

Articles 15 & 17 of the Directive on
Copyright in the Digital Single Market
Questionnaire – Annex to the Comparative
National Implementation Report

BELGIUM

Last Updated: 5 July 2023

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This comparative report is based on 25 national questionnaires prepared by national legal experts.

National Expert(s):

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The full study is available for download at: <https://informationlabs.org/copyright>

Country: BELGIUM

National Expert: PROF DR JOZEFIEN VANHERPE (KU Leuven Centre for IT & IP Law)

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PART I: Article 15 CDSMD

Note: The questions below concern the national implementation of Article 15 CDSMD in your country. They refer to this as the “local national implementation” or LNI. It is recommended that you read all the questions before beginning to compose answers. In all responses, please cite the relevant provisions of national law in your country.

Background information

- 1. Did your national jurisdiction provide protection (whether via copyright or a relevant targeted related right) for press publications prior to the adoption of the CDSMD? If so, please briefly describe this, indicating any differences from the protection provided by Article 15 CDSMD.**

No, there was no protection specific to press publications.

For the sake of completeness, however: prior to the adoption of the CDSMD, Belgian law already provided a right to compensation for publishers in the sense of Article 16 CDSMD.

- 2. Has Article 15 CDSMD been transposed into national law in your country? If so, please cite the legal act with which and the date on which this was done. Please also briefly indicate whether you consider that the transposition takes a textual (“*ad litteram*”) or intentionalist approach (e.g., one that is adaptive to national circumstances).**

Yes, through the *Wet van 19 juni 2022 tot omzetting van Richtlijn (EU) 2019/790 van het Europees Parlement en de Raad van 17 april 2019 inzake auteursrechten en naburige rechten in de digitale eengemaakte markt en tot wijziging van Richtlijnen 96/9/EG en 2001/29/EG(1)* (in Dutch) / *Loi du 19 juin 2022 transposant la directive (UE) 2019/790 du Parlement européen et du Conseil du 17 avril 2019 sur le droit d'auteur et les droits voisins dans le marché unique numérique et modifiant les directives 96/9/CE et 2001/29/CE(1)* (in French). The act dates from 19 June 2022. It was published in the Belgian Official Gazette on 1 August 2022 and entered into force on the same day. Below, it is referred to as the Belgian Implementation Act, or ‘BIA’. The amended provisions are included in Book XI of the Belgian Code on Economic Law (below: ‘BCEL’), more specifically in Title 5 (copyright), Chapter 3 (neighbouring rights), Section 6/1 (provisions concerning press publishers).

I consider the Belgian transposition to take a textual approach, faithful to the text of Article 15 CDSMD.

An additional note, that does not seem to fit into the answers to any of the questions below: on 31 January 2023 and 1 February 2023, two actions for annulment were filed with the Belgian Constitutional Court in relation to the provisions of the BIA that seek to implement Article 15 CDSMD into Belgian law, with docket numbers 7922 (filed by Google) and 7925 (filed by Meta) (see [here](#)). These cases are still pending at the time of writing.

If available, please provide a link to the legal provision in the official language(s) of your jurisdiction. If you are aware of a good (official or unofficial) English language translation, please include that as well.

Official versions of the BCEL are available in [Dutch](#) and in [French](#). I am not aware of any good English language translation of the full legal provisions of the BIA.

AC 1: Subject matter

3. What is the subject matter (object) of protection by the LNI and how is this defined? Please focus on any differences (including additions) from the concept of “press publications” as defined by Art. 2(4) CDSMD.

The BIA applies to ‘press publications’. The new Art. XI.216/1 BCEL defines a ‘press publication’ as a collection composed mainly of literary works of a journalistic nature, but which can also include other content protected by copyright or neighbouring rights, and which

- (a) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine;
- (b) has the purpose of providing the general public with information related to news or other topics; and
- (c) is published in any media under the initiative, editorial responsibility and control of a service provider.

Periodicals that are published for scientific or academic purposes, such as scientific journals, fall outside the scope of the concept of press publications.

This definition is almost exactly the same as the definition provided in Art. 2(4) CDSMD. The only textual difference is that Art. 2(4) CDSMD refers to the inclusion of ‘other works or other subject matter’, while the new Art. XI.216/1 BCEL refers to ‘other works or performances’. However, the Belgian legislator has stated that this difference in wording does not affect the substantive scope of the concept of ‘press publication’, as the concept of ‘performances’ (in Dutch: ‘prestaties’ and in French: ‘prestations’) should in this context not only be held to include performances by performing artists, but also phonograms, first fixations of films, and broadcasts.¹ To avoid any confusion on this matter, the relevant categories of subject matter are grouped together under the label ‘protected content’ in the answers to the next questions.

4. Does the LNI protect against uses of individual words or very short extracts? If these are excluded from protection, how are they defined? Please note whether a qualitative or quantitative approach is taken and whether such short extracts may include non-literary content. Please note whether there are specific provisions on headlines.

No. The new Art. XI.216/2(4) 2° BCEL provides that the protection does not apply to the use of individual words or very short extracts of a press publication. The text of the BIA does not contain any further specification concerning the scope of a ‘very short extract’. However, the preparatory works note that the question whether an extract has economic value in itself will constitute an important element of interpretation in determining whether or not this extract is ‘very short’.² The preparatory works also clarify that, for example, an extract of a certain number of characters (e.g., 200 characters, irrespective of whether said extract concerns the title or the text of the press publication), or artwork that forms part of a press publication, such as press photos or cartoons, will most

¹ *Memorie van Toelichting, Wetsontwerp tot omzetting van Richtlijn (EU) 2019/790 van het Europees Parlement en de Raad van 17 april 2019 inzake auteursrechten en naburige rechten in de digitale eengemaakte markt en tot wijziging van Richtlijnen 96/9/EG en 2001/29/EG / Exposé des Motifs, Projet de loi transposant la directive (UE) 2019/790 du Parlement européen et du Conseil du 17 avril 2019 sur le droit d’auteur et les droits voisins dans le marché unique numérique et modifiant les directives 96/9/CE et 2001/29/CE*, 5 April 2022, Parliamentary Documents 21-22, nr 2608/001 (hereinafter: ‘Explanatory Memorandum BIA’) 14. The preparatory works do not expressly refer to databases in this particular context. However, in other parts of the Explanatory Memorandum BIA, such as on page 22, the term ‘works or performances’ is also considered to refer to databases.

² Explanatory Memorandum BIA 76.

likely *not* be considered as a ‘very short extract’.³ Finally, the preparatory works note that this is a European concept that will be subject to further refinement through case law, hereby expressly referring to the jurisdiction of the Court of Justice of the European Union (CJEU).⁴ The jurisdiction of the CJEU has contributed to the decision of the Belgian legislator not to include a definition of the concept of ‘very short extract’ in the BIA.⁵ Therefore, it cannot be said with absolute certainty whether a qualitative or quantitative approach is taken and whether or not ‘very short extracts’ may include non-literary content. Finally, there are no specific provisions on headlines.

5. Does the LNI extend to mere facts reported in its subject matter? If these are excluded from protection, how are they defined?

While mere facts are not expressly mentioned in the implementing provision of the BIA, the preparatory works expressly refer to Recital 57 CDSM Directive, which excludes mere facts reported from the subject matter of the press publisher’s right under Art. 15 CDSM Directive.⁶ Therefore, the answer to this question is negative. The BIA does not provide a definition of ‘mere facts reported’.

6. Does the LNI extend to public domain content incorporated in its subject matter? If these are excluded from protection, how are they defined?

No. The new Art. XI.216/2(4) 3° BCEL provides that the protection does not apply to the use of protected content as to which the term of protection has expired—and that therefore belong to the public domain.⁷

7. Does the LNI include any other threshold conditions for protection?

No. The threshold conditions set by the BIA do not go beyond the requirements of Art. 15 CDSM Directive.

AC 2: Right-holders

8. Who are the beneficiaries of the protection for press publications in the LNI? Please indicate any exclusions, (e.g., territorial). Please indicate if the LNI employs lists of press publications or beneficiaries that would be covered.

The protection for press publications applies to the benefit of press publishers that are established in a Member State of the EU. No further definition is provided. The BIA does not employ lists of press publications or beneficiaries that would be covered.

However, the new Art. XI.216/2(5) BCEL sets forth that anyone whose name or identifiable acronym is mentioned as such in the press publication, a reproduction thereof or in connection with a communication thereof is assumed to be a press publisher, unless proof to the contrary is provided.⁸

³ Explanatory Memorandum BIA 77.

⁴ Explanatory Memorandum BIA 77. See also *Verslag van de Eerste Lezing namens de Commissie voor Economie, Consumentenbescherming en Digitale Agenda, uitgebracht door de heer Patrick Prévot, Wetsontwerp tot omzetting van Richtlijn (EU) 2019/790 van het Europees Parlement en de Raad van 17 april 2019 inzake auteursrechten en naburige rechten in de digitale eengemaakte markt en tot wijziging van Richtlijnen 96/9/EG en 2001/29/EG / Rapport de la Première Lecture fait au nom de la Commission de l’Economie, de la Protection des Consommateurs et de l’Agenda Numérique par M. Patrick Prévot, Projet de loi transposant la directive (UE) 2019/790 du Parlement européen et du Conseil du 17 avril 2019 sur le droit d’auteur et les droits voisins dans le marché unique numérique et modifiant les directives 96/9/CE et 2001/29/CE*, 13 May 2022, Parliamentary Documents 21-22, nr 2608/003 (hereinafter: ‘Prévot Report’) 22.

⁵ Explanatory Memorandum BIA 77.

⁶ Explanatory Memorandum BIA 78.

⁷ See also Explanatory Memorandum BIA 76.

⁸ See also Explanatory Memorandum BIA 78.

AC 3: Restricted acts

9. Against what kind of acts does the LNI protect? Please provide any relevant definitions.

Protection is offered against acts of (1) reproduction and (2) making available to the public, defined in accordance with Art. 2 and Art. 3(2) ISD. A full translation into English of the new Art. XI.216/2(1) reads as follows:

‘Without prejudice to the rights of the author, the performer, the producer of phonograms or first fixations of films, and of the broadcaster, only a press publisher established in a Member State of the European Union shall be entitled to

1° reproduce or have reproduced their press publication by any means or in any form, directly or indirectly, temporarily or permanently, in whole or in part, for the online use thereof by an information society service provider;

2° make their press publication available to the public by any means for the online use thereof by an information society service provider in such a way that members of the public may access the press publication from a place and at a time individually chosen by them.’

10. Does the LNI cover hyperlinking to the protected subject matter? If not, how is hyperlinking defined?

No. The new Art. XI.216/2(4) 1° BCEL provides that the protection does not apply to hyperlinking activities. The BIA does not provide a definition of ‘hyperlinking’.

AC 4: Targeted users

11. Does the LNI target use by a specific kind of user (provider)? Please provide any relevant definitions. Specifically, please indicate whether private or non-commercial uses by individual users are covered. Please also indicate whether online platforms (OCSSPs) are covered.

The press publisher’s right can only be invoked against providers of an ‘information society service’ in the sense of Art. 1(1)(b) of Directive (EU) 2015/1535 who use the press publication(s) at issue in the way described in the answer to Q9. This follows from the new Art. XI. 216/1(2) BCEL, in combination with Art. I.18 1° BCEL. The latter provision defines an ‘information society service’ as any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the sake of completeness, a minor terminological deviation in the BIA is noted. The Dutch and French versions of the CDSM Directive, respectively, refer to ‘*aanbieders van diensten van de informatiemaatschappij*’ and ‘*fournisseurs de services de la société de l’information*’, while the relevant provision of the BIA refers to ‘*verleners van diensten van de informatiemaatschappij*’ and ‘*prestataires de services de l’information*’. This choice was made for the sake of terminological coherence within the BCEL and does not have any substantive impact on the implementation under Belgian law.⁹

Private or non-commercial uses by individual users are not covered.¹⁰

OCSSPs are covered, as Article XI.228/2 BCEL defines OCSSPs as a specific type of information society service providers.

⁹ Explanatory Memorandum BIA 73.

¹⁰ Explanatory Memorandum BIA 78.

12. Does the LNI allow for the rights it provides to be invoked against:

- a) **right owners whose content is incorporated in the protected subject matter?**
- b) **holders of licenses to exercise rights in content that is incorporated in the protected subject matter?**

Please describe the applicable rules.

No, to both aspects of the question. The pre-existing Art. XI.203 BCEL provides (1) that no legal provision concerning neighbouring rights may be interpreted as a limitation of the rights of authors and (2) that neighbouring rights may be subject to a non-exclusive or exclusive license. Consequently, when protected content is integrated in a press publication following a non-exclusive license, the new neighbouring right may not be invoked to prevent the use of such protected content by other users that have obtained a license for such use.¹¹ In view of this existing provision, the Belgian legislator considered that there was no need for an express implementation of the specifications set by Recital 59 and Article 15 CDSM Directive in this context.¹²

AC 5: Exceptions and limitations

13. Does the LNI recognise exceptions or limitations to the protection it provides? If so, please indicate what these are.

Yes. As discussed above in the answers to Q4, Q6 and Q10, Art. XI.216/2(4) provides that the protection does not apply to (1) acts of hyperlinking, (2) the use of individual words or very short extracts of a press publication, and (3) the use of protected content as to which the term of protection has expired.

In addition, the exceptions and limitations set for all neighbouring rights under Art. XI.217 through XI.219 BCEL apply.

AC 6: Licensing

14. Does the LNI include provisions on the licensing (incl. systems of extended collective licensing) of uses of press publications? If so, please briefly describe any relevant details. For example, these could involve the following:

- **criteria for determining the height of compensation;**
- **the process for negotiating compensation;**
- **transparency duties (incl. data sharing obligations);**
- **duties to engage in negotiations;**
- **oversight by a government authority;**
- **(mandatory) collective rights management.**

Yes, as set forth by the new Art. XI.216/2(2)-(3) BCEL.

Insofar the press publisher is prepared to allow the online use of their press publication(s), the press publisher and the information society service provider must conduct licensing negotiations in good faith. Moreover, as further stated in the preparatory works: in case one of the parties offers to negotiate, the other party must start negotiations in good faith.¹³

In case no agreement can be reached within four months following a motivated request to start negotiating¹⁴, one of the parties may commence dispute resolution proceedings before the Belgian Institute for Postal Services and Telecommunications (in Dutch: 'Belgisch Instituut voor Postdiensten en Telecommunicatie' and in French: 'Institut belge des services postaux et des télécommunications', with website: <https://www.bipt.be>, hereinafter: 'BIPT'). This government authority, which was established by law, is responsible for the regulation and supervision of postal companies and telecommunications operators. The BIPT may take a binding administrative decision that establishes the amount of the remuneration for the online use of press publications by information

¹¹ Explanatory Memorandum BIA 74.

¹² Explanatory Memorandum BIA 74.

¹³ Explanatory Memorandum BIA 75.

¹⁴ See as to this specification Explanatory Memorandum BIA 75.

society service providers. This decision may be appealed before a specialised section of the court of appeal of Brussels.¹⁵

In order to allow the press publisher to correctly assess the economic value of the use made of their press publications by an information society service provider, such provider must, upon the written request of the press publisher, provide current, relevant and complete information on such use. This information includes (but is not limited to¹⁶) the number of consultations of the press publications and the revenues generated by the information society service provider through the use of the press publications.

The deadline to provide such information is one month starting from the day after the notification of the press publisher's written request. The press publisher may not use this information for any other purpose(s) than the evaluation of the press publisher's right and the attribution of an appropriate share of the remuneration to the author(s) of the work(s) included in the press publication. The information is to be treated in strict confidence.

AC 7: Revenue sharing

15. Does the LNI require that any revenue it provides be shared with authors of works incorporated in its subject matter? If so, does it provide details on e.g., the size of the share or modes of collection and distribution or transparency obligations on press publishers? Please describe the applicable rules.

Yes. The new Art. XI.216/2(6) BCEL provides that authors of works that have been incorporated in a press publication have an unwaivable right to an appropriate share of the remuneration received by press publishers from information society service providers for the use of their press publications. Potential beneficiaries include journalists, cartoonists and press photographers.¹⁷ This share is to be determined by a collective agreement between press publishers and authors and will be subject to mandatory collective management. The parties must negotiate in good faith.¹⁸ The law allows for the possibility to appoint a representative collective management organisation for the purpose of (1) negotiating and entering into the collective agreement determining the appropriate share, as well as (2) collecting and distributing this share.

In accordance with the new Art. XI.216/2(7) BCEL, press publishers must, upon the written request of relevant collective management organisations, provide current, relevant and complete information on the remuneration received from the information society service provider(s) concerning the use of their press publication(s). The deadline to provide such information is one month starting from the day after the notification of the collective management organisation's written request. The collective management organisation may not use this information for any other purpose(s) than the evaluation of the appropriate share for the author(s) of the work(s) included in the press publication. The information is to be treated in strict confidence.

In accordance with the new Art. XI.216/2(8) BCEL, the parties may bring the matter before a commission in case no agreement is reached on the abovementioned appropriate share, provided that proof is rendered that the parties have at least attempted to resolve the issue through mediation (within the legal framework set by Articles 1724 through 1737 of the Belgian Judicial Code). This commission is intended to facilitate an agreement between the parties. However, if no agreement may be reached, the commission determines the appropriate share of the remuneration that is to be accorded to authors. The commission is presided by a representative of the Belgian Minister for Economy and consists of representatives of the press publishers and representatives of the right-holders. This mechanism may be subject to further specification through a Royal Decree. At the time of writing, no such Royal Decree has been promulgated.

¹⁵ See as to this specification Explanatory Memorandum BIA 75.

¹⁶ See as to this specification Explanatory Memorandum BIA 76.

¹⁷ Explanatory Memorandum BIA 78.

¹⁸ Explanatory Memorandum BIA 79.

AC 8: Term of protection

16. What is the term of the protection afforded to press publications by the LNI?

The term of protection is two years after the publication of the press publication, starting from 1 January of the year after the year in which this press publication was published, as set forth by the new Art. XI.216/3 BCEL.

AC 9: Waiver

17. Can right-holders waive their rights under the LNI? Can authorisation be given for free?

The BIA does not specify whether a full waiver is possible. However, it is repeated that the authors' appropriate share (see answer to Q7 above) is unwaivable.

AC 10: Entry into effect

18. From what date did the protection provided by the LNI come into effect in your jurisdiction?

The relevant provisions of the BIA entered into force on 1 August 2022. They do not apply to press publications that were published for the first time before 6 June 2019.

The application of these provisions is subject to the outcome of the annulment proceedings before the Belgian Constitutional Court, that are still pending at the time of writing (see the answer to Q2 above).

Additional information

19. Can you think of any noteworthy divergence in the LNI from the standards set out in Article 15 of the CDSMD that you have not already addressed above? If so, please elaborate.

No.

PART II: Article 17 CDSMD

Note: The questions below concern the national implementation of Article 17 CDSMD in your country. They refer to this as the “local national implementation” or LNI. It is recommended that you read all the questions before beginning to compose answers. In all responses, please cite the relevant provisions of national law in your country.

Background information

- 1. Has Article 17 CDSMD been transposed into national law in your country? If so, please cite the legal act with which and the date on which this was done. Please also briefly indicate whether you consider that the transposition takes a textual (“*ad litteram*”) or intentionalist approach (e.g., one that is adaptive to national circumstances).**

Yes, through the *Wet van 19 juni 2022 tot omzetting van Richtlijn (EU) 2019/790 van het Europees Parlement en de Raad van 17 april 2019 inzake auteursrechten en naburige rechten in de digitale eengemaakte markt en tot wijziging van Richtlijnen 96/9/EG en 2001/29/EG(1)* (in Dutch) / *Loi du 19 juin 2022 transposant la directive (UE) 2019/790 du Parlement européen et du Conseil du 17 avril 2019 sur le droit d'auteur et les droits voisins dans le marché unique numérique et modifiant les directives 96/9/CE et 2001/29/CE(1)* (in French). The act dates from 19 June 2022. It was published in the Belgian Official Gazette on 1 August 2022 and entered into force on the same day. The amended provisions are included in Book XI BCEL, more specifically in Title 5 (copyright), Chapter 4/1 (use of protected content by OCSSPs).

I consider the transposition to take a largely textual approach. However, as to the inclusion of an equitable remuneration right for authors and performers, subject to mandatory collective management, a more intentionalist approach may be uncovered.

If available, please provide a link to the legal provision in the official language(s) of your jurisdiction. If you are aware of a good (official or unofficial) English language translation, please include that as well.

Official versions of the BCEL are available in [Dutch](#) and in [French](#). I am not aware of any good English language translation of the full legal provisions of the BIA.

Note: if there is no national implementation of Article 17 CDSMD you can end the questionnaire at this point.

AC 1: Subject matter

- 2. What is the subject matter (object) of protection by the LNI?**

The protection applies to the following categories of protected content:

- works protected by copyright (Art. XI.165(1) BCEL);
- performances protected by a neighbouring right (Art. XI.205(1) BCEL);
- phonograms and first fixations of films protected by a neighbouring right (Art. XI.209(1) BCEL); and
- broadcasts protected by a neighbouring right (Art. XI.215(1) BCEL).

The relevant provisions of Belgian law refer to ‘works and performances’ instead of the concept of ‘works and other subject matter’ utilised in Art. 17 CDSM Directive. While this may appear to refer only to works protected by copyright and performances protected by a neighbouring right, the preparatory works confirm that the concept of ‘performances’ should in this context not only be held to include performances by performing artists, but also

phonograms, first fixations of films, and broadcasts..¹⁹ To avoid any confusion on this matter, the relevant categories of subject matter are grouped together under the label ‘protected content’ in the answers to the next questions.

AC 2: Right-holders

- 3. Who are the beneficiaries of the protection provided by LNI? Please note whether there are any deviations from the directive.**

The holders of the rights indicated in the answer to Q2.²⁰ No deviations from the CDSMD have been uncovered.

AC 3: Exclusive rights

- 4. Against what kind of act does the LNI protect right-holders? Is a legal qualification given to those acts (e.g., “communication to the public”)?**

In the event that an OCSSP offers the public access to protected content uploaded by the OCSSP’s users (as listed in the answer to Q2), the new Art. XI.228/3 BCEL qualifies the activities of the OCSSP as an act of communication to the public, including the making available to the public, of such protected content.

AC 4: Targeted providers

- 5. Does the LNI target a specific kind of service provider? Please provide any relevant definitions, including any exclusions (“carve-outs”). Please focus on any differences from the concept of “online content sharing providers” (OCSSPs) as defined by Article 2(6) CDSMD and any elements taken from the recitals (e.g., facilitating piracy, definitions of “large amounts”).**

The BIA applies to ‘online content-sharing service providers’ (OCSSPs). The definition provided by the new Art. XI.228/2 BCEL matches Art. 2(6) CDSMD. It includes information society service providers whose main or one of the main purposes is to store and give the public access to a large amount of protected content uploaded by its users, which it organises and promotes for profit-making purposes. It excludes providers of services such as not-for-profit online encyclopaedias, not-for-profit educational and scientific repositories, open source software-developing and -sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use.

For the sake of completeness, a minor terminological deviation in the BIA is noted. The Dutch and French versions of the CDSM Directive, respectively, refer to ‘*aanbieders van een onlinedienst voor het delen van content*’ and ‘*fournisseurs de services de partage de contenus en ligne*’, while the relevant provision of the BIA refers to ‘*verleners van een onlinedienst voor het delen van content*’ and ‘*prestataires de services de partage de contenus en ligne*’. This choice was made for the sake of terminological coherence within the BCEL and does not have any substantive impact on the implementation under Belgian law.²¹

- 6. Were the targeted service providers considered to infringe the relevant exclusive rights in your country prior to the adoption of the LNI? Please indicate whether any liability was primary or secondary.**

Generally no, save for the uncertainties that accompany the broad scope of the right of communication to the public and its application to online service providers. However, as this issue results from case law of the CJEU on Art. 3 ISD, this issue is not specific to Belgian law.

¹⁹ Explanatory Memorandum BIA 89 in conjunction with 14.

²⁰ Explanatory Memorandum BIA 88.

²¹ Explanatory Memorandum BIA 86.

AC 5: Scope of protection

- 7. In your national jurisdiction prior to the transposition of the CDSMD did the service providers targeted by the LNI benefit from the protection of an immunity (e.g., the national implementation of the hosting safe harbour provided by Article 14 of the ECD (Directive 2000/31/EC))? If so, does this provision continue to apply?**

Yes, prior to the CDSMD implementation, immunity applied through the implementation of Art. 14 e-Commerce Directive (ECD) in Art. XII.19 BCEL. In accordance with the new Art. XI.228/3 BCEL, in the event that an OCSSP conducts an act of communication to the public or making available to the public in the sense of the new regime, Art. XII.19(1) BCEL does not apply. Outside of the scope of the implementation of Art. 17 CDSM Directive in Belgian law, Art. XII.19(1) BCEL continues to apply, albeit awaiting the application of Art. 6 Digital Services Act (DSA) from 17 February 2024 onwards.

- 8. Does the LNI provide an immunity for targeted service providers against the protection it introduces? If so, please describe the conditions for this immunity. To the extent that such conditions relate to obligations to take action against infringing content, please distinguish between obligations to take action against current infringing content and obligations to take action against future infringing content.**

The applicable legal regime is set forth in the new Art. XI.228/5(1) BCEL. If no authorisation is granted, OCSSPs will be liable for unauthorised acts of communication to the public, including the making available to the public, of protected content, unless the OCSSP demonstrates that they have:

1. made best efforts to obtain an authorisation; and
2. made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific protected content for which the right-holders have provided the OCSSPs with the relevant and necessary information; and in any event
3. acted expeditiously, upon receiving a sufficiently substantiated notice from the right-holders, to disable access to, or to remove from their websites, the notified protected content, and made best efforts to prevent their future uploads in accordance with point 2.

- 9. Does the LNI identify a standard of care to which targeted service provider should adhere in relation to the conditions of the immunity? For example, the Directive makes reference to “best efforts” and to “high industry standards of professional diligence”. Please also discuss whether you consider any such terms used in the LNI to represent accurate translations of the corresponding terms in the EU provision, preferably taking into account both the English language and the national language versions.**

The standard of care to which OCSSPs should adhere under the BIA is defined on the basis of the criteria of (1) ‘best efforts’ and (2) ‘high industry standards of professional diligence’.

The criterion of ‘best efforts’ (in Dutch: ‘naar beste vermogen’ and in French: ‘meilleurs efforts’) corresponds to the English version of Art. 17 CDSM Directive. The Dutch version of Art. 17 CDSM Directive refers to the need to ‘alles in het werk hebben gesteld’, which may be translated as ‘to have made every effort’ and sets a stricter standard for the threshold for OCSSPs to escape liability. In order to be in line with the other linguistic versions of the CDSM Directive, the Belgian legislator decided to implement the criterion of ‘best efforts’.²²

The criterion of ‘high industry standards of professional diligence’ (in Dutch: ‘strengere sectorale normen op het gebied van professionele toewijding’ and in French: ‘normes élevées du secteur en matière de diligence professionnelle’) corresponds to the wording used in the different linguistic versions of Art. 17 CDSM Directive.

²² Explanatory Memorandum BIA 92.

10. Are the conditions for the immunity in the LNI subject to the principle of proportionality? If so, please describe any specified implications.

Yes. The new Art. XI.228/5(3) BCEL sets forth that the analysis of whether an OCSSP satisfies the conditions for immunity must take account of the following elements, in view of the principle of proportionality:²³ (1) the type, the public and the size of the service and the type(s) of protected content uploaded by the OCSSP's users, and (2) the availability of appropriate and effective measures and the costs thereof for OCSSPs. These elements are not exhaustive. The new Art. XI.228/5(4) BCEL adds that further specifications of the conditions for immunity may be provided by Royal Decree, hereby expressly referring to the industry dialogues organised by the European Commission in accordance with Art. 17(10) CDSM Directive. At the time of writing, no such Royal Decree has been promulgated.

The relevance of the principle of proportionality also comes to the fore in the differentiated approach for start-ups, discussed in the answer to Q11 below.

11. Do the conditions of the immunity differ depending on the characteristics of the specific service provider (e.g., size or age)? If so, please describe those differences, providing any relevant definitions.

Yes, the BIA provides a lighter liability regime for certain new OCSSPs (start-ups). The new Art. XI.228/5(2) BCEL defines new OCSSPs as OCSSPs (1) the services of which have been available to the public in the European Union (EU) for less than three years, and (2) which have an annual turnover below 10 million euros, calculated in accordance with Commission Recommendation 2003/361/EC.

In order to escape liability, such new OCSSPs must prove to have:

1. made best efforts to obtain an authorisation; and
2. acted expeditiously, upon receiving a sufficiently substantiated notice from the right-holders, to disable access to, or to remove from their websites, the notified protected content.

Where the average number of monthly unique visitors of such new OCSSPs exceeds 5 million, calculated on the basis of the previous calendar year, there is a third condition for immunity, namely that they must prove to have:

3. made best efforts to prevent further uploads of the notified protected content for which the right-holders have provided relevant and necessary information.

AC 6: Right-holder cooperation

12. Does the LNI depend the conditions of the immunity on right-holder cooperation? If so, please describe what cooperation is expected of right-holders.

Yes, as the right-holders are expected to provide a 'sufficiently substantiated notice' to the OCSSPs in relation to the relevant protected content and provide 'relevant and necessary information' in this context (see answers to Q8 and Q11 above). The new Art. XI.228/8(2) BCEL confirms that, where right-holders request to have access to their specific protected content disabled or to have this protected content removed, they shall duly justify the reasons for their requests.

13. Does the LNI allow right-holders to " earmark" content the unauthorised online availability of which could cause them significant economic harm? If so, please provide any definitions and conditions that govern such earmarking and describe any special regime set in place for earmarked content.

I am not aware of the existence of any such regime under Belgian law.

²³ See also Explanatory Memorandum BIA 95-96, which expressly refers to the need to interpret the BIA in accordance with the principle of proportionality.

AC 7: General monitoring

14. Does the LNI permit the conditions of the immunity to result in general monitoring? If not, please explain how “general monitoring” is defined.

No. The new Art. XI.228/6(2) BCEL provides that the application of the BIA does not lead to a general monitoring obligation.²⁴

15. Does the LNI recommend or dissuade from using any specific kind of technology in order to adhere to the conditions for immunity? If so, please describe.

No.

AC 8: Exceptions and limitations

16. Prior to the adoption of the LNI, did national law provide for an exception or limitation to copyright for uses for the purpose of a) quotation, criticism and review; and b) caricature, parody or pastiche? If not, has it now introduced such exceptions or limitations? Please describe the conditions under which such exceptions or limitations apply.

Yes, prior to the BIA, Belgian law already provided for an exception to copyright for the purposes of:

- (a) Quotation, criticism and review, subject to the lawful disclosure of the copyright-protected work (this first condition does not apply to materials protected by neighbouring rights), respect for honest professional practices and a proportionality test (see Art. XI.189(1) BCEL for copyright and Art. XI.217 1° BCEL for neighbouring rights); and
- (b) Caricature, parody or pastiche, subject to the case law of the CJEU in the *Deckmyn* case²⁵, subsequent to which ‘the essential characteristics of parody, are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery’ (see Art. XI.190, 10° and Art. XI.217, 9° BCEL for neighbouring rights).

Both sets of exceptions are subject to the application of the three-step test (see Art. XI.192/3 BCEL and Art. XI.218/3 BCEL).

These exceptions were already of a mandatory law nature prior to the BIA, in accordance with Art. XI.195 BCEL and Art. XI.219 BCEL. Thus, the Belgian legislator considered that there was no need to expressly implement Art. 17(7) into Belgian law.²⁶

17. Do other exceptions or limitations apply to the protection provided by the LNI? If so, please describe.

Yes. The new Art. XI.228/6(1) BCEL provides that the cooperation between OCSSPs and right-holders may not lead to the prevention of the availability of protected content uploaded by users that does not infringe copyright and/or neighbouring rights, including when the protected content at issue falls within the scope of an exception. Thus, the exceptions set forth in Art. XI.189-XI.193 and XI.217-219 BCEL apply.

²⁴ See also Explanatory Memorandum BIA 98.

²⁵ Case C-201/13 *Johan Deckmyn en Vrijheidsfonds VZW tegen Helena Vandersteen* ao [2014] ECLI:EU:C:2014:2132.

²⁶ Explanatory Memorandum BIA 97-98.

AC 9: Licensing

18. Does the LNI include provisions on the licensing (incl. systems of extended collective licensing) of relevant uses? If so, please briefly describe any relevant details. For example, these could involve the following:

- **criteria for determining the height of compensation;**
- **the process for negotiating compensation;**
- **transparency duties (incl. data sharing obligations);**
- **duties to engage in negotiations;**
- **oversight by a government authority;**
- **(mandatory) collective rights management.**

The BIA does not regulate the way in which the licensing process must take place, except as to a transparency obligation imposed on OCSSPs vis-à-vis right-holders under the new Art. XI.228/7(1) BCEL (see answer to Q25 below). More in general, freedom of contract applies.²⁷ This means that: (1) the right-holders are not obliged to grant any authorisation; and (2) that the OCSSPs are not obliged to accept all licenses that are proposed to them.²⁸

Importantly, however, the new Article XI.228/4 BCEL seeks to establish an equitable remuneration right for the exploitation of protected content by OCSSPs. It sets forth that, in case an author or performing artist has transferred their right of communication to the public in the context of the exploitation of their work and/or performance by an OCSSP, they retain an unwaivable, collectively managed right to remuneration in return for such exploitation. This provision was added in one of the final stages of the legislative process. This explains why it is not expressly treated in the Explanatory Memorandum of the BIA. This equitable remuneration right is meant to ensure that authors and performing artists receive fair payment for the use of their work via OCSSPs.²⁹ The inclusion of this equitable remuneration right was the subject of vehement discussion in the Belgian Parliament, as it was argued by some that this aspect of the BIA is not in line with Art. 17 and Art. 18 CDSM Directive.³⁰ On 31 January 2023 and 1 February 2023, two actions for annulment were filed with the Belgian Constitutional Court in relation to the provision of the BIA that seeks to establish an equitable remuneration right for exploitation by OCSSPs, with docket numbers 7922 (filed by Google), 7927 (filed by Sony Music Entertainment Belgium) (see [here](#)). These cases are still pending at the time of writing.

19. Under the LNI, do licenses obtained by a platform cover the platform’s users and/or the other way around? If so, please explain.

Yes. The new Art. XI.228/3(2) BCEL provides that authorisation obtained by an OCSSP also applies to acts of communication to the public or making available to the public by the users of the OCSSP(s) at issue, when they are not acting on a commercial basis or where their activity does not generate significant revenues.

For the inverse situation, no relevant provision was uncovered. It may therefore be assumed that licenses obtained by the users do not cover the OCSSP(s).

AC 10: Legitimate uses: *ex ante* safeguards

20. Does the LNI include a concept of “legitimate uses”? If so, how are these defined? How are legitimate uses treated?

No. However, as noted in the answer to Q25 below, the new Art. XI.228/7(2) BCEL provides that OCSSPs shall inform their users in their terms and conditions that they can use protected content under exceptions or limitations to copyright and/or neighbouring rights. Such use may be considered as ‘legitimate use’.

²⁷ Explanatory Memorandum BIA 88.

²⁸ Explanatory Memorandum BIA 88.

²⁹ Prévot Report 6. The BIA provides a parallel unwaivable equitable remuneration right subject to collective management in relation to music and video streaming services (Art. XI.228/10 BCEL). This rights falls outside the scope of this questionnaire and therefore remains untreated here.

³⁰ See eg Prévot Report 12, 22-34.

21. Does the LNI include a concept of “manifestly infringing uploads”? If so, how is this defined? How are “manifestly infringing” and “non-manifestly infringing” uploads treated?

No. However, reference may be made to the general applicability of the principle of proportionality, as noted in the answer to Q10 above.

22. Does the LNI include other *ex ante* mechanisms for the avoidance of action against legitimate content? If so, please describe these citing the relevant provisions of national law.

No.

AC 11: Legitimate uses: *ex post* safeguards

23. Does the LNI provide for effective and expeditious complaint and redress mechanisms in the event of disputes? If so, please describe these. If applicable, please include information on time limits, decision-makers, procedural steps and whether any review is performed by humans.

Yes. The new Art. XI.228/8 BCEL provides that OCSSPs must put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, protected content uploaded by them.³¹ Complaints submitted under this mechanism shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review. Further specifications regarding such complaint and redress mechanisms may be provided by Royal Decree, including as to the appropriate deadline for decisions to be made, the procedural steps and the status of the content subject to the complaint in the course of the complaint and redress proceedings. At the time of writing, no such Royal Decree has been promulgated.

These complaints and redress mechanisms do not affect the availability of judicial redress mechanisms in accordance with the Belgian Judicial Code.³²

24. Does the LNI foresee for any other ways of settling disputes over content posted on their platforms (e.g., out-of-court mechanisms or recourse to the courts, incl. collective redress)? If so, please list these.

Yes. The new Art. XI.228/9 BCEL provides that OCSSPs must appoint two or more mediators in their general terms and conditions or license agreements with right-holders that are established or habitually resident in Belgium, for their activities aimed at users that are established or habitually resident in Belgium. The OCSSPs should be prepared to work together with these mediators with the objective of settling any dispute pertaining to the disabling or removal of uploaded content. These mediators must satisfy the conditions set by Art. 1726 of the Belgian Judicial Code. The mediation is conducted in accordance with the detailed rules on out-of-court mediation set forth in Part 7 of the Belgian Judicial Code. While this mediation is of a voluntary nature and does not affect the availability of judicial redress mechanisms in accordance with the Belgian Judicial Code³³, the OCSSPs, their users and the right-holders must contribute to mediation attempts made in accordance with this provision in good faith. The OCSSP must pay a reasonable share of the total costs of the mediation. At the request of the parties, the mediator may put forward a non-binding proposal as to the appropriate division of the mediation costs, including the reasonable share to be borne by the OCSSP.³⁴ In this context, the mediator takes account of all relevant circumstances, in particular the relative merits of the arguments of the parties to the dispute, their behaviour, and their size and relative financial strength.

³¹ See also Explanatory Memorandum BIA 100-101.

³² Explanatory Memorandum BIA 101.

³³ Explanatory Memorandum BIA 102-103.

³⁴ See also Explanatory Memorandum BIA 103.

AC 12: Sanctions

25. Does the LNI foresee sanctions in cases of abuses of the procedures it introduces by right-holders, users and/or platforms? If so, please describe these.

Not beyond the general prohibition of abuse of right.

AC 13: Information obligations

26. Does the LNI impose information obligations on platforms? If so, please describe these.

Yes, both vis-à-vis the right-holders and the users of the platform.³⁵ These obligations may be specified further by Royal Decree. At the time of writing, no such Royal Decree has been promulgated.

As to the former, the new Art. XI.228/7(1) BCEL provides that OCSSPs must provide right-holders, at their request, with adequate information on the functioning of their practices as to their cooperation with right-holders in the context of the liability regime and, where license agreements are concluded between OCSSPs and right-holders, information on the use of protected content covered by these agreements.

As to the latter, the new Art. XI.228/7(2) BCEL provides that OCSSPs shall inform their users in their terms and conditions that they can use protected content under exceptions or limitations to copyright and/or neighbouring rights.

AC 14: Waiver

27. Can right-holders waive the rights provided by LNI? Can authorisation be given for free?

The BIA does not specify whether a full waiver is possible. However, it is repeated that the equitable remuneration right established to the benefit of authors and performers for the use of their work(s) and/or performance(s) by OCSSPs (see answer to Q17 above) is unwaivable.

AC 15: Entry into effect

28. From what date did the protection provided by the LNI come into effect in your jurisdiction?

The relevant provisions of the BIA entered into force on 1 August 2022.

The application of these provisions is subject to the outcome of the annulment proceedings before the Belgian Constitutional Court, that are still pending at the time of writing (see the answer to Q17 above).

Additional information

29. Does the LNI explicitly address the relationship between the protection it provides as against OCSSPs and fundamental or human rights (whether of OCSSPs or third parties)?

Not in the text of the BIA. However, as the BIA contains specific safeguards to protect user freedoms, as well as an express confirmation of the prohibition of a general monitoring obligation, it may be stated that this relationship is addressed implicitly.³⁶

³⁵ See also Explanatory Memorandum BIA 99-100.

³⁶ See as to doubts raised in this context in the course of the legislative process Prévot Report 34-36.

30. Can you think of any noteworthy divergence in the LNI from the standards set out in Article 17 of the CDSMD that you have not already addressed above? If so, please elaborate.

No.