

## 2.2.2 Belgium

Many Belgian research organisations subscribed in 2007 to the Berlin Declaration on Open Access. This ambition was affirmed by the *Brussels Declaration on Open Access*, signed in 2012 by the Belgian, Flemish and French Community ministers of research at a conference organised by [OpenAIRE](#). The declaration makes Open Access the default in circulating the results of Belgian academic and scientific research. It mentions the effort to support, set-up and maintenance of repositories and ‘other innovative digital infrastructures to facilitate scientific communication’. It recognises that Open Access to scientific publications will be followed by Open Access to Data soon. Consequently, most Belgian universities have an Open Access mandate in place.

On a federal level, the “Code of Ethics for scientific research in Belgium”<sup>23</sup> has been in effect since 2009. With a focus on the verifiability of research, it states that “The primary data of a research project and the protocols must be kept and made accessible during a determined and sufficient period. When publications, especially review and summary articles, do not contain all the necessary data for verification, the data should nevertheless be available”.

IPR in Belgium is regulated through the Wetboek van economisch recht / Code de droit économique (Code of Economic Law<sup>24</sup>) - book XI, which is a federal competence. The articles XI.189 to XI.192 of the Code contain the major statutory exceptions to copyright protection, including exceptions for use of copyright protected works for research and educational purposes.

An Open Access provision has been adopted in the Belgian law as of September 2018<sup>25</sup>. This law gives authors the right to make the final peer reviewed manuscript of peer reviewed scholarly articles available in Open Access if the publication is a result of research funded by public funds for at least 50%, with a maximum embargo period of 6 months for science technology and medicine and 12 months for social sciences and humanities.

In line with the European legislation, the EU PSI Directive<sup>26</sup> on open data and the re-use of public sector information is currently being implemented into federal and regional law according to the federated jurisdiction. The EU DSM directive<sup>27</sup> on copyright and related rights in the Digital Single Market is being implemented into federal law as well.

The three main governmental funders of Belgium (BELSPO - federal, FRS-FNRS -French Community, and FWO - Flanders) have adopted Open Access policies in line with the Belgium Open Access provision. Belgium follows the line to provide Open Access through mainly Open Access repositories with Open Access publishing as an option for immediate Open Access. Belspo and FWO also encourage good research data management practices and have a DMP requirement included in their mandates<sup>28</sup>.

<sup>23</sup> [https://www.belspo.be/belspo/organisation/publ/pub\\_ostc/Eth\\_code/ethcode\\_en.pdf](https://www.belspo.be/belspo/organisation/publ/pub_ostc/Eth_code/ethcode_en.pdf)

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[http://www.ejustice.just.fgov.be/cgi\\_loi/loi\\_a1.pl?language=nl&la=N&cn=2013022819&table\\_name=wet&&aller=list&N&fromtab=wet&tri=dd+AS+RANK&rech=1&numero=1&sql=\(text+contains+\(%27%27\)\)#LNK0335](http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=nl&la=N&cn=2013022819&table_name=wet&&aller=list&N&fromtab=wet&tri=dd+AS+RANK&rech=1&numero=1&sql=(text+contains+(%27%27))#LNK0335)

<sup>25</sup> <https://www.dekamer.be/FLWB/PDF/54/3143/54K3143006.pdf>

<sup>26</sup> DIRECTIVE (EU) 2019/1024 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on open data and the re-use of public sector information

<sup>27</sup> DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

<sup>28</sup> An overview can be found here: <https://openaccess.be/open-access-in-belgium/open-data/>

Because of the federated state, the federated entities developed additional and separate initiatives. The 'Open Access Decree' of the Wallonia-Brussels Federation<sup>29</sup> consolidates the deposit policy of the Universities, stipulating that all scientific articles subsidized by public funds must be deposited in an institutional repository. At least 3 universities of Belgium signed the (French) [Jussieu Call](https://jussieucall.org/jussieu-call/)<sup>30</sup> for Open Access publication made by several French researchers (more than 110 signatories in total until now).

The Flemish universities started working groups on Open Science and research data management in 2015 within the Flemish Interuniversity Council (VLIR) with the goal to discuss both Open Science practices and policy advice. A result of the activities was the white paper 'Research Data Management and the Flemish universities'<sup>31</sup> with recommendations to invest in infrastructure, training, copyright and incentivising the research process. Around the same time, the Flemish Council for Science and Innovation (VRWI)<sup>32</sup> urges the Flemish Government and relevant R&D stakeholders to make Open Science a top priority. The Flemish government included Open Science in its coalition agreement 2019-2024 and started the Flemish Open Science Board (FOSB) in 2020. FOSB unites Flemish stakeholders in a shared vision for the future with regard to Open Science and EOSC. The initiative is supported by the Flemish government with a budget, a guiding roadmap and KPI's to be achieved<sup>33</sup>.

There are currently (September 2021) 15 Open Access institutional mandates in Belgium research institutes<sup>34</sup>. They follow an Immediate Deposit/Optional Open Access (ID/OA) Mandate<sup>35</sup>. Besides Open Access policies for publications, universities and research institutions have developed their own guidelines or policies on Open Access to data and research data management.

The DMPbelgium Consortium provides DMPOnline.be<sup>36</sup> to help write data management plans. KU Leuven has its own platform<sup>37</sup>. Furthermore, a dedicated website contains extensive information on Open Science in Belgium and information on activities related to Open Science and EOSC<sup>38</sup>.

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<https://www.dekamer.be/FLWB/PDF/54/3143/54K3143006.pdf>

<sup>29</sup> <http://archive.pfwb.be/10000000208d0d1>

<sup>30</sup> <https://jussieucall.org/jussieu-call/>

<sup>31</sup> <https://vlir.be/publicaties/rdm-white-paper/>

<sup>32</sup> <https://www.vario.be/nl/publicaties/open-science-voor-een-betere-wetenschap-met-grotere-impact>

<sup>33</sup> <https://www.ewi-vlaanderen.be/nieuws/open-science-vlaanderen-uitgewerkte-roadmap>

<sup>34</sup> <http://roarmap.eprints.org/view/country/056.html>

<sup>35</sup> More information can be found here: <https://openaccess.be/open-access-in-belgium/brussels-declaration-on-open-access/>

<sup>36</sup> <https://dmponline.be/>

<sup>37</sup> <https://dmponline.kuleuven.be/>

<sup>38</sup> <https://openaccess.be>

## 6.2.5.2 Belgium

### 6.2.5.2.1 Authorship

The Belgian *Code de droit économique* (CDE)<sup>111</sup> defines as author the natural person who creates the work, and introduces a presumption of authorship, according to which it has to be considered as the author who is indicated as such, unless proven otherwise. The editor of an anonymous or pseudonymous work is to be considered as the author *vis-à-vis* third parties (Art. XI.170 CDE).

As to co-authorship, Art. XI.169 CDE provides that for works of collaboration in which the contributions of each author can be singularly identified, co-authors cannot use their own contributions for new collaborations, unless agreed otherwise, while they can use their own contributions in isolation without prejudice to the exploitation of the collaborative work.

### 6.2.5.2.2 Subject matter

The CDE offers a general definition of protected works, followed by a broad definition of protected literary works, including oral speeches. Official acts are excluded from protection (Art. XI.172 CDE).

### 6.2.5.2.3 Exceptions

**Illustration for teaching and scientific research.** Adding several specifications to the exception provided by the InfoSoc Directive, article XI.191/1 CDE, authors cannot prohibit (i) the use of the published work for citation for teaching or scientific research purpose within the extent necessary and compliant with fair practices; (ii) its free use in teaching activities (including for exams) inside or outside the educational establishment buildings; (iii) its non-commercial reproduction and communication to public for illustration for teaching within the extent necessary; (iv) the use of works by deceased authors for the compilation of textbooks (“anthologies”) pursuing no direct or indirect economic profit and under the conditions of respect of the moral rights of the authors and of payment of fair compensation; (v) the reproduction and communication of the work by kindergartens/daycare centres (“établissements d'accueil de la petite enfance”) for pedagogical purposes. It is mandatory to indicate sources and author, unless it is proven impossible. The exception for digital teaching provided by Article 5 CDSM Directive has yet to be implemented.

**Private use for non-commercial purposes.** Article XI.190(9) CDE provides a very broad private copying exception for copies of lawfully accessed works – music sheets excluded – by natural persons for non-commercial purposes, with no qualifying constraints but only the requirement of fair compensation.

**Text and data mining.** Belgian law does not contain any provision adequate to address TDM needs. Articles 3 and 4 CDSM Directive are yet to be implemented.

**Public lecture.** Under Article XI.172(1) CDE, public speeches delivered in legislative, judicial or political assemblies can be freely reproduced and communicated to the public, under the condition that only the author can withdraw them from the market. Differently than in other national laws, no specific

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<sup>111</sup> Code de droit économique, 11-13, 077, 28 Février 2013, as last amended by L 2019-05-02/28.

reference is made to lecture or speeches in academic events, nor the provision fixes any quantitative limitation of use.

**Quotation.** In line with the Berne Convention and the InfoSoc Directive, Article XI.189(1) CDE states that authors cannot prohibit quotations of published works for purposes of criticism and review, to the extent justified by the purpose, and respecting fair practices. Author and sources should be mentioned unless proven impossible.

**Uses in libraries and other CHIs.** While Article 6 CDSM Directive on digital preservation has yet to be implemented, in line with the InfoSoc Directive, Article XI.190(12) CDE allows public libraries and other cultural institutions to reproduce a certain number of copies of works in their collection for purposes of preservation of the cultural and scientific heritage, with no commercial purposes. Fair compensation schemes apply. The public lending exception is provided for study and cultural purposes and it is not subject to fair compensation. It covers literary, musical and audiovisual works, for the latter two categories only 2 months after their first publication (Article XI.192 CDE).

**Marrakesh (accessibility for visually impaired individuals).** Under Belgian law, as long as the work is lawfully accessible, the author cannot prohibit any act necessary to make accessible format copies of the work or performance and to the exclusive use of the beneficiary, or any act carried out by authorized national entities necessary to make available accessible format copies to beneficiaries and other authorized entities across EU. (Artt.XI.190(15) CDE). Subsequent paragraphs specify technical elements of the functioning of the mechanisms, while paras 18 and 19 refer to the cross-border exchange of accessible works. Art.XI.299(2)(4) CDE and Art.XI.310(1)(1ter) CDE extend the Marrakesh exception to the realization of programs in accessible format and to the extraction, reproduction, communication to the public of part of a database to make that material accessible for visually impaired individuals. Ar

**Orphan works.** The provisions (Articles XI.129/1 and XI.218/1 CDE) are fully in line with EU law.

**Out-of commerce works.** While Article 8(2) CDSM Directive has yet to be implemented, Article XI.190(13) CDE allows libraries and other cultural institutions to communicate to the public from the terminals provided in their establishments, for the purpose of private study or research, out-of-commerce works included in their collections.

**Other software exceptions.** As in the EU text, Art.XI.299 CDE excludes the need for rightholder's authorization, absent specific contractual determinations, for acts necessary to use the program in conformity with its functions, including for the correction of errors (§1). Backup copies and study of functioning of the program are not subordinated to the absence of a different contractual specification (§2), and the same can be said of the interoperability exception under Art.XI.300(1), subject to the three-step test. All limitations are regulated using a language that is fully in line with the text of the Software Directive.

**Other database exceptions.** In line with EU law, the CDE includes an exception to the right of reproduction and communication to the public (copyright) and to the sui generis right on a lawfully accessed database, lawfully accessed, for lawful use personal use, public security, and non-profit teaching or research purposes (Art.XI.310(1)) The exception to the right of communication to the public is limited to educational establishments that are officially recognized, in the context of their

activities, and upon implementation of appropriate safety measures, to the extent this does not prejudice the normal exploitation of the work (Art.XI.191/2 CDE).

**Open repository right.** According to Article XI.196(2/1) CDE, authors of scientific works stemming from research funded at least for 50% from public sources, who have granted an exclusive or non-exclusive license to a publisher, retain the right to make the work available in a free, open format, after an embargo period of 12 months in the field of social science and 6 months for other science. The provision applies also retroactively on scientific works published before the entry into force of the provision.

#### 6.3.5.5 Belgium

##### Relevant legislative initiatives

- The Act of 30 July 2018 on the protection of natural persons with regard to the processing of personal data, TITLE 4. - Processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes referred to in article 89, §§ 2 and 3, of the Regulation.

##### Issues

- General clause article 186: Data subjects' rights can be limited if necessary to achieve the research purpose.
- Organizational measures:
  - General clause article 187: a possible Code of conduct on a specific field prevails on the following organizational measures.
  - Art. 190 states that in case a DPIA highlights a high risk, a DPO shall be appointed.
  - Art. 204 states that the DPO shall issue opinions on the use of the various pseudonymization and anonymization methods, in particular on their effectiveness in terms of data protection.
  - Art 191 concerns the record activities that shall introduce new items:
    - 1° the justification for the use of the data, whether pseudonymized or not;
    - 2° the reasons why the exercise of the rights by the data subject is likely to make the achievement of the purposes impossible or to seriously hinder it;
    - 3° where appropriate, the data protection impact assessment if the controller processes sensitive data, within the meaning of article 9.1 of the Regulation, for scientific or historical research or statistical purposes.
    - According to art. 196, the agreement or notification concerning the data collection shall be appended to the record of processing activities.
  - Art. 191 establishes that the record activities for data processing for archiving purposes in the public interest shall introduce new items:
    - 1° the justification for the public interest of the stored archives.
    - 2° the reasons why the exercise of the rights by the data subject is likely to make the achievement of the purposes impossible or to seriously hinder it.
- Re-use and further processing of collected personal data is analyzed under article 194:
  - Where personal data are not collected from the data subject, the controller shall conclude an agreement with the original controller. Unless :
    - 1° the processing relates to personal data that were made public;
    - 2° European Union law, a law, a decree or an ordinance: a) gives the controller as a mandate to process personal data for archiving purposes in the public interest, scientific or historical research or statistical purposes; and b) prohibits the reuse of the data collected for other purposes.

- Where exempted from concluding an agreement, the controller shall notify the original controller of the data collection.
- The controller of the further processing shall not have any access to the pseudonymization keys.
- Anonymization and pseudonymization techniques are described by article 197ff:
  - Articles 198-199 state that when the data processing is based on data collected from the data subject, the controller shall anonymize or pseudonymise the data once they have been collected or before the further processing.
  - Article 200 specifies that the de-pseudonymization is allowed only to the data controller after consulting the DPO.
  - Article 204 states the prohibition to disseminate any non-pseudonymized data, unless:
    - 1° the data subject has given his consent; or
    - 2° the data were made public by the data subject in person; or
    - 3° the data are closely linked to the public or historical nature of the data subject; or
    - 4° the data are closely linked to the public or historical nature of facts in which the data subject was involved.
  - Article 205 provides a general rule, unless it has been different established, by which the controller can disseminate pseudonymized data, with the exception of the personal data referred to in article 9.1 of the Regulation, while, according to article 206 non-pseudonymized data can be communicated to an identified third party only if he/she is unable to reproduce the data communicated. This condition is not necessary if:
    - 1° the data subject has given his consent; or
    - 2° the data were made public by the data subject in person; or
    - 3° the data are closely linked to the public or historical nature of the data subject; or
    - 4° the data are closely linked to the public or historical nature of facts in which the data subject was involved.