (2020–2023) publish and read agreement enables open access publishing for affiliated corresponding authors in 44 subscription journals, without barriers or charges to authors, and articles will be published under a CC-BY licence. Reading access covers 75 of IOPP’s journals. As described on the Jisc website: ‘The agreement builds on one of the UK’s first OA agreements, established in 2014. It will drive up OA publishing from participating institutions in 44 IOPP subscription journals from 33% in 2018 aiming for 100% open access in year one, to the benefit of researchers, students and the global scientific community’;<sup>82</sup>



- Karger – three-year (2020–2022) Read and Publish agreement offers the rights to access content, along with rights to publish articles immediately open access under Creative Commons licences in the publisher’s journals;<sup>83</sup>
- Rockefeller University Press (2020–2022) Read and Publish pilot agreement covering 100% of article processing charges for corresponding authors from participating UK institutions. Articles in three hybrid journals will be published under a CC-BY licence and directly deposited in PubMed Central (PMC). This was the first open access agreement with a US-based university press.<sup>84</sup>

There are also read and publish two-year pilot agreements with UK-based society publishers (2020–2021):

- Microbiology Society;
- Portland Press;
- IWA Publishing;
- Company of Biologists;
- European Respiratory Journal.

The agreements will result in 100% of UK scholarly output being published open access in the societies’ hybrid journals, with some including fully OA titles in the fixed-price deals.<sup>85</sup>

Another transformative agreement with a UK-based society publisher was announced in May 2020. This agreement with the Royal Society of Chemistry, concluded for a two-year period (2020–2021), provides UK institutions with access to read, and covers open access publication in hybrid journals and in fully open access journals, as described in Option 4: upgrade to unlimited open access publishing.<sup>86</sup>

Also, in May 2020, the agreement with Brill was announced (Bridging Agreement). It covers reading access to the full Brill Journal Collection, as well as unlimited open access publishing in all Brill journals for 2020 for authors affiliated with participating institutions. Articles which have already been published in 2020 will be made available in open access retroactively.<sup>87</sup>

As stated above, the agreement with Springer was concluded earlier. The three-year agreement (2019–2021) enables authors affiliated with participating institutions to publish open access at no cost and retain copyright as most open access articles are published under a CC-BY licence.<sup>88</sup> The agreement meets the goals of Plan S and – as described on the Jisc website – ‘anticipates a further increase in the percentage of UK research being published open access in the eligible journals from 74% in 2018 to closer to 100% by 2020’.<sup>89</sup> Details concerning the agreements are available on the Jisc websites.<sup>90</sup>

# United States of America

In the United States of America, negotiations with publishers are carried out separately by universities, although the increasing need for developing and aligning negotiation strategies has been noticed and addressed. In May 2019, the University of California (UC) published a toolkit ‘Negotiating with scholarly journal publishers’. This was based on the experiences of negotiations with Elsevier and aimed to serve as a ‘North American framework for creating transformative change in the scholarly publishing industry’.<sup>91</sup> Although the agreement with Elsevier has not been reached, UC developed a negotiating strategy and initiated a nationwide debate about the transition to open access.

A few months later, a similar initiative was launched by the Massachusetts Institute of Technology which released ‘The MIT Framework for Publisher Contracts’. This provided guidance on negotiations as well as goals and core principles clarifying open access conditions.<sup>92</sup> The initiative was endorsed by a number of institutions: universities, libraries, consortia and associations.

In the following month, Carnegie Mellon University announced that it had reached a transformative agreement with Elsevier, ‘the first of its kind between Elsevier and a university in the United States’.<sup>93</sup>

As 2020 began, a number of institutions released information about ongoing negotiations or new agreements. The University of California was planning to reopen negotiations with Elsevier and informed about progress with other publishers (Wiley, Springer Nature<sup>94</sup>) as well as new publishing agreements (Association for Computing Machinery, JMIR Publications, Public Library of Science<sup>95</sup>) and fully implemented UC’s first transformative open access agreement with Cambridge University Press.<sup>96</sup> The University of Idaho Library was renegotiating a contract with Elsevier which resulted in a new, one-year contract under which journal package was reduced.<sup>97</sup>

MIT continued negotiations with Elsevier under the newly adopted MIT Framework for Publisher Contracts. In February 2020, an update on the negotiations was announced - ‘Elsevier has agreed to develop an offer that satisfies our commitment to copyright retention for authors and adherence to MIT’s open access policy. The MIT Libraries have signed a memorandum of agreement that ensures the MIT community will continue to have direct access to Elsevier content through June 2020 to provide ample time for Elsevier to develop a new proposal’.<sup>98</sup> In June 2020, MIT ended negotiations for a contract, because ‘Elsevier was not able to present a proposal that aligned with the principles of the MIT Framework for Publisher Contracts’.<sup>99</sup>

The result of negotiations between Elsevier and California State University Libraries (CSU) was announced in March, 2020; the CSU has finalised a two-year ScienceDirect contract with Elsevier and agreed to ‘a Read and Publish-Plus agreement with substantial savings, additional content, and a vision that moves the CSU Libraries and Elsevier towards a new model of academic publishing’.<sup>100</sup> In April 2020, the State University of New York Libraries Consortium (SUNY Libraries Consortium) announced

that it will not renew its deal with Elsevier. The decision followed negotiations that lasted over 18 months and were informed by the analysis of the journal marketplace as well as internal analysis. As said in the statement: 'Depending on local selections, annual savings to SUNY as a whole are anticipated to be in the \$5–\$7 million (50–70%) range. Access to the ScienceDirect 'big deal' terminated on 1 April 2020'.<sup>101</sup>

At the same time, the decision to cancel the bundled journal subscription deal was announced by the University of North Carolina at Chapel Hill (the subscription expired on 30 April 2020) and Iowa State University. Both institutions subscribed to a smaller set of titles and undertook some steps to provide alternative access to Elsevier content (i.e. Interlibrary Loan).<sup>102</sup>



# Legal Aspects of Transformative Agreements

The analysis below was performed using the agreements gathered in the Transformative Agreement Registry administered by the Efficiency and Standards for Article Charges initiative.<sup>103</sup> Hyperlinks to the registry entries of all analysed agreements are provided in the Appendix.

From the technical legal standpoint, the agreements analysed in this study are a result of amending the traditional subscription contracts for access to closed journals with terms that allow eligible authors to have their papers placed in open access without having to pay for this individually (such costs being covered under the terms of a transformative agreement). Thus, the agreements analysed consist of three types of contractual terms: (1) terms related to open access; (2) terms related to access to closed journals; and (3) terms related to more generic issues such as choice of law, forum, etc.

Below, we present the result of the analysis of all three types of contractual terms. Therefore, only the first part of this analysis addresses the ‘transformative’ aspect of the agreements registered at ESAC, while the rest relate to more general issues of licencing contracts with publishers.

## Terms related to open access

### Identification of eligible authors

The benefits of transformative agreements can only be enjoyed by eligible authors, and they are usually identified by their affiliation with institutions that are party to the agreement or in another way linked to that party (e.g. a member of a consortium, operating in a given territory). Exceptionally, one of the analysed agreements provides that affiliates in some institutions have the opportunity to publish for free, and affiliates in others receive a discount. The agreements do not oblige the publishers to publish any submitted article. As a consequence, the agreements are neutral towards the publisher’s freedom and towards the adopted procedure for the review of papers.

The scope of eligible authors is often indirectly affected as transformative agreements usually contain a list of journals in which articles may be published under the agreed terms. Some agreements allow the publisher to amend the list, providing safeguards in the event of a reduction in the number of available journals.

## Terms between publishers and authors

Authors are not party to transformative agreements and their rights and obligations vis-a-vis the publisher are specified in their respective publishing agreements. A transformative agreement may not reach its intended goals if it limits itself to the issue of the publishing fee only. Unfortunately, most analysed transformative agreements do not specify any additional rules for the publishing agreements. Only one of the analysed agreements contains an annex setting out the essential provisions of the publishing agreement, and a link to the publishing agreement is provided in another. However, most agreements contain provisions on licences under which articles can be published by eligible authors (only the following licences are included in the analysed agreements: CC-BY, CC-BY-NC, CC-BY-NC-ND, CC-BY-NC-SA). Other agreements assume that the licence depends on the journal to which the article was submitted. It is often stipulated that the publisher may change the available licences. As a result, the choice of the licence rarely belongs to the author. Nevertheless, some transformative agreements do provide for interesting safeguards, for example:

- the right of the publisher to require a CC-BY-NC licence for a maximum of 2% of journals;
- the right for the author to subsequently change the licence from CC-BY-NC to CC-BY;
- the right of termination of the agreement by the scientific institution if more than 2% of the journals change the licence;
- the right to choose a CC0 licence for data.

## Workflow

Under the analysed agreements, authors opt-in for open access under the procedure operated by the publisher and only some transformative agreements require that it has to be accepted by the other party or allows the other party to cooperate in constructing it. Several agreements contain provisions on informing authors entitled to publish in open access about this possibility. There are two types of such provisions. Firstly, according to some agreements, the publisher should place certain information and links on their website. Secondly, the publishers in several cases undertook to provide helpdesks and information or promotional materials.

Almost every agreement specifies a procedure for the verification of the author's rights, although sometimes it is not clear whether verification is mandatory or optional. The scientific institution to which the publisher refers usually has a few days to confirm or deny that the author is entitled to publish. If they do not respond, the publisher proceeds under the assumption of a positive answer. In principle, each agreement requires the author to provide data that allows the publisher to verify the author's eligibility. Some of the agreements indicate that the scientific institution is to specify

how to identify the author. Identification is sometimes based on the internet domain of the email address (a list of such domains is usually included in the schedules). Other identification methods used are fixed identifiers or IP addresses, which are usually listed as available in the future. Exceptionally, authors are required to provide information such as the reference to a specific transformation agreement or an indication of the source of funding for the research.

## Publishing fees

In the analysed contracts, publishing fees are sometimes amalgamated with subscription fees in a bulk-sum payment. Within this fee, it is possible to publish a certain number of articles or articles whose publication cost does not exceed the fee.

According to most contracts, unused funds are forfeited. However, there are contracts in which funds are transferred to subsequent years and are only lost at the end of the contract and contracts in which funds are already lost at the end of a given year. The exception is a few contracts where a minimum number of articles is specified. If this is not achieved, the publisher shall reimburse the difference between the fees for the published articles and the costs of publication of that minimum number.

The exhaustion of a limit of funds or articles makes publication possible only for an additional fee. Several contracts allow for publication free of charge for a certain period of time after the end of the contract. This is based on the assumption that another contract will be concluded to cover the costs of publishing these articles. If this does not happen, the scientific institution has to pay these fees. Agreements often include clauses obliging publishers to inform when the number of publications allowed is due to be exhausted.

The issue of the distribution of publications between individual institutions bound by a transformation agreement with a publisher is usually ignored. Where provisions concerning this issue exist, there is one pool of publications for all institutions and the principle that publications are accepted on a first come, first served basis.

## Transfer of closed papers to open access

Agreements vary widely as to whether articles published outside open access can be transferred to open access. There are several solutions:

- total exclusion of this possibility;
- allowing such a possibility for a certain period of time or without an indication of a deadline;
- this possibility is allowed if the publisher has neglected their obligations and the author has provided correct identification data.

# Terms related to access to closed journals

## Persons authorised to access licensed publications

In all agreements, the persons entitled to access publications are broadly defined. In principle, they are always students, employees, and other persons affiliated at the institution(s) that are party to the agreement or that are the beneficiaries under the agreement. Also, in principle, each agreement contains a provision allowing for the use of resources by persons physically located in the premises of the scientific institution. Some agreements contain provisions that expressly exclude certain persons from the group of authorised users or additional conditions that are required for such persons to have access to the content provided (such as limited access for independent contractors). Only a few agreements contain provisions for the absence of a limit on the number of simultaneous users of the publisher's electronic system. However, none of the contracts contain provisions to limit this number in any way.

## Licensed publications

All agreements assume that the journals listed in the annexes to the agreement are made available to users in electronic form. In any case, the right of access covers the issues published during the term of the agreement in question and, as a rule, articles also issued previously. It is assumed in the agreements that access to previous issues only applies to those that have already been published in electronic form.

The differences between the contracts mainly concern the consequences of the change in the number and scope of publications made available. Only some agreements contain provisions dealing with such situations.

In addition, there are provisions specifying the effects of increasing or decreasing the range of available publications above a certain number, generally defined as a percentage. In the case of an increase in this quantity, there is a possibility to demand an additional fee, and in the case of a reduction, to reduce the fee or terminate the contract. It is sometimes unclear whether the right to reduce the fee occurs with every limitation of available content or only if a certain level is exceeded.

Separately, the provisions adopted in the event of the need to remove content due to its illegality should be mentioned. Again, any claims are only provided for in the event of a reduction exceeding a certain amount, and below this amount scientific institutions are generally not entitled to any remuneration. The provisions applied in case of the transfer of rights to published content to other entities can also be found.

Due to the reduction in the scope of available publications, it is generally accepted that the fee may be reduced, but it is typical that the amount of this reduction is generally and unclearly determined or left to the publisher. Alternatively, instead of reducing the amount of the agreed fee, other solutions are adopted, in particular the provision by

the publisher of additional content instead of that which will no longer be available. Finally, some contracts provide only for the possibility of termination in the event of a significant reduction in the range of available content.

## Perpetual access

A frequently accepted solution is to oblige the publisher to maintain access to the publications covered with the agreement after its termination. In any case, there is a reservation that the use of these publications is allowed under the terms and conditions of the contract. The scope of content to be accessed after the termination of a contract is sometimes limited in comparison to its duration. Some contracts provide for an additional fee for access after the termination of the contract.

## User rights

Each agreement assumes that users have the right to use publications for scientific and educational purposes. Generally, the provisions of the agreements can be regarded as being in line with the common concept of exceptions and limitations codified in copyright law. Only exceptionally do the agreements contain regulations that restrict users' rights very strictly. The differences between the contracts concern the commercial use of the content provided. There are various provisions in this respect. There are also provisions containing definitions to deal with doubtful situations.

Separate mention should be made of the provisions concerning machine analysis of the content made available by the publisher. The agreements contain the following solutions in this respect:

- general approval of text and data mining;
- making such a possibility dependent on signing an additional agreement attached to the transformation agreement;
- approval of text and data mining only through the service made available by the publisher;
- mentioning that this will be possible only in the future.

In principle, each agreement also contains the obligations of the scientific institution in case of violation of the terms and conditions of use of the content by users. Since users are, in principle, not bound to the publisher by any agreement, the scientific institution can be held liable for any breach they have committed and its exclusion requires demonstration that those obligations have been met. The contracts mention: prevention of the infringement, removal of its effects, cooperation in clarifying the circumstances of the infringement and notifying the publisher when the infringement occurs. No contract contains all these obligations, but it must be borne in mind that they may arise either indirectly from other provisions of the contract or directly from law.

# Terms related to generic contractual issues

There is a long list of generic contractual issues that have to be taken into consideration in a transformative agreement, as is the case with every complex agreement negotiated in an international setting and involving many different entities, products, and services. Below we single out some selected ones.

## Contracting parties

Every analysed contract was concluded between a publisher and an intermediary institution acting on behalf of other scientific institutions and sometimes also on its own behalf. Sometimes a list of the parties bound by the contract is specified in an attachment to the contract. The possibility to add institutions is often provided by a unilateral decision of all parties. In some contracts, the publisher's side also consists of several entities. The list of parties may be semi-open, as the contracts often include as parties 'affiliates' of the contracting parties. Depending on the exact wording of the relevant provisions of the agreement, there may be different issues related to the identification of parties to the contract and, as a result, the attribution of contractual responsibilities and liabilities to specific entities. The clearer the contract is on this matter, the better. Vagueness in this area may result in a diluted responsibility or in a situation where one party bears liability for someone else's conduct.

## Service level agreement

Notwithstanding the provisions on force majeure, it is common for contracts to provide for breaks in access to the website through which the publisher makes content available to users. Only part of such provisions provides for financial compensation to the scientific institution for the lack of access.

Given that the use of the publications depends on access to the electronic system, while the maintenance of such system may require its temporary shutdown, these issues should be addressed in the contract.

Assuming that the amount of time required for the normal maintenance of the IT system is known in advance, it is possible to indicate in the contract for how long it will not be available. It is also advisable to introduce an obligation for the publisher to inform in advance about planned shutdowns.

Since the lack of access to a publisher's resources makes it impossible to use them, a scientific institution should have the right to demand a fee reduction if the planned shutdown time is exceeded, regardless of other claims allowed in case of improper performance of the contract.



# Case Studies

## Germany

Authors: Ralf Schimmer, Colleen Campbell, Max Planck Digital Library

### Context, motivation and rationale

As signatories<sup>104</sup> of the Berlin Declaration on Open Access of 2003<sup>105</sup> and participants in the global Open Access 2020 Initiative<sup>106</sup>, the German research community, as represented by the German Rectors' Conference (HRK)<sup>107</sup> and the other members of the Alliance of German Science Organisations<sup>108</sup> have adopted a strategy of transformative agreements<sup>109</sup> for the three largest commercial publishers of scholarly journals: John Wiley & Sons, Springer Nature, and Elsevier.

The negotiation of transformative agreements was selected as a priority action by the working group of the 'Digital Information' Initiative<sup>110</sup>, launched in 2008 by the Alliance of Science Organisations in Germany, and falls within the working group's strategic field of action dedicated to the Scientific Publishing System.

The scientific publication system continues to expand in terms of volume and is characterised by a multiplicity of (also new) players with different interests. The primary objective to be pursued in this area is to exhaust the potential of digital publishing. This is achieved by ensuring open access to scientific content, exploiting the potential of the digital options and organising publishing as a science-friendly service market on a sustainable basis. Derived objectives include establishing simple, comprehensive access to scientific information to support digital teaching and education, increasing the visibility of science from Germany, e.g. by achieving a high proportion of open access, and influencing global publishing by means of national solutions serving as examples, e.g. national master agreements for licences, services and business processes.

The transformation of publishing is being conducted at an organisational and economic level as well as a technological level.

The working group specifically defined establishing a stronger link between open access and licencing with scholarly publishers as a central priority for their work, aiming to establish standards for transformative and open access framework agreements, specifically through nationwide agreements with the major publishing houses. This priority action also directly responds to two other key priority issues identified by the working group: cost transparency and the need for appropriate tools and processes to be developed at the operational level to efficiently support authors who wish to publish their works open access.

The working group of the 'Digital Information' Initiative has identified additional areas for future conceptual work in the open access transition, including the establishment and support of new open access business models to support the transition of scholarly journals of lesser-funded disciplines, cooperative funding approaches for OA monographs, self-hosting of content and sustainable publication infrastructures, open access repositories and their relationship with institutional research information systems, their potential for open science and alternative supply routes. To support these efforts, a dialogue on a policy level with the Federal Ministry of Education and Research continues during the implementation phase of the open access strategy.

The prioritisation of negotiating transformative agreements with the three largest commercial publishers was predicated by a rational cost/benefit analysis and the potential impact of negotiations in terms of open access publishing and the urgency of cost transparency and control. In order to arrive at an understanding of the overall research profile of Germany and assess the total cost of publication, analyses on the total article output of authors from German institutions were conducted to surface the key data points including:

- share of articles with German corresponding authorship (relevant for negotiations and cost modelling exercises);
- share of articles per publisher;
- share of articles per institution;
- share of articles published in fully open access journals;
- share of articles published open access in 'hybrid' journals.

These data were then analysed and considered in relation to current and projected expenditure:

- current total subscription expenditure per publisher;
- estimated APC spending on articles published in fully open access journals;
- estimated APC spending on articles published open access in 'hybrid' journals;
- estimated cost of publishing all articles with German corresponding authorship based on current APC price points (merely as reference).

From these exercises, it was learned that, individually, these are the three publishers with whom German authors most frequently publish, together constituting a 49% share of new German research articles published annually.



### Germany: Corresponding Authors Journal Output 2014–18

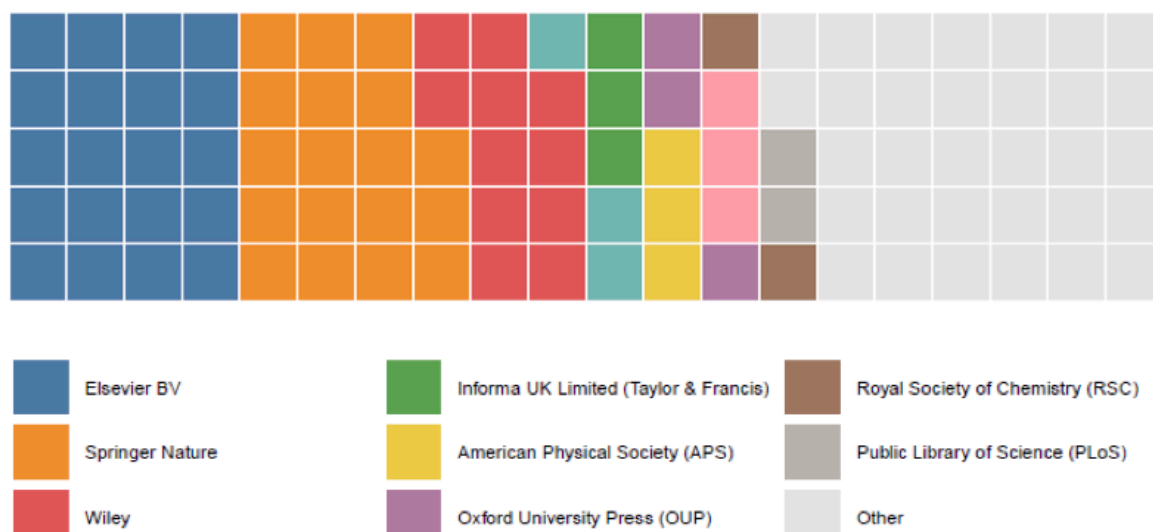


Figure 1. Overview of the volume and publisher share of scholarly journal articles published in 2014–2018 by corresponding authors affiliated with German institutions<sup>111</sup>

Equally significantly, a survey of central institutional electronic resource subscription expenditure, conducted in 2017 in the context of the Projekt DEAL negotiations, revealed that the three largest publishers take a share of nearly two-thirds of the collective subscription budget of German institutions each year, and subscription pricing was reported to consistently be subject to annual increases and non-disclosure clauses.

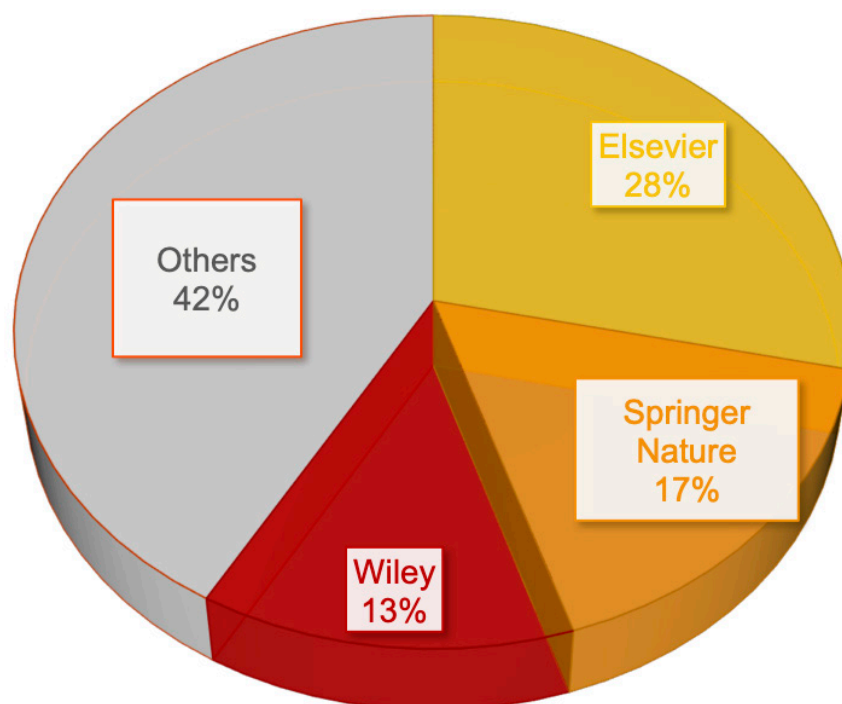


Figure 2. Distribution of subscription spending at German Universities in 2015<sup>112</sup>

Furthermore, cross-checking German research article licence types in Crossref with publisher journal lists, DOAJ and other sources revealed a significant amount of ‘hybrid’ open access publishing was occurring, which signified additional money flowing to these publishers in the form of ‘hybrid’ open access publishing charges paid by authors, estimated to be in the range of 5–10% on top of the relative subscription fees paid by their institutions. Based on the fact-based case presented in the 2015 White Paper<sup>113</sup> by the Max Planck Digital Library, such costs are considered to be unjustified, as the current investment in subscriptions alone is sufficiently ample to enable a transition of scholarly journals to open access.

Data analyses of the publishing trends of German researchers further revealed a steady growth in articles published in fully open access journals, highlighting the need to introduce mechanisms for the central oversight and control of payments of open access publishing charges or APCs.

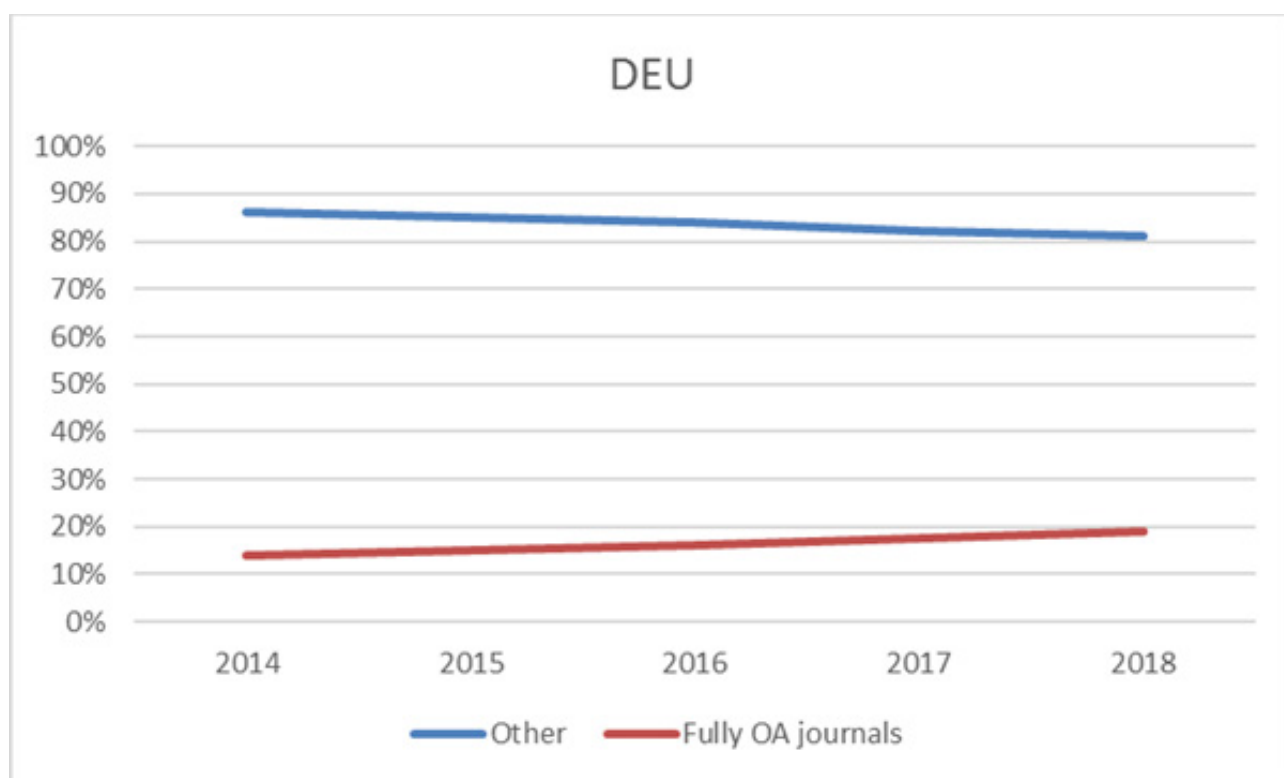


Figure 3. Percentage growth of articles published in fully OA journals in 2014–2018 by corresponding authors affiliated with German institutions<sup>114</sup>

Given the relevance of the journals of the three largest commercial publishers to German authors, as demonstrated by their share of published articles, the importance of the total subscription expenditure, and the clear need to gain oversight and control over the rising costs of publishing articles open access in fully OA and ‘hybrid’ journals, transformative agreements with the three largest commercial publishers represented an opportunity for the highest return on investment in terms of the potential benefits to the negotiations. At the same time, the financial and publishing entity that these three publishers represent in the German context warranted the involvement

of the highest level of research administration in the negotiations and, although Projekt DEAL has not been mandated to negotiate further agreements with other publishers, the negotiation and implementation experience among library and regional consortium leaders in Projekt DEAL will, undoubtedly, pave the way for additional agreements at local, regional and national levels.

## Legal and organisational considerations

As a federal country, publisher agreements have, historically, been negotiated by regional consortia, considering opt-in participation. Lacking a national entity to issue a mandate for transformative agreements, yet recognising the necessity for a unified, all-in approach in order to amass the political and financial leverage necessary to secure the desired results, HRK was tasked by the fellow members of Alliance of German Science Organisations to institute Projekt DEAL<sup>115</sup> to negotiate nationwide transformative ‘publish and read’ agreements on behalf of all German academic institutions<sup>116</sup> including universities, universities of applied sciences, research institutions, state and regional libraries. Comprising well over 700 institutions, the defining criteria for inclusion under the ‘all-in’ DEAL umbrella is an institution’s eligibility to participate in the Alliance and national licences funded by the German Research Foundation; hospitals (with the exception of university hospitals) and private companies of any kind are excluded.

To carry out the project, the Alliance brought together a project group<sup>117</sup> with representatives of the relevant stakeholder groups, including research and higher education administrations, libraries, funders and scientists, assigning appropriate roles and responsibilities within the project support team, steering committee and negotiating team, according to their areas of competence: bibliometric and financial analysis, contract and competition law, procurement, publisher relations, publishing workflows and metadata standards, professional negotiation skills, communications.

### DEAL Project Structure



Figure 4. Projekt DEAL Structure. Internal document

With the support of staff and experts from their own institutions, the project group conducted significant work before the negotiation process was initiated, including data analyses and cost modelling of potential scenarios, risk assessments, obtaining legal clearance, securing formal buy-in of institutions under the Projekt DEAL umbrella, and preparing an exit strategy in case negotiations failed, empowering the negotiating team to step away from the table. Initial steps into different areas of the planning began as early as 2013 and negotiations formally began in 2016, with Elsevier, and in 2017, with Springer Nature and Wiley.

## Negotiation objectives

Building on the expectation of the cost neutrality voiced in the Final Conference Statement of the 14th Berlin Open Access Conference<sup>118</sup> and in line with the ESAC Guidelines for Transformative Agreements<sup>119</sup>, Projekt DEAL negotiations aimed for these specific objectives:

- Enable immediate open access publication of all new research articles by authors from German institutions (CC-BY) to increase visibility and impact among scholars worldwide;
- Secure permanent full-text access to the complete scholarly journal portfolios for future generations;
- Grant all researchers in Germany with equal access to scholarly content and open access publishing opportunities;
- Establish fair and reasonable pricing for such services articulated with a simple and future-oriented cost model based on the number of articles published, i.e. Projekt DEAL's Publish and Read (PAR) model.

The PAR cost model introduced by Projekt DEAL enables former subscription fees to be repurposed to support open access publishing in, otherwise, closed ('hybrid') journals while mitigating the risk of financial disruption for institutions and for the journals in which their researchers choose to publish. Under the PAR model, lump-sums of subscriptions are disaggregated and costs are expressed in PAR fees, attributed based on article output (i.e. payment of one PAR fee per article). Different from an Article Processing Charge or APC, PAR fees are paid centrally by participating institutions for each article published (alleviating authors of the financial and administrative burden of publishing their articles open access). Additionally, all costs are rolled up into a single (PAR) fee covering the open access publishing services rendered and, to a lesser degree, as compensation for the reading access granted to the publisher's content still beyond the paywall. Combining reading and publishing services into a single fee was a strategic choice.

In keeping with the aims of the Projekt DEAL negotiating team, the PAR fee has a specific function of introducing cost transparency in scholarly publishing, in contrast to previous subscription fees which were subject to confidentiality clauses and difficult to compare. As the scholarly publishing system already has clear indicators of cost for open access publishing, i.e. the article processing charges of fully open access publishers such as BioMedCentral or PLoS, introducing a per-article PAR fee constitutes a first step in exposing the (previous) cost of subscriptions and laying those costs

out in a way that they can be compared against the benchmark of fully open access publishing price points.

Of course, in the current phase of transition, reading access is still required and, thus, the PAR fee cannot be compared to an APC as yet, but the per-article PAR fee is also seen as a strategic mechanism for cost control in that PAR fees accorded in DEAL agreements are expected to decrease in subsequent agreements. As open access content in subscription portfolios continues to grow (as more transformative agreements are negotiated and, elsewhere, as authors continue to publish in an uncontrolled 'hybrid' setting), this diminishes the need or justification for a reading component in the costs. In this way, future PAR fees are expected to be reduced to the level of a per-article open access publishing charge; with price transparency, such fees can be easily compared with the fees of other publishers to drive market competition and introduce downward pressure on pricing.

## Negotiation outcomes and current status

### Projekt DEAL – Wiley Agreement<sup>120</sup>

Following an interim agreement as negotiations continued in 2018, Projekt DEAL successfully concluded its first transformative agreement with the publisher John Wiley & Sons in January 2019. The agreement achieved all of the stated objectives and introduced new benchmarks in open access negotiations:

'Hybrid', or Transformative, Component (publishing and reading in subscription journals)

The DEAL agreement secured a PAR fee of EUR 2,750 and shall remain unchanged over the course of the three-year agreement. When multiplied by the expected number of articles published a year (in the order of 9,500 according to publishing trends), the total projected PAR fees are cost-neutral with respect to the previous total subscription expenditure. Former hybrid publishing charges have been reined in and removed from the equation, therefore representing an overall cost reduction for Germany.

While the total amount in PAR fees is on a level with the previous subscription spend, the German research community receives, in return, greater value for money: open access publishing and perpetual reading access to the full Wiley online portfolio extended to all DEAL institutions.

At an operational level, the agreement has instituted certain technical obligations on the part of the publisher that are necessary to support open access publishing workflows, from submission interface customisation, to metadata requirements, to tracking author affiliation, invoicing and reporting.

## Fully Open Access Component

Additionally, the agreement introduces an overall discount of 20% on the list price of the APCs of fully open access journals. The APCs of fully open access journals are managed centrally by the DEAL Operating Entity, MPDL Services GmbH, which handles billing and payments between the publisher and DEAL institutions.

Key elements of the Projekt DEAL–Wiley Agreement and the full text of the contract can be found on the Projekt DEAL website.<sup>121</sup>

## Projekt DEAL – Springer Nature Agreement<sup>122</sup>

On 8 January 2020, Projekt DEAL concluded a transformative agreement with Springer Nature. With more than 13,000 scholarly articles by authors affiliated with German institutions accepted for publication each year in Springer Nature journals, the agreement is currently regarded as the world's largest transformative agreement. All of the key benchmarks achieved in the DEAL-Wiley agreement are replicated in the Springer Nature agreement, including the PAR fee, again, set at EUR 2,750 which marks cost neutrality with respect to previous subscription spending. A new benchmark was introduced in terms of the payment schedule for PAR fees which, over the course of the three-year agreement, will shift progressively from pre-payment to post-payment.

Key elements of the Projekt DEAL–Springer Nature Agreement and the full text of the contract can be found on the Projekt DEAL website.<sup>123</sup>

## Projekt DEAL – Elsevier negotiations

In July 2018, negotiations with Elsevier were suspended<sup>124</sup>, as the financial demands of the publisher were not in line with Projekt DEAL objectives. Nearly 200 universities and research institutions across Germany have, subsequently, cancelled their agreements with Elsevier, as contracts came up for renewal at the end of 2018 and 2019. Individual institutions prepared for the cancellation by estimating the projected levels of demand for content by their students and faculties, in advance of cancellation; critical analysis of a variety of sources, such as COUNTER 5 usage reports, actual usage log files, and Unpaywall data, consistently revealed projected demand scenarios that were deemed manageable. Following cancellation, institutions established their own processes to meet the actual demand for articles through a variety of methods including installing browser extensions (Lean Library, OA Button, etc.), integrating services such as 1findr and Unpaywall into library link resolvers and systems, document delivery and ILL, and vouchers for the purchase of individual articles when necessary. Anecdotal evidence reported from institutions indicates that the projected levels of demand far exceed the actual demand as manifested by user requests for ILL or the purchase of articles.

# Implementation of DEAL Agreements

## Workflows

One of the key aspects for the successful implementation of transformative agreements which cannot be overstated, is the importance of defining robust workflows related to the publishing process in the agreement and establishing these on both publisher



and institutional sides for the benefit of authors; the ESAC Recommendations<sup>125</sup> provide a basic source of information in this regard. Under the DEAL agreements, publisher interfaces were customised to give authors visual and textual cues to signal their open access publishing entitlements as early in the article publishing process as possible; in the case of fully open access journals, this occurs at the moment an author submits their manuscript and, in the case of ‘hybrid’ journals this occurs at the moment the author is notified of acceptance. An example of how authors are informed of their options under the Wiley agreement can be found at the Wiley website.<sup>126</sup>

Similarly, institutional dashboards were set up to give relevant library staff a window into the publishing pipeline, so that authors could be quickly and properly identified and their eligibility for coverage under the agreement approved. As an example, information on managing Wiley institutional dashboards can be found at the Wiley website.<sup>127</sup>

### Payment streams

The Publish and Read (PAR) model introduced by Projekt DEAL is a powerful mechanism for the transformation of scholarly publishing, as it disaggregates lump-sum subscription payments and associated costs with actual article output. However, as immediately transposing former subscriptions funds into open access publishing funds (PAR fees) would prove extremely challenging, if not impossible, for most institutions, an innovative financing or ‘cost allocation’ model was needed to facilitate the transition upon conclusion of the DEAL agreements. The DEAL cost allocation model is therefore designed to plug into present institutional budget structures that have, historically, been oriented around the practices of the (old) subscription system. At the same time, the model has built-in flexibility to adapt as institutional budgets are restructured to match the (new) article output-oriented open access world.

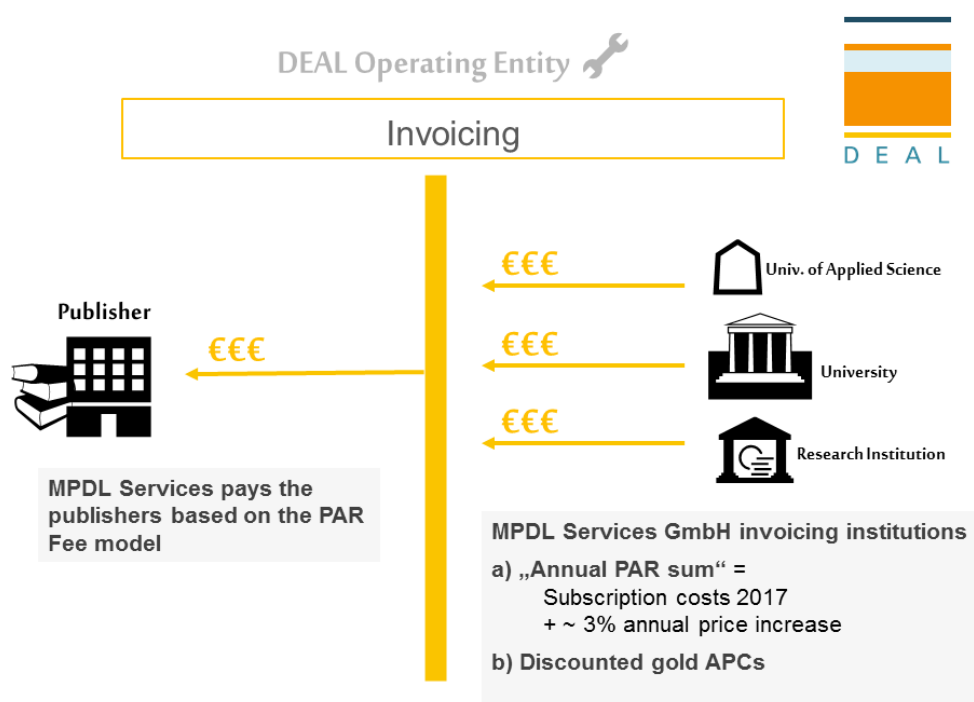


Figure 5. DEAL Operating Entity. Invoicing

The DEAL cost allocation model allows PAR fees to be centrally administered, in accordance with the organisational needs of institutions, independent from the payment streams towards publisher set out in the financial obligations of the DEAL agreements.

Whereas the overall costs of DEAL agreements are based on PAR fees corresponding to articles published, under the DEAL cost allocation model, participating institutions are billed at sign-up to an agreement, or at the start of a contractual year, for an amount that is based on their former subscription expenditure with the publisher, called an Annual PAR fee. Paying an amount in line with former subscription expenditures facilitates participation for institutions, as their budgets are already prepared for such transactions.

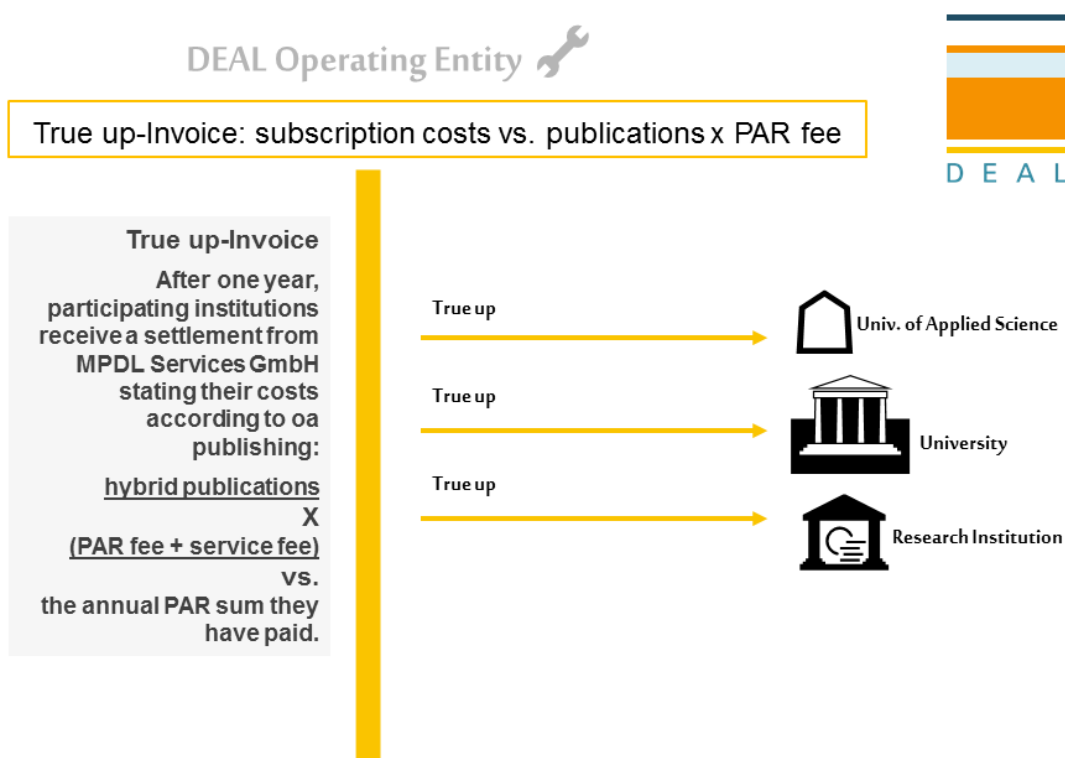


Figure 6. DEAL Operating Entity. True up-Invoice: subscription costs vs. publications x PAR fee

At year end, through a 'true up' process, published articles are tallied and new invoices issued by the DEAL Operating Entity to participating institutions (True-up invoicing), reflecting their actual publishing output (PAR fee x N articles). This grants institutions time through the course of the year to prepare their budgets for OA.

In cases where the warranted publication-based fees (True-up PAR fees) exceed the fees paid up front at the start of the year (Annual PAR fees), institutions are asked to balance their accounts, paying the difference to the degree within their means. All surplus generated from these True-up invoice payments is used to reimburse those institutions whose up-front payment of Annual PAR fees exceed their publication-based costs, once all financial deficits of the DEAL Operating Entity have been covered.



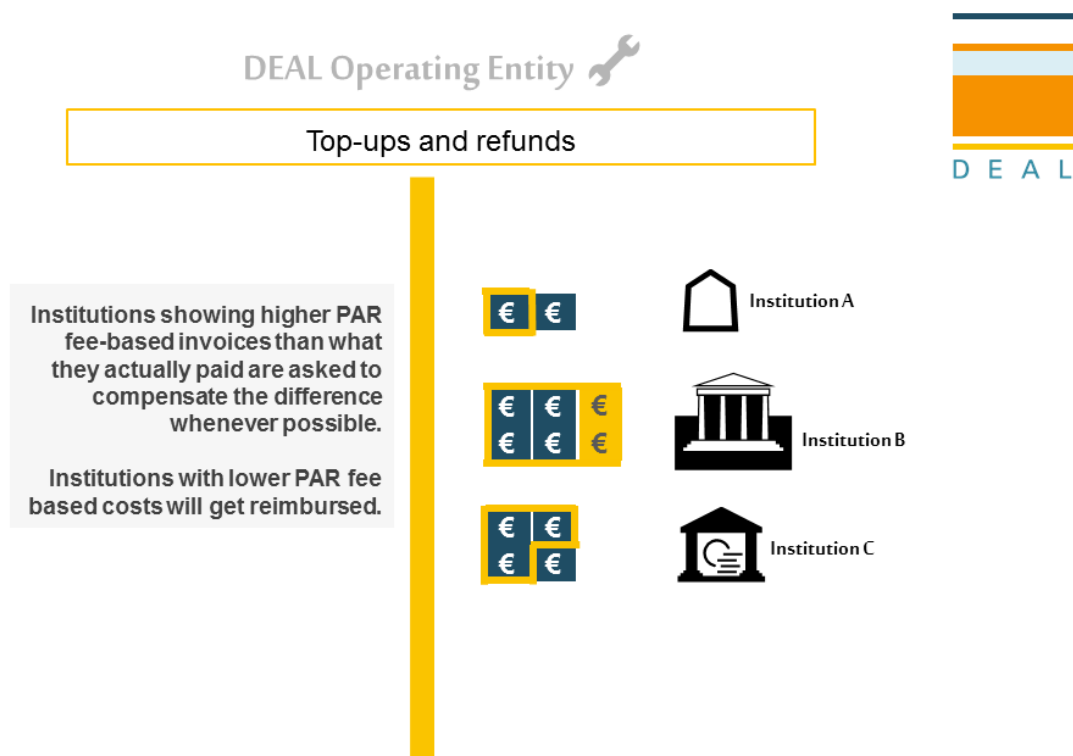


Figure 7. DEAL Operating Entity. Top-ups and refunds

The DEAL cost allocation model enables all institutions to pay their fair share for services rendered in line with DEAL's all-in approach and increases the benefits for all eligible institutions: lower or even no cost for non-research-intensive institutions, and expanded access for the entire research community. The DEAL cost allocation model was drawn up by the DEAL Operating Entity, MPDL Services, and, having received the full approval of the German Rectors' Conference and the Alliance of German Science Organisations, was first implemented as part of the sign-up and participation process of the DEAL–Wiley agreement.

## Conclusion

In describing 'What makes an agreement transformative'<sup>128</sup>, the ESAC Initiative states:

Transformative agreements are a temporary and transitional instrument of change proposed by the academic and research community, motivated by the political will to make open the default in scholarly communication and the financial need to substantially reduce the costs that currently characterise journal publishing under the subscription business model. Responding to the first objective, transformative agreements increase the proportion of new articles published open access, the benchmark being 100% of affiliated authors' manuscripts accepted for publication in the journals covered by the agreement. Simultaneously, transformative agreements address the second objective by bringing the two current transactional realms of scholarly journal publishing – institutional subscriptions and author-facing open access

publishing fees – under the oversight and control of one central agreement in which the payment structure substantially shifts fees previously paid for subscriptions to cover open access publishing.

In this regard, the success of a transformative agreement is evident at its entry point, in the services, terms and conditions negotiated, and the two DEAL agreements concluded to date can be characterised as meeting the stated objectives of Projekt DEAL and as truly transformative.

Transformative agreements also grant institutions and consortia the opportunity to prepare for a fully open access future, providing a framework for library budgets, processes and workflows – currently organised around pre-payments of subscription packages – to be adapted to support article-level services.

With two agreements negotiated and in the course of being implemented, the work of Projekt DEAL is far from complete. Negotiations with Elsevier remain suspended but not definitively cancelled. The stakeholders of Projekt DEAL remain firm in their commitment to their unified, all-in approach to transformative agreements, as they represent a viable and essential strategy in the drive to make open the default and scholarly communication.

## Norway

Authors: Nina Karlstrøm, Nils Andenæs, The Norwegian Directorate for ICT and Joint Services in Higher Education and Research (Unit)

### Background

A national consortium for licence negotiations was formed in Norway in 2003. From 2018, the work of the licence consortium has been carried out by Unit – the Norwegian Directorate for ICT and Joint Services in Higher Education and Research. The licence department in Unit, the Licence and Open Access Group, is fully financed by the Norwegian Ministry of Education and Research, and as of 2020, the Licence and Open Access Group negotiates around 33 agreements on behalf of 140 institutions. All research and education institutions that receive government funding are eligible to participate in Unit negotiated agreements.

### Motivation and rationale

In August 2017, the government published their open access policy for research results, stating that publicly funded research must be published open access without embargo from 2024.

The national guidelines to ensure all stakeholders work towards the same goal, include the following measures:

- Publicly funded research articles are to be made openly available. Researchers

shall examine the possibilities for publishing their articles in open access journals and choose open access journals where academically acceptable. Only in exceptional circumstances may articles that are publicly funded be published in journals that do not allow the article to be made available in an academic repository;

- All publicly funded research articles must be deposited in a suitable academic repository. This shall take place at the latest on the publication date, irrespective of the publishing channel and when the article can be made openly available;
- Institutions and consortia that negotiate agreements with publishers shall ensure that these agreements promote open access without increasing total costs, and that the terms and conditions are open and transparent;
- Institutions that fund research projects shall contribute to cover the costs associated with open access publishing. In research performing institutions, costs associated with open access publishing shall be seen as part of the research budgets, just as costs associated with other key activities. Researchers and research performing institutions are encouraged via their networks to contribute to the promotion of publishing services that deliver the required quality at an appropriate price.

By the time of the release of the national guidelines, the Unit consortium had already secured the support from its Steering Committee to start negotiating transformative agreements with publishers.

Existing agreements with Elsevier and Springer Nature were extended for one year, and the four largest agreements in the consortium (Elsevier, Wiley, Springer Nature and Taylor & Francis) were all up for renegotiation in 2018.

In 2018, the main funder, the Norwegian Research Council, signed Plan S. This entailed that funding for publishing in hybrid journals would be cut back unless there was a transformative agreement in place. As the Research Council funds most research activity in Norway, the impact would be considerable. Research intensive institutions in Norway were now faced with the situation that they were spending a substantial amount on agreements with publishers that included journals that authors were unable to publish in and comply with government and funder open access mandates. The international developments in other countries also played a part in encouraging the senior management at the main universities to join the push for negotiating transformative agreements.

Publishing Norway 2019

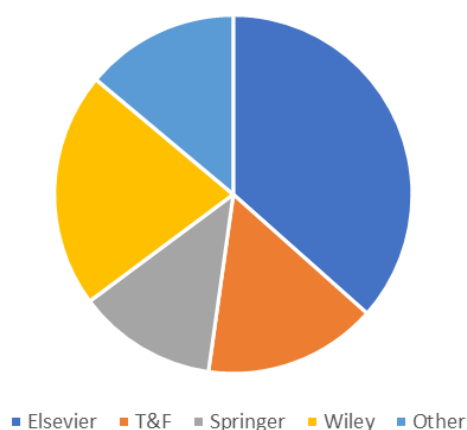


Figure 8. Publishing in Norway in transformative agreements 2019

## Negotiation objectives

For these new types of agreements, there was a set of objectives, based on the LIBER principles for negotiations with publishers.<sup>129</sup>

As this was a new type of agreement, it was important to secure the support of the universities and their management. A set of objectives were created, based on LIBER's '5 principles for Open Access negotiations' and the joint Nordic principles for transformative agreements:<sup>130</sup>

- articles with corresponding authors from Norway shall be openly available at the time of publishing;
- publishing open access shall not increase total costs;
- licence agreements, costs and business models must be fully transparent;
- perpetual access to content published in subscription journals must be granted;
- agreements should demonstrate a move towards models where costs are related to the volume of Norwegian institutions article publishing output.

These principles were presented to the National Rector's Conference in May 2018 and led to a letter of support from Universities Norway (UHR).<sup>131</sup> The letter confirmed the principles and stated:

- The Unit shall negotiate agreements that ensure open access to research results, according to the aforementioned principles;
- University rectors/heads of research will participate in the negotiations with the four publishers mentioned above;
- UHR view a continuation of the current subscription agreements as unsustainable, and is committed to achieving the goal of making publicly funded research openly available through a constructive dialogue with publishers;
- UHR will recommend reviewing the renewal of agreements that do not meet their requirements.

## Legal considerations

Previous licence agreements to subscription content negotiated by the Unit all had confidentiality clauses. Public bodies in Norway do not have the opportunity to negotiate more confidentiality than the Norwegian Freedom of Information Act allows. They therefore have a duty to provide public access to the agreement as per Norwegian law. Information in the agreement that is considered as trade secrets under Norwegian law will be exempted from public disclosure.

## Negotiation outcomes

The negotiations turned out to be more prolonged and labour intensive than the Unit had anticipated. By the end of 2018, when all four contracts expired, agreements had not been reached with any of the publishers. By March, an agreement was in place with Wiley, but it was realised that there was not enough movement in the negotiations with Elsevier to continue. On 12 March, it was announced that the agreement with Elsevier would not be renewed. Three days later, the agreement with Wiley was announced.

Conversations with Elsevier were quickly resumed and an agreement was reached for a two-year pilot for 2019 and 2020. In June, an agreement with Springer Nature was announced and in October, an agreement was finally reached with Taylor & Francis. All publishers kept access open during the whole negotiation period. The agreements met the requirements stated in the negotiation principles and all are posted in the ESAC registry. As of March 2020, the following agreements are in place (see Table 1).

Publisher/ Agreement	Preliminary turnover 2020 (€)	Agreement period	Estimated number of articles published 2020*	Unlimited publishing	Fully open access titles included	Licence
Elsevier	9,686,510	2019–2020	1862/2100	No	Yes	CC-BY CC-BY-NC-ND
Wiley**	3,977,291	2019–2021	897/1250	No	Yes	CC-BY CC-BY-NC CC-BY-NC-ND
Springer Compact	2,150,535	2020–2022	651/725	No	No	CC-BY CC-BY-NC
Taylor & Francis**	2,080,000	2020–2022	571/900	No	No	CC-BY CC-BY-NC CC-BY-NC-ND
SAGE	1,316,775	2020–2022	270	Yes	No	CC-BY
ACS	560,470	2020–2022	124/124	No	Yes	CC-BY
Oxford University Press (OUP)	543,687	2020–2022	150	Yes	No	CC-BY CC-BY-NC CC-BY-NC-ND
Cambridge University Press (CUP)	215,249	2020–2022	145	Yes	No	CC-BY CC-BY-NC-SA CC-BY-NC-ND
Institute of Physics (IOP)	182,488	2017–2020*	20	No	No	CC-BY
De Gruyter	98,565	2018–2020*	67	No	No	CC-BY

\* Quota/estimated total

\*\* Aim to reach estimated 100 % of publishing output in final year of agreement

Table 1. Unit Consortium's transformative agreements 2017-2022

## General overview of new agreements

Authors identify themselves by choosing their affiliation from a drop-down list of institutions during the article submission process.

If the author belongs to an institution that is part of a publish and read agreement, they are informed by the publisher that they are eligible to publish their article open access at no cost to themselves. If the author chooses make use of this option, then the library staff will be notified and can approve or reject the request.

The Unit, in cooperation with institutions, provides input into how the publishing options are communicated to the authors in a clear and understandable way. This aims to ensure that all potential authors are captured during the submission process to avoid double payment of article processing charges. This includes informing them of the licencing options, (and which are 'funder preferred').

The library can reject a request from an author to publish open access if the author is not affiliated with their institution, or if there are no publishing funds available. In this case, the author can choose to publish their article behind a paywall at no cost or seek to cover the open access publishing fee from other sources.

## Conclusion

The publish and read agreements have helped meet the short-term aim of greatly increasing the number of journals in which researchers in Norway can publish and fulfil the open access requirements of research funders. They have also, in most cases, achieved this by repurposing existing subscription costs, thereby slowing the trend of APCs being paid in addition to subscription costs.

The involvement of senior management at the four main universities, represented by the vice-chancellors, proved key in engaging high level decision makers from publishers in the negotiation process. The involvement of senior university management also helped strengthen the negotiation mandates and raise awareness of the key issues facing the libraries in the transition to open access.

These agreements have also provided a great deal of insight and data into publishing trends, criteria for financially sustainable models, and challenges around author engagement. These experiences will prove very valuable in identifying the key changes that are required when pursuing and implementing the longer term aims of transforming the scholarly communications landscape. The agreements have moved the focus of discussion with publishers from one based on a closed subscription-based model, where costs are based largely on the right to read paywalled content, to one where open access requirements take centre stage.

## Sweden

Authors: Anna Lundén, Britt-Marie Wideberg, National Library of Sweden

### Background

The Swedish library consortium, Bibsam, was formed in 1996 and consists of 91 participating organisations from all Swedish HEIs, and some research institutes that are funded by the state, and governmental agencies with research focus. The consortium is administered by the National Library of Sweden and has a turnover of EUR 46 million (2020), which includes 15 transformative agreements. It is governed by a steering committee consisting of seven representatives from participating organisations and headed by a vice-chancellor.

### Motivation and rationale

Open access to scholarly articles has been demanded for nearly two decades and the European Commission continues to prioritise open access, for instance within Horizon Europe. In 2016, the Swedish government stated that 'All scientific publications resulting



from research financed with public funds shall be published open access immediately. All stakeholders within the research system have a responsibility to work towards this goal.<sup>132</sup> In Sweden, the Swedish Rector's Conference, the Swedish Research Council and the National Library of Sweden have all signed the OA2020 initiative for the necessary large-scale transformation to open access. Furthermore, cOAlition S, with its bold plan, is supported by three Swedish signatories, aiming to accelerate the transition to open access. This has had the effect that publishers are more willing to discuss open access provisions during the negotiation process. But to break the cycle of the current subscription system, measures need to be adopted to pull funding away from paywalls and redirect it towards open access.

The average publication output by corresponding authors affiliated with Swedish HEIs amounts to around 17,000 articles per annum. Assuming, as in a White Paper<sup>133</sup> by the Max Planck Digital Library, that article processing charges (APCs) are below EUR 2,000 in a purely open access scenario, the total expenditure on APCs would amount to EUR 34 million. This is equivalent to the current spend on e-journal licences, and proves that a switch from a business model based on paying for subscriptions to paying for publishing articles immediately open access is possible.

## Legal considerations

The Bibsam Consortium has so far signed two Memorandum of Understanding (MOU), one with Elsevier and one with Wiley. The reason for signing an MOU has been to clearly set the frames for the upcoming negotiations. This has turned out to be a very useful tool to move away from the previous locked positions.

Based on the commitment to support and enhance pricing transparency, the transformative agreements will be publicly available in the ESAC registry of transformative agreements.<sup>134</sup>

With one publisher, the negotiation of the agreement text took more than a year, and was finalised six months after the start date of the agreement. This lengthy process was mainly due to difficulties in reaching a compromise on the legal terms regarding the open access provisions. This once more demonstrates the importance of asking for a contract template at the very beginning of the negotiation, in order to discuss pricing terms and legal terms at the same time, thus allowing room for obtaining better contract clauses.

## Negotiation objectives

Below are the three main objectives in any negotiation that the Bibsam Consortium undertakes:

- immediate open access to all articles published by the publisher to researchers affiliated with participating organisations (both in hybrid and fully open access journals) with a CC-BY licence;
- continued reading access for participating organisations to all journals published by the publisher;

- a sustainable price model that enables a transition to open access and allows for a redirection of revenue streams.

The Bibsam Consortium requires that any publisher contract renewal must include some kind of open access provision. If no acceptable open access provision is offered, the contract renewal will be limited to one year or even cancelled. This is what happened in the spring of 2018 when the agreement with the largest scholarly publisher, Elsevier, was cancelled. The cancellation was a crucial element in reaching a new agreement, which allows unlimited open access publishing with continuous reading rights. For more information on the consequences of the cancellation, please see the evaluation report.<sup>135</sup>

## Negotiation outcomes

As of May 2020 the Bibsam Consortium has signed 15 transformative agreements (see Table 2). The first agreement was signed with Springer Nature as early as 2016. Agreements are now in place with all the major publishers and some of the larger society publishers. Two agreements with gold open access publishers are in place: Frontiers and Springer Nature Fully OA. The aim is to enter into more agreements with more open access publishers. The size and type of the agreement varies. As an example, the agreement with Institute of Physics is an offset agreement.

One experience is that it is very important to close agreements with unlimited publishing in order to avoid too much administration and unexpected costs. A publishing corridor is one way to try to share the risk between the parties. It is also important to put pressure on the publishers to get them to develop easy-to-use and reliable submission systems.

Publisher/ Agreement	Preliminary turnover 2020 (€)	Agreement period	Estimate number of articles 2020	Unlimited publishing	Fully open access titles included
Elsevier	14.3 m	2020–2022	3800	Yes	Yes
Wiley	5.9 m	2020–2022	1500	No	Yes
Springer Compact	4.2 m	2019–2021	1635	No	No
Springer Nature Fully OA	1.9 m	2019–2021	1277	No	Yes, exclusively
Taylor & Francis	3.5 m	2018–2020	1386	No	No
SAGE + Royal Society of Medicine	1.7 m	2020–2022	540	Yes	No
ACS	1.2 m	2020–2022	433	No	Yes
Oxford University Press (OUP)	0.9 m	2019–2021	342	No	No
Royal Society of Chemistry (RSC)	0.5 m	2018–2020	200	Yes	No
Cambridge University Press	0.4 m	2019–2021	250	Yes	Yes
Institute of Physics (IOP)	0.3 m	2017–2020	30	No	No
Karger	0.2 m	2017–2020	60	Yes	Yes
APS	0.2 m	2020–2020	200	Yes	No
De Gruyter	0.2 m	2018–2020	50	No	Yes
SPIE	0.1 m	2020–2022	50	Yes	Yes
Mark Allen Healthcare	0.1 m	2019–2021	< 10	Yes	No OA-journals

Table 2. Bibsam Consortium's transformative agreements 2017-2022

## Conclusion

Transformative agreements should, according to Plan S, only exist during a limited transitional period, more specifically until the end of 2024. It is important to be able to move as quickly as possible to other models which are only pay to publish. The Bibsam Consortium is willing to participate in new initiatives that redirect funds currently used to pay subscriptions to make journals open access. The Consortium looks forward to working with publishers who demonstrate leadership in this important new era of open science and with all stakeholders to develop new business models, which will make journals open access to users all over the world.

# Recommendations

This chapter provides recommendations concerning both the legal aspect of transformative agreements and negotiation procedures in general, based on the information and analysis presented above.

## Legal recommendations

### **Maintain review of papers based on merits, safeguard against overpayment and under-availability**

The analysed agreements are neutral towards the publisher's freedom of choice between submitted papers and do not interfere in the scientific review procedure. This is definitely a desired approach and care should be taken to draft all transformative agreements in such a manner. However, without regulating this issue further in the agreement, this may result in an overpayment (in case the number of papers accepted for publication is not sufficient) or under-availability (in case some of the accepted papers fall outside the negotiated number or bulk-sum payment and have to be covered separately). It is therefore necessary to specify in detail how payments under the agreement are calculated and settled. For example, in order to safeguard against overpayment, a fee can be due only for accepted articles. The fee could be of such an amount that it would also compensate for the costs of reviewing articles not accepted for publication.

### **Prevent discrimination of non-eligible authors**

Another issue that requires more in-detail regulation is joint and collective authorship. Some authors of a paper can be affiliated to an institution that is not a party to the agreement. While covering fees for such authors will most probably not be a goal of the publisher's contracting party, care should be taken not to deprive eligible authors of the benefits. This may result in negative consequences for cooperation between authors, as they may tend to discriminate non-eligible co-authors in research and writing. It also doesn't seem fair to collect additional APCs with the only reason being the affiliation of some of the authors, as the amount of the necessary review work will generally remain the same.

### **Pay attention to the composition of the covered journals and available publications**

While it is reasonable to allow publishers to amend the list of journals covered by a transformative agreement, it is essential to follow good practice in safeguarding against unilateral quantitative or qualitative reductions to the list. Such safeguards are

essential, and both the composition of the list and the publisher's flexibility in changing it materially affect the practical effect of the transformative agreement and authors' benefits.

The list of available publications (the 'read' part of a transformative agreement) should also be clearly defined. Provisions allowing unilateral amendments to these lists by the publisher should be avoided. Any changes to the scope of the content to be made available should require the consent of both parties, as they affect the rights and obligations of the parties to the agreement. A solution that takes into account the interests of both parties is to reduce the fee if the available resources are reduced and to increase it if they are increased. Both should require the agreement of both parties, although account should also be taken of the removal of part of the resources for reasons beyond the control of the parties, for example, because a third party has declared that the content infringes its rights. It should be avoided that the fee reduction exhausts the claims of the scientific institution. If part of the resource is unavailable as a result of a breach of duty by the publisher (e.g. transfer of rights to another person), the fee should be reduced due to the inability to use it. Nevertheless, the scientific institution should have the claims provided for by the applicable law in the event of breach of contract. Such claims may also be provided for in the contract itself. It is not advantageous for a scientific institution to allow for the possibility to terminate the contract in the event of a reduction in the range of materials available while not being able to demand a reduction in fees. As a rule, the scientific institution will be interested in continuing the agreement, and abovementioned solution leads to continuing it on a worse basis (less content for the same fee). The equality of the parties is definitely affected by provisions allowing the publisher to unilaterally determine the amount of compensation for reducing the scope of available content. In some jurisdictions, such provisions may even be considered null and void.

There is no reason why reducing the amount of available material should result in a reduction of the fee only when it exceeds a certain amount, e.g. a certain percentage of all available content. It seems that reduction of the fee should apply regardless of the size of the reduction. Similarly, there is no reason to take into account only the number of completely unavailable journals when calculating to what extent the resources have been reduced. In many cases (e.g. claims by third parties), only certain articles will be removed and in that case the reduction should also be taken into account. It is clearly disadvantageous for a scientific institution if the publisher denies access to certain publications due to the transfer of copyright. Having these rights is a condition for the performance of the agreement, and their transfer should be treated as a breach of the agreement, unless agreed with the other party.

### **Provide for minimal standard publishing agreements for authors**

With regard to the relationship between the publisher and authors, most of the analysed agreements limit themselves to setting the publishing fee. It is definitely recommended following (still less numerous) the good practice of such agreements that specify the terms of publishing agreements in more detail, as authors are usually the weaker party vis-a-vis publishers. Parties to a transformative agreement should agree, for example, on a minimal standard of a free licence for authors, licence for data, etc.

### **Provide for a good workflow**

For a transformative agreement to reach its goals, the authors have to actually be aware of their open access options and make an informed choice. It is thus necessary to adjust the paper acceptance workflow accordingly. It is recommended, as best practice, to specify the process of communication between authors, institutions, and the publisher in more detail. The parties should not leave such issues in the realm of assumptions, and a well-written procedure can help not just the contracting parties, but lay down a framework for standardisation between different institutions and publishers. Clearly, the widest possible range of information activities and assistance for authors is desirable. Needless to say, the verification of eligible authors also has to be properly regulated in the transformative agreement and any modifications should require the mutual consent of the parties.

We refer the readers to ESAC Workflow Recommendations for Transformative Agreements<sup>136</sup>, ESAC Sample Workflow Terms<sup>137</sup> and to 'The weakest link – workflows in open access agreements: the experience of the Vienna University Library and recommendations for future negotiations'<sup>138</sup> for valuable inspiration on issues that should be included in an agreement and observed in the practice of its application.

### **Know what the taxpayer is paying for**

A well-written payment clause in a transformative agreement should not be limited to the mere quotation of a sum payable. Unused funds should be properly administered, for example, by diverting them towards opening future publications. Conversely, a procedure for additional payments in case the stipulated funds are used should also be provided for. Publishers should report about the status of the funds over the time of the performance of the agreement. Additionally, if the agreement is entered into by a consortium, the members of the consortium should agree, between themselves how the funds are distributed between respective eligible authors.

### **Do not limit statutory user freedoms, expand them**

It is worth remembering that the agreement is not the only source for the delimitation of the scope of persons that may access the licensed publications. The other important source is copyright law, which contains a list of limitations and exceptions that, under some circumstances, result in allowing certain persons to access copyrighted works in spite of the right owner's consent or licence terms. It is important to have this statutory list in mind when negotiating with a publisher, and institutions should not undertake to limit access to persons authorised to it under the law.

While there is some contractual freedom for specifying how users may use the publications, generally parties to the agreement cannot supersede the freedoms to access and use of copyrighted works that follow from copyright law. Care should be taken not to limit the scope of copyright exceptions and limitations provided in law. For example, an attempt to regulate whether the use of the content provided for commercial purposes is permitted and how such purposes should be understood may contradict the rules that follow from a copyright statute. Defining the rights in a contract in a narrower manner than in law may raise doubts as to the effects of such a contract and may give rise to disputes. Each agreement should also include



a provision that the scope of user rights adopted in the agreement does not violate the rights under the free licences, or does not cover materials available in open access. Certainly, for a fully-fledged transformative agreement, these terms should not be limited to merely access, but contain a framework for transferring all closed journals and their publications to open access, preferably under a CC-BY licence or equivalent.

### Think in the long term

Although some of the analysed agreements stipulate perpetual access, in some legal systems, perpetual obligations may be terminated at any time. Depending on the applicable law, should it limit the validity of perpetual contractual obligations, it may be preferable to safeguard availability of papers for a certain term or at least until the expiry of intellectual property rights. In order to safeguard long-term availability, the parties should consider agreeing separate terms for the preservation and archiving of publications using a public infrastructure.

## Negotiation procedure

The quality of contractual terms on publishing fees is very dependent on the level of parties' preparation for negotiations. It is strongly recommended that this includes gathering and analysing data about such issues as the specific journals that are most popular among authors, the publisher's share of the given market, the record of payments to the given publisher, the preference of authors towards open access (and the prognosis of this preference given the known policies or obligations that the authors are subject to), as well as usage, citations, etc.

Having well-defined and strongly supported negotiation goals and objectives is a crucial starting point and a necessary basis for negotiations. They should be agreed upon by all parties on whose behalf negotiations are conducted. As there is a growing number of open access and open science policies adopted and implemented by scientific institutions, funders, and governments, it is essential to put transformative agreements in the broader context of such policies and make sure they serve as one of the tools of their implementation, fitting into a long-term strategy.

Transformative agreements with the same publishers are negotiated and signed in many countries. Negotiators need to be aware of the situation elsewhere and use to the greatest possible extent the information available thanks to the transparency of existing transformative agreements. International alignment of policies and strategies regarding open access is a *conditio sine qua non* of a new publishing paradigm.

Due attention should be given to the practical aspects of negotiations so that any tactical errors do not compromise the results. In this regard, it's advisable to use many of the widely available resources on negotiation strategies, tactics, and techniques.

Finally, all negotiation stages should be accompanied by communication activities based on a comprehensive, thoughtful, and flexible communication strategy. The academic and wider public should be able to understand the process and its outcomes as rooted in shared principles and values and aimed at the common good.



# Appendix:

## List of analysed agreements

1. Service and Supply Contract for ScienceDirect Freedom Collection Database between Library and Information Centre of the Hungarian Academy of Sciences and Elsevier (1282/EISZ-2019) B.V., available at: <https://esac-initiative.org/about/transformative-agreements/agreement-registry/els2019eisz/>
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