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CASE STUDY (II) ON FREEDOM OF EXPRESSION IN THE CONTEXT OF THE MEDIA

Marie-Pierre Granger, Orsolya Salat (Central European University)

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number	partner name	People involved
1	UU	Pauline Phoa
2	UA	Maria Teresa Solis Santos
12	CEU	Marie-Pierre Granger, Orsolia Salát
15	UNITN	Elena Ioriatti, Elisabetta Pulice
18	UNIOVI	Ignacio Villaverde Menéndez, Javier A. Gonzalez Vega

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INTRODUCTION

The objective of WP7 is to study, from the perspective of EU citizenship, specific problems EU citizens face in exercising civil rights and liberties in areas which fall within the scope of EU law, but also in areas beyond the scope of EU law. In the EU legal context, fundamental rights, including civil rights, have gained not only visibility but also, arguably, significance, now that the Lisbon Treaty has made the Charter of Fundamental Rights legally binding.

Media freedom and policy in the EU in general has been widely researched and studied, focusing largely on the areas less directly relevant for citizens, i.e. television and radio broadcasting, media regulators, etc. This case study therefore focuses on tackling barriers in an area more relevant for individual citizens' freedom of expression, referred to as citizens' journalism. This is a new field of practice and research, where conceptual clarifications are needed and which calls for further research into the application and evolution of legal and procedural frameworks, in line with changing journalism landscape (blogs, online comments, etc).[1]

The Council of the European Union adopted Guidelines on freedom of expression online and offline for its external policy[2], while it does not have such guidelines internally, for its member states. Internally, freedom of expression is not strongly under the radar. There has been a discussion whether the mutual recognition of judgments in civil and commercial matters should not apply to defamation cases,[3] since there is so much divergence.[4] At the end, this has not become the case, therefore the strong substantive divergences remain, and need to be mutually recognized, with all resulting problems with forum shopping, and a potential race to the bottom.

This report's initial understanding of citizen journalist has deliberately been an uncircumscribed one, in order not to impose an arbitrary, potentially too narrow concept on the different legal orders examined in this task. Therefore, the questionnaire was drafted to screen all possible forms of citizen journalism, such as blogs, social media, comments, wiki contributions, and had asked specific questions about their status, responsibility, sanctions

[1] Although whistle blowers are important actors in this changing context of access and sharing information, we decided to leave it out of the scope of the report, because there is already a fair amount of comparative studies on whistle-blower protections in EU member states.

[2] EU Human Rights Guidelines on Freedom of Expression Online and Offline FOREIGN AFFAIRS Council meeting Brussels, 12 May 2014, https://eeas.europa.eu/delegations/documents/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf.

[3] The Commission originally would have even maintained *exequatur* in defamation cases during the drafting of Brussels I regulation, see Commission 'Proposal for Regulation of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters', SEC (2010) 748 Final as cited by the bEUcitizen D7.2. report, 43. http://beucitizen.eu/wp-content/uploads/D7.2_Report_final.pdf.

[4] See only the Commission study, *Comparative study on the situation in the 27 Member States as regard to the law applicable to non-contractual obligations arising out of violations of privacy or the right related to personality* http://ec.europa.eu/justice/civil/files/study_privacy_annexe_3_en.pdf , as cited by the bEUcitizen D7.2. Report, 43. http://beucitizen.eu/wp-content/uploads/D7.2_Report_final.pdf.

on their own, and in comparison to a generally perceived category of journalism if there is one in the given legal system.

Citizen journalism is generally seen to provide an important avenue for political participation, the political engagement of citizens between elections, and the reinvigoration of a sense of authenticity or belonging. In an era of mistrust in both domestic and EU political institutions, republicanism is gaining appeal: scholarship has already recognized the need with regard to citizen journalism specifically, Ian Cram wrote a whole book on citizen journalism from the republican perspective.[5] If there is any chance that the internet creates a truly republican "digital commons" so many hope for, it would certainly not be possible without citizen journalists. Equally, any prospect that EU citizens develop or further develop a transnational political discourse or an European public opinion or political public as Habermas would argue,[6] presupposes citizen journalists writing on it. In this sense, citizen journalists writing on EU issues appear to be a necessary (though naturally insufficient) condition for more political, social, or in any sense thicker (post/or beyond-market) version of EU citizenship, both in practice and conceptually.[7]

The so conceived ideal of citizen journalism would promote these more ambitious ideals of European citizenship and democracy. This is not to deny that activities looking like citizen journalism might of course harm others or might go beyond the scope of freedom of expression, and violate privacy rights or spread hate messages, and so on. There is some literature observing that citizen journalism might run the risks of bad journalism (hate speech, misinformation, etc.) to a larger extent than professional journalism. The initial understanding of this paper however was not to form any view on that. The risks generally do not seem to outweigh the massive legitimacy and other political-moral gains a more engaged transnational citizenry would bring to the European project. Furthermore, there was no indication that courts would be less willing to grant protection against violations of privacy, equality or dignity if caused by citizen journalists. This deliverable undertakes to check what the legal conditions are under which they operate, and whether there is convergence or divergence between different EU countries' legal orders in this regard.

[5] See for a systematic analysis: Ian Cram, *Citizen Journalists. Newer Media, Republican Moments, and the Constitution*. Edward Elgar, Cheltenham, 2015.

[6] Jürgen Habermas, "Politische Öffentlichkeiten jenseits des Nationalstaates?", in: ders. Ach, Europa Suhrkamp, Frankfurt/M. 2008, 188 generally ibid, Zur Verfassung Europas, Suhrkamp, Frankfurt/M 2014.

[7] See Daniel Gaus & Sandra Seubert, "Introduction: Unbounded Citizenship, Political Participation, Linguistic Diversity – Barriers Towards EU Citizenship As A Concept And Practice?" in Sandra Seubert & Frans Waarden, *Being a Citizen in Europe: Insights and Lessons from the Open Conference, Zagreb 2015*, bEUcitizen Deliverable 2.2. http://beucitizen.eu/wp-content/uploads/D2.2-Being-a-Citizen-in-Europe-Insights-and-Lessons-from-the-Open-Conference-Zagreb-2015_final.pdf.

1. BLOGGERS AND BLOG EDITORS

Definition, relation to journalism

In the countries under examination, there is no legislative definition for blogger or blog. The legal status of bloggers is therefore not unequivocally clear in every country, and there are significant differences and internal fragmentations in this regard. In case law and legal scholarship, there is a wide variation on the conditions which determine whether bloggers qualify as journalists, professional journalists, or simply citizens exercising their freedom of expression. This variation is by far not only nominal: journalists have -- at least de facto, in the casuistic results of case law -- a special status in every country, and that status also varies, comes with different rights and duties.

In Belgium, this relates to the more general issue of the overlap between freedom of press and freedom of expression.[8] All the more so, as the concept of "open" or "free" journalism have been taking hold in recent years, and especially due to the internet, where every citizen with a computer and internet access can become a journalist. The Belgian state is supportive of this process, while other countries might be considered to be more hostile.
Whether a blogger will qualify as a journalist in Belgium depends on the content of the actual activity:[9] if he or she publishes on a (i) regular basis, with the (ii) aim of reaching the general public, and about (iii) what is happening in society, then the blogger will qualify as a journalist falling under the scope and protection of the freedom of the press (art 25 of the Belgian Constitution, i.e. not simply art 19 on freedom of expression). The Court of Cassation confirmed that no specific professional qualification is required for an activity to fall under freedom of the press, because that right is granted to everyone. The Constitutional Court ruled in 2006 that the journalistic privilege of protection of sources should extend beyond the circle of professional journalists, to anyone engaging in journalistic activity.[10] Therefore, it is safe to conclude that a blogger will be considered a journalist if he or she fulfils the mentioned conditions, however, when the blog only gives opinions on personal matters, it will fall under general freedom of expression exercised by a citizen.

In Italy, similarly, no legislative definition of blog or blogger exist, and there is some ambiguity whether bloggers fall under the 1948 Press Law. The Italian Constitution also protects both general freedom of expression and freedom of the press. Thus, the question arises how to distinguish professional journalism from journalistic activity, in the sense of "individual activity of giving information and news (including expressing opinions on it)."[11] Professional journalists are notably required to register at the national journalists'

[8] Report on Belgium, 3,
[9] Report on Belgium, 5.
[10] Decision 91/2006 of the Belgian Constitutional Court of 7 of June 2006 as cited by the Report on Belgium, 5.
[11] Report on Italy, 4.

Association, and omission to register in principle may amount to criminal liability.[12] They are also bound by the Code of Ethic, and journalism is all in all a "regulated profession."[13] However, it appears that these rules do not apply to most bloggers: both the Constitutional Court and the Supreme Court clarified that the occasional journalistic activity, even if paid, does not require registration.[14] That can be applied to bloggers, whose activity therefore qualifies as non-professional journalism, which then falls under the individual exercise of freedom of expression (and not freedom of the press).[15] On the other hand, the press in Italian law refers to "typographic prints, or prints obtained by mechanic or physic-chemical means, in whatever way intended for publication."[16] Another concept is that of the "editorial product" which has been extended also to the online environment. An editorial product is "the product realized on a paper structure (*supporto cartaceo*), including a book, or on an IT structure (*supporto informatico*), intended for publication or in any case for the circulation of information at the public by any means, also electronic …"[17] Editorial products and other products which are disseminated to the public, with regular periodicity, and have a heading, fall under the Press Law, with accompanying obligations.[18] Thus, a blog might still qualify as press, although this is not automatic, and needs to be based on "specific features of the blog and the intention of it."[19]

In the Netherlands, too, there is no legal definition of bloggers, and there is no specific legal status accorded to bloggers as such. On the other hand, in contrast to Italy, journalism is a "free profession", which anyone can join, without registration or any other qualification. What matters is the nature of the activity: anyone who publishes information, news or opinion of public interest, merits high level protection, [20] independent of the means of communication. Data protection norms generally prohibit publication of information about a private person without their consent, however, there is a journalistic exception, which then might be understood to be a definition of journalistic activity. In the interpretation of the Dutch Data Protection Authority, such is the case when "a) the publication is aimed at (objective) information gathering and dissemination, b) the person who publishes does regularly, c) the publication aims to bring a public issue to the attention, and d) the publication allows a right to respond and/or rectification."[21]
While formally journalists are not subject to a stricter regime of responsibilities, Dutch courts might in effect conclude that being a professional journalist is a factor which

[12] Legge 3 febbraio 1963, n. 69, Ordinamento della professione di giornalista as cited by the Report on Italy, 4.
[13] Report on Italy, 16.
[14] Report on Italy, 5.
[15] Id.
[16] Art. 1 of the Press Law, as cited by the Report on Italy, 7.
[17] Law 7-3-2001 n. 62 as cited by the Report on Italy, 8.
[18] Report on Italy, 7-8.
[19] Report on Italy, 9.
[20] Report on the Netherlands, 3.
[21] Data Protection Guidelines:
https://autoriteitpersoonsgegevens.nl/sites/default/files/downloads/rs/rs_20071211_persoonsgegevens_op_internet_definitief.pdf as cited by the Report on the Netherlands, 4.

mandates some enhanced responsibility of care in the circumstances of a case.[22] This might in theory be applicable to bloggers if -- in the casuistic inquiry – the weighing of all factors leads to this. However, the opposite is more likely: eg a personal blog was considered to fall under a less heavy duty to respect privacy than traditional wide-circulation news media by a Dutch court.[23] Another illustrative case is when a professional journalist published an opinion piece on his own personal website, and the court did not consider his professional capacity as journalist to be relevant.[24] On the other hand, the case is also insightful in another respect: the balance fell heavily on the side of the right to privacy because the opinionated nature of the publication – being published on a website – was not as clear as if it had been published in the opinion column of a traditional newspaper. Cases related to that latter can be brought as examples for the emerging existence of such a difference, disadvantaging blogs over traditional media.[25] This does not mean that Dutch courts automatically disadvantage blogs, quite to the contrary: in another decision, the fact that a defamatory statement was published on a blog, constituted an important factor in the court's reasoning in rejecting that *criminal* defamation took place.[26]

In Spain, there is no legal definition of blog or blogger, and, not even that of journalist. This latter term is only defined in statutes and collective work agreements of mass media outlets, but such definitions have not found any reflection in either legislation or judicial decisions.[27] On the other hand, Spanish courts have for long been keen on upholding the applicability of expression and information rights to anybody, independent of professional status, i.e. no difference between mere citizens and professional journalists can be established on the basis of the constitution.[28] Thus, while bloggers are not considered journalists, this does not mean they are in a less or more favourable position than classic journalists.

Registration, licensing

In neither of the countries have blogs as such to be registered or licensed, but the issue is rather complex and often not settled clearly.
In Belgium, bloggers need to possess a domain name in order to be identified. This is done either by choosing a free sub-domain name offered by blog services providers, or by registering a full domain name.[29]

[22] Report on the Netherlands, 6.
[23] ECLI:NL:GHAMS:2010:BO5417, Amsterdam Court of Appeal, 30 November 2010, para. 3.6. as cited by the Report on the Netherlands, 7.
[24] ECLI:NL:RBSGR:2007:BB8427, District Court of The Hague, 21 November 2007, para. 4.2-4.5 as cited by the Report on the Netherlands, 7.
[25] ECLI:NL:RBAMS:2008:BD1695 LJN BD1695, District Court of Amsterdam, 15 May 2008, para. 4.9. as cited by the Report on the Netherlands, 7.
[26] ECLI:NL:RBNHO:2015:2320, District Court of North-Holland, 23 March 2015 , pt .3.3 as cited by the Report on the Netherlands, 10.
[27] Report on Spain, 4.
[28] Judgment 30/1982 of the Constitutional Court Id.
[29] Report on Belgium, 8.

In Italy, the press is heavily regulated, and the status of a "newspaper" brings with it both advantages and disadvantages. Newspapers stricto sensu have to be registered, and failure of registration results in criminal liability ("clandestine press"); at the same time, newspapers properly registered are entitled to get support from a state-provided fund (!).[30] As mentioned, an editorial product which falls under the law might be "realized … on a IT structure"[31] Therefore, a regularly updated blog with a heading might fall under the duty to register. Case law in this regard is not consistent. While until 2011 it might have seemed that courts would consider blogs to be newspapers in the sense relevant for the duty of registration,[32] in 2012, the Supreme Court reversed, and considered that a duty to register for blogs and online newspapers (with accompanying criminal liability) would be unconstitutional.[33]

In contrast, in Spain there is no duty to register in any sense, for any potential groups of bloggers. As the rapporteur put it: "it is a free and private market, subject only to the contractual conditions of use supplied by the provider of web services in accordance with the provisions in the Law 34/2002, of 11 July, on services for society of information and electronic commerce.[34]"[35] Note that in Spain, journalists also do not have a special status.

Protection of sources and other privileges

Belgian law, as in most regards, is the most protective with regard to protection of sources of bloggers as well. An important Constitutional Court decision from 2006[36] stated that the protection of sources is necessary to enable the press to function as the public "watchdog", and that this protection extends not only to journalists as a professional group, but to persons engaging in journalistic activity. This interpretation covers bloggers who write on issues relevant to the public.[37]

In Italy, protection of sources is granted under the name of "professional secrecy." This institution exempts professional journalists from the duty to testify in criminal cases, unless a judge orders it, in case no other ways are available to prove the issue in question.[38] Otherwise, the violation of professional secrecy is an offense, and with regard to journalists, it can lead to disciplinary proceedings.[39] Courts gave an extensive interpretation of the journalistic privilege, thus it in practice covers not only the sources of professional

[30] Arts 5 and 16 of the Press Law, Report on Italy, 9.
[31] Law 7-3-2001 n. 62, art. 1 as cited by the Report on Italy, 8.
[32] 2008 and 2011 cases as cited by the Report on Italy, 7-8.
[33] 2012 case cited by the Report on Italy, 8 (without any further precise reference).
[34] BOE núm.166, 12 de julio de 2002, as cited by the Report on Spain, 4.
[35] Report on Spain, 4.
[36] 91/2006 of the Belgian Constitutional Court of 7 of June 2006, as cited by the Report on Belgium, 5.
[37] Id.
[38] Report on Italy, 29.
[39] Id.

journalists, but also journalists falling under the category of "*giornalisti pubblicisti."*[40] All in all, this appears to imply that bloggers in general do not benefit from the protection of sources, unless they qualify as either professional or "publicist" journalist, this latter meaning freelance, but still paid and non-occasional contributions.[41] Thus, compared with Belgium, the Italian understanding of bloggers' privilege is rather restrictive.

In the Netherlands, the protection of journalistic sources is in general not adequately granted. After three critical ECtHR decisions,[42] a process was launched to improve the legal framework, however, no new law has been adopted as of the time of the submission of the national report.[43] Until its adoption, the old regime of ex post facto judicial review for violation of source protection applies.[44] There has been no case of protection of sources involving bloggers. As it stands now, should such a case arise, Dutch courts would likely adopt the approach of the ECtHR to protection of sources, which is rather narrow, and only applies to professional journalists.[45]

In Spain, the question whether the protection of sources of bloggers is guaranteed is not clearly settled. Protection of sources is generally granted to a category called "information professionals". This category implies a communication medium in which the blog is inserted, and an employment relationship of the blogger to the media. Apart from such – rare – cases, it might be that bloggers acting truly as "citizen journalists", i.e. not as "information professionals" do not enjoy the privilege of protection of sources.[46] As there is no case law in this regard, this is only a danger, not a confirmed judicial interpretation. Even if the protection extends to bloggers, it is rather limited, because it is circumscribed by vague exceptions. The exemption from testifying notably does not apply "for the cases in which the crime may seriously endanger the security of the State, the public peace or the sacred person of the King or his successor."[47]

Responsibilities and Sanctions

Generally speaking, bloggers are under a duty to abide with all laws just like everybody else, and therefore, their liability in case of a violation falls under the general regimes of criminal and civil liability. This will include, depending on the particular country, especially laws protecting personal honor, privacy, data protection, laws against some form of hate speech, etc. While many of these laws might be problematic, the country rapporteurs have not

[40] Report on Italy, 30.
[41] Report on Italy, 5.
[42] 22 November 2007, nr. 64752/01, (Voskuil/ Nederland), ECtHR 14 September 2010, nr. 38224/03 (Sanoma/Nederland), and ECtHR 22 November 2012, nr. 39315/06, (De Telegraaf/Nederland) as cited by the Repor ton the Netherlands, 14, note 43.
[43] Report on the Netherlands, 14-16.
[44] Id.
[45] Id.
[46] Report on Spain, 6.
[47] Art 418 of the Criminal Code, as quoted by the Report on Spain, 6.

clearly identified issues which are specific to bloggers, or actual instances of problematic application of these laws to bloggers.

A more intriguing question is whether bloggers operate under some special liability regime. For professional journalists, there usually is some sort of professional self-regulatory oversight body, such as a deontological council or a professional organization setting -ethical - rules for the profession. The OSCE specifically recommends that states promote participation of online media actors in self-regulatory mechanisms as well.[48]

In Belgium, the deontological self-regulatory bodies of professional journalists sometimes consider bloggers to fall within the ambit of their supervision. Especially if the blog in question can be qualified as "factual journalistic activity"[49], i.e. informing the general public. This extensive interpretation of the competence of these bodies does not appear to raise concerns because the sanctions which can be inflicted by the deontological councils are not legally binding, i.e. the ultimate sanctioning power is reserved for the courts,[50] who apply general law.
Belgian law is quite logical regarding structures of liability: as a principle, it is solely the blogger who is responsible for the posted material. However, if the authoring blogger cannot be made responsible – which is assumed to be the case when the author is not "known and resident" in Belgium – then the editor will be primarily responsible, followed by the publisher, the printer, and the distributor (cascading liability).[51]

In Italy, as mentioned, the press is heavily regulated, accompanied with comparatively intense state intervention into the exercise of freedom of expression in general. This results in strict rules for editorial products, and responsibility of the editor especially for defamatory content[52]. Blogs, however, in judicial interpretation, do not automatically qualify as such, and therefore bloggers are first of all responsible for their own comments and articles.[53] They are held responsible for the comments of others only if they filter them, and even then only on the basis of complicit, and not of autonomous liability (unlike editors of press).[54] However, in some cases, courts do not follow this, and make the bloggers directly responsible for defamatory comments posted by others.[55] This, according to the Freedom House report on Italy, cited by the country report, creates a chilling effect, and results in self-censorship on controversial matters.[56]

[48] The Online Media Self-Regulation Guidebook / Ed. by A. Hulin and M. Stone; Vienna: OSCE Representative on Freedom of the Media, 2013, http://www.osce.org/fom/99560?download=true. The Report on Belgium mentions OSCE and the representative of the OSCE, cf. 6 & 23.
[49] Report on Belgium, 7.
[50] Id.
[51] Report on Belgium, 10.
[52] Report on Italy, 9.
[53] Report on Italy, 9-10.
[54] Report on Italy, 10
[55] Court of first instance of Varese (decision no. 116 of 8 April 2013) as cited by the Report on Italy, 10.
[56] Report on Italy by Freedomhouse, available at:

While in relation to defamation, the qualification of "press" comes with disadvantages, Italian law also knows scenarios where the press is privileged. One such area which hits bloggers for not being considered press is the law applicable to seizures.[57] With regard to press, any measures of seizure must be approved by a judicial authority or else cease to apply after twenty-four hours, however, the case law does not apply these guarantees to blogs.[58] The Supreme Court only limited the otherwise thus basically unlimited seizing power by imposing the requirement of balancing: accordingly, libelous statements which do not have "an offensive potential" ought not to trigger the use of the seizure power.[59] According to most basic ECHR jurisprudence, statements which do not even offend, cannot be sanctioned in any way, let alone in such drastic one as seizure.

Spanish law does not formally foresee enhanced responsibility for either journalists or bloggers. Higher diligence and due care is still required from "contracted personnel by a mass medium" since they are "co-responsible for the opinions or information published."[60] In the case of blogs supported on servers or web services, providers are responsible only if they have actual knowledge of illegal content and do not remove or make it inaccessible. The relevant Spanish law specifies that having actual knowledge means "when a competent body has declared the wrongfulness of the data, ordered their withdrawal or makes access to them impossible, or the existence of the damage has been declared, and the lender is aware of the corresponding resolution, without prejudice to the procedures for detection and removal of content that the providers implemented under voluntary agreements and other means of actual knowledge that may be established."[61] Spain is the only country where anonymous speech is explicitly unprotected, and this was confirmed at the highest level, by the Constitutional Court.[62]

https://freedomhouse.org/sites/default/files/FOTN%202015%20Full%20Report.pdf as cited by the Report on Italy, 11.

[57] Report on Italy, 11.

[58] Court of first instance of Naples, decision no. 1184 of 18 February 2015; Cass, criminal section, 10594/13 as cited by the Report on Italy, 11.

[59] 2014 decision of the Supreme Court as cited by the Report on Italy, 11 (no specific reference).

[60] Report on Spain, 5.

[61] Art 16, Title II, Chapters II and III of the Law 34/2002, of 11 July, services of the society of the information and of electronic commerce, as quoted by the Report on Spain, 6.

[62] STC 153/2000 and ATC 56/2002 as cited by the Report on Spain, 7.

2. SOCIAL MEDIA USERS

General status of social media users, the question of "public" or "private" speech

In none of the countries examined exists a special legislative framework for social media, nor has there been very many cases involving social media users.

In Belgium, social media users benefit from the broad scope of freedom of expression in general. Belgian jurisprudence is explicitly reluctant to apply different standards to online speech than to any other speech, clearly in order to maintain the same level of protection of freedom of expression to everybody.

The main problem appears to be that social media posts are considered private posts, and that makes it hard to prove that there has been a defamation.[63] For instance, the posting of a dishonest and disrespectful messages in a Facebook discussion group towards co-workers was not considered illegal, as the person posting it was not aware of the group being open to all, and he regretted his deed, which was anyway not very serious (no insult or injury).[64] Thus, in this regard, social media posts do not run the risk of being considered public speech eo ipso (i.e. they will not automatically qualify as "public" for the purposes of defamation, and thus certainly not considered as aggravating circumstance).

Generally, Belgian courts will carefully examine whether a social media post realized any of the usual speech offences (defamation, slander, etc.), and will apply the usual proportionality test in every case.[65]

In Italy, in contrast, courts are rather unequivocal about the public nature of social media posts. This is in line with the generally less expression-friendly legal environment in Italy. The Italian country report refers especially to libel cases,[66] and explicitly states that posting on social media qualifies as an aggravating circumstance (for being considered public, as reaching a potentially unlimited audience).[67] What is more, the Italian Supreme Court even found a post not identifying the defamed person by name punishable: accordingly, "it is sufficient that enough details are included so that the offended person can be identified by as few as two persons"[68]. While Italian courts deciding on libel cases typically do not utter

[63] Report on Belgium, 10-11.

[64] Judgement N.º 2010/AB/00014 of 4 March 2010 rendered by the Labor Court of Brussels as cited by the Report on Belgium, 12.

[65] See eg Judgement of the Commercial Court of Brussels rendered on 24 December 2013 as cited by the Report on Belgium, 12.

[66] See Report on Italy, 13, citing Adriana Apicella "Diffamazione a mezzo stampa, è reato anche su Facebook", Justicetv.it, January 17, 2013 , http://www.justicetv.it/index.php/news/2992-diffamazione-a-mezzo-stampa-e-reato-anche-su-facebook; and Mauro Vecchio,"Diffamazione, stampa e social pari sono?" Punto Informatico, January 15, 2013, http://bit.ly/1L88ZGK, quoted also in the Report on Italy by Freedomhouse, available at https://freedomhouse.org/sites/default/files/FOTN%202015%20Full%20Report.pdf.

[67] Id.

[68] Report on Italy, 13, referring to Report on Italy by Freedomhouse, op. cit. The decision is: Cass., I criminal section, decision no. 16712 of 16/04/2014. See also "Cassazione: è diffamazione parlar male su Facebook anche senza fare nomi", La Repubblica, April 16, 2014, http://bit. ly/1PaZqKX .

strong concerns for freedom of expression, in one recent case, according to the report, the court took into account the "right to news reporting" ("*diritto di cronaca*"), and found, on this basis, that a libelous content had not needed to be removed.[69] Therefore, while not freedom of expression in general, this more specific Italian right might come to the help of social media users in some – although necessarily limited – circumstances, which can be conceptualized as news reporting.

At first similarly, in the Netherlands, the legal regime applicable to social media users is the same as what applies to bloggers. That is freedom of expression within the limits set by the ECHR Art 10(2), as interpreted by the ECtHR, whose case law is closely followed and monitored by Dutch courts.[70]

This is however where any similarity of the Dutch approach to the Italian one ends. In contrast to Italy, Dutch case law shows that expression on social media is viewed more leniently by Dutch courts. Facebook and Twitter are surfaces where people share their views in a not necessarily "nuanced" way according to Dutch courts, thus, they are to be understood in their rather relaxed and subjective context.[71] In another case, the court considered that negative and accusatory statements on a social network called Hyves will be taken by its readers "with a grain of salt" and understood in their context.[72] On the other hand, the Supreme Court has ruled in the context of the same social network that a publication visible to 20-25 persons fulfils the requirement of being "public" for the purposes of defamation law.[73] Thus, one can imply that Dutch courts are quite liberal and contextual as to the content of social media posts, they are of the view that social media posts in non-closed groups are public, with all resulting activation of legal liability.

A Dutch court was also especially attentive to the way information flowing on social networks such as Facebook can change their public or partially public nature when for instance a partially public post is shared and becomes accessible to everyone, and took note of the difference when information is only shared privately.[74]

Privacy settings therefore matter for legal consequences in Dutch law, and posts in closed social media groups generally will not qualify as public for either the purposes of defamation law, or for incitement prosecution. In contrast, Twitter tweets are understood to be "mini-blogs", and, thus, fully public by the same court.[75]

Social media posts are furthermore not exempt from scrutiny for terrorism-related activities. Case law shows that social media posts are used as additional inference for authorities to

[69] Court of first instance of Rome, I civil section, decision no. 13275/15. as cited by the Report on Italy, 15.
[70] Report on the Netherlands, 22.
[71] ECLI:NL:RBAMS:2014:8364, District Court of Amsterdam, 1 December 2014 and ECLI:NL:RBDHA:2015:14365, District Court of Den Haag, 10 December 2015, para. 11.16-11.21, 12.4, 12.53, 12.74, 12.83 as cited by Report on the Netherlands, 22.
[72] ECLI:NL:GHAMS:2010:BL6050, Amsterdam Court of Appeal, 23 February 2010, para 4.7. as cited by the Report on the Netherlands, 22.
[73] ECLI:NL:HR:2011:BQ2009, Dutch Supreme Court, 5 July 2011, para. 2.5 as cited by the Report on the Netherlands, 22.
[74] ECLI:NL:RBDHA:2015:14365, District Court of Den Haag, 10 December 2015 as cited by the Report on the Netherlands, 23.
[75] Id.

establish terrorist intent for a condemnation for preparatory acts and incitement to terrorist acts.[76]

In Spain, social media users generally do not fall under a special legislative framework, i.e. there is neither preference nor disadvantaging of social media posts vis-à-vis other communication. There is one exception, which is hate speech, where posting on internet is an aggravating circumstance. According to article 510 of the Criminal Code, incitement to hatred is punished with a penalty "in their upper half when the facts had been conducted through a social communication medium, via Internet or through the use of information technology, making them accessible to a large number of people."[77] There is no reason why this logic of wider accessibility could not be applied to any sort of illegal speech.

Responsibility for illegal expression posted to social media

Responsibility for social media posts is a further issue on which the examined jurisdiction show variation.

In contrast to the relatively clear status of social media posts as protected expression in Belgium, the responsibility for them in case of illegality appears somewhat murky. Especially online hate speech is an area which appears generally "more controversial" than off-line.[78] While the general rule of course is the responsibility of the author, in addition, it might be necessary to determine whether the social media network is an intermediary, and, thus, co-responsible.[79] A 'hosting service provider', according to the Belgian Code of Economic Law, stores "information provided by a service recipient."[80] If the hosting services provider does not have "an effective knowledge of the illegality of the activity or of the information contained", it will be exempted from liability, provided that it removes or blocks access to the illegal information as soon as it becomes aware of it. On the other hand, in the context of a student website not employing immediate moderators and thus tolerating anonymous defamatory messages being spread, the Brussels Court of Appeals rejected the reference to exemption.[81] All in all, there is not yet enough case law to clarify the conditions about the lack of knowledge and immediacy of the response of the host.[82] Generally, it appears that a host will be exempted in criminal matters if it does not have knowledge of the illicit content. In civil matters, the host is exempted if it does not have any knowledge of circumstances

[76] ECLI:NL:RBDHA:2014:14652, District Court of The Hague, 1 December 2014 and ECLI:NL:GHDHA:2015:83, The Hague Court of Appeal, 27 January 2015 as cited by the Report on the Netherlands, 23.
[77] Art. 510 § 3, Criminal Code, as cited by the Report on Spain, 10.
[78] Report on Belgium, 13.
[79] Id.
[80] Art XII 19.1. of the Code of Economic Law of 28 Feruary 2013, as cited by the Report on Beligum, 13.
[81] Brussels Court of Appeal on 25 November 2009, as cited by the Report on Belgium,
[82] Report on Belgium, 14, citing Q. VAN ENIS, *La Liberté de la presse à l'ère numérique*, Bruxelles: Larcier 2015, 381-382.

revealing the presence of such content, and if, upon getting aware, it acts promptly to remove or render inaccessible the information, and notifies the public prosecutor.[83]

In Italy, social media themselves are liable only "on a negligence basis ("*responsabilità omissiva"*, meaning for the failure to control and block illegal contents)"[84]. This therefore implies a duty to monitor and in case of illegality, to block social media content. There is not more detail on what this consists of, thus, it does not seem to raise particular problems.

In the Netherlands, the social media as provider of user generated content (UGC) might be responsible in certain circumstances, and is subject to a duty of care. Illuminating the approach of Dutch courts is a case where Facebook was held obliged to disclose the identity (name and address) of a Facebook user engaged in illegal activity ("revenge porn"). The court ruled that such obligation exists when the injured third party "plausibly" alleges that "an anonymous or untraceable user" published illegal content, and the illegality "can only be remedied" if the user's identity is revealed.[85] The simple deletion of the profile in question amounted to violation of the duty of care by Facebook, under which the social media is required to make "all reasonable efforts to see if the name and address can be located", and the social media's statements in this regard can be subjected to an independent investigation.[86]

While social media content is generally not subject to unreasonable or disproportionate limitation in the Netherlands, there is a new monitoring trend worth noting. The country report mentions recent police practice according to which people posting messages inciting (promoting or initiating) protests – this case against the building of asylum homes – had the police visit them in their homes and advised to "watch their tone". Police claim this is analogous to their public monitoring function, e.g. to the situation when police go to someone behaving badly on the streets.[87] This is clearly a question which has not been settled at a high judicial forum in either of the countries or in Europe as such. While this type of monitoring does not result in direct legal responsibility, it certainly might have a chilling effect on freedom of expression, and also might be problematic for the privacy of the home.

In Spain, as elsewhere, the author of the message is responsible in the first line. The social media (as editors) are also criminally responsible, if they do not reveal the identity of the message author, or do not disclose the author's identity if required to do so.[88]

[83] Report on Belgium, 14, 17.
[84] Report on Italy, 15.
[85] ECLI:NL:RBAMS:2015:3984, District Court of Amsterdam, 25 June 2015, paras. 4.3, 4.4, 4.10. as cited by the Report on the Netherlands, 25-26.
[86] Id.
[87] Report on the Netherlands, 27.
[88] Report on Spain, 9-11.

3. ON-LINE COMMENTS

General status of commenting

Regulation of commenting is particularly pregnant with the need for reconciling conflicting interests. The first, most debated issue is to what extent and under what conditions the platform giving place to the comment can be held liable for illegal content. The European Court of Human Rights have handed down two decisions with contradictory outcome in this regard, and there remained still much unclarity. A notice-and-take-down system, the one which would come to mind as easiest and most respecting of freedom of expression, was not seen as sufficient to guarantee privacy rights and protection against hate speech in the *Delfi* judgment. Or, at the very least, according to this decision, member states are free to place a stronger duty of care on at least *commercial* platforms to prevent hate speech. Note that the imposition of a general monitoring requirement would likely violate the EU E-Commerce directive.[89] The *MTE and index.hu v Hungary*[90] judgment, on the other hand, seems to stick to the notice-and-take-down requirement, at least in cases where not clearly unlawful comments are at issue National authorities and the European court disagreed on whether the comment in question is illegal at all, or is protected by freedom of expression in this latter case. On the one hand this disagreement itself shows the real risk of self-censorship which might ensue: if high courts – like the Hungarian supreme court and the ECtHR – do not agree, then how operators of platforms would know what is legal and illegal. On the other hand, the merely "offensive and vulgar" nature of the comment in question in the Hungarian case has prevented (or exempted) the ECtHR from clarifying the rules applicable to unlawful – as opposed to "not clearly unlawful" – comments. This unclarity hides a divide within the ECtHR itself, as the exceptionally strongly worded concurring opinion – and not the majority opinion – is the only one emphasizing that the *Delfi*-jurisprudence clearly holds in this case, too. As it will be seen below, the member states examined in this report are also not unequivocally clear in their stance.

A second general issue has not arisen in the European courts, but has been addressed in the Netherlands, i.e. the scope of freedom of expression of the intermediaries with regard to comments they do not find in line with their own views. This poses the question whether a platform's freedom of expression extends to remove comments which are not unlawful, but

[89] For a different view – which is nonetheless critical of these developments from the perspective of freedom of expression – see Aleksandra Kuczerawy and Pieter-Jan Ombelet, Not so different after all? Reconciling Delfi vs. Estonia with EU rules on intermediary liability, LSE Media Policy Project Blog , July 1 2015, http://blogs.lse.ac.uk/mediapolicyproject/2015/07/01/not-so-different-after-all-reconciling-delfi-vs-estonia-with-eu-rules-on-intermediary-liability/
In general, see Patrick Van Eecke, 'Online service providers and liability: A plea for a balanced approach' (2011) 48 Common Market Law Review, 5, 1455–1502.

[90] MTE and index.hu v. Hungary, Application no. 22947/13, Judgment of the Court of 2 February 2016, ECLI:CE:ECHR:2016:0202JUD002294713.

diverge from the views the platform wishes to promote (and, thus, support, and possibly, finance).

The answer might depend on the notion of diversity or media pluralism applied in the country. Assuming a speech market free from domination, media actors are free to discriminate what views they give platform to. The Dutch solution seems to conform to this marketplace of ideas model regarding comments. When however, the state actively promotes free expression to guarantee diversity, for instance, by providing funding to media outlets, then at least those funded media outlets would arguably be required not to silence one side of a debate.

Commenters and commenting is generally also not regulated in any specific statutes.

In Belgium, comments fall under the generally liberal freedom of expression protection, and might only be subject to proportional limitations in pursuance of legitimate ends, as under the ECHR. Opinions are more strongly protected, and knowingly wrong factual statements do not get protected. Limits entail usual protection against defamation, slander, racist and xenophobic speech, etc. Courts appear rather cautious in applying these laws, especially criminal laws, to comments. The report mentions a case where a court noted for instance that negative online comments can be balanced out by positive comments[91] – as if to say it is the entirety of the interpretative context that matters.

In the Netherlands, comments fall under the general framework of freedom of expression, which is rather liberally regulated in the country. Comments however operate in a specific framework which might be called "speech in speech": where one speaker gives platform to other speakers without any prior agreement between them about the content of the speech. It is not obvious whether the two speakers ought to be treated equally, or the platform provider's freedom of expression ought to include some control over the views expressed in comments.

Dutch courts are also sensitive about potential consequences of online speech. Recall that the general approach is that social media, and especially Twitter communication is to be understood in its rather relaxed context, with an accompanying relatively lenient judicial attitude. However, this does not mean that courts would not be mindful of possible – intended or not – more serious effects: The Report cites a case where particularly negative online statements about someone identified with full name remained in Google search results. The court pointed out that Google users may not any more have the context of the original post, allowing a nuanced interpretation of the statements. The rapporteur therefore notes that "it may be safe to conclude that this de-contextualising effect of Internet search engine results like Google's, is less present in the traditional news media which usually offer a clearer distinction between factual and opinion-forming publications."[92]

[91] Report on Belgium, 16, referring to S. DE POURCQ, 'De aansprakelijkheid voor onrechtmatige reviews over hotels op facebook en op booking-en reviewsites' in: E. LIEVENS, E. WAUTERS and P. VALCKE (eds.), *Sociale media anno 2015*, Antwerpen-Cambridge: Intersentia 2015, 159.

[92] Report on the Netherlands, 28, citing ECLI:NL:RBSGR:2007:BB8427, District Court of The Hague, 21 November 2007, para. 4.2-4.5. and ECLI:NL:RBAMS:2008:BD1695, District Court of Amsterdam, 15 May 2008, para. 4.9.

In another case, the Dutch equal treatment authority decided that the removal was protected (a kind of a protected speech act), since the media was free to remove comments which it did not like. This is probably a fully consistent interpretation in the Dutch setting, where the state interferes very little with freedom of expression. Quite a different matter would be to decide a case the same way in Italy, where some media receive state funding, just in order to promote diversity. Thus, any European-wide policy must be aware of such underlying fundamental differences in member states' approach to media freedom and diversity in general.

In Italy, as it has already been pointed out, the division between professional and non-professional journalism is all-decisive as to the scope and limits of the expressive activity in question. The Supreme Court accordingly confirmed that forums do not constitute professional journalism, and as such, do not benefit from either the higher protection of the press, nor are subjected to higher professional standards.[93]

In Spain, comments are considered analogous to the "letters to the director". Comments fall under general freedom of expression doctrines, and are subject to the same limits.[94]

Responsibility for comments

While all countries examined consider comments protected by general freedom of expression, they vary greatly as to the most intriguing question of who can be held liable for comments posted.

In Belgium, as elsewhere, primary responsibility for posting unlawful comments reside with the commenter. However, as anonymous commenting is protected, the question arises who is responsible for that. In general, in contrast to some other jurisdictions, Belgian law does not make intermediaries responsible for the speech of the commenters, only for their own actions. In certain limited cases, nonetheless, intermediaries are liable to disclose the identity of the commenters.[95] For instance, in relation to review sites, Belgian courts developed a jurisprudence according to which such hosting providers are exonerated from liability if they play only a "passive" role.[96] This criterion will be considered fulfilled if the provider does not know about the incorrect information. If it does, or can reasonably be expected to know, then deletion or blocking access is required, but in principle only, if the content is manifestly illegal.[97] Since however in most cases it is the host which is required to decide whether that is the case or not, this rather carefully carved-out rule might in practice result in overcautious behavior, thus create a chilling effect.[98]

[93] Report on Italy, 16-17, no specific case number referenced.
[94] Report on Spain, 14.
[95] S. DE POURCQ, 'De aansprakelijkheid voor onrechtmatige reviews over hotels op facebook en op booking-en reviewsites' in: E. LIEVENS, E. WAUTERS and P. VALCKE (eds.), *Sociale media anno 2015*, Antwerpen-Cambridge: Intersentia 2015 as cited by the Report on Belgium, fn 47 at page 17.
[96] Id.
[97] id.
[98] Id.

On the other hand, some case law indicates that if a site makes clear, by way of a notice, that it applies no prior control over third party content, then it will be exonerated. More precisely, what needs to be established is that it plays a "neutral role": where "components are merely technical, automatic and passive, producing no (immediate) knowledge of or control over the data stored."[99] While this gives incentives to refrain from *a priori* control, just as the deontology councils in Belgium recommend[100], the inverse is applicable to the posterior moderation (which is positively recommended by the deontology bodies). Notably, and, as if to anticipate the *Delfi* judgment, Belgian doctrine long established that subsequent control does not automatically exempt from liability.[101]

Italy, in line with its general strict stance towards "opinion crimes" and rigid or quasi-objective privacy protection, seems to uphold the principle of *direct* liability of both the content provider and intermediaries.[102] It remains to be seen whether this approach conforms to the nuanced jurisprudence of the ECtHR, or Italian courts will in the future refine their current stance. So far, case law appears to be scarce.

The Netherlands, in line with its generally more balanced approach, has case law from lower courts detailing the criteria for the liability of the intermediaries. Accordingly, liability of the owner of the website, the ISP or the forum moderator only arises if they knew or could have known that the comments were (factually) incorrect or unlawful, and the burden of proof is on the complainant.[103] In the actual case, the court also took into account various policies of the forum mitigating the potential occurrence of illegal comments (e.g. registration, house rules requiring that negative comments be supported by arguments, deletion of bundled messages, and of threats, and – this might even be overly cautious – of calls to action.)[104]

In Spain, the concept of "letters to the director" structures the responsibility for comments. In case of a known author, the commenter is responsible[105]. However, if the medium allows for anonymous commenting, then it is automatically responsible, as it is understood to have "assumed its content."[106] Art. 30 of the Penal Code established the order of exclusive and subsidiary responsibilities in the following way:
"1st. Those who really drafted the text or produced the sign in question, and those who have induced them to do it.
2nd. The directors of the publication or program that is divulged.
3rd. Directors of the publishing company, radio station or broadcaster.

[99] Report on Belgium, 17, referring to Q. VAN ENIS, *La Liberté de la presse à l'ère numérique*, Bruxelles: Larcier 2015, 379-380.
[100] Id.
[101] Id.
[102] Report on Italy, 17, no specific case number referenced.
[103] ECLI:NL:RBZUT:2007:AZ8634, District Court of Zutphen, 8 February 2007, para. 4.3- 4.8. as cited by the Report on the Netherlands, 29.
[104] Id.
[105] Judgments of the TC 65/2015, 126/2003, 3/1997 as cited by the Report on Spain, 14.
[106] Report on Spain, 14, referring to "doctrine exposed in the STC 159/1986."

4th. Managers of the recording, reproductive or printing business.
3. When for any reason other than the extinction of criminal responsibility, including a declaration of rebellion or residence outside Spain, any person covered by any number of the previous paragraph cannot be pursued, the procedure against those mentioned in the number immediately following shall apply."[107]

There have however been no cases mentioned in the Report on Spain, except for one decision of the Supreme Court involving hosting provider's liability for violation of intellectual property rights in relation to newspapers and magazines accessed through its webpage youkioske.com. However, in this case, freedom of expression was not thematised at all.[108]

WIKI

Wikipedia contributions do not fall under any specific regime either. Jurisdictionally, a Dutch court confirmed, in line with the Wikimedia Foundation's own rules, too, that local chapters, such as Wikimedia Nederland cannot be made liable for user-generated content.[109] Generally, the freedom of expression of Wiki contributors is not overly limited, and there have not been cases or controversies in which the freedom of expressions of wiki contributors have been at stake. Neither there have been any issues regarding cross-border aspects which (could) affect wiki contributors' freedom of expression.

[107] Report on Spain, 16.
[108] "conviction of a crime against intellectual property (articles 270 and 271 CP) of the Audiencia Nacional, Sala Penal, second section, no. 6/2015, of 5 March", Report on Spain, 13 and 16.
[109] ECLI:NL:RBUTR:2008:BG6388 District Court of Utrecht, 10 December 2008.

4. INSTITUTIONAL CONTEXT OF CITIZEN JOURNALISM

In Belgium, journalism is generally considered to be a self-regulated area. Still, there exist two media authorities at the community level, i.e. a deontological council of journalists in Wallonia and one in Flanders.[110] There appears to be no problem with their independence. Courts also provide strong protection to the freedom of expression of citizens, and live up to the challenges brought about by new information technologies.[111] No cases of official harassment, redundant tax investigations, or any other undue pressures have been reported with regard to Belgium either. The institutional context of citizen journalism – just as journalism and freedom of expression in general – is by and large optimal in the country.

In Italy, as already mentioned, the state more strongly undertakes to guarantee pluralism of the media in general, and the freedom to be informed in particular.[112] Therefore, Italy instituted independent administrative agencies which perform a mixture of regulatory, control, and arbitration functions, in a kind of "anti-trust" framework.[113] The Authority for Media (AGCOM) deals with challenges brought about by the new technologies, such as online fraud, or protection of children on the internet.[114] The independence of the authority is not questioned. Another important feature of the institutional context in Italy is the mentioned state funds from which "editorial products" can be supported, such as online journals.[115]

In the Netherlands, there is some uncertainty as to whether internet content which is not considered "public or private/commercial broadcasting", like user-generated content platforms Youtube.com, fall under the scope of the Media Act.[116] This, as the rapporteur notes, is not fully conforming to the European Audiovisual Media Services directive, which specifically exempts such services.[117] No other problems with the institutional context were discernible in the Netherlands.

In Spain, the institutional context of citizen journalism does not seem to raise any major concerns according to the country report.

[110] Report on Belgium, 21.
[111] Id.
[112] Report on Italy, 19.
[113] Id.
[114] Report on Italy,19-21.
[115] Law no. 61/2001 ("Nuove norme sull'editoria e sui prodotti editoriali e modifiche alla legge 5 agosto 1981, n. 416") as cited by the Report on Italy, 22.
[116] Report on the Netherlands, 32.
[117] id.

5. FUNDING

Citizen journalism tends to be unfunded, funded by advertisements, or sometimes from funds provided by some mechanism by the state or by international actors.

In Belgium, there is no information on funding of citizen journalism.

In Italy, the funding depends on what category the actual activity falls within. As mentioned, if citizen journalism is such which qualify as "editorial product" (registered online journal), then it is entitled to receive funding from state providing funds.[118] Largely, however, citizen journalism is funded from advertisement. The online advertising sector (all over, i.e. not only in the context of citizen journalism) is the second largest advertising means after television, exceeding one billion euros.[119] There is also an increasing trend of "premium" paying content introduced on the Italian online information market.[120] Thus, there is no single, discernible model of funding applicable to all or the majority of "citizen journalism," as the market – just as the Italian legal approach – is structured along the lines of different other categories.

In the Netherlands, the Report found empirical data on the business model of citizen journalism, especially blogs. It states that many blogs are actually added to traditional newspaper's online surfaces, thus the two in terms of the business model are not to tell apart.[121] Naturally, advertisements, on a page view basis, constitute an important source of income for most blogs and citizen journalism generally in the Netherlands, too.[122] Different funds and foundations are established by the government to support innovative, high quality, and investigative journalism (i.e. not specifically citizen or online journalism), and artistic media projects.[123] The report has not raised any issues with regard to problems of independence or undue state influence resulting out of such funding schemes.

In Spain, there was no information on how citizen journalism is funded.

[118] Law no. 61/2001 ("Nuove norme sull'editoria e sui prodotti editoriali e modifiche alla legge 5 agosto 1981, n. 416") and Law no. 62/2012 converting legislative decree no. 63 of 18 May 2012 on "disposizioni urgenti in materia di riordino dei contributi alle imprese editrici, nonché di vendita della stampa quotidiana e periodica e di pubblicità istituzionale" as cited by the Report on Italy, 22.

[119] AGCOM, Annual Report as cited by the Report on Italy, 23.

[120] Report on Italy, 23.

[121] Report on the Netherlands, 30.

[122] Id.

[123] Report on the Netherlands, 35-36.

6. THE CONCEPT OF 'CITIZEN-JOURNALIST'

The concept of citizen-journalism may be said to exist in some of the countries, however, with in effect strongly varying meaning.

In Italy, a citizen journalist might be considered a kind of lower-ranking journalist, outside of the professional circles.[124]

In Belgium, the concept of open journalism is used, understood as the possibility for anyone to engage in journalism. As the report emphasizes, it seems that the "Belgian constituent" has always – already in 1831 -- intended to extend the freedom of the press to any citizen.[125] This at the same time means that anyone engaging in this activity should provide the public "with accurate, complete and objective information. This implies the exercise of caution, rigour and objectivity, either in terms of the research, analysis and dissemination of information."[126]

In the Netherlands, the notion specifically exists in the language, and has been at least once famously used by a non-professional reporting on a bombing threat.[127]

In Spain, the concept does not appear to play an important role.[128]

[124] Report on Italy.
[125] Report on Belgium, 22.
[126] Id, referring to J. ENGLEBERT, *La pocédure garante de la liberté de l'information*, Louvain-la-Neuve: Anthemis 2014, 209.
[127] Report on the Netherlands, 31.
[128] Report on Spain.

7. GENERAL CONTEXT OF PROTECTION AND REGULATION OF JOURNALISM

Privacy – protection of sources

Obtaining information is at the heart of journalistic work, and can often only be secured through offering protection to sources. Protection of journalistic sources is an important legal principle in every examined jurisdiction.
The countries differ however in the elaboration and technical details of the operation of the protection, resulting in wide-ranging substantive differences in the level of protection.

In Belgium, already the applicable law might seem rather liberal, mentioning "journalist" as the subject of the right to the protection of sources, which thus pointed in the direction that not only professional journalists were protected. The Constitutional Court however went even further, and annulled the term "journalist" from the law, and clarified unequivocally that any person, independent of their profession or status, who engages in journalistic activity is entitled to protection of sources.[129] On the other hand, the rapporteur notes that the broadness of the right might encourage impunity for criminal offences in some areas, as it was the case with racist or xenophobic press offences until 1999.[130] In defamation cases, courts would put emphasis on the duty of checking the veracity of information obtained from anonymous sources with as much prudence as possible.[131] Generally, the right to protection of sources goes hand in hand with the duties of professional ethics and deontology.[132] The right is also not unlimited: a judge can order the disclosure in case of an offence representing serious threat to the physical integrity of a person, provided that the information is crucial for the prevention of such an offence, and the information cannot be obtained in any other way.[133] Belgian law also generally prohibits investigation measures as to any data on sources of information, except if there is "an indication that the journalist is involved, personally and actively, in a development that carries risks for a crucial public interest." [134] The law also gives numerous procedural guarantees in order to avoid disproportionate interference, such as prior consent of a body consisting of three judges, the duty of informing of the journalists' association, the duty to verify that the link between the threat and the information is direct, and the mandatory presence of one judge at the actual implementation of the approved measure.[135] In case of violation of the confidentiality of

[129] Judgment № 91/2006 of the Belgian Constitutional Court of 7 June 2006, as cited by the Report on Belgium, 26.
[130] Report on Belgium, 27.
[131] Id. et seq.
[132] Id.
[133] Article 4 of the Law of protection of journalistic sources as cited by the Report on Belgium, 28.
[134] Report on Belgium, 29.
[135] Report on Belgium, 29-30, citing Q. VAN ENIS, *La Liberté de la presse à l'ère numérique*, Bruxelles: Larcier 2015, 265-266.

journalistic sources, public authorities can be sued under common law civil liability for damages, and there have been cases in this regard.[136]
In the Netherlands, there is a stalemate of proposed legislative changes to source protection since 2014. The country has been criticized by the ECtHR several times for its lack of adequate formal framework of protection. The proposed legislation is also heavily debated, thus currently the old regime applies, with only limited – ex post facto – judicial review. In substance, Dutch courts likely would follow the ECtHR case law, naturally only ex post facto.[137] This case law is rather limited, and provides source protection only to professional journalists, at least currently.

In Italy, professional secrecy is protected in several legal norms. Violation of the duty of confidentiality is criminalized,[138] and also prompts disciplinary liability.[139] The Code of Criminal Procedure exempts journalists from the duty to testify and reveal their sources.[140] Still, if the information is "essential for the evidence of the crime and its truth can be proven only through the identification of the source", the journalist can be obliged by a judge to reveal it.[141] Clearly, this implies a much lower standard of protection than the Belgian, or the potential future Dutch solution. On the other hand, in interpretation, the report mentions that courts extended the exemption beyond professional journalists, to cover "publicists", as well.[142]

Spain appears to be even more restrictive than Italy. The constitution mentions the principle of professional secrecy twice, firstly as to "the professional secrecy in the exercise of the freedom of information"[143], and secondly the exemption from testifying in criminal proceedings.[144] However, this latter protection is rather limited, as it does not apply for crimes seriously endangering "national security", "public peace" or the "sacred person of the King or his successor."[145] It is not clarified why exactly these are the values so important as to override protection of sources, let alone the problem inherent in the vagueness of the "sacred person"-criterion. Spanish courts also seem rather restrictive in their interpretation. The Constitutional Court has rejected that the protection would exempt a journalist from providing proof of veracity in (criminal) libel cases, even against a politician.[146] This clearly

[136] Id.
[137] Report on the Netherlands, 15.
[138] Art. 622 of the Italian Criminal Code as cited by the Report on Italy, 27.
[139] Art. 48 Law no. 69/1963 as cited by the Report on Italy, 27.
[140] Art 200 of the Code of Criminal Procedure as cited by the Report on Italy, 27.
[141] Id.
[142] Eg "Court of first instance of Enna in 2015 concerning the crime of aiding and abetting (*favoreggiamento*) as regards two journalists that refused to reveal their sources" as cited by the Report on Italy, 28, fn 46 (no specific case number reference)
[143] Art. 20. (1) of the Constitution of Spain, cited by the Report on Spain, 18.
[144] Report on Spain, 18, referring to Art. 24 (2) of the Constitution of Spain.
[145] Id, referring to Art 418 Criminal Procedural Act.
[146] Report on Spain, 18.

goes against the Council of Europe's recommendation on protection of journalistic sources,[147] and is likely contrary to the jurisprudence of the ECtHR.[148]

Protection of journalistic material

Once journalists obtain information, they should be able to preserve their material support. Therefore, the question arises to what extent are journalists, including citizen-journalists', equipment protected, and what powers the police have (like stop and search journalists' cameras, phone, etc., or seize materials) in relation to evidence gathering. What is more, sometimes, police might be inclined to destroy evidence documenting police misconduct, for instance, (citizen) journalists' phone/video recording, typically in some situation involving crowd control.[149]

In Belgium, the legal framework applicable to such supporting equipment is the same as that of confidentiality in general, i.e. all in all a rather liberal one. However, the report expresses concerns over a 2010 law on national security which expanded the surveillance powers of security bodies.[150] While the law instituted some procedural guarantees, it only applies to professional journalists, in contrast to the constitutional interpretation equalizing the status of professional and non-professional journalists, and also depriving foreign journalists of protection.[151] For professional journalists, Belgian law only allows for limiting the right of professional secrecy with regard to materials if the security "service in question possesses serious indications that the professional journalist has been involved personally and actively in a potential offence that affects a crucial general interest."[152]

In Italy, there is elaborate case law in relation to the protection of journalistic equipment, and it is also brought into connection with the principle of confidentiality. Thus, the seizure of a laptop is typically unlawful even in case of an ongoing investigation against a journalist, since that would enable authorities to access sources unrelated to the proceeding.[153] The Italian Supreme Court also held that the protection of such materials is not the exclusive

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[147] *Principle 4 (Alternative evidence to journalists' sources):* In legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities should consider, for the purpose of establishing t he truth or otherwise of the allegation, all evidence which is available to them under national procedural law and may not require for that purpose the disclosure of information identifying a source by the journalist, Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, *Adopted by the Committee of Ministers on 8 March 2000 at the 701st meeting of the Ministers' Deputies, available https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2fd2*

[148] Goodwin v. United Kingdom, (1996) 22 EHRR 123.

[149] Eg as it allegedly happened by the Hungarian-Serbian border in 2015 September, see eg, *OSCE Representative calls on authorities in Hungary to ensure the safety of journalists covering the refugee crisis*, http://www.osce.org/fom/182646 or in France during the labour demonstration in 2016: *France police violence must stop* http://europeanjournalists.org/blog/2016/06/03/france-police-violence-must-stop/

[150] Loi relative aux méthodes de recueil des données par les services de renseignement et de sécurité / Wet betreffende de methoden voor het verzamelen van gegevens door de inlichtingen- en veiligheidsdiensten. *Moniteur Belge / Belgisch Staatsblad* 10 March 2010. as cited by the Report on Belgium, 31.

[151] Report on Belgium, 31.

[152] Report on Belgium, 31, referring to Q. VAN ENIS, *La Liberté de la presse à l'ère numérique*, Bruxelles: Larcier 2015, 674.

[153] Decision of the Court of first instance of Ragusa in 2014 as cited by the Report on Italy, 29 (no specific reference).

privilege of journalists, but a "fundamental guarantee" of freedom of information.[154] Therefore, display and seizure of the laptop can only be made by respect for the principle of proportionality, implying the showing of "absolute necessity of that specifically mentioned material to the verification of the facts."[155]

In the Netherlands the issue of protection of journalistic material has also come up explicitly in court. There, a person photographed speech checking police officers, with a view to post them on social media, after blurring the faces. Police disagreed and seized his camera. Upon this, he published the names of the police officers. The court finally found that the memory card cannot be destroyed, however, the faces and names of the officers cannot be published.[156] Also in the Netherlands, a new law was introduced in 2015 banning professional journalists to use drones without a license.[157] The law still allows the use of drones for private purposes, thus some interpretative issues regarding citizen journalism might later arise. For now, there is a judicial proceeding pending.[158]

In Spain, according to the law, the judicial authority might authorize the seizure of information support material, however, its implementation is problematic, as mentioned above in relation to protection of sources in general.[159] Furthermore, a 2015 law on protection of public safety declares that to acquire personal or professional images and data of authorities or members of security bodies which could endanger their personal or family security, is a grave offence.[160] This is now under examination at the Constitutional Court.[161]

[154] Report on Italy, 29 (no specific reference).
[155] Id.
[156] Report on the Netherlands, 8.
[157] https://www.villamedia.nl/opinie/bericht/er-is-niets-tegen-een-journalist-met-een-drone ; https://www.rijksoverheid.nl/onderwerpen/drone/vraag-en-antwoord/regels-drone-zakelijk-gebruik as cited by the Report on the Netherlands, 37.
[158] Id.
[159] Report on Spain, 20.
[160] Art. 36. 23. of the Law 4/2015, http://www.boe.es/boe/dias/2015/03/31/pdfs/BOE-A-2015-3442.pdf.
[161] Report on Spain, 9.

CONCLUSION

There is variation in the examined countries as to which fundamental right protects citizen journalism.

Belgian legal understanding orders under freedom of the press if the citizen is writing (i) on a regular basis, (ii) with the aim of reaching the general public, and about (iii) what is happening in society. If either the regularity, the purpose or the topic is different, the activity will still be protected by general freedom of expression. As if to be its mirror image, in Italy, freedom of the press and freedom of expression are strongly differentiated. Professional journalists fall under freedom of the press, and citizen journalists under freedom of expression. The „ individual activity of giving information and news (including expressing opinions on it)" is not considered press. However, there is a middle category of „publicists", under which sometimes citizen journalists might fall, and, finally, Italian law knows the right to chronicle or news reporting which again might support citizen journalism.

In the Netherlands, there is no formal distinction between freedom of expression and freedom of the press. In case law, however, in accordance with the ECHR, press is seen to come with enhanced responsibility, especially as regards factual statements. On the other hand, while data protection law generally prohibits publications on private persons, there is a journalistic exception, which then points to an enhanced protection of journalism, be it citizen-driven or professional.

In Spain, there is no specifically granted freedom of the press, every such activity falls under general freedom of expression, still a category „information professionals" with enhanced responsibility exists.

There is thus a lot of unclarity as to the relation of citizen journalists, bloggers, social media users to professional journalists. There certainly does not appear to be any way to harmonize these legal approaches in the foreseeable future.

Substantive standards, especially in questions related to defamation, privacy, and hate speech also strongly diverge already in these few examined member states, sometimes at least on the books likely below ECHR minimum standards. This might be the case with provisions concerning protection of head of states, like insult to the queen in the Netherlands, or to the sacred person of king in Spain. Such antiquated concepts might not be really enforced, but constantly legitimize the possibility of rather vague restrictions. This is a lingering danger, often coupled with newer regulatory impulses regarding speech perceived to be connected to terrorism, operating with similarly vague notions.

The fact of different rules being applicable, and, through mutual recognition instruments, enforced, is particularly problematic in the online context, where content can be accessed cross-border. So far, however, no cases on citizen journalism involving cross-border issues have arisen in the examined countries.

There is also a particular heterogeneity as to the concept of publicity or public-ness. While e.g. the Netherlands tend to consider blogs or social media surfaces as being in the legal

sense less public than traditional media (e.g. newspapers), in Spain and Italy, to the contrary, the criminal law considers as aggravating circumstance that hate speech was divulged through the medium of the internet.

The institutional framework of citizen journalism is very diverse. Belgium and the Netherlands clearly apply a liberal regime where journalism is seen as a self-regulated and/or free profession. In contrast, Italy specifically considers journalism to be a regulated profession, even though courts do not apply the concept to all citizen journalism. In any case, there certainly is no way to harmonize the law with regard to the institutional context of citizen journalism at the European level. Protection of sources and of journalistic material is partly underdeveloped, and some countries find it hard even to conform to the rather minimalistic standards of the European Court of Human Rights.

A country might have a generally liberal framework, like the Netherlands, but parallel to this might provide a lot of public funds for perfectionist purposes, or which are meant to correct market failure (like art, high quality or high risk/cost investigative journalism). Apparently no concerns of independence, or undue influence have so far surfaced. Italy seems to be generally at the opposite end (overall context very much regulated, strong substantive limits, too), and does regularly fund journalism – however, after all, it seems to be an automatic, and, thus, in a sense "neutral" funding mechanism, although conditioned on registration.

The idea mentioned in the beginning, according to which citizen journalism is a republican endeavor, has certainly not penetrated strongly the legal framework and case law in these countries. If one wants to classify, then the few features which can be identified are sometimes liberal, at other times either communitarian or authoritarian– These add up to a rather eclectic, and from country to country varying legal landscape, where strong contours are almost only visible at the national borders. On the basis of this report, not much of a developing legal idea of "European citizen journalism" can be discovered, either from the legislation, courts, or citizen journalists litigating and constructing it from the bottom up, despite the fact that there are many blogs and other types of citizen journalism which are read throughout the European Union. Thus, we face a situation where a Europe-wide (transnational) practice actually exists, but the legal contexts of the practice differ from country to country.

Therefore, more preparatory initiatives by the EU are recommended, for instance organising meetings with European civil society organizations, legal professionals, journalists'organizations, social media providers, bloggers and other citizen journalists on the question of how citizen journalism contributes to a thicker understanding of European citizenship. More funds, including perhaps even for translation, could be allocated to support access to citizen journalism. It is also advisable to start an EU wide debate on the relationship between freedom of press and the freedom of expression, and the ways in which new media initiatives are to be sustained.

ANNEX: COUNTRY REPORTS